IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 325
3173583

	BETWEEN	: AMANDA-denice: PRIDE Applicant
	AND	KARL GRAHAM BARKER First Respondent
	AND	RUSSELL NOEL CANNONS Second Respondent
	AND	MADUSHIN RAJITH AMARASEKERA Second Respondent
	AND	GLENN WAYNE KEVEY Fourth Respondent
	AND	CONSTRUKT ARCHITECTS LIMITED Fifth Respondent
Member of Authority:	Antoinette Baker	
Representatives:	The Applicant in person Alison Maelzer and Matthew Morrissey, counsel for the Respondents	
Investigation Meeting:	4 April 2023 at Auckland	
Submissions received:	4 April 2023	
Determination:	21 June 2023	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, (Amanda) was employed from July 2021 as an architectural graduate at the business owned by the respondent (C). The first to fourth respondents are the four directors of C. When New Zealand was placed into its second Covid-19 lockdown in August 2021 Amanda initially worked from home as did others working at C's business. When it became necessary and allowable to have employees return to the workplace, C completed a risk assessment process. This ultimately resulted (after consultation with its employees) in the implementation of a return to the office policy that acknowledged that C operated a 'mixed workplace' of vaccinated and unvaccinated employees. To manage that risk C required unvaccinated employees to test weekly against Covid-19 by using a Rapid Antigen Test (RA test). C would organise a space for testing in private, was to provide the test kits at its own cost and asked the employee to only communicate a result if it was positive.

[2] Amanda was unvaccinated by choice. When the above policy was proposed she made it clear she would not RA test for Covid-19 on 'moral grounds' and then later because the ends of the test swabs contained chemicals that were harmful. She continued to work from home and C commenced discussions with her about this. This included a scheduled performance review. Amanda maintained her position that she would not RA test but acknowledged she needed to return to the office to do her job.

[3] Further communications occurred and C required Amanda to return to work and follow the testing policy. Amanda remained off work generally supported by medical certificates. C then conducted two disciplinary processes. The first resulted in a final written warning to return to work and test. When Amanda did not agree to do this C commenced a second disciplinary process which resulted in dismissal

[4] At this time, Amanda 'served' the four directors of C with 'Notices of harm and liability' (Notices) claiming they had each caused her 'stress and duress.' Amanda also began to return any letters and communications sent to her by C with red writing across them that included the phrase: "No consent-No contract. This is attempted fraud!". The Notices gave 10 days to

respond after which the directors would lose their right to defend her claims and could then be liable for damages to be paid to Amanda.

[5] C through its lawyers challenged Amanda about the legal validity of the Notices and communicated that the directors of C would not respond to these documents. C asked Amanda for more details about the claim of 'stress and duress.' Amanda did not provide more details. When C commenced the second disciplinary procedure, Amanda indicated she did not intend to change her position about RA testing and would not attend a further meeting. C dismissed Amanda without notice for serious misconduct. Its decision was essentially because she had not complied with the final written warning and that it had lost its trust and confidence in her.

[6] On the same date she was dismissed Amanda 'served' 'Affidavits of Harm and liability' (Affidavits) on each director of C which expanded on the content of the Notices with quotes from director communications. The content beyond these quotes is hard to follow. Like the Notices, the Affidavits claimed a monetary amount from each director to be paid to Amanda for harms done to her, if they were not responded to within 10 days. Amanda confirmed to the Authority at the Investigation Meeting that she had used the Affidavits before in a different situation.

[7] C through its lawyers, communicated there would be no response to the Affidavits and challenged their legal validity.

[8] Amanda then 'served' on each director a 'Notice of thanks and gratitude' (Thanks Notices) which included that because of the director's 'silence' in response to the Notices and Affidavits, 'all the criminal offences that you have made against me are now unrebutted' and 'the unrebutted Affidavit sent to you now stands as Truth in Law and a Judgment in Commerce, which No one can overturn.' The Notices attached a schedule of payments to be paid to Amanda.

