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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-000001
[2022] NZHC 291

UNDER	the Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
IN THE MATTER	of an application for judicial review for the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021
BETWEEN	RYAN YARDLEY First Applicant
	JOSHUA WALLACE Second Applicant
	DEFENCE FORCE WORKER Third Applicant
AND	MINISTER FOR WORKPLACE RELATIONS AND SAFETY First Respondent
	COMMISSIONER OF POLICE Second Respondent
	CHIEF OF DEFENCE FORCE Third Respondent
	ATTORNEY-GENERAL Fourth Respondent

Hearing: 15 February 2022

Appearances: M I Hague and A P Miller for the Applicants
V McCall and E Cameron for the Respondents

Judgment: 25 February 2022

JUDGMENT OF COOKE J

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[1] By the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 (the Order) the Minister for Workplace Relations and Safety determined that work carried out by certain Police and Defence Force personnel could only be undertaken by workers who had been vaccinated. The Order was made under s 11AA of the COVID-19 Public Health Response Act 2020 (the Act). This allows such an order to be made if it is in the public interest, and it is appropriate to achieve the purpose of the Act.

[2] These judicial review proceedings are brought by three Police and Defence Force workers who do not wish to be vaccinated, and who face termination if they are not vaccinated by 1 March 2022. Thirty-seven additional workers in the same position have also sworn affidavits in support of the claim. The proceedings were filed on 6 January 2022. On 7 January the applicants applied for urgent interim orders. The application was considered by Cull J on 12 January who noted that the affected

workers had been stood down but their employment had not yet been terminated, and that there was an agreement that the proceedings be heard urgently.[1] On that basis she declined the application for interim orders.

[3] This judgment deals with the substantive judicial review application which has now been heard by me. Given that the Order takes full effect on 1 March the judgment has been released with some urgency.

Background

[4] Following the enactment of the Act in May 2020 a series of significant measures have been implemented under its provisions directed to addressing the effects of COVID-19, including orders implementing what can generally be described as vaccine mandates. The primary provisions utilised to implement such mandates have been ss 9 and 11 of the Act. These empower the Minister for COVID-19 Response to make orders that will contribute or likely contribute to preventing or limiting the risk of an outbreak or spread of COVID-19, or avoiding or remedying its actual potential adverse public health effects.

[5] Three judicial review proceedings have been heard in the High Court challenging such orders. In September 2021 in *GF v Minister of COVID-19 Response and Others* Churchman J dismissed a challenge to an order bought by a former employee of the New Zealand Customs Service who had had her employment terminated.[2] Two arguments were addressed — that the order was ultra vires the Act, and that it was irrational. In October in *Four Aviation Security Service Employees v Minister of COVID-19 Response* I then heard and dismissed a challenge to the order relating to Customs Service employees of broader scope, which included an argument that the order breached the New Zealand Bill of Rights Act 1990 by being an unjustified limit on the right to refuse to undergo any medical treatment as affirmed by s 11.[3] I concluded that the order was a justified limit on that right. In doing so I noted:[4]

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1 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 16.
2 *GF v Minister of COVID-19 Response and Others* [2021] NZHC 2526.
3 *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012.
4 At [128].

> There is a last point of significance. This case concerns the measure that was introduced when New Zealand had eradicated the virus after the first outbreak, and was seeking to prevent a further outbreak (or delay a further outbreak until a greater proportion of the population is vaccinated, means of treating and managing the virus are better known, and the health system is better organised to address such an outbreak). Since that time it is a matter of judicial notice that an outbreak has occurred in Auckland, and that COVID-19 is spreading. It does not appear that this outbreak can be eliminated, reflecting the greater transmissibility of the Delta variant. Whether the challenged measure would remain demonstrably justified on the basis that it contributes to addressing the spread of the virus in circumstances when the virus is endemic in at least parts of New Zealand is an open question. This question is not before me. I note that under s 14(5) of the Act the Minister and Director-General are obliged to keep their COVID-19 orders under review.

[6] Finally in November in *Four Midwives v Minister for COVID-19 Response* Palmer J heard and dismissed a claim advanced by certain midwives affected by a vaccine mandate, together with the first part of a challenge to the mandate brought by certain teachers and doctors.[5] Palmer J rejected the argument that the orders were not within the empowering provision of the Act notwithstanding it did not explicitly refer to vaccination. Palmer J endorsed the observation made in *Four Aviation Security Services Employees* that it was surprising that the legislation had not specifically addressed vaccination and the issues it raised.[6] The second claim in the proceedings brought by teachers and doctors that the relevant order is not a justified limit on the right under s 5 of the Bill of Rights is to be heard shortly. That question was not addressed by Palmer J.

[7] The Minister for Workplace Relations and Safety, the Hon Michael Wood explains in his affidavit that in October 2021 Cabinet made decisions to amend the Act to allow vaccine mandates for other reasons, such as "preventing services from being unable to function because large numbers of people are away sick for long periods". He explains that he lodged a Cabinet paper that was considered by Cabinet on 26 October 2021 seeking legislative amendments to authorise such vaccine mandates. That paper recorded that there was public health advice that additional vaccine or testing mandates were not required. I understand this to be advice that such mandates were not considered necessary to contribute to addressing the risk of the outbreak or spread of COVID-19. The Minister explained, however, that there were other

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5 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064.
6 At [74].

justifications for mandates. The Police were given as an example of key public services where a vaccine mandate might be justified.

[8] Cabinet agreed with these recommendations, and proposed amendments were then introduced to the House of Representatives and the COVID-19 Response (Vaccinations) Legislation Act 2021 was duly passed in November 2021.[7] The new s 11AB allows the Minister for Workplace Relations and Safety to make orders specifying work that must only be undertaken by a worker who is vaccinated. The key prerequisites for making such an order are set out in the following terms:

> **11AA Requirements for making COVID-19 orders under section 11AB**
>
> (1) The Minister may make a COVID-19 order under section 11AB in accordance with the following provisions:
>
> (a) the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990; and
>
> (b) the Minister—
>
> (i) must have consulted the Prime Minister, the Minister for COVID-19 Response, the Minister of Justice, and the Minister of Health; and
>
> (ii) may have consulted any other Minister as the Minister thinks fit; and
>
> (c) before making the order, the Minister—
>
> (i) may consult the Director-General; and
>
> (ii) must be satisfied that the order is in the public interest and is appropriate to achieve the purpose of this Act.
>
> (2) For the purposes of subsection (1)(c)(ii), **public interest** includes (without limitation)—
>
> (a) ensuring continuity of services that are essential for public safety, national defence, or crisis response:
>
> (b) supporting the continued provision of lifeline utilities or other essential services:
>
> (c) maintaining trust in public services:
>
> (d) maintaining access to overseas markets.

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[7] Section 11 of the Act was also amended at the same time to expressly authorise vaccine mandates.

[9] A further important amendment was also made to the Employment Relations Act 2000. Under a new cl 3 of Schedule 3A, employees could have their employment terminated for failing to meet an order made under the Act.

[10] Following consultation, the Minister lodged a Cabinet paper considered by Cabinet on 22 November 2021 seeking mandatory vaccination under this power in relation to Police and the Defence Forces. The Minister explains:

> 16. My recommendation was based on the clear public interest in ensuring continuity of the services provided by the Police and the New Zealand Defence Force, both of whom are essential for public safety, national defence and crisis response.
>
> 17. In addition to the public interest considerations, I also understood that requiring vaccination for these categories of work would contribute to the overall public health response to COVID-19 in the following ways:
>
> 17.1 A fully-functioning Police service ensures our communities are safe and feel safe, particularly when interacting with Police, and contributes to public trust and confidence in Police's commitment to maintaining law and order and playing a key role in the our COVID-19 response. Police also interact daily with the general public, including vulnerable members of our community who are less likely to be vaccinated for a range of reasons.
>
> 17.2 The NZDF performs a unique and critical function for New Zealand, namely defending New Zealand, as well as providing any public service and aid to the civil power in times of emergency. This includes maintaining regional boundaries and ensuring MIQ facilities are secure. Many NZDF staff both live and work in close quarters on bases and in barracks, where bathroom and dining facilities are shared amongst large groups of people. An outbreak in these settings could affect the NZDF's operational capability to respond to emergencies, including as part of our COVID-19 response.

