IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 489
3154423 and 3154621

	BETWEEN	KARL MALCOLM AND 4 ORS Applicants
	AND	THE CHIEF EXECUTIVE OF DEPARTMENT OF CORRECTIONS AND 4 ORS Respondents
Member of Authority:	Rachel Larmer	
Representatives:	Greg Bennett, counsel for the Applicants Susan Hornsby-Geluk, counsel for the Respondents	
Investigation Meeting:	On the papers	
Submissions and Further Information Received:	2 November 2021 from the Applicants 3 November 2021 from the Respondents 4 November 2021 from the Applicants 4 November 2021 from the Respondents	
Date of Determination:	5 November 2021	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Parties

[1] Mr Karl Malcolm is the lead Applicant and his employer, the Department of Corrections, is the lead Respondent. There are four other Applicants and four other Respondents, namely;

(a) Applicant Carol Waring whose employer is Counties Manukau District Health Board;

(b) Applicant Phillippa McDermott whose employer is Waikato District Health Board;

(c) Applicant Rebecca Mildren whose employer is Bay of Plenty District Health Board;

(d) Applicant Julie Kerr whose employer is Capital & Coast District Health Board.

Non-publication

[2] Although the Applicants in the Amended Statement of Problem sought "*name suppression*", they advised the Authority on 4 November 2021 that they were no longer seeking a non-publication order prohibiting publication of their names or of any other information.

Applicants' claims

[3] The Applicants lodged an Amended Statement of Problem on 2 November 2021. It claimed that the Applicants had been subjected to unjustified actions in their employment, because their Respondent employers were requiring them to be vaccinated in accordance with the COVID-19 Public Health Response (Vaccinations) Order 2021 ("the Order").

[4] The Applicants sought;

(a) An award of distress compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

(b) A finding that the vaccination mandate set out in the Order was unlawful on the grounds that the Human Rights Act 1993 (HRA) and "*associated legislation overrides the vaccination mandate*".

[5] The Applicants also applied to have their entire matter removed to the Employment Court under s 178(1) of the Act. The Applicants relied on the grounds in s 178(2)(a) and (b) of the Act, namely that the matter involved;

(a) An important question of law that arose other than incidentally; and

(b) Such urgency, and was of a nature, that the removal was in the public interest.

[6] The applicants identified the s 178(2)(a) important question of law as being "*whether the Human Rights Act, the New Zealand Bill of Rights Ae (sic) be in breach by the mandate that the NZ Government*." (sic)

[7] The Applicants under the s 178(2)(b) ground for removal, namely that due to the nature and urgency of the matter the removal to the Court was in the public interest, alleged that "*The estimated number of workers affected could be as high as 500,000*."

Respondents' position

[8] The Respondents disputed that;

(a) The Authority had jurisdiction to determine the lawfulness or otherwise of the Order;

(b) Any of the Applicants had properly raised personal grievance claims, as required by s 114(1) of the Act;

(c) There was any matter currently before the Authority that was capable of being removed to the Employment Court.

[9] Alternatively, the Respondents submitted that if the Authority considered it had jurisdiction over the Order claims, then that should be removed to the Employment Court under s 178(2)(b) of the Act.

[10] The Respondents accept that if the employment institutions were held to have jurisdiction over the Order claims, then that was of such a nature and urgency that it was in the public interest for it to be removed to the Employment Court.

[11] The Respondents agreed the deadline for an affected worker to be vaccinated makes this matter urgent. The outcome of any challenges in the employment institutions to the lawfulness of the Order would also affect other employees/employers, whose work fell within the scope of the Order, not just the parties to these proceedings. It was therefore clearly in the public interest for the lawfulness of the Order to be clarified by the Employment Court as soon as possible, if need be.

[12] However, if the Authority concluded that the Applicants had properly raised personal grievances, then the Respondents challenged removal of the personal grievances to the Employment Court because none of the grounds for removal in s 178(2) applied. The Respondents say that the Authority is the appropriate body to hear conventional personal grievance claims.

