

**NOTE: This determination contains an order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 385  
3238759

BETWEEN SHALINEE DOWLUT  
Applicant  
AND AURECON NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Natasha Szeto  
Representatives: Applicant in person  
Mark Lawlor and John Gray-Smith, counsel for the Respondent  
Investigation Meeting: 21 November 2023 and 20 February 2024 in Tauranga,  
11 March 2024 by audio-visual link  
Submissions and information received: 2 April 2024 from the Applicant  
3 April 2024 from the Respondent  
Date of determination: 1 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Shalinee Dowlut was employed by engineering firm Aurecon New Zealand Limited (Aurecon) as a Level 5 Project Management Consultant. She holds a project management professional credential from the Project Management Institute.

[2] Central to this matter is Ms Dowlut's response to Aurecon's annual review of her performance in 2023. In assessing Ms Dowlut's performance as "Needs improvement" (the lowest of its performance ratings) Aurecon identified two main aspects for improvement, being communication and taking accountability. Ms Dowlut

did not accept the feedback or the rating. She raised allegations about the managers giving the feedback, and those taking the review process. She did not engage in the process for improvement which Aurecon tried to implement, which led to a disciplinary process and ultimately Ms Dowlut's summary dismissal for serious misconduct.

[3] Ms Dowlut raises personal grievance claims related to the performance review and improvement processes, culminating in what she says was an unjustifiable dismissal. She also raises multiple personal grievances related to other aspects of her employment at Aurecon.

[4] Aurecon says its review and the review process, and the decision to dismiss Ms Dowlut were consistent with what a fair and reasonable employer could have done in all the circumstances at the relevant time. Aurecon denies all of Ms Dowlut's personal grievance claims.

### **The Authority's investigation**

[5] Written witness statements were lodged from Ms Dowlut and her general practitioner. Witnesses from Aurecon were Ms Dowlut's line manager Andrew Douglas, Technical Director; Project Managers Katherine Eveleigh, Integrated Transport and Mobility Practice Leader, and Ryan Ellis, Technical Director; human resources advisor Mia Ye, Senior People Consultant; and the decision-maker David Hughes, Transport Leader. All witnesses attended the Investigation Meeting and answered questions from me under oath or affirmation.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

### **Issues**

[7] Ms Dowlut raised multiple personal grievance claims which Aurecon responded to. Based on Ms Dowlut's claims, the issues the Authority was to investigate and determine were:

- (a) Whether Ms Dowlut was unjustifiably disadvantaged by Aurecon raising performance concerns with her.

- (b) Whether Ms Dowlut has been discriminated against by Aurecon.
- (c) Whether Ms Dowlut has been subjected to racial harassment by Aurecon.
- (d) Whether Aurecon has engaged in adverse conduct for a prohibited health and safety reason.
- (e) Whether Ms Dowlut has a claim under the Equal Pay Act 1972, in particular on the basis that she has been unlawfully discriminated against (s161(1)(qd) of the Act).
- (f) Whether Aurecon retaliated or threatened to retaliate against Ms Dowlut in breach of s 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022 because Ms Dowlut made or intended to make a protected disclosure.
- (g) Whether Ms Dowlut was unjustifiably dismissed from her employment with Aurecon.
- (h) If Ms Dowlut is found to have a personal grievance, whether she should be reinstated to her position.
- (i) If Ms Dowlut is found to have a personal grievance, whether she should be reimbursed for wages or other money lost as a result of the grievance (subject to mitigation).
- (j) If Ms Dowlut is found to have a personal grievance, what remedies are appropriate including compensation (s 123(1)(c) of the Act) and recommendations (s 123(1)(ca) and (d) of the Act).
- (k) If Ms Dowlut is found to have a personal grievance, whether any remedies should be reduced for contributory conduct (s 124 of the Act).
- (l) Whether costs and disbursements should be awarded to the successful party.
- (m) Whether interim non-publication orders should be made permanent.

### **Relevant background**

[8] Shalinee Dowlut was employed by Aurecon on 23 August 2021 as a Project Management Consultant (Level 5). Consultants working in project management work with and support Aurecon's Technical Directors, Project Managers and other managers

and peers driving large, complex projects. The role is collaborative, supportive and requires a degree of agility to respond to the needs of the Project Managers, and the individual project. Consultants need to be open to feedback and flexible to change. Part of the “technical mastery” of Ms Dowlut’s role included developing quantitative estimates for project costs, resources and projected cash-flows in consultation with technical experts.

[9] Throughout the relevant period, the majority of Ms Dowlut’s work was on two projects at Aurecon – a major project with Technical Director Ryan Ellis, and a more minor project with Practice Leader Katherine Eveleigh.

#### *Performance reviews*

[10] Aurecon’s annual performance review process includes a self-evaluation and Team Leader evaluation, which represent the formal review phase of Aurecon’s “Let’s Talk” process. Let’s Talk includes performance goal setting, career development and planning, performance check-ins and annual reviews. As part of the review process, employees are given an overall rating in respect of their performance goals. The ratings are Top 10%, Excelled, Achieved, and Needs Improvement.

[11] In January 2022 Ms Dowlut’s reporting line changed to Andrew Douglas, Technical Director. That June, in her first performance review process with Aurecon, Ms Dowlut received an “achieved” performance rating, which she disagreed with and escalated within Aurecon.

[12] In late 2022, issues began to emerge with Ms Dowlut’s performance. From September, Ms Eveleigh began to experience issues working with Ms Dowlut, which she raised with Ms Dowlut directly. Ms Eveleigh says there were inaccuracies in the monthly forecasting which were not necessarily of Ms Dowlut’s making, but she found Ms Dowlut inflexible in her forecasting approach and reluctant to adapt to client preferences. On one particular occasion, Ms Eveleigh tried to contact Ms Dowlut to urgently deal with a problem in the forecasting. Ms Dowlut first declined Ms Eveleigh’s phone call, then said she had a headache and began to question Ms Eveleigh’s qualification to assess her work. On another occasion, Ms Dowlut refused Ms Eveleigh’s instruction to provide a backing sheet for an invoice to a client, and Ms Eveleigh ended up doing it herself. Ms Dowlut created invoices and sent them to the client without checking them with Ms Eveleigh first, and on at least one occasion,

without copying Ms Eveleigh into the email. Ms Eveleigh took on work within Ms Dowlut's role because she found it easier to do it herself.

[13] In January 2023, Ms Dowlut became ill while on holiday overseas but then did not complete the required forms to obtain approval to work remotely. She also did not advise project managers she was away. A medical certificate she later gave Mr Douglas referred to the reason as being a "respiratory tract infection".

[14] Mr Douglas raised these issues with Ms Dowlut in their monthly check-ins following her 2022 review, including the importance of remaining polite with all stakeholders, maintaining open communication with project managers, not issuing invoices without prior approval of project managers, and spending time in the office to build rapport.

[15] In March 2023, Aurecon commenced its annual performance review process with a request to all employees to submit their self-evaluations. These were due by 10 March, but Ms Dowlut was unwell and requested an extension three days after the due date had passed. As events transpired, Ms Dowlut did not complete and return her self-evaluation to Aurecon until weeks after her performance review meeting with Mr Douglas.

[16] Ryan Ellis, Technical Director, also began to experience issues with Ms Dowlut's performance around March, particularly in relation to invoicing. There were significant communication issues both internally within Aurecon and with the client on the major project. At the end of April, Ms Dowlut sent an invoice directly to a client without sending it to Mr Ellis first for an internal review.

[17] As part of the performance review process, Mr Douglas sought feedback on Ms Dowlut's performance from Project Managers Ms Dowlut had worked with in the performance year including Ms Eveleigh and Mr Ellis. Ms Eveleigh had raised issues with Mr Douglas prior to the annual performance review process but as part of the review process, Ms Eveleigh shared some specific examples and concerns about Ms Dowlut's performance with Mr Douglas on 10 May. At the end of April, Mr Ellis also approached Mr Douglas about Ms Dowlut forwarding an internal Aurecon email on to a client, in which she appeared to question the legitimacy of Aurecon's approach. Mr Ellis said it was not helpful Ms Dowlut had sent an internal email to the client, and the

tone in the email did not help either. The invoice had to be recalled from client review and reissued.

