IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 30
EMPC 326/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHELLEY GOLDIE Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: On the papers

Appearances: V Corbett, counsel for plaintiff
D Traylor and J Rainbow, counsel for defendant

Judgment: 28 February 2023

JUDGMENT OF JUDGE J C HOLDEN

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[1] Ms Goldie was dismissed by the Department of Corrections, effective on 6 January 2022.

[2] On 6 May 2022, her representative raised a grievance with the Department of Corrections for unjustifiable dismissal.

[3] Because that grievance was raised more than 90 days after Ms Goldie's dismissal, and the Department of Corrections did not consent to her raising the grievance outside the 90-day period prescribed by the Employment Relations Act 2000

(the Act), Ms Goldie applied for leave from the Employment Relations Authority (the Authority) to raise her grievance out of time.[1]

[4] Ms Goldie argued there were exceptional circumstances that occasioned the delay in raising a grievance; in particular she said she had made reasonable arrangements to have the grievance raised on her behalf by an agent, and the agent unreasonably failed to ensure that the grievance was raised within the required time.[2]

[5] The Authority did not accept that the delay in raising the personal grievance was occasioned by exceptional circumstances and the application for leave was declined.[3]

[6] Ms Goldie challenges the Authority's determination declining her application and this judgment resolves her challenge.

Ms Goldie was dismissed for failing to be vaccinated against COVID-19

[7] Ms Goldie started working for the Department of Corrections in 2017.

[8] In early October 2021, the Government announced that mandatory COVID-19 vaccinations would be extended to a number of public service sectors, including prisons. The vaccination order came into effect for the Department of Corrections prisons from 6 November 2021.

[9] Ms Goldie was told that her position was covered by the vaccination order and that she had until 8 December 2021 to have the necessary vaccinations. She was told that, if she did not do so, her employment would be terminated on four weeks' notice.

[10] Ms Goldie was not prepared to have the COVID-19 vaccinations and, by letter dated 9 December 2021, was given four weeks' notice of the termination of her employment. As a result, Ms Goldie's employment with the Department of Corrections ceased on 6 January 2022.

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1 Employment Relations Act 2000, s 114(1), (3) and (4).
2 Section 115(b).
3 *Goldie v Chief Executive of the Department of Corrections* [2022] NZERA 408 at [44] (Member Arthur).

Ms Goldie engaged an agent

[11] In early November 2021, after Ms Goldie's role was designated as requiring vaccination against COVID-19, she contacted an employment advocate. That advocate has significant experience in the employment institutions and Ms Goldie found them through a work colleague.[4]

[12] The advocate advised Ms Goldie that she could have a defence against dismissal and that if she was dismissed for not taking the vaccine, she could raise a grievance. There also was discussion of a class action against the Department of Corrections in respect of its treatment of unvaccinated staff. Ms Goldie signed an authority to act at the beginning of November 2021 and provided that to the advocate. That authority was an instruction from Ms Goldie to the advocate's firm to act for her in a class action that involved her employer, the Department of Corrections. It referred to the effect the COVID-19 vaccine mandate had on Ms Goldie.

[13] On Monday 6 December 2021, Ms Goldie emailed the advocate noting that she had been told that the advocate intended to represent Department of Corrections' staff for wrongful dismissal. She advised that she and her partner would be supportive of that but that she sought more information about what the advocate's intentions were and how she and her partner could support those intentions.[5] The advocate rang Ms Goldie and her partner that night and spoke to them for approximately three quarters of an hour, explaining what submitting a case against the Department of Corrections for wrongful dismissal meant, including the grounds they would be relying on.

[14] Ms Goldie says the advocate confirmed that they were acting for several corrections officers who were looking at taking action if they were dismissed under the vaccine mandate. Ms Goldie and her partner explained their own circumstances and how a dismissal would impact on them. Ms Goldie says that the advocate said they would be happy to raise a grievance on her behalf if she was dismissed.

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4 In separate proceedings the employment advocate is seeking non-publication of their name. For that reason, their name is not used in this judgment.

5 Ms Goldie's partner was also employed by the Department of Corrections and similarly was facing dismissal for not having the COVID-19 vaccination.

Ms Goldie said she would confirm everything once she had discussed the situation with her partner. Ms Goldie says the advocate was very supportive and adamant she would have a case if the Department of Corrections was to dismiss her under the vaccine mandate and that the advocate was keen to support her partner and her. Ms Goldie was encouraged by the advocate's enthusiasm and proactive stance. Ms Goldie understood that the initial idea of some sort of group action had turned into the advocate representing her personally.

