

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 433  
3172322

BETWEEN	JONATHAN COLLIER Applicant
AND	DAMAR INDUSTRIES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Jo Douglas, counsel for the Applicant Dean Organ, advocate for the Respondent
Investigation Meeting:	10, 11 and 26 October 2022, at Rotorua
Submissions received:	26 October, 8 November and 6 December 2022
Determination:	10 August 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Following his dismissal from employment, the applicant Jonathan Collier raised personal grievance claims with his employer the respondent Damar Industries Ltd.

[2] When the grievances remained unresolved after mediation, Mr Collier asked the Authority to investigate and determine them.

[3] At an investigation meeting Mr Collier and support witnesses including a health and safety expert gave evidence, along with several management employees of Damar. All were questioned by counsel Jo Douglas, advocate Dean Organ, and the Authority. Extensive submissions were received from the parties.

[4] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore record all the evidence or information considered by the Authority, or submissions received.

[5] The Chief of the Authority has granted an extension of time beyond the normal three-month period for giving this determination, required because of the demands of other Authority work.

### **Dismissal and the grievance claims**

[6] Mr Collier was told he was dismissed at the end of a meeting with Damar managers held in the workplace on 24 January 2022.

[7] He received a letter dated 27 January 2022 confirming the dismissal. A copy of a file note he was given from the 24 January meeting, recorded that Mr Collier had been told Damar's trust and confidence in the employment relationship had gone, and he had been advised of a proposal to dismiss him and invited to consider and comment on it before the proposal was confirmed.

[8] The file note recorded that Damar told Mr Collier he was being dismissed with immediate effect for specific breaches of Damar's Code of Conduct. The breaches were;

Clause 2.2.1 Refusing to obey a lawful and reasonable instruction .....

Clause 2.2.11 Failure to observe Damar's health and safety procedures .....

[9] Mr Collier claims that, without justification, Damar dismissed him and also disadvantaged him by imposing a covid vaccination policy and by harassing and abusing him.

[10] The remedies sought from the Authority by Mr Collier to resolve his grievance claims are the reimbursement of lost wages of up to \$21,668 under s 123(1)(b) of the ER Act, and total compensation of up to \$70,000 under s 123(1)(c)(i) of the Act.

[11] Mr Collier has not acknowledged there was any wrongful conduct on his part that contributed towards the situation giving rise to his grievance claims. For that reason he does not concede there should be any reduction in remedies, as the Authority may order under s 124 of the ER Act when it finds contributory fault is present.

[12] Damar has sought a reduction in remedies for contributing behaviour, if the Authority determines Mr Collier has a personal grievance of any kind.

### **Covid-19 pandemic**

[13] Damar's business is the manufacture and supply of chemical products, including road marking paints and aerosol products. It is a large employer and at material times had around 130 people working at its Rotorua site.

[14] Mr Collier commenced employment in May 2011 in the position of Quality Control Officer. At the time of dismissal in 2022 he was also a Health and Safety Representative of the staff, a position he was elected to in 2017, and he was Head Fire Warden.

[15] Before Covid he was well regarded by senior management including Scott Thomson, Executive Chairman, director and owner of Damar. Apart from a historical warning in 2016, there had been no serious issues with Mr Collier's conduct or performance. In November 2021 he had received a good annual report based on a comprehensive assessment of him. He had been viewed as leadership material by Mr Thomson.

[16] After the onset of Covid, Damar voluntarily closed for several weeks but because it was classified as an essential service it was able to re-open and continue operations. Mr Collier was an essential worker in a position needed by his employer to provide quality control services.

[17] By late 2021 national health authorities were urging the population of New Zealand to become vaccinated, as the newly available vaccine became more widely accessible.

[18] In November 2021, Damar began a process leading on 22 November to the presentation to staff of a Health and Safety Risk Assessment. The process was one WorkSafe NZ had devised for general use and made available to the public through its website.

[19] Damar engaged with staff to hear their views about vaccination. A doctor and local MP were invited to visit Damar and address the staff. The support of staff was high at 96% in favour of Damar introducing mandatory vaccination.

[20] Mr Collier was one of six employees who did not support that proposal. On 6 December 2021 he gave his feedback to the proposal, and he was personally consulted by management, including Mr Thomson, who wanted to fully understand his concerns about vaccination. Mr Collier advised Damar he did not think the risk assessment had given an accurate measurement of the potential for Covid to catch and spread in the workplace.

[21] Mr Collier viewed the risk assessment as made against a worst- case scenario, which he thought was unlikely to occur. He considered the risk was relatively low. He said that existing health and safety protocols, social distancing, the ability to isolate affected staff and test them, masking and work bubbles, were adequate to minimise risk.

[22] Mr Collier's opposition to becoming vaccinated was based on a personal belief that vaccination could harm his health. That belief was informed by the opinion of others including a close member of his family. He was concerned for his immediate family, as his partner had experienced a reaction to vaccination and the couple were about to have their first child. Mr Collier also rationalized that mandatory vaccination would unreasonably interfere with a right he had to choose whether or not to be vaccinated.

[23] After meeting with Mr Collier on 24 November, Damar summed up what it called his 'hesitancy to be vaccinated' as follows;

Jono stated he had no easy answer and said he wasn't vaccinated and wasn't planning to. He went on to say he has heard there may be a different vaccine becoming available but hasn't had time to research it yet. He then said he had close family/friends who have

had a serious reaction to the vaccine, with one of them being his stepson, and following a meeting with the GP had advised not to receive the second vaccination. Jono also mentioned another person who had a severe reaction. Jono stated he wasn't an anti-vaxer but has concerns about the speed and development of the vaccine and how the World Health Organisation still states it as a trial vaccine until 2023.

Chris summed up Jono's comments to confirm his concerns and it was the risk around the Pfizer vaccine and the potential health implications that could occur. Jono acknowledged this was correct.

[24] Mr Collier was receptive to a proposal from Mr Thomson to have the GP return and answer further questions from staff.

[25] Damar decided to implement mandatory vaccination and on 8 December 2021 advised Mr Collier. He was informed that as an unvaccinated employee he was required to have a first dose by 15 December and full vaccination by 12 January 2022.

[26] Mr Collier was advised that without a first dose his employment would terminate on four weeks' paid notice from 15 December. After that date he would not be able to continue working but if, during the notice period, he became fully vaccinated he could return to his job upon providing proof of having the treatment.

[27] When Mr Collier had not had a dose by 15 December, his work finished and the notice period commenced by operation of the advice earlier given to him.

[28] He looked for new employment while under notice. Without finding any he changed his mind about becoming vaccinated and, on 11 January 2022, advised Damar he had received the first dose of vaccine. Mr Collier told Damar he was 'not happy about it at all' but he had a family to support and could not do without his job at Damar, which he said he would return to.

#### **Four conditions**

[29] Upon going back to Damar on Monday 17 January 2022, Mr Collier was met by Damar's Operations Manager, John van Dort, who gave him a letter signed by Mr Thomson and Heather Turner, Damar's Human Resources Manager.

[30] The letter, dated 13 January, was addressed to him. It began by welcoming Mr Collier back to work and thanking him for having the first vaccination. He was acknowledged to have made a ‘difficult decision’.

