ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE APPLICANT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2021-485-474
[2021] NZHC 2526

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER OF	a judicial review of the COVID-19 Public Health Response (Vaccinations) Order 2021
BETWEEN	GF Applicant
AND	Minister of COVID-19 Response First Respondent
	Associate Minister of Health Second Respondent
	Attorney-General Third Respondent

Hearing: 20 September 2021

Counsel: A J Fechney (advocate by leave) for Applicant
A Powell and K Bell for Respondents

Judgment: 24 September 2021

JUDGMENT OF CHURCHMAN J

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Introduction

[1] This case addresses the intersection between the legislation designed to achieve the public benefit of preventing or limiting the risk of the spread of the COVID-19 virus and the private interests inherent in an employment relationship.

[2] The applicant was previously an employee of the New Zealand Customs Service but had her employment terminated as a result of the implementation of the

COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order). She challenged the termination of her employment relationship in the Employment Relations Authority (the Authority). However, she was unable to convince the Authority that her dismissal was unjustified.

[3] The Authority has no jurisdiction to declare legislation invalid. Consequently, the applicant commenced judicial review proceedings in this Court challenging the lawfulness of the Vaccinations Order on two grounds:

(a) that the Vaccinations Order is ultra vires the COVID-19 Public Health Response Act 2020 (the Act), as s 9 of that Act imposes conditions on the COVID-19 Response Minister making an order and one or more of those conditions were not met; and

(b) that the Vaccinations Order is irrational, and therefore unlawful, principally because of the consequences it has for unvaccinated employees.

[4] The applicant seeks the following relief:

(a) an order declaring that the Vaccinations Order was unauthorised or otherwise invalid;

(b) that the Vaccinations Order be set aside; and

(c) such costs as the Court considers just.

[5] The respondents oppose the application.

The legislation

[6] The Vaccinations Order was made under ss 9 and 11 of the Act. It was signed by the Associate Minister on 28 April 2021. The purpose of the Vaccinations Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated. Part 4 of

Schedule 2 to the Vaccinations Order covered Government officials such as the applicant, who worked at ports. Such officials were described as "affected persons". Clause 7 of the Vaccinations Order provided that:

> An affected person must not carry out work or otherwise conduct an activity at a place unless they are vaccinated.

[7] The Vaccinations Order also imposed liabilities on public sector employers, such as the applicant's employer. Such an employer was described as a Person in Control of a Business or Undertaking (PCBU). Clause 8(1) provided:

> A relevant PCBU must not allow an affected person to carry out work or otherwise conduct an activity at a place unless satisfied that the affected person is vaccinated.

It was this Order that the applicant's employer relied on to terminate her employment because she was unwilling to be vaccinated.

[8] An amendment to the Vaccinations Order was signed by the COVID-19 Response Minister and notified in the Gazette on 8 July 2021 and came into force on 14 July 2021 (the Amendment Order).

[9] There were a number of differences between the original Vaccinations Order which came into force on 30 April 2021 and the Amendment Order. The original Order applied to all work undertaken in the context of managed isolation and quarantine facilities (including transportation to and from those facilities), and work undertaken by certain Government officials in affected workplaces (airports and aircraft, ports and ships).

[10] The Amendment Order extended the scope of the overall Order beyond Government employees, to require additional groups of workers to be vaccinated. This included certain workers who handle "affected items"[1] removed from managed isolation and quarantine facilities, aircraft and ships who had contact with other groups of affected workers. There were also new provisions giving the Minister power to

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[1] Under cl 4 of the Order, an affected item means an item (apart from cargo or freight) removed for cleaning, disposal, or reuse from an affected ship or a passenger area of an affected aircraft or an item removed for cleaning, disposal, or reuse from a managed quarantine facility or a managed isolation facility.

grant exemptions. It was the impending extended application of the Order that was said to give rise to the element of urgency in this case.[2]

First ground – is the Order ultra vires the Act?

The arguments

[11] The case for the applicant was that it was "unlikely" that the COVID-19 Response Minister was satisfied that the Vaccinations Order did not limit or was a justified limitation on the rights and freedoms under the New Zealand Bill of Rights Act 1990 (NZBORA), and that there were significant questions of law arising from the Order, including:

(a) whether a vaccine with only provisional consent is analogous to medical experimentation, which may give rise to issues under the International Covenant on Civil and Political Rights;

(b) whether the Vaccinations Order was a reasonable limitation on the rights guaranteed by the NZBORA;

(c) whether the Vaccinations Order was prescribed by law for the purposes of the Act;

(d) whether it mattered that the Vaccinations Order was not subjected to a "democratic process" prior to its commencement; and

(e) whether the Vaccinations Order was an inherent breach of the right to justice, especially in circumstances where employees only had 48 hours' notice that their employment was liable to be terminated.

[12] The applicant also argues that it is unlikely that the Minister was satisfied that the Vaccinations Order would be appropriate in achieving the purpose of the Act, as it

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[2] Specifically, Part 2 of Schedule 1 of the order specified that if an affected person belonging to a group in Schedule 2 was not vaccinated before 11.59pm on 14 July 2021, that affected person must, if not a service worker, have their first injection of the Pfizer/BioNTech COVID-19 vaccine before the close of 30 September 2021.

was not co-ordinated, orderly, and proportionate, and did not consider social and economic factors, such as the possibility of mass terminations of employment.

[13] The applicant also developed an argument that the Vaccinations Order was objectionable on the basis it contained what was effectively a "Henry VIII clause".[3]

[14] The respondents deny all of the applicant's allegations. In relation to the breaches of NZBORA, they rely on s 5 of that Act and say that the limits imposed can be demonstrably justified in a free and democratic society.

