

[2] Both parties seek a permanent non-publication order and I have considered further submissions on the issue.

[3] The applicant has legitimate concerns that the central issues in dispute relate to private health matters that do not warrant any public interest and that allusions to the applicant's health may have an unfair and discriminatory impact upon her in future employment applications. The respondent party has highlighted the fear of negative media comment on their business and their workers desire for anonymity and fear of exposure on social media.

[4] I have balanced this against the parties' objectively legitimate concerns around negative publicity, as I must be satisfied of specific adverse consequences or other compelling reasons to order non-publication - it is a reasonably high standard to meet but it has been achieved here where I consider the applicant to be in a vulnerable situation and likewise the respondent's business.¹

[5] In considering all the factors, including the circumstances of the employment relationship ending, I make the non-publication order permanent.

[6] I use the following random identifiers for the applicant, the respondent company and sole director who gave evidence during the investigation meeting. Four employees of the company gave evidence and I will refer to them by their positions. I have redacted parts of evidence and only quoted correspondence where specific detail is necessary:

- OOE - the applicant.
- WQX Ltd - is the respondent company.
- YEI – Sole director of WQX Ltd.

¹ See *Erceg v Erceg* [2016] NZSC 135 and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511 and *FVB v XEY* [2020] NZEmpC 182 and *GF v NZ Customs Service* [2021] NZERA 382.

Employment relationship problem

[7] OOE was employed by WQX Limited (WQX Ltd) from 29 July 2021 in a dispatch/operations role working in a plant nursery. The employment ended summarily on 8 April 2022 in disputed circumstances.

[8] OOE is claiming that she was unjustifiably dismissed and unjustifiably disadvantaged and is seeking lost wages and compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[9] WQX Ltd says that the dismissal of OOE was justified as she had disregarded a reasonable and lawful instruction to take certain protective measures to mitigate the risk of COVID-19 spread in the workplace and the actions of WQX Ltd were appropriate in all the circumstances.

The Authority's investigation

[10] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I, likewise, have carefully considered the helpful submissions and information provided by both parties and refer to this where appropriate and relevant.

[11] OOE provided a written brief of evidence and answered questions at the investigation meeting. YEI, the sole WQX Ltd director and four current workers, likewise gave evidence for WQX Ltd. I also visited WQX Ltd.'s premises on 9 March 2023, to ascertain the layout of the workplace.

Issues

[12] The Authority must consider:

- (a) Was OOE the subject of actions or omissions by her employer that caused her disadvantage?
- (b) Was OOE the subject of bullying or discriminatory action?
- (c) Did WQX Ltd act fairly and reasonably in enacting measures to mitigate the risk of transmission of Covid-19 in the workplace?
- (d) Was OOE unjustifiably dismissed?

- (e) If WQX Ltd's actions in dismissing OOE do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:
 - i. Lost wages.
 - ii. Compensation under s 123(1)(c)(i) of the Act; and
- (f) If OOE is successful in all or any element of her personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?
- (g) How costs are to be dealt with.

What caused the employment relationship problem?

[13] OOE commenced employment with WQX Ltd on 29 July 2021. The position of dispatch and operations involved collaborating with co-workers potting plants and working in the dispatch area dealing with delivery drivers and occasional public customers. The workplace is a large, partially covered plant nursery with open ends (one accessible by a driveway from a public road) and two enclosed buildings. YEI says WQX Ltd employed around ten employees in various roles. YEI did not work in the day-to-day business as he worked on research and development in a laboratory setting.

[14] OOE described no issues in her employment until pressure was placed upon WQX Ltd to deal with COVID-19 issues toward the end of November 2021: including the emergence of Omicron, the introduction of a vaccine, the need for mask wearing and other precautionary measures. In addition, OOE was experiencing trauma in her personal life with the breakdown of a relationship. OOE shared this information and the impact on her with co-workers and acknowledged that she received personal and practical support.

[15] An initial difficulty for OOE around August 2021, was her decision not to be vaccinated and subsequent pressure from co-workers who had decided to be vaccinated, to reveal her vaccination status. In addition, I heard evidence from co-workers that prior to the debate about vaccines, OOE was sometimes tardy in adherence to mask wearing, hand sanitising and interacting with members of the public and delivery drivers. OOE had also discussed with a co-worker that a relative living overseas had had an adverse reaction to being vaccinated and this was the reason behind her reluctance to be vaccinated.

[16] WQX Ltd witnesses acknowledged that apart from using QR codes, encouraging mask wearing and hand sanitising, they did not initially develop a comprehensive policy to combat the risk of infection spread until mid-January 2022, when the Covid Protection Framework (traffic lights system) moved to red nationwide to deal with the Omicron variant. By early February 2022, vaccination boosters and third vaccine doses were also being utilised.

[17] A flashpoint for OOE was an informal staff meeting convened by YEI on 1 February 2022. Just prior to the meeting YEI says he was getting feedback from co-workers about OOE's reluctance to get vaccinated and adhere to precautionary measures including mask wearing. YEI says at this point, he did not know who was vaccinated but he thought OOE was not.