[31] The letter set out four conditions he was required to observe while awaiting a second vaccination dose, worded as follows;

1. You must receive your second vaccination on or before 2 February 2022.
2. A mask must be worn at all times.
3. A 1 metre social distance must be maintained at all times during working hours.
4. Separate lunch breaks and segregation for other staff members during breaks.

[32] Immediately following the four conditions, the letter said;

Failure to adhere to the above requirements and in the absence of being fully vaccinated by 2 February 2022 your employment with Damar may cease on this date.

[33] The letter ended with Damar noting a duty it had under the Health and Safety at Work Act 2015 to ensure everyone was safe while at work.

[34] Mr Collier was invited to discuss the advice given in the letter if he wished, with either Mr Thomson or Ms Turner.

[35] When asked by Mr van Dort, Mr Collier indicated he had no questions about the conditions or anything else in the letter.

### **Conduct leading to dismissal**

[36] The actions of Mr Collier considered by Damar to have been a breach of its Code of Conduct, were observed to occur at about 3pm on Wednesday 19 January 2022 and at about 1pm the following day, Thursday 20 January, after his return to work at the beginning of the week.

[37] On the Wednesday afternoon at about 3pm, Mr van Dort saw Mr Collier sitting in the tea or lunchroom set aside and furnished for use by staff taking a break. Mr Collier was seated close to Rose Rankin, a colleague he worked alongside of in Damar's laboratory. They appeared to be less than one metre apart and Mr Collier was not wearing a mask.

[38] Mr van Dort went up to Mr Collier, told him he was required to sit apart from others and instructed him to move. Mr Collier showed surprise and left the break room. He went to see Ms Turner to discuss the situation but she was unavailable, and he returned to his work in the laboratory.

[39] Next morning, Thursday, the Authority accepts from Mr Collier, he did speak to Ms Turner and raised with her his understanding that he could sit socially distanced with colleagues who were in his work 'bubble'.

[40] Previously 'bubbles' had been used at Damar, until about mid-November 2021 when staff were told the requirement to keep within their bubbles no longer applied. By then staff vaccinations had reached 96%.

[41] Ms Turner said to Mr Collier that she would discuss with other managers the matters he had raised and return to him with advice.

[42] Later, in the early afternoon, Mr Collier was seen sitting with others at a table on a grass area outside the staff break room, eating lunch with them. This was reported to Ms Turner by email from a manager who saw him.

### **Letter of Thursday 20 January**

[43] That afternoon Mr Collier was given a letter requiring him to attend an investigation meeting next day, Friday 21 January, at 12.30pm. The letter gave notice that his conduct Mr van Dort had observed on Wednesday, the day before, was to be investigated. The specific conduct was described as a breach of the following condition of his return to work;

4. Separate lunch breaks and segregation for other staff members during breaks.

### **Mr Thomson's approach to Mr Collier on Thursday afternoon**

[44] Shortly after receiving notice of the investigation meeting, Mr Collier was approached by Mr Thomson at about 2pm and ushered into an empty room. Mr van Dort accompanied them. Mr Thomson indicated he was disturbed by Mr Collier's conduct observed earlier that day and he forcefully told Mr Collier it would not happen again. To Mr Collier, he appeared angry.

[45] Mr Thomson's behaviour during this meeting of just a few minutes, is the basis of Mr Collier's separate complaint that he was harassed and abused by the senior officer of Damar.

### **Letter of Friday 21 January**

[46] At about 9.30am on Friday, Mr Collier was given another letter requiring him to attend the investigation meeting already scheduled for 12.30pm that day.

[47] The letter was similar to the one Mr Collier had been given the day before but referred to a serious breach reported to have occurred after midday on Thursday 20 January. It notified him that the meeting was an opportunity to discuss a breach of his condition of his return to work. Condition 4 regarding separate breaks and segregation, was reproduced in the letter.

### **The Friday 21 January meeting**

[48] The meeting began at about 12.30pm. Mr Collier's mother attended by audio-visual link as his support person. Mr Thomson was present with Ms Turner and Mr van Dort. After discussion for no more than 30 minutes the meeting was adjourned and arranged to be continued after the weekend at 10am on Monday 24 January.

[49] On Monday morning at the end of a brief meeting, Mr Thomson confirmed to Mr Collier his dismissal with immediate effect for serious misconduct, being his failure to comply with the Code of Conduct.

[50] A note given to Mr Collier confirmed the dismissal. It referred to clauses in the Code of Conduct specifying refusal to obey lawful and reasonable instructions,

and refusal to observe health and safety procedures, as forms of serious misconduct which could result in summary dismissal.

### **First grievance - unjustified covid vaccination**

[51] This is the first in time of the three discrete grievances Mr Collier raised. It is described in his statement of problem as a claim of unjustified action causing disadvantage through the imposition of an unjustified Covid vaccination policy.

[52] The following account of the grievance is given in the statement of problem;

#### **Covid Vaccination Policy**

2.9. On 22 November 2021, David Cronshaw, Health and Safety Compliance Manager and Tracey Leek, Health and Safety Coordinator undertook a Covid-19 health and Safety risk Assessment for the respondent. (“The Risk Assessment”)

2.10. The Risk Assessment was fundamentally flawed overstating the risk of harm from Covid-19 at the Damar workplace.

2.11. Based on the flawed Risk Assessment, a mandatory vaccination policy was introduced. Mandating vaccination was not a reasonably justifiable policy in the circumstances and in light of the risk of harm present.

2.12. On 24 November 2021, the applicant attended a meeting with Heather Turner, Chris Bradley, CEO and Scott Thomson, Managing Director, for the purpose of consulting with him on the proposal to introduce this policy. The applicant indicated he did not agree with the proposed policy. He made it clear throughout the consultation that he had concerns about adverse health reactions, and potential health implications of the vaccine, arising from personal experiences in his family. He indicated he did not intend being vaccinated.

2.13. On 2 December 2021, the applicant confirmed in writing his opposition to the proposal to introduce mandatory vaccine requirements and included comments on why he did not agree

that the risk assessment had accurately assessed risk of harm due to Covid-19.

2.14. The applicant did not receive a response to this feedback.

2.15. The respondent had a staff meeting on 2 December 2021, attended by all staff, to confirm its final policy.

2.16. Staff were advised in this meeting that Damar had “no option” but to introduce mandatory vaccination. This decision was flawed and unjustified as the company clearly did have options other than mandatory vaccination.

2.17. Six individuals initially indicated they would not be vaccinated and 5 left the workplace due to this unjustified policy.

2.18. The 6 unvaccinated staff were advised that if they remained unvaccinated after 12 December (extended from 1 December) they would be given 4 weeks notice and paid in lieu of working. If vaccinated within the notice period, the staff would be allowed back to work, but would have to wear a mask until one week after the second vaccination.

2.19. At no stage during this consultation process was the applicant advised that he could bring a support person or obtain advice about the proposal that could result in the termination of his employment.

[53] Damar regarded the introduction of the mandatory vaccination policy as an action compelled by the risk assessment. A file note of the meeting with unvaccinated staff and a doctor held on 2 December 2021, recorded items discussed including the following;

- Damar has done a Risk Assessment on being a mandated vaccination site that clearly shows we don't have an option.

