IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 646
3193519

	BETWEEN	NICHOLAS HALL Applicant
	AND	KIWI RAIL LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Mary-Jane Thomas, counsel for the Applicant Matthew McGoldrick, counsel for the Respondent
Investigation Meeting:	2 and 3 May 2023 at Palmerston North
Submissions Received:	3 May 2023 from the Applicant 3 May 2023 from the Respondent
Date of Determination:	2 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nicholas Hall commenced employment on 29 November 2021 with Kiwi Rail Limited (KiwiRail) as a Telecommunications Technician. Mr Hall resigned in August 2022 and he says his resignation was in the nature of an unjustifiable constructive dismissal because no action was taken in relation to his complaint about how he was treated in the workplace.

[2] Mr Hall also says that he was unjustifiably disadvantaged in four ways. Firstly, the decision by KiwiRail requiring employees to have COVID-19 vaccinations, secondly, Kiwi Rail's unilateral changes to the process it followed for employees who

remained unvaccinated, thirdly, KiwiRail's refusal to investigate Mr Hall's complaints of workplace bullying and lastly KiwiRail's actions after the removal by the Government of the vaccine mandate. This fourth claim was withdrawn by Mr Hall's counsel at the investigation meeting.

[3] Mr Hall seeks compensation for humiliation, loss of dignity and injury to feelings in respect of the unjustified dismissal and for each disadvantage claim. He also seeks reimbursement of three weeks lost wages at his pay rate from 12 August 2022.

[4] KiwiRail rejects the claims and says Mr Hall resigned of his own volition and it did not breach any fundamental duty to him which made his resignation reasonably foreseeable so he cannot have been constructively dismissed. KiwiRail also says Mr Hall was not disadvantaged by its actions.

[5] KiwiRail implemented a vaccination policy requiring employees to be vaccinated but submitted the way in which it did that and the decisions it made about vaccinations were the actions of a fair and reasonable employer. Further, the decision to implement such a policy was made having conducted an appropriate risk assessment and having considered all relevant factors, including consultation with its employees.

[6] Any unilateral changes to the notice period for employees who remained unvaccinated did not impact on Mr Hall because the process KiwiRail followed in relation to its employment relationship with Mr Hall was halted when the Government advice changed with regard to vaccination. He never received a notice of termination. In relation to the alleged failure to investigate workplace bullying, KiwiRail says that it appropriately responded to Mr Hall's concerns by making inquiries and its decision to take no further action was justified in the circumstances.

The Authority's investigation

[7] For the Authority's investigation written statements were lodged by Mr Hall and Charlotte Miles. For KiwiRail written statements were lodged from Sacha Montgomery, General Manager of Zero Harm, Michael Jones, Regional Infrastructure Leader for the lower North Island, Myles Dyeming, Senior Telecommunications Technician, Allan Cotton, Operations Manager, Lesley Wildes, Lead Human

Resources Business Partner, and Myles Radford, Signals, Traction, Telecommunications and Electrical Manager. Both parties provided oral and written submissions on the day.

[8] 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. This determination has been issued outside the usual statutory period as exceptional circumstances existed for the delay.[1]

Background

[9] Mr Hall was recruited from overseas and relocated to New Zealand during the COVID-19 global pandemic in 2021. After a two week stay in a managed isolation and quarantine facility in New Zealand he started work at KiwiRail on 29 November 2021. The work group he joined was a small technical specialist group and his role was to perform routine maintenance and breakdown support of the KiwiRail telecommunications network and also work on projects to expand and upgrade the network. Training and induction was carried out on the job through a mix of external and internal training and formal and informal training.

[10] Mr Hall reported to Mr Cotton but Mr Dyeming was the leading hand who supervised the work of the team. Mr Dyeming was located on site with the team and worked with them whereas Mr Cotton was located elsewhere.

[11] At the time Mr Hall commenced his employment, KiwiRail was in the process of consulting on its vaccination policy. The decision to implement the policy took effect on 24 November 2021. Mr Hall's position was not covered by the Government vaccination mandate[2] but the policy required employees in his role and work group to be vaccinated.

[12] Mr Hall did not wish to be vaccinated. He says he was asked twice in his first two days in an open office, firstly by Mr Cotton, his manager, and then by Mr Dyeming what his vaccination status was. Mr Cotton denies he asked about vaccination in that manner but agreed they did have a discussion. Mr Cotton recalls his intent was to

[1] Employment Relations Act 2000, ss 174E and 174C(4).

advise Mr Hall that KiwiRail was about to make a decision on the outcome of its consultation on mandatory vaccinations for employees.

[13] Mr Dyeming does not recall ever asking Mr Hall about his vaccination status directly. He does recall a conversation in December 2021 with Mr Hall when there was no-one else present about milestones and training requirements. To the extent he asked Mr Hall about his vaccination status, it was because vaccination status did at that time impact on Mr Hall's induction and training. Some of the training providers required participants to be vaccinated and some of the sites Mr Hall's workgroup were working at belonged to other agencies. Each agency had their own vaccination requirements and some required anyone attending their work sites to have vaccination certificates.