Urgency

[13] The Authority granted urgency on the jurisdiction issues and, if need be, to the removal application. Urgency on the underlying substantive claims was to be assessed once the removal application had been determined.

[14] Urgency was based on the claims in the Amended Statement of Problem, and more specifically on the Applicants challenge the lawfulness of the Order that is at the core of these proceedings.

[15] However, the Applicants fundamentally changed their position about that, when Mr Bennett filed his submissions. So the position is that having obtained urgency, the Applicants then immediately rescinded the core claims which the grant of urgency was based.

[16] Urgency would not have been granted if Mr Bennett had acknowledged to the Authority from the outset that the Applicants accepted the lawfulness of the Order. If that had occurred, then the Authority would have likely handled the grievance claims in accordance with its normal procedure.

[17] However, this matter has still been determined in accordance with the urgent timetable the parties agreed to. Subsequent to agreeing this timetable, Mr Bennett sought to add 14 new Applicants and 14 new Respondent parties to these proceedings. He also sought to introduce new (unsworn) affidavit evidence.

[18] The Authority pointed out that if that this new material was permitted the issuing of this determination would necessarily be delayed. Newly joined parties had to be served, and they needed time to take advice and respond to the claims made against them. The existing timetable could therefore not be met. Mr Bennett elected not to extend the current timetable by pursuing this new material.

Statement in Reply

[19] The Authority notes the considerable difficulties that it has faced in obtaining a validated Statement of Problem. That, combined with the urgency of the application meant that the Respondents were not required to file a Statement in Reply in the required form, but rather were permitted to file an "*appropriate response*" that reflected the time constraints.

[20] The Respondents now face a fundamentally different claim, as articulated in the Applicants' submissions, than what was pursued by the Applicants during three case management conferences and in the Amended Statement of Problem.

Mediation

[21] Mediation has not occurred. Both parties said mediation was not appropriate at this time, due to the urgency of the challenge that had been made to the lawfulness of the Order. The parties therefore sought the Authority's determination on the jurisdiction and removal matters as soon as possible, and did not wish to delay that occurring by taking time to attend mediation.

[22] Had the Authority known the Applicants were not challenging the lawfulness of the Order, then the parties would have likely been directed to mediation consistent with the Authority's normal processes. The Authority therefore records concern about the manner in which this matter has bene placed, and progressed, before the Authority.

Issues

[23] There are three preliminary issues that, by agreement with the parties, are to be dealt with by the Authority 'on the papers', prior to a substantive investigation of the unjustified disadvantage grievance claims. These include:

(a) Whether the Authority has jurisdiction to hear the Applicants' claims;

(b) Whether the substantive personal grievance claims should be granted urgency;

(c) Whether the substantive matter should be removed in its entirety to the Employment Court to determine in the first instance.

Amended Statement of Problem

[24] The Respondents said that the Amended Statement of Problem lodged by the Applicants on 2 November 2021 identified two issues for the Authority to investigate and determine:

(a) *Issue 1*: the lawfulness of the COVID-19 Public Health Response (Vaccinations) Order 2021; and

(b) *Issue 2*: personal grievances for unjustified disadvantage and/or discrimination by each Applicant against their respective employer, for allegedly requiring the Applicants to be vaccinated, in accordance with the Order.

[25] It is important to acknowledge that the Amended Statement of Problem sets out the claims that are to be investigated and determined by the Authority. It therefore sets out the parties and parameters of the Authority's inquiry. The Authority cannot investigate claims that have not been served on the other party.

[26] Counsel also cannot introduce new claims, parties or evidence for the first time in submissions. Mr Bennet sought to do this in his submissions. While that could potentially have been addressed by adjourning this investigation to enable these concerns to be dealt with, the time constraints involved in this matter meant, that is not a valid option in this particular case.

