IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2025] NZERA 478
3216639

BETWEEN	DEBORAH HANCOCK First Applicant
AND	CHRISTINE GIBSON Second Applicant
AND	HENRICA RYAN Third Applicant
AND	JONES & SANDFORD TIMBER & HARDWARE (1999) LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Liz Lambert and Erika Whittome, advocates for the Applicants Penny Swarbrick, counsel for the Respondent
Investigation Meeting:	4 – 5 March 2025 in New Plymouth
Submissions received:	15 April and 5 May 2025 from the Applicants 15 April and 16 May 2025 from the Respondent
Date:	6 August 2025

DETERMINATION OF THE AUTHORITY

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[1] Deborah Hancock, Christine Gibson and Henrica Ryan (collectively, the applicants) were dismissed by their employer Jones & Sandford Timber & Hardware (1999) Limited (Jones & Sandford) trading as Mitre 10 New Plymouth on 15 March 2022 for refusing to take a Covid-19 Rapid Antigen Test (RAT).

[2] Jones & Sandford says the applicants failed to follow a lawful and reasonable instruction made under the terms of its Covid-19 Policy and this amounted to serious misconduct. Jones & Sandford says dismissal was the appropriate outcome given the

nature of the misconduct and that the applicants could not be trusted to follow lawful and reasonable instructions in the future.

[3] The applicants say the policy was not lawful and reasonable because taking the RAT was a medical procedure or intervention and Jones & Sandford could not require them to take one. The applicants also say that refusal to take a RAT was not serious misconduct, but even if it was misconduct, dismissal was a disproportionate response.

[4] This determination resolves whether the applicants were unjustifiably dismissed and whether there was a breach of their employment agreements.

The Authority's investigation

[5] On 23 January 2024, I issued a determination[1] on two preliminary issues. I found the applicants had raised personal grievances for unjustifiable dismissal in accordance with section 114 of the Employment Relations Act 2000 (the Act). However, the applicants were unsuccessful in their application to join Mitre 10 (New Zealand) Limited (Mitre 10) as a controlling third party to the proceedings to resolve their personal grievances under section 103B(3) of the Act. I also determined a subsequent costs application from Mitre 10, in its favour.[2]

[6] Following the Authority's preliminary determination, a case management conference was held with the parties to clarify the claims. The applicants amended their statement of problem in relation to the breach of contract claim for "failing to provide a safe workplace leading to our ultimate dismissal".[3] This matter was set down for a substantive investigation meeting on 4 and 5 March 2025.

[7] Written statements were provided from each of the three applicants - Deborah Hancock, Christine Gibson and Henrica Ryan. Jones & Sandford witnesses were Julia McDowall, Human Resources Manager, Jones & Sandford; Stuart Jones, Managing Director, Jones & Sandford; Celena Harry, Chief People Officer, Mitre 10; and Julie Simpson, human resources and employment relations contractor for Mitre 10. All witnesses appeared to give evidence and answer questions under oath or affirmation.

[8] At all times, including during Jones & Sandford's processes, the three applicants have asked for their matters to be considered together. This determination reflects that

[1] *Hancock and Ors v Jones & Sandford Timber & Hardware (1999) Limited v Anor* [2024] NZERA 35.
[2] *Hancock and Ors v Jones & Sandford Timber & Hardware (1999) Limited v Anor* [2024] NZERA 249.
[3] Paragraph 3, page 15 of the Applicants' amended Statement of Problem (3 July 2024).

the applicants' claims have been consolidated into one proceeding. However, factors individual to each applicant have also been identified and specified where relevant.

[9] As permitted by s 174E of 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 carefully considered.

Issues

[10] The issues for determination are:

(a) Whether the applicants were unjustifiably dismissed for serious misconduct.[4] If so, whether they should be paid compensation for injury to feelings under s 123(1)(c)(i), and lost wages from 15 March 2022.

(b) Whether Jones & Sandford has breached the applicants' individual employment agreements by introducing a policy requiring vaccination, masking and testing. If so, whether the applicants should be awarded damages for lost wages expected to have been received had the employer not breached (calculated in relation to loss of future earnings).

Relevant background

[11] Jones & Sandford trades as Mitre 10 New Plymouth. All three applicants were employed by Jones & Sandford and worked in its New Plymouth store.