[54] The decision to introduce mandatory vaccination led to Mr Collier and five other unvaccinated staff members being issued with a letter on 8 December, advising they would be put on notice of termination of employment if they did not have a first vaccination dose by 15 December 2021.

[55] Although Mr Collier did not want to undergo vaccination, during the notice period when he found himself without suitable alternative employment, he chose to become vaccinated and keep his Damar job. Although he was not coerced to become vaccinated, he was under strong economic and social pressure to keep his Damar job. Having no job was unacceptable to him.

### **Elements of a disadvantage grievance**

[56] A disadvantage personal grievance requires an employer to have taken some *action* affecting an employee's employment or conditions of employment to their *disadvantage*.

[57] Also required is a lack of *justification* for that action, which is to be assessed under the test of justification at s 103A of the ER Act.

[58] The Authority finds that Damar's decision to implement a mandatory vaccination policy was an action to the disadvantage of Mr Collier. The decision introduced into his employment an ultimatum that had not existed before – 'no jab, no job' - as it has been described. This had not been a condition of employment previously and the introduction of it substantially weakened the employment relationship and threatened its continuation.

[59] The central question raised by the grievance claim is whether the disadvantageous action of Damar was justified. Section 103A of the ER Act requires that question to be answered by looking objectively at all the circumstances at the time the action occurred and, in this case, by determining whether the implementation of a mandatory vaccination policy was what a fair and reasonable employer could have done.

### **No option**

[60] Damar considered that the implementation of the vaccination policy had been determined by the result of its risk assessment. It told staff on 2 December 2021 that the risk assessment left no option but to make Damar a mandated vaccination site.

[61] The focus of s 103A must therefore be the integrity of the risk assessment as a health and safety measuring process.

[62] It is obvious from its origins the risk assessment was not a precise tool or gauge. It was designed by WorkSafe for use across the broad spectrum of workplaces in New Zealand, for deployment by a diverse range of employers and managers who are not expert and may be inexperienced in risk assessment of disease infection. They cannot reasonably be expected to approach the task with complete neutrality or impartiality. They are likely to have the interests of their business and their staff collectively at front of mind.

[63] Damar made its assessment within two broadly stated parameters; lower risk and higher risk. The range between lower and higher risk was 3 points; 1 for lower risk and 3 for higher risk, with 2 for medium.

[64] The risk assessment matrix applied six risk factors to four work areas (Office, Logistics, Factory/Aerosol, Engineering). Maximum possible higher risk was 18 (6x3) and minimum possible lower risk was 6 (6x1). No risk at all, or 0, was not within the available range.

[65] Across the matrix the assessment produced a total of 59 out of maximum possible higher risk of 72, or 82%. Lower risk was recorded only once out of 24 assessments, and medium risk 10 times.

[66] Numerically the overall assessment was clearly on the side of higher risk.

[67] The risk assessment was just that, an *assessment* of risk. Its conclusion did not dictate whether employees should or should not be given notice of dismissal if they remained unvaccinated. That required a decision to be made by Damar after it had interpreted the risk assessment data and applied its judgement.

[68] There was no analysis by Damar to show why or how a higher risk compelled the conclusion that mandatory vaccination was required at its site.

### **Mr Cronshaw's evidence**

[69] David Cronshaw, Damar's Health and Safety and Compliance Manager, was a co-author of the risk assessment. He has a higher qualification in health and safety.

[70] Mr Cronshaw told the Authority the relatively narrow 1 to 3 range was included in the design to bring simplicity to the assessment exercise, by avoiding indecision that may creep in when selection is to be made from having too wide a range.

[71] A variation of 1 to 10, or 1 to 100, is simply a magnification of a range. The use of 1 to 3 did not necessarily compromise the accuracy of the assessment, the Authority finds.

[72] When Damar presented the Risk Assessment exercise to its staff on 22 November 2021, they were advised in writing that it was being undertaken in line with the risk assessment process outlined by WorkSafe New Zealand.

[73] With regard to the context in which the risk assessment was being carried out, staff were informed of a duty of care Damar had under the Health and Safety at Work Act 2015 to take every reasonably practicable step to eliminate, or otherwise minimise, any risks to staff. Risks included Covid-19 in the workplace.

[74] Staff were also informed;

New Zealand has moved away from an elimination strategy, towards one of minimisation and protection. This will result in a degree of ongoing exposure and transmission within the community.

The purpose of this risk assessment is to determine whether the risks associated with the nature of the work our staff perform raises the risk of COVID-19 infection and transmission. Current control mechanisms of reducing risk need to be assessed as to their effectiveness and whether mandatory vaccination should be considered.

#### **Assessment of exposure**

The degree to which a person is exposed to COVID-19 at work is the determining factor as to whether a mandatory vaccination is required.

For the purposes of this assessment, exposure is the outcome of proximity and time.

[75] In his evidence Mr Cronshaw described the WorkSafe risk assessment as being;

..... not a prescribed process. As with all risk assessments there are many ways of doing them and they are all to a degree subjective and based on the risk appetite of the business.

[76] Mr Cronshaw noted that Damar had no experts in virology, epidemiology or vaccinology on its staff, and he said;

Therefore, undertaking a risk assessment with limited and constantly changing information was difficult. Any prudent person would take a risk averse approach, which is what Damar did.

[77] Mr Cronshaw noted that the national experts, Doctors Baker and Bloomfield who were constantly addressing the media, had said that one of the most effective ways of mitigating the spread of the virus was the wearing of a face mask and vaccinations. Masking was one of the controls Damar had earlier implemented, along with physical distancing, requiring all visitors to the workplace (including contractors, clients and customers) to be vaccinated, and other measures.

### **Mr Cosman's opinion**

[78] Michael Cosman is recognised by the Authority as a long-standing expert in health and safety. He established his expertise and wide experience of giving evidence as an expert in different jurisdictions, civil and criminal. He had had previous involvement in infection risk matters.

[79] His evidence was directed to the adequacy of the risk assessment Damar carried out in November 2021, as a means of determining whether to or not to impose a Covid-19 vaccine mandate for all its staff. His opinion was given in the context of the Health and Safety at Work Act 2016 (HSWA).

[80] Mr Cosman concluded his opinion with the following;

## Conclusion

20. In my opinion the approach to risk assessment evidenced in the document is poor and particularly surprising in the context of a Major Hazard Facility that has a number of very significant health and safety risks that it has to manage on a daily basis. The document does suggest a degree of pre-determination that vaccination should be mandated and does not fully consider other equally effective options that could be applied in the short or long term.
21. Finally as an elected Health and Safety Representative (HSR) it is noticeable that Mr Collier and his fellow HSR's were not formally consulted as representatives of the workforce throughout the COVID-19 pandemic as might reasonably be expected in accordance with the Health and Safety at Work (Worker Participation, Engagement and Representation) Regulations 2016 and Part 3 of HSWA.

[81] Mr Cosman based his opinion on the principles of risk assessment as set out in the International Risk Management Standard, ISO 31000.