[18] YEI in his written evidence says this was not a problem per se as he "never wanted to impose a vaccination policy, it's just that I needed to think about what else (WQX Ltd) could do to ensure everyone's health and safety in the workplace."

[19] At the 1 February meeting, YEI acknowledged he openly inquired of OOE's vaccination status whilst her co-workers were present and she did not answer his question. YEI recalled he was admonished by another co-worker for placing OOE in an uncomfortable position.

[20] YEI did not then seek legal advice but decided that he would collaborate with co-workers to devise a Covid response policy that he says utilised Worksafe NZ's vaccination assessment tool. He anonymously surveyed WQX Ltd's workers proposing protective measures and seeking feedback on propositions that included: should wearing N95 masks be compulsory, should 1-2 metre social distancing be adopted and "should vaccination certificates be made compulsory at work?".

[21] As a result of feedback from the survey, YEI determined most workers wanted additional protections "in particular masks and social distancing." This involved the workers including OOE, suggesting having breaks at separate times, creating social bubbles and extra hand-sanitising stations. After this discussion, the focus naturally shifted to how OOE could be accommodated given her vaccination status and mask wearing reluctance.

[22] After a meeting with OOE shortly after 1 February, YEI devised a one-page series of bullet points for her headed “Change Procedures Under Red Covid Restrictions”. It included distancing guidelines at break times, procedures to interact with co-workers, the need to use sanitiser for self and common use equipment and crucially a requirement that OOE wear a N95 mask all day (and in interim a blue surgical mask). The document that OOE signed on 10 February had no mention of OOE’s vaccination status or any requirement to be vaccinated. It was apparent WQX Ltd was not pressuring OOE to be vaccinated.

[23] The issue then became, whether OOE had established grounds for not wearing a mask. In this context, OOE says she made it clear to YEI that her mask wearing reluctance was connected to ongoing trauma she was experiencing and receiving counselling for. OOE says she provided YEI with a copy of a letter from her psychologist on or around 10 February and indicated she was seeking an exemption card to show she was unable to wear a mask. YEI in his written evidence says he vaguely remembered OOE saying she was receiving treatment for trauma and he acknowledged being shown the psychologist’s letter but considered it at the time to be insufficient evidence to support a mask exemption.

[24] The psychologist’s letter that was addressed to the Disabled Persons Assembly (DPA) was brief, it only indicated OOE “is receiving regular psychological treatment for trauma.” OOE says she obtained the letter for the purpose of obtaining a mask exemption that DPA was then issuing. OOE says that YEI was fully aware that her counselling support was connected to the trauma of her relationship breakdown. OOE asserted during the investigation meeting that she had Post Traumatic Stress Disorder (PTSD) and her psychologist’s letter confirmed this as a reason for her not wearing a mask. There was no mention of PTSD in the letter.

[25] WQX Ltd did not challenge the veracity of OOE’s disclosure and during the investigation meeting YEI conceded he was aware that around late 2021 OOE was taking time off for counselling support and that this was connected to her disclosure she had left an abusive personal relationship.

[26] However, YEI on being pressed during the investigation meeting claimed he did not draw any connection between the “trauma” reference in the psychologist’s letter of 8 February and OOE’s past disclosure of abusive relationship issues.

Events leading up to end of the employment relationship

[27] After the exchanges on or around 10 February, OOE obtained a mask wearing exemption card from DPA that she attached to an email to YEI of 11 February. YEI responded questioning the authenticity of the exemption and asked for something from the government. YEI indicated “This looks like something anyone could print from the web” and then he admonished OOE for “not sharing in this mask policy.”

[28] I observe at this point, WQX Ltd took no steps to ascertain the validity of OOE’s DPA issued exemption card. If they had, they would have discovered that no exemption cards being issued had any legal validity. However, DPA had been approved by the Ministry of Health as an issuer of exemption cards. It was not until 27 April 2022, the government announced a process of legally valid exemption cards being issued through the Ministry of Health by the end of May 2022.² Instead in his evidence, YEI says he was aware exemption cards were being abused and he assumed OOE was abusing DPA’s issuing system. YEI’s written evidence explains his perspective at the time as:

I didn’t think I was being unfair, I just needed something to say that (OOE) couldn’t wear a mask. She told me she was receiving psychological treatment, but that doesn’t mean that she couldn’t wear a mask. I’m sure there are many people receiving psychological treatment, but who can wear masks. I just wanted something extra to satisfy myself that I was meeting our obligations, especially as we were frequently dealing with the public.

[29] In addition, YEI says he was under pressure from OOE’s co-workers, saying they did not feel safe working alongside OOE as she was not following other suggested measures (such as social distancing) and they were aware of OOE’s vaccination reluctance. YEI resolved to ask OOE to take some leave to give the parties some breathing space.

[30] Meanwhile on 14 February, in a conversation OOE recorded there was a verbal altercation between OOE and a co-worker about the use of a piece of equipment when OOE was not wearing a mask and the worker suggested OOE was not being a team player and was “playing us all for idiots”. OOE then went to discuss the matter with YEI (she also recorded the conversation claiming she had permission to do so) and was challenged about the validity of her DPA issued mask exemption, YEI describing it as “a joke” and he implored OOE to just be a team player. In response, OOE indicated she could not wear the mask all day and

² See Radio New Zealand News report of 27 April 2022, <https://www.rnz.co.nz/news/political/465971/new-face-mask-exemption-card-will-have-legal-standing-hipkins-says>

offered to wear it when interacting with customers. YEI was dismissive when OOE explained she could not breathe with the mask on all the time and YEI laughingly said, “what are you going to do - drop dead if you wear a mask”. YEI then indicated we would see how this “played out” if she continued to not be a team player.