[18] Mr Douglas received some positive feedback on Ms Dowlut's performance, but he felt it was overshadowed by the negative feedback. Specific examples included that Ms Dowlut had issued invoices to clients without agreement from the project manager, lacked ownership and accountability when mistakes were made and blamed others, did not follow clear instructions on work needed to correct invoices, had completed inaccurate forecasting, refused to complete invoice backing sheets despite requests, had used condescending language with the accounts team and had not notified her manager, or project managers of her workplace absence in February 2023.

[19] On 8 May 2023, Mr Douglas conducted Ms Dowlut's annual performance review discussion. Mr Douglas had also asked a Principal from the team to attend because of Ms Dowlut's reaction to receiving an "achieved" rating in the previous performance year and her decision to escalate a complaint to human resources. During the discussion, Mr Douglas advised Ms Dowlut of her provisional rating of "needs improvement". Ms Dowlut alleged racism and bullying, saying the feedback was not based on her performance, but her ethnicity.

[20] A few days later, Mr Douglas emailed Ms Dowlut an overview of the 8 May meeting, which included the following statement:

I have been very pleased with your willingness to take on challenges and/or new tasks, your understanding of Aurecon tools and interaction with the team and myself as team leader. However your performance on projects has unfortunately been inconsistent this year. I am genuinely saddened to select a 'needs improvement' rating this year due to having received consistent feedback from the Project Manager's [sic] of a number of the projects you have been working on that they have experienced a generally defensive approach resulting in argumentative language, lack of ownership and accountability for outcomes.

[21] In response to the allegations of racism and bullying Ms Dowlut had raised, Mr Douglas contacted human resources and provided Ms Dowlut with links to the complaint resolution policies, but also stated:

...workplace bullying does not include legitimate differences of opinion or reasonable management action such as providing constructive feedback on unsatisfactory work performance.

[22] Mr Douglas set out in writing the areas in which Ms Dowlut was required to improve which were communication and accountability. He indicated Aurecon's

expectation that Ms Dowlut's performance would improve by 12 June 2023, and next steps may include a formal performance improvement plan.

[23] In response to Mr Douglas' email, on 11 May Ms Dowlut advised Mr Douglas she had formally requested a mediation through Employment NZ and had received advice to file a report for harassment, discrimination and racism. Senior People Consultant Mia Ye responded to Ms Dowlut to confirm Aurecon was happy to work with mediation services to rebuild faith and trust in the employment relationship.

[24] On 22 May Mr Ellis sent Mr Douglas an email giving an example of Ms Dowlut "failing to take ownership for fundamental mistakes". Another manager working on the major project with Mr Ellis and Ms Dowlut at the time forwarded the email to Mr Hughes on the project governance group and said Ms Dowlut's performance was impacting the issuing of variation invoices. The same day, Ms Dowlut declined a performance check-in invitation from Mr Douglas and again told Mr Douglas she had contacted Employment NZ regarding bullying, harassment and racism, and requested mediation. Mr Douglas acknowledged Ms Dowlut's response, but said he wanted to support Ms Dowlut by having regular check-ins to work together to uplift Ms Dowlut's performance, and this would not stand in the way of rebuilding the employment relationship with the support of mediation.

[25] On 14 June Mr Ellis raised a further instance where Ms Dowlut had issued an invoice directly to a client despite making it clear in a meeting with her that morning it was to come to Mr Ellis first. Ms Dowlut provided her self-assessment to Aurecon. She assessed her performance as "Top 10 percent". Later that month on 22 June, the parties attended mediation provided by the Ministry of Business, Innovation and Employment (MBIE).

[26] On 26 June following requests from Aurecon to provide details of her racism and bullying complaints, which she had first raised six weeks prior, Ms Dowlut provided a summary of events to Aurecon. Consideration of the complaints was handled by Aurecon's human resources team. Ms Ye commenced the process the next day by contacting the individuals involved and seeking their responses to concerns Ms Dowlut had raised.

[27] On 3 July Aurecon concluded its consideration of Ms Dowlut's racism and bullying complaints. Ms Ye advised Ms Dowlut of Aurecon's finding there was no

evidence of bullying or other inappropriate behaviour and a formal investigation process was not warranted.

[28] Ms Ye also advised Ms Dowlut the assessment of her performance as “needs improvement” remained valid. Ms Ye said Aurecon still wanted to meet with her to proceed with an informal performance improvement plan (PIP) with a first check-in on 7 July. She proposed a new timeline for the PIP. Ms Ye concluded the letter with:

Given the breakdown of the employment relationship, I will be assisting in these meetings going forward along with Andrew. The meeting invite will be sent to you shortly.

[29] Ms Dowlut’s response to Ms Ye was that Aurecon was required to go through mediation services to communicate with her. Aurecon responded it disagreed – its intention was to progress the PIP and it expected Ms Dowlut to engage in the process. Ms Ye stated the intention of the PIP was to support Ms Dowlut to make the necessary improvements and if she did not engage with the PIP and refused to meet to discuss it, this could amount to misconduct and be grounds for a disciplinary process, the potential outcome of which would be a written warning.

[30] Mr Ellis says he attempted to discuss Ms Dowlut’s performance informally with her on a number of occasions and to highlight errors or inconsistencies in the issuing of invoices but was met with “resistance and denial”. Mr Ellis saw a behaviour change and things started to get difficult. He says Ms Dowlut seemed resistant to acknowledging inconsistencies and inaccuracies and she blamed other people. Mr Ellis implemented a process change from the handover document / protocol, as he did not have confidence invoices were accurate and he wanted them sent to him before going to the client. On 5 July Ms Dowlut sent the March 2023 invoice to the client before obtaining Mr Ellis’ approval.

[31] On 7 July Mr Douglas and Ms Ye attempted to hold a check-in meeting with Ms Dowlut over Teams. Aurecon said it expected improvement by 28 July for “final review”. The same day, Ms Dowlut lodged a Statement of Problem in the Authority.

[32] Further MBIE mediation followed. On 13 July, Mr Douglas and Ms Ye conducted a PIP meeting with Ms Dowlut over Teams. In a follow-up email, Aurecon advised Ms Dowlut there had not been any progress against the areas requiring improvement (communication and accountability). In particular, Mr Ellis had asked Ms Dowlut multiple times not to send invoices directly to the client without his

approval, and this occurred again on 21 July in breach of an instruction from Aurecon that Ms Dowlut was not to have direct contact with clients.

[33] The decision was made and communicated to Ms Dowlut that she would be removed from the major project. On 24 July, Ms Ye wrote to Ms Dowlut on behalf of Aurecon on the outcome of the 13 July PIP meeting, stating:

This is a pattern of behaviour that we have been working with you on and you continue to deliberately ignore reasonable instructions from your Line Manager and Project Manager. Given the challenges of this project, [different consultant] will provide support as the PC for [major project] going forward and you are to focus on other projects.

[34] Following receipt of this letter, Ms Dowlut had a medical incident and was admitted to hospital, although Aurecon was not aware of this at the time.

#### *Disciplinary Process*

[35] From late July, Aurecon attempted to commence a disciplinary process with Ms Dowlut due to her lack of engagement with the performance improvement process. David Hughes, Transport Leader, took over the process as the decision-maker.

[36] On 24 July Mr Hughes invited Ms Dowlut to a disciplinary meeting on 28 July. The main concerns Mr Hughes said Aurecon wanted to raise were:

- (a) Continued unsatisfactory performance.
- (b) Unwillingness to accept performance feedback.
- (c) Impact of performance and conduct on other managers.
- (d) Failure to follow reasonable instructions.

[37] The letter concludes by saying the concerns (individually and cumulatively), if substantiated, could amount to serious misconduct and the most serious disciplinary outcome may be termination of employment without notice.