[9] C through its lawyers that challenged Amanda about the legal validity of the Thanks Notices and communicated that the directors did not intend to reply to them.

[10] Amanda lodged a claim in the Authority for 'unjustified dismissal' against the four directors of C saying she was 'bullied, coerced, threatened with dismissal, being segregated from the workplace, and having my medical privacy breached. Each of the four directors … took part in these actions contributing to me being put under stress and duress.' C says it carried out a fair process to implement its policy to require unvaccinated employees to RA test, that it was necessary for Amanda to return to the office to do her job, and that it was justified to dismiss Amanda. The four directors say they were not her employer and that claims against them should be struck out.

The Authority's investigation

Phone conference call 22 August 2022

[11] I held a phone conference call attended by Amanda, her support person, Ms Maelzer as counsel for the respondents, me, and an Authority Officer.

[12] I explained that because the individual employment agreement (IEA) before me stated C as the employer, an unjustified dismissal claim needed to be brought against the employer. I indicated I would join C as a fifth respondent. I also considered the material lodged and explained that to define the employment relationship problem before me in such a way to resolve the matter meant I would also consider a claim for disadvantage. I relied on s 160(3) of the Act to do this.

Directions of the Authority 22 August 2022

[13] After the phone conference call I issued a Directions of the Authority identifying C as the employer and joining it as a respondent. I confirmed that the directors would remain as parties until the substantive matter was resolved. I set out the issues likely to be investigated which centred on s 103A of the Employment Relations Act 2000 (the Act) for a claim of unjustified dismissal, disadvantage and a compensation remedy. A timetable for briefs of evidence and a date for the investigation meeting were also directed.

Material provided before the Investigation Meeting

[14] Before the investigation meeting, Amanda supplied further material including the full suite of Notices, Affidavits, Thanks Notices, and various other documents. She did not provide a brief of evidence. The Authority received briefs of evidence from Messers Barker and Cannons, two of the directors of C. Amanda returned most communications to her from the Authority with red writing over them that was difficult to understand both as to intent and motivation.

Investigation meeting 4 April 2023

[15] Amanda attended the investigation meeting with a support person. Mr Barker and Mr Cannons, attended with Counsel.

[16] I directed that those appearing in the public gallery were not to record the proceedings.

[17] At the investigation meeting Amanda made it clear to me that she did not see the need to answer questions about her position because it was all in the 'unrebutted affidavits' she had already supplied. She further explained that her expectation was that I would simply be upholding her claims for compensation and the directors of C had lost their opportunity to defend her claims. I gave Amanda an opportunity to reconsider her position about being sworn or affirmed to answer questions on the material she had provided (and to be cross examined on the same). I reminded her that my role was to investigate the grievance issues identified earlier. I explained to Amanda that upholding an 'unrebutted affidavit' was not within the jurisdiction of the Authority as I had already explained in the earlier phone conference call. Amanda did not change her view that she wanted her 'unrebutted affidavits' upheld. As a result of this, Amanda did not give any evidence on oath or affirmation.

[18] Messers Cannons and Barker gave their evidence on oath and affirmation. I provided Amanda the opportunity to ask them questions. She largely declined.

[19] I gave Amanda the opportunity to have more time to consider submissions that were presented in writing by counsel for the respondents after C's evidence was heard. Amanda declined. Amanda gave an oral summary about her position. Counsel for the respondents spoke briefly to the submissions they had set out in writing.

[20] The investigation meeting lasted until just after noon and I reserved my determination.

Application to strike out the claim against the four directors

[21] After the investigation meeting, Counsel for the respondents applied to have the Authority direct that the proceedings be struck out against the four directors of C under s 221(a) of the Act. This application was provided to Amanda, and she was given time to respond which she did.

[22] This determination deals with both the strike out application and the substantive matter.