Background to the making of the Vaccinations Order

[15] Section 9 of the COVID-19 Public Health Response Act 2020 authorises the Minister to make a COVID-19 Order. That authorisation is subject to the following provisos:

> (a) the Minister must have regard to advice from the Director-General about–
>
> (i) the risks of the outbreak or spread of COVID-19; and
>
> (ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and
>
> (b) the Minister may have regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and
>
> (ba) 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
>
> (c) the Minister:
>
> (i) must have consulted the Prime Minister, the Minister of Justice and the Minister of Health; and

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[3] A "Henry VIII clause" is a provision in delegated legislation such as the Vaccinations Order, authorising the overriding of primary legislation such as an Act of Parliament. See Phillip Joseph: *Joseph on Constitution and Administrative Law* (5th ed, Thomson Reuters, Wellington 2021) at 26.5.1.

(ii) may have consulted any other Minister that the Minister (as defined in this Act, thinks fit); and

(d) before making the Order, the Minister must be satisfied that the Order is appropriate to achieve the purpose of this Act.

[16] The circumstances that led to the passing of the COVID-19 Public Health Response Act 2020 were set out by the Court in *Borrowdale v Director-General of Health* and need not be repeated here.[4] The Act was passed as a specific response to the global COVID-19 pandemic.

[17] The purpose of the Act was set out in s 4 which provided:

> 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.

[18] Part 2 of the Act set out, as one of the provisions to limit the risk of outbreak or spread of COVID-19, the making of COVID-19 Orders.

[19] COVID-19 Orders were able to be made by the Minister.[5] The Minister was defined as being:[6]

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4 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864.
5 Section 9(1) COVID-19 Public Health Response Act 2020.
6 Section 5(1).

> **Minister** means the Minister who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the administration of this Act.

[20] The Act is administered by the Ministry of Health. The Minister of Health was the Hon Andrew Little, and the Minister of COVID-19 Response was the Hon Chris Hipkins. The Hon Dr Ayesha Verrall signed the Order on behalf of Mr Hipkins and the applicant argues that she was not authorised to do so. It is therefore necessary to look at the relevant statutory provisions and the reasons why Dr Verrall signed the Order.

[21] Dr Verrall has provided an affidavit in these proceedings. She deposes that she was appointed as Associate Minister of Health on 6 November 2020 and played a co-ordinating role among other Associate Ministers of Health under the leadership of the Minister in relation to the COVID-19 response. She confirms that she signed the Vaccinations Order on 28 April 2021. She also deposes that as well as being a medical doctor, she has a PhD in epidemiology and had worked as an infectious diseases physician prior to entering Parliament.

[22] Mr Hipkins has also sworn an affidavit in this matter. He deposes that he was directly involved in the decisions leading to the making of the Vaccinations Order and the Amendment Order; that the Orders were approved by him and reflected decisions he had made in the policy process. He explains that the original Order was signed by Dr Verrall at his request as he was unavailable to execute it at the time.

[23] Mr Hipkins' affidavit also sets out the process he went through in relation to the relevant mandatory provisions in s 9(1)(a), (ba), (c) and (d) of the Act.

[24] Mr Morehu Rei, Ministerial Advisor to Mr Hipkins also filed an affidavit in these proceedings. Appended to his affidavit are copies of various memoranda containing advice on the Vaccinations Order provided to Mr Hipkins, the Prime Minister, the Minister of Justice and various other Ministers.

[25] Dr Ashley Bloomfield, the Director-General of Health, also provided an affidavit and attached to it are copies of several briefing papers containing advice he

gave to the Minister about matters such as the risks associated with the outbreak or spread of COVID-19, and the nature and extent of measures appropriate to address those risks. A memorandum of 28 April 2021 specifically includes an analysis of the impact of the Order on rights guaranteed by the NZBORA 1990. The relevant conclusion in the memorandum was that if there was a robust public health rationale for the provisions of the Order, it would be a justified restriction on the rights and freedoms (including those contained in ss 11 and 19) guaranteed in NZBORA.

[26] The affidavit of Mr Hipkins sets out the consideration he gave to the advice received.

[27] In terms of the ministerial consultation required by s 9(1)(c), the affidavit of Mr Hipkins confirms the evidence of Morehu Rei as to the documents that were sent to the relevant Ministers, and specifically confirms that Mr Hipkins in his capacity as COVID-19 Response Minister consulted with the Prime Minister, Minister of Health, Minister of Justice and other Ministers before the Order was made.

[28] Mr Hipkins deposes that the signature copy of the Vaccinations Order was delivered to his office on 28 April 2021 but, as he was not available at this time, he had asked Dr Verrall to sign the Order on his behalf. He expresses the view that she had both the expertise and knowledge of the subject matter to be able to deal with any last-minute issues that might have arisen and that she had been privy to the decision-making process in respect of the Order. He relies on s 7 of the Constitution Act 1986 as authorising the delegation of the signing of the Order.

[29] Mr Hipkins also confirms that on 1 June 2021, the House of Representatives approved the Vaccinations Order.

[30] Section 7 of the Constitution Act 1986 provides:

> **Power of member of Executive Council to exercise Minister's powers**
>
> Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council.

[31] The applicant's argument was that s 7 of the Constitution Act 1986 was not effective to authorise Dr Verrall to sign the Order on behalf of Mr Hipkins because the context required that the Minister sign personally. The context was said to require "clearer accountability" and it was said that such accountability could only be achieved by the Minister signing the Order personally.

[32] The final signing of the Vaccinations Order is clearly a function covered by s 7 of the Constitution Act. Mr Hipkins does not become any less "accountable" for the Order by delegating the function of signing it to Dr Verrall. If Mr Hipkins had not ensured that the various requirements for the making of an Order had been complied with, then he could be held accountable for authorising Dr Verrall to sign on his behalf just as if he had signed the Order personally.

[33] I therefore conclude that pursuant to s 7 of the Constitution Act, Dr Verrall lawfully signed the Order on behalf of Mr Hipkins.