[11] He also addressed whether such measures involved a demonstrably justified limitation of fundamental rights. He says in his affidavit:

> 23. It is my view that the limitations on the rights of people working in Police or the NZDF who would be covered by the Specified Work Vaccinations Order are justified. This is because of the strong public interest objective for such a mandate, which also contributes to New Zealand's overall public health response. I consider it in the public interest to maintain the operational capacity of these workforces so they can continue to play a critical role in our COVID-

> 19 response and remain prepared to respond to a wide variety of incidents and emergencies across New Zealand and internationally.

[12] Cabinet agreed with his recommendations. The Order was then prepared. Before it was signed the Minister received a briefing from the Ministry of Business, Innovation and Employment which set out advice in relation to the Order, including the legal requirements under s 11AB. The Minister confirms in his affidavit that before making the decision to sign the Order he was satisfied that it involved a justified limit on rights and freedoms in the New Zealand Bill of Rights Act, that the Order was in the public interest, and that it was appropriate to achieve the purpose of the Act. The Order was signed on 13 December 2021 and came into effect from 16 December.

[13] As promulgated cl 3 of the Order provided:

> **3 Purpose**
>
> The purpose of this Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring specified work to be carried out only by affected workers who are vaccinated where it is in the public interest to do so.

[14] Prior to the hearing of the application for judicial review, and by minute dated 11 February, I raised an issue about the stated purpose of the Order. I had read the Minister's evidence to be that the Order had not been promulgated for the purpose stated in cl 3. Whilst it was necessary for the Minister to be satisfied that the Order was appropriate to achieve the purpose of the Act, the relevant purpose appeared to be that referred to in s 4(b) of the Act related to supporting a response that "avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect)". In particular I understood that the Order had been promulgated in order to address the threat to the continuity of Police and Defence Force services arising from absenteeism caused by COVID-19, rather than to limit the spread of it. As I indicated in my minute it appeared to be a mismatch between the Minister's evidence and the stated purpose of the Order in cl 3.[8]

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[8] Since the hearing I have identified that the Regulations Review Committee also recorded this issue in its February 2022 report; see Regulations Review Committee *Examination of COVID-19 orders presented between 9 and 21 December 2021* (February 2022).

[15] In response by memorandum of counsel dated 13 February, Crown counsel advised that the Minister had decided to clarify the purposes of the Order and that the COVID-19 Public Health Response (Specified Work Vaccinations) Amendment Order 2022 had been signed by him. This introduced a replacement clause in the following terms:

> **3 Purpose**
>
> The purpose of this order is to—
>
> (a) avoid, mitigate, or remedy the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
>
> (b) ensure continuity of services that are essential for public safety, national defence, or crisis response; and
>
> (c) maintain trust in public services.

[16] It is also significant to note that the Order did not affect all of the Police workforce. Deputy Commissioner Tania Kura explained in her evidence that as at January 2022 Police had an overall workforce of just over 15,000, but that the definition of the work covered by the Order affected just short of 11,000 staff. The remaining, mainly non-sworn staff were covered by the Police's employment policies rather than the Order. The position of the New Zealand Defence Force (NZDF), described by Brigadier Matthew Weston is different, however. NZDF again has slightly over 15,000 personnel, with just over 3,000 of them being civilians. For NZDF the Order covers all of the personnel, including the civilian staff.

The applicants' challenge

[17] The applicants challenge the Order on four main grounds:

(a) that the Order was not properly made for the purposes of the Act and it is inconsistent with those purposes; and

(b) that the Order is inconsistent with other legislative provisions in the Defence Act 1990, the Policing Act 2008 and other legislation, and accordingly unlawfully purports to suspend the operation of other legislation; and

(c) that the Order fails to meet the Crown's obligations under the Treaty of Waitangi for being inconsistent with Treaty principles, including because of disproportionate impact on Māori; and

(d) that the Order is unlawful as it involves an unjustified limit on rights protected by the New Zealand Bill of Rights Act, particularly the right to refuse to undergo medical treatment (s 11), the right to manifest religion (s 15), the right to be free from discrimination (s 19) and other rights recognised by s 28 of the Bill of Rights (including the right to work, and of minority groups to enjoy their culture and practice of religion).

[18] The claims are supported by a number of affidavits, including affidavits from each of the three applicants, 37 affidavits from other affected workers employed by the Police and NZDF, and expert evidence from Dr Nikolai Petrovsky. Dr Petrovsky is presently the Director of the Diabetes and Endocrinology Department of Flinders Medical Centre, Academic Professor at Flinders University, and Director of Vaxine Pty Ltd, a biotechnology company specialising in vaccine development and formulation. In this latter role he has developed a vaccine for COVID-19 which is presently in use in Iran. Finally the applicants rely on expert evidence from Raharuhi Koia, a Minister within the Presbyterian Church of Aotearoa New Zealand.

[19] Affidavit evidence in response has been provided by the Hon Michael Wood (Minister for Workplace Relations and Safety), Deputy Police Commissioner Tania Kura, Brigadier Matthew Weston (Chief People Officer of NZDF), Dr George Town (Chief Science Adviser at the Ministry of Health), and Peter Old who is the Principle Defence Chaplain for NZDF.

Consistency with purposes of the Act

[20] The applicants' first argument is that the Order does not advance, and/or is inconsistent with the purpose of the Act. The relevant purpose of the Act is set out under s 4 of the Act itself. It provides:

> **4 Purpose**
>
> The purpose of this Act is to support a public health response to COVID-19 that—
>
> (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
>
> (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
>
> (c) is co-ordinated, orderly, and proportionate; and
>
> (ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and
>
> (cb) is economically sustainable and allows for the recovery of MIQF costs; and
>
> (d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

[21] Under s 11AA(c)(ii) the Minister must be satisfied that the proposed order is appropriate to achieve the purpose of the Act when an order under that section is made.

[22] Mr Hague referred to the importance of decisions being consistent with the purpose of legislation as explained by the Supreme Court in *Unison Networks Ltd v Commerce Commission*.[9] He argued that the Order here was not consistent with the purposes of the Act, particularly the requirement that it be proportionate, that it allowed social economic and other factors to be taken into account, and that it was economically sustainable. That was because the economic and social factors and the implications of the Order had not been fully taken into account.

[23] I do not accept these submissions and agree with the arguments advanced in response by Ms McCall. Mr Hague argued that the requirements in s 4 were cumulative, as was shown by the use of the word "and" between each of the clauses, and that accordingly an order needed to achieve all of the specified purposes. This involves a misreading of the section. The use of the word "and" simply expands the purpose of the Act clarifying that each of them supports the public health response to

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9 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

COVID-19. It does not mean that a measure implemented under the Act must further each and every purpose. So, for example, a measure that does not allow for the recovery of MIQ costs under s 4(cb) but is nevertheless directed to one of the other purposes would still be in accordance with the purpose of the Act. Neither should such purposes be read narrowly as cases such as *Unison Networks* and *Canterbury Regional Council v Independent Fisheries Ltd* demonstrate.[10] Purpose statements such as the one in the Act should be read broadly and purposively.

[24] I also have little hesitation in finding that an order directed to ensuring the continuity of Police and NZDF services is consistent with the purpose of supporting a public health response to COVID-19 because it seeks to mitigate or remedy the actual or potential adverse effects of the COVID-19 outbreak (directly or indirectly) in accordance with the purpose in s 4(b). Avoiding the implications of absenteeism caused by the virus, and the potential effects on the continuity of essential services provided by the Police and NZDF fall squarely within that purpose.