[12] Deborah Hancock was employed by Jones & Sandford in 2016. Her job title was Casual Floor team / checkout. Ms Hancock worked throughout the store wherever she was needed, except for mixing paint which was not her area of speciality.

[13] Christine Gibson was employed by Jones & Sandford on 19 April 2021. She was a permanent staff member who worked four days a week, but often picked up extra shifts. She was a Team Member in the Zone 3 Department – tools and hardware.

[14] Henrica Ryan was employed by Jones & Sandford in 2007 and was the longest-serving employee of the three applicants. She was employed as a Full time / part time team member and worked on the checkout at the time of her dismissal.

[4] Paragraph 1, page 1 of the Applicants' amended Statement of Problem (3 July 2024).

[15] All three applicants worked in public-facing roles and frequently encountered members of the public in their work. Ms Hancock and Ms Ryan also had daily interactions with their colleagues in the store, and Ms Gibson to a lesser extent.

[16] The Covid-19 pandemic sets the background context for this matter. In response to the global pandemic, the New Zealand government introduced significant and rapid changes which required employers and retailers to continuously adapt their operations. The situation was without precedent - there was no previous knowledge of the Covid-19 virus or its effects. In early 2021, the government announced the procurement of Covid-19 vaccines, and a vaccine rollout began in mid-2021.

[17] In late 2021 Jones & Sandford was considering introducing a Covid-19 policy which had been developed by Mitre 10. On 13 December Jones & Sandford met with team members over a draft policy and there were group consultations the next day. In late December, Jones & Sandford disseminated the draft policy to its employees as part of consultation packs. Employees were given three weeks to provide feedback. The three applicants worked on their feedback together with their representative, and sent it to Jones & Sandford on 28 December 2021 in advance of the 7 January 2022 deadline. The feedback ran to 17 pages, and mostly set out the applicants' opposition to mandatory vaccination and their reluctance to share any health information with their employer. The applicants' feedback mentions the availability of breathalyser and atmospheric testing devices to minimise the need for "over-policing" in the workplace. No objection to testing per se was raised. Although the applicants say they were not provided a reasonable amount of time for consultation given the holiday period, nothing ultimately turns on this point because they engaged with the consultation process and provided feedback.

[18] The Covid-19 Protection Framework, also known as the "traffic light" system came into effect in December 2021. It introduced three levels of controls to be activated based on pressure on the health care system. The traffic light was at the 'red' level for the whole of New Zealand from 23 January 2022 and it remained at that level until 13 April 2022 when it was moved to orange.

[19] Jones & Sandford confirmed the Covid-19 policy shortly before the whole of New Zealand was placed in the red traffic light level. The policy was to take effect from 1 February 2022. Jones & Sandford employees were asked to provide information about their vaccination status from their official My Vaccine Record page, administered

by the Ministry of Health. A certificate called "My Vaccine Pass" (MVP) could be downloaded from the Ministry of Health to serve as an official record of Covid-19 vaccination status. The Covid-19 policy says that team members are not obliged to provide information about their vaccination status but if they choose not to, they will be treated for the purposes of the policy as if they are unvaccinated.

[20] From 1 March 2022, unvaccinated team members would be regarded as not ready or able to work and non-compliant with health and safety requirements unless they could provide evidence of undertaking a negative Covid-19 test within the previous seven days and provide the results to Jones & Sandford. The Covid-19 policy states that failure to comply with this requirement may result in formal disciplinary action.

[21] On 31 January 2022, Jones & Sandford met with the applicants as a group, as they had requested. The applicants, via their representative, asserted that testing was unlawful. On 1 February 2022, the policy came into effect. The applicants raised a concern that the implementation of the policy required an agreed variation to their individual employment agreements, but Jones & Sandford told them it disagreed.

[22] On 25 February 2022 the General Store Manager for Mitre 10 MEGA and Mitre 10 New Plymouth, sent letters to each of the applicants advising them that they were being formally instructed and required under the Covid-19 policy to provide evidence of a negative test on 1 March. The applicants were advised that if they failed to comply with the instruction, the company reserved the right to treat the failure as potentially amounting to serious misconduct, and a disciplinary process may be commenced. The applicants were required to take a RAT under the supervision of a Covid-19 Response Manager who was trained to ensure the test was taken correctly, record the result and respond appropriately according to the test outcome.

