IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 39
EMPC 402/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a strike out order
BETWEEN	KARL MALCOLM First Plaintiff
AND	CAROL WARING Second Plaintiff
AND	PHILLIPPA MCDERMOTT Third Plaintiff
AND	REBECCA MILDREN Fourth Plaintiff
AND	JULIE KERR Fifth Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Defendant
AND	THE CHIEF EXECUTIVE OF THE COUNTIES MANUKAU DISTRICT HEALTH BOARD Second Defendant
AND	THE CHIEF EXECUTIVE OF THE WAIKATO DISTRICT HEALTH BOARD Third Defendant
AND	THE CHIEF EXECUTIVE OF THE BAY OF PLENTY DISTRICT HEALTH BOARD Fourth Defendant
AND	THE CHIEF EXECUTIVE OF THE CAPITAL & COAST DISTRICT HEALTH BOARD

Fifth Defendant

Hearing: (on the papers)

Appearances: G Bennett, advocate for the plaintiffs
S Hornsby-Geluk, counsel for the defendants

Judgment: 9 March 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Five employees say they were discriminated against by their respective employers, because they were required to be vaccinated against COVID-19 under an enactment requiring mandatory vaccinations of certain workers.

[2] They raised employment relationship problems in the Employment Relations Authority, which determined that they were in essence challenging the legality of the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order), once it was extended to cover groups in the health and disability sector, and in correction prisons.[1] The Authority found that although they claimed, in effect, they were the victims of generic discrimination, no valid personal grievances had been pleaded or raised. For these reasons, there was no problem which the Authority was able to investigate, or to remove to this Court.

[3] The employees then challenged the determination in this Court, which resulted in the employers applying to strike the claims out, for want of jurisdiction. This judgment resolves that issue.

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1 *Malcolm v The Chief Executive of Department of Corrections* [2021] NZERA 489.

Vaccinations Order

[4] Although the details were not been pleaded for the plaintiffs, I infer that their concerns are based on those aspects of the Order which require affected persons, as defined, not to carry out certain work, also as defined, unless they are vaccinated.[2]

[5] With effect from 25 October 2021, sch 2 of the Order was amended so that it covered staff members of a corrections prison, which includes persons employed by the first defendant; it also extended the Order to cover groups in relation to the health and disability sector, which includes persons employed by the second to fifth defendants.[3]

The Authority's determination

[6] In its determination, the Authority set out the background to the matter, noting it had granted urgency on the jurisdictional issues which had been raised before it, and if the case got that far, to the hearing of a removal application.

[7] As a preliminary comment, the Authority noted that the plaintiffs had initially challenged the lawfulness of the Order that was at the core of the proceedings but in submissions which were presented on the jurisdictional issue, they had fundamentally changed their position by stating that they accepted the lawfulness of the Order.[4]

[8] After referring to these difficulties, the Authority concluded that it needed to address the claims raised in the amended statement of problem, and not the "proposed, intended or amended version of the claims" that were referred to in the plaintiffs' submissions.[5]

[9] The Authority accordingly addressed two main issues. The first concerned whether the Authority had jurisdiction to investigate and determine the lawfulness of the Order; the second was whether the jurisdiction to investigate and determine

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2 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 7.

3 COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021; COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021. A full analysis of the relevant legislation pertaining to vaccinations is found in *VMR v Civil Aviation Authority* [2022] NZEmpC 5.

4 *Malcolm v The Chief Executive of Department of Corrections*, above n 1, at [15] and [16].

5 At [29].

personal grievance claims for unjustified disadvantage and/or discrimination was available, having regard to the way in which the plaintiffs' claims had been framed.

[10] On the first issue, the Authority noted that the plaintiffs claimed that they were required to be vaccinated by their respective employers; they said this was a breach of the Human Rights Act 1993 (HR Act), the Employment Relations Act 2000 (ER Act), the Health and Disability Commissioner Act 1994 (HDC Act), and the New Zealand Bill of Rights Act 1990 (NZBR Act).