[38] On 25 July Ms Dowlut sent an email to Mr Hughes saying she had a medical condition which arose due to Ms Ye's communication of 24 July. Ms Dowlut provided a medical certificate saying she should be fit to resume work the next week on 31 July and provided Aurecon with the first page of a Te Whatu Ora "Inpatient Transfer of Care" record outlining her medical condition.

[39] Given Ms Dowlut's absence from work, the disciplinary meeting scheduled for 28 July did not proceed and was paused pending her return. Mr Hughes invited Ms Dowlut to provide any medical information she wanted considered as part of the disciplinary process. Further private mediations occurred on 9 August and 15 August.

[40] On 22 August Mr Hughes re-initiated the disciplinary process and invited Ms Dowlut to a meeting on 25 August. There was communication between the parties about Ms Dowlut's fitness to attend the disciplinary meeting. Mr Hughes said Aurecon did not currently have any medical information to suggest it was not safe for her to attend or engage in the process. Mr Hughes asked to be provided with a medical certificate setting out her current diagnosis, whether and to what extent the diagnosis impacted on her fitness to attend a disciplinary meeting, and what steps Aurecon could take to mitigate any impact. In response to this, Ms Dowlut emailed Mr Hughes saying he was perpetually harassing her via email, her medical report is private and cannot be disclosed to Aurecon, and she had lodged a case in the Disputes Tribunal to follow up whether Mr Hughes' "intentions are criminal in motive".

[41] Mr Hughes noted Ms Dowlut was declining to provide medical information, and therefore he had no basis to assess the reasonableness of her request not to proceed with the disciplinary meeting. Ms Dowlut was again invited to provide any medical information she wanted Aurecon to consider.

[42] On 24 August, the day before the scheduled meeting, Ms Dowlut signaled her intention not to attend on the basis her "medical assessment...is unfavourable to be part of any such discussions". Ms Dowlut provided a doctor's certificate from her general practitioner setting out her symptoms. Her general practitioner stated his support for Ms Dowlut not to continue with any work-place meetings, performance reviews or disciplinary actions until the current investigation through the Authority has concluded.

[43] On 25 August in response to the communication from Ms Dowlut and her doctor, Mr Hughes requested better particulars about Ms Dowlut's medical situation. Mr Hughes said the medical certificate did not respond to the questions Aurecon had asked and did not provide sufficient information for him to understand and assess Ms Dowlut's condition or the reasonableness of her request to delay the disciplinary process. On 28 August, Ms Dowlut suggested Aurecon could contact a specialist at Tauranga hospital for an up-to-date diagnosis. A few days later, Ms Dowlut provided a further medical certificate from a different general practitioner at the same practice as

her usual doctor, who described her symptoms as an extreme stress response related to being removed from the major project. The doctor noted Ms Dowlut was happy to continue working 40 hours per week, but should avoid interactions, communications and meetings regarding disciplinary actions to ensure a calm and supportive environment.

[44] On 1 September Mr Hughes advised Ms Dowlut Aurecon had decided to continue with the disciplinary process on the basis it would not be unsafe or unreasonable, and steps could be taken to mitigate any impact on her health. The steps proposed by Aurecon included Ms Dowlut obtaining legal representation and/or support, providing written responses in advance, taking breaks and obtaining support from the Employee Assistance Programme (EAP). A meeting was scheduled for 6 September, which was rescheduled to 8 September. Ms Dowlut did not attend. Mr Hughes requested a further medical certificate to explain her absence, and asked Ms Dowlut to provide feedback in response to the disciplinary concerns in writing by 12 September. Ms Dowlut was advised a preliminary decision would be made on this date. On 11 September Ms Dowlut provided feedback to Aurecon. She said she had asked for the PIP and check-in to be conducted at mediation. Ms Dowlut reiterated that colleagues have bullied and harassed her and have retaliated by providing negative feedback. She says the Authority hearing will be the place for Aurecon to prove its allegations, and prove the staff involved were competent to assess her performance.

[45] On 13 September Mr Hughes invited Ms Dowlut to a meeting on 15 September and gave her one last opportunity to provide written feedback. Ms Dowlut did not attend the meeting on 15 September, although she was at work and online during the scheduled meeting time.

[46] On 19 September Aurecon provided Ms Dowlut with its Notice of Preliminary Decision which set out the four concerns and the history of attempted engagement. Aurecon found its allegations to be substantiated and provided reasons. Ms Dowlut did not respond to this letter. On 22 September Aurecon terminated Ms Dowlut's employment, effective immediately. She was paid a month's wages in lieu of notice.

[47] On 6 October, and despite her employment having ended more than two weeks' prior, Ms Dowlut provided Aurecon a medical certificate saying she is medically fit and able to perform normal work duties with no limitations imposed, and no further medical follow up is planned.

## **Was Ms Dowlut unjustifiably disadvantaged in relation to performance concerns?**

### *Applicable law*

[48] For her disadvantage claims to succeed, Ms Dowlut must establish that one or more conditions of her employment was affected to her disadvantage by an unjustified action by Aurecon.<sup>1</sup> This means I need to determine whether Ms Dowlut suffered a disadvantage in her employment, and – if so – whether this was caused by an action by Aurecon and whether that action was unjustified.

[49] Aurecon’s actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[50] There are two aspects to the performance concerns Aurecon raised with Ms Dowlut. The first is the performance review which resulted in Ms Dowlut’s performance being assessed as “needs improvement”. The second is Aurecon’s actions in relation to the PIP.

### *Performance review*

[51] Ms Dowlut claims her performance was unfairly assessed on 8 May 2023, resulting in no change to her level as a Consultant (Level 5), and no pay rise or bonus. Ms Dowlut says her performance should have been assessed based on regular audits over the year, there was no transparency around the process of evaluation and promotion, feedback from her manager was unfair, not in good faith (with the motive being to deprive her of a pay rise and bonus) and demonstrated extreme bias and discrimination. She says performance feedback should come through the WorkDay (internal assessment tool) platform, and complaints about her performance should have been raised with her at the time and not “saved up” for performance assessment. Communication is not a key performance indicator (KPI) for her role, and it was unfair that her performance was assessed against it. Even if communication was a valid measure, Ms Dowlut says there were no issues with her communication because she was not told not to contact the client directly about the major project work, she followed the accepted invoicing protocol and changes to the protocol could only be at the direction of the project manager. Lastly, the only people qualified to assess her

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<sup>1</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

performance were those trained in specific processes to do with the project. Ms Dowlut has broadly alleged none of Aurecon's staff who assessed her performance were competent, qualified, or impartial and that has resulted in abusive, intimidating, bullying, harassing, provocative and retaliatory behaviour throughout the process.

[52] Aurecon says the overwhelming weight of the evidence is the views Mr Douglas reached on behalf of Aurecon and conveyed to Ms Dowlut at her performance review were genuine, and reasonably based. The process was balanced because it was Aurecon's usual process to gather feedback from managers and peers and the concerns the project managers raised with Mr Douglas were genuine and reasonably based. Aurecon also gave Ms Dowlut multiple opportunities to participate in the process including giving her an extension to provide her self-assessment, which she still did not meet. Lastly, Aurecon was required to raise its concerns with Ms Dowlut in good faith so she could address them. The manner in which Aurecon raised issues, including in the 11 May email sent after the first performance meeting, was respectful and measured.

[53] Based on the evidence before the Authority, I find Ms Dowlut was disadvantaged by being given a performance review rating of "needs improvement". Although I accept Aurecon's evidence that remuneration and bonuses are not directly tied to performance rating, and progression opportunities are always at the company's discretion it is likely she was excluded from consideration of any of these benefits in her employment because of her performance assessment and rating.

[54] However, I consider Aurecon's actions were justified and were the actions of a fair and reasonable employer in all the circumstances.

