

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2023] NZEmpC 140
EMPC 448/2022**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN HONE HEKE TANIWHA
Plaintiff

AND TE RŪNANGA O TOA RANGATIRA INC
Defendant

Hearing: On the papers

Appearances: L Lambert, advocate for plaintiff
L Castle, counsel for defendant

Judgment: 28 August 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment concerns a challenge to a determination of the Employment Relations Authority which concluded that Mr Taniwha, a former employee of Te Rūnanga o Toa Rangatira Inc (the Rūnanga) did not raise a dismissal personal grievance within 90 days.¹

[2] Mr Taniwha's challenge is brought on a non-de novo basis. He asserts that the Authority's conclusion was wrong in fact and/or in law. In particular, he says his employment relationship problem as filed in the Authority related not to a dismissal grievance, but to a disadvantage grievance which the Authority did not consider.

¹ *Taniwha v Te Rūnanga o Toa Rangatira Inc* [2022] NZERA 625 (Member O'Sullivan).

[3] The parties agreed that after the filing of affidavit evidence, the challenge would be resolved on the papers. I am advised by the representatives that no submissions were filed.

The Authority's determination

[4] The Authority, in explaining the employment relationship problem, stated Mr Taniwha's employment had been terminated because the Rūnanga considered his role came under the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) which required mandatory vaccination for a person in Mr Taniwha's role. He had decided not to be vaccinated. This led to a formal decision by the Rūnanga to terminate his employment on notice.² The Authority went on to record that in his employment relationship problem, Mr Taniwha said his dismissal was unjustified and he had put forward a number of reasons supporting that position.³

[5] The Rūnanga claimed Mr Taniwha did not raise his grievance within the statutory 90-day timeframe provided for under the Employment Relations Act 2000 (the Act). Nor did it consent to an extension of time. It was accordingly agreed that this point should be resolved as a preliminary issue on the papers. Affidavits were filed by the parties.⁴

[6] The Authority made reference to the provisions of s 114(1) of the Act which stipulates how a personal grievance is to be raised. It noted that Mr Taniwha argued his personal grievance was raised in time; thus, he had not applied for leave to file a grievance outside the 90-day period.⁵

[7] The Authority said it needed to identify the actions giving rise to the personal grievances as alleged in the statement of problem. The Authority went on to summarise the chronology.

² At [2].

³ At [3].

⁴ At [3]–[4].

⁵ At [5]–[6].

[8] On 15 October 2021, the Rūnanga had advised Mr Taniwha he would need to be vaccinated as a result of the promulgation of the Order.

[9] Detailed reference was made to a conversation which took place on 10 November 2021 between Mr Taniwha and the Rūnanga's human resources manager, Mr Tamaki, for which the Authority had a transcript. In summary, the Authority recorded that Mr Taniwha had been told the Rūnanga considered that relevant staff needed to be vaccinated by 15 November 2021 or have received their first jab by that date. Since Mr Taniwha's role fell under the Order, its provisions would apply to him.

[10] The Authority said Mr Taniwha's views about the Order were diametrically opposed to those of the Rūnanga. He relied on his rights under the New Zealand Bill of Rights Act 1990 to refuse treatment, and asserted there was nothing in his employment agreement about the COVID-19 Response Act 2020, under which the Order had been made. Mr Taniwha had told the Rūnanga that people still have rights.⁶

[11] The Authority said Mr Taniwha had gone on to comment that he could still take the Rūnanga to court but then pulled back slightly saying "I just want clarification [on the suspension]". This was a reference to the fact that Mr Taniwha had been suspended a few days earlier for an alleged border infringement.⁷

[12] Mr Taniwha was told he had until 15 November 2021 to respond to the request to be vaccinated.

[13] The Authority recorded that on the same day, Mr Taniwha wrote a detailed letter making it clear he did not wish to be vaccinated, setting out his reasoning. His letter concluded by saying: "I am not able to give my full consent to undergo a medical procedure ...".⁸

⁶ At [11]–[12].

⁷ At [13].

⁸ At [8].

[14] The Rūnanga responded on 11 November 2021 saying, amongst other things, that as an employer who provided health services, it was required to uphold the law by taking positive action to ensure that roles falling within the scope of the Order were performed only by vaccinated workers. The letter went on to state that the Rūnanga did not consider it appropriate for it to provide advice or engage specifically on the matters of concern, but directed him to the Ministry of Health for this. It referred to a legal authority which had dealt with the legality of the Order, and finished by noting this was a challenging time and advising Mr Taniwha that confidential counselling support was available.⁹

[15] The Authority recorded that the next stage in the procedure was a letter sent by the Rūnanga on 16 November 2021, terminating Mr Taniwha's employment with effect from 13 December 2021. The 90-day period for filing a personal grievance ran from that date, and expired on 13 March 2022.