[23] The reason that Jones & Sandford treated all three applicants as being unvaccinated was because none of them had provided the necessary proof of being fully vaccinated by accessing their official records from the Ministry of Health as the policy required.

[24] Ms Hancock had received two doses of the vaccine, one in October 2021 and one in November 2021. Ms Hancock had a "purple covid card" issued by a pharmacist, but could not recall ever accessing the online app to download her MVP.

[25] Ms Gibson also received two doses of the vaccine and also had the purple covid card. Unlike Ms Hancock, Ms Gibson had downloaded her MVP because she needed this to access healthcare facilities to help a family member who was in hospital in Auckland. However, after she returned from Auckland Ms Gibson deleted both the app and her downloaded MVP.

[26] Ms Ryan received one dose of the vaccine on 21 November 2021, following which she had an adverse reaction that she linked to the vaccine. On her return to work on 6 December 2021, Ms Ryan self-reported the adverse reaction to Jones & Sandford's human resources team.

[27] On 26 February 2022 the applicants' advocate emailed the General Store Manager for Mitre 10 MEGA and Mitre 10 New Plymouth, advising him that the RAT is a medical procedure which the applicants had not consented to, and the company could not legally require or demand a medical procedure. The applicants told Jones & Sandford the policy was improper and invalid and the company had not gained their consent to attach the policy to their agreements. Each of the applicants individually emailed the General Store Manager thanking him for the "offer" but declining to be RAT tested.

The refusal

[28] On 1 March 2022, each of the applicants was booked into a different timeslot to go to the boardroom at the Mitre 10 store to meet Julia McDowall, Human Resources Manager and undertake a RAT. Ms Gibson was first at 7:30 am, then Ms Ryan at around 8:00 am. Ms Hancock was last at around 9:30 am. Each of the applicants in turn went into the boardroom, spoke to Ms McDowall to refuse the RAT, and was advised by Ms McDowall that they were refusing a lawful and reasonable instruction, that they needed to leave work immediately, and that the next step would be an invitation to a disciplinary meeting.

[29] Jones & Sandford sent each of the applicants a letter that day inviting them to a disciplinary meeting. The letter stated:

> You were given a letter dated 25.02.2022 instructing you to undertake a COVID-19 test and provide the business with evidence of a negative test on 01.03.2022 in accordance with the obligations of our COVID-19 policy. You have not done so. This was a lawful and reasonable instruction. We are treating this apparent failure to comply with a

> lawful and reasonable instruction as potentially amounting to serious misconduct, which could impact your ongoing employment.

[30] On 7 March 2022, there was an online disciplinary meeting with all three applicants via Teams at their request. The applicants were represented by their advocates. For Jones & Sandford Ms McDowall attended with another manager, and the company's lawyers. At this meeting, the applicants read out pre-prepared personal statements about why they had refused to undertake a RAT. These statements were later provided to Jones & Sandford.

[31] In summary, their statements were:

(a) Ms Hancock – there is a harmful chemical on the RAT swab stick. A nose swab is a medical procedure. Tests should only be used if employees are symptomatic. Ms Hancock says she will not be having the RAT test because she is fit and healthy, has no signs of Covid, and feels forced into a medical procedure because her employer does not trust her to do the right thing.

(b) Ms Gibson – says she is fit and healthy. She declined the RAT test because of the chemical on the swab. Ms Gibson says she suffers from uncontrollable nosebleeds and is not prepared to take the chance of an invasive procedure when she shows no signs of illness. Despite being fully vaccinated, Ms Gibson says she has decided to exercise her right to decline her employer's request to her personal health information.

(c) Ms Ryan – had one vaccination but would not be getting any more. The RAT test contains a chemical in the swab that goes up the nose.

[32] The meeting on 7 March 2022 was the first time the applicants had made Jones & Sandford aware they had a concern about the chemical on the end of the RAT swab stick, which Ms Hancock referred to as carcinogenic ethylene oxide.

[33] A few days later on 10 March 2022, Jones & Sandford gave the applicants its preliminary decision on the outcome of the disciplinary process. This confirmed Jones & Sandford's view that the applicants had failed to comply with a lawful and reasonable instruction, this amounts to serious misconduct, and the appropriate outcome is termination of their employment. Jones & Sandford said they did not agree that the Covid-19 policy is unlawful, did not accept that RAT tests are harmful, and the

requirement for Covid testing was consistent with its employment obligations including the policy. All three applicants were invited to provide evidence of double-vaccination and were told that providing this evidence would be likely to have a "significant" impact on Jones & Sandford's preliminary decision to terminate their employment.