[55] In terms of inputs to the performance assessment process, Aurecon gave Ms Dowlut ample opportunity to submit her self-assessment, including extending the deadline once it had passed. There is no credible basis for any implication that Aurecon engineered the process to exclude Ms Dowlut's self-assessment. Instead, I view Ms Dowlut's failure to submit her self-assessment as not acting in her reciprocal duty of good faith to be responsive and communicative. I also do not accept the submission that Aurecon should not have proceeded with the performance assessment process without Ms Dowlut's input. Self-evaluation was only one of the "data points" as Mr Douglas put it. The company needed to assess its employees' performance in accordance with the much bigger "Let's Talk" process which included post-performance discussion/review calibration across the business.

[56] It is also, I accept, unremarkable Mr Douglas sought feedback on Ms Dowlut's performance from project managers with whom she had been directly working. Mr Douglas said managers receive all kinds of input throughout the performance year through channels other than the WorkDay system, including on Teams chats, in emails, and other documents, and they are open to performance feedback at all times whether positive or negative. While in hindsight, Aurecon could have improved its process by recording all feedback from Ms Eveleigh and Mr Ellis in a way that could be more readily provided to Ms Dowlut, this was a minor defect that did not result in Ms Dowlut being treated unfairly. This is because I accept the evidence of these managers and Mr Douglas that the concerns and issues had been raised directly with Ms Dowlut well prior to the performance review process, and on multiple occasions. Mr Douglas rejected the idea Ms Dowlut was previously unaware of the concerns he raised in the 8 May meeting because he had conversations with Ms Dowlut about the challenges since late 2022. Mr Ellis also rejected the idea Ms Dowlut could have been surprised or that his concerns had been saved up for performance review time because there had been trouble on the major project for a while. Ms Eveleigh said she had been raising issues with Ms Dowlut directly and then with Mr Douglas well prior to the performance review process, and there were email trails to support this.

[57] There was no evidence before the Authority to support Ms Dowlut's contention Mr Douglas only took into account feedback from people who were bullying or harassing her, and their feedback was retaliatory and designed to disadvantage her in employment. Mr Douglas contacted four project managers Ms Dowlut had worked with in the performance year. The other two did not report anything significant, and certainly nothing to counteract the feedback he had received from Ms Eveleigh and Mr Ellis. In addition to this, although Mr Douglas was aware Ms Dowlut had experienced difficulties with Ms Eveleigh, Ms Dowlut only raised a formal complaint about Ms Eveleigh following the performance review process and she never raised a formal complaint about Mr Ellis. Therefore it simply cannot be the case that Mr Douglas only accepted feedback from people who were bullying or harassing Ms Dowlut. There is merit to Aurecon's submission that Ms Dowlut's allegation of bad faith on the part of the reviewer was a wholly unreasonable and unjustified response to disagreeing with the reasonableness and accuracy of the feedback.

[58] Based on the evidence before the Authority, Ms Dowlut considered there were few people within Aurecon who were qualified and experienced to review and provide

constructive criticism of her performance – being those subject matter experts trained in the specific project methodology. However the core performance concerns Aurecon had raised were not technical requirements of the role necessitating subject matter expertise – they were about communication and taking accountability. I accept these were core requirements of the Consultant role and I find it was fair and reasonable for Aurecon to assess Ms Dowlut’s performance in relation to these requirements.

[59] I also accept Aurecon’s submission the performance review discussion is the opportunity to discuss performance and the managers’ minds were not closed to the possibility the performance rating could change. Mr Douglas said the discussion was intended to bring performance issues to Ms Dowlut’s attention in an informal way, to give her fair opportunity to address and resolve them before they potentially became more serious. Mr Douglas set out the genuine concerns clearly, and said Aurecon was committed to helping Ms Dowlut succeed. Further, he felt Ms Dowlut had the ability to make the required improvements if she accepted and acted on the criticisms.

[60] Based on the evidence before the Authority, I accept Aurecon had not pre-determined the outcome of the annual performance review discussion and it was genuinely open to Ms Dowlut’s feedback. I am persuaded Mr Douglas was genuine when he said in evidence he felt Ms Dowlut could quickly improve her performance with the right support, and his attempt to implement the monthly check-ins was to provide some structure to that support. Unfortunately Ms Dowlut declined to take up the offer.

[61] In all, I find Aurecon reached the decision to give Ms Dowlut the “needs improvement” rating based on a fair process, and it was a decision open to a fair and reasonable employer to make.

#### *Performance improvement plan*

[62] Mr Douglas followed his 11 May letter by inviting Ms Dowlut to a fortnightly check-in starting on 24 May, which Ms Dowlut declined.

[63] Mr Douglas raised with Ms Dowlut that Aurecon was concerned about the lack of progress in performance improvement, and noting she had refused to meet to discuss the concerns raised. On 7 July, Aurecon proposed to continue with regular performance check-ins and due to Ms Dowlut declining meeting invitations, a performance meeting did not occur until 13 July. To prepare for the 13 July meeting, Mr Douglas spoke to

other managers including Mr Ellis to see whether there had been any improvement in Ms Dowlut's performance.

[64] On 13 July, Mr Douglas attended the meeting with Ms Dowlut, with Ms Ye in support. Although Ms Dowlut was originally on an informal improvement or enhancement plan, which included check-ins and feedback on progress, Ms Ye stepped in to support Mr Douglas because the relationship had broken down based on allegations Ms Dowlut had made about Mr Douglas bullying her. Ms Ye described the meeting on 13 July as difficult. Ms Dowlut interrupted and talked over Mr Douglas. However Ms Ye was clear an outcome of the meeting was Ms Dowlut was instructed not to send anything to the client on the major project directly. This was disobeyed on 21 July when Ms Dowlut sent another invoice directly to a client, which was reported to Mr Douglas by Mr Ellis.

[65] Before the Authority, Ms Dowlut continued to deny any wrongdoing in relation to client communication. Mr Ellis said he specifically asked Ms Dowlut to send everything to him before it was sent to the client and he did not make a distinction between backing sheets, draft invoices, and final invoices. Ms Dowlut said she had not been given a direct instruction not to contact clients directly and she also differentiated between draft file excel sheets, and final invoices and did not consider the invoice she sent to the client was covered by the same instruction. I was not persuaded by Ms Dowlut's logic in denying the instruction had been given and also disputing what the instruction was. Having reviewed the documents and heard from the witnesses from Aurecon, I find it is more likely than not that Aurecon (through Mr Ellis, Mr Douglas and Ms Ye) instructed Ms Dowlut on multiple occasions not to contact clients directly without project manager approval, and she acted contrary to those instructions. Even if the scope of the instructions had been unclear (which I do not accept), Ms Dowlut was on notice about her communications to clients and it was objectively unwise of her to continue to send anything directly to clients without prior project manager approval.

[66] Ms Dowlut was disadvantaged by the actions Aurecon took in her PIP and as a result of the outcome of it. Ms Dowlut was removed from working on a major project which at the time accounted for around 20 hours of work a week. She was required to look for other project work within Aurecon. I accept there would have been a loss of status and she felt disadvantaged by not continuing to have the experience of working on the major project (although I also note the evidence of Mr Ellis that Ms Dowlut

continued to work on timesheets after she had been removed from the project and should not have had any involvement at all).

[67] However, despite any disadvantage, I find Aurecon's actions in attempting to implement a performance improvement process and plan, and in removing Ms Dowlut from the major project, were the actions of a fair and reasonable employer in the circumstances at the time, and they were justified. Aurecon assessed Ms Dowlut's direct communication with the client as presenting both a business and reputational risk. It only withdrew the major project in response to concerns it had and had raised with Ms Dowlut on multiple occasions - in relation to Ms Dowlut's contact with the client which was in direct opposition to instructions from Mr Ellis which were reiterated by Mr Douglas. For the sake of completeness, I also record although Ms Dowlut seems to have been under the impression it was Ms Ye who "threatened" and then "withdrew responsibility" for the major project from her, the decision was a business decision made by Aurecon through Mr Douglas and Mr Ellis.

[68] I conclude it was open to a fair and reasonable employer to implement a performance improvement process involving fortnightly check-ins and regular progress reviews, with an expectation being set that Ms Dowlut's performance would improve after four weeks.