[11] The Authority found that while the plaintiffs could have pursued claims that focused on whether each employer's actual implementation of the Order had breached the relevant employee's statutory and/or contractual employment obligations, the amended statement of problem did not raise such claims. Instead, it was "highly focused on criticising the government's implementation of the Order".[6] The Authority was being asked to determine that an employer's lawful compliance with the Order automatically breached employees terms and conditions of employment.[7]

[12] In short, the Authority considered it was being required to consider a claim of "automatic blanket discrimination" for each of the five plaintiffs, simply because each employer had relied on the Order to require each individual to be vaccinated.[8] The Authority said that such concerns were a matter for judicial review in the High Court.[9] Accordingly, it did not have jurisdiction.[10]

[13] Turning to the second issue, the Authority noted that whilst it has jurisdiction to consider alleged disadvantage or discrimination grievances, the amended statement of problem did not identify essential details on which such claims would have to be based.[11]

[14] The Authority determined that references to disadvantage and/or discrimination grievances in the amended statement of problem were insufficiently

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6 At [49].
7 At [48].
8 At [60].
9 At [61].
10 At [64].
11 At [71].

detailed to validly raise a personal grievance. The employers could not read the pleading and know what the employment relationship problem was that was being alleged by each employee. In each case, there was no statement as to when the claim arose, who was involved, what the specific claim was, what facts the employee was relying on, the nature of the alleged grievance (that is, disadvantage or discrimination), the grounds of discrimination relied on, or even if the alleged ground of discrimination on the grounds of religion, applied to any particular employee. That level of uncertainty and lack of clarity was inconsistent with the requirement to give the employer sufficient notice of the problem.[12]

[15] The Authority determined that references in the amended statement of problem to the fact that personal grievances were being raised were insufficient to do so.[13]

[16] The Authority concluded that the grievances were unavoidably linked to an attempt by the plaintiffs to challenge the lawfulness of the Order. A claim that the defendants' compliance with the Order automatically led to grievances was said to be misconceived.[14]

[17] A claim that each employer had determined the relevant employee would "potentially be dismissed" was anticipatory, and not sufficiently detailed to enable each employer to provide a substantive response to the purported grievance.[15]

[18] Summarising, the Authority held that these fundamental omissions meant the amended statement of problem was insufficiently detailed to validly raise personal grievances on behalf of any of the plaintiffs, as required under s 114 of the ER Act.

[19] Then, the Authority commented on those parts of the amended statement of problem which described the government's public health response to the COVID-19 pandemic. Reference was made to the actions, comments and policies of the Prime Minister and the Minister for COVID-19 Response. The Authority considered that those statements also related to issues which concerned the lawfulness of the Order,

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12 At [79]–[81].
13 At [75] and [76].
14 At [88] and [89].
15 At [90].

which fell outside the Authority's jurisdiction. The pleading suggested that the Prime Minister and/or named ministers had subjected the plaintiffs to unjustified actions. It had been asserted that the Prime Minister, the Minister for COVID-19 Response and the Director-General of Health had breached s 142W of the ER Act, which relates to persons involved in breaches of employment standards under pt 9A of the ER Act.[16] The Authority concluded such claims were also beyond the Authority's jurisdiction, unless those persons were in fact in an employment relationship with the employees, which was not alleged. In any event, the named individuals were not party to the proceedings, so the Authority could not investigate claims against them.[17]

[20] It followed that because there were no proper claims before the Authority which it could investigate, there was no substantive claim that was capable of being removed to the Court under s 178(1) of the ER Act. Costs were reserved.

Process in this Court

[21] The plaintiffs' challenge was originally filed on 10 November 2021. I held a telephone directions conference with the representatives on 11 November 2021. At that conference, there was discussion as to the form of the statement of claim (incorrectly described as a statement of problem).

[22] Mx Hornsby-Geluk, counsel for the defendants, submitted that the document was not compliant with the Court's requirements. Counsel said no remedies had been specified, claims had been brought against persons who were not defendants, and the content went well beyond what is required of a statement of claim under reg 11 of the Employment Court Regulations 2000 (the Regulations).