[15] Ms Goldie emailed the advocate again on 7 December 2021, advising the advocate that she was happy for them to represent her in a case against the Department of Corrections.

[16] In an affidavit filed by the advocate in the Authority, they say they undertook to be Ms Goldie's advocate to raise a personal grievance against the Department of Corrections "on or about 6 December 2021".

[17] The following day (8 December) at 10.35 am the advocate emailed Ms Goldie requesting personal employment information, which the advocate said was required to raise her grievance. After Ms Goldie was unable to make contact by telephone, she emailed the advocate at 12.13 pm the same day with most of the information the advocate had requested, again reiterating that she wished "to take the Department to court for Unjustified Dismissal" and was happy for the advocate to take action on this. She also sent the advocate her voice recording of a meeting that she had with the Department in November 2021. She received a text message the same day from the advocate asking for an email address for the prison manager, which Ms Goldie provided.

[18] As can be seen, all these discussions and contacts were made prior to Ms Goldie being given notice of her dismissal from the Department. They were, however, after Ms Goldie had been told of the consequences of her failing to be vaccinated. After Ms Goldie was given notice of her dismissal from the Department of Corrections, she sent a text message to the advocate advising that she had all of her emails to go through and would do so over the weekend. The advocate texted back

confirming they had received the voice recording that Ms Goldie had sent the previous day.

[19] On 10 December 2021, Ms Goldie contacted the advocate again asking them to telephone her. She sent a timeline by email to the advocate on 13 December and emailed them again on 16 December 2021. There was no reply to any of those contacts.

[20] On 18 January 2022, however, Ms Goldie telephoned the advocate and they spoke for around four minutes. During that conversation the advocate said that they were close to submitting Ms Goldie's personal grievance claim but that they had a bit more work to undertake and that they would update her later on. Ms Goldie said that she thought that her claim was all but completed and was due to be submitted to the Department. She decided to give the advocate some time before contacting them again as she assumed they were quite busy. She telephoned the advocate again on 8 February and 25 February 2022, but her calls were not answered. When she did not get hold of the advocate on 25 February 2022, she said she was quite anxious about the progress that was being made. Ms Goldie recalled that there was a time limit that needed to be stuck to, although she was not exactly sure what that was.

[21] On 16 March 2022, the advocate did take a call from Ms Goldie. The advocate said they were driving and would update Ms Goldie the following day. However, this did not happen.

[22] Ms Goldie continued to try and make contact with the advocate throughout March – on 17, 23, 24 and 29 March 2022. She also telephoned the advocate on 7 April and sent multiple emails to them but got no response. At around that time, a friend of Ms Goldie's told her about Mr Corbett, who is her current counsel. She had an initial consultation with him on 13 April 2022, and she instructed him to take on her case.

[23] Over the next two to three weeks Mr Corbett sought, and Ms Goldie provided, information and copies of emails between herself and the former advocate. Mr Corbett raised the grievance with the Department of Corrections on 6 May 2022.

The Act sets out a number of steps in considering whether leave should be granted

[24] The relevant sections of the Act provide:

> **114 Raising personal grievance**
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> (1) Every employee who wishes to raise a personal grievance must, subject to sub- sections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
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> …
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> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
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> (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
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> (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
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> (b) considers it just to do so.
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> …
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> **115 Further provision regarding exceptional circumstances under section 114**
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> For the purposes of section 114(4)(a), exceptional circumstances include—
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> …
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> (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time;
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> …

[25] The first point is that the exceptional circumstances provided for in s 115 are not exclusive. There could be exceptional circumstances that do not fit within any of

the four examples given. Nonetheless, here Ms Goldie argues that her circumstances fall within s 115(b).

[26] There are two components to s 115(b):

(a) the employee made reasonable arrangements to have the grievance raised on their behalf by an agent; and

(b) the agent unreasonably failed to ensure that the grievance was raised within the required time.

[27] If both those components are satisfied, the enquiry turns to s 114(4)(b), which also has two components:[6]

(a) whether the delay in raising the grievance was occasioned by the exceptional circumstances; and

(b) whether the justice of the case requires an extension of time.