[34] Jones & Sandford requested feedback on its preliminary decision by 10:00 am on 11 March 2022, however the timeframe was extended to enable the applicants to respond. The same day, Ms Ryan requested information on the name of the RAT test and the safety data sheet. Jones & Sandford provided this information the same day, but Ms Ryan did not see it until two weeks later. Nothing turns on this delay because Ms Ryan said her objection was not just to the chemical on the swab but to nasal testing in general, which she considered to be a medical procedure.

[35] Correspondence followed between 11 and 14 March, during which the applicants' advocate suggested there may be a way for the applicants to return to work and be tested using cotton buds that do not contain ethylene oxide. Jones & Sandford responded by asking if there were any RATs approved for use in New Zealand that the applicants would be prepared to be tested with. The applicants' advocate then asked whether the air testing and breathalyser options had been investigated.

[36] On 15 March, Jones and Sandford sent the applicants "Final Outcome" letters. Generically to all letters, the final outcome letter stated:

> We are using RAT tests that are approved by the Ministry of Health…We do not agree that it is appropriate to substitute any item in the test kit, or to undertake the test in a manner other than is recommended. We are not aware of any official guidance indicating they may be harmful and they are not considered to be hazardous substances…
>
> We do not agree that breathalysing and/or atmospheric testing are substitutes for testing an individual…
>
> You are not prepared to use the RAT tests we provide, and have not provided us with the name of any other government-approved test that you would consider suitable, which demonstrates to us that you are not prepared to undertake any RAT test and therefore will continue to fail to comply with our policy…

> …You have failed to comply with the lawful and reasonable instruction you were given, and have given no indication that you will comply in future. Our final decision is that we confirm our preliminary decision. Your employment is therefore terminated with immediate effect.

[37] Specific to Ms Hancock, Jones & Sandford added the following:

> You did advise at the meeting that you would take a test only if you were symptomatic, but stated that you would not otherwise be tested.

[38] Specific to Ms Ryan, Jones & Sandford added the following:

> That is consistent with your advice to us at the meeting that you would not undertake a test under any circumstances, even if you were symptomatic.

[39] On 1 April 2022 Ms Gibson sent an email to Ms McDowall raising personal grievances for unjustified dismissal on behalf of all three applicants.

[40] Following the applicants' dismissal, testing requirements under the Covid-19 policy were reviewed in April 2022. The requirement to undertake RATs every seven days at the red level remained in place, but the requirement for testing was removed if the alert level was amber or below. By September 2022, Jones & Sandford's Covid-19 policy had completely removed the requirement for undertaking RATs.

Were the applicants unjustifiably dismissed?

What is the law?

[41] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether Jones & Sandford'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.

[42] 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.

[43] I need to assess whether the decision Ms McDowall made on Jones & Sandford's behalf to dismiss the applicants, and how Ms McDowall reached that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

(a) Jones & Sandford fully and fairly investigated the allegations against the applicants before dismissing them;

(b) Jones & Sandford raised the concerns it had with the applicants (including giving them relevant information) before dismissing them;

(c) Jones & Sandford gave the applicants reasonable opportunity to respond to its concerns before dismissing them;

(d) Jones & Sandford genuinely considered the applicants' explanations before dismissing them (the decision was made without predetermination).

[44] The Authority must not find a dismissal to be unjustifiable solely because of minor defects that did not result in the employee being treated unfairly.[5] While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

Applicants' submissions

[45] The applicants say a flawed risk assessment led to a flawed policy being introduced, and that led to a flawed (unlawful and unreasonable) instruction being given to them, and therefore refusal to comply with it could not amount to serious misconduct. They say their refusal was not serious misconduct under the terms of their individual employment agreements. They also say no alternatives to dismissal such as being put on leave without pay, using annual leave or being redeployed were discussed with them.