[31] Later the next day, after another verbal altercation between OOE and a co-worker, YEI approached OOE saying the production manager was “pissed off” by her and he was off for a trip to Otago and while he was away, he did not want OOE at work except for a half day, until 23 February.

First personal grievance

[32] On 22 February 2022, YEI says he determined the best way forward was to accommodate OOE in a temporary office to minimise contact with other workers. He texted OOE on 22 February with this suggestion, to be discussed the next day. In response, OOE raised a personal grievance by email of 27 February contending she was being bullied by co-workers after YEI had pressed her about her vaccination status. OOE reiterated that she considered her DPA issued mask exemption should be respected and contested the suggestion that her working location could be changed without agreement. OOE suggested she had safety concerns with the proposed relocation of her workspace claiming the site proposed was dangerous as it was also used as a tool shed and paint storage area. OOE then recounted in detail her issues of negative interchanges with co-workers. As remedies, OOE sought reinstatement in her former position, a bullying free environment and payment of compensation.

[33] WQX Ltd sought legal advice and responded by letter of 8 March, agreeing to OOE’s suggestion that mediation was the best way forward. In the interim, OOE provided a sick leave certificate up to 14 March and WQX Ltd agreed to pay OOE up to the mediation date. The response however, rejected OOE’s grievances and did not engage with, or suggest how OOE’s complaints about co-workers alleged negative behaviours would be resolved.

[34] In the interim, YEI by email of 9 March, indicated if OOE did not agree to work in the suggested alternative workspace she could only return to working at the front of the building with customer interactions, if she was vaccinated and wore a face mask.

[35] OOE responded by discursively recounting the reasons for why she would not work in the alternative location; emphasising it “needs to be discussed”; reiterated her mask exemption status and right to privacy over her vaccination status and asserted she needed a safe work environment and, requested she be placed on paid special leave.

[36] YEI responded on 11 March with:

Unfortunately, as you are not vaccinated, we cannot risk our health and safety obligations by having you work from the pack-shed office area. We are still exploring what a vaccination policy and/or mask policy may look like, however, we’ve been unable to progress either as you have not engaged with us in good faith.

[37] YEI then emphasised a desire to agree on a temporary alternative working arrangement and said:

If you are uncomfortable working from the workshop office, please provide an alternative proposal. We are happy to discuss changes to the workshop office, to ensure that it is a healthy and safe environment.

Otherwise, we will discuss this further at mediation.

[38] The parties attended an unsuccessful mediation on 17 March.

Mediation aftermath

[39] After the mediation OOE emailed YEI on 20 March, refusing to undertake what she saw as a different role in an alternative work location because she considered it unsafe. OOE then posited that enforcing vaccination mandates was likely to soon change and that government departments were being advised to consider pausing the dismissal of unvaccinated workers.³

[40] I observe the latter point was a reasonable one, the Covid ‘landscape’ was evolving rapidly. Rapid Antigen Test kits (RAT) were becoming available and private sector employers were being urged to reassess their health risk assessments. However, it was also a very uncertain environment and Business New Zealand’s Kirk Hope, noted in a 9 March media article, that vaccination mandates were likely to be soon lifted so he urged caution in dealing with unvaccinated workers. Mr Hope opined business was “caught between a rock and a hard place” in that “they need the staff, but they want to keep their vaccinated staff

³ See <https://www.publicservice.govt.nz/guidance/updated-guidance-for-agencies-on-vaccination-policies-and-associated-dismissals/>.

safe”. Mr Hope concluded the dilemma in stark terms: “In reality unvaccinated people are more likely to transmit and spread the virus. How you deal with that is a real challenge for business”.⁴

[41] OOE concluded her 20 March email requesting guidance on returning to work and gave some options on how that could occur.

WQX Ltd’s response

[42] WQX Ltd responded with a letter of 23 March, headed “Response to Personal Grievance/Letter of Expectation”. After traversing events and their perspective on them, a concession was made in respecting OOE’s right to refuse medical treatment “as a result, (WQX Ltd) did not seek to impose a vaccination requirement”. However, after asserting that they had assessed all reasonably practicable steps to reduce risks, WQX Ltd reiterated that wearing a face mask, despite acknowledging OOE’s anxiety, was the way forward. The letter then proceeded to instruct OOE to “comply with all lawful and reasonable instructions” that were then listed and included in summary that she:

- Wear a stipulated face mask unless a GP’s medical certificate stipulated otherwise.
- Undertake daily Rapid Antigen Testing.
- Refrain from entering shared spaces until advised otherwise.
- Respect social distancing requirements.
- Ensure all customers wear face masks and scan QR codes.