Prerequisites for lawfulness

[34] Section 8 of the Act contains a number of safeguards to ensure that the power to make Orders under the Act is not abused. The section provides:

> **Prerequisites for all COVID-19 orders**
>
> A COVID-19 order may be made under this Act only–
>
> (a) while an epidemic notice under section 5 of the Epidemic Preparedness Act 2006 is in force for COVID-19; or
>
> (b) while a state of emergency or transition period in respect of COVID-19 under the Civil Defence Emergency Management Act 2002 is in force; or
>
> (c) if the Prime Minister, by notice in the *Gazette*, after being satisfied that there is a risk of an outbreak or the spread of COVID-19, has authorised the use of COVID-19 orders (either generally or specifically) and the authorisation is in force.

[35] In this case, the requirements of s 8(a) are met. On 17 March 2021, the Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice 2021 was gazetted. It was in force at the time the Order was made.

Achieving purposes of the Act

[36] Section 9(1)(d) of the Act stipulates that:

> Before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

[37] The applicant submits that the Order is not appropriate to achieve the purpose of the Act. It is therefore necessary to identify what the purpose of the Act is and to assess the Order against that purpose.

[38] The purpose of the Act is found in s 4 as set out above at [6]. The Act is intended to support a public health response to COVID-19.

[39] The purpose of the Vaccinations Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.[7] In his affidavit, Mr Hipkins explains the rationale for requiring workers undertaking the type of work covered by the Order to be vaccinated. It was because the affected workers may be exposed to, and infected by, COVID-19 in the course of their work and subsequently become vectors for transmitting the virus more widely.

[40] The affidavit referred to the advice the Minister had received showing that a number of international studies had shown that vaccination leads to a significant reduction in the rate of transmission of COVID-19, and confirms that the health advice that he had received convinced him that there was a strong public health rationale for the Order. Given the advice he had received, such a conclusion is logical and rational.

[41] I therefore accept that the requirements of s 9(1)(d) are met and that the Minister was satisfied that the Order was appropriate to achieve the purpose of the Act.

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7 Clause 3 of the Vaccinations Order.

Provisional consent

[42] The applicant's argument was that, because the Pfizer vaccine has provisional consent under s 23 of the Medicines Act 1981, that requiring anyone to be vaccinated with that vaccine effectively amounts to requiring that person to participate in medical experimentation contrary to the International Covenant on Civil and Political Rights.

[43] On 3 February 2021, provisional consent was granted for the use of the Pfizer vaccine. The circumstances leading to the grant of provisional consent were examined by Ellis J in *Ngā Kaitiaki Tuku Iho Medical Action Society Incorporated v The Minister of Health*.[8]

[44] Before medicines (including vaccines) can be used in New Zealand, they need either provisional or full consent. Provisional consent is time limited for a period of two years or less, although extensions are permitted.[9] It is not necessary for provisional consent to be applied for prior to applying for full consent. They are alternatives. They are both valid forms of consent.

[45] However, the processes for obtaining provisional and full consent are different (particularly in relation to the level of information required to be provided), Ellis J noted that, because an application for full consent for the Pfizer vaccine was made at the same time as the application for provisional consent, full particulars, as required by s 21 of the Medicines Act, were provided with the result that "…it is difficult to see how the assessment process could, in the circumstances, have been more thorough".[10]

[46] While Ellis J, in *Ngā Kaitiaki Tuku Iho Medical Action Society Incorporated v The Minister of Health* held that it was reasonably arguable that the Minister's opinion as to existence of a relevant and limited class of potential recipients of the Pfizer vaccine was incorrect, it was accepted that, in relation to the use of the vaccine by frontline workers, that would be a lawful use for a provisionally approved vaccine.[11]

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8 *Ngā Kaitiaki Tuku Iho Medical Action Society Incorporated v The Minister of Health* [2021] NZHC 1107.
9 See Medicines Act 1981, s 23(4).
10 At [69]-[70].
11 At [64].

[47] The present situation is therefore that the Pfizer vaccine has, and had at the date of the termination of the applicant's employment, provisional approval for use in New Zealand. That approval was granted on the basis of the provision of information of similar comprehensiveness to that required for full approval. Dr Bloomfield's evidence was that the vaccine had also been granted full approval by the United States Food and Drug Administration after having initially administered there under an emergency use authorisation. It is therefore not possible to categorise the use of a vaccine which has been through the process of assessment and granted provisional approval as being the equivalent of "medical experimentation".

Henry VIII provision

[48] The applicant submitted that s 11 of the COVID-19 Public Health Response Act 2020 which authorised the making of Orders such as the Vaccinations Order was a Henry VIII provision. Her submission was "…the use of this clause in these circumstances is not only unfair, unreasonable, and unlawful: but also, constitutionally inappropriate".

[49] The difficulty with this submission is that s 11 of the Act does not authorise the making of an Order overriding any primary legislation. In particular, it does not override the NZBORA. Neither the Minister, nor his advisors, asserted the provisions of the Order meant that the Minister was not obliged to have regard to the rights guaranteed by NZBORA and, to the extent that the Order limited those rights, to undertake an analysis of whether the test in s 5 of NZBORA was met. There is therefore no substance to the applicant's submission that the Order amounted to an unlawful Henry VIII provision.

48 hours' notice

[50] The applicant's argument that there was a breach of natural justice because employees only had 48 hours' notice that their employment was liable to be terminated, appears to be related to the requirement in s 14(2) of the Act that Orders made under s 11 of the Act must, at least 48 hours before the Order comes into force:[12]

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[12] Section 14(2) COVID-19 Public Health Response Act 2020.

(a) be published on a publicly accessible Internet site maintained by or on behalf of the New Zealand Government; and

(b) be notified in the *Gazette*.

[51] This particular provision does not limit the rights of affected employees. It did not require the applicant (or any other person affected by the Act) to take any particular legal steps within that timeframe. Specifically, it did not limit the ability of the applicant to challenge the justification of the termination of her employment in the Authority. The applicant's argument on this point is therefore misconceived.