[46] Ms Hancock says she felt pressured to be vaccinated and Jones & Sandford contributed to this by offering incentives for vaccination. Ms Hancock never accessed or downloaded her MVP. Ms Hancock was concerned about the privacy and security of her health information at Jones & Sandford because she says issues that had been

[5] Section 103A(5) of the Act.

raised "upstairs" (with management) had a way of making their way back to the shop floor. In any case, Ms Hancock says it was not Jones & Sandford's business because her health status was private. Ms Hancock says proposing dismissal was a breach of good faith because her employment did not mean that she had signed up for vaccinations or undertaking RATs. A RAT was a medical procedure and trained people had to administer it. Jones & Sandford's requirement to take a RAT was not a lawful instruction and failing to take one was not serious misconduct because it was wholly unrelated to the types of serious misconduct listed in her employment agreement. Ms Hancock says she worked at Jones & Sandford for seven years and had never had a problem, there was no reason at all for Jones & Sandford to think that she would refuse a lawful and reasonable instruction in future. The breach of trust was that Jones & Sandford did not trust her any more after she refused a RAT. By that stage, Ms Hancock says it had gone past the point where she could have provided proof of her vaccine status, because there was no trust and the relationship was just broken.

[47] Ms Gibson did not provide her MVP to Jones & Sandford for two reasons: she realised the expiry date on her MVP was incorrect (although she admits she did not take steps to correct it) and she had deleted her MVP after she no longer required it to care for her family member because she did not want her information to be held by the government or shared online. Ms Gibson simply says she does not feel that she has done anything wrong and she sees the company's policy as being extreme measures. Ms Gibson says Jones & Sandford was asking her to do something that was unsafe for her and she did not feel her health was being taken into consideration. There was no acknowledgement by Jones & Sandford that RATs were an invasive procedure. Ms Gibson says she does not consider refusing the RAT was serious misconduct because she was not hurting anyone else, nor did the conduct fit into any of the types of serious misconduct listed in her employment agreement. Ms Gibson says she has not done anything in the course of her employment that could cause Jones & Sandford to mistrust her.

[48] Ms Ryan did not qualify for an MVP because she had not had two vaccinations. Ms Ryan says she had been vaccine-injured and even though she had been unable to obtain any medical confirmation that the symptoms she experienced were linked to the vaccine, she did report it to Jones & Sandford human resources when she returned to work on 6 December 2021. After what happened, Ms Ryan said vaccination and RATs were not options for her because she was unwilling to undergo any medical

interventions and the presence of ethylene oxide on the end of the RAT swab stick would have introduced a chemical into her body. Ms Ryan never enquired into obtaining a vaccine exemption from the government. Ms Ryan says refusing the RAT was not serious misconduct because Jones & Sandford should only have tested when employees were symptomatic and she possibly would have undertaken a RAT if she had been symptomatic. Ms Ryan says in the 13 years she worked for Jones & Sandford, she did everything asked of her and this was the only time she had said no.

[49] After the period for closing submissions had expired, the applicants provided a case in support of their contention that the requirement for screening is not lawful in an employment context.[6]

Jones & Sandford's submissions

[50] Jones & Sandford says it had the right to introduce a policy and it did so appropriately. It also says it gave the applicants a lawful and reasonable instruction based on the policy and it was justified in ending their employment when they refused to follow the instruction.

[51] Jones & Sandford points to the context of the Covid-19 pandemic and says employers were using their best endeavours to keep their employees and others in their workplace safe. It was contemplated by the Government that one way in which employers would do this would be to conduct risk assessments and formulate policies based on the risk assessments. Jones & Sandford relies on clause 8 of the applicants' individual employment agreements and its general right as an employer to introduce workplace policies. Jones & Sandford says its policy did not mandate vaccination and the testing requirement was a "proportionate and measured" response to dealing with the Covid-19 pandemic.

[52] Jones & Sandford says the law relating to lawful and reasonable instructions is well-settled[7] and an employer is entitled to treat a failure to comply with a lawful and reasonable instruction as amounting to serious misconduct. It says the applicants' refusals to undertake a RAT struck at the heart of the employment relationship because Jones & Sandford needed to have faith and confidence that employees would follow their policies, especially regarding health and safety. Jones & Sandford says the applicants' prior employment records were irrelevant because the failure to follow a

[6] *Department of Labour v IDEA Services Limited*, District Court Hastings, 4 Nov 2008.
[7] *Wellington etc Clerical etc IUOW v College Group Limited* [1984] ACJ 315.

lawful and reasonable instruction in this context was an isolated event of such seriousness that it amounted to serious misconduct.