[23] Mr Bennett, advocate for the plaintiffs, properly accepted that a compliant statement of claim needed to be filed. He acknowledged that no remedies had been pleaded, and that he would need to remove claims against persons who could not properly be brought before the Court as defendants since there was no qualifying employment relationship with them.

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16 At [104].
17 At [101]–[105].

[24] In the minute which I subsequently issued after the telephone directions conference, I drew Mr Bennett's attention to those paragraphs of the Authority's determination which raised issues that were likely to again become a problem as to jurisdiction.[18]

[25] I also directed the plaintiffs to file and serve an amended statement of claim.

The amended statement of claim

[26] Such a document was filed on 18 November 2021.

[27] The amended statement of claim focused on Mr Malcolm's circumstances, stating that the circumstances of the other plaintiffs were, in effect, the same. It was pleaded that Mr Malcolm has been unjustifiably disadvantaged by his employer, the Chief Executive of the Department of Corrections (Corrections), who he says failed to consider or comply with the HR Act, the ER Act, the NZBR Act, the Medicines Act 1981, as well as the HDC Act and associated regulations.

[28] Later, it is alleged that the case is not one of an unjustified disadvantage or unjustified dismissal. The pleading states that the case is "far deeper and broader" as the mandate is denying employees, the plaintiffs, to have their fundamental employment rights upheld without discrimination.

[29] In respect of Mr Malcolm's circumstances, it is alleged that Corrections made no effort to make inquiries of any of its staff as to whether they believed that the actions they were taking under the Order were breaching any of their rights. In Mr Malcolm's case, this particularly related to religious and ethical beliefs, and whether his rights and freedoms were being breached because he was being "threatened by the tyranny of the majority against the minority".[19]

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18 For example [49], [71], [79] and [80].

19 In Mr Malcolm's affidavit, to which I refer below, he says his concern relates to ethical beliefs, not religious beliefs.

[30] Corrections had either refused, failed, or omitted to offer Mr Malcolm the same terms of employment or conditions of work, as had been made available for other employees engaged in the same, or similar, work.

[31] Mr Malcolm says he has been subjected to detriment because he had been stood down in circumstances where other employees were not stood down. He also pleads that Corrections will dismiss him.

[32] He asserts that Corrections is "blindly complying" with the Order to not have any employee who is not vaccinated employed, even though this amounts to discrimination against him on the grounds of religious belief and/or ethical belief. Mr Malcolm also relies on the disability ground of discrimination. He says if a substance was injected into him, it would give rise to organisms in his body which would cause illness or harm, and thus a disability.

[33] Next, it is alleged that an Order which mandates vaccinations for all persons in an entire profession or industry regardless of actual risk, does not meet the test of proportionality, necessity, or reasonableness.

[34] It is asserted that the government had taken a "lazy and fundamentally flawed approach to risk management", and that this approach should be soundly rejected by the courts when challenged by employees, because it was a discriminatory action.

[35] Statements are then made as to the propriety of the Order imposing mandatory vaccination. It is implied that it cuts across the right of freedom of expression, as well as the plaintiffs' rights to question the science and lack of research and understanding of the consequences of vaccination, as well as the mid to long-term risks. The plaintiffs say they are entitled to the protection of the statutes already mentioned, and that they should not be subjected to mandated orders against their will.

[36] Reverting to Mr Malcolm's position, he has alleged that because of his views and beliefs, he was suspended pending termination of employment. If he had not held those views, he would not have been stood down. Those steps amounted to discrimination under ss 104 and 105 of the ER Act, ss 21 and 22 of the HR Act, and

s 20 of the HDC Act. Reliance is also placed on s 19 of the NZBR Act, although it is acknowledged that while government departments and ministries acted as "state actors" the various defendants did not, which appears to raise an issue as to whether the gateway provisions of that Act, s 3, would allow a Bill of Rights claim to be brought against the defendants.[20]

[37] In the final part of the introduction of the amended statement of claim, it is asserted that the second to fifth plaintiffs all have the same grievance as does Mr Malcolm, but with their respective employers. They say that their employers discriminated against them in the same manner as occurred in his case: each of the employers "blindly followed the Order that has been issued, without any consideration for [the plaintiffs'] beliefs, or whether the action of their respective employers was discriminatory".