The parties have competing submissions

[28] Essentially, Ms Goldie's position is that she had made reasonable arrangements with the advocate to raise her grievance and that they unreasonably failed to do so. Ms Goldie says that was an exceptional circumstance, as provided for in s 115(b), which led to the delay in her raising the grievance.

[29] The Authority's determination appears to turn on its view that it was unreasonable for Ms Goldie to wait as long as she did before giving up on her instructed agent and finding new representation.

[30] Ms Goldie disagrees with that approach and submits that it is appropriate to consider the position from 17 March 2022, when arguably Ms Goldie may have been expected to have understood that the advocate was not going to lodge the personal

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6 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7 at [25].

grievance, and that 90 days should be taken from that date. Mr Corbett, on behalf of Ms Goldie, notes that the grievance was lodged well within 90 days of 17 March 2022.

[31] The Department of Corrections submits that Ms Goldie failed to make reasonable arrangements to have her grievance raised. It says she was aware that she had to raise a grievance within 90 days of the date of her dismissal, pointing to the provision in the applicable collective agreement that articulated the relevant dates. The Department also notes that Ms Goldie's termination letter drew her attention to her right to take a personal grievance under the Act.

[32] On the Department of Corrections' submissions, Ms Goldie was sophisticated and confident in relation to legal matters and her arrangements with the advocate to raise a personal grievance on her behalf were materially deficient. Those arrangements were, therefore, unreasonable.

[33] The Department submits that the evidence does not establish that any instructions were ever given to the advocate to raise a personal grievance; the initial engagement was in relation to a "class action" against the Department of Corrections.

[34] Although the Department of Corrections accepts that Ms Goldie told the advocate that she was happy for him to represent her and her partner in their cases against the Department, and for the advocate to take the Department to Court for unjustifiable dismissal, those communications pre-dated her receiving notice of the termination of employment and were therefore contingent on that event. The Department of Corrections says that, although Ms Goldie subsequently provided the advocate with certain information, she issued no instructions.

[35] The Department appears to accept that the advocate failed to be responsive and engaging but says that something more is required to find that reasonable arrangements were made by Ms Goldie.

[36] The Department of Corrections also argues that, even if Ms Goldie's initial arrangements with the advocate were reasonable, she could not reasonably continue to rely on those arrangements based on the subsequent events. The Department points

to the lack of engagement from the advocate. It submits that from 16 or 17 March 2022, at the latest, Ms Goldie simply did not have reasonable arrangements in place for her grievance to be raised. It notes that, as at 16 March 2022, Ms Goldie still had 21 days within which she could have raised her grievance but did not do so.

[37] The Department of Corrections submits further that, if the Court were to be satisfied that the delay was occasioned by exceptional circumstances, it is not just to grant leave. The Department says that is because Ms Goldie knew, or ought to have known that the advocate had not, and was not going to, raise a personal grievance on her behalf a substantial period prior to the expiry of 90 days and yet, despite that knowledge, she did not act with sufficient alacrity to ensure that her rights were preserved.

[38] The Department of Corrections also points to the further delay of 23 days after the date that Ms Goldie instructed Mr Corbett.

Ms Goldie made reasonable arrangements to have her grievance raised by an agent

[39] The parties refer to various Court decisions that touch on s 115(b) of the Act. Both parties refer to *Melville v Air New Zealand Ltd*, in which the Court declined to grant leave, finding that, while the grievant made it clear that she wanted her union to pursue a grievance for unjustifiable dismissal on her behalf, she did not expressly request the Union to raise the grievance.[7] Thus, the Court found she failed to meet the first limb of s 115(b).[8] The Court also referred to the inclusion of the 90-day time limit in the collective agreement, which Ms Melville had referred to, albeit somewhat obliquely, in her reminder email to the Union representative.

[40] With respect, I consider the bar in *Melville* was set too high. In that, I agree with Chief Judge Colgan in *Davies v Dove Hawkes Bay Inc*.[9] As noted in *Davies*, while leave to appeal the Employment Court's decision in *Melville* was declined, the Court of Appeal said that it could not accept, as a matter of law, that there must always

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7 *Melville v Air New Zealand Ltd* [2010] NZEmpC 87, (2011) 9 NZELC 93,700 at [33].
8 At [34].
9 *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83, [2013] ERNZ 191 at [21].