[53] Jones & Sandford says the case law provided by the applicants is misstated and does not support a general proposition that all health screening is illegal per se. It says the context, facts and legal framework are all distinguishable from the present case, and the task for the Authority is determine whether Jones & Sandford was justified in its decision to dismiss the applicants.[8]

Were the applicants' dismissals substantively justified?

[54] The Covid-19 pandemic provides the background context for this matter. It is against those circumstances that Jones & Sandford's actions and how it acted must be assessed. The substantive justification for Jones & Sandford's decision is analysed in terms of the test of what a notional fair and reasonable employer could do in the circumstances at the time the dismissal occurred.

[55] Jones & Sandford dismissed the applicants for failing to follow a lawful and reasonable instruction to undertake a RAT. The applicants' claim is not about the lawfulness and reasonableness of the Covid-19 policy itself and I have previously found the applicants did not raise personal grievances for unjustified disadvantage in time and in accordance with the Act.[9] However, Jones & Sandford's instruction to the applicants was based directly on the Covid-19 policy and therefore it is necessary to assess the reasonableness of the policy to the extent that it underpins the instruction.

[56] In formulating its policy, Jones & Sandford relied on official guidance from the Ministry of Health and WorkSafe New Zealand. The approach taken and decisions reached by Jones & Sandford were evidence-based and the consequence of thorough and reasonable consideration of the circumstances at the time. The policy did not mandate vaccination for all employees. Employees were only required to undertake a RAT if their vaccination status was effectively unknown, which was the default position if the employee failed to or declined to provide an MVP. The MVP was the only officially Government-recognised way to prove vaccination status at the time. Assessing the policy against the test set out in *Wellington etc Clerical etc IUOW v College Group Limited*[10], the policy did not require employees to perform an act

[8] *Department of Labour v IDEA Services Limited*, District Court Hastings, 4 Nov 2008.
[9] *Hancock and Ors v Jones & Sandford Timber & Hardware (1999) Limited v Anor* [2024] NZERA 35 at [80] – [81]
[10] [1984] ACJ 315.

contrary to law, was within the scope of the employees' contractual obligations, and did not demand the performance of an impossible or dangerous task. For these reasons, I find Jones & Sandford's Covid-19 policy in relation to RAT testing was both lawful and reasonable.

[57] In determining whether the policy, and in particular the requirement for RAT testing, was reasonable, I have also considered the case of *Department of Labour v IDEA Services Limited*[11] submitted by the applicants. I am not persuaded by the applicants' submission that this case is authority for the general proposition that requiring screening is unlawful in the employment context. The case is distinguishable and of limited relevance because of the entirely different legal and factual contexts. The Judge in the District Court was required to determine whether an employer had taken "all practicable steps" by not requiring blood test screening of employees to the criminal standard of "beyond reasonable doubt". In the current matter, the Authority is required to consider what a fair and reasonable employer could do. I conclude *IDEA Services* does not assist me in deciding whether that test is met.

[58] There was no express prohibition on introducing workplace policies in the applicants' individual employment agreements, and I also find the Covid-19 policy was incorporated into the applicants' individual employment agreements through the right to change policy (clause 8 of the agreements) and explicitly preserved by the operation of clause 24 of the agreements. This issue is also discussed below in relation to the applicants' breach of employment agreement claims.

[59] Having concluded the Covid-19 policy was reasonable and it was applicable to the applicants, I have to consider whether it was reasonable for Jones & Sandford to issue instructions to the applicants to undertake RATs based on the policy. I conclude it was. The applicants were given multiple opportunities to provide evidence of their vaccination status. Ms Hancock and Ms Gibson – being fully vaccinated at the time - could have done so, but chose not to for their own reasons. Jones & Sandford also gave the applicants opportunities to propose alternatives, despite not agreeing that RATs were a medical procedure or intervention. The applicants were unable to propose methods of testing that had the same efficacy as RATs such as atmospheric testing,

[11] *Department of Labour v IDEA Services Limited*, District Court Hastings, 4 Nov 2008.

breathalyser testing, mucus testing or saliva testing, or to propose an alternative method of individual testing that was government-approved and would ensure accurate results.

[60] In light of this context, it was reasonable for Jones & Sandford to treat all three applicants as being unvaccinated team members under the terms of the Covid-19 policy, and non-compliant with health and safety requirements until they had provided evidence of a negative Covid-19 test.