[14] On 3 December Mr Hall received a generic all of staff email from the Chief Zero Harm Officer at KiwiRail requiring confirmation of his vaccination status by 10 December 2021. On the same day he was informed he had been removed from a planned course provided by an external provider because they were not providing services to unvaccinated people at that stage.

[15] Mr Hall requested further information from KiwiRail and outlined his personal concerns about taking the vaccine and his questions about the efficacy of the vaccine. Mr Hall's evidence was if he had been told during his recruitment process that KiwiRail were consulting with staff about a vaccine mandate he would not have considered taking the role nor was it likely that he would have returned to New Zealand.

[16] On 13 December Mr Hall says he was asked again by Mr Cotton what his intentions were on vaccination as it impacted on training. Some external training course providers required attendees to have COVID-19 vaccination passes.

[17] At this stage, Mr Cotton's evidence was he had a growing awareness there might be issues in getting Mr Hall through all the required training to complete his induction which is why he said he was enquiring about Mr Hall's vaccination status.

[18] On 14 December KiwiRail responded to Mr Hall's email questioning the policy and raising his concerns about vaccination and provided answers to his questions as follows:

> KiwiRail has made its decision based on:
>
> - Ministry of Health advice and guidance;
> - Input from our Chief Medical Officer;
> - Assessed by our legal team to ensure all legal and contractual obligations are met; and
> - A thorough risk assessment across all Business Units.
>
> The decision and the implementation of the mandate have also been informed by our consultation with staff and unions. Attached is a copy of the risk assessment pertaining to your Business Unit. This was conducted alongside HSAT representatives, Union delegates and worker representatives. We have utilised the risk assessment template recommended by WorkSafe New Zealand. Further information regarding the WorkSafe template can be found in the attached document.
>
> Paid pandemic special leave is available for staff who become unsell as a result of the COVID-19 vaccination. In addition ACC have a policy in regard to covering physical injury resulting from a COVID-19 vaccination
>
> ….
>
> We are offering information support sessions which I have registered you for in order to further discuss your concerns, a member of our team will make contact with you.

[19] Mr Hall was of the view that email did not address his questions about transmission, and he responded on 17 December requesting all documents relevant to the decision making process including the Ministry of Health advice and guidance, the input from the Chief Medical Officer, any assessment by the legal team and evidence of consultation between the union and its membership.

[20] On 23 December 2021, Ms Montgomery from the Zero Harm team responded to Mr Hall with links to information KiwiRail relied on to inform the vaccination policy, the business area role profiling and risk assessment workshop sessions for each business group and the updated protocols taking into account the "Traffic Light"[3] approach. She also provided a link to the Medsafe website and stated:

[3] The COVID-19 Protection Framework replace Alert Levels in December 2021 and ended in mid-September 2022. It had three traffic light settings of Red, Orange and Green.

> Prior to the Policy being endorsed by our Executive I can confirm that conversations were held with legal advisors and our Chief Medical Officer to confirm and clarify some information and verify process, however I cannot provide emails from those advisors.
>
> I can confirm our Unions were consulted with in the development of the Policy and were invited to both participate in the BU workshops and the opportunity to provide input/feedback.
>
> Finally, I wish to make sure you have access to all the information we have prepared for the KiwiRail COVID vaccine support service. We recognise that making a decision to be COVID vaccinated has been difficult for you and wish to acknowledge that you have been registered as working through the Kiwirail COVID vaccine support programme.
>
> …
>
> I can confirm the dates you need to be aware of to ensure you comply with the KiwiRail Policy are:
>
> 1st vaccination will be required by 31st January 2022
>
> 2nd vaccination by 14th of March.
>
> In order to remain working during this time, you will participate in the COVID PCR surveillance testing and maintain a weekly negative COVID test until your second vaccination is completed OR have a medical exemption approved by MoH and you have provided your My Vaccine Pass into Predict.
>
> …

[21] On 25 January 2022, Mr Hall was removed from an in house KiwiRail training course because of his vaccination status and says he was asked in front of other participants if he was an "anti vaxxer". KiwiRail accepts a mistake was made because wearing face masks was the only requirement at that stage. The facilitator who was a KiwiRail employee apologised to Mr Hall and the facilitator's manager also followed up with Mr Hall to inform him they had asked facilitators not to engage in conversation around vaccination. This was the Track Protection (Individual Train Detection) course that was necessary if Mr Hall was to progress to work outside of the workshop and he never completed that course.

[22] On 27 January 2022, a personal grievance was raised on behalf of Mr Hall for unjustified disadvantage relating to the decision to mandate COVID-19 vaccinations. The concerns were the risk assessment was not specific to Mr Hall, subjective information from employees had been taken into account and there was a failure to correctly analyse the risk. The letter also proposed alternative arrangements including

rapid antigen testing as a temporary working arrangement until Mr Hall was able to receive the Novavax vaccine. He also requested the deadline for him to have his first vaccination be extended.