be an express instruction by the claimant to the agent to bring a timeous claim. The Court of Appeal said that would amount to a quite unwarranted narrowing down of the statutory provision in s 115(b); in the words of the provision, the employee has to make "reasonable arrangements" to have the particular grievance raised on their behalf.[10]

[41] In any event, the reliance on *Melville* fails on the facts. Here, the evidence of Ms Goldie and of the advocate was that the advocate was engaged to act on Ms Goldie's grievance. The initial approach was in respect of a proposed class action, but by the middle of December 2021, that instruction had morphed into a personal grievance claim, which was what both Ms Goldie and the advocate thought the advocate was to do. I do not consider there is anything in the point that most of the contact occurred before Ms Goldie was dismissed; she knew the consequences of her not having the vaccine, and the contact made after she received notice and it took effect was simply part of the ongoing instruction. There was no need for her to reissue her instructions after the dismissal took effect.

[42] I also do not put much weight on the 90-day provision being in the collective agreement. Section 115(c) of the Act already includes as an exceptional circumstance where the employee's employment agreement does not contain the required explanation concerning the resolution of employment relationship problems.[11] That explanation must include reference to the period of 90 days within which a personal grievance must be raised.[12] Including the 90-day timeframe in the applicable agreement cannot mean s 115(b) does not apply; something more must be required. Here, the evidence was that Ms Goldie understood there was a time limit, but there was no evidence she reviewed the collective agreement or that she knew the date the time period ended.

[43] The other cases where leave was declined referred to, in particular by the Department, are also distinguishable from the present case. In *Wills v Farmlands Co-*

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10 *Melville v Air New Zealand Ltd* [2010] NZCA 563, (2010) 8 NZELR 190 at [27], cited in *Davies*, above n 9, at [20].

11 Employment Relations Act 2000, ss 54 and 65.

12 Sections 54(3)(a)(iii) and 65(2)(a)(vi).

Operative Society Ltd the finding was that the grievant just took advice;[13] in *McMillan v Waikanae Holdings (Gisborne) Ltd*, the Court found that Mr McMillan had taken insufficient steps to establish whether he had a grievance and had not given instructions to anyone to actually raise it within the prescribed time.[14]

[44] *Davies* was a case where the Court found exceptional circumstances under s 115(b).[15] In so doing, the Court said if a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.[16]

[45] *Hutchison v Nelson City Council* was another case where s 115(b) was found to apply.[17] It has some similarities to the present case; Ms Hutchison engaged an experienced lawyer and gave him instructions to act for her on her personal grievance. She relied on him to do what was necessary to implement her instructions. The Court found she had made reasonable arrangements to have the grievance raised on her behalf.[18]

[46] Here too, Ms Goldie instructed an experienced advocate to pursue her grievance and provided them with the information necessary to do so. She made reasonable arrangements to have her grievance raised on her behalf by an agent.

The agent unreasonably failed to ensure that the grievance was raised

[47] There is no question that the agent failed to ensure the grievance was raised. The affidavit filed by the agent in the Authority goes into some detail as to why that

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13 *Wills v Farmlands Co-Operative Society Ltd* [2020] NZEmpC 227, (2020) NZELR 787 at [30].
14 *McMillan v Waikanae Holdings (Gisborne) Ltd* (2005) 7 NZELC 97,859 (EmpC).
15 *Davies*, above n 9.
16 At [29].
17 *Hutchison v Nelson City Council* [2013] NZEmpC 184.
18 At [29].

was. While the advocate had various matters impacting on their effectiveness at the relevant time, there simply is no excuse for them not to have looked after Ms Goldie's interests, if only by informing her in a timely manner that the advocate was no longer in a position to act. The Court has previously noted that representatives in employment law matters have a considerable responsibility to the people or businesses they represent. If representatives find they cannot properly represent their clients, they should advise their clients of the true state of affairs and help them find assistance elsewhere.[19]

[48] In conclusion on this point, the agent unreasonably failed to ensure that the grievance was raised within the required time.

Even if the agent did not act unreasonably in the circumstances, there were exceptional circumstances

[49] Although I have found the agent unreasonably failed to raise the grievance within time, I address the possibility that, in view of the agent's personal issues, their failure was not unreasonable.