[61] Based on the evidence, the applicants deliberately refused to undertake RATs as required under the Covid-19 policy. This was a failure to follow a lawful and reasonable instruction, as well as a wilful and deliberate act affecting safety.[12] The applicants' continued refusal to undertake RATs in the circumstances were actions capable of amounting to serious misconduct and I accept it was reasonable for Jones & Sandford to consider the misconduct as such, given it related to a health and safety requirement during a global pandemic. The company needed to be able to rely on its lawful and reasonable instructions being carried out to have confidence the store could provide a safe environment for its workforce, customers and suppliers.

[62] Having determined the conduct was serious misconduct, it was open to a fair and reasonable employer to conclude it had lost trust and confidence in the applicants to follow lawful and reasonable instructions and summary dismissal was an option available to Jones & Sandford. For all these reasons, I conclude the applicants' dismissals were substantively justified.

Were the applicants' dismissals procedurally fair?

[63] The requirement to provide a negative RAT came into effect on 1 March, which was one month after the Covid-19 policy came into effect in all other respects on 1 February.

[64] Based on the evidence before the Authority, I find Jones & Sandford followed a fair and reasonable process in ending the applicants' employment. Jones & Sandford advised the applicants they would be required to undertake RAT testing in line with the policy well before the testing part of the policy came into effect. Again, the applicants were only required to take RATs because they had not provided proof of vaccination status, which was a deliberate choice on Ms Hancock's and Ms Gibson's part. If Ms

[12] Point 9 of the list of behaviour constituting serious misconduct, individual employment agreements.

Hancock and Ms Gibson had chosen to provide this, they would not have been required to undertake RAT testing.

[65] Jones & Sandford reminded the applicants of their requirement to undertake RATs when they were invited to the boardroom on 1 March and they were advised of the consequences of refusal. When they attended their booking time, the applicants were again advised, this time by Ms McDowall, of the requirement to undertake a RAT and the consequences of refusal.

[66] The applicants purported to raise a new issue in submissions that the instruction was not lawful because it was given by the General Store Manager for Mitre 10 MEGA and Mitre 10 New Plymouth, who - as an employee of Mitre 10 and not Jones & Sandford - was therefore not a party to the employment agreements between Jones & Sandford and the applicants. This issue was not raised in the evidence of any of the applicants, nor advanced by the applicants in any way prior to submissions. The General Store Manager's authority (or implied lack thereof) was never challenged by the applicants and I find it unsubstantiated by the evidence. Even if I had been persuaded that the General Store Manager did not have authority to issue the initial instruction, it was Ms McDowall who issued the critical instruction when she required each of the applicants to undertake a RAT on 1 March in the boardroom under her supervision.

[67] Although there was little room for Jones & Sandford to mistake or misunderstand the applicants' intentions after they had refused the RATs on 1 March, Jones & Sandford wrote to the applicants, giving them a further opportunity to explain their refusals in writing. Jones & Sandford then met with the applicants before issuing the preliminary decision. The applicants were given a further opportunity to respond before the final decision was made. For all these reasons, I find Jones & Sandford fully and fairly investigated the allegations against the applicants, raised the concerns it had with the applicants, gave them a reasonable opportunity to respond to its concerns and genuinely considered the applicants' explanations before dismissing them.

[68] As a fair and reasonable employer, Jones & Sandford was also required to carefully consider any new information from the applicants before proceeding to make its final decision. I find Jones & Sandford did this even though the applicants' reasons for refusing RATs did change over the course of the process. One example of this is that although the applicants referred to undertaking RATs as a "medical intervention",

two of the applicants later said they would be willing to use a cotton bud, suggesting it was not the method of testing they objected to, but their belief that the RAT swab sticks contained a harmful chemical. Jones & Sandford says it does not recall dangerous chemicals on the swabs coming up as an issue at all during the policy consultation and there was no theme of employees objecting to self-testing. Despite this, Jones & Sandford continued throughout the process to consider everything presented by the applicants up until the final decision was made, as reflected in the final outcome letters of 15 March.