[25] Mr Hague argued that even if the sub-sections of s 4 were not cumulative the Order was directly inconsistent with some of the purposes set out in s 4, particularly ss 4(ca) and (cb). He also argued that there had been a failure to take into account particular circumstances of the affected workers, including because of a narrow formulation of exceptions to the mandate. There may be some significance in the submission directed to the lack of assessment of individual circumstances arising from the terms of the Order, but it is not a submission that is properly advanced on the ground of improper purpose. I will address how this argument might have significance for assessing whether the Order involves a demonstrably justified limit of fundamental rights below. In terms of the challenge based on the purpose of the Order I do not accept that the decision of the Minister can be criticised on the basis that it is inconsistent with some of the specified purposes. The Order is plainly directed at achieving the purpose of the Act. The fact that some may argue about whether it really does so does not go to the essence of this ground of review. The balancing of the purposes referred to in s 4 is for the relevant decision-maker. Once it is established

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[10] *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57.

that the measure is properly directed to achieving the purposes of the Act the requirement to act consistently with the purposes of the Act is satisfied.[11]

[26] Finally it is appropriate to note the surprising situation arising from the mismatch between the purpose of the Order as explained in the Minister's affidavit and the statement of the purpose as originally formulated in cl 3. This has implications, at the least for procedural fairness. Both the applicants' and the respondents' written submissions proceeded on the basis that the Order was directed to preventing and limiting the risk of an outbreak or spread of COVID-19. It is clear that this was not the Minister's purpose, and indeed that the Act had been amended to allow for vaccination mandates for additional purposes. I accept Ms McCall's submission that the wrongly formulated cl 3 was an error — she described it as a drafting mistake. But I do have a residual concern that the lack of clarity about the purpose of the Order may have had implications in the process surrounding its promulgation, at least to the extent that it showed some lack of clarity among officials. There is no lack of clarity in the Minister's affidavit, however. And I proceed on the basis that his purpose in promulgating the Order is as he described it in his affidavit.

[27] Strictly speaking the applicants are able to say that they had demonstrated a reviewable error arising from the incorrect formulation of the purpose of the Order in cl 3 as it was promulgated. The Minister's rationale for the Order, and his assessment of the demonstrated justification for the limit on fundamental rights, did not support an order having the purpose described in the original cl 3. For example, there is no direct evidence of advice from the Director-General, or any other person on the relevant health science issues. Indeed the contemporaneous documents record that the Minister had received advice that further vaccine mandates were not needed for health reasons. This gives rise to a significant issue as to whether the measure could then be demonstrably justified on health grounds associated with the spread of the virus. But this problem with the Order as originally promulgated would not necessarily entitle the applicants to relief by way of judicial review. Relief is ultimately discretionary, and I accept the submission that the formulation of the purpose in cl 3 was a mistake,

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[11] I put to one side the question whether the existence of a collateral inconsistent purpose, or non-consistent purpose, may establish a ground of review; see P A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021) at [23.2(3)].

and that a Court should not set aside an order formulated to address an issue of public interest simply because there has been a misdescription of the purpose of the measure in the Order.[12]

[28] Given that I have reached the view that the Order is unlawful on other grounds which I explain below, however, I do not need to address this point further.

Suspension of legislation

[29] The second ground of review is that the Order unlawfully suspends the operation of other legislation.

[30] Mr Hague argued that there were special constitutional aspects of the relationship between central Government and both the Police and the NZDF. These were reflected in particular statutory provisions that implemented operational independence. Mr Hague referred to ss 16(2)(d) and 58 of the Policing Act 2008, ss 9 and 59(2)(d) of the Defence Act 1990, and ss 14(2)(b) and 73(3)(d) of the Public Service Act 2020. He argued that regulations must be consistent with other enactments that are superior to them in the hierarchy of authority, [13] and that the Order cut across these legislative provisions and was unlawful for inconsistency with such legislation.

[31] There is no need to address the arguments over whether the measures contemplated by the Order are in fact inconsistent with the legislation Mr Hague referred to. As Ms McCall submitted there is a straightforward answer to this ground of challenge. The Act provides:

> **13 Effect of COVID-19 orders**
>
> (1) A COVID-19 order may not be held invalid just because—
>
> (a) it is, or authorises any act or omission that is, inconsistent with the Health Act 1956 or any other enactment relevant to the subject matter of the order; or
>
> (b) it confers a discretion on any person, or allows any matter or thing to be granted, specified, determined, designated, defined,

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12 Indeed it may become within the concept of a defect in form or technical irregularity as contemplated by s 19 of the Judicial Review Procedure Act 2016 particularly as there has been no substantial wrong or miscarriage of justice.

13 *Alan Johnson Sawmilling Ltd v Governor-General* [2002] NZAR 129 (HC) at 143.

> approved, or disapplied by any person, or allows a person to impose conditions or give directions, whether or not there are prescribed criteria.
>
> (2) However, subsection (1)(a) does not limit or affect the application of the New Zealand Bill of Rights Act 1990.
>
> (3) To avoid doubt, nothing in this Act prevents the filing, hearing, or determination of any legal proceedings in respect of the making or terms of any COVID-19 order.

[32] This provision addresses precisely the concern that this ground of challenge is directed to. It ensures that orders made under the Act remain effective even if they are inconsistent with other legislation.

[33] Mr Hague sought to argue that s 13(1)(a) did not apply because the enactments that he was relying upon were not "relevant to the subject matter of the order". I do not accept that. It is a necessary element of his argument that the terms of the Order are in conflict with those enactments. If they are so in conflict then those enactments are relevant to the subject matter of the Order. The legislation relied upon relates to the authority to regulate issues such as personal employment. I see no reason to read down the intended scope of s 13(1)(a), or to give the words of the enactment other than a normal purposive interpretation. Section 13(1) does not apply to, or in any way limit the New Zealand Bill of Rights, and both sub-sections (2) and (3) demonstrate legislative care to ensure that fundamental rights and principles are not eroded.

[34] For these reasons I dismiss this ground of review.

A failure to meet Treaty of Waitangi obligations

[35] The next ground of review is that the Order fails to meet the Crown's Treaty obligations as Māori will be dismissed from employment or service at a disproportionately higher rate rather than other ethnicities.

[36] Ms Miller stressed the fundamental importance of the Treaty as recognised in a number of instruments. She referred to the Crown's COVID-19 Māori Vaccination Immunisation Plan, and the conclusions of the Waitangi Tribunal highlighting a lack of concern by the Crown for Māori in relation to vaccination, and recommending that the Crown should engage with Māori in accordance with specified Treaty-based

principles.[14] She argued that the Order was inconsistent with a number of Treaty principles including partnership, active protection, equity and promoting the ability of Māori to make personal choices as to their social and cultural path and not to be disadvantaged by that choice. In advancing the argument Ms Miller put forward mathematical assessments by way of oral submission directed to the alleged disproportional effect that the Order had in terms of dismissal, and argued that such an effect must at least be a mandatory relevant consideration that the Minister had failed to take into account.

[37] I do not accept these arguments for two reasons.

[38] First, the Minister has made it clear in his affidavit that the position of Māori, and of potential Treaty principles, were taken into account. This is further shown by the contemporaneous advice. The Minister expressly took into account that COVID-19 was likely to disproportionately affect Māori because of a range of factors, and also addressed the possibility of the disproportionate effect upon Māori from the Order because of their lower rates of vaccination compared with the wider population. So these matters were explicitly addressed as relevant considerations.

[39] Secondly, the suggested disproportionate effect on Māori resulting from terminations arising from the Order is not to be made out on the evidence. I accept that the concerns arising out of the Crown's engagement with Māori throughout the health response as highlighted in the Waitangi Tribunal's report are important. But the relevant percentage differences that Ms Miller relied upon in oral submissions were very small, and well within what I would expect to be a margin for error for such an analysis, which in any event was not supported by any statistical evidence. I am not satisfied that the applicants have demonstrated a disproportionate impact on Māori arising from the Order.

[40] For these reasons this ground of review is also dismissed.

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14 Waitangi Tribunal *Haumaru – The COVID-19 Priority Report* (WAI 2575, 2021).

Unjustified limit upon fundamental rights

[41] The final, and in my view, key ground of challenge is that the Order is unlawful as it implements unjustified limits on fundamental rights protected by the New Zealand Bill of Rights Act.

[42] It is important to record this ground of challenge is advanced both in the statement of claim, and in submissions, on the basis that the Order is unlawful for being an unjustified limit on the relevant rights. It is not limited to a challenge to the decision of the Minister on conventional judicial review grounds. Rather it is based on the argument that the Order itself imposes an unlawful measure. It is accordingly the type of claim that I addressed in *Four Aviation Security Service Employees v Minister of COVID-19 Response*. The Court itself must assess whether the measures implemented by the Order are an unjustified limit on any rights that have been limited.[15] The analysis I set out of a claim of that nature in that judgment was not challenged in the submissions of the parties, and can be taken as the basis upon which I proceed.