The issues to be determined

[23] The issues for determination are:

a. Is Amanda's application against the four directors to be struck out?
b. Was Amanda disadvantaged by C through actions of its directors?
c. If so, was Amanda unjustifiably dismissed by C both substantively and procedurally with reference to s 103A of the Act?
d. Depending on the above, what compensation should be awarded under s123(1)(c)(i) and (ii) of the Act?
e. Is there to be an award for legal representation costs?

Is Amanda's application against the four directors to be struck out?

[24] Section 221(a) of the Act provides that:

> In order to enable the …Authority … to more effectively dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the

> proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order, - (a) direct parties to be joined or struck out; …

[25] Amanda's applications against each of the four directors of C (the first to forth respondents) are struck out. My reasons follow.

[26] Amanda appears to give two reasons why she says C was not her employer. I take this from the documentation provided, the explanations she gave to me at the investigation meeting and her response in writing to the strike out application.

[27] Firstly, Amanda says the copy of the IEA is not valid because it does not have a 'wet ink signature'. I am unclear whether Amanda also says she did not sign using an electronic signature but either way I prefer the straightforward affirmed evidence from Mr Barker about the start of Amanda's employment with C. He says C used a recruitment agency and after interviewing Amanda, C emailed an electronic version of the IEA as an offer of employment to the recruitment agency. The agency returned the accepted IEA signed by Amanda in attachment to an email. Amanda then commenced working at the business operated by C.

[28] I find the process outlined by Mr Barker to be expected and common in this digital era. Amanda would also have been working in an industry heavily reliant on the electronic medium and she is likely to have been comfortable using an electronic signature. I further accept the submission from the respondents that an electronic signature is legally accepted to confirm a written contract[1]. This is inconsistent with Amanda's contention that to be a valid contract there has to be a 'wet ink' signature.

[29] I find Amanda likely signed her IEA that stated C as her employer and that she commenced working for C. This supports that C was her employer.

[30] Secondly, Amanda rejects the existence of C. She has used words to say it is a 'legal fiction' to which I understand she believes it does not exist and that it is the directors' actions

[1] Part 4, Contract and Commercial Law Act 2017.

that she must challenge being those who she says did harm to her. At best I find that Amanda misunderstands the concept of corporate identity, or that she has been wrongly advised that C as a registered company cannot be a party to proceedings in this jurisdiction. I accept as legally correct the submission from C that C as a registered company on the New Zealand Companies Register is a legal entity in its own right.[2] The directors are protected from liability due to that registration.

[31] Amanda has not provided me with a valid reason why I should depart from considering C to be her employer or why I should consider she has a valid claim against the four directors other than repeating that I should effectively uphold her 'unrebutted affidavits' against each of them. The Act sets out the jurisdiction of the Authority[3]. This does not include upholding 'unrebutted affidavits.'

[32] I do not intend to traverse the other grounds put forward to strike out. I find the above reasoning sufficient to support an order to strike out.

[33] I will now consider the remaining issues in relation to C as the employer.

Was Amanda disadvantaged by C through the actions of its directors?

[34] An employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.[4]

[35] Amanda needs to establish if there was a relevant action affecting her employment to her disadvantage. It is for C to then show its actions were justified as a fair and reasonable employer could have acted in the circumstances at the time.[5]

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[2] Companies Act 1993, s15.
[3] Section 161 Employment Relations Act 2000.
[4] Employment Relations Act 2000, 103(1)(b)
[5] As above s 103A(2).

[36] I am not satisfied that Amanda has shown any unjustified action by C through its directors that has likely affected her employment to her disadvantage. My reasons follow.

Coercion and bullying to undertake a medical procedure

[37] I will reference communications that Amanda refers to in the Affidavits about this issue. In doing so I accept these communications occurred. They are consistent with other documentation before me of communications during the process that C used to propose and implement a policy to manage the risk of operating a 'mixed workplace,' and further discussions with Amanda about the requirement to RA test.