[82] He said of risk assessment;

10. The key steps include an understanding of the internal and external context within which the risk is being assessed, the factors associated with the risk within that context (who is exposed and under what circumstances), an assessment of what controls are in place against possible means of reducing the likelihood and consequence of exposure to the risk and then comparing this to both an organisational risk tolerance and any relevant legal standards. Where current controls do not adequately reduce the risk then additional treatments (controls) must be applied. The whole process must be subject to consultation and communication with key stakeholders (in this case workers and their representatives) and be kept under constant review as changes to the risk or what is known about it and how to control it occur.

11. COVID-19 is a particularly dynamic risk and hence any risk assessment would need to be regularly revised to ensure it reflects the current state of knowledge.
12. In the HSWA the concept of reducing risks so far as is reasonably practicable is a central concept.

[83] Mr Cosman described Damar's risk assessment as very brief and incomplete. It was not clearly placed in the context of Damar's business and the risk factors associated with transmission of infection within the workplace. He said that context also included the locality of Damar at Rotorua, at the time a place of relatively low incidence of Covid cases from community transmission.

[84] Mr Cosman described the criteria used in the risk assessment as quite vague. No indication had been given of the scale used to make the assessment or how to interpret the result. He noted that with the first risk factor in the assessment matrix – i.e. 'How many people does the employee carrying out the work come into contact with?'- it was impossible to answer without referencing factors such as proximity, duration of contact, duration over which the assessment is made or what to compare the answer with. He gave an example of a more specific question giving an objective and reproducible result.

[85] Mr Cosman noted that Damar's assessment only considered four areas of business. They did not include the quality control laboratory Mr Collier worked in. He viewed it a segregated area accessed by the four people who worked there. Mr Cosman considered that because its risk profile was drawn from these factors, the laboratory should have been assessed independently of other parts of the workplace, the Office, Logistics, Factory/Aerosol and Engineering.

[86] Mr Cosman viewed as 'arbitrary' the ratings assigned by the document. He noted that in each of the four areas assessed, a rating of 3 – higher risk – had been given against the factor – 'Does the work involve regular interaction with people considered at higher risk of severe illness from COVID-19, such as people with underlying health conditions?' The basis for the highest score of 3 being given in all four work areas was unclear. Mr Cosman considered this question is normally

intended for people in health care or aged care settings where there is a particularly vulnerable population.

[87] Mr Cosman could find no evidence that anyone in the laboratory where Mr Collier worked was classed as vulnerable.

[88] Mr Cronshaw's evidence was that there were staff who were vulnerable because they had underlying health issues, but he produced no satisfactory evidence of that. He said he had understood there were 'privacy issues' with respect to disclosing this type of information.

[89] Mr Cronshaw also assessed people who appeared overweight or appeared to have a high Body Mass Index (BMI), as vulnerable and as likely to have underlying health issues.

[90] The scores left no margin in any work area at Damar, for the likely differences between a health care or rest home operation and Damar's workplace.

[91] Mr Cosman noted the lack of any express conclusion completing the risk assessment process;

17. Having completed the risk assessment (even though it is a flawed process) there is nothing to compare the total score against in order to determine whether vaccination is likely to be indicated or not. There is no conclusion, recommendation or similar – just a number.

[92] He noted the absence of testing as a control measure implemented by Damar. He considered that equally effective options for protecting workers other than simply vaccination, should have been discussed with Mr Collier, given that he was one of only six workers who were unvaccinated at the time of the risk assessment.

[93] For Mr Collier it was submitted that the mandatory vaccination requirement was based on a subjective and flawed risk assessment process. It was submitted this was a sham to support a decision heavily leveraged towards business goals and objectives, rather than the health and safety of those whose labour helped achieve those goals and objectives.

[94] For Damar it was submitted the process by which the assessment was conducted was extensive, thorough and fair. It considered the widely publicised views of health officials and experts, MBIE guidance about conducting the assessment, consultation with all Damar employees including Mr Collier about the completed draft assessment, and consideration of feedback from all employees. Several days were allowed for staff to consider what had been assessed and the ratings or scores given. Mr Collier's feedback had been extensive, it was submitted.

[95] The Authority has considered the evidence and information obtained from its investigation. It accepts the opinion of Ms Cosman that Damar's risk assessment was not adequate for its purpose. The Authority finds that the high degree of subjectivity involved was at the expense of objectivity and tended to drive a result Damar wanted.

[96] What was required was an assessment of risk, not an assessment of Damar's risk tolerance.

[97] The conclusion expressed by Damar that it had no option but to introduce mandatory vaccination is unsupportable. There clearly were options but these were not considered sufficiently or at all. There was the option of paid leave. Mr Collier worked in a laboratory with just a few others, yet there seems to have been no consideration given to the degree risk in that place and whether it could be addressed with measures other than mandatory vaccination. Mr Collier was permitted to return to work there when he was not fully vaccinated.

[98] The Authority finds that a fair and reasonable employer would not have conducted the risk assessment with the deficiencies found in it by Mr Cosman. A fair and reasonable employer would not have regarded the risk assessment as compelling Damar to implement mandatory vaccination because it had no choice but to do that.

[99] Mr Collier was disadvantaged by the unjustified action of Damar and accordingly has a personal grievance.

### **Contribution to covid vaccination grievance**

[100] In settling a grievance with any of the remedies provided by s 123 of the ER Act, the Authority is required by s 124 to determine whether the actions of the employee contributed to the situation that gave rise to the grievance. The Authority

must determine whether contributing behaviour, if any is found, requires a reduction in the remedies to be awarded.

[101] There was nothing about the conduct or behaviour of Mr Collier that contributed to his grievance. He was entitled to decline to be vaccinated. No reduction in remedies is required for contribution.

### **Second grievance - harassment and abuse**

[102] This is the second in time of the three grievance claims raised by Mr Collier. His grievance about Mr Thomson's conduct grew from contact the pair had on Thursday 20 January 2022 for a few minutes in the early afternoon, shortly after Mr Collier had been seen sitting outside the break room eating close to others at the same table.

[103] Mr Thomson sought Mr Collier out to speak to him about his conduct. Mr Collier regarded Mr Thomson's manner and tone as unreasonable and intimidatory, and his approach an improper intervention when there was going to be an investigation meeting next day at 12.30pm. The letter Mr Collier was given about the meeting had advised that Mr Thomson would be attending it 'as the decision-maker'.

[104] Mr Thomson asked Mr Collier to step into an unoccupied room, where he proceeded to speak plainly and sharply, making his displeasure clear to Mr Collier. He told Mr Collier that his conduct would not happen again.

[105] In evidence Mr Collier said he did not take this to mean he had been or was about to be dismissed and would not be at work anymore to be able to repeat the conduct. He took it to mean that he must comply with the written conditions which he had been given on returning to work at the beginning of the week.

[106] Mr Thomson's approach and manner left Mr Collier apprehensive that dismissal would happen.

[107] The Authority does not consider that the actions and words of Mr Thomson were harassment or abuse within the usual meaning of those words. For a brief time, Mr Thomson urgently and forcefully conveyed to Mr Collier his displeasure or

dissatisfaction and told him clearly he must comply with the instructions given earlier. From his manner it was plain that he was deeply concerned and annoyed with Mr Collier. He confirmed in his evidence those were his feelings.