[43] The letter concluded with a warning that failure to comply “may be considered to be misconduct or serious misconduct, and could result in disciplinary action being taken, including the possibility of summary dismissal”. It also emphasised the measures were temporary to meet health and safety obligations and WQX Ltd was till prepared to discuss “temporary alternative working arrangements” once OOE returned to work.

[44] As context, the Auckland University Public Policy Institute records that on 23 March 2022:

⁴ See <https://www.stuff.co.nz/business/127999973/government-departments-advised-to-pause-dismissal-of-unvaccinated-workers>.

Changes are made to the Red Light setting: no limitations on numbers of people gathering outdoors, indoors limit increase to 2000 people. Government announces changes to mandated use of vaccine pass for the 4th April (no longer required at most businesses and venues unless the business chooses to). From that date mandated workplace vaccines are also not required except in health care (aged care and disability workers included) and for border workers.⁵

OOE's responses

[45] OOE responded on 24 March, providing her GP practice policy on mask exemptions which was that they were not issuing such and they did not support the use of exemptions, unless compelling health reasons existed.

[46] YEI emailed back on 27 March indicating: "I look forward to your return to work next week, as per the terms contained within my letter of 23 March 2022". He further acknowledged the advice OOE's GP practice had provided but indicated "this does not satisfy our request for a medical certificate which confirms it is inappropriate for you to wear a mask" and he repeated his view that the DPA issued exemption card was insufficient. YEI also demonstrated he was aware of the government seeking to soon tidy up the mask exemption scheme (changes were not enacted until 4 April 2022).⁶

[47] A further series of adversarial emails between OOE and YEI ensued in the period up to 27 March, when OOE emailed YEI, saying she would return to work the following week "within my regular role and workspace as per my employment contract"; she wanted a safe environment free from discrimination and bullying and, on her return, she would wear her DPA mask exemption card.

[48] YEI emailed back on 27 March, stating he had issued a "lawful and reasonable instruction" and no return was possible until OOE could temporarily meet "the requirements in my letter of 23 March 2022". YEI then suggested, this was a temporary suspension of OOE's usual duties based on health and safety concerns. The email warned if OOE did turn up at work refusing to comply with his directions – "I will be required to consider appropriate next steps: including disciplinary action for failing to comply". OOE responded the same

⁵ *Covid-19 Timeline 2022, Auckland University Public Policy Institute Policy Commons: <https://www.policycommons.aac.nz>*

⁶ Op-cit.

day, reiterating her personal grievance and repeated she intended to return to work without following the requirements of the 23 March letter.

[49] On 28 March, OOE returned to the workplace and proceeded to work unmasked whilst wearing her DPA mask exemption card. OOE was approached by YEI around 9 am. YEI says he reiterated the expectations in the 23 March letter; asked OOE to do a RAT test that she refused unless everyone else had to do the same. OOE also refused to wear a mask. After a heated discussion (that OOE recorded) YEI walked away.

[50] Later the same day (28 March), OOE entered a different work area and YEI approached and told her to work in another location away from co-workers. OOE continued to contest this instruction that caused YEI to get more frustrated and he again walked off with the situation unresolved (interchange also recorded by OOE). OOE then had a break in her car away from co-workers but returned to work and was approached by a co-worker who indicated she was of the belief that OOE had been suspended. Later in the morning, YEI told OOE she could not work in a shared area unless masked – a heated interchange ensued with OOE insisting her actions were justified and YEI expressing frustration that OOE could not see his perspective and her requirement to work as part of a team. OOE was then asked by YEI to leave the workplace after refusing to sign a letter saying she had been suspended.

[51] That evening OOE emailed YEI, setting out her perspective of what had occurred earlier in the day, noting a co-worker had been inappropriately briefed about her suspension before it happened. OOE then related she had contacted Worksafe New Zealand regarding mask wearing and she had been advised to take the matter up with the Employment Relations Authority. OOE then traversed the earlier encounter with YEI and suggested she was being made the victim of bullying and discriminatory actions. OOE confirmed she had agreed to be placed on paid leave but that YEI had suggested suspending her. The letter ended “I will now ask the employment authorities to sort his out”.

Suspension/disciplinary invite

[52] By way of a letter of 30 March, YEI confirmed the earlier decision to suspend OOE from 28 March, “on full pay while an investigation is undertaken into allegations relating to wilful disobedience”. The letter then invited OOE to attend a disciplinary meeting on 5 April: “Due to your failure to wear a face covering”. YEI advised WQX Ltd would be legally represented and OOE was welcome to be likewise. The purpose of the disciplinary meeting

was described as to give OOE an opportunity “to provide any explanation or comment on the allegation that you wilfully disregarded the lawful and reasonable directions” set out in the 23 March letter that were then reproduced. The letter ended with a warning that WQX Ltd were treating the matter as potentially serious misconduct and quoted OOE’s employment agreement definition of such, including:

10.1. Wilful insubordination.

10.2. Refusal to carry out lawful instructions.

10.3. Behaving in an insulting and discourteous manner.

10.4. Acting in a way that may bring discredit to the business or cause offence.

10.5. Conduct that may cause risk to the safety of staff or customers.

10.6. Such behaviour which may deeply impair or destroy the essential trust and confidence in the employment relationship.