[38] Amanda says that Mr Cannon's communications in response to her position about the proposed policy to RA test were 'a form of coercion and an attempt to convince me to undertake a medical procedure against my will'. These communications can be summarised as Mr Cannons saying to her that:

a. he had done a RA test and 'that it is little more than a cotton bud on the base of the nose, that's it'
b. the RA test is 'non-invasive'
c. 'we are all making compromises. We are all doing things we don't want to do. This is the reality we are in. And so, we can use rhetoric to make this sound more extreme than perhaps it is and that's why I wanted you [Amanda] to understand the reality of what is being asked.'
d. all that was being asked was to use kits provided by C at the workplace, that Amanda could quietly do her own test and 'only had to comment to us if there was a positive result'
e. in response to Amanda saying she saw no reason to RA test when she was healthy: 'The issue of being healthy is a red herring because we all know that we can be asymptomatic and carry a virus. So, this is part of the protocol for the unvaccinated so that's the basis on which we need to assess it.'
f. while Amanda 'may see the weekly testing requirement as punitive or unnecessary' it was in place to 'alleviate concerns from vaccinated staff in the workplace who remain

uneasy in a mixed workplace environment' and that 'everyone had to 'make adjustments'.

[39] Standing back and considering the above, I do not find that Amanda was bullied or coerced by Mr Cannons during the discussions about her being unwilling to RA test. Having heard from Mr Cannons I find it likely that he was trying his best to give Amanda an opportunity to reconsider her position in a reasonable way rather than 'coercing or bullying' her. I accept his and Mr Barker's oral evidence that C wanted to do what it could to retain its staff and accommodate their choices. The 'mixed workplace' model at the very least supports that this was the intention. I do not find that Amanda was 'bullied and coerced' as unjustified actions to support her being disadvantaged in her employment.

Segregation

[40] Amanda refers to being 'segregated.' She refers to words used by Mr Cannons in January 2022 when he explained the proposed Covid-19 protocols to staff for returning to the office. Mr Cannons explained to employees that having a 'mixed workplace' meant those who were unvaccinated fell into a 'subcategory', and this required different protocols for that group to manage risk as part of C's health and safety plan. Amanda claims she was 'segregated' and 'medically discriminated' because of this approach.

[41] C submits that Mr Cannon's message was part of explaining the reasonable risk assessment process at the time. I agree. I find that C was operating within the then context of protecting its whole workplace and, as further submitted for C, this was part of C's health and safety obligations[6] and consistent with implementing a policy under the IEA[7]. I am satisfied after hearing Mr Barker's affirmed evidence that C had considered how to do this by relying on the advice available through official Government websites, daily ministerial television broadcasts and its own professional body guidance. That Amanda did not agree with this advice did not mean that her employer was being unreasonable not to follow it at the time. It was the

[6] Health and Safety at Work Act 2015, s 36.
[7] IEA, clause 26.

standard advice being given to workplaces in New Zealand about how to contain the spread of Covid-19 which at the time was a concern about the spread of a new ‘delta’ variant.

[42] Amanda in her affidavits refers to ‘segregation’ as the action of separating ‘people into groups so that those who claim authority can manipulate and control and oppress them for commercial gain’. A reasonable ordinary meaning of the word ‘segregation’ means a type of serious discrimination. I do not find what Mr Cannons said about two categories of employees in C’s workplace or the policy that was eventually put in place by C to require unvaccinated employees to RA test weekly means on any sensible basis that C through its directors’ actions segregated Amanda.

[43] I do not find that Amanda was ‘segregated’ as an unjustified action to support her being disadvantaged in her employment.

Medical privacy breached

[44] In the Affidavits, Amanda objects to C asking her for any information about her ‘medical condition/situation/status’ and says this breached her medical privacy. I take it this claim refers to C proposing to ask for results of RA tests.

[45] I interpret that this part of Amanda’s claim is consistent with her objection to follow the policy to weekly RA test. For the same reasons as above, I do not find this supports a claim that she was unjustifiably disadvantaged in her employment.