Right to refuse medical treatment

[43] The Crown accepts that the Order limits the right in s 11 of the New Zealand Bill of Rights Act to refuse to undergo medical treatment. The parties' written submissions, and indeed their evidence, then devoted significant attention to the extent of the other rights in the Bill of Rights which were limited by the Order. Given that the Crown accepts, as it has in the previous challenges to vaccine mandates, that the right in s 11 is limited by the Order, I doubt whether the potential applicability of other fundamental rights will likely make much difference to the ultimate outcome of this challenge. I accept, however, that there may be some more subtle implications arising if the other rights are found to be limited. But there is no dispute that the Order limits the right of affected workers to refuse to undergo a medical treatment.

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15 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 3, at [40]–[42]. This is more fully understood by reference to the line of the Supreme Court and Court of Appeal authority referred to in footnote 33.

Right to work

[44] Mr Hague also relied on the right to work recognised in article 23(1) of the Universal Declaration of Human Rights 1948, as well as articles 6–8 of the International Covenant on Economic, Social and Cultural Rights. As Ms McCall emphasised those rights are not to be found in the New Zealand Bill of Rights Act. Mr Hague relied on the existence of other rights and freedoms as preserved by s 28 of the New Zealand Bill of Rights Act.

[45] I accept Ms McCall's submission that such rights recognised in international instruments can be taken to have only indirect relevance, and that they do so through the machinery of New Zealand's domestic legislation which sets out the principles of employment law, including the ability to take a case to the Employment Relation Authority and the Employment Court. That legislation can be taken to be New Zealand's domestic implementation of such principles. But that employment law machinery may not apply to all Police and NZDF personnel.[16] Moreover the Employment Court has a limited judicial review jurisdiction as set out in ss 187 and 194 of the Employment Relations Act 2000. That jurisdiction does not extend to a challenge to the Order made in this case. Only the High Court has such jurisdiction. It follows that it would be the function of the High Court to review the legality of the measures imposed by the Order in light of the principles reflected in international law.

[46] I accept that such principles may have indirect relevance. Whilst the right to refuse medical treatment is substantively limited by the Order because of the coercion involved in affected workers being faced with the decision to either get vaccinated or have their employment terminated, it does not literally compel the medical treatment.[17] But the associated pressure to surrender employment involves a limit on the right to retain that employment, which the above principles suggest can be thought of as an important right or interest recognised not only in domestic law, but in the international instruments. So in that sense the right to refuse to undergo medical treatment is not the only right (or significant interest) that is being limited.

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16 See for example Defence Act 1990, s 45.

17 See *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 3, at [125].

Right to manifest religion

[47] The applicants contend that their right to manifest religion or belief recognised by s 15 of the New Zealand Bill of Rights Act is being limited. A number of the workers affected by the Order have filed affidavits referring to their fundamental objection to taking the Pfizer vaccine given that it was tested on the cells that were derived from a human foetus, believed to be an aborted foetus. Dr Town confirms that such testing did occur, although he says that it is not known whether the foetus was aborted. Some of the deponents also expressed the view that the requirement to be vaccinated is inconsistent with other Christian values.[18] This evidence is supported by the evidence of Minister Koia, although Minister Olds, the Principle military Chaplain for NZDF, has given evidence that the mandates are not in conflict with the free exercise of religious belief.

[48] The applicants do not contend that the right in s 13 — the freedom of thought conscience, religion and belief — has been limited. For the reasons explained by Ellis J in *New Zealand Health Professionals Alliance Inc v Attorney-General* s 13 is concerned with more fundamental internal beliefs that could not be subject to justified limits.[19] With respect to the s 15 right to manifest religion or belief Ms McCall relied on Ellis J's finding that the requirement for health practitioners to provide information to women seeking an abortion was not inconsistent with the limit on the s 15 right.

[49] I accept Mr Hague's submission, however, that an obligation to receive a vaccine which a person objects to because it has been tested on cells derived from a human foetus, potentially an aborted foetus, does involve a limitation on the manifestation of a religious belief in "observance, practice, or teaching" of religion contemplated by s 15. It is grounded in a core principle of the particular Christian religion and the objection to abortion. The fact that others observing the same religion do not agree with the stance does not mean that the stance does not involve the observance of a religious belief. Any justification for the limit on that right for reasons

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18 For example, beliefs based on 1 Corinthians 3:16–17, 6:19–20; Genesis 1:27; Psalm 139:14.

19 *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 629 at [65], [86]–[88].

of public policy is best then engaged through the justified limits analysis arising under s 5.[20]

[50] I am not satisfied, however, of the applicants' broader claims that requiring vaccination is inconsistent with the manifestation of religion or belief arising from the concept of individual bodily integrity, personal autonomy or similar Christian values. In reaching that conclusion I apply the approach to the identification of stances that involve the manifestation of a religion explained by the majority of the Canadian Supreme Court in *Syndicat Northcrest v Amselem*.[21] This seems consistent with the approach applied in *New Zealand Health Professionals Alliance Inc v Attorney-General*.[22] The relevant belief must be religious and not secular. This involves the applicants' demonstrating that they sincerely believe that a certain practice or belief is required by the religion, or that they believe that it is required by the religion and it has the appropriate nexus with that religion. [23]

[51] Ms McCall helpfully referred to decisions of the Canadian Human Rights Tribunal where it was found that claimants did not successfully demonstrate that a refusal to wear a mask was religious in nature.[24] Whilst the objective connection with a religion involves a low threshold, I do not accept that a belief in an individual's bodily integrity and personal autonomy is a religious belief or practice. Rather it seems to me, in the circumstances of this case, to be a belief in the secular concept referred to in s 11 of the New Zealand Bill of Rights Act.

[52] For these reasons I accept that the right to manifest religion under s 15 of the New Zealand Bill of Rights Act is limited for those who object to vaccination with a vaccine that has been tested using cells derived from a human foetus on religious grounds, but not otherwise.

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20 Which may involve a different approach than that adopted by Ellis J, albeit one that leads to a similar outcome. The separate step contemplated by s 5 of the Bill of Rights is an unusual feature of the New Zealand Legislation – see A and P Butler *The New Zealand Bill of Rights Act – A Commentary* (2nd ed, LexisNexis NZ Ltd, Wellington, 2015) at [6.22].

21 *Syndicat Northcrest v Amselem* [2004] SCC 47 at 581 and 589.

22 *New Zealand Health Professionals Alliance Inc v Attorney-General*, above n 19 at [93].

23 See *Syndicat Northcrest v Amselem,* above n 21, at 583.

24 *Pelletier v 1226309 Alberta* [2021] AHRC 192; *The Worker v The District Managers* [2021] BCHRT 41.

Right to be free from discrimination

[53] The applicants also argue that the Order limits the right to be free from discrimination on the grounds set out in the Human Rights Act 1993 in accordance with s 19 of the New Zealand Bill of Rights Act. This is on the basis of their religious beliefs, and also because of the indirect discrimination against Māori.

[54] I apply the test for identifying discrimination set out by the Court of Appeal in *Ministry of Health v Atkinson*.[25] This involves considering whether there is differential treatment between persons in comparable situations on the basis of a ground of discrimination, and whether the differential treatment amounts to a material disadvantage.

[55] I do not accept Ms McCall's submission that the prohibited ground of discrimination in s 21 of the Human Rights Act is limited to religious beliefs, and not the manifestation of those beliefs. If a measure disproportionately affects a group because it limits a particular religious practice, or other manifestation of belief, then it seems to me to be clearly subject to the right to be free from discrimination on the basis of religion.[26]

[56] I do accept her submission, however, that there is insufficient evidence of disparity of treatment arising from the manifestation of religious belief that I have found to be limited. The Order does not impose differential treatment on its face — all affected are treated in the same way. That does not prevent indirect discrimination arising, however. The concept of indirect discrimination was addressed by the Court of Appeal in *Ngaronoa v Attorney-General*, with the Court explaining that the necessary differential treatment needed to be demonstrated.[27] Here there is no evidence, statistical or other kind, showing that a group is being disadvantaged because of a particular religious belief which they practice — here declining to be vaccinated because of the fact that the vaccine has been tested on cells derived from a human foetus. The fact that there are some affected workers who have explained that

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25 *Ministry of Health v Atkinson* [2012] NZCA 184, [2013] 3 NZLR 546 at [55].

26 For example, a measure preventing the wearing of head coverings could potentially discriminate against a number of groups whose manifestation of belief involves certain head coverings.