[23] KiwiRail responded setting out its position on the matters raised: it did not accept the risk assessment relied on was not specific to Mr Hall's role, the staff survey was appropriate, KiwiRail had relied on Government guidance on transmissibility, rejected the proposition that Mr Hall remained a low risk of introducing COVID-19 into the workplace if he was regularly tested, raised concerns about waiting for Novavax, declined to adjust the 31 January deadline for the first vaccination dose and advised that alternative arrangements would be discussed in a meeting with Mr Hall.

[24] Mr Hall was invited to a meeting on 4 March held by audio visual technology. The purpose of these meetings was to hear from each individual employee who had not been vaccinated in light of the COVID-19 vaccination policy that required employees to be vaccinated. The risk of transmission, the vaccination policy and the process being followed by KiwiRail were all discussed. Mr Hall also expressed his concerns as follows:

> I feel like KiwiRail has now created an environment of constructive dismissal where I have been repeatedly asked by my manager when I am going to get it because it makes a difference, like ordering tools, laptops, training etc. I turn up to work, say hello to everyone, then they leave without telling me, they don't give me any instructions to do anything or where they are going. This has been going on for weeks now and people barely can make eye contact with me in the office. It is clear to me that you were thinking that I will be fired soon so why bother with him or hopefully he will give up and quit. I have plenty to offer KiwiRail but you are willing to throw all that away for a policy that could become irrelevant in a matter of weeks, and that is all I have got.

[25] The meeting involved a lot of back and forth between KiwiRail's representatives and Mr Hall's representative about the reasonableness of the vaccination policy and the process that was being followed. Mr Hall's summary of his concerns came at the end after it was clear there was little agreement between the parties. At the conclusion of the meeting Michael Jones, Regional Infrastructure Leader and the decision maker in this matter was to consider Mr Hall's feedback and submissions from the meeting and deliver his decision in due course.

[26] After the meeting but before the vaccine mandate was removed, Mr Hall's representative requested an extension to the timeframe in the policy to allow

employees to become vaccinated. Mr Hall was willing to take a different vaccination not yet approved for use in New Zealand but likely to be. KiwiRail initially refused to extend the time frame but revisited that decision and later confirmed it would extend the timeframe allowing further time for employees to receive the vaccination.

[27] On 22 March KiwiRail was informed that Mr Hall had Covid and therefore had sought a temporary medical exemption through the Ministry of Health.

[28] On 1 April Mr Hall was notified of KiwiRail's decision to pause consideration of the continuation of his employment under the vaccination policy while it reviewed its risk assessments to reflect the current environment and the latest Government advice. On 19 April KiwiRail removed its vaccine mandate for employees in Mr Hall's role. This meant there was no longer a risk of termination of employment for Mr Hall.

[29] Several months went by. It would be fair to say that during this period Mr Hall was deeply unhappy. His evidence was that he did not feel integrated into the team, the training remained on pause despite the vaccine pass requirements being lifted, and although he raised the issue without success at the 4 March 2021 meeting, he was feeling isolated and ostracised at work. Seeing no steps being taken to improve his integration into the team and the work he was employed to do, spilled over during an exchange with Mr Cotton on 27 July 2021. Mr Cotton says this was the first time he was aware of how unhappy Mr Hall was.

[30] Mr Cotton had called into the workshop and seeing Mr Hall there he wanted to engage with him as he usually did with members of the team when he called by. He asked Mr Hall what he had on next week. Mr Hall responded that he did not know because he was not involved in things. When Mr Cotton enquired further Mr Hall responded with words to the effect of Mr Cotton was the manager it was his job to know. Mr Cotton was taken aback as he had not realised there was a problem so he responded saying he would talk to Mr Dyeming first thing next Monday.

[31] On the same day Mr Hall's lawyer raised another personal grievance on his behalf for unjustified disadvantage due to ongoing bullying and KiwiRail's actions in not investigating Mr Hall's previous complaint he was feeling isolated at work. The letter requested a formal investigation into bullying and for Mr Hall to be placed on

paid special leave while that was undertaken. Another grievance due to the failure by KiwiRail to ensure safe reintegration to the workplace was also raised but was not pursued in the Authority.

[32] Mr Hall said in evidence that at that stage he had been in his role for eight months and was hardly doing any work. He felt as though management had been so sure he would be terminated, they now did not know what to do with him.

[33] Mr Hall described spending most of his days sitting in the workshop having been excluded from work. The only work he did was when the team needed an extra pair of hands or if work came into the workshop. He described not seeing the team, and days when they would get up and leave without saying anything to him. Also contributing to his situation was the fact he had only been given a tool bag with minimal tools and not enough to do a basic job without borrowing tools from someone else. In addition, he could not see any steps being taken to advance the training paused during Covid.

[34] After the Government mandates were relaxed Mr Hall knew two of the external training providers were dropping their vaccination pass requirements from 4 April 2021 and this was conveyed to KiwiRail on 28 March 2022 by Mr Hall's representative.

[35] Mr Cotton's evidence was that while he was aware that COVID-19 had delayed some of Mr Halls induction and training he was unaware until that conversation in July with Mr Hall that there was little meaningful work or training organised for Mr Hall despite the country opening up again after the Government vaccine mandates being removed in April.