[16] On 14 March 2022, Mr Taniwha had sent an email to the Rūnanga stating that he would be "... lodging a personal grievance for unfair dismissal ...".¹⁰ He then lodged a statement of problem on 21 March 2022, which was eight days after the 90-day period to which the Authority had referred.

[17] In its discussion of these events, the Authority said there were three occasions on which Mr Taniwha had said he raised his "personal grievances". It went on to deal with each of those occasions.

[18] The first was in the telephone call of 10 November 2021. Having listened to a recording of that telephone discussion, the Authority concluded it was clear the employer was still expecting a reply as to whether Mr Taniwha would be vaccinated. The Authority found that nothing in the conversation indicated a personal grievance had been raised. Rather, and consistent with other statements, Mr Taniwha had made it clear he had rights and may exercise them at some future date. Although the Rūnanga may have been aware he was not happy with its

⁹ At [9].

¹⁰ At [15]–[16].

approach on the vaccination issue, the Authority found it was not notified in this conversation that he was raising a grievance.¹¹

[19] The Authority then considered the terms of the 10 November 2021 letter sent by Mr Taniwha, noting his point that at some future date he may exercise a right to file a personal grievance. It concluded the letter did not raise such a claim.¹²

[20] The email of 14 March 2022 also referred to a future date when a personal grievance for unfair dismissal would be lodged. The email was clear that Mr Taniwha was not raising a grievance then and there. The subsequent statement of problem could be seen as raising personal grievances but Mr Taniwha had reserved his position, stating that he would provide a timeline to support his personal grievance at the time of mediation. In effect, the Authority concluded that this could not remedy the pre-existing problems.¹³

[21] The Authority went on to say that the Rūnanga knew Mr Taniwha did not agree with the approach it was taking in respect of the COVID-19 vaccinations, and knew he did not agree with the Order. In the context of the case, however, this was a long way from advising the Rūnanga he had grievances and what these were. He said there was no mention of bullying “other than what Mr Taniwha said during the 10 November telephone conversation”. It noted bullying was mentioned in the statement of problem, but that was outside the prescribed 90-day period.¹⁴

[22] Accordingly, the Authority concluded Mr Taniwha could not proceed with his personal grievances as they were not filed within the statutory timeframe.¹⁵ Costs were reserved.

¹¹ At [23]–[24].

¹² At [27].

¹³ At [29].

¹⁴ At [31].

¹⁵ At [33].

The statement of claim

[23] The statement of claim raising the challenge relied on the affidavit which Mr Taniwha had filed in the Authority. He pleads that he had not raised an unjustified dismissal claim at all in that affidavit because he had realised such a grievance may technically have been out of time. However, in his affidavit he had raised an unjustified disadvantage claim that arose during his employment.

[24] The statement of claim went on to particularise elements of Mr Taniwha's disadvantage claim as follows:

- (a) Coercion and failure to explore all alternatives – It is alleged that in his letter of 10 November 2021, Mr Taniwha made it clear to his employer he had concerns about the COVID-19 vaccine and he was unwilling to give informed consent to a vaccinator injecting him. Mr Tamaki had responded that it had to “take positive action and uphold the law”. It is alleged in light of Mr Taniwha's concerns, the employer had a duty of good faith to consider his objections and apply for an exemption under cl 12(a) of the Order.
- (b) Issues about Mr Taniwha's suspension – It is alleged that in the telephone call of 10 November 2021, Mr Taniwha raised what he described as “an unjustified suspension”. However, the employer was intent on talking about vaccine requirements, stating that the suspension would fall away if Mr Taniwha refused to be vaccinated by 15 November 2021. Mr Tamaki also alleged that the employer was going to send him an invitation to a meeting to talk about the suspension, but as it had been notified that Mr Taniwha was not vaccinated, that issue took precedence. It is alleged that the issues which he raised in the telephone call about the suspension were in effect stayed unjustifiably because of the possibility his employment would be terminated were he not to be vaccinated.
- (c) Unilateral variation of contract – It is alleged that Mr Taniwha made it clear twice in the telephone call that he did not agree his employment

agreement could be unilaterally varied to the effect that the employer could terminate the employment agreement if vaccination did not occur.

- (d) Unfair and bullying treatment – Mr Taniwha alleged that in the telephone call he was treated unfairly. When he raised this, the employer said it was just doing its job. He alleges he made it clear that it was not “okay to get bullied and harassed like this”.
- (e) Error as to interpretation of events – It is alleged the Authority erred in its analysis of the telephone conversation and, in particular, of statements which it said showed Mr Taniwha was making it clear he had a right to obtain an exemption under the Order and, if necessary, go to Court in the future.

Analysis

The documents which were filed in the Authority

[25] Mr Taniwha alleges in this Court that a mistake occurred in relation to the conclusions reached by the Authority Member. He says it was not his intention to raise a dismissal grievance but a disadvantage grievance.