Was Amanda unjustifiably disadvantaged in her employment by C’s implementation of the requirement to weekly RA test?

[46] C submits that it was justified to have put in place the policy it did. As already discussed, C referred me to its statutory obligations[8] to ensure as far as is reasonably practicable both the health and safety of its workers at work and that others are not put at risk from work carried

[8] See above at note 6.

out. Amanda rejects this. The material she has put forward appears to refer to situations that include material that is against vaccination or the efficacy of testing or relates to employees mandated to be vaccinated. I do not find this material relevant. I accept C's submission that it had health and safety statutory obligations to meet, and that this guided the policy implementation that included RA testing weekly for unvaccinated employees.

[47] C has referred me to an Authority determination that says employers may implement a health and safety policy requiring staff to be vaccinated against Covid-19[9]. C submits that what was implemented here in relation to the RA testing was the least intrusive restriction for an unvaccinated employee. I agree with these submissions.

[48] My consideration of the process used by C to implement the testing as a requirement satisfies me that it designed, consulted, and implemented a thorough risk assessment covering off 'Spaces, Tasks/Roles, and Individuals.' C then promptly consulted against the changing government requirements. I have already referred to my acceptance that C relied on advice available.

[49] The evidence provided by C about its process shows me that there was a thorough and thoughtful framework designed to allow for a 'mixed workplace'. Amanda responded to the proposal for the policy. She thanked her employer for 'taking the time to consult with each of us' … and that 'it shows the care and consideration for each person in the office.' I find sufficient evidence in the communications to show that Amanda was given opportunities to engage in the consultation process.

[50] Considering the above I do not find the policy to RA test weekly was an unjustified action by C that could have disadvantaged Amanda in her employment.

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[9] *Huch v Supercity Towing Limited* [2023] NZERA 74 at [90].

Was Amanda unjustifiably disadvantaged because her IEA was changed without her consent?

[51] C submits that as well as the above statutory duty, Amanda's IEA included that C was able to introduce new policies under clause 26 being that 'The employer may introduce new policies, or amend or delete existing policies, at its sole discretion.' I agree that C had the ability to do this. Based on this, I do not accept what appears to be Amanda's reference in red writing on documentation sent or returned to the Authority or the respondents that suggests her IEA has been changed without her agreement.

[52] I find that C had the contractual ability to implement the policy to require Amanda to RA test weekly and this did not result in an unjustifiable action that could have disadvantaged her in her employment.

Was Amanda unjustifiably disadvantaged because C required her to come into the office?

[53] I heard from Mr Cannons and Mr Barker that they had tried hard with the other directors to work a way around what Mr Cannons agreed was an 'impasse.' The consideration of whether Amanda could continue to work from home was largely discussed in the performance review. The transcript of that meeting shows me there was a thorough discussion with Amanda who was fully engaged in discussing her performance. Amanda had been leading a project. Working from home impacted her ability to do this. She agreed that working from home impacted her efficiency and that others were affected.

[54] Mr Barker's evidence included that Amanda was a new graduate in need of mentoring. Amanda did not disagree with this at the performance review. Mr Barker gave evidence that work processes with architecture meant that real life interaction including, for example, on going moment to moment chats and discussions using quick hand sketching could not be fully replaced by online platforms used. I found Mr Barker's explanations about this in his oral evidence plausible and understandable. Mr Barker further gave evidence that the project Amanda led was large and included working with large architectural plans and files. He says there were significant issues for C needing to meet tight timeframes that I understand are staged

in an overall process. Mr Barker's evidence was straightforward and consistent with the performance review discussion.

[55] While Amanda appears to be critical about C taking its commercial needs into account, I find that in requiring her to return to the office it was reasonable for C to consider its commercial needs to deliver on its work.