[36] Mr Cotton did speak to Mr Dyeming about it and was told there was limited work Mr Hall could carry out because he had not completed the training or certifications to be able to do certain work. This conversation was not passed on to Mr Hall. Mr Cotton urged Mr Dyeming to make sure they were keeping Mr Hall busy and to get him trained. Mr Cotton said he immediately made arrangements for the working at heights course. Mr Hall had completed all the training that he could until the vaccination mandates were lifted.

[37] Mr Dyeming's evidence was that training was the main impediment to having Mr Hall work in the field on the current project with the team. It was described to me as a one-off large project that was absolutely essential to KiwiRail's operations which was why despite COVID-19 and the impact that had on the work environment, the team were engaged full time and completely focussed on this project. This was the reason why they were seldom in the workshop.

[38] The working from heights course was unavailable to Mr Hall while attendees were required to hold vaccine passes. Completion of that course and the Track Protection course appeared to be the main courses that Mr Hall needed.

[39] Mr Dyeming accepted at the investigation meeting he knew Mr Hall was missing out on training because of the impact of COVID-19 but his view was this was only short term until the current project was completed. That project involved a lot of height work and because of that Mr Dyeming was required to work predominantly on site and away for the office.

[40] He could understand Mr Hall's frustration, but a number of factors were at play including the first working at heights course that Mr Hall attended but was sent away from in February due to a mix up in the rules around whether vaccination or masks were required. In addition, some of the sites they were working on had their own vaccination requirements and this was an additional reason why Mr Hall could not be included. Mr Dyeming recalled having a conversation with Mr Hall and explaining there would be much more time for other staff to assist with his training once certain milestones in the project had been met.

[41] It was, however, accepted that Mr Hall was left in the office approximately 80 per-cent of the time mostly on his own and in hindsight it was accepted this would have been disheartening. There was some work that was needed to be done from the workshop and in times of ordinary operation, a member of the team was often in the workshop for routine maintenance and to be available but it was unlikely this would be the same team member for over three months at a time.

[42] Mr Dyeming said after Mr Cotton spoke to him on 26 July alerting him to the fact some courses had just become available for Mr Hall, he went and spoke to Mr Hall at his desk telling him there were three courses he could attend and gave him the

attendance forms. Shortly after Mr Hall said he was sick and went home. Mr Hall did not return to work after that day.

[43] Mr Hall's evidence was that this was the last straw. He felt ostracised and was certain his in his views the company just wanted him gone. He knew some of the courses had been available to him since the vaccine mandate was lifted back in April and he also had a view that another team member was being deliberate in excluding Mr Hall.

[44] On 4 August, while Mr Hall was on sick leave, KiwiRail responded in writing to Mr Hall's last personal grievance raised about being ostracised at work. KiwiRail's position was it was not aware Mr Hall had raised concerns about workplace bullying prior to the grievance being raised but nonetheless any inability to participate at work was due to the training requirements having been interrupted with the impacts from the COVID-19 pandemic, not from any deliberate actions of others causing Mr Hall to be ostracised in his role.

[45] KiwiRail also declined to place Mr Hall on special paid leave while it investigated because it was not conducting any further investigation and asked for a medical certificate because Mr Hall had left work on 26 July and had not returned. Mediation was suggested as a way forward.

[46] Mr Hall provided a medical certificate and arrangements were made for mediation. Then on 10 August Mr Hall received his payslip showing he was paid for only 12 hours work over that two-week period meaning he had been placed on sick leave without pay for the reminder of the pay period. Mr Hall said he felt he had no choice but to resign. From his perspective KiwiRail had rejected his concerns about workplace bullying twice and now his financial position was jeopardised by the decision not to provide him with special leave while that was being worked through.

[47] Although mediation was confirmed, it was for a date in the future, which was after Mr Hall had exhausted his sick leave. Mr Hall resigned on 12 August 2022 and raised a personal grievance of constructive dismissal.

[48] On 27 September 2022, after his resignation Mr Hall received KiwiRail's documents showing how it investigated in relation to his claim he was ostracised in

the workplace. He had requested that information in writing on 4 August when his lawyer raised the additional personal grievance on his behalf that the investigation into his earlier grievance claim (that he was ostracised at work) was inadequate.

Constructive Dismissal

[49] The doctrine of constructive dismissal concerns situations where an employer's conduct compels a worker to resign. A resignation may be held in employment law, to be as much a dismissal as where an employer has actually dismissed the worker.

[50] One recognised category of constructive dismissal is where it can be shown the resignation is caused by the employer's actions including any breach of duties owed to that employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that an employee would resign rather than put up with such breaches or where a breach of duty by the employer leads an employee to resign.[4]

[51] The focus for the Authority in considering this matter is on whether there was a breach of a duty flowing from an implied term of the employment agreement to provide a safe workplace. Failure to take appropriate steps to prevent bullying occurring, or to adequately respond to and resolve bullying complaints may breach this obligation.

[52] Similarly, if an employer's failure to deal with an unjustified disadvantage makes work so unsafe or intolerable for an employee that they are not prepared to continue to work under those conditions and instead decide to resign, this can provide grounds for a personal grievance claim against their employer on the basis that the situation is one of constructive dismissal.