[53] The letter then proceeded to highlight the “most serious issue is the allegation you have wilfully disobeyed a lawful and reasonable instruction”. It then proceeded to highlight two specific “events” being : 1) that on 2 February 2022, OOE had allegedly failed to insist a customer wore a mask and scan a QR code and: 2) A 15 February 2022 social distancing from co-workers’ failure, in the potting shed on two occasions.

[54] The letter concluded, by warning OOE that dismissal was a potential outcome of the disciplinary investigation and she should seriously consider obtaining representation. OOE responded on 30 March, suggesting before any “process” could proceed YEI had to answer her questions. YEI responded on 30 March, indicating if OOE did not attend the disciplinary meeting a decision on the “status of employment” may be made in her absence. OOE then responded twice contesting WQX Ltd’s ability to enquire about the nature of her disability and she cited Ministry of Health advice that a person with a mask exempt status did not have to legally prove such. YEI responded again on 30 March, reminding OOE of the opportunity she would have at the disciplinary meeting to provide feedback on all allegations made

[55] OOE responded further on 31 March, suggesting a disciplinary approach was unjustified. OOE flagged her 27 February 2022 unresolved personal grievance and the ongoing impact on her and expressed a perception she was being bullied.

[56] OOE then made a series of discursive points, contesting the process from her perspective of events and she asked YEI to commit to responding by 1 April to her concerns and questions.

[57] I observe that much of OOE's expressed concerns were repetitive but it would appear at this point, OOE was the sole focus of any investigation and her concerns related to co-worker conduct were simply ignored.

[58] With no response forthcoming, OOE forwarded an updated and amended personal grievance on 2 April to YEI. The letter that is fulsome, recounts OOE's "various events and significant concerns in respect of your dealings with me". It concluded with claims that WQX Ltd's actions had breached privacy and health and safety obligations; OOE's employment agreement and the NZ Bill of Rights Act 1990 concerning freedom of thought, conscience and religion, the right to refuse medical procedures and the right to expect to be at all times treated equally, with respect and dignity.

[59] On the same day (2 April), OOE sent a further email admonishing YEI for failing to respond to her 31 March letter and concluding by impliedly ignoring the request to attend a disciplinary meeting, stating: "I will wait for your feedback on a date to return to my regular workplace".

[60] On 4 April, OOE forwarded another email to YEI to get a response to her email of 31 March. It also highlighted material on good faith process obligations. YEI responded on 4 April suggesting WQX Ltd's letter of 30 March, "comprehensively outlines the company's concerns" and he reiterated, if OOE did not front the upcoming disciplinary meeting, WQX Ltd would make a preliminary decision on information provided.

The disciplinary/investigation meeting

[61] OOE attended the meeting at 10:15 am on 5 April 2022. The meeting was conducted by a tele video link, by agreement, without OOE obtaining representation or support. YEI and WQX Ltd's advocate attended and conducted the meeting. The meeting was recorded and the subject of an agreed transcript provided to the Authority. The advocate set the scene by emphasising that WQX Ltd had no vaccine policy and that was not "really the big issue" and the company's concerns largely related to OOE's "behaviours and responses during the Covid response" as detailed in the 30 March letter. The advocate suggested

... ultimately it comes down to ... you were given a lawful and reasonable direction to wear a face covering, to undertake daily Rapid Antigen Testing, to refrain from entering shared spaces, to respect social distancing and to ensure customers are wearing a facemask and scanning QR codes. ⁷

[62] The advocate continued with “these allegations do amount to serious misconduct” with dismissal being a potential outcome and she emphasised this “is an investigation meeting”. WQX Ltd’s advocate then stressed no decision was going to be made at the meeting but a preliminary decision was likely within a couple of days and OOE would have a further opportunity to comment on it.

[63] After explaining, in some detail, the distinction between the government’s Covid protection framework to prevent community transmission and an employer’s duty to set policy consistent with the Health and Safety at Work Act, the advocate suggested WQX Ltd was looking for

... some kind of medical information that would help them make a decision around whether or not they can make an internal mask exemption for you and what that means for the risk assessment withing the business.

[64] OOE at several points as the meeting progressed, tried to suggest that she had evidenced proof to WQX Ltd that she was suffering from trauma and being treated for it and this explained her difficulty with mask wearing and she considered she should not have to recount or explain the origin of the trauma. In response, WQX Ltd’s advocate repeatedly suggested more specific medical information was required to establish “you are not able to wear a mask”.

[65] OOE offered to re-submit her psychologist’s letter, asserting this was sufficient. In reply, WQX Ltd’s advocate suggested the psychologist’s diagnosis of trauma said nothing about mask wearing. OOE also offered and later provided, a letter from a domestic violence support agency that expanded on her need for trauma counselling and the context of it, but WQX Ltd’s advocate reiterated all OOE had to do, was to return to her psychologist to obtain an explicit opinion linking her trauma to an inability to wear a mask. OOE twice stated she disagreed with this additional requirement and said she did not have to prove anything further. OOE referred to explaining her trauma to YEI and being laughed at on 14 February. At this point in the meeting, YEI deflected discussion of the 14 February interchange and suggested

⁷ Page one of agreed transcript of 5 April 2022 meeting.

his letter of expectation of 23 March, was the key issue to anticipate how OOE would conduct herself if she returned to work.