[108] It may have been unwise for Mr Thomson to have intervened at this point while a disciplinary meeting he was going to participate in as the decision-maker was pending, but the Authority finds that the conduct by oral expression in itself was not so unreasonable as to amount to unjustified action.

[109] Mr Thomson because of his position and ownership had a strong attachment and personal investment in Damar. He was committed to the efforts that were then being made to preserve and protect Damar and its employees from the threat of Covid. It is understandable if he momentarily lost a little self-control, but his behaviour was not extreme, persistent, or repeated, as will often be the case with harassment and abuse.

[110] As this intervention by Mr Thomson occurred close in time to the disciplinary meeting notified for the following day, if there was any disadvantage suffered by Mr Collier it may be looked at as a forerunner of the decision and decision-making that led to immediate dismissal. Mr Thomson's conduct and display of strong feelings, along with other evidence, might indicate whether the decision to dismiss was swayed by predetermination, or conducted with undue haste, or whether for any other reason the actions of Damar in dismissing Mr Collier were not those of a fair and reasonable employer.

[111] Viewed at the time the action occurred, the Authority finds that the contact made by Mr Thomson on its own was not an unjustified action causing disadvantage to Mr Collier in his employment.

[112] Mr Collier does not have a personal grievance from that contact.

### **Third grievance - unjustified dismissal**

[113] In turning to the third grievance claim of Mr Collier, the Authority must assess whether the conduct alleged of him was capable of being serious misconduct, so that summary dismissal could be a response of a fair and reasonable employer.

[114] The Court of Appeal has stated the test is whether the conduct deeply impairs or is destructive of the basic trust and confidence that is an essential element of an employment relationship<sup>1</sup>.

[115] The Authority finds that refusal to obey a lawful and reasonable instruction, and failure to observe an employer's health and safety rules, the conduct Mr Collier was dismissed for, are both capable of being serious misconduct. Depending on the circumstances, such conduct may justify summary dismissal.

[116] Disobeying instructions given to counter the spread of a debilitating and sometimes fatal contagious disease, in the absence of reasonable explanation or excuse, might amount to serious misconduct and leave it open to a fair and reasonable employer to dismiss an employee found upon inquiry to have breached those instructions.

[117] Mr Collier had been given notice in writing on 17 January 2022 that he must observe four conditions while waiting to receive his second dose of covid vaccine on 2 February. Mr Thomson and Ms Turner signed the conditions. Mr Collier had acknowledged the seriousness of the situation the conditions were addressed to. After they were presented and discussed by Mr van Dort, no issues were raised about the conditions by Mr Collier when given the opportunity to ask questions. The notice also invited him to seek clarification at any time if needed.

[118] On the face of the notice, its words were not as well chosen as they might have been. In condition 4 the expression *segregation for other staff members* perhaps may not convey the message intended. More likely that message was, *segregation from other staff members*. If he was unsure what was meant, Mr Collier asked no questions. Neither did he raise any issue about the feasibility of condition 4 in a practical sense.

[119] The Authority accepts that when Mr van Dort spoke to him during the afternoon break he was taking at about 3 pm on Wednesday 19 January, Mr Collier did express surprise at being instructed to move away from his colleague Ms Rankin, and he did go to find Ms Turner and ask her about the requirements when he was with someone from his 'bubble'. Ms Turner was unavailable then.

---

<sup>1</sup> *Northern Distribution Union v BP Oil New Zealand Ltd* 3 ERNZ 483 at 487 (CA)

[120] The Authority also accepts that early in the morning at work next day, Thursday, Mr Collier did approach Ms Turner and he did ask her about the way condition number 4 applied to bubbles. Although she was a signatory to the notice in which the conditions had been stated, Ms Turner said she would have to ask other managers about it. She said she would return to Mr Collier with advice about that issue. She had not done so after 1 pm on Thursday afternoon, when it was reported to her that Mr Collier had been seated at an outside table eating lunch, close to five or six other employees including Ms Rankin his laboratory colleague.

[121] Just after 1pm, Mr Collier was given a letter dated 20 January requiring him to attend an investigation meeting. This gave about 24 hours' notice of the meeting, which was to be held at 12.30pm on Friday 21 January for the purpose of discussing and responding to 'the breach of a condition' notified on 17 January regarding his return to work. Condition number 4 was set out in the letter.

[122] It is clear that the letter was referring to 'the breach of a condition' which Damar considered had occurred the previous day, 20 January.

[123] The letter was headed Investigation Meeting but in substance, the Authority finds, it gave notice of a disciplinary meeting rather than a solely fact-finding meeting. In submissions for Damar, it was accepted that the meeting was intended to be disciplinary in nature.

[124] Although the letter warned of possible 'disciplinary action' being taken, no details were given as to what form that action might take. The letter merely referred to 'the next step of the Damar disciplinary procedure'. That procedure, set out in House Rules annexed to the Mr Collier's employment agreement, comprised several steps, each of increasing seriousness, from an oral warning up to summary dismissal.

[125] The letter also advised that Mr Thomson and Ms Turner would attend the meeting, the former 'as the decision-maker'. Mr Collier was advised he was entitled to have a representative or support person present at the meeting. He had about 24 hours to arrange that assistance if he required it.

[126] After Mr Collier received the letter, at about 2pm he was approached by Mr Thomson who expressed considerable annoyance and said he was disappointed in Mr

Collier. Mr Thomson had by then been informed that Mr Collier had been seen at lunchtime sitting outside eating with several others.

[127] On Friday 21 January at about 9.30am, Mr Collier was given another letter advising that ‘a further serious breach’ of a return-to-work condition, number 4, had been reported the previous day at 1.17pm. The letter advised that the situation was considered to be;

.....extremely serious as you appear to refuse to comply with the requirements of the letter provided to you on 17 January 2022.

[128] The letter advised that this further breach was to be discussed in conjunction with the breach of 19 January 2022. The meeting for that discussion was due to take place within three hours, at 12.30pm.

[129] Again, although the letter was headed Investigation Meeting it advised Mr Collier of the possibility that disciplinary action could be taken, including the next step of the Damar disciplinary procedure. Again, no further or better detail was given as to what that next step might be of the four or five available, which ranged upwards from an oral warning to summary dismissal.

[130] The Authority infers from the two letters that Damar considered the Thursday breach of condition 4 was a repetition of the Wednesday breach, and therefore the investigation of it could take place in the same meeting Mr Collier had been given notice of on Thursday afternoon.

[131] The Authority finds that for the purposes of a disciplinary investigation the Wednesday and Thursday alleged breaches should have been regarded as two separate breaches, although they could have been investigated in the same meeting provided reasonable notice was given of a meeting after each breach was alleged to have occurred.

[132] The Authority finds that only three hours or less notice was unreasonable for the second alleged breach. Until it was investigated it could not be regarded as a simply a repetition of the first alleged breach. If it was something regarded as ‘extremely serious’ as Damar said in its letter, it was likely to put Mr Collier at risk of

receiving a higher level of disciplinary action, especially if viewed as repeat behaviour. In the circumstances the second alleged breach potentially aggravated the first alleged breach and was not simply a continuation of the same conduct.