Social and economic factors

[52] The submission that in making the Vaccinations Order, the Minister did not consider social and economic factors is untenable in the light of the contents of the affidavit of Mr Hipkins and the detail in the briefing papers that he received. The claim that the Order could have resulted in "mass terminations of employment" also seems to be an over-statement. It is inconsistent with the applicant's contention that over 95 per cent of her work colleagues were in fact vaccinated. A very small percentage of the applicant's colleagues would therefore have faced termination of employment, assuming that they could not be redeployed.

[53] Dr Bloomfield's affidavit provided a range of evidence indicating where social and economic factors were considered. For example, in a briefing of 10 February 2021 from the Ministry of Health and Dr Bloomfield to Mr Hipkins in his capacity as the Minister of COVID-19 Response, it was explicitly acknowledged that high vaccine uptake, in combination with other public health measures, would support the Government's elimination strategy and ongoing economic, social and cultural recovery.

[54] That briefing went on to discuss opportunity-cost related barriers for workers and their household contacts in receiving the vaccine, and possible incentives to encourage vaccinations (such as petrol vouchers) as well as work-related issues such as taking leave to get vaccinated, and specific leave support schemes.

[55] A table providing indicative costings of a financial support scheme for affected workers to take time off to receive the vaccine was appended to that briefing. Dr Bloomfield's affidavit also evidenced that in later briefings to Mr Hipkins and other Ministers (such as the Minister of Transport and Workplace Relations and Safety) from MBIE and the Ministry of Health, including on 15 March 2021 and 16 April 2021, there was continued discussion of these factors, and also discussion of redundancy compensation and the possibility of redeployment for workers unwilling to be vaccinated, with Mr Hipkins explicitly making a note regarding redundancy entitlements on the 15 March 2021 briefing.

[56] A later briefing from Dr Bloomfield to Mr Hipkins, in relation to the Amendment Order, directly discussed means by which to avoid significant negative economic impacts arising from the disruption of the supply chain.

[57] I also note that the requirement to take into account social, economic or other factors in s 9(1)(b) is discretionary rather than mandatory. However, it is clear that the Minister did have regard to such factors. In addition to the matters referred to above, among the matters specifically referred to in the evidence of Mr Hipkins and Dr Bloomfield, was the fact that the Government had determined to pursue an elimination strategy having identified that New Zealand's hospital system was vulnerable to being overwhelmed, and that if the COVID-19 virus became established in the community, it would cause considerable loss of life, and would do so disproportionately in respect of vulnerable groups such as Māori.

[58] Where economic and social factors have clearly been considered, it is not for the Court in judicial review proceedings to second-guess the policy decisions made by the Government in this regard.

NZBORA: the relevant rights

[59] As set out above, under s 9(1)(ba), in making an Order under s 11 of the Act, the Minister must be satisfied that the Order does not limit or is a justified limit on the rights and freedoms in NZBORA. Therefore, if the Vaccinations Order is not a demonstrably justifiable limit on the rights and freedoms in NZBORA, it will be ultra vires.

[60] As noted in the Crown Law advice appended to the ministerial briefings for the Vaccinations Order and repeated in the submissions on behalf of the applicant, the relevant rights within NZBORA that may be engaged as a result of the Order are ss 11 (the right to refuse to undergo any medical treatment) and 19 (the right to be free from discrimination, particularly on the grounds of disability, sex, or religious beliefs).

NZBORA and s 9(1)(ba) of the Act

[61] A number of different grounds were advanced in support of the applicant's submission that the Minister could not have been satisfied that the Vaccinations Order was a justified limitation on NZBORA rights.

[62] The applicant was critical that Mr Hipkins only devoted a small number of paragraphs in his affidavit to addressing the reasons why he considered that the Order was a justified limitation on NZBORA rights; that in order to have been satisfied, the Minister was obliged to have engaged in consultation with other political parties, obtain "advice" and considered "opposing views". It was submitted that the Minister could not be satisfied "without having conducted a wide inquiry" and it was also submitted that the Minister had not had regard "to the tests established by the Supreme Court in *Hanson* [sic] *v R*".

[63] Some of the submissions advanced by the applicant were essentially matters of evidence rather than legal issues. These were expressions of opinions such as "the Vaccinations Order was not necessary, in considering the high voluntary uptake of the COVID-19 vaccine …", and other submissions talked about the vaccination rate amongst workers in roles affected by the Vaccinations Order. No affidavit evidence was filed by the applicant in support of the application. Submissions are not the place for what is effectively the giving of evidence or the expression of opinion.

[64] The number of paragraphs that a deponent uses to explain the reasons for a decision is not a measure of the depth of analysis. The information placed before the Court by way of affidavit and exhibits to the affidavit, detail the advice given to the Minister in relation to NZBORA issues and, as set out in [75] below, correctly summarised the test under s 5 of NZBORA.

[65] At [34]-[39] of his affidavit, Mr Hipkins explains why, having analysed the advice he received, including advice about NZBORA, he came to the conclusion that there was a sufficient public health rationale for making the Order, and that the reduction in risk achieved by the Order was material and could not be achieved in any other less rights-intrusive way, and that the Order would be justified from a NZBORA perspective.

[66] In terms of the applicant's complaints, there was no legal obligation on the Minister to consult with other political parties or to "conduct a wide inquiry". Demonstrably, he did obtain and consider advice. As I detail below at [75]-[93], there is nothing in the analysis he undertook that is inconsistent with the tests articulated by the Supreme Court in *Hansen v R*.

[67] In relation to the applicant's argument that in order for a limitation to be demonstrably justified in a free and democratic society, as required by s 5 NZBORA in respect of any valid limitation on NZBORA rights, the applicant argued that the legislative process that the Order went through needed to be "democratic" and it was not.