[66] After exhausting the mask exemption issue, the focus of the meeting shifted to why OOE refused to undertake Rapid Antigen Tests. OOE suggested the request was a change to work arrangements and her consent had to be sought and that she believed it was discriminatory to only test her. WQX Ltd.'s advocate noted everyone else was vaccinated and willing to wear masks. Finally, when she was pressed, OOE said she would only agree to RAT if everyone else was required to do it. I objectively consider this to be an obstructive stance.

[67] A discussion ensued on social distancing, with OOE accepting it was easy to do but she contested whether her employment agreement required her to engage 'face to face' with customers. Specific social distancing incidents between OOE and co-workers were then discussed with OOE contesting the extent of co-workers' concerns.

[68] QR code checking was not traversed on the basis it was being phased out but OOE was asked if she would tell an unmasked customer to wear a mask and she answered – yes.

[69] In summing up toward the end of the meeting, WQX Ltd's advocate suggested they had to consider whether there was

... any space for an internal face mask exemption, whether they feel like they've received enough information. And whether or not they think that Rapid Antigen Testing is a factor in all of this and whether it is needed.

[70] OOE was then afforded an opportunity to ask questions and she attempted to discuss what private information had been shared with her supervisor but YEI closed this exchange down. YEI then made a final effort to suggest OOE undertake a RAT test prior to returning to work but OOE rebuffed this suggestion falling back on a contention that it was discriminatory to only require her to test.

[71] A discussion then ensued on a request by OOE to have longer than 5pm that day to provide further feedback which was denied. The meeting's duration was around 45 minutes.

Preliminary decision

[72] By letter the next day (6 April), YEI indicated that social distancing issues and scanning customer QR codes were no longer concerns to be pursued but YEI had reached a

preliminary view that OOE had “failed to comply with the lawful and reasonable directions provided to you on 23 March 2022” and “... trust and confidence required in the employment relationship may have been irreparably damaged”. A preliminary view was then detailed, suggesting OOE’s actions amounted to serious misconduct in accord with her employment agreement definitions.

[73] YEI suggested OOE’s inability to wear a “face covering” or undertake a RAT meant WQX Ltd could not meet Health and Safety at Work Act obligations “to eliminate or minimise risks to health and safety as far as reasonably practicable”.⁸

[74] I observe mutual health and safety obligations are expressed in OOE’s employment agreement (Fourth Schedule), including OOE being:

... responsible for working in a safe manner, taking reasonable care to ensure health and safety of you and others, complying with any instructions given to you on matters that potentially pose a risk to health and safety.

[75] Under a heading “Next Steps” YEI said he had made a preliminary decision to end OOE’s employment but before finalising this, he invited “further feedback to my concerns” by a meeting or in writing.

[76] OOE responded by email of 6 April, referencing her unresolved personal grievance and suggested the preliminary decision to dismiss, was an “adverse reaction to my personal grievance. I don’t agree with your decision” and she reiterated a view that the provided DPA mask exemption was valid.

Dismissal

[77] By letter of 8 April, YEI indicated he had considered OOE’s feedback but remained of the view that she had “failed to comply with the lawful and reasonable directions provided to you on 23 March 2022”. YEI then confirmed the preliminary decision to dismiss OOE on a finding of serious misconduct, was upheld and would take effect immediately. He confirmed OOE would be paid up to and including, 7 April 2022.

[78] The letter’s penultimate sentence indicated: “Without any evidence supporting your face covering exemption, it is not reasonable to take the risk that you might infect others with COVID-19”.

⁸ Section 36 - Primary duty of care, Health and Safety at Work Act 2015.

The Law

[79] In considering a dismissal's justifiability, the statutory framework of the Act is applied by the Authority. This involves the application of s 103A (the justification test) and whether good faith obligations were met by the parties to the employment relationship.

[80] The Authority must consider on an objective basis, whether WQX Ltd's actions and how it implemented OOE's dismissal, were what a fair and reasonable employer could have done in all the circumstances. The Act guides this inquiry by setting out procedural factors (s 103A(3)(a-d)) that an employer under scrutiny, must aspire to meet and then allows for any other essentially contextual factors the Authority may consider appropriate (s 103A(4)). It also has some flexibility to take account of the resources available to the employer including implicitly whether access to advice was available.

[81] In addition, the Authority can balance its approach even if it identifies procedural defects, by assessing whether those defects are potentially minor and did not result in the employee being treated unfairly (s 103A(5)).

[82] The Authority's focus in considering the adequacy of WQX Ltd's approach to procedural fairness, will also include whether in effecting the dismissal, was there sufficient exploration of alternatives including the timing of the dismissal.

Assessment

Did WQX Ltd provide a fair opportunity for comment on the impact of their informal COVID-19 mitigation policy and the consequences of OOE failing to comply?