27 *Ngaronoa v Attorney-General* [2017] NZCA 351. See also Selene Mize "Indirect Discrimination Revisited" [2007] NZ L Rev 27.

this is their reason not to be vaccinated does not do that of itself. Other affected workers have other reasons not to be vaccinated. For there to be discrimination it needs to be shown that a group having a particular religious practice was differentially treated, and in a way that has caused disadvantage. That has not been demonstrated. In terms of the effects on the basis of race arising from discrimination against Māori, for the reasons I have already explained I do not accept that has been established on the evidence.

Conclusion on affected rights

[57] I do not need to address the other arguments advanced by the applicants which I do not accept. The Order limits the right to be free to refuse medical treatment recognised by s 11 of the New Zealand Bill of Rights Act (including because of its limitation on people's right to remain employed), and it limits the right to manifest religious beliefs under s 15 for those who decline to be vaccinated because the vaccine has been tested on cells derived from a human foetus which is contrary to their religious beliefs. I do not see any other rights as being relevant.

Is the limit on rights demonstrably justified?

[58] I accordingly now address the decisive question in this challenge, which is whether the limitation of fundamental rights is demonstrably justified in a free and democratic society given the public interest that is sought to be advanced by the Order.

[59] Section 5 of the Bill of Rights provides:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[60] It is not common for human rights legislation to have a general justification exception of this kind.[28] It removes the necessity to interpret the rights themselves in a way that incorporates justification, and the unnecessary complexities that can arise

[28] See A and P Butler *The New Zealand Bill of Rights Act – A Commentary*, above n 20.

as a consequence. The approach mandated by s 5 has been described as a "masterstroke against rigidity".[29]

Margin for appreciation or deference

[61] There is a preliminary question that is appropriately addressed. Ms McCall argued that it was necessary for the Court to allow for a degree of deference to the assessment made by the Minister when assessing whether the measures involved a demonstrably justifiable limit on fundamental rights. This was alternatively expressed as allowing for a margin for appreciation.

[62] This is a matter I addressed for *Four Aviation Security Workers v Minister of COVID-19 Response*.[30] I again proceed on the basis more fully explained in that judgment. I am not convinced that reference to deference, or to a margin for appreciation clarifies the Court's task in the present case. There is an important distinction between the policy decisions made by the Executive, and the legal questions that are addressed by the Court. The choices made by governments on their response to COVID-19 involve wide policy questions — including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures. These are decisions for elected representatives to make. The Court addresses narrower and more limited legal questions — here whether the measure adopted is a demonstrably justified limitation of rights pursuant to s 5 of the New Zealand Bill of Rights Act. The Court's function is not to address the wider policy questions. The Minister was free to choose between any options that were legally open to him. The options were so open to him if they satisfied the legal requirement that they were a demonstrably justified limit on the relevant rights.

[63] I accept when addressing the legal questions that the views of the Minister as set out in his evidence are to be given weight. Equally the views expressed by Deputy Commissioner Kura and Brigadier Weston, as senior and experienced persons in their respective areas should also be given weight. Questions involving expertise, such as those addressed by Dr Town may give rise to institutional limitations on the Court's

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29 Sir Robin Cooke "Practicalities of a Bill of Rights" (1986) 2 Aust Bar Rev 189 at 199.

30 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 3, at [80]–[86].

ability to reach definitive conclusions, particularly when their evidence is only provided by way of affidavit. But ultimately the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. And the Crown has the burden to demonstrate that a limitation of a fundamental right is demonstrably justified.[31] The Court of Appeal recently explained the rigour that this requires in *Make It 16 Inc v Attorney General*:[32]

> … The relevant purpose to be identified under the *Hansen* s 5 analysis is the purpose of the limiting measure.[33] In this case, the limiting measure is the limitation of the franchise to those aged 18 and over, thereby disenfranchising those under the age of 18 years. The purpose of the limitation is to demarcate between those who are to be considered adults and those who are to be considered children.
>
> That being the case, in terms of the remaining steps in the s 5 analysis, the Court needed to inquire why Parliament made the choice it did, why are 16 and 17 year olds excluded, deemed children and not adults? What is the social advantage of limiting the age to 18 years? If there is one, does the social advantage outweigh the harm to the protected right. Would extending the franchise to 16 and 17 year olds be harmful? Would it have benefits?
>
> The overly broad formulation of the purpose resulted in the Judge being unduly deferential to Parliament and in turn failing to inquire whether the Attorney-General had discharged the burden of proof that lay on him to justify the limit on the protected right.[34] The doctrine of "margin of appreciation" certainly allows Parliament some latitude or leeway but it can only go so far. As was said by this Court in *Child Poverty Action Group Inc v Attorney-General*:[35]
>
> > That latitude or leeway to the legislature does not however alter the fact that the onus is on the Crown to justify the limit on the right. The justification has to be "demonstrable".
>
> And:[36]
>
> > … the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away or shirk that task.

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31 *Ministry of Health v Atkinson*, above n 25, at [163].

32 *Make It 16 Inc v Attorney General* [2021] NZCA 681 at [51]–[53].

33 See *Ministry of Health v Atkinson*, above n 25, at [117]; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [65].

34 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [108]–[112] per Tipping J; and *Ministry of Health v Atkinson*, above n 25, at [163].

35 *Child Poverty Action Group Inc v Attorney-General*, above n 33, at [91] (footnote omitted).

36 At [92].

[64] As I will elaborate upon below there is also room for the precautionary principle to operate given the subject matter of the measures. That is a relevant legal principle that potentially applies. But the Court must nevertheless grapple with the difficult questions for itself in order to provide the answers to the legal issues that arise.

The Court's approach

[65] The relevant question then becomes whether the limitation on fundamental rights that has been identified is reasonable, and demonstrably justified in a free and democratic society. The burden is on the Crown to establish this. The approach usually applied to assessing the justification for the limit on rights is that set out by the Supreme Court in *R v Hansen*, which in turn adopted the approach of the Supreme Court of Canada in *R v Oakes*.[37] Tipping J described the approach as involving a number of steps,[38] although it should be remembered that this is not a rigid test, but rather a framework for the Court to ultimately address the question of justification.

[66] The relevant justification here is the advancement of the objective of the Order identified in its amended terms — to ensure continuity of services that are essential for public safety, national defence, or crisis response, and to maintain trust in public services. The risk to the continuity of such services arises from potential absenteeism in the workforce caused by COVID-19. That could be direct, or indirect. Particular workers could be absent because of their own illness, or because they are required to isolate by becoming a close contact of someone with the illness. So the risk created by the unvaccinated relates not only to their own vulnerability, but also because they are seen as a risk of transmitting COVID-19 to others or causing colleagues to require to isolate.[39] The maintenance of trust in public services would be associated to this — providing confidence to the public that the Police in particular, but potentially NZDF, have a fully vaccinated workforce which it is safe to interact with.

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37 *R v Hansen*, above n 34; *R v Oakes* [1986] 1 SCR 103.
38 At [103]–[104].
39 I note the very recent change to isolation requirements.

[67] Against that background, determining whether the measures implemented by the Order are demonstrably justified seem to me to involve questions along the following lines:

(a) How many unvaccinated workers the Order addresses compared with the overall workforce. In particular how many workers have been pressured into vaccinating, or have been terminated/resigned as a consequence of the Order?

(b) Of that number, how many would have been pressured to vaccinate, or terminated/resigned in any event as a consequence of the existing internal policies applied by Police and NZDF. In other words what is the effect of the Order that was not already being achieved by existing vaccination policies?

(c) What is the risk of the continuity of services of Police and NZDF arising from this number of workers that are so addressed by the Order? This will include evidence of the additional risks of contracting and transmitting COVID-19 arising from being unvaccinated, in light of the number of workers so identified, and the overall workforce and its dynamics. It will also include an assessment of the impact on public trust in these services.

(d) Does the benefit so identified amount to a demonstrably justified limit on the rights bearing in mind the adverse impact on the persons whose rights are so limited?

[68] There may be alternative ways of framing the required inquiries, but an analysis along these lines appears to me to be appropriate. These questions go to the first step described by Tipping J in *Hansen,* namely to ascertain whether the limiting measure serves a sufficiently important purpose to justify the curtailment. These questions are also relevant to the subsequent steps, and particularly that the measure limits the rights no more than reasonably necessary, and in due proportion to the importance of the objective.