[133] Damar seems to have recognised this potential in the letter, for it referred to the appearance of deliberate disobedience on the part of Mr Collier through his 'refusal to comply' with the requirements. This much more serious character of the breach had not been referred to in respect of the first breach, which breach might well have been attributed to confusion, carelessness, or forgetfulness on Mr Collier's part rather than wilful disobedience.

[134] Both the Wednesday and Thursday alleged breaches needed to be investigated properly as separate or distinct breaches, having potentially different disciplinary outcomes in terms of the circumstances. It appears that through haste, the Thursday breach and its investigation was conflated with the Wednesday breach.

[135] It is understandable that Damar was alarmed when it learned of the second alleged breach. The circumstances of it may well, at first sight, have indicated greater culpability on the part of Mr Collier than shown by the first alleged breach.

[136] To conduct a disciplinary investigation into alleged wilful disobedience amounting to serious misconduct and giving rise to the possibility of dismissal as a consequence, a fair and reasonable employer could not have required an employee to attend on three hours or less notice. With such short notice, Mr Collier was not given a reasonable opportunity to respond to Damar's concerns before it decided to dismiss him.

[137] Neither was he given a reasonable opportunity to decide on the level of representation or support he might want to have at the disciplinary meeting, or an opportunity to obtain that. There was not enough time for Mr Collier to decide whether his mother should or could properly represent and support him. It is unlikely he could have found anyone else in the short time available. As it happened his mother, who is not a professional employment representative, had little chance of preparing and could do little more than give her son the comfort of her presence. She could not attend in person but observed the disciplinary meeting by video link. She was not well prepared, as she only found out from Mr Collier about the Wednesday breach during the meeting.

[138] Mr Collier's choice of representative, the expertise of that person and their state of preparedness for a disciplinary meeting and mode of participation, were ultimately his responsibility, provided Mr Collier had been given a reasonable opportunity to decide on the arrangements he wanted to make and how he wanted to respond to Damar's concerns.

[139] No good reason has been shown to the Authority why the meeting of 21 January could not have been deferred even by just a few days, with consideration given to suspending Mr Collier until it took place. During the meeting when a resumption of it on another day was first proposed, Mr Collier suggested he could remain away from work until Wednesday. This was rejected when Damar decided it should resume on Monday instead. It is apparent that Damar was anxious to hold and conclude the disciplinary meeting as quickly as possible. In the view of the Authority, in achieving that aim it acted with unreasonable haste.

[140] The degree of haste from Thursday afternoon onwards is some indication of a mind-set Damar had before the Friday meeting, that Mr Collier had breached the condition number 4 on two occasions and had done so in wilful defiance of the condition on both.

[141] Although the Authority has found that Mr Thomson's conduct did not amount to harassment or abuse, his words and manner did reasonably display to Mr Collier the appearance that he had made up his mind about what was eventually going to happen. Insisting to Mr Collier that his conduct would not happen again, but without waiting to hear whether he had an explanation or excuse to offer, could reasonably suggest to Mr Collier that Mr Thomson had made up his mind about what had happened before the disciplinary meeting took place.

[142] It was plain to Mr Collier and his mother during the Friday meeting that Mr Thomson was the decision-maker, and that Ms Turner and Mr van Dort had only a subordinate role in the investigation.

[143] Ms Turner and Mr van Dort agreed in their evidence that Mr Thomson had been the primary decision maker. The letters to Mr Collier had advised that he would be the decision-maker. If nothing else, deferring the start of the meeting for a few days would have given Mr Thomson a chance to reflect on whether it was wise for

him to lead the meeting, after the approach he had made on Thursday afternoon to Mr Collier, and whether the appearance of pre-determination might be conveyed from that contact.

### **Ms De Vries email**

[144] Mr Collier should also have been shown the message given to Ms Turner by Ms Christine De Vries, who had reported seeing him on Thursday outside eating lunch with others. Her message said that he was in the company of five or six other employees. Mr Collier admitted to at least two others but not necessarily five or six. He had no real opportunity to answer that claim. When Damar viewed Mr Collier as an employee who appeared to be refusing to obey instructions, a very serious allegation against any employee, it was important for Mr Collier to know what an eyewitness had told Mr Turner about his behaviour observed by that person.

[145] The email also reports that Mr Collier mentioned to Ms De Vries issues about the feasibility of condition number 4. He said he could not stop people joining him at the lunch table outside and it was not possible to have a separate break, as the room available for that and the outside area were occupied all the time.

[146] Those issues noted by Ms De Vries in her email, if it had been shown to Mr Collier or his support person, may well have triggered discussion around them at the disciplinary meeting. They raised questions about the clarity of condition 4, something Mr Collier had sought from Ms Turner before the Thursday sighting of him in apparent breach of condition 4. Mr Collier had also touched on the issue of whether it was possible to have separate breaks if the break room was in use most of the day.

[147] This email was a primary piece of information from an eyewitness. It directly led to a disciplinary meeting held to inquire into an allegation of serious misconduct. For that reason, it should have been available to Mr Collier or his representative or support person, or its contents should have been accurately and fully made known to them. It was not disclosed until much later.

### **Adjournment of Friday meeting until Monday**

[148] The Authority has considered whether the adjournment over the weekend cured the short notice problem with the Friday meeting, by allowing Mr Collier another two days to review the response he had given on Friday, and to consider whether it could be improved on Monday or whether he should return to the meeting with another representative.

[149] A letter from Mr van Dort emailed to Mr Collier on Friday after the meeting had adjourned and after he had gone home, said that the Monday meeting was a follow up of the Friday meeting and would enable Mr Collier to provide a response before a final decision was made.

[150] Mr Collier had reasonably assumed the Friday meeting had been for that purpose and he said everything he could then in response.

### **Monday meeting**

[151] The Monday meeting was short, and Mr Thomson did most of the talking. Ms Turner made a file note about it. It says that Mr Thomson started the meeting by saying to Mr Collier that the investigation had been discussed. He referred to the Covid-19 situation and measures Damar had taken in that regard. He referred to the return-to-work conditions Mr Collier had been given on 17 January, and to the Wednesday afternoon sighting of him close to another employee during a break. He referred to his breach of instructions again on Thursday.

[152] The file note records;

Scott then advised Jonathan that the trust and confidence in the relationship had gone and the preliminary decision was summary dismissal ....

[153] The Authority finds that the purpose of the meeting on Monday was for Damar to present to Mr Collier the decision from its disciplinary investigation of Friday. The inquiry had proceeded well beyond the point where it could be wound back to the beginning, by disregarding everything said at the Friday meeting. It is clear Mr Thomson had already made the decision by the time the Monday meeting started.

[154] It was a pretence to suggest that Damar retained an open mind to consider any further response Mr Collier might have on Monday. The file note records that he advised the meeting he had said everything on Friday.

[155] Another file note of Ms Turner dated 27 January, records what had happened at the end of the Friday 21 January meeting;

Jonathon was asked if he had anything further to add. Jonathon asked when a decision would be made. It was agreed to meet again on 24 January at 10am and Jonathon requested to not attend work until the next meeting which was agreed by the company.

[156] From the file note, it is clear that the 21 January meeting was the opportunity Mr Collier had been given to provide any response to the allegations of breach. The 24 January meeting was for the purpose of conveying to him the decision about the serious misconduct alleged. The disciplinary meeting did not allow a second chance for Mr Collier to respond to the allegations of serious misconduct.