[83] I find that WQX Ltd did give OOE and her co-workers, an ample opportunity to comment on the proposals they developed to mitigate the risk of COVID-19 spreading. In addition, YEI afforded OOE ample opportunity to comment on the proposals he developed to get around OOE's vaccination reluctance and mask wearing aversion. I find that OOE did not constructively engage in response. Specifically, OOE's conditional response to RAT testing was objectively unreasonable. I also after inspecting the work premises, find that OOE's evasive engagement with the suggestion her work location be changed to avoid contact with co-workers, was unreasonable. I do accept from photographs provided that the proposed workspace was messy but this could have easily been resolved but OOE refused outright to contemplate moving and engaged in objections on spurious grounds.

Did WQX Ltd fail to genuinely consider OOE's mask wearing exemption?

[84] In this context, given YEI and others were aware of OOE's domestic violence circumstances and that she was undergoing counselling, it is perplexing YEI could not simply accept the DPA mask exemption. While I observe the psychologist's letter made no mention of a PTSD diagnosis and OOE did not provide any confirming medical evidence of this diagnosis during the investigation meeting, I accept that the letter evidence's that OOE was engaged in a treatment programme for trauma. Another letter disclosed during the investigation process from the same psychologist dated 10 October 2021, confirmed OOE was then undergoing counselling for psychological issues arising from a domestic violence situation. Evidence of a referral to a domestic violence agency was also produced.

[85] Objectively YEI did not appear to grasp that the psychologist's letter OOE provided, was addressed to DPA and not the employer – the implication to be easily drawn, is it was being advanced for the purpose of obtaining a mask exemption and the mention of trauma was the causative factor why a mask exemption was sought.

[86] I consider that the ongoing attempts to force OOE to produce further medical evidence, were unreasonable in all the circumstances and caused OOE evident and understandable distress. However despite this, OOE could have easily resolved matters by obtaining a specific letter from her psychologist confirming what was implicitly evident.

[87] Further, as OOE's stance became increasingly entrenched and isolated from co-workers it is evident that she adopted an unreasonably obstructive approach to what I find were genuine and extensive efforts to retain her in employment such as RAT and distancing measures. In this context, while not ideal, YEI at times, expressed his frustrations to OOE in an inappropriate manner. I, however, do not find in the circumstances that he acted in a bullying manner.

[88] A problem for WQX Ltd is the formal bullying complaint OOE made about co-workers' conduct was not investigated and an uncritical view was formed of the actions of OOE's co-workers. WQX Ltd has no workplace bullying complaints policy and OOE's employment agreement did not assist in this regard.

[89] Once the matter escalated to a disciplinary investigation of OOE, I find WQX Ltd did fulfil its responsibility to properly apprise OOE of its concerns in accord with s 103A(3)(b) of the Act.

Did WQX Ltd give OOE an opportunity to respond to their concerns before dismissing her?

[90] I find WQX Ltd did provide OOE with ample opportunity to make a submission on the decision to end the employment relationship and they undertook a careful process in accord with s 103A(c) of the Act which is a key element promoting procedural fairness. It poses the question - did the worker have an opportunity to address the employer about concerns expressed leading to a dismissal – the answer to that is: yes.

Did WQX Ltd consider reasonable alternatives to dismissal?

[91] The evidence demonstrated that WQX Ltd did engage in discussion about alternatives to dismissal as described above but not once the decision to dismiss had been made.

Other factors

[92] I have, utilising s103A(4) of the Act, considered the contextual background, including that WQX Ltd had a lawful and reasonable purpose in seeking the information on OOE's vaccination status and mask wearing.⁹ However, despite being a small employer, I find YEI could have avoided the confrontation around mask wearing by accepting the DPA issued exemption as legitimate. However, there was ample evidence that YEI sought to 'work around' the mask issue and objectively viewed, OOE continued to resist all attempts at accommodation and she manifestly failed to consider her co-workers concerns. This placed WQX Ltd in a very difficult situation.

[93] Applying the final consideration of s103A(5) of the Act, I have found no defects in the process leading up to the dismissal and how it was effected.

Finding on the dismissal

⁹ Section 34B Covid-19 Public Health Response Act 2020.

[94] I find that in the circumstances, while WQX Ltd say they were only trying to ascertain the validity of OOE's mask exemption status, the tenor of communication suggests they were seeking to end the employment for wider reasons including understandable pressure from OOE's co-workers about OOE's vaccination status and OOE's obstinacy in not being willing to compromise by working in an alternative location and be RAT tested

[95] Substantively, while I have found the refusal to recognise OOE's mask exemption status was unreasonable, I find that the overall reasons advanced for the dismissal were sufficient grounds to constitute serious misconduct in all the circumstances, at the time. What makes the decision to dismiss narrowly justifiable, was OOE's inexplicable objection to undertake daily Rapid Antigen Tests as an alternative to mask wearing and her unreasonable refusal to contemplate a sensible change to her work location and duties. Both these stances destroyed the trust and confidence in the employment relationship that both the employer and co-workers were entitled to place in OOE.

Consideration of OOE's disadvantage claim

[96] On the evidence given at the investigation meeting of YEI and co-workers, I find OOE was not the subject of bullying. What was evident, is OOE isolated herself in the workplace by her own actions in not agreeing to take precautionary COVID-19 measures. The sometimes-robust responses of co-workers were in my view, entirely understandable in the context of events. While OOE's employer respected her decision to not be vaccinated, it was evident that OOE would not make any reasonable accommodations – this was typified by OOE's refusal to undergo RAT's and her failure to take account of co-worker concerns over distancing in the workplace.