[56] I further accept Mr Barker's oral evidence that there were no other projects that would get around the 'impasse.' For example, he said there was a 'bare dirt' project starting but again the same issues working remotely would arise.

[57] I do not find C's requirement that Amanda return to the office was an unjustified action that could have disadvantaged Amanda in her employment.

Was Amanda unjustifiably disadvantaged by C's disciplinary process during and up to the final warning letter?

[58] On 17 February 2022 Mr Barker for C sent Amanda a formal invitation to a disciplinary meeting on 23 February 2022. She was invited to bring a support person and told the matter could result in a finding of misconduct that may result in a final warning letter.

[59] The letter included a detailed summary of C's view about what had happened to date and stated that Amanda may be in breach of her IEA including noncompliance with:

a. reasonable and lawful instructions (to return to work and RA test weekly)
b. not acting or omitting to act in a way that does not adversely affect the health and safety of others
c. health and safety requirements including policies and instructions
d. knowing or complying with policies

and that this could impact on C's trust and confidence in Amanda and could amount to misconduct.

[60] The same allegations were repeated for an alleged breach of the protocols put in place according to the changes in the Government restrictions. Attached to the letter were documents including Amanda's employment agreement, recordings of meetings, the policies relied on, Amanda's performance review form and the audio recordings for the 20 January and 8 February 2022 meetings, the latter being the performance review meeting.

[61] C indicated that while it had not decided about the allegations, a disciplinary outcome may include 'up to and including a final written warning'.

[62] Amanda did not respond to the invitation to the disciplinary meeting until the day of the meeting. She sent in a medical certificate stating she was unfit for work until 3 March 2022 and on the same day served each of the four directors with the Notices. I have already referred to the response to the Notices by C's lawyers and that Amanda began to return their communications, with red writing across them.

[63] After some further communications a meeting occurred on 2 March 2022. Amanda brought a support person.

[64] On 8 March 2022 C's lawyers wrote to Amanda. As above I accept C's submission that Amanda's position had not changed. C asked for any final response about its proposal to issue a final warning letter. It included its responses to the feedback she gave in the meeting.

[65] Overall, C submits that its disciplinary process up to the final written warning was carried out fairly. I accept this submission. I accept C put allegations to Amanda in writing and these all hinged around the single issue about the requirement to RA test. Amanda was given a reasonable opportunity to respond in a formal disciplinary meeting. C investigated her concern about chemicals on the RA test kit swab ends with the supplier and further asked Amanda to provide further information for C to consider which Amanda declined to do. C then responded to all issues raised by Amanda in writing. Traversing this material, I do not find any new issues and I accept that the process was one that was procedurally fair.

[66] I further note that C then gave Amanda the opportunity to comment on a proposal to issue a final warning which effectively was for her to return to the office and comply with the policy to RA test weekly. C brings to my attention that Amanda did not respond to that request. Amanda responded by returning C's proposal to issue a final written warning with red writing saying: "No consent, no contract. This is attempted fraud" and attached the first Notice. I have already referred to the Notices above. I find C gave a reasonable response to these through its lawyers.

[67] Based on the above I am satisfied there was no unjustifiable action in the way C progressed the first disciplinary process and up to when it made a decision to issue a final warning.

Was the Applicant unjustifiably dismissed by C both substantively and procedurally with reference to s 103A of the Act?

[68] In determining justification of a decision to dismiss an employee I must decide whether C's decision to dismiss was what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.[10] This involves considering the process used and the reasonableness of the decision itself. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee. In considering a matter in relation to a company as the employer the actions of the directors may be relevant to examine.

[69] In her Statement of Problem Amanda claims she was unjustifiably dismissed after being 'bullied, coerced, threatened with dismissal, being segregated from the workplace, and having her medical privacy breached'[11]. I have already covered these issues under the head of disadvantage except for the claim of 'threatened with dismissal' which I will deal with under this issue.