[68] This argument confuses two different concepts. Section 5 refers to a society which is free and democratic not the process by which laws are made. Orders in council are just as much a part of our democratic process as laws enacted in primary legislation.

[69] There is no requirement in NZBORA or any other piece of legislation that stipulates that secondary or delegated legislation cannot contain a provision that limits one or more rights set out in NZBORA. As discussed above, the Vaccinations Order was appropriately made in terms of its empowering Act.

Discussion of s 11 NZBORA

[70] Section 11 relates to the right to refuse to undergo any medical treatment. The White Paper commentary to the draft Bill of Rights states that the term "medical" should be used in a "comprehensive sense", including surgical, psychiatric, dental, and

psychological and similar forms of treatment.[13] The respondents conceded that the administering of the COVID-19 vaccination was medical treatment within the scope of s 11.

[71] Section 11 provides that "Everyone has the right to refuse to undergo any medical treatment". Although the Vaccinations Order does not itself compel people to be vaccinated, as they are free to make the same choice that the applicant did, Ms Fechney argued that, as the consequences of exercising the right contained in s 11 NZBORA to refuse vaccination were the loss of employment, affected employees were subject to duress and their ability to make a free and informed choice was compromised.

[72] Mr Powell argued that the mere imposition of what he described as a "practical cost" on the decision to refuse medical treatment did not *per se* limit the right to do so. However, he ultimately accepted that employees who were faced with the choice of either being vaccinated or having their employment terminated suffered a sufficient imposition on their freedom of choice to engage the s 11 right. This means that in terms of s 5 NZBORA the obligation shifted to the Crown to establish that the reasonable limits prescribed by law were demonstrably justified in a free and democratic society. The same applies in relation to the s 19 right to be free from discrimination.

[73] In terms of s 19 NZBORA and the right to freedom from discrimination, the relevant test was articulated by the Court of Appeal in *B v Waitemata District Health Board*:[14]

> There is no dispute as to the correct test. This Court in *Ministry of Health v Atkinson* described the approach to s 19(1) as a two step process:
>
> > [T]he first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

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13 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1985] I AJHR A6 at [10.176].

14 *B v Waitemata District Health Board* [2016] NZCA 184 at [84]-[85]. See also *Ministry of Health v Atkinson* [2012] NZCA 184.

[74] It is now therefore necessary to undertake an inconsistency analysis under s 5 of NZBORA.

[75] The most commonly applied test under s 5 was articulated by Tipping J in *Hansen v R*, adapted from the approach of the Supreme Court of Canada in *R v Oakes*:[15]

(a) the limit must serve a sufficiently important objective or purpose, which warrants overriding a protected right or freedom;

(b) the means chosen to achieve the objective must be proportionate, which encompasses concepts of:

(i) rational connection – the means chosen must be rationally connected to the objective in that they logically tend to advance the objective;

(ii) minimal impairment – the means chosen should impair the right or freedom no more than is reasonably necessary; and

(iii) proportional effect – the benefits achieved by the measure must not be outweighed by the significance of the limitation of the right.

[76] Firstly the limit on the applicant's ss 11 and 19 rights must serve a sufficiently important objective, warranting the overriding of those rights. Here as discussed above, the purpose is set out in the Vaccinations Order itself, under cl 3:

> The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.

[77] As discussed by Tipping J in *Moonen v Film and Literature Bord of Review*, an important factor in defining the limit and its purpose is that the broader the purpose, the greater impact that "minimal impairment" element may have. Therefore, a

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15 *Hansen v R* [2007] NZSC 7 at [92]; and [104]. See also *R v Oakes* [1986] 1 SCR 103 (SCC).

significantly broad purpose such as "protecting the health of New Zealanders" may easily satisfy the first limb, but encounter challenges under the minimal impairment limb, because there may be other less rights-limiting measures that achieve the same purpose.[16]

[78] Here the limit serves a focussed and particularly important objective – to prevent and/or limit the risk of the spread of a pandemic throughout the general public of New Zealand. In *New Health New Zealand Inc v South Taranaki District Council*, O'Regan and Ellen France JJ observed:[17]

> We agree with the Courts below that the objective of preventing and reducing dental decay is sufficiently important to justify a limitation on the s 11 right, assuming that this can be done in a manner that is otherwise justified.

[79] Preventing and limiting the spread of a potentially deadly pandemic is just as important, if not arguably much more important, than preventing the spread of dental decay.

[80] The next three limbs are part of a proportionality analysis. First, the means chosen must be rationally connected to the objective in that they logically tend to advance the objective. It is not particularly difficult to satisfy this limb. As noted in the affidavit of Dr Bloomfield, there is growing scientific evidence and consensus that the Pfizer vaccine is effective in reducing the rate of transmission of COVID-19. There is therefore a logical relationship or rational connection between the limiting measure (the Vaccinations Order) and the objective (to prevent or reduce the risk of COVID-19 spreading.

[81] Second, the means chosen should impair the right or freedom no more than is reasonably necessary. The key question here is whether there is an alternative measure that has the same effect but is less likely to be inconsistent with the appellant's ss 11 and 19 rights. The appellate courts have adopted a "range of reasonable alternatives" test to determine whether there was, in the words of McGrath J in *Hansen*, an alternative but less intrusive means of addressing the legislature's objective which

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16 See *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 at [18].
17 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59 at [126].

would have a similar level of effectiveness".[18] The Court of Appeal in *Ministry of Health v Atkinson* said:[19]

> There is no dispute as to the relevant principles. This limb of the test can be addressed by considering whether the Ministry's approach fell within a range of reasonable alternatives. In *R v Hansen*, Blanchard J noted that "a choice could be made from a range of means which impaired the right as little as was reasonably necessary". Tipping J dealt with minimal impairment in this way:
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> > [126] … The Court must be satisfied that the limit imposed …is no greater than is reasonably necessary to achieve Parliament's objective. I prefer that formulation to one which says that the limit must impair the right as little as possible. The former approach builds in appropriate latitude to Parliament; the latter would unreasonably circumscribe Parliament's discretion. In practical terms this inquiry involves the Court in considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence.
>
> McGrath J put the point slightly differently when he said:
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> > [217] The second question concerning proportionality is whether the measure intrudes …as little as possible … The inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness …
>
> A similar approach has been adopted in Canada. For example, in *RJR-MacDonald Inc v Canada*, McLachlin J said the requirement for minimal impairment meant that:
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> > [160] …the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[82] The potential availability of alternative measures was acknowledged by Crown Law in its advice to the Minister for COVID-19 Response.[20] Crown Law advised that for the Minister to assess whether the compulsory vaccinations required for certain

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18 *Hansen v R*, above n 15, at [217].