[53] Mr Hall says KiwiRail breached its duty to him to provide a safe workplace by not responding to his bullying complaint and conducting a satisfactory investigation and this in turn created conditions that made it unsafe or intolerable for him at work. He made two complaints on two different occasions about how he was left to his own devices and ignored at work. His position on both occasions was that he was

4 *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

deliberately ostracised including being left in the workplace with no work to do, not being trained or inducted into his role and that he had no proper tools.

[54] On a day-to-day basis he reported that his colleagues routinely ignored him and engaged in very few conversations with him and another team member who had been appointed just prior to him was engaged fully with the team and had use of a company vehicle. I understood his evidence to be that although he may not have been happy about it, while the vaccine mandates were in place, there were things he could not do but since they had lifted, some three months earlier, nothing had changed for him. There were other COVID-19 vaccine related incidents he was concerned about, including the course he was sent away from and the fact that person may have already known his vaccination status. The situation compounded to the point he believed that his employer wanted him gone and being at work was intolerable for him.

Investigation of Mr Hall's first complaint

[55] KiwiRail's position was that Mr Hall did not raise his complaint until the letter of 27 July and that was the day after he started a period of sick leave from which he never returned to work.

[56] Ms Wildes explained she interpreted Mr Hall's statement at the meeting on 4 March about isolation at work as Mr Hall setting out his views about the working environment as it related to the process they were dealing with at that time. As a result, she said it was not considered to be a complaint about workplace bullying and not followed up as such.

[57] While Mr Hall's oral statement at that type of meeting was unlikely to be sufficient to have raised a grievance, and in any event, it was enough to put KiwiRail on notice about the concerns Mr Hall had.

Investigation of Mr Hall's second complaint

[58] KiwiRail did investigate after the letter of 27 July set out the claim that Mr Hall was isolated and ostracised. Ms Wildes met with Mr Cotton and Mr Radford, who was Mr Cotton's manager, to gather information with a view to her drafting and co-ordinating the response to Mr Hall's personal grievance. It was not entirely clear who the decision maker was. Ms Wildes said she was not the decision maker, but Mr

Cotton and Mr Radford gave evidence that they deferred to Ms Wildes. The letter conveying the decision was sent by Ms Wildes. This confusion highlights problems with the process.

[59] KiwiRail's Harassment and Bullying Prevention Policy (the Policy) gave HR business partners the ability to conduct a preliminary investigation and make decisions on complaints. The policy provided exclusion and isolation as examples of bullying behaviour. Ms Wildes kept notes summarising the discussion. There was no reference in the notes to consideration of whether the behaviour complained either met or did not meet the definition in the Policy.

[60] The decision reached in the meeting was there were explanations for the things complained about by Mr Hall. Based on that, no further action was to be taken. It was unclear from the letter and the evidence at the investigation meeting whether the conduct was considered not to constitute bullying and therefore did not require investigation (either formal or informal) under the Policy or whether it did but there were reasons it did not merit investigation.

[61] There is no record of any consideration of whether further information should be requested. There were also several matters discussed that were about Mr Hall and which were not put to him. They are relevant because they were potentially prejudicial to him in that they tended to suggest there was also fault with Mr Hall. For example:

> Communication is two way. There was a recent plan for him to work on a Sunday. He didn't attend work on the Friday and the plan was not able to be set. He doesn't always communicate openly.

[62] Another example when discussing his claim about tools:

> He hasn't got a full range of tools - $20,000 cost. He has base tools and the PPE required for the job.

[63] At the investigation meeting with the Authority, it was accepted the tools Mr Hall had were insufficient and that appeared to be the first time anyone checked exactly what had been provided to Mr Hall.

[64] With regard to being excluded by a specific individual, the notes record the conclusion as follows:

> Do not accept that [emp A] has been excluding – is Nick's perception.

[65] In addition, there is a reference to Mr Hall's record of learning with a comment that Mr Hall's technical knowledge and experience may not have been at the level expected and that there was a need to see his record of learning to have a base to start from. Because that had not been provided, KiwiRail had been unable to respond.

[66] There was discussion about the courses Mr Hall had been on, a suggestion he walked off one and reference to the conversation earlier that week that was the catalyst for Mr Hall to take sick leave. Mr Hall's evidence at the investigation meeting was that he was asked to leave the training course, rather than walking off, because of COVID-19 requirements that were wrongly applied to him before the vaccination policy was fully implemented. He received an explanation and an apology for that.

[67] Finally, there was a conclusion that employee A during the week 18 – 22 July had work to go on with and got on with the work followed by a statement "If work is to be done it is expected people will put themselves forward."

[68] Ms Wildes drafted the letter rejecting Mr Hall's claims. A draft was circulated to Mr Cotton and Mr Radford for comment before it was sent to Mr Hall on 4 August 2022. The letter concluded Mr Hall was not excluded from work but rather he had been unable to undertake full duties because he had not yet completed all the training required for him to be able to undertake project work in the field. He was reminded that he needed to be proactive in seeking and engaging in work and contributing to discussions with colleagues. It was said work had been planned for him but he had been away suggesting his absences had prevented him being involved in work and while he might see team members leaving at different times, this was explained in terms of them leaving at required times to travel to jobs. It was concluded there was no intent to isolate Mr Hall.