[69] Ms Dowlut's refusal to respond to genuine performance concerns and engage with attempts to help her to improve did not demonstrate her duty to act in good faith towards Aurecon by being active and constructive in maintaining a productive employment relationship and in particular, being responsive and communicative.<sup>2</sup> Ms Dowlut's evidence to the Authority was characterised by inflexible adherence to her own technical interpretations. Her response to feedback and lawful and reasonable instructions from Aurecon was to challenge, deflect and – in the most extreme examples - raise allegations and complaints against individuals entirely devoid of merit or substance.

[70] Ms Dowlut has also attempted, in submissions, to say Aurecon has breached her individual employment agreement on the basis she had a "right" to resolve her employment relationship problem in the Authority. These claims are unsubstantiated. Ms Dowlut's employment agreement states employment relationship problems can be

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<sup>2</sup> Employment Relations Act 2000, section 4(1A)(b).

addressed by raising a personal grievance and the Authority is also available when required. She did not have a “right” to resolve her employment matters through the Authority, she had the right to bring a claim, which she exercised. That did not stop Aurecon’s processes, and it was obligated to continue to attempt resolution of the employment relationship problem in good faith.

*Conclusion on disadvantage*

[71] Based on the evidence before the Authority, Aurecon acted as a fair and reasonable employer could when carrying out the performance review and performance improvement processes. Ms Dowlut was not unjustifiably disadvantaged.

**Was Ms Dowlut unjustifiably dismissed?**

[72] I turn now to consider the process around and reasons for Ms Dowlut’s dismissal.

*Applicable law*

[73] In determining whether a dismissal was unjustified, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether Aurecon’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[74] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person’s employment.<sup>3</sup>

[75] I need to assess whether the decision Mr Hughes made on Aurecon’s behalf to dismiss Ms Dowlut for serious misconduct and irreparable harm to the relationship of trust and confidence, and how Mr Hughes reached that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- (a) Aurecon fully and fairly investigated the allegations against Ms Dowlut before dismissing her;

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<sup>3</sup> Employment Relations Act 2000, s 4(1A).

- (b) Aurecon raised the concerns it had with Ms Dowlut (including giving her relevant information) before dismissing her;
- (c) Aurecon gave Ms Dowlut a reasonable opportunity to respond to its concerns before dismissing her;
- (d) Aurecon genuinely considered Ms Dowlut's explanations before dismissing her (the decision was made without predetermination).

[76] The Authority may take into account other factors as appropriate and must not determine the dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Dowlut being treated unfairly.<sup>4</sup> While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to consider, evidence an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable. It is not the role of the Authority to substitute its view for that of the employer.<sup>5</sup>

[77] In considering whether Aurecon met the standard of reasonableness, the Authority is empowered to make a factual inquiry about whether Aurecon had a sufficient and reliable evidential basis for concluding Ms Dowlut had committed an act or acts of serious misconduct as a first step. In relation to the issue of disobeying instructions, the Court of Appeal has held:

...ultimately the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal.<sup>6</sup>

[78] The Court also noted of the mutual obligation of good faith:<sup>7</sup>

The obligation to act reasonably and in good faith in pursuing contractual rights rests upon the employee as well as the employer. The genuineness of the employee's behaviour, which is central to the character of the act of disobedience, is to be judged objectively in the light of all the circumstances, including the way in which resolution of the dispute is approached.

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<sup>4</sup> Employment Relations Act 2000, s 103A(5).

<sup>5</sup> *Angus v Ports of Auckland Limited* [2011] NZ EmpC 160.

<sup>6</sup> *Sky Network Television v Duncan* [1998] CA284/97.

<sup>7</sup> Above n6.

[79] The second step is to determine whether dismissal is warranted in all the circumstances which may include an assessment of trust and confidence.<sup>8</sup> The Court of Appeal held:<sup>9</sup>

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is essential of the employment relationship.

*Analysis of procedure*

[80] Mr Hughes first took over the disciplinary process because of the seriousness of Ms Dowlut's allegations and the impact on staff in the Transport team and others in the local office. Mr Hughes was also aware of strain on the team and challenges with the major project as he sat on the governance group.

[81] On 24 July 2023, Mr Hughes wrote to Ms Dowlut inviting her to a disciplinary meeting to discuss:

- (a) Continued unsatisfactory performance.
- (b) Unwillingness to accept performance feedback.
- (c) Impact of performance and conduct on other managers.
- (d) Failure to follow reasonable instructions.

[82] Aurecon has a Disciplinary Policy for Misconduct / Serious Misconduct, New Zealand. The policy provides a disciplinary procedure, and says an example of serious misconduct can include serious or repeated failure to follow a reasonable instruction. The concerns Aurecon had relating to the code of conduct were particularly around Ms Dowlut following directions, taking feedback, and communication. Mr Hughes expressed the concerns, and advised Ms Dowlut that the concerns, if established, could amount to serious misconduct and that her employment with Aurecon was at risk.

[83] When Mr Hughes sent the letter on 25 July, Ms Dowlut had been admitted to hospital, but I accept Mr Hughes was not aware of this at the time. In light of the medical certificate Ms Dowlut produced, Mr Douglas agreed to pause the disciplinary process until her return to work, and Ms Dowlut was provided with paid special leave for the week up to 31 July. On 31 July, Ms Dowlut wrote to Mr Hughes saying that she had resumed work as of that day, was "feeling ok" and had a doctor's appointment at

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<sup>8</sup> *Waitoa v Chief Executive of the Ministry of Social Development* [2021] NZEmpC 113 at [56] and [57].

<sup>9</sup> *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487.

lunch for a follow up. Mr Hughes wrote requesting Ms Dowlut provide medical information about her claim that Aurecon's communications caused the medical event, and any medical information she wanted considered as part of the disciplinary process.

[84] During August the parties attended two private mediations. At the conclusion of these, on 22 August Mr Hughes invited Ms Dowlut to a meeting on 25 August. Ms Dowlut requested the disciplinary meeting invitation be withdrawn, which Aurecon declined. Ms Dowlut then said Aurecon could not proceed due to legal advice and health status. Ms Dowlut also said her current medical assessment is unfavourable to be part of any disciplinary discussions. There was communication back and forth about Ms Dowlut's health and whether the disciplinary process could proceed. Ms Dowlut provided a medical certificate from her doctor on 24 August which stated his support for Ms Dowlut to "not continue with any work-place meetings, performance reviews or disciplinary actions until the current investigation through the Employment Relations Authority has concluded".

[85] In response to this medical certificate, Aurecon requested further and better medical information and in particular, sufficient information for it to understand and assess her condition and the reasonableness of her request to delay the disciplinary process. Aurecon offered to pay for Ms Dowlut to obtain a further medical certificate.

[86] Ms Dowlut claims the progress of the disciplinary process was unreasonable because it should not have continued in light of her medical issues supported by the medical records of her hospital admission and her doctor's certificate, harassment complaints she was making about the communications, and her statement of problem lodged with the Authority.

[87] Ms Dowlut says Aurecon faked the impact of "reputational damage" to justify its decision to discipline and ultimately dismiss her. Aurecon should have accepted her medical certificates as being genuine and sufficient. She says Aurecon acted in "defiance" of medical recommendations, which was a serious breach of good faith and her employment agreement, and led to a relapse of her health conditions. Ms Dowlut says the nature and content of communications from Aurecon were threatening, distressful and perpetual and Aurecon engaged in threatening behaviour and abuse of authority to cause harm and tarnish her career through allegations of serious misconduct. She says there was no serious misconduct, and there was a deliberate

attempt by staff to pursue false allegations that discriminated unfairly during performance review and clear proof of bullying and harassment.