[50] As noted, s 115 does not define "exceptional circumstances" exhaustively and there could be exceptional circumstances that do not fit within the four examples given. In the context of s 115, an "exceptional circumstance" is one that is out of the ordinary course, or unusual, or special, or uncommon. It need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.[20]

[51] The examples included in s 115, however, assist in determining when such circumstances exist and when they do not; the Court must be conscious of not readily expanding exceptional circumstances beyond the examples set out.[21]

[52] Nevertheless, in circumstances where a grievant has made reasonable arrangements for a grievance to be raised on their behalf by an agent, and, through no

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19 *Bennett v Employment Relations Authority* [2020] NZEmpC 54, [2020] ERNZ 136 at [55].
20 *R v Kelly* [2000] QB 198 (CA) at 208, cited in *Creedy*, above n 6, at [32].
21 *Creedy*, above n 6, at [28].

fault or responsibility of the grievant, the agent fails to do so, the circumstance may be analogous, even if the failure of the agent is not "unreasonable". For example, if an agent is involved in a serious accident or a sudden illness that prevents them from raising the grievance in time, it may be wrong to suggest that the agent's failure was "unreasonable". In such a situation, whether by parity of reasoning, or simply because the circumstances would still be exceptional, s 114(4)(a) would likely apply.

[53] This means that if the Court were to accept that the various matters impacting on the advocate at the relevant time meant that their failing to raise the grievance was not unreasonable, nevertheless there were exceptional circumstances here.

The delay was occasioned by the exceptional circumstances

[54] But for the exceptional circumstances, Ms Goldie clearly would have submitted her grievance within the required time. When looking at the chronology, there is no question but that Ms Goldie was committed to challenging her dismissal. Her own actions were timely; by 18 January 2022, just 12 days after her dismissal, Ms Goldie thought that her claim would be submitted imminently.

[55] Accordingly, the delay was occasioned by the exceptional circumstances.

It is just to grant leave

[56] The final question for the Court on this issue is whether it is just to grant leave to Ms Goldie to raise the personal grievance after the expiration of the 90-day period.

[57] It is under this head that the delay between when the grievance ought to have been submitted and when it was submitted is relevant. It may not, for example, be just to allow a grievant, even with exceptional circumstances, to submit a grievance well beyond the end of the 90-day period. An employer may be prejudiced by such a delay, memories may have faded, and witnesses may become unavailable. The Department, however, raises no prejudice to it in defending the grievance. It simply argues that Ms Goldie did not act or did not act with sufficient alacrity in the circumstances, to ensure her rights were preserved.

[58] While certainly, by mid-March 2022, Ms Goldie had concerns regarding the agent's responsiveness, she had managed to make contact with them on 16 March 2022 and they made no suggestion that they were not going to act for her. It does not strike me that it automatically follows that when they did not call her, as promised, the following day, that this date marked the latest point at which she could reasonably have relied on the agent to act. It does not seem unreasonable to me that she continued to try and make contact with the person that she had instructed, and who had the information necessary for her grievance, for another two to three weeks before she finally abandoned all hope that the agent would do what was required and sought alternative representation.

[59] There then was approximately three weeks after Mr Corbett was instructed before the grievance was actually submitted. However, the emails demonstrate that, during that period, Mr Corbett was seeking information from Ms Goldie about her grievance and about the steps she had taken with the previous agent, and she was providing him with that information. While possibly a grievance might sensibly have been submitted more quickly, any short delay would not impact on whether the justice of the case required an extension of time.

[60] In conclusion, I consider it just to allow Ms Goldie to proceed with her personal grievance. Leave is granted accordingly.

Substantive case now to be timetabled

[61] In declining leave, the Authority determined the proceedings before it. No part of the employment relationship problem remains before the Authority.[22]

[62] In those circumstances, and as accepted by the parties (albeit reluctantly by the Department), the entire employment relationship problem is before the Court.[23]

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[22] While there was an application for removal filed with the Authority, the determination on the preliminary issue rendered that application redundant.

[23] *Abernethy v Dynea NZ Ltd* [2007] ERNZ 271 (EmpC), at footnote 1, [34], [59], [60]; see also *Davies*, above n 9, at [43].

[63] There will now be a directions conference convened to progress Ms Goldie's substantive claim.

[64] Ms Goldie is entitled to costs on this challenge, calculated on a 2B basis.[24] If they cannot be agreed between the parties, she may apply to the Court by memorandum filed and served within 20 working days of this judgment. The Department may respond by memorandum filed and served within a further 15 working days, with Ms Goldie entitled to file and serve a memorandum in reply within a further five working days. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 4.15 pm on 28 February 2023

[24] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.