[69] One of the difficulties with the present case is that there is little before the Court that allows an analysis along these lines to be undertaken. There was nothing in the parties' written submissions of this kind. No doubt that can be partly explained by the fact that the Order as originally promulgated identified the incorrect purpose, and the parties' submissions proceeded on the basis that the purpose of the Order was to address the spread of COVID-19. The parties submissions also tended to address these question of justified limitation at a more abstract level, rather than by reference to the actual evidence of the effect of the measure. As demonstrated by the questions above, in order for the Court to determine whether the purpose of ensuring the continuity of services that are essential for public safety, national defence, or crisis response and maintenance of trust in public services is achieved, the inquiry is necessarily a practical one.

[70] More importantly, whilst there is some evidence that allows the Court to assess these questions it is far from complete, and only addresses such questions indirectly. That can also be said of the advice given to the Minister when he made his decision, and also of his advice to Cabinet in relation to the proposed decision. The Crown can still show by the evidence filed that the measure was demonstrably justified, however.

Number of affected Police personnel

[71] I will address what the Order actually achieved by first considering the evidence on the number of unvaccinated Police personnel that were impacted by the Order. I will then address the number for NZDF.

[72] Deputy Commissioner Kura describes the rollout of vaccination for Police in her evidence. At the time the Police first advanced a case to be included in an order they advised the Minister that as at 21 October 2021, 83.1 per cent of Police had received at least one or more doses of the vaccination, and 70.1 per cent had received both doses. By the time the Order took effect on 17 January 2022 Police had an overall workforce of 15,682 involving 10,114 sworn staff, 340 authorised officers, 324 recruits and 4,900 non-sworn staff. The mandate arising under the Order covered the 10,892 sworn staff. Deputy Commissioner Kura explains the remaining 4,790 were "covered by Police's internal vaccination policy".

[73] Police assessed the number of people actually affected by the Order when it took effect. That was identified as being 164 unvaccinated staff members as at 17 January 2022. They were stood down. Deputy Commissioner Kura says that on 8 February Police served a notice of termination on 60 affected staff and that the remaining 104 staff are now going through further consultation on their options, have taken up leave without pay, are choosing to vaccinate, have been redeployed, or are choosing to resign. So in terms of the actual impact of the Order, the evidence before the Court suggests it is limited to 164 Police workers, 60 of which have had their employment terminated. That is in the context of an overall workforce of over 15,000, and a workforce of just short of 11,000 covered by the Order.

[74] There is no evidence before the Court that this number would have been any different had the matter been addressed by the Police's internal vaccination policy (as is the case of approximately 4,000 civil staff). Neither do I have any evidence that the mandate in the Order had a material effect on overall vaccination rates for Police. For example there is no evidence that the rate of those being vaccinated at the end of October 2021 was in decline and that the Government mandate introduced through the Order was needed to materially address that decline. Neither do I have any evidence of what is thought the total vaccination rates would have been without the Government's mandate introduced by the Order.

[75] The only evidence of any Police officers affected by the Order getting vaccinated in anticipation of a mandate is found in one of the affidavits filed in support of the application. Police Sergeant John Moody says that he got vaccinated because of the threat of dismissal arising from "the mandate". But even this evidence does not clearly indicate whether it was the mandate introduced by the Order as opposed to the pre-existing internal mandate that led to this decision. I accept that it is possible that some Police officers got vaccinated because of the anticipated effect of the Order but I do not think that possibility can be taken very far without any actual evidence of this.

[76] Neither has the Court been provided with an explanation of how the existence of a number such as 164 unvaccinated personnel, 60 of whom were terminated, materially addressed the ability of the Police to provide continuity of services. This number of affected officers seems to me to be low relative to the total numbers in the

force, and having 60 officers terminated involves workforce disruption in itself. This much was recognised and assessed by the Minister, and it was considered that the low number of prospective terminations would be manageable. The only evidence on the improved ability to ensure continuity of services is in one paragraph of Deputy Commissioner Kura's evidence where she says:

> Although vaccination could be implemented through policy, Police considered a mandate would enable Police to quickly advance a vaccination requirement, and to make clear to our large workforce who would be required to be vaccinated. It would not have been practical to deal with each individual staff member on a piecemeal basis, and a mandate would also allow us to draw on the Ministry of Health's exemption process. A mandate would also provide communities with greater confidence that it is safe to interact with and call on Police for assistance when needed.

[77] I find this evidence unpersuasive given that the number of personnel in issue is in the order of 160 staff. I do not understand why the internal policies prevented advancing a vaccination requirement in a timely way for such officers, making it clear who were required to be vaccinated, or why it would have been impracticable to deal with the affected officers individually. The officers affected by the Order still need to be dealt with individually in any event, as do the civilian staff. Moreover this justification for the Order seems to be close to one based on administrative convenience, which is not a compelling justification for limiting rights.

[78] I am also not satisfied that any greater confidence for the public could really be involved. Police would be able to publicly state that they had policies requiring vaccination, there were extremely high vaccination rates, and that any unvaccinated staff were being effectively managed so that there was no concern for the public. I am unconvinced that there was any material risk to public confidence, particularly as there is no evidence that the number of affected staff would have been any greater had the matter been left to the internal policies, and there is no evidence to suggest there was a risk arising from waning public confidence.

[79] In addressing the evidence of the number of unvaccinated Police officers Ms McCall argued that the Court should limit itself to the information that was before the decision-maker when the Order was made. She points out the Minister advised Cabinet in November 2021 as at that stage 98.4 per cent of constabulary staff had

received one dose, that 80.8 per cent were fully vaccinated, and there were slightly over 1,000 staff who had not recorded that they had been vaccinated. She argued the relevant number was accordingly 1,000 police officers, not 160.

[80] I do not accept Ms McCall's submission as a matter of principle. It seems to be that the Court can, and should take into account factors and evidence that post-date the decision implementing the measure. First, the Court cannot be confined to the evidence that was before the Minister when the Order was made as part of its overall inquiry in determining whether a measure involves a demonstrably justified limit on a fundamental right or rights. Both the applicant and Crown can be expected to file evidence, and indeed have filed evidence and arguments going beyond what might have been before the decision-maker at the time of making his decision.[40] That is because it is the Court that must be persuaded by the Crown that the measure is demonstrably justified.[41] Secondly, the measure has not yet had legal effect as it requires vaccination by 1 March 2022. So the Court is reviewing evidence and argument at a stage before the measure takes effect, and so it would be artificial not to take into account what has emerged between December 2021 and February 2022 in those circumstances. Thirdly, there is a statutory duty for the Minister to keep the orders he has decided to implement under review in s 14(5) of the Act. That reflects a legislative intention to monitor the justifications for orders in light of changing circumstances. It is accordingly consistent for the Court to also monitor the question of legality on that basis. Finally, an error with the Order's purpose was identified prior to the hearing and was corrected by the Minister a day before the hearing. In those circumstances it would again be artificial for the Court to say that it must put to one side anything that has transpired since the original decision in December.

[81] In any event, the advice the Minister provided to Cabinet in relation to the 1,000 constabulary staff is unlikely to accurately record how many had received the

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40 Accordingly there can be no procedural unfairness to the Crown. The evidence between both parties, including the evidence of Dr Petrovsky and the Ministry's Chief Science Adviser, Dr Town, address developments post-dating the decision in detail – including particularly the emerging information in relation to the Delta and Omicron variants.

41 See for example, *New Health New Zealand v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948; the Supreme Court addressed that question in relation to fluoridation without being confined to materials before a particular decision-maker – indeed in that case actual decisions by the relevant territorials had not even been made, although at [176] Glazebrook J declined to address the question for such reasons.

vaccine as this number also included those who were "yet to update their vaccination status using the police's online reporting tool". When greater analysis was done by Police in January 2022 the number affected was only 164.

NZDF's position

[82] The position is similar with NZDF. Brigadier Weston explains that there are 15,480 NZDF personnel, of which 3,048 are civil staff. He explains that there was a pre-existing requirement for the regular forces through orders issued under s 27 of the Defence Act, and that this had been amended to include a requirement for vaccination against COVID-19. He also explains the pre-existing requirement to be vaccinated for those working in places such as managed isolation facilities in accordance with the COVID-19 Public Health Response (Vaccination) Order 2021.