[69] Tools were referred to and concluded he had sufficient base tools and PPE required for his duties. Vehicles are for team members who are on the call out roster. Mr Hall had not completed the training and requirements to be placed on that roster. Based on those conclusions it was not considered there was any reason to place Mr Hall on special leave but KiwiRail offered to attend mediation. He was asked to provide a medical certificate and to advise of his expected return to work date.

Was there an adequate response to Mr Hall's complaint?

[70] What KiwiRail had in front of it was complaint that an employee was feeling isolated and ostracised through team conduct together with a lack of meaningful work couched in terms of a bullying complaint. In accordance with the good faith requirements in s 4 of the Act, an employer could have been expected to investigate such a complaint and provide a basis for the conclusions reached, particularly because it related to safety in the workplace.

[71] The Policy required that investigations about bullying comply with the principles of natural justice. There were a number of issues in this regard particularly with the process that was followed. Those at the meeting to discuss the complaint and who ultimately made the decision to take no further steps, did not have first-hand information about how the workgroup was functioning on a day-to-day basis. Mr Cotton was Mr Hall's manager and could speak in part to the training difficulties caused by COVID-19 disruptions, but he had been unaware Mr Hall had very little meaningful work until the conversation on 26 July.

[72] Mr Hall was never spoken to, and no enquiries were made of Mr Dyeming who was responsible for the allocation of work and present on a day-to-day basis. Nor were any of Mr Hall's workgroup spoken to so the decision maker/s had no information other than what was provided in the grievance letter from Mr Hall's lawyer and what Mr Cotton knew about training.

[73] It is also clear from the meeting summary that the decision makers drew on information they had about other matters to do with Mr Hall. There was a view he did not communicate openly, that his concerns about being ostracised were based solely on his perception, that it was a fact he had a full set of tools, that his leave had impacted on the situation, and that his level of competence was not at a level expected.

[74] In light of that it is significant that Mr Hall was not spoken to in order to understand the specifics of his complaint and to respond to the views the decision makers had about him and his complaint. The extent of time Mr Hall spent on his own and the actual list of tools he had came out in evidence at the investigation meeting and appeared to be a surprise to the relevant managers. While COVID-19 must have played a part in the reason for the delay in training, KiwiRail appeared to have been

unaware of the reality of Mr Hall's situation at work and had not communicated with him about the situation both parties found themselves in.

[75] Mr Dyeming was not interviewed or asked for information, and this is significant because although he was not Mr Hall's manager, he was the person most likely to have relevant information about allocation of work and the reasons for that.

[76] Without information from those actually involved, any outcome or decision risks being influenced by information that is not relevant or reliable and/or not having relevant information that may have changed the outcome. There was also no analysis as to either why the complaint did or did not reach the threshold or definition of a bullying complaint and it was not clear whether HR had exercised a discretion given to it in the Policy and in what way.

[77] These are defects in the process KiwiRail followed that were not minor and have resulted in Mr Hall being treated unfairly in the overall circumstances of this matter.

Were the breaches sufficiently serious to cause resignation?

[78] During the earlier part of the year COVID-19 and the requirement for vaccination passes interfered with Mr Hall's training schedule, but those impediments were lifted in April when the vaccine mandate was lifted.

[79] Given the amount of time Mr Hall was in the workshop it was a fact he was isolated and the reasons for that were not adequately investigated. No explanation was given for why enrolment in the essential training was delayed until July, some three months after the requirement for vaccination passes was removed by at least two of the external training providers.

[80] On hearing his complaint was not going to be taken further, noting he had not been spoken to, Mr Hall formed the view he was not believed and that nothing would change. In these circumstances he was entitled to draw that conclusion and take the actions of his employer at face value because there had been no engagement with him. He was offered an opportunity to attend mediation which may have advanced matters, however, he resigned before that could be attended because he had exhausted his sick

leave and was financially impacted. Mediation at that stage could not remedy the issues with the investigation of his complaint and knowing that Mr Hall had been enrolled in a number of courses in July after the conversation with Mr Cotton was not enough to displace the obligation to look into a complaint that raised concerns about workplace safety with an open mind.

[81] Having established there was a failure to adequately respond to Mr Hall's complaint, in the overall circumstances of this matter, I am also satisfied this was sufficiently serious taking into account the context which made it reasonably foreseeable that Mr Hall would not be prepared to keep working under such conditions knowing that his employer was not going to investigate the matter.

Was Mr Hall disadvantaged in his employment?

[82] Mr Hall also claims he was disadvantaged in three additional ways: by the decision to require employees to have the COVID-19 vaccination, KiwiRail's unilateral changes to the process it followed for employees who remained unvaccinated after the date vaccination was required by, and refusal to investigate Mr Hall's complaints of workplace bullying.