[38] The amended statement of claim then describes a history of events as to the unfolding of the pandemic in New Zealand and elsewhere. Reliance is placed on the statutory enactments already referred to. In addition, reference is made to cls 5 and 6 of the Code of Health and Disability Services Consumers' Rights (the Code) which it is submitted is a regulation under the HDC Act; it is asserted, for example, that these clauses provide that nothing in the Code requires a provider to act in breach of a duty or obligation imposed by any enactment; or that an existing right is not overridden or restricted simply because the right is not included in the Code.

[39] Reference is also made to s 4(1A) of the ER Act. The pleading states that the section is applicable; it implies that obligations of the section have not been satisfied, because the outcome in the present matter "is predetermined" and the plaintiffs' human rights are being ignored "by the government and the defendants".

[40] A procedural flaw is raised under the test set out in s 103A of the ER Act. It is alleged that the defendants could not claim they were acting as fair and reasonable employers when they issued a notice of vaccination or dismissal prior to the Order taking effect.

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[20] See *VMR v Civil Aviation Authority,* above n 3, at [211].

[41] The plaintiffs also allege that the various defendants began to prepare for all staff to be vaccinated from 12 October 2021, after an announcement from the Prime Minister and the Minister for COVID-19 Response on that date, but before the Order came into force on 25 October 2021.

[42] Detailed criticisms are then made of the way in which the issue of mandatory vaccinations have been dealt with by the Prime Minister, in light of the human rights covenants referred to in the long title of the HR Act, which states the statute is "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights", and in light of the long title of the NZBR Act which states the act, inter alia, affirms "New Zealand's commitment to the International Covenant on Civil and Political Rights". It is pleaded that these rights are incorporated into the plaintiffs' collective and individual employment agreements and are contractually binding.

[43] Next, it is pleaded that the mRNA COVID-19 vaccine (Pfizer-BioNTech or Moderna) may give rise to serious adverse effects. It is alleged that those risks include death; a possibility which it is said has been downplayed. Reference is also made as to the safety and effectiveness of such vaccines for individuals, including children. Relevant studies as to the efficacy of such persons taking the vaccine would not be finally concluded until at least 2025.

[44] It is pleaded that information about these effects have not been published or shared by the Prime Minister and the Minister for COVID-19 Response, or the defendants, and there is an issue as to whether it should have been. In failing to do so the relevant employers misled the plaintiffs, giving rise to breaches of the HR Act. For these reasons, there was discrimination on the grounds of religious and ethical beliefs, as well as disability since the plaintiffs were not informed of and do not know the long-term consequences of taking the vaccine.

[45] The remedies sought for each plaintiff are $40,000 under s 123(1)(c)(i) of the ER Act, an order that each employer discriminated against their respective employee and that each employee be returned to their normal duties. An interim order is sought

preventing the dismissal of each plaintiff until such time as this Court issues a judgment. Lastly, a stay of costs in the Authority is sought.[21]

Application for strike out

[46] After the amended statement of claim was filed, the defendants applied promptly for a strike out order.

[47] They say the Court does not have jurisdiction to hear the matter.

[48] It is alleged that the amended statement of claim effectively contends the Order is unlawful. Only the High Court, and Senior Courts have the ability to judicially review decisions of the executive or legislature; the Employment Court does not.

[49] Alternatively, if the plaintiffs are no longer claiming the Order was unlawful, the matter determined by the Authority was so fundamentally different as to no longer be "a matter previously determined by the Authority".[22] Consequently, the Court has no jurisdiction under ss 179 and 187 of the ER Act. A related point is that the plaintiffs have not properly raised valid personal grievances.

