

(Yardley v Minister of Workplace
Relations and Safety [2022])

**SUPPRESSION ORDER: ORDER SUPPRESSING ANY PUBLICATION,
INCLUDING SOCIAL MEDIA PUBLICATION OF THIS JUDGMENT OR ITS
EXISTENCE UNTIL 2 PM FRIDAY 25 FEBRUARY 2022.**

**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

[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:

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

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