[97] Two matters remain at issue. One is procedural, in that WQX Ltd did not conduct (or if they did it was not documented) an investigation of OOE's concerns about the bullying allegations she formally raised in her initial personal grievance. However, they did respond to the personal grievance letter in a reasonably prompt manner and agreed to attend mediation (on OOE's suggestion) whilst the employment relationship was still 'on foot'. Whether matters resolved or not after the mediation, was subsumed by the ongoing stance of OOE refusing to accommodate WQX Ltd's legitimate concerns.

[98] I find WQX Ltd then took reasonable steps to alleviate the pressure OOE was under from co-workers but as described, OOE did not appreciate or respond to such suggested

measures. I find that in all the circumstances, WQX Ltd made sufficient effort to provide a safe working environment for OOE.

[99] The omission that I have found unjustified, was WQX's unreasonable and continued refusal to recognise OOE's mask exemption status. This caused OOE some understandable distress. I have found, had the mask exemption been accepted, OOE would have still been justifiably dismissed for other compelling reasons. However, the distress caused OOE, was real and given the knowledge WQX Ltd had of her personal circumstances, it was avoidable. OOE was also the subject of hurtful and dismissive comment by YEI, who could have initially approached the mask exemption issue in a more understandable and compassionate manner. As such on this narrow ground, OOE has established she was disadvantaged as the actions of WQX Ltd around the mask exemption issue were not what a reasonable employer could have undertaken. OOE is entitled to a consideration of a remedy to resolve the distress this caused.

Suspension

[100] I have declined to consider the suggestion that OOE was unjustifiably suspended because her actions in opposing precautionary measures justified the suspensions albeit in extraordinary circumstances.

Discrimination

[101] I likewise do not find that WQX Ltd engaged in any overtly discriminatory behaviour towards OOE on any of the grounds set out in s 105 of the Act. I find WQX Ltd took a consistent approach to all workers as they considered how to mitigate the risk of COVID-19 transmission.

[102] OOE's advocate has suggested that s 108A of the Act prohibiting adverse treatment in employment of a person affected by family violence is at issue. However, no connection is drawn to suggest any adverse treatment was on the direct basis of OOE's status as a victim of family violence. On the contrary, WQX Ltd appear to have been supportive of OOE's situation. The non-recognition of the mask exemption was not discriminatory per-se, despite a finding that WQX Ltd should have accepted the reasons for the exemption as valid. The policy on mask wearing applied equally to others and on the face of it was not a detrimental requirement.

[103] In the final analysis I have found the dismissal was justified on the grounds of OOE's refusal to undertake RATs and her unreasonable objection to being temporarily relocated as accommodation to her vaccination reluctance and mask wearing inability. Neither of these grounds constitutes discrimination in all the circumstances.

Compensation for humiliation, loss of dignity and injury to feelings

[104] OOE gave evidence of the sense of isolation, frustration, distress, and humiliation the ongoing refusal to accept her mask exemption caused. This was exacerbated by OOE having to dwell on the perceived injustice of her situation including the knowledge that she had confided in her employer that she was the subject of domestic violence and was experiencing the ongoing impact of such and her at times experiencing a dismissive attitude to her concerns.

[105] Considering the evidence proffered and awards made by the Authority and the Employment Court and surveying cases brought to my attention in submissions, I consider that OOE's evidence warrants compensation of \$5,000 under s 123(1)(c)(i) of the Act as YEI's dismissiveness was an aggravating factor.¹⁰

Contribution

[106] Section 124 of the Act states that I must assess the extent to what, if any, OOE's actions contributed to the situation that gave rise to her successful disadvantage personal grievance and then assess whether the calculated remedy should be reduced. I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹¹.

[107] In the narrow circumstances, I find that OOE's provision of mask exemption from DPA was at the time her only viable option and could not be construed as an action that contributed to her personal grievance. I do however find OOE's refusal to provide further supporting medical information to be an issue as it fell into a pattern of obstructive behaviour by OOE and it was unreasonable.

¹⁰ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

¹¹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[108] OOE adopted a defensive and obdurate approach to communications and this contributed to the circumstances leading up to her personal grievance including her isolation from co-workers and this did not support her reciprocal duty to act in good faith.

[109] In such circumstances, I find OOE, contributed to the circumstances giving rise to her personal grievance and reduce by 10% the \$5,000 compensatory amount I have assessed under s 123(1)(c)(i).

Summary

[110] I have found that:

- (a) OOE was justifiably dismissed.
- (b) OOE was the subject of actions by WQX Limited that caused her an unjustified disadvantage (an unreasonable refusal to accept a mask exemption and dismissive behaviour thereafter).
- (c) WQX Limited must within 28 days of this determination being issued, pay OOE the sum of \$4,500 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.

Costs

[111] Costs are reserved. The parties are invited to resolve the matter between themselves. If they are unable to do so, the party that considers it is entitled to seek a costs contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply.

[112] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

David G Beck
Member of the Employment Relations Authority