[50] Finally, it is alleged the amended statement of claim discloses no reasonably arguable cause of action or is otherwise an abuse of the processes of the Court.

[51] The application is supported by an affidavit from Mr David Pattinson, Prison Director of Northland Region Corrections Facility. He outlined Corrections' approach to the implementation of the Order, in so far as it related to Mr Malcolm.

[52] He confirmed that Mr Malcolm commenced sick leave on 5 November 2021 and has been on ACC since that date. He was due to return to work in February 2022.

[53] After Mr Malcolm went on sick leave, he told Mr Pattinson that he understood, and accepted, he was an affected worker covered by the Order and that he was required to receive two vaccinations by 8 December 2021. He also confirmed on

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21 *Malcolm v The Chief Executive of Department of Corrections* [2021] NZERA 517.
22 Employment Relations Act 2000, s 187(1)(a).

16 November 2021 that he was not yet vaccinated but was considering receiving the vaccine and was seeking advice about that issue from a medical specialist. Mr Pattinson understood Mr Malcolm's concerns primarily related to a medical condition of a family member, who he believed might suffer an adverse reaction to the Pfizer vaccine.

[54] The next day, Mr Malcolm advised Mr Pattinson that he had now received his first dose of the Pfizer vaccine. He thanked Mr Pattinson for his understanding of his circumstances. He also said he had booked his second vaccination for 7 December 2021.

[55] Mr Pattinson also said that, given these steps, he considered Mr Malcolm's employment was not under any immediate threat.

[56] Finally, Mr Pattinson said he did not believe that Corrections had undertaken any action that could be considered discriminatory. At no point during the process had Mr Malcolm expressed any view that it was, nor did he raise any concerns on the basis of religious or ethical beliefs, or disability. Rather, his concern about being vaccinated was based on the impact this could have on a family member.

[57] In the plaintiffs' notice of opposition, they say that the Court does have jurisdiction to determine whether they were subjected to discrimination. A grievance could be raised by way of a claim, which is what occurred when the case was before the Authority. The defendants were thus appraised of the plaintiffs' claims. Valid personal grievances had been raised.

[58] Mr Malcolm filed an affidavit in support of the plaintiffs' opposition. He too referred to the chronology. He said that after being vaccinated he suffered heart palpitations, a severe headache, felt unwell and found it hard to concentrate. He also had to self-isolate from a family member who had ended up with shingles as a result of being vaccinated.

[59] He said he is in a category of people who are susceptible to myocarditis, as he is diabetic and Maori. He said he told prison management about his severe reaction, and that of his partner. He did not feel they were at all concerned.

[60] His concerns about vaccination were based on his ethical beliefs and that vaccination could lead to disability. He considered he was forced into being vaccinated. He asserts he was thereby discriminated against. He acknowledged that as he had now been vaccinated, he would not now be dismissed from his employment for declining to do so.

[61] He went on to state that the case was not about the legality of the Order, which he accepted was lawful, but about the way his employer had failed to comply with the ER Act, and the Health and Safety at Work Act 2015.[23] He reiterated that he did not want to be vaccinated, since it went against his beliefs, and he was concerned that a vaccine could cause him illness.

[62] No affidavit evidence was produced on behalf of any other plaintiff.

[63] Detailed submissions were provided by each representative which will be referred to where relevant.

Relevant legal principles

[64] Rule 15.1 of the High Court Rules 2016 applies, via reg 6 of the Regulations.[24] It provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a proceeding if it–
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

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[23] An enactment not referred to in the amended statement of claim, the notice of opposition or the plaintiffs' submissions opposing the application for strike out.

[24] As confirmed in *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

...

[65] The Court of Appeal in *Attorney-General v Prince* outlined the standard principles which apply to such an application:[25]

a) Pleaded facts, whether or not admitted, are assumed to be true.

b) The cause of action or defence must be clearly untenable.

c) The jurisdiction is to be exercised sparingly, and only in clear cases.

d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if extensive argument is required.

e) The Court should be particularly slow to strike out a claim in any developing area of the law, especially where a duty of care is alleged.