### **‘Preliminary’ decisions**

[157] In *Edwards v The Board of Trustees of Bay of Islands College*<sup>2</sup> the Employment Court was critical of the kind of approach taken on 24 January by Damar, when it announced a ‘preliminary’ decision to summarily dismiss and then asked Mr Collier if he had anything to add. When told by Mr Thompson that trust and confidence had gone from the relationship, dismissal was inevitable when Mr Collier had said everything he could at the Friday meeting.

[158] As the Court observed in *Edwards*, an employer is required by s 103A(3((d) of the ER Act to consider an employee’s explanation or response *before* deciding to dismiss. If Damar considered all trust and confidence had gone, there was nothing Mr Collier could say that was likely to restore that trust and confidence. Confirmation of dismissal became a mere formality.

[159] It was suggested by Damar that if Mr Collier had been contrite and remorseful he might have been spared dismissal. That seems unlikely in the circumstances,

---

<sup>2</sup> [2015] NZEmpC 6, at [306] to [312]

beginning with Mr Thomson's agitated intervention before the Friday meeting, the decision-making role he had, and the haste with which the disciplinary meeting proceeded.

[160] Damar also knew that Mr Collier had served the company for 11 years, that he had a good record and a good annual report for 2021, in which he was reported as being honest and reliable and having a supportive attitude to management. He was also reported to have been observant of health and safety policies and procedures. There had been no previous instance of his being disobedient to instructions. Mr Collier offered to stay home until he had his second job, as an alternative to dismissal. It is clear these matters were given no proper consideration and the outcome of the disciplinary meeting had already been decided.

[161] As to the lack of any apology or expression of regret from Mr Collier, Damar did not have to wait for those to be offered. It could have asked for them and then judged the sincerity with which any were given.

[162] The Authority does not accept that the significant deficiencies with the Friday meeting were rectified with the Monday meeting.

### **S 103A(3) considerations**

[163] In applying the test of justification at s 103A(2) of the ER Act, the Authority must have regard to four express considerations as well as any others it thinks appropriate.

[164] As to the first consideration, the Authority finds that having regard to the relatively high level of resources available to Damar, it did not sufficiently investigate the allegations against Mr Collier before dismissing him. To do so required that Mr Collier be given a reasonable opportunity to respond to the employer's concerns, so that any response could be considered as part of all the information available to Damar.

[165] The short notice and haste of the disciplinary meeting was unreasonable. Mr Collier could have been suspended, if necessary, until he had had a reasonable chance to decide what response he wanted to give and how he wanted to present that. Suspension would also have served as an interim health protection measure against

any risk of further breaches occurring in the workplace, while Mr Collier remained unvaccinated.

[166] The second matter for consideration was satisfied by Damar; it did raise the concerns it had before dismissing Mr Collier.

[167] The third matter, a reasonable opportunity to respond to the employer's concerns, has been touched on above under the first consideration. Its presence in s 103A(3) as one of four express considerations, emphasises the importance of the opportunity. Three hours was not such an opportunity to respond to an allegation of serious misconduct, one indicated as having possible serious disciplinary consequences including summary dismissal.

[168] The fourth matter, the consideration given to Mr Collier's explanation, presupposes that he had had a reasonable opportunity to respond so that the employer was in a position to genuinely consider any explanation given. The Authority considers it is likely that Mr Thomson had decided by the time the Monday meeting began what his decision would be.

[169] There were other important considerations as well as the four expressed in the ER Act. They include Mr Collier's length of service with Damar, his good record, and the availability of suspension from the workplace for the short period of about nine days until he was due to have a second vaccination dose. Dismissal with immediate effect took no account of these factors at all and was an unduly harsh punishment. Damar's view expressed to Mr Collier that there were no mitigating circumstances, was unreasonable in the circumstances.

[170] Merely three hours' notice of a disciplinary meeting, given to an employee of 11 years of service is severely disproportionate. Also disproportionate was the approximately 21 hours between the Thursday alleged breach and the letter giving notice of a disciplinary meeting about that breach. Damar allowed itself much more time than it gave Mr Collier to prepare for the Friday meeting.

[171] For the above reasons the Authority finds that Damar has not justified the dismissal of Mr Collier. Its actions in conducting a disciplinary inquiry which concluded with the summary dismissal of Mr Collier, were not what a fair and reasonable employer could have done in all the circumstances.

[172] The Authority does not consider the defects in the process were minor or did not result in Mr Collier being treated unfairly. Mr Collier's mother's evidence is accepted by the Authority that she noticed him to be under stress when awaiting the disciplinary meeting. It was unfair for him while already under strain to have less than three hours to think about how he should present his position in responding to serious allegations at a disciplinary meeting. He did not receive a fair hearing in the rushed circumstances.

[173] The Authority finds that Mr Collier was unjustifiably dismissed and has a personal grievance for that reason.

### **Contributing behaviour – unjustified dismissal grievance**

[174] The Authority considers that Mr Collier did contribute to the situation that gave rise to his dismissal grievance. He was at fault for not raising the views or thoughts he had about bubbles and their possible application to the conditions of his return to work. The absence of any mention of bubbles in the conditions presented in writing to him on 17 January, should at that time have caused Mr Collier to question whether there were still such things in operation and, if there were, how bubble members were to be identified.

[175] Mr Collier was a staff health and safety representative and for that reason had a greater obligation to be communicative about areas of doubt or uncertainty in health and safety instructions given to staff. Mr van Dort had asked him on the Monday whether he had any questions. The bubble issue must have been in his mind then, for he raised it on Wednesday as soon as he was alleged to have breached the rules for the first time.

[176] For the same reason, if he had doubts about the workability or practicability of condition 4 regarding any limitations on being able to have separate breaks, he should have raised them when invited to. A more proactive approach to obtaining clarity within health and safety rules, could reasonably have been expected by an employer from a staff health and safety representative.

[177] Had Mr Collier sought and obtained clarification about bubbles on 17 January when he returned to work, the Wednesday alleged breach may not have occurred. It

would have become clear that he was not to sit too near his laboratory co-workers such as Ms Rankin during breaks. It seems unlikely Mr Collier would have been summarily dismissed for the Wednesday breach alone.

[178] The dismissal was substantially the result of the Thursday alleged breach and the appearance to Damar that Mr Collier was being wilfully disobedient. As regards contributory conduct, the chain of causation between the Wednesday and the Thursday alleged breaches may have been lessened when Mr Collier on Thursday morning eventually did seek clarification from Ms Turner about the requirements. But until she returned to him with advice, he could not reasonably assume that bubbles applied, especially when the four return to work conditions had made no mention of them.

[179] Having asked Ms Turner for clarification on Thursday morning, Mr Collier should have waited for her response before sitting outside at the table with several people, some of whom would not have been included in his bubble in any event.

[180] The Authority considers there was a significant degree of fault displayed by Mr Collier in assuming, when he could not be sure, that bubbles were in operation. His blameworthy actions were causally connected to the situation that led to his unjustified dismissal.

[181] Mr Collier's contributory fault is to be accounted for when assessing remedies for his unjustified dismissal grievance.