19 *Ministry of Health v Atkinson* [2012] NZCA 184 at [151]-[153]. Cited with approval by O'Regan and Ellen France JJ in *New Health* at [133].

20 Annex 1 of the COVID-19 Public Health (Vaccinations) Amendment Order 2021 for Ministerial Consultation (14 June 2021) at [2].

workers under the Vaccinations Order were a justified limitation on those workers' rights, he would need to answer "yes" to two questions:

(a) Are the persons to be affected by the widening of the Vaccinations Order at risk of being infected with COVID-19?

(b) If so, will vaccination materially reduce the risk that they contract COVID-19 and transmit it to someone in the community beyond what can be achieved by non-intrusive means?

[83] The question for determination is therefore whether other, less intrusive means could have achieved a similar result to the Vaccinations Order. For example, whether the combined effect of mandatory wearing of PPE, social distancing, cleaning of surfaces and other environments and regular testing and monitoring (such as monitoring temperatures using thermal imaging cameras) could have had a similar result to compulsory vaccination.

[84] However, the context of the Order needs to be acknowledged at this point. While the Courts have a significant role of review under s 5,[21] O'Regan and Ellen France JJ in *New Health New Zealand Inc v South Taranaki District Council* also acknowledged that the Courts are not in a position to conclusively determine disputed matters of science, and deferred to the World Health Organisation and Ministry of Health in noting the benefits of the public health measure in that case (fluoridation).[22] Similarly, O'Regan and Ellen France JJ also held that public policy decisions are often based on approximations and extrapolations from the available evidence, citing an article from Professor Choudry of which the full quote is:[23]

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation… which rings true: "[d]ecisions on such matters must inevitably

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21 *R v Hansen*, above n 9, at [108].

22 At [114].

23 At [118]. See Sujit Choudhry "So what is the real legacy of Oakes? Two decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501 at 524.

> be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".

[85] This quote was also cited in *Ministry of Health v Atkinson*. In that case, the Court also referred to the Canadian Supreme Court Decision of *RJR-MacDonald Inc v Canada*, where McLachlin J observed that "proof to the standard required by science is not required", rather "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view".[24]

[86] Therefore, a conclusion under this limb needs to take into account the level of latitude to be afforded to public policy decision-makers, particularly in matters of science. The evidence of Dr Bloomfield establishes the scientific support for the efficacy of vaccinations in reducing the spread and harm of COVID-19. It supports an inference that they are significantly more useful in achieving the objective than alternative measures.

[87] Finally, the benefits achieved by the measure must not be outweighed by the significance of the limitation of the right. This is a particularly relevant when considering s 19 as the applicant has argued that the Vaccinations Order violates affected workers' rights on the grounds of sex (which includes pregnancy), religious belief, ethical belief, or disability. There is no evidence before the Court as to why the applicant was unwilling to be vaccinated so this analysis needs to be undertaken at a theoretical level.

[88] A similar issue of discrimination arose in *Vavricka and Ors v The Czech Republic*, a recent decision of the European Court of Human Rights.[25] The Court this year held that the imposition of a fine on parents and the exclusion of children from preschool for refusing to comply with statutory child vaccination duty was not inconsistent with the right to life, the right to respect for private and family life, and the freedom of thought, conscience, and religion. The Court observed:[26]

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[24] *Ministry of Health v Atkinson*, above n 19, at [166], citing *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [133] and [137].

[25] *Vavricka and Ors v The Czech Republic* ECHR 47621/13, 8 April 2021.

[26] At [306].

> The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population. The notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding.

[89] The Court's task in this case is to balance the benefit of the vaccine and the risk of being unvaccinated against any discrimination in relation to those affected. In this case, it would entail considering the potential for discrimination in relation to affected workers in light of:

(a) the scientific support that vaccines reduce the risk of transmission of COVID-19 and its harm to the vaccinated person;

(b) the benefit of the vaccine reducing transmission to affected workers who in turn, are less likely to transmit the virus into the community; and

(c) the economic, social, and health benefits of a reduced risk of the virus being transmitted to the community.

[90] If these benefits outweigh the potential discrimination, the limitation is proportionate, and demonstrably justified under s 5 of NZBORA.

[91] The answer to these questions is again found in the evidence of Dr Bloomfield. Relevantly, Dr Bloomfield deposed:

- COVID-19 is a viral infectious disease that can cause severe acute respiratory syndrome and death;
- a proportion of those who contact COVID-19 will require hospitalisation including treatment from a ventilator and/or in an intensive care unit which is a finite resource to treat those who suffer serious health effects from a range of medical conditions or injuries;
- the disease would likely have the most severe effects on vulnerable members of the community, such as the elderly and those with other

health problems or co-morbidities and would disproportionately impact on Māori and Pasifika communities;

- vaccination serves three public health purposes:
  - protecting the vaccinated person by preventing that person from contracting the disease, or if the person contracts the disease, by considerably lessening the severity of their symptoms and the chance of the disease being fatal;
  - reducing the chances of the vaccinated person spreading the disease, either because they will not contract the disease and therefore will not be a link in the chain of transmission or because with less severe symptoms they are likely to have a lower viral load and are less likely to exhibit symptoms that spread the disease such as coughing and sneezing;
  - once a large enough proportion of the community is vaccinated, vaccination will also protect those who are vulnerable in the community and those who cannot be vaccinated from the disease;
- as border workers are most likely to be the source of any community outbreak it is important that they are vaccinated to stop transmission into the wider community;
- at the time of providing his advice on the original Order there were indicators that the vaccine had an appreciable impact on transmission and that evidence has subsequently grown increasingly compelling with a number of international studies showing vaccination leads to a significant reduction in the transmission of COVID-19.