[66] It is important for present purposes to acknowledge the extent to which evidence may be used on a strike out application. The Court of Appeal dealt with this issue in *Attorney-General v McVeagh:*[26]

> The Court is entitled to receive affidavit evidence on a striking-out application, and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. *Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; …* But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[67] Thus, in *Couch v Attorney-General*, the Supreme Court placed a strong focus on the pleaded case.[27]

[68] I deal with the present application for strike out on the basis of these principles.

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25 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267. Endorsed by the Supreme Court in cases such as *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [10].

26 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566 (emphasis added).

27 *Couch v Attorney-General,* above n 25, at [31]–[32].

Issue one: legality of the Order

Submissions

[69] For the defendants, Mx Hornsby-Geluk submitted that, in reality, the plaintiffs' claim and the remedies sought were fundamentally based on the lawfulness of the Order.

[70] Mx Hornsby-Geluk said this is evident having regard to:

- Multiple paragraphs of the amended statement of claim which can only be understood as challenging the legality of the Order.
- The assertion that the Order overrides the ER Act, the HR Act, and basic human rights. It was submitted the supremacy of one law over another is a matter which can only be tested by way of judicial review in the High Court.
- The statement in the amended statement of claim that mandatory vaccinations "fails the tests of proportionality, necessity and reasonableness". This is an assessment which arises under the NZBR Act. Any challenge to that particular assessment is a matter for judicial review in the High Court.
- The assertion that blind compliance with the Order amounts to discrimination, which can only be understood as meaning the Order itself is discriminatory.
- The plaintiffs' claim that the Order permits only vaccinated people to perform certain work. Although it is alleged that this is discriminatory, no particulars had been given with regard to each plaintiff.
- The fact that the Court is asked to order that the plaintiffs "be returned to their normal duties". This would require the Court to determine the Order is unlawful, because the Court could not be expected to make an unlawful order.

- The claim that the outcome of the employment processes undertaken by the defendants was based on the Order and was predetermined, appeared to be based on an acknowledgment that it is not possible for the defendants to allow the plaintiffs to remain in their current roles whilst unvaccinated.

- The allegation that the Prime Minister and the Minister for COVID-19 Response did not share certain information, confirmed that the plaintiffs were concerned about the government policy that led to the creation of the Order. In effect, the plaintiffs were challenging actions taken by the Executive rather than the employers.

- The fact Mr Malcolm said he was harmed and damaged by the terms of the Order; that is, the Order itself is alleged to have caused harm rather than the actions of each employer.

[71] In response, Mr Bennett said the plaintiffs accepted the Order was lawful, but asserted that the defendants were failing to act within the requirements of the obligations of the ER Act and were using the Order to override "the ER [Act] requirements". He said the respective defendants had simply followed the Order and failed to consider the ER Act. Thus, the plaintiffs were discriminated against by the defendants when they applied the Order to each of them.

[72] Mr Bennett accepted that the claim the plaintiffs had made in the Authority "that the vaccination mandate is unlawful as the [HR Act] and associated legislation overrides the vaccination mandate" was a claim that "needed to be expressed more clearly and precisely".

[73] Mr Bennett also submitted that the Court must identify the true nature of the dispute[28] and that the essence of the plaintiffs' claim was that they had been discriminated against by their employers because the Order was used by them to require vaccination when the plaintiffs objected to it based on religious beliefs, ethical beliefs and/or disability.

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[28] Relying on statements in *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152, [2017] ERNZ 858 at [85].

Analysis of issue one

[74] There are numerous paragraphs in the amended statement of claim which undoubtedly refer to the premise that the Order is, in and of itself, discriminatory.[29]

[75] It is clear that the plaintiffs' take strong exception to the enactment of the Order. They allege it is inherently discriminatory. That was the position when the relationship problem came before the Authority, and it is still the case now.