[83] A vaccination programme was rolled out for NZDF commencing in February 2021. This was introduced as part of the baseline requirements for service. Brigadier Weston gives evidence, however, that the COVID-19 vaccination baseline requirement was "not sufficient to ensure the ability of the NZDF to continue to operate as needed". He says that whilst it was already a requirement for the regular forces, NZDF was "unable to extend to those others working for the NZDF (in particular the members of the civil staff)". He also outlined how civil staff fully interact with the regular forces. So the workers that were excluded from the Order in relation to Police operations — the civilian staff — are the very category of workers regarded as central to justifying the Order for NZDF.

[84] Brigadier Weston's evidence is that at 1 February 2022 99.2 per cent of the regular forces were fully vaccinated leaving 75 members of the regular forces who were not. 98.7 per cent of the civil staff were fully vaccinated leaving 40 who were not. There is no evidence addressing whether the 75 regular force members changed in number because the Government mandate implemented by the Order. Neither is there any evidence whether the 40 civilian staff was smaller in number than would have been the case had there been no Order and the NZDF's internal employment policies left to operate. The maximum total number said to be covered by the Order is 115, with no evidence as to whether that number is smaller as a consequence of the

Order, or evidence about terminations/resignations and how that would have been different with and without the Order. Neither do I have any evidence that there were in fact more than 115 workers addressed by the Order because the fact it was going to be implemented led some workers to get vaccinated or resign in anticipation (excluding those who would have resigned because of the operational policies in any event).

[85] Neither is there any evidence on how the existence of the 115 personnel (or the 40 if it is limited to the civil staff) adversely affected the ability of NZDF to ensure continuity of capability in light of a total personnel count of over 15,000. On the face of it this is a small number of people, and I do not accept that I can simply assume that there is a threat to the overall continuity of NZDF services (or the public trust in those services) if these are the relevant number of workers affected.

[86] In addition the applicants' evidence is that a reasonably low percentage of NZDF personnel are actually recorded as being ready for deployment for a range of reasons. To show that the vaccine mandate in the Order had a material impact it would be necessary to understand how the number of people affected by that mandate impacted on the deployment capability. If the mandate in the Order mainly addresses the position of the civilian staff, it would also be appropriate to explain how the numbers of unvaccinated civilian staff would impact on deployment capability. Evidence establishing a justification for such reasons has not been provided.

Health advice

[87] The relatively low number of unvaccinated Police and NZDF personnel impacted by the Order may not, of itself, mean that the Order is not a reasonable limit on rights that can be demonstrably justified. If the evidence established that the presence of unvaccinated personnel, even in small numbers, created a materially higher risk to the remaining workforce a justification may be apparent. This is particularly so when that risk is combined with what may be called the precautionary principle, and a consideration of the need to maintain public trust that is also part of the objective of the measure.

[88] The evidence on these further issues is sparce, however. I accept that Dr Petrovsky is qualified to give expert evidence on the likely effects of vaccination on the workforces. He explained in his evidence that vaccination has potential benefit in reducing the severity of disease, even with the Omicron variant. But in his view mandatory vaccination does not assist in preventing workers in affected roles from contracting COVID-19, or transmitting it to others. Indeed his view was that it may ultimately increase the spread of the virus in a workforce because of increased asymptomatic transmission by the vaccinated, or undue reliance by them on the vaccine's apparent protection. His view was that the more effective measures involved other techniques, such as the use of rapid antigen testing and isolation.

[89] The Ministry's Chief Science Adviser, Dr Town gives different evidence. As I explained in *Four Aviation Security Service Employees v Minister of COVID-19 Response*, there are limits on the Court's ability to make findings on disputed questions of expert evidence in a judicial review proceeding, particularly in the absence of cross-examination.[42] In my view, provided the Crown provides expert evidence that establishes the pre-requisite for the justified limitation on rights it is for the applicant to show why that evidence is wrong.[43] But there is some difficulty in relying on that approach here given the absence of full engagement with the analysis conducted by Dr Petrovsky in the evidence filed by the respondents. Dr Petrovsky's analysis is detailed, relying on a number of studies. I accept that Dr Town is qualified to give expert evidence relevant to these issues, although he is not an immunologist. He explains his speciality is "in evaluating scientific evidence and helping to ensure that credible science is at the core of decision-making". He considered Dr Petrovsky's evidence, and directly addressed his analysis on some topics — for example Dr Petrovsky's evidence about the adverse events and mortality rates during the Pfizer trials, and the risk of myocarditis and pericarditis. But in terms of Dr Petrovsky's analysis of the effectiveness of the vaccine to inhibit the spread of COVID-19 in a workforce such as Police and NZDF he did not directly respond, but instead provided his own more generalised opinions, effectively in parallel. His evidence is then reasonably carefully expressed. He says:

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42 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 3, at [85].
43 At [86].

59. The latest evidence of vaccine effectiveness in relation to Delta and Omicron are summarised in Exhibit GT-04. In general, data shows the Pfizer vaccine is very effective against symptomatic disease and hospitalisation in relation to Delta, and somewhat less effective against viral infection and transmission. Protection is shown to decline after several months.

60. In relation to Omicron, studies show that vaccination provides some protection against symptomatic disease. However, vaccine effectiveness is reduced compared to Delta. Rapid waning of vaccine effectiveness occurs against Omicron, but a booster dose restores protection. Vaccine effectiveness against hospitalisation appears to be 60-70% after a primary vaccine course, but declines to around 45% from 25 weeks after the second dose. Vaccine effectiveness against hospitalisation increases to around 90% after a booster dose (including in those over 65 years of age). The most recent variants science updates dated 27 January and 3 February 2022 are attached at Exhibit GT-05 and Exhibit GT-06 respectively.

61. The information in respect of Omicron is still in its infancy and is evolving. Many of the studies are either in pre-print (have not yet been subject of peer review) or have significant limitations. The Ministry of Health constantly reviews and makes publicly available on its website the most up to date and relevant scientific information.

62. In summary, whilst we are in the early stages of understanding Omicron, emerging evidence would indicate that:

    62.1 It is more transmissible and has a higher secondary attack rate than the Delta variant;

    …

    62.3 Vaccines show reduced effectiveness compared with Delta in terms of becoming infected with and transmitting Omicron;

    62.4 The vaccine (especially after a booster) still provides a significant impact on the severity of the illness and hospitalisation;

    …

[90] I note that the advice summarised in the attached exhibits in relation to Omicron suggested effectiveness against infection at much lower levels than for Delta and that it declined "rapidly after the first month". It also contained information about symptomatic disease suggesting that early evidence was that a booster restored rapidly waning protection, but that protection also dropped within a period after the booster.

[91] I take it from this evidence that vaccination may still have some effects in limiting infection and transmission, but at a significantly lower levels than was the

case with the earlier variants. It is clear from the evidence that vaccination does not prevent persons contracting and spreading COVID-19, particularly with the Omicron variant. It is equally clear that it does still provide protection from serious illness and death, although this effect wains after the second dose, and seems to wain in a similar way after the booster. I accept on the basis of Dr Town's evidence that vaccination might contribute to preventing contracting and spreading the Delta and Omicron variants to some extent, although not nearly as much as it did against the original versions of COVID-19.

[92] I have no other evidence that this remaining protective effect significantly contributes to maintaining the continuity of Police and NZDF services in light of a number of personnel within those services who might remain in the services unvaccinated without the Order. The evidence of particular witnesses assume that the vaccine has a significant effect. For example Deputy Commissioner Kura's evidence was that the advice to Police was that unvaccinated and partially vaccinated Police staff were more likely to contract the virus. But the health advice so provided for the opinion is not in evidence. Similarly the Minister's paper to Cabinet stated that unvaccinated individuals were more likely to contract and transmit COVID-19 and become more seriously ill and that Police were more likely to have higher levels of sick leave given their operations. Again the advice relied upon is not available to the Court, and I note the other references in the Cabinet documents to health advice that further vaccine mandates to stop the spread of COVID-19 were not needed.

[93] I note there is one concrete example of affected workers referred to in the contemporaneous documents, however. That is a reference to a NZDF diving team whose capacity was interrupted because of COVID-19 infection. But the advice pointed out that the divers were all vaccinated, so that it does not take the position very far.