[92] The applicant has not identified any alternative method of addressing the spread of the virus that could be said to be equally as effective. While lockdowns are potentially one such alternative, they have social and economic consequences that are far greater than those of vaccination.

[93] On the basis of the evidence of the respondents, I conclude that, to the extent that requiring affected workers to be vaccinated before carrying certain duties might amount to discrimination, the benefits of that requirement outweigh any discrimination and that the limitation is proportional and demonstrably justified.

[94] I also note that cl 7A of the amendment to the Order made on 14 July 2021 provides a limited exemption from the duty under cl 7 permitting an affected person who handles affected items to carry out certain work without being vaccinated if the affected person has particular physical or other needs a suitably qualified health practitioner determines, would make it inappropriate for the person to be vaccinated.

Second ground – irrationality

[95] The second ground of invalidity advanced by the applicant was irrationality. There was some overlap between the "illegality" submissions and the "irrationality" submissions. A number of disparate arguments were advanced in support of the irrationality proposition, including that:

(a) the Order was not created in partnership with Māori, or with any consideration of Te Tiriti o Waitangi;

(b) the Order imposed duties and obligations relating to work health and safety on PCBUs, workers, and other persons at workplace, which would ordinarily only be imposed in accordance with s 211 of the Health and Safety at Work Act 2015;

(c) the Order had the effect of inciting or instigating a breach of an individual employment agreement, in breach of article 23.1 of the Universal Declaration of Human Rights (UDHR); and

(d) the Order has the effect of breaching consumer's rights under Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, particularly relating to coercion, effective communication, right to be fully informed, to make informed choice and give informed consent, and services that comply with legal, professional, ethical and other relevant standards.

The law

[96] A reviewable decision may be challenged on the ground that it is unreasonable or irrational.[27] Another way of formulating this is to inquire whether the Minister's powers were exercised in accordance with the law and the relevant law would include

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[27] *The Laws of New Zealand – Administrative Law: Unreasonableness* (online ed, LexisNexis) at [99].

matters such as human rights obligations under the UDHR or rights under the Health and Safety at Work Act.[28]

[97] Adopting such an approach avoids having to enter the debate about whether there should be a variable intensity of review ranging from "normal intensity" to "hard look" and "anxious scrutiny".

[98] A decision will be irrational and therefore unlawful if it is not supported by any evidence or if there is a disconnect between the conclusion and the process of logic by which the conclusion is arrived at. Obviously it can also be unlawful to fail to follow an applicable legal principle.

[99] The difference between judicial review and merits review is that, in a case such as the present one, it is not for the Court to decide matters such as whether a risk exists and what the best way of addressing that risk is. The test is whether it was reasonable for the Minister on the basis of the information before him, to have reached the conclusions he did.

[100] Some sorts of decisions lend themselves more readily to judicial review such as decisions focusing on the application of legal principles or statutes, and other decisions, such as those where the decision-maker has relied on technical or specialist evidence or has applied specialist knowledge, are less easily reviewable.

[101] The allegations in this case involve alleged breaches of important human rights and inconsistency with legislation. These are the sorts of issues that the Courts are well suited to determine. However, to the extent that the arguments challenged the Minister's assessment of specialist medical advice that he received, provided the Minister's decision is a rational interpretation of that advice, the Court cannot substitute its own assessment of the evidence.

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[28] See *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [22]; and *X and Y v Chief Executive, Oranga Tamariki* [2021] NZHC 2449 at [193].

Te Tiriti o Waitangi

[102] The proposition advanced by the applicant was that it was "…unreasonable that the Vaccinations Order was not created in partnership with Māori, in accordance with Te Tiriti o Waitangi …".

[103] The arguments relating to Te Tiriti o Waitangi were of a general nature rather than focusing on claimed breaches of particular obligations in the Treaty. It was submitted that:

(a) Māori are more likely to have health conditions, which may mean they are unable to receive a COVID-19 vaccine;

(b) Māori have traditionally lower vaccination rates than non-Māori; and

(c) Māori are more likely to be lower paid with little scope for redeployment in their employment agreement.

[104] These submissions essentially invite the Court to undertake a merits review of the decision. The implication is that there were better or more effective ways of addressing Māori health issues.

[105] It is clear that the Minister was alive to the potential impact of COVID-19 on the Māori population and the potential for a disproportionate impact on Māori and Pasifika communities, and that the need to protect Māori is one of the factors that the Government had regard to in choosing an elimination strategy of which the Vaccinations Order was part. These matters are specifically covered in the affidavit of Dr Bloomfield and the affidavit of Mr Hipkins.

[106] It is also clear that the Minister received specific advice on Te Tiriti o Waitangi.

[107] The Minister concluded that the best way for the Crown to discharge its obligations to Māori was to pursue the elimination strategy of which the Vaccinations Order was an important component. The policy choice, informed as it was by specialist medical advice, is one that will not lightly be interfered with in judicial

review proceedings. On the basis of the evidence of Mr Hipkins and Dr Bloomfield referred to above, the decision was a logically rational one.

[108] There is no statutory obligation requiring the Minister to engage in any particular process of consultation with Māori and, although the applicant submitted that Māori should have been consulted during the three-day period for ministerial consultation, it was not clear exactly who the applicant thought that consultation should have been with. The Vaccinations Order is not inconsistent with the Crown's obligations under Te Tiriti o Waitangi. In fact it reflects the Crown's recognition of the vulnerability of Māori to COVID-19 and of its decision to implement a strategy that best protected the Māori community.