The vaccination requirement

[83] The first disadvantage grievance claims KiwiRail's policy mandating vaccination for employees was unreasonable and it failed to properly consider proposed alternatives to termination and vaccination. Central to this submission is the issue of transmission (especially of the Omicron variant) and whether the risk of an unvaccinated employee as compared with a vaccinated employee was sufficiently considered. In his letter of 27 January 2022, it was stated:

> Our understanding of the current scientific position is that double vaccinated people can contract and pass on the virus, meaning they are no less likely to give COVID-19 to a double vaccinated employee than an unvaccinated employee. This issue is vitally relevant to the risk assessment undertaken by the employer when weighing up taking the unprecedented step in New Zealand law of requiring its employees to be vaccinated.

[84] It was also submitted a policy that would inevitably lead to dismissal was not required under the Health and Safety Act Work Act 2015 (HSWA) and that there were

other reasonable alternatives to dismissal and to requiring vaccination that were not given sufficient consideration. These included:

(a) Mandatory rapid antigen testing (RAT) testing as often as required.

(b) Exclusively performing work alone (which was already the bulk of the Applicant's role as a telecommunications technician). The Applicant had very little interaction with the public.

(c) Rearranging the vehicle schedule (his was the only close contact the Applicant had with other employees), so that he would be able to take a vehicle on his own.

(d) Office and administration tasks would be completed remotely on the Applicant's device;

(e) The Applicant would not use the bathroom facilities at work;

(f) The Applicant would continue physical distancing from other staff and public.

(g) The Applicant would continue hand sanitising, mask wearing, and any other relative requirement.

[85] The submission was that these alternative arrangements for Mr Hall would eliminate or at least be more effective in minimising the introduction and transmission of COVID-19 into the workplace than vaccination. That meant the creation and implementation of such a policy could not be the actions of a fair and reasonable employer and therefore could not be justified.

[86] In short, I do not find this disadvantage was made out. There was no scientific information before the Authority to confirm the submissions of Mr Hall's counsel about the risk of transmissibility between vaccinated and non-vaccinated employees. Even if there was, the standard by which an employer's actions are assessed is whether its actions and decisions were what a fair and reasonable employer could have done in all the circumstances at the time. The circumstances in this case included a global pandemic and the implementation by the New Zealand Government of significant public health measures to prevent the spread of the virus. Once the Omicron variant

emerged the New Zealand Government relaxed its controls and KiwiRail follow suit shortly after by removing its vaccination policy.

[87] The timeframe in which KiwiRail did this was not unreasonable especially when considering the overall circumstances at the time. On 23 March 2021, the Government announced measures to ease the Government restrictions and removal of the requirement for vaccination passes from 4 April 2021. On 1 April Mr Hall's representative was notified that KiwiRail was reviewing its risk assessment to ensure its policy remained appropriate. Consideration of Mr Hall's employment under the vaccination policy was paused until a final decision was made about the continuation of the vaccination requirement.

[88] An all of staff email was sent out on 8 April about the review of the risk assessment was likely to be completed that week. The email referenced the fact that Omicron was so widespread in the community that there was equal or greater risk of KiwiRail employees catching it outside of work as opposed to at work meaning that a "one size fits all Vaccine Policy no longer makes sense." On 14 April Mr Hall was aware by virtue of another all of staff email that he was no longer required to be vaccinated under the policy and then on 26 April that any HR processes commenced in relation to him were to be "permanently halted".

[89] The evidence from KiwiRail about its policy and risk assessment was that its position at all times was to protect its workers from exposure to the COVID-19 virus and to reduce the risk of them becoming ill given the potential for fatality as was being reported internationally. KiwiRail approached its risk assessments from the position that COVID-19 was an identified "Critical Risk" because contracting the virus presented a person with the potential for fatal outcome. It sought to apply controls that would prevent persons being exposed in the course of their work, or if they became exposed, controls that would lessen the severity of the ill health they may experience.

[90] The way in which KiwiRail approached the proposal to apply a vaccination mandate across the organisation included a series of Business Unit "risk appraisal" style group sessions using guidance provided by WorkSafe NZ. The work each

business group undertook, the types of potential exposure points in their workday and whether the role could be performed at home or not were considered.

[91] The risk assessment for Mr Hall's business unit was completed before Mr Hall arrived on 10 November 2021. Having reviewed the exposure factors considered when consulting with Mr Hall's business group[5] and the exposure risk assessment and the risk matrix as well as the consultation documents that were sent out to all employees, I am satisfied KiwiRail conducted an appropriate risk assessment that was tailored to the role that Mr Hall took up.

[92] With regard to failure to consider alternatives to vaccination for Mr Hall, the simple fact was there were a mixture of training providers and work sites that Mr Hall could not attend without a vaccination pass. The proposed alternatives did not and could not provide a work around for other agencies requirements.

[93] Against the backdrop of the COVID-19 pandemic, I am satisfied KiwiRail made decisions to implement its policy and then remove it consistent with its obligations under the HSWA. The duty of good faith which required KiwiRail to communicate with its employees about its policy and to consult was not breached. Risk assessments were conducted, feedback was sought and Government advice and other advice was taken into account.

[94] I am satisfied given the overall circumstances its decisions and actions with regard to implementation of its policy to require its employees to be vaccinated to address its general duty of care and management of risks under the Health and Safety at Work Act 2015 were procedurally and substantively justified.