[88] Aurecon says it was reasonable for Mr Hughes to proceed and require Ms Dowlut to participate in the disciplinary process because the medical information did not suggest it was unsafe to require Ms Dowlut to attend a meeting or respond in writing. Steps had been proposed to mitigate any medical response which Aurecon considered fair and reasonable. The evidence Aurecon had at that time was Ms Dowlut had engaged in significant (in terms of volume, frequency and subject matter) correspondence with Aurecon and the Authority since 24 July and throughout August, and there was no evidence to suggest she was incapable of responding in writing. The weight of the evidence suggests she made a conscious decision not to participate in the disciplinary process, and in those circumstances it was fair and reasonable for Aurecon to proceed.

[89] The first issue I have to consider in terms of process is whether Aurecon's actions in continuing with the disciplinary process in light of Ms Dowlut's requests to delay or withdraw the process were the actions of a fair and reasonable employer in the circumstances. I then have to consider whether Aurecon sufficiently investigated the allegations, raised concerns, gave Ms Dowlut a reasonable opportunity to respond and genuinely considered any explanations. Determining these issues first necessitates a close examination of the process Aurecon followed.

[90] When Mr Hughes attempted to advance the disciplinary process, which had been paused for medical reasons and private mediations, Ms Dowlut requested the process be indefinitely paused due to her "health status". Mr Hughes asked for more information about the nature of her health concerns. Ms Dowlut says she did not attend the disciplinary process meetings because she believed she could die - she viewed herself as an ailing person in recovery. Mr Hughes asked for further information on her diagnosis as it was incomplete. He approved further special paid leave for Ms Dowlut on 25 August and offered payment of reasonable costs to obtain further medical information.

[91] On receiving a second doctor's letter dated 31 August 2023, Mr Hughes considered the totality of the information and decided there was no clear diagnosis or underlying condition. However he accepted Ms Dowlut had suffered a situational medical response, and he considered the effects of this (or likelihood of a repeat) could

potentially be mitigated. Mr Hughes proposed steps Aurecon could reasonably take to mitigate any health impacts of the disciplinary process. Ms Dowlut did not accept the mitigation steps because the parties were already in a mediation process, and she said she was unable to engage with Mr Hughes' correspondence. She had medical letters confirming she should not attend stressful meetings and from her perspective, that should have been sufficient for Aurecon to stop the process.

[92] Over this time, Mr Hughes had scheduled multiple disciplinary meetings which were then delayed, and rescheduled. The first was 28 July, then 25 August, 6 September and finally 8 September 2023.

[93] On 8 September, Mr Hughes requested Ms Dowlut respond to Aurecon's concerns in writing by 12 September, following which he told Ms Dowlut he would provide her with a preliminary view on potential disciplinary outcome. Ms Dowlut sent brief feedback on 11 September, which Mr Hughes took into account. There was a further meeting scheduled for 15 September, which Ms Dowlut declined for medical reasons. Aurecon gave Ms Dowlut the opportunity to provide further feedback in writing instead. Aurecon sent Ms Dowlut a preliminary decision on 19 September. On 22 September in the absence of any substantive response to his preliminary view, Mr Hughes wrote to Ms Dowlut to confirm his preliminary view and dismiss her.

[94] Based on the evidence before the Authority, I find Aurecon followed a fair and reasonable process. Mr Hughes' decision to progress the disciplinary process was open to a fair and reasonable employer to make, based on the information available to him at the time.

[95] Firstly, Mr Hughes invited Ms Dowlut to a meeting on the day she had been admitted to hospital – a fact he was unaware of at the time. I accept Ms Dowlut suffered a medical event on 24 July 2023. However, Aurecon's reasonable response was to pause the process including postponing the proposed disciplinary meeting on 28 July, while further enquiries were made about Ms Dowlut's health. The invitation to the disciplinary meeting was not withdrawn, but paused in light of Ms Dowlut's hospital admission.

[96] When Ms Dowlut resumed work on 31 July however, Mr Hughes was satisfied Ms Dowlut could carry on with work and disciplinary processes provided she had appropriate support. I accept that was a reasonable position to take in the circumstances

because Ms Dowlut was discharged from hospital the day after her admission, with no follow-up treatment planned and was declared fit to resume work on 31 July.

[97] On 31 July, Aurecon requested any information Ms Dowlut wanted considered as part of the disciplinary process. Mr Hughes said his intention in asking for further medical information was to help his understanding of Ms Dowlut's medical requirements based on her underlying condition or diagnosis. Instead, when Mr Hughes attempted to restart the disciplinary process on 22 August by inviting Ms Dowlut to a meeting, she declined to be involved and alleged Mr Hughes had a criminal motivation to harm her.

[98] Ms Dowlut's general practitioner gave evidence to the Authority. He said Ms Dowlut's diagnosis at the time of her hospital admission and subsequently was ambiguous, but there would have been elements that were concerning to her. To provide context, Ms Dowlut's doctor said the medical certificate he provided on 24 August 2023 (approximately one month after Ms Dowlut's hospital admission) was based on a 15-minute appointment, and relied on Ms Dowlut's self-reported symptoms and clinical notes of her hospital admission. In light of the ambiguity about Ms Dowlut's medical diagnosis, I find it was open to Mr Hughes as a fair and reasonable employer to decide the disciplinary process could proceed with appropriate mitigation steps in place. Aurecon designated Mr Hughes to see the disciplinary process through and he carried out as much due diligence about Ms Dowlut's condition as was reasonable in the circumstances. Mr Hughes said he was genuinely concerned for Ms Dowlut, and there was difficulty in terms of what the nature of the medical diagnosis actually was. That accords with the report from Ms Dowlut's general practitioner.

[99] I also accept as time went on, Mr Hughes reasonably began to have doubts about the genuineness of Ms Dowlut's claimed lack of fitness to participate in Aurecon's disciplinary process.

[100] At first, Ms Dowlut expressed reluctance to provide medical information to Aurecon, claiming it was private and sensitive and she had good reason not to divulge too much. This was a claim she later mostly resiled from when she provided Aurecon with further (though still incomplete) medical information.

[101] Ms Dowlut claimed she could not even read Mr Hughes' communications because she was too unwell. It surprised Mr Hughes to learn at the Authority that Ms

Dowlut had not been reading his communications, because the specificity of her responses suggested otherwise. This claim was also inconsistent with Ms Dowlut's other actions at the time, in particular raising and progressing complaints with WorkSafe New Zealand, the New Zealand Police, and the Authority. Between 24 July and early October 2023, Ms Dowlut was engaging in a significant amount of correspondence with Aurecon and other agencies on a range of issues.

[102] Despite his legitimate doubts about Ms Dowlut's condition, Mr Hughes approved paid special leave for Ms Dowlut because she had exhausted her sick leave and annual leave entitlements. He also proposed ways in which Ms Dowlut could engage with the disciplinary process that would not exacerbate her symptoms. Ms Dowlut did not engage with Aurecon about mitigation steps. As it later transpired, Ms Dowlut did not even discuss the proposed mitigation steps with her doctor. She chose not to provide written submissions in response to the concerns Aurecon had raised, which Aurecon proposed as a reasonable alternative to a meeting on more than one occasion. I have carefully considered the communications Aurecon sent to Ms Dowlut over this time, and conclude they are measured and professional. I do not accept Ms Dowlut's categorisation of the nature and content of the communications as threatening, although I accept she may have genuinely been distressed by them because she did not wish to engage in the disciplinary process.

[103] I also take into account since the time of her annual performance review discussion on 8 May 2023, Ms Dowlut had exhibited a pattern of deflecting and avoiding circumstances where she did not wish to confront performance issues legitimately being raised with her. In the context of that history, the paucity and lack of specificity of medical information about Ms Dowlut's diagnosis, her unwillingness to engage about any mitigation steps, and the inconsistency of her behaviour in engaging with other objectively stressful processes, it was fair and reasonable for Aurecon to decide to proceed with the disciplinary process. Viewed objectively, I am persuaded Aurecon's position was reasonably held - there was no medical reason for Ms Dowlut not to participate in the disciplinary process and she had made a conscious decision not to do so.

[104] Although I accept it was not available to Aurecon at the time of the disciplinary process, I am reinforced in that view by the fact Ms Dowlut provided Aurecon with a follow-up medical certificate on 6 October 2023, which reports she is medically fit and

able to perform normal work duties with no limitations imposed, and with no further follow up planned.