[76] As set out above, at the telephone directions conference shortly after the proceeding was filed, I indicated that the problems identified by the Authority required consideration.[30] That did not occur. The jurisdictional issues remain.

[77] The plaintiffs' claims focus on the alleged discrimination which they say is inherent in the Order.

[78] In short, I accept the accuracy of the various points made for the defendants that the plaintiffs' claims challenge the validity of the Order.

[79] Neither the Authority at first instance, nor the Court on challenge, can consider these issues. In *GF v Minister of COVID-19 Response*, Churchman J stated:[31]

> The Authority has no jurisdiction to declare legislation invalid. Consequently, the applicant commenced judicial review proceedings in this court challenging the lawfulness of the Vaccination Order. ...

[80] In another recent High Court judicial review proceeding, *Yardley v Minister for Workplace Relations and Safety*, Cooke J made the same point with regard to the limited judicial review jurisdiction which this Court possesses.[32]

[81] Similarly, Chief Judge Inglis stated in *Employees v Attorney-General*:[33]

> ... First, the validity of the Order is for the High Court to consider on an application for judicial review. This Court has a judicial review function but it is limited to certain matters. Inquiring into the validity of an Order made by

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29 For example [23], [34], [55], [56] and [58].
30 At [21]–[24].
31 *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [3].
32 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [45].
33 *Employees v Attorney-General* [2021] NZEmpC 141, [2021] ERNZ 628 at [7] (footnotes omitted).

> a Minister pursuant to another Act is not one of them. Nor do I regard s 189 as otherwise broadening out the reach of those powers. Reading s 189 in the way submitted for the applicant would mean that the Court could intervene by way of judicial review in an almost limitless manner provided there was some connection to an employment relationship. That is plainly not what Parliament intended; indeed s 194A specifically excludes claims for termination of an employment relationship by way of judicial review. Such claims are to be pursued by way of personal grievance or breach of contract (common law). Allowing the claim to proceed as currently formulated would cut across the statutory framework.

[82] I respectfully agree with these statements.

[83] Standing back, I conclude that the many paragraphs of the statement of claim which expressly or impliedly raise a claim concerning the validity of the Order must be struck out.

Issue two: the remaining paragraphs

[84] That, however, is not the end of the analysis, because there are paragraphs in the amended statement of claim where the plaintiffs attempt to raise concerns about the way in which their respective employers dealt with the requirements of the Order.[34]

Submissions

[85] Mx Hornsby-Geluk submitted that if the amended statement of claim is to be regarded as accepting that the Order is not unlawful and that the plaintiffs are now saying that each employer undertook a flawed process in dealing with the requirements of the Order by not considering the plaintiffs' religious or ethical beliefs, and/or the ground of disability, then the case has fundamentally shifted.

[86] Mx Hornsby-Geluk relied on ss 179(1) and 187(1)(a) of the ER Act. It was submitted that, if the plaintiffs are no longer claiming the Order is unlawful, the matter determined by the Authority has so fundamentally changed as to no longer be "a matter previously determined by the Authority". Therefore it does not fall within the jurisdiction of the Court under ss 179(1) and 187 of the ER Act.

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[34] For example [9], [16]–[18], [52], [53] and [62].

[87] Mr Bennett submitted that the Authority had failed to consider the matter in its entirety. He said it had "cherry-picked" phrases from the amended statement of problem when determining the case. He argued it had always been the essence of the plaintiffs' case that they were being discriminated against by their employers, who had used the Order to require the employees to be vaccinated even when they were relying on religious or ethical beliefs, and/or disability grounds not to be vaccinated.

Analysis of second issue

[88] I must now consider the remaining paragraphs of the amended statement of claim – those which apparently refer to issues other than the validity of the Order.