Unilateral changes to the process

[95] Mr Hall sent a letter on 1 April 2022 raising a grievance for unjustified disadvantage after KiwiRail extended the notice period to six weeks for employees who were to receive notices of termination. The disadvantage claimed is the added stress caused by the unilateral decision to make this change. On review of the correspondence between the parties it is evident the extension to the notice period was something sought on behalf of a group of employees whose employment was being

[5] KiwiRail COVID-19 Exposure Risk Profiling Tool – Exposure Factors considered.

considered and for whom termination of employment was a possibility. The extension benefited those employees who were at risk of termination of their employment due to their vaccination status.

[96] In light of the amendment to the Employment Relations Act 2000[6] making it mandatory for employers to exhaust all reasonable alternatives that would not lead to dismissal before giving a termination notice, extending the notice period to allow further time before termination was not unreasonable. In accordance with that amendment a termination notice was cancelled if the employee became vaccinated so I find providing extra time must have been a reasonable step for an employer to take.

Refusal to investigate workplace bullying

[97] This was raised as a separate disadvantage grievance. The flaws in the workplace investigation form part of the rationale for the finding of unjustified dismissal. While there was a failure to properly investigate the complaint, there was not however, a refusal.

Remedies

[98] Having established that Mr Hall's employment ended by way of unjustified constructive dismissal, Mr Hall is entitled to an assessment of remedies for his personal grievance.

Lost wages

[99] Mr Hall seeks lost wages for the three weeks he was out of work. He says that amounted to $4,290.00 at $42.50 per hour. His new employment paid him $5.50 less per hour and therefore he has suffered an additional loss of $200 per week. He claims this as an additional loss from the date of his last pay to the date of the Authority meeting.[7] There were 90 weeks from resignation to Authority investigation meeting.

[100] When an employee has lost remuneration as a result of the personal grievance, s 128(2) of the Act provides the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser amount.

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6 Employment Relations Act 2000, schedule 3A.
7 $4,290.00 + $18,000.00 = $22,290.00.

The Authority may also in its discretion under s 128(3) order an employer pay to an employee a sum greater than compensation for three months lost remuneration. There was insufficient evidence of Mr Hall's loss beyond three months to consider exercising the discretion to award a greater sum under s 128(3). Subject to any issues as to contribution Mr Hall is entitled to reimbursement of lost wages in the sum of $4,890.00 (gross).

Compensation for humiliation, loss of dignity and injury to feelings

[101] Mr Hall seeks compensation for hurt and humiliation in the amount of $30,000.00 for unjustified dismissal. Mr Hall's evidence established that he was humiliated by how he was unfairly treated over the failure to investigate his bullying complaint combined with the actions KiwiRail took that impacted on him in relation to the COVID-19 vaccination policy. This situation clearly damaged Mr Hall's health and impacted on him at a time when he was already impacted. He had recently relocated to New Zealand with his family and there was an international pandemic. Mr Hall's wife gave evidence of the impact on their family which I accept.

[102] I note some of the distress experienced was likely also part of the collective situation caused by the COVID-19 pandemic, but I accept the actions of the employer in not investigating a complaint about isolation in the workplace at a time when he was left in the workshop for approximately 80 per-cent of his time at work, has impacted on Mr Hall and his family.

[103] Considering the distress experienced by Mr Hall around the time leading up to his resignation and the evidence of the ongoing effects on him and the general range of awards in similar cases an appropriate amount of compensation under s 123(1)(c)(i) of the Act is $20,000.[8] This is the amount that Kiwi Rail must pay Mr Hall without deduction and within 28 days of this determination, as compensation for humiliation, loss of dignity and injury to feelings.

8 *Richora Group Limited v Cheng* [2018] NZEmpC 113.

Contributory conduct

[104] Under s 124 of the Act, the Authority must consider whether any remedies awarded should be reduced to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[105] I do consider that Mr Hall could have raised his concerns earlier in relation to how dire the situation was for him but I accept his evidence that he had reached the view, rightly or wrongly, that his employer wanted him gone and that it was in his nature to try to carry on rather than cause a fuss. The cause of the grievance can be attributed to the actions of the employer and its failure to engage when he raised his concerns and accordingly no reduction in remedies is required.

Orders

[106] Kiwi Rail Limited is ordered to make the following payments to Nicholas Hall:

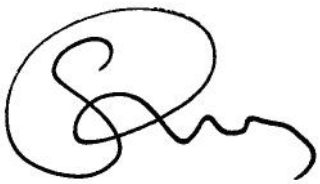
(a) Reimbursement of lost wages amounting to $4,890.00 (gross) under s 123(1)(b) of the Act; and

(b) Compensation in the sum of $20,000 under s 123(1)(c)(i) of the Act for hurt and humiliation suffered by Mr Hall because of his constructive dismissal.

Costs

[107] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs 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, the other party will 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. The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[9]

[9] www.era.govt.nz/determinations/awardingcosts-remedies



Sarah Kennedy-Martin
Member of the Employment Relations Authority