[69] Based on the evidence before the Authority, I also accept that Jones & Sandford not only considered alternatives to RAT testing, but also considered alternatives to dismissal. Ms McDowall gave evidence of this, which was supported by the evidence of Mr Jones who confirmed Ms McDowall discussed this with him. The alternatives included whether the applicants could work in different areas or zones of the store, which was not possible because all areas presented the same or similar risks. Working from home was not an option given the nature of the work. Leave without pay was not an option because Jones & Sandford had no idea how long the circumstances were going to continue. While Ms McDowall did not discuss these alternatives with the applicants, all proposals the applicants put to Jones & Sandford were responded to. I also accept as genuine, Ms McDowall's evidence that the employment relationships were not beyond repair at the time she sent the preliminary decisions out and Jones & Sandford would have genuinely been open to preserving the employment relationship. On that basis, there is no evidence that Jones & Sandford predetermined the outcome of the disciplinary process.

Conclusion

[70] Based on the evidence before the Authority, I conclude the applicants were not unjustifiably dismissed. Their dismissals were substantively justified and procedurally fair. The applicants have not been successful on their personal grievance claims and no remedies are available to them.

Were the applicants' individual employment agreements breached?

What is the law?

[71] The applicants say their individual employment agreements were an express bargain and they had never agreed to submit to medical interventions. They also say case law is clear – health and safety policies can only be incorporated into their

individual employment agreements if agreed. They say the Covid-19 policy was a fundamental health and safety policy and although the policy did not require vaccination, it was a "de facto vaccination policy" because the RAT testing regime was only required in the absence of being able to prove vaccination status. The applicants say health and safety policies mandating vaccination need to be specifically signed because of the significance of what is proposed. They say all fundamental variations to an individual employment agreement require signed agreement of the parties and in the absence of such, the introduction of the policy was a unilateral variation to their agreements and was both unlawful and unreasonable.

[72] Jones & Sandford says an employer may lawfully impose workplace policies unless an employment agreement expressly prohibits them. Polices may exist independently of the individual employment agreement and do not need to be bargained unless there is a contractual obligation to do so. It says the applicants were given the opportunity, and engaged with, full and proper consultation before the policy was introduced. The introduction of Covid-19 policies per se has been specifically considered by the Authority to be lawful.[13]

Analysis

[73] Section 113 of the Act makes it clear that a personal grievance is the only way to challenge a dismissal before the Authority. To the extent that the breach of contract claim is a duplication of the applicants' personal grievance claims, it cannot proceed.

[74] Irrespective, I find it was not a breach of the applicants' individual employment agreements for Jones & Sandford to introduce the Covid-19 policy for the reasons set out below.

[75] The applicants' individual employment agreements contain two directly relevant clauses. Clause 8 states:

> The Company has established policies and guidelines on many matters as diverse as Health and Safety procedures to standards of dress. These policies may be altered from time to time at the Company's discretion, but not to conflict with specific conditions of this employment agreement.

[13] See *Bullen v Fliway Transport Ltd* [2023] NZERA 406; *YQD v KiwiRail Ltd* [2-24] NZERA 323; *Basher v Big Chill Distribution Ltd* [2-24] NZERA 63.

> 8.1 You agree to familiarise yourself with and to observe all of our policies and procedures which may change from time to time depending on the Company's requirements. *MOM [Mega Operations Manual]

[76] Clause 24 – Completeness states:

> This agreement together with any appendices, Company policies and related guidelines, replaces all previous written or oral agreements and understandings and represents a full record of the agreement entered into by you and the Company, subject to the right to change Policy as set out in Clause 8, and supersedes any previous agreement relating to the employment whether in writing or not. Any changes or additions to this employment agreement shall not be binding unless mutually agreed and recorded in writing.

[77] In this matter, Jones & Sandford exercised its right to change policy as set out in clause 8. The employer's right to change policy under clause 8 is explicitly preserved by the operation of clause 24. A change in policy or even the introduction of a new health and safety policy is not a "change or addition" to the employment agreement that requires mutual agreement recorded in writing.

[78] The applicants have not provided any legal or evidential basis for their claim that the introduction of a Covid-19 policy is a breach of their individual employment agreements. I find the claim unsubstantiated and it does not succeed.

Findings

[79] I find Deborah Hancock, Christine Gibson and Henrica Ryan were not unjustifiably dismissed by Jones & Sandford Timber and Hardware (1999) Limited. Their personal grievance claims are unsuccessful.

[80] I find Jones & Sandford Timber and Hardware (1999) Limited did not breach the individual employment agreements of Deborah Hancock, Christine Gibson and Henrica Ryan.

Costs

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

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Jones & Sandford 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 the applicants 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.

[83] 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.[14]

Natasha Szeto
Member of the Employment Relations Authority

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