[89] I agree that the Court cannot consider a matter not previously determined by the Authority if it does not fall within the jurisdiction of the Court under ss 179(1) and 187 of the ER Act. The Court takes a broad approach when assessing whether a matter has been previously determined by the Authority. A refusal or failure by the Authority to consider a particular aspect of an employment relationship problem does not result in a conclusion that the matter was not before the Authority.[35]

[90] Here, the matter determined before the Authority was that it had no jurisdiction to determine what was fundamentally an attack on the lawfulness of the Order and because no valid personal grievances had been raised.

[91] The Authority's conclusion that valid personal grievances had not been raised was because of the fact that no description of the core details had been provided that would enable each employer to understand and deal with the problem being raised by their respective employee.

[92] Having examined the amended statement of problem, I conclude the Authority did not err in reaching this conclusion. I am not satisfied that the Authority was selective when considering the pleading. The determination reflects a very careful analysis of the amended statement of problem which indeed contained a paramount focus on government action.

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[35] *Sinton v Coatesville Motors 2013 Ltd* [2020] NZEmpC 137 at [18]; *Davis v Idea Services Ltd* [2020] NZEmpC 225 at [35]; and *Hatcher v Burgess Crowley Civil Ltd* [2019] NZEmpC 5 at [10].

[93] Nor was it incorrect to concentrate on the pleading rather than Mr Bennett's submission. The strike out authorities are clear that this is the correct approach.[36]

[94] As recorded earlier, some details of Mr Malcolm's intended claim of a personal grievance were provided to the Court. Apparently, this was the first time they had been particularised; it is also apparent that this information was not before the Authority. No details about the individual circumstances of the other plaintiffs were provided to the Court at all, and I infer, to the Authority. All of this reinforces the conclusion reached by the Authority that insufficient particulars had been provided as to it, or to the defendant, concerning the raising of personal grievances by each plaintiff, contrary to the requirements of the ER Act.

[95] Because the Authority concluded there were no valid personal grievances, "the matter" did not extend, and could not extend, to such claims.

[96] I have considered whether a yet further opportunity should be given to the plaintiffs to amend their claims. Sometimes such an option is appropriate where it appears to the Court that it is in interests of justice to do so, and there is reason to think the pleading is capable of correction.[37] Because insufficient details were pleaded in respect of any of the plaintiffs' alleged personal grievances, I must conclude that the problems cannot now be fixed by a further amended statement of claim. The language of the Act in ss 179 and 187 is fatal for the plaintiffs because valid grievances were not raised at the outset.

Conclusion

[97] I have concluded that the central thrust of the amended statement of claim relates to the plaintiffs' concerns that the Order is not lawful; this is an issue which cannot be considered by this Court. Nor do the remaining paragraphs disclose a reasonably arguable cause of action because the matter before the Authority did not

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36 At [65]–[67].

37 *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC); *CED Distributors (1988) Ltd v Computer Logic Ltd (in rec)* (1991) 4 PRNZ 35 (CA); and see Matthew Casey *SIMS Court Practice* (online looseleaf ed, LexisNexis) at [HCR 15.1.7(f)].

include valid personal grievances; the plaintiffs have no shown that the Authority erred in reaching this conclusion.

[98] It follows that the plaintiffs' challenge must be struck out for want of jurisdiction.

[99] For completeness, I refer to the various points made by Mr Bennett about the interface of the several statutes which he relied on in support of the submission that the employers had not had sufficient regard for the protection of human rights when dealing with issues as to mandatory vaccination. The way in which the various legislative provisions should interact with each other are important, a point to which I referred in *VMR v Civil Aviation Authority*.[38] However, given the fact that the proceeding is being struck out, it is not appropriate for the Court to analyse these issues further in this judgment. Such a possibility must await a case where they are properly before the Court.

[100] I reserve costs. The parties should discuss this issue directly in the first instance. My provisional view is that costs on a 2B basis are appropriate. If they are unable to resolve this matter, an application may be made in the usual way within 21 days, with a response given in a like period.

B A Corkill
Judge

Judgment signed at 1.45 pm on 9 March 2022

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38 *VMR v Civil Aviation Authority*, above n 3.