[105] In the circumstances, Aurecon acted as a fair and reasonable employer could throughout the disciplinary process.

*Substantive justification*

[106] Ms Dowlut denies the allegations of serious misconduct. She denies she was given reasonable performance feedback, and denies she acted contrary to reasonable instructions. Ms Dowlut also says Aurecon has exaggerated the reputational and professional credibility impact of her actions to justify her dismissal. She did not engage directly with Aurecon about the serious misconduct concerns, consistently claiming Mediation Services or the Authority would be the appropriate arbiter of the facts.

[107] Aurecon says it was reasonable to conclude the disciplinary concerns about Ms Dowlut's conduct were established and they amounted to serious misconduct. It was also reasonable to conclude Ms Dowlut's conduct had irreparably harmed Aurecon's essential trust in her to perform her role professionally, constructively and consistently. The issues from Aurecon's perspective had moved beyond mere non-performance, and went to the heart of trust and confidence in the relationship because of Ms Dowlut's failure to engage with its people and processes – beginning with the performance review process, and concluding at the end of the disciplinary process. Aurecon says it was untenable and unworkable for a project consultant to refuse to accept reasonable and constructive feedback, refuse to engage about steps to improve and refuse to follow clear instructions. In those circumstances, termination of Ms Dowlut's employment was reasonable due to trust and confidence in the relationship being deeply impaired or destroyed.

[108] The onus is on Aurecon to show it had a reasonable belief of serious misconduct warranting dismissal. It must show it carried out a proper inquiry to enable it to form such a belief. On the facts of this matter, Aurecon also has to establish it had good reasons for losing trust and confidence in Ms Dowlut.

[109] Based on the evidence before the Authority, Aurecon met the test of justification in s 103A of the Act, in that I find its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[110] Aurecon consistently communicated its concerns to Ms Dowlut about her conduct from 24 July when Mr Hughes first invited her to a disciplinary meeting. There were four allegations raised, which were all supported by examples. Mr Hughes says in his notice of preliminary decision that Aurecon has been attempting to resolve its concerns in relation to unsatisfactory performance since May 2023, and it had been attempting to meet with Ms Dowlut to assist her to improve since that time. In relation to the fourth allegation, Mr Hughes notes there have been repeated instances of Ms Dowlut failing to follow Aurecon's reasonable instructions not to contact clients directly months after Aurecon brought the issue to her attention. Aurecon believed engaging in mediation might offer an alternative solution to disciplinary action and a disciplinary outcome, and attended four mediations over the course of three months.

[111] Based on the evidence before the Authority, I find Aurecon sufficiently investigated the allegations. Aurecon raised its concerns with Ms Dowlut on multiple occasions, gave Ms Dowlut ample opportunity to respond and genuinely considered the (admittedly limited) feedback Ms Dowlut did give. Aurecon scheduled five disciplinary meetings to obtain Ms Dowlut's views, which I find demonstrates openness to hearing her feedback. I also find Aurecon's participation in multiple mediations supports that its decision to dismiss Ms Dowlut was made after considering reasonable alternatives. Ms Dowlut's conduct throughout the performance review, performance improvement and then disciplinary processes reinforced the concerns Aurecon reasonably held, and contributed to its loss of trust and confidence in her.

[112] I note for the sake of completeness that Aurecon invites me to make a credibility finding in relation to evidence Ms Dowlut produced at the investigation meeting, but I find it not to be necessary to do so because I find Aurecon's actions were justified.

[113] I am satisfied after considering all the evidence and submissions before the Authority, that the decision to dismiss Ms Dowlut was one which a fair and reasonable employer could have made in all of the circumstances. I accept Ms Dowlut's conduct had deeply impaired or destroyed the basic trust and confidence Aurecon had in the relationship.<sup>10</sup> Ms Dowlut's claim that she was unjustifiably dismissed does not succeed.

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<sup>10</sup> *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 6.

## **Other personal grievance claims**

### *Discrimination and racial harassment*

[114] Ms Dowlut claims she has been both discriminated against in her employment<sup>11</sup> and racially harassed in her employment.<sup>12</sup> Discrimination in employment, in the present context, means not offering Ms Dowlut the promotional opportunities or conditions of work that have been offered to other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances.<sup>13</sup> Racial harassment means an employer or their representative has used language, visual material or physical behaviour that ridicules or expresses hostility against the employee on the ground of race, which is hurtful or offensive and which has a detrimental effect on the employee's employment, job performance or job satisfaction.<sup>14</sup>

[115] Before the Authority, Ms Dowlut said her claim of discrimination relates to starting her employment on a lower wage than other employees, and not advancing through the different levels of Consultant. Aurecon says any personal grievance claim relating to when Ms Dowlut started her employment is now well outside the 90-day period.<sup>15</sup>

[116] Ms Dowlut also claims the negative feedback she received about her performance was due to harassment, discrimination and racism. Ms Dowlut first raised claims of racism and bullying at her performance review discussion with Mr Douglas and the Principal on 8 May 2023. She said she was not allowed to talk and was forcefully told to be quiet – an allegation that was not substantiated by Aurecon's review of her bullying and harassment claims. She alleged Mr Douglas and the Principal were dismissive and unsupportive. She alleged Ms Eveleigh showed aggression, competitive nature and rivalry and she would trigger disputes and belittlement. In the summary of allegations Ms Dowlut later provided on 26 June, she categorised behaviour towards her as "aggressive", "authoritative" and/or "rude". She also says discrimination was evident in the fact new staff were recruited at a higher level and she should have been made a Level 6 project manager. She said Mr Ellis, Ms Eveleigh and Mr Douglas were not fit to provide performance appraisals and there was a deliberate

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<sup>11</sup> Employment Relations Act 2000, s 103(1)(c).

<sup>12</sup> Employment Relations Act 2000, s 103(1)(e).

<sup>13</sup> Employment Relations Act 2000, s 104.

<sup>14</sup> Employment Relations Act 2000, s 109.

<sup>15</sup> Employment Relations Act 2000, s 114.

attempt to cause prejudice and harm in her career growth and promotion. She further says the withdrawal of the major project on 24 July was due to bias, discrimination and an attempt to harass.

[117] Aurecon says the allegations of harassment, discrimination and racism are not only entirely without evidence, the claims are wholly unreasonable and unjustified. Ms Ye conducted a preliminary investigation of Ms Dowlut's claims after she received more detail of the allegations, by seeking written feedback from the named managers. She concluded there was not sufficient evidence to justify or require a formal investigation – a decision that Aurecon informed Ms Dowlut of on 3 July.

[118] I accept Aurecon's submission that any claims relating to the start of Ms Dowlut's employment are out of time. Aurecon does not consent to the claims being raised and no exceptional circumstances are claimed. Related to the claims about level and progression, Ms Dowlut provided no evidence she started her employment on a lower level than she should have, or that she was failing to progress through Aurecon. Aurecon says it did not discriminate against Ms Dowlut by reason of any of the prohibited grounds under the Act<sup>16</sup> and I accept that. There is no evidence of discrimination other than Ms Dowlut's assertions.

[119] In relation to the racial harassment claim, Ms Dowlut has provided no evidence there was any behaviour exhibited by Aurecon or its representatives that expressed hostility against her on the basis of her race. The feedback from relevant managers on Ms Dowlut's performance was detailed with clear and coherent examples.

[120] I find Aurecon followed a fair and reasonable process in responding to Ms Dowlut's allegations of racism and bullying. Ms Ye gave evidence she reviewed the definition of "bullying" in Aurecon's policy and carefully considered Ms Dowlut's summary document, and the responses of individuals involved. Based on the evidence before the Authority, it was open to Aurecon acting as a fair and reasonable employer to decide the allegations did not require more than a preliminary investigation and response. Given the timing of the complaints, it seems likely Ms Dowlut raised claims of racial harassment and discrimination in direct response to receiving (what she perceived as) negative feedback on her performance. I am persuaded by Aurecon's submission the pattern that emerged was when Ms Dowlut's work was reviewed and

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<sup>16</sup> Employment Relations Act 2000, s 105.

she was held to account she responded by becoming defensive, questioning others' qualifications and expertise, and ultimately, making unfounded accusations to deflect from the performance issues that were fairly and reasonably being raised with her. I conclude there was no evidence of bullying or harassment and it was open to Aurecon acting as a fair and reasonable employer to conclude the same.