[182] While the Authority accepts from Mr Collier, and as confirmed by his record, he was not a rule breaker, there was more he reasonably should have done to make sure the rules were clear to him about taking breaks and segregation. While the wording of condition 4 was not prescriptive and may have left room for more than one interpretation, Damar could reasonably expect that Mr Collier would seek clarification if he was unsure whether bubbles were still in operation. He was invited to ask but did not.

[183] Mr Collier did not contribute to the failure of Damar to allow him an opportunity to respond to the alleged Thursday breach, when he received only three hours' notice of the disciplinary meeting to be held at 12.30pm on Friday.

[184] His contributory conduct is assessed at about one third, or 35%.

### **Conclusion**

[185] Damar acted without justification and to the disadvantage of Mr Collier, when it implemented mandatory vaccination following a risk assessment carried out by it. Mr Collier did not contribute to the situation that led to that grievance.

[186] Mr Collier does not have a personal grievance arising out of Mr Thomson's conduct in the workplace on the afternoon of Thursday 20 January 2021.

[187] Mr Collier was unjustifiably dismissed by Damar on 24 January 2022 and for that reason has a personal grievance. He contributed by about one third (35%) to the situation that gave rise to that grievance.

### **Settlement of the personal grievances - remedies**

[188] The remedy Mr Collier has sought for his unjustified disadvantage grievance is compensation of up to \$20,000 under s 123(1)(c)(i) of the ER Act for humiliation, loss of dignity and injury to feelings.

[189] Grievance remedies are discretionary.

[190] Although Mr Collier lost his job, that was for serious misconduct and not as a consequence of the risk assessment or implementation of mandatory vaccination. His decision to become vaccinated, although it ran contrary to his beliefs, averted the dismissal he was given notice of on 8 December 2021. He lost no wages before he was unjustifiably dismissed on 24 January 2022.

[191] This determination on its own can be viewed as vindication of him and a remedy to settle his grievance.

[192] Mr Collier felt the injustice of the situation where mandatory vaccination was imposed on him by Damar, through reliance on its risk assessment and without adequate consideration of alternatives. He suffered injury to his feelings.

[193] In November and December 2021, Damar did not intend to harm Mr Collier in any way and would have preferred to see him continue in his job. It did not intend to trample on his feelings or disrespect his beliefs. There was no malevolence in its actions.

[194] Damar tried to act in the best interests of all of its staff. It was a natural and understandable concern to Mr Thomson that Damar could be shut down as a workplace if Covid took hold among staff. In that event jobs would be threatened and the business itself put at risk. Damar was faced with a complex and changing situation in which it tried to protect the health of its workers and avoid the risk of widespread loss of jobs through closure.

[195] Although Mr Collier saw himself as having a right to choose not to have treatment, that right was not unqualified or unconditional. The rights of other Damar workers to be kept safe from the risk of harm, and the right of Damar to protect its business, have to be balanced with those of Mr Collier. Damar tried to strike that balance.

[196] But for the risk assessment Mr Collier would not have received the letter of 8 December 2021, headed 'Mandatory vaccine requirement', putting him on notice of dismissal. There is also a connection between the four conditions imposed on Mr Collier when he returned to work, and the assessment of risk. They were conditions he was required to obey, and a short time later they became the conditions he was accused of breaching.

[197] The conditions could arguably be considered unreasonable if they had not been based on a risk assessment a fair and reasonable employer could have made.

[198] Alternatives to mandatory vaccination which, if implemented, would have allowed Mr Collier to continue working at Damar's premises, are likely to have carried with them conditions imposed in reliance on the Health and Safety at Work Act. It cannot be known exactly what those conditions would have been because alternatives were not adopted. They are likely to have included the wearing of masks and social distancing, and quite possibly separate lunch breaks and segregation as well. Without a risk assessment exercise being carried out, all of these could reasonably have been required under the Health and Safety at Work Act. In that case

Mr Collier could reasonably and lawfully have been required to comply with them upon returning to work.

[199] The events surrounding the implementation of mandatory vaccination and consequences of that for Mr Collier, were quickly overtaken and overshadowed in January 2022 by his dismissal and substantial harm that caused him.

[200] The Authority cannot find any basis for awarding compensation anywhere near \$20,000 in the circumstances. The award will be \$3,000 under s 123(1)(c)(i) of the ER Act.

[201] To settle his unjustified dismissal grievance Mr Collier seeks compensation under s 123(1)(c)(i) of up to \$30,000 and the reimbursement of lost wages under s 123(1)(b) of up to \$20,063.

[202] Mr Collier had long service as a permanent employee and was encouraged by good performance reviews to think he had a good future at Damar. Within days of returning to work after making the difficult decision to become vaccinated, to his bewilderment he was rapidly investigated and summarily dismissed. He had to ask his mother for money as a consequence of being without pay. The evidence before the Authority shows his self-esteem and confidence took a heavy knock.

[203] In assessing compensation for humiliation, loss of dignity and injury to feelings, the Authority must have regard to the recent uplift approved by the Employment Court in the bands of compensation given by it in *Richora*<sup>3</sup>. Band 2 is now \$12,000 to \$50,000<sup>4</sup>.

[204] The unjustified dismissal and the injury caused by it to Mr Collier falls within band 2. The Authority assesses compensation at near the mid-point of band 2, at \$29,000.

[205] Taking account of contribution by Mr Collier of slightly more than one third at 35%, the compensation awarded is \$18,850.

---

<sup>3</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113

<sup>4</sup> *GF v Comptroller of New Zealand Customs Service* [2023] NZEmpC 101, at [162]

[206] There is no dispute that as a result of his dismissal Mr Collier lost earnings of \$11,400 in an eight-week period before he obtained new employment. He claims an additional 5 weeks of shortfall between pay in the new job and Damar pay, a total of \$1,493.75. Further he claims this shortfall for an additional 29 weeks, a total of \$,8663.75.

[207] The Authority finds no basis in this case for exercising its discretion to go beyond the 3-month period of s 128(3) of the Act.

[208] The submission of Damar is also accepted that there is no evidence to show that Mr Collier tried to mitigate the shortfall loss in his new employment, by looking for a better paying job from week eight to week 13.

[209] The award is \$11,400 which will not be reduced for contribution, as a sufficient reduction has been made to the remedy of compensation.

### **Orders for payment**

[210] To settle the grievances Damar is ordered to pay to Mr Collier a total of \$21,850 (\$3,000 plus \$18,850) compensation and a total of \$11,400 as lost wages.,

### **Non-publication order**

[211] The order made orally on 26 October 2022 and in writing on 1 November 2022, will now lapse. The Covid situation and public attitudes have changed since the beginning of 2022, to the extent that the orders are no longer necessary. It is in the interests of justice that the investigation and determination of this matter, as with most other Authority cases, should be visible to those who wish to know about such proceedings.

## **Costs**

[212] If the parties cannot agree on how the question of costs is to be resolved, the Authority will determine that issue based on the usual daily rate awarded in cases such as this one.

[213] If an application becomes necessary, it is to be made on behalf of Mr Collier within 14 days of the date of this determination, and any reply on behalf of Damar is to be made within a further 14 days.

Alastair Dumbleton  
Member of the Employment Relations Authority