[10] Section 103A(2) Employment Relations Act 2000
[11] Statement of Problem, :Amanda-denice: PRIDE dated 20 May 2022

Second disciplinary process and substantive decision to dismiss

[70] On 21 March 2022, C's lawyers wrote to Amanda to invite her to a further disciplinary meeting. This was because after C provided a final written warning, Amanda did not return to work or agree to RA test to enable her to do so. C started a further disciplinary process sending Amanda a detailed letter including the first disciplinary process issues and the alleged failure to comply with the written warning. This letter indicated that the outcome may be dismissal. While Amanda claims C 'threatened to dismiss' her, I accept the submission for C that the reference to this in the second disciplinary letter is a standard communication expected of a fair and reasonable employer who wants to raise serious issues with an employee.

[71] On 22 March 2022 Amanda emailed Mr Barker and said she would not attend a further disciplinary meeting (as scheduled for the following day) because 'she was under duress from the actions being taken against me'. I note here that C had recorded that at the disciplinary meeting Amanda would not provide any further details beyond the Notices to explain the stress and duress claim.

[72] On 23 March 2022, C's lawyers wrote to Amanda to say that C was proposing to end her employment and she was given time to respond. The letter was again very detailed and provided summaries of where the process had got to. Amanda emailed Mr Barker on 24 March 2022 saying that:

> Further to the request for feedback from me, as to be expected, my position on the matter at hand remains the same as it had since November last year, I have nothing further to add. I will also reiterate that I am under Stress and Duress caused from the actions and allegations against me.

[73] On 25 March 2022, C through its lawyers wrote to Amanda terminating her employment without notice based on her non-compliance with the previous written warning and included that C had been 'careful to provide [Amanda] with a fair and reasonable process' and that C considered Amanda had been 'impertinent and disrespectful throughout.' The letter continued that C also considered that the result of Amanda continuing not to agree to RA test caused her to work from home (except when she was on sick leave) and that the 'lack of performance' 'had

come at a significant cost to our business and has been difficult for your managers and the team'.

[74] I find that C followed a fair process to consult with its employees about the protocols requiring unvaccinated employees to RA test, Amanda continued consistently to disagree, but I find it was open for C to have considered that Amanda's refusal did not have a reasonable basis. She provided little in the way of reasons, and as discussed above I accept the submission for C that the requirement was at the lower end for an unvaccinated employee in the workplace.

[75] I also find it was within scope for C to decide it was justified to dismiss Amanda for serious misconduct. As well as the above refusal to comply with the RA testing and return to work which in turn became a breach of the written warning, her actions breached duties under her employment agreement and her duty to ensure the safety of herself and others. Again, while Amanda disagreed with this, C was entitled to follow the standard advice provided at the time about the virus risks.

[76] I find C was further justified to dismiss because Amanda had been 'disrespectful and impertinent' if not at the start of discussions, then from the commencement of the disciplinary processes. I accept that the service of the Notices and their content was as given in C Mr Barker's evidence, 'unsettling' for the directors due to their nature and content. I find that C could then overall have reasonably formed the view that it had lost its trust and confidence to continue to employ Amanda.

[77] Accordingly, I find that C's decision to dismiss was justified.

Summary of orders

[78] The claims by :Amanda-denice: Pride against the first, second, third and fourth respondents are struck out.

[79] The claims by :Amanda-denice: Pride against Construkt Architects Limited based on unjustified dismissal and disadvantage are dismissed.

Costs

[80] I have been asked by the respondents to reserve costs. The parties are encouraged to reach their own agreement as to costs. If they do not and a determination is needed from the Authority the respondents may lodge and serve, a memorandum on costs within 14 days of the date of issue of this written determination. From the date of service of that memorandum Amanda would then have 14 days to lodge and serve a reply. Costs will not be considered outside this timetable unless prior leave is sought and granted.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff. [12]

Antoinette Baker
Member of the Employment Relations Authority

[12] https://www.era.govt.nz/determinations/awarding-costs-remedies/.