[121] There is absolutely no credible claim any performance feedback was related to Ms Dowlut's race. Given the lack of evidence and foundation for these claims, I find they are wholly unsupported and cannot succeed. I find no evidence Ms Dowlut was discriminated against, or subject to racial harassment in her employment.

*Adverse conduct for a prohibited health and safety reason*

[122] Under this head of personal grievance, the employee's employer must have, in relation to the employee, engaged in adverse conduct for a prohibited health and safety reason.<sup>17</sup> Adverse conduct is defined as dismissal, refusing to offer work and opportunities on the same terms as others, retirement / resignation, and other detriment.<sup>18</sup> Prohibited health and safety reasons are defined in s 89 of the Health and Safety at Work Act 2015 (HSWA), and relate primarily to the exercise of roles and powers under HSWA including those of health and safety representatives. The prohibited health and safety reason must be a substantial reason for the conduct, and not merely a reason.<sup>19</sup>

[123] Ms Dowlut says Aurecon through Ms Ye has breached the Act by engaging in adverse conduct for a prohibited health and safety reason. She says Ms Ye made the decision to remove her from the major project without the involvement and agreement of Mr Douglas, and without taking into account her consultation with a technical expert on the matter, with an attempt to deceive. Ms Dowlut also says communications sent by Aurecon were accusatory and lacked evidence, and this was retaliation against Ms Dowlut for lodging a claim in the Authority. She says the harassing and threatening nature of email communications aggravated her medical conditions and evidence she provided of the health impact were "defied" by the company.

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<sup>17</sup> Employment Relations Act 2000, s 103(1)(j).

<sup>18</sup> Employment Relations Act 2000, s 110.

<sup>19</sup> Employment Relations Act 2000, s 110 (3).

[124] Aurecon says it has not taken any adverse actions against Ms Dowlut including dismissing her for a prohibited health and safety reason.

[125] Although this claim somewhat overlaps with other claims, I note again Ms Dowlut's removal from the major project was an Aurecon decision to mitigate risk it perceived to its business. There is simply no credibility to the claim Ms Ye (or Aurecon) removed Ms Dowlut from the project in retaliation for her raising bullying and harassment claims and removing her from the project was motivated by a desire to cause Ms Dowlut physical harm to her health, safety and wellbeing. As I have noted earlier, I have considered the communications from Aurecon and do not accept Ms Dowlut's categorisation of any of the communications as harassing or threatening.

[126] Ms Dowlut was not acting in a role or exercising powers under HSWA. There is no evidence Aurecon acted against her for a prohibited health and safety reason. This claim is not only misconceived in law, but is totally unsupported on the evidence. I find it cannot succeed.

[127] In submissions, Ms Dowlut attempted to introduce a new claim under s103(1)(j)(ii) in relation to contravening s 92 of HSWA on the basis she was coerced, intimidated and Aurecon forcefully persisted in its disciplinary process. This claim is out of time, being raised more than 90 days after the action being complained of, and in any case would not have succeeded being misconceived in law and totally unsupported on the evidence.

#### *Claim of discrimination under the Equal Pay Act*

[128] The Equal Pay Act concerns issues of pay disparity on the basis of the sex of the employees.<sup>20</sup>

[129] Ms Dowlut says she does the same work as colleagues at Levels 6, 7, and 8 on similar projects in terms of responsibilities and accountabilities. She says Mr Douglas knew about the disparity.

[130] Aurecon says there was no discrimination, and the elements for a cause of action under the Equal Pay Act are not made out.

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<sup>20</sup> Equal Pay Act 1972.

[131] There was no evidence of pay disparity on the basis of sex. The onus is on Ms Dowlut to provide a credible evidential basis for her claim. This claim is misconceived in law, and is unsupported by the evidence. I find it cannot succeed.

*Retaliation in relation to Protected Disclosure*

[132] An employee may have a claim for a personal grievance on the basis the employer has retaliated, or threatened to retaliate against them because the employee intends to make or has made a protected disclosure.<sup>21</sup> The protected disclosure has to be a substantial reason for the employer's actions, and the burden of proof is on the employer.<sup>22</sup> A disclosure of information is a protected disclosure if the discloser believes on reasonable grounds there is or has been serious wrongdoing in or by their organisation, discloses information in accordance with the Act and not in bad faith.<sup>23</sup>

[133] Ms Dowlut says she reported the behaviour of senior members of Aurecon and their malpractice to seek resolution and justice. Although the basis for her claim is not entirely clear, Ms Dowlut's claim appears to be that she made a protected disclosure to Aurecon (internally) and to the Authority (externally). Ms Dowlut says communications sent by Aurecon were accusatory and lacked evidence, and this was retaliation for Ms Dowlut engaging with the Authority process.

[134] Aurecon says it is unclear what is alleged to be a protected disclosure. To the extent this relates to bullying or Ms Dowlut's application to the Authority, Aurecon says it has not retaliated against her, and the reasons for dismissal were clearly set out and reasonably founded.

[135] In relation to the disclosures Ms Dowlut says she made to Aurecon about bullying and harassment, I find Aurecon responded appropriately and has satisfied me there was no evidence of retaliation in any of its actions that followed the making of the alleged disclosure.

[136] The Authority is not an "appropriate authority" to whom a protected disclosure can be made.<sup>24</sup> There being no protected disclosure or intention, Aurecon cannot logically have taken any retaliatory action in respect of it.

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<sup>21</sup> Employment Relations Act 2000, s 103(1)(k).

<sup>22</sup> Protected Disclosures (Protection of Whistleblowers) Act 2022, s 21.

<sup>23</sup> Protected Disclosures (Protection of Whistleblowers) Act 2022, s 9.

<sup>24</sup> Protected Disclosures (Protection of Whistleblowers) Act 2022, s 25.

[137] This claim is misconceived in law and unsupported by the evidence. I find it cannot succeed.

### **Remedies**

[138] None of Ms Dowlut's claims have succeeded and she is therefore not entitled to an assessment of remedies.

### **Non-publication orders**

[139] On 21 November 2023, I made interim non-publication orders, which were to continue in force until further order of the Authority.<sup>25</sup> I now make the following non-publication orders permanent on the basis of privacy, and because it is not in the public interest for the following information to be published:

- (a) Client names, identifying details and commercially sensitive information relating to clients of Aurecon.<sup>26</sup>
- (b) Names of Aurecon's staff other than witnesses. Witnesses have been named in this determination.
- (c) Non-publication of Ms Dowlut's doctors' and surgeons' names. Ms Dowlut's general practitioner was a witness in the proceeding but there was no objection to the non-publication of his name and I find it is not in the public interest for him to be named in this determination.
- (d) Specific details of Ms Dowlut's medical diagnosis. Ms Dowlut did not seek the fact of her conditions, hospital admissions, or medical certificates to be subject to the order. Aurecon did not object to the non-publication, although noted the difficulty of determining the issues without reference to medical information. I consider it is in the interests of justice that Ms Dowlut's medical information is kept private to the extent possible, and I have limited discussion of Ms Dowlut's specific medical information in this determination.

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<sup>25</sup> Employment Relations Act 2000, schedule 2, clause 10(1).

<sup>26</sup> This includes documents 8, 9, 12, 14, 18 and 49 of the first bundle of documents, and document 64 of the second bundle.

## **Costs**

[140] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[141] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Aurecon – as the successful party - may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Dowlut will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[142] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>27</sup>

Natasha Szeto

Member of the Employment Relations Authority

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<sup>27</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)