The precautionary principle

[94] Even a modest vaccination protection on a modest number of personnel needs to be considered in the context of the potential effects of a pandemic. In *Four Aviation Security Service Employees v Minister of COVID-19 Response* I referred to what can

be described as the precautionary principle as being of real significance.[44] I indicated that in the case of the Aviation Security workers who were at a key location where COVID-19 might first enter New Zealand, which at that stage had managed to eliminate COVID, this principle should operate. This principle has been explained in other COVID-19 related cases, particularly in Canada. In *Spencer v Attorney-General of Canada* the Federal Court of Ontario addressed this concept in relation to restricting entry into Canada.[45] Pentney J said:[46]

> … The precautionary principle is a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad, and it gives effect to the precautionary principle in a manner that reflects the Government of Canada's overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate it given the current state of knowledge of the virus.
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> Viewed in light of the precautionary principle, the fact that the Order may not provide perfect protection is not particularly significant. The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection. This, in turn, would have a significant – perhaps deadly – effect on the wider Canadian public, based on the experience thus far.

[95] I agree with that approach. It is consistent with the one I applied in *Four Aviation Service Employees*. But the position is different here as this Order is not sought to be promulgated and justified on a public health need to suppress the spread of the virus. Rather it is imposed for the purpose of ensuring continuity of, and confidence in, essential services. One of the main justifications for the precautionary approach is the health risk to the wider public. That is not suggested as relevant here. But I accept that there may be an analogous concept — if there was evidence of a threat to the continuity of Police and NZDF services then there is room for giving the Crown the benefit of the doubt in imposing measures to address that risk. It is plain that such services are of vital importance, and that they can be needed during the pandemic. In the last few months the effects of the tsunami in Tonga, and the occupation of the grounds of Parliament and the surrounding areas by protesters demonstrates the need to ensure such services are readily available.

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44 *Four Aviation Security Service Employees v Minister of COVID-19 Response*, above n 3.
45 *Spencer v Attorney-General of Canada* [2021] FC 361.
46 At [113]–[114].

[96] But the burden still is on the Crown to demonstrate that the limitation on the applicants' rights is reasonable and demonstrably justified in light of the precautionary principle (or the version of it described above). Ultimately this case may be thought to come down to a contest between the fundamental rights of the applicants and this version of the precautionary principle.

[97] I am not satisfied that the Crown has put forward sufficient evidence to justify the measures that have been imposed, even giving it some benefit of the doubt. The apparently low numbers of personnel the Order actually addresses, the lack of any evidence that they are materially lower than would have been the case had the internal policies been allowed to operate, and the evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the Order materially addresses. If there is a threat to these services it will arise precisely because vaccination and other measures are not able to prevent the risk that Omicron will sweep through workforces.

[98] It is apparent from the evidence that Omicron is highly transmissible, and that it could affect a significant number of New Zealanders, and accordingly a significant number of Police and NZDF personnel. But it is apparent from such waves of infection in other countries that ultimately the levels of infection drop. In other words it has a relatively temporary but very significant impact. That is of importance in my view. The major impact for a period of three to six months may need to be addressed. But the terminations arising from the Order are permanent. It may be that the suspension of the unvaccinated address any potential problems arising from the Omicron wave that are identified. That would suggest that the Order is not proportionate as other means (suspension) could have been employed to achieve the same end in accordance with steps (b)(ii) and (iii) of Tipping J's approach in *Hansen*.

[99] It is important to also bear in mind that there is plainly a risk of other COVID-19 variants emerging in the future. At the time of *Four Aviation Security Service Employees* and *Four Midwives* information in relation to the Delta variant had just been emerging. In this case it is now Omicron that is the new threat. Other variants

may well emerge in time. It is presently unknown what impact vaccination may have on such future variants.

[100] That the Omicron variant significantly changes the benefits that vaccination provides by preventing people contracting and transmitting COVID-19 (as opposed to the seriousness of the illness) is reflected in the fact that the Order only mandates two vaccine doses. It does not mandate a booster dose. This contrasts with the mandate imposed for public health reasons which does mandate a booster, implemented by the COVID-19 Public Health Response (Vaccinations) Amendment Order 2022 signed by the Minister for COVID-19 Response on 21 January 2022. The fact that there has been no urgent promulgation of an amendment to the Order subject to this challenge to mandate the booster, even when the Order was amended the day before the fixture for this proceeding, is perhaps indicative of the fact that Police and NZDF expect they will be able to manage this issue internally with their own policies, and that no mandate is truly necessary.

The impact on the Order on those affected and the ultimate conclusion

[101] I then compare the case the Crown has presented with the limitation of the rights and the significance and impact of that limitation. The applicants, and the other affected workers who have provided evidence not only describe the significant impact upon them of being required to be vaccinated when this is inconsistent with their own principles, values or beliefs, but they also explain the sometimes significant economic effect that will occur for many of them if their employment is terminated. So the truncation of fundamental rights also has economic impacts.

[102] Mr Hague also emphasised that a key difference between the internal policies and the requirements of the Order was that the Order was far less flexible in addressing individual circumstances. The Order contemplates termination of workers that do not comply. The exceptions in the Order are limited, and generally do not vary depending on the individual circumstances of the person involved. That was not so with respect to the internal policies. An individual employee of the Police or the NZDF would be able to go through processes where their internal circumstances were taken into account and assessments could be made on whether the particular functions they

undertook involved any significant risks for others. For example an assessment could be made on the extent to which the person had a public facing role, or interacted with other colleagues, or whether they could work from home. That individual assessment was not available when this situation was regulated by the Order, and a breach of the Order allows termination given the amendment to the Employment Relations Act.[47]

[103] I accept that the greater individual flexibility in internal policies is relevant in assessing whether the measures imposed by the Order are demonstrably justified. It is for the Crown to show why that flexibility is inconsistent with the public interest sought to be advanced by the measure. And I do not accept that this is addressed simply by witnesses saying that individual consideration was administratively difficult. For example, for Police that individual consideration will presumably still be applied with respect to the significant number of non-sworn officers. I have no evidence that explains why this is workable for civil staff, but not workable for sworn officers, particularly given the low number of people involved.

Conclusion

[104] For the above reasons I conclude that the Order does not involve a reasonable limit on the applicants' rights that can be demonstrably justified in a free and democratic society and that it is unlawful. There will be an order setting the Order aside.

[105] In essence, the Order mandating vaccinations for Police and NZDF staff was imposed to ensure the continuity of the public services, and to promote public confidence in those services, rather than to stop the spread of COVID-19. Indeed health advice provided to the Government was that further mandates were not required to restrict the spread of COVID-19. I am not satisfied that continuity of these services is materially advanced by the Order. The actual number of affected staff — 164 Police staff and 115 NZDF staff is very small compared to the overall workforce of over 15,000 for each of the Police and NZDF. Moreover there is no evidence that this number is any different from the number that would have remained unvaccinated and employed had the matter simply been dealt with by the pre-existing internal vaccine

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47 Employment Relations Act 2000, sch 3A cl 3.

policies applied by Police and NZDF. Neither is there any hard evidence that this number of personnel materially effects the continuity of NZDF and Police services.

[106] COVID-19 clearly involves a threat to the continuity of Police and NZDF services. That is because the Omicron variant in particular is so transmissible. But that threat exists for both vaccinated and unvaccinated staff. I am not satisfied that the Order makes a material difference, including because of the expert evidence before the Court on the effects of vaccination on COVID-19 including the Delta and Omicron variants.

[107] I should make it clear what this case is not about. The Order being set aside in the present case was not implemented for the purposes of limiting the spread of COVID-19. Health advice was that such a further mandate was not needed for this purpose. Neither should the Court's conclusion be understood to question the effectiveness and importance of vaccination. The evidence shows that vaccination significantly improves the prospects of avoiding serious illness and death, even with the Omicron variant. It confirms the importance of a booster dose given the waning effect of the first two doses of the vaccine.

[108] But the Order made in the present case is nevertheless unlawful and is set aside. The applicants will be entitled to costs. Memoranda may be filed (no more than five pages plus a schedule) by the applicants and then the respondents if costs cannot be agreed.

[109] Finally at the hearing I asked the parties to consider whether protections could be put in place if my judgment was not released by 1 March. By memorandum dated 21 February the respondents set out a stance that appeared to me to properly preserve the position. The applicants nevertheless filed an application for interim relief dated 23 February. Given my judgment I apprehend that this application is unnecessary.

Cooke J

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