[26] A statement of problem was signed and filed by Mr Taniwha on 21 March 2022.

[27] Paragraph one was headed “Unfair Dismissal”. It went on to state: “As you are aware, the above applicant has been or [is] in the process of being terminated unjustifiably and unfairly.”

[28] Paragraph two was headed “Legitimate medical exemptions rejected”. It went on to state:

I had put in medical exemptions before November 7, 2021, which were deemed illegitimate when the new order came into effect at 11.59 on November 7, 2021. Section 12 of the Legislation Act 2019 says “legislation does not have retrospective effect”.

[29] Annexed to the statement of problem was a medical certificate signed by a registered counsellor, certifying that Mr Taniwha was in her care and she had determined it would be inappropriate for him to be vaccinated.

[30] On 4 April 2022, the Rūnanga filed a statement in reply. It asserted that the grievance had been filed out of time.

[31] On 14 October 2022, Mr Taniwha filed an affidavit, the first paragraph of which stated:

I raised a number of personal grievances of unjustified disadvantage in employment (section 103 (1) (b) Employment Relations Act 2000) [ERA] before my dismissal by the Respondent on 15 November 2021.

[32] The affidavit went on to record that he had been threatened with dismissal for not taking a vaccination, that this was not a requirement of his employment contract, and that he had been suspended from employment on 4 November 2021 for an alleged “breach of a border order”. Then he made reference to the telephone call of 10 November 2021 and the termination letter of 16 November 2021, after which he summarised his claim by stating:

I believe that my employer knew full well by 10 November that I had a personal grievance that I was trying to resolve with it; that I raised contractual concerns, health and safety at work concerns, unjustified discipline in the form of my suspension and bullying concerns all within that phone call.

[33] On 28 October 2022, Mr Tamaki filed an affidavit for the Rūnanga. He gave his account of the key events. In referring to the telephone discussion of 10 November 2021, he said he did not recall Mr Taniwha raising any personal grievances in the discussion.

[34] The determination states that the 90-day issue was resolved on the papers. The determination was issued on 25 November 2022.

What was the nature of the grievance Mr Taniwha was pursuing?

[35] There was an inconsistency in the documentation filed by Mr Taniwha. The statement of problem referred to a dismissal grievance. The supporting affidavit referred only to a disadvantage grievance.

[36] The Authority proceeded on the basis that the issue pertained to a dismissal grievance and did not consider the issue highlighted in Mr Taniwha's affidavit that he was in fact attempting to raise a disadvantage grievance.

[37] A contextual consideration is that Mr Taniwha was unrepresented.

[38] In hindsight, it would have been desirable to clarify the inconsistency as to the nature of the grievance being raised. Be that as it may, the later and more detailed document was in fact Mr Taniwha's affidavit. The statement in the affidavit as to the nature of the grievance was not expressly identified and considered.

Was a disadvantage grievance raised?

[39] The next question, then, is whether the statements made in the telephone conversation of 10 November 2021, and the letter of that date, were sufficient to put the employer on notice that a disadvantage grievance was in effect being raised.

[40] The Authority correctly referred to dicta of this Court in *Chief Executive of Manukau Institute of Technology v Zivaljevic*,¹⁶ which referred to the principles identified by the Court in a number of previous cases, particularly *Creedy v Commissioner of Police*.¹⁷

[41] These and other authorities establish that a personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. However, it is also the case that it is insufficient for an employee simply to advise an employer that he or she considers they have a personal grievance, or

¹⁶ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

¹⁷ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

even to specify a statutory type of personal grievance. The employer must know what it is responding to, and must be given sufficient information for that purpose on the merits with a view to resolving the grievance soon and informally, at least in the first instance.¹⁸

[42] The question I must now consider is whether Mr Taniwha crossed this threshold in his communications with Mr Tamaki. In doing so, I remind myself that the Court's role at this stage is not to determine whether Mr Taniwha raised a valid disadvantage grievance. Rather, the question is whether he raised a personal grievance within the period of 90 days beginning with the day on which the action alleged to amount to that grievance occurred or came to the notice of the employee.

[43] In considering this question, I must consider first the allegations contained in the statement of claim asserting error. Secondly, I must consider the evidence that was before the Authority in support of those assertions, principally the transcript of the telephone conversation of 10 November 2021, and the subsequent letter of the same date.