Health and Safety at Work Act 2015

[109] The applicant submitted that:

> The Vaccinations Order disregards the extensive health and safety framework of the Health and Safety at Work Act 2015, undermining the Act's objectives …

[110] The applicant's arguments seem to be that because the Health and Safety at Work Act (HSWA) provided a statutory framework regulating issues of health and safety in a workplace, it was not open to the Government to pass any other legislation that impinged on the workplace.

[111] While s 211 of the HSWA allows regulations to be made under that Act relating to health and safety, it is permissive in nature rather than mandatory. It does not say that the only way that a regulation which affects health and safety in a workplace can be made, is pursuant to s 211.

[112] The applicant expressly submitted that:

> The effect of the Vaccinations Order is to constrain a PCBU from determining, under a health and safety risk assessment, that alternative risk mitigation controls are appropriate.

[113] This submission implies that there is, or should be, a right for an employer to disregard the Government's decision on the best way to address the COVID-19

epidemic. Such a submission ignores the fact that the Act and the Orders pursuant to it, address a health issue that affects the whole of society. To the extent it imposes obligations that are additional or different to those of employers under the HSWA, it does so for a purpose different to the purpose of the HSWA. It does not repeal or replace the provisions of the HSWA and is not inconsistent with it.

Employment Relations Act

[114] The applicant mounted similar arguments in relation to the Employment Relations Act 2000 (ERA) as those advanced in relation to the HSWA. The particular submission advanced by the applicant was:

> The Vaccinations Order was created without regard to the significant and substantial implications in the employment jurisdiction, which has had the effect of further disadvantaging employees, adding to the inequality of power in the employment relationship.

[115] It was also argued that the Vaccinations Order had the effect of inciting or instigating a breach of an individual employment agreement and of article 23.1 of the Universal Declaration on Human Rights (the right to work).

[116] The argument that the Order was created without regard to employment relationships is untenable. The advice received by the Minister clearly considered employment relationship issues with the ministerial briefing paper of 15 March 2021 even considering whether or not some form of statutory redundancy compensation should be available for those employees whose employment was terminated as a result of the implementation of the Order.

[117] The applicant's arguments seem to be that the ERA gave the Authority and Employment Court exclusive jurisdiction in relation to anything to do with aspects of the employment relationship. This is clearly not the case. Many other statutes address matters which are fundamental to an employment relationship. The Income Tax Act 2007 with its obligation on employers to deduct and remit tax from the wages payable to employees is one example. Perhaps most relevantly for these proceedings is the HSWA. This imposes obligations on both employers and employees in relation to activities in the workplace. It is also a statute which is not enforced through the

employment jurisdictions and prosecutions for its breach take place in the District Court.

[118] The Vaccinations Order does not purport to override or oust the jurisdiction of the Authority or Employment Court. Indeed, the right to challenge a dismissal which has occurred as a result of the implementation of the Order remains and was exercised by the applicant in this case. If the applicant had been able to demonstrate in the Employment Relations Authority that there was an alternative available position to which she could have been redeployed but was not, then her unjustified dismissal proceedings would have been successful.

[119] Because the statutory processes to challenge an alleged unjustifiable dismissal remain available, it cannot be said that the "right to work" has been breached. Neither have employment relationships been interfered with in an unlawful way.

Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights) Regulations 1996

[120] The applicant's submission was:

> The Vaccinations Order undermines the Code of Health and Disability Services Consumers Rights to the extent that it disadvantages vulnerable people with disabilities and other health conditions.

[121] The argument was expanded on with the submission that:

> The Vaccinations Order adopts a paternalistic approach, undermining a person's rights to independence, by placing undue influence on a person to receive the COVID-19 vaccination, with the immediate threat of termination of employment.

[122] This submission is misconceived. The Code sets out rights of consumers of health care and duties of providers of health care. In the present case, it is relevant at the point where a vaccine is being administered. Nothing in the Order limits or excludes rights and duties under the Code. A health care provider cannot coerce anyone to undergo vaccination.

[123] The Order does not undermine a health consumer's right to be fully informed. It is open for workers such as the applicant to choose not to be vaccinated for whatever

reasons they see fit. As discussed above, that choice has consequences. If the worker is unable to obtain an exemption, the consequences may be redeployment or termination of employment.

[124] The applicant acknowledges that the Vaccinations Order allows for medical exemptions but submits:

> …however, there is a significantly high threshold, and requires the discretion of the Minister to grant an exemption.

[125] The reasoning behind the exemptions provisions in the Code is addressed in the affidavit of Mr Hipkins. He refers to the public health rationale behind the decision and the international studies that informed his decision.

[126] The Minister has clearly considered the situation of people who have medical conditions which preclude them getting the vaccine, and has amended the Order to include an opportunity for such people to apply for an exemption. There has been no breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights (Regulations). For the reasons discussed above in relation to s 5 NZBORA, any limitation on the right to refuse medical treatment is justified.

Outcome

[127] For the reasons detailed above, the Vaccinations Order is neither ultra vires the empowering Act nor irrational. The application for judicial review fails.

[128] At the conclusion of the hearing of this matter, I reserved to Ms Fechney the right to make further submissions about the interim order anonymising the applicant's name. Mr Powell indicated that he did not wish to file submissions in reply and would abide the decision of the Court.

[129] Accordingly, the interim order remains in place until the Court has received and considered such submissions as Ms Fechney wishes to make.

[130] If costs are in issue, the respondents are to file a memorandum within 10 working days of the date of this decision with the applicant having 10 working days to reply. The issue will then be dealt with on the papers.

Churchman J

Solicitors:
Crown Law Office, Wellington for Respondents

cc: Ashleigh the Advocate, Leeston for Applicant