[44] Dealing with the particular assertions of unjustified disadvantage as pleaded in Mr Taniwha's statement of claim, I begin with the allegation that there was coercion and failure to explore all alternatives. The essence of this assertion appears to be that against the background of strong views against vaccination, an application for a vaccination exemption has to be made under cl 12A of the Order. This provision provides that a relevant person conducting a business or undertaking (PCBU) may, by notice in writing to the Minister, apply for an exemption for a person specified in the application. On the material attached to the statement of problem, it appeared that Mr Taniwha had obtained a medical certificate for the purposes of cl 7A of the Order. This clause provided for a registered health practitioner to certify that a person should not be vaccinated. The certificate was dated 3 November 2021 but it was no longer

¹⁸ At [36]–[38].

relevant as at 10 November 2021, since cl 7A was repealed with effect from 7 November 2021.¹⁹

[45] In fact, Mr Taniwha did not rely on either the provision or the certificate in the telephone conversation. Instead, he referred to applying for “an exemption under 9B”.

[46] There was no “9B” under the COVID-19 Public Health Response Act 2020, but it is reasonable to infer Mr Taniwha was referring to the provision which, by 10 November 2021, allowed for an exemption, cl 12A of the Order. Although the situation was unclear, there was sufficient information provided by Mr Taniwha as to his strong views about not being vaccinated, and to confirm he wished to obtain such an exemption. This was a step which the Rūnanga, as a PCBU, would plainly have had to have considered and, if appropriate, initiated; and if not appropriate, discuss its views with Mr Taniwha.

[47] The second point concerned the suspension which had been imposed by letter of 4 November 2021 and which was attached to his affidavit as filed in the Authority. In the letter it was alleged Mr Taniwha may have breached COVID-19 border restrictions without proper authorisation, and there had been no communication of his actions with the Manager Mental Health and Addictions of the Rūnanga. He was accordingly suspended forthwith. He was told that a disciplinary meeting would be arranged for the week beginning 15 November 2021.

[48] In the telephone conversation, Mr Taniwha raised strong objection to the overriding of the disciplinary process by the possibility of him being terminated. Notice of termination was ultimately given on 16 November 2021 but the last day of work was not to occur until 13 December 2021. However, Mr Tamaki was adamant the disciplinary process was no longer relevant. It is clear Mr Taniwha wanted his employer to address the issue notwithstanding the possibility that the notice of termination of employment would be given at the same time as he understood the suspension was to be considered.

¹⁹ COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021, cl 9.

[49] The third allegation concerned what he described as a unilateral variation of contract. He was raising a legal point as to whether the law permitted his employer to act as it did. The employer, in its letter of 11 November 2021, addressed the issue. It is apparent that the Rūnanga realised, from the communications of 10 November 2021, that Mr Taniwha was not accepting the employer could terminate his employment on the ground asserted. He plainly wanted his employer to engage with him about his concerns.

[50] Next, Mr Taniwha alleges that the treatment of him was unfair and bullying. The clear inference of this assertion is that, by proceeding in the circumstances – rapidly and without considering the suspension issue – Mr Taniwha felt he was being improperly treated. As the Authority noted, in the telephone call he referred to being bullied. Obviously he wanted his employer to cease such an approach.

[51] Finally, Mr Taniwha asserts that properly interpreted, his references to future events in the telephone conversations related to what would happen if he was unable to obtain an exemption.

[52] Standing back, I am satisfied Mr Taniwha outlined these concerns. Plainly, he wished his employer to address them all. They related to events that had taken place from 3 to 10 November 2021. The concerns were obviously within the necessary 90-day timeframe. I am satisfied that the test for raising a grievance under s 114(2) of the Act is met.

[53] As I have already said, whether any or all of the assertions raised will succeed is another question which is not for me to consider at this stage.

Section 179(5) of the Act

[54] Section 179(5) of the Act provides that there is no right of challenge to a determination, or part of one, about the procedure the Authority has followed, is following or is intending to follow.

[55] No issue was raised by the Rūnanga as to the application of the subsection, but for completeness, I deal with it.

[56] This is a case where the finding by the Authority had substantive effect. It meant that it would not investigate Mr Taniwha's employment relationship problem at all.

[57] That being so, and in accordance with many authorities,²⁰ s 179(5) does not apply.

Result

[58] The challenge is allowed. The Authority's preliminary determination concluded the proceedings before it. No part of the employment relationship remains before the Authority. In these circumstances, the relationship problem is now before the Court.²¹

[59] I direct the parties to attend mediation to resolve the limited personal grievance claims that I have found were validly raised. I also encourage the representatives to resolve costs issues in light of the fact that Mr Taniwha's challenge has succeeded. If necessary, I will receive memoranda.

B A Corkill
Judge

Judgment signed at 11 am on 28 August 2023

²⁰ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [25]; *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91, [2019] ERNZ 250 at [27](c); *Bird v Vice-Chancellor of the University of Waikato* [2023] NZEmpC 16, (2023) 19 NZELR 521 at [19].

²¹ *Abernethy v Dynea NZ Ltd* [2007] ERNZ 271 (EmpC) at [34], [59], and [60]. See also *Goldie v Chief Executive of the Department of Corrections* [2023] NZEmpC 30 at [61]-[62].