[27] The Authority has held three urgent case management conferences with the parties to address issues that impacted on the validation of these matters. This included problems over the identity of the parties, concerns about the validity of Applicants' 'authorities to act', and difficulties regarding service of these proceedings. As a result of this intervention, a timetable was set to enable an urgent determination of the jurisdiction and removal issues to be done.

[28] Considerable time and resources have been devoted, on an urgent basis, to getting the matter to this point. The Authority has therefore elected to proceed to determine these matters, based on the claims that are currently before it, so that the parties are in a positon to challenge this determination at the earliest possible date.

[29] Accordingly, this determination is necessarily confined to addressing the claims in the Amended Statement of Problem, and not to the proposed, intended or amended version of the claims that appear in the Applicants' submissions.

Applicants' submissions

[30] Mr Bennett's submissions attempted to introduce evidence from counsel and included claims against non-parties. He also positioned the claims as not involving a challenge to the lawfulness of the Order, contrary to what has been claimed in the Amended Statement of Problem.

[31] Accordingly to Mr Bennett's submissions, the Applicants' position is broadly that:

(a) They now accept that the COVID-19 Public Health Response (vaccinations) Order 2021 (the Order) is lawful and that the Authority has no jurisdiction to review it;

(b) They have discrimination claims that are separate from a challenge to the lawfulness of the Order, because they are based on "*Human Rights and associated legislation."*

(c) They are claiming that the Prime Minister and the Minister of COVID-19 Response are "*persons involved in breaches*" of "*employment standards*", under s 142W of the Employment Relations Act 2000 (the Act);

(d) They have personal grievance claims for unjustified disadvantage and discrimination that;

(i) Have been validly raised with their employers though the Amended Statement of Problem;

(ii) Should be removed in their entirety to the Employment Court, in the first instance;

(iii) Alternatively, if this matter is not removed to the Court, the Authority should grant urgency to the substantive claims.

[32] Mr Bennett submitted that the Applicants had "*provided sufficient information for the respondents to be aware of their personal grievance*." The Authority did not accept that submission. It was disputed by the Respondents. There was no evidence of personal grievance claims being raised, other than via service of the Amended Statement of Problem.

Respondents' submissions

[33] The Respondents submitted that the Authority does not have jurisdiction over Issue 1 or Issue 2, so there were no claims capable of removal. In particular;

(a) The Authority does not have jurisdiction to determine the lawfulness or otherwise of the Order;

(b) Only the High Court (and superior Courts) have the ability to judicially review a decision of the executive or legislator;

(c) Neither the Authority nor the Court has the ability to make the findings sought by the Applicants in the remedies section of the Amended Statement of Problem;

(d) The Act only allows judicial review proceedings to be brought in very limited circumstances, and this does not extend to an order made under the COVID-19 Public Health Response Act 2020;

(e) The Applicants have not properly raised personal grievances with their individual employers;

(f) There is no employment relationship between the Applicants and the Prime Minister and/or the Minister of COVID-19 Response;

(g) The alleged breaches of employment standards are inextricably linked to the lawfulness of the Order, which is not capable of review by the employment institutions.

[34] The Respondents further submitted that if the Authority considered that the Applicants had properly raised personal grievance claims with their employers, these personal grievance claims for unjustified disadvantage and/or discrimination can and should be dealt with as conventional personal grievances by the Authority, in accordance with its normal processes. Accordingly, neither urgency nor removal to the Employment Court were warranted regarding the substantive claims.

[35] Alternatively, the Respondents said that if the Authority determined that it did have jurisdiction in relation to Issue 1 (lawfulness of the Order), then only Issue 1 (and not the underlying substantive claims) should be removed to the Employment Court. If the Authority determined that it had jurisdiction over Issue 1, then the Respondents agreed that the matter of the lawfulness of the Order was urgent, time sensitive and in the public interest.

[36] The Respondents' position regarding any matters relating to Issue 2, was that these could and should be addressed in the first instance by the Authority. The Respondents did not agree that the nature of the claims or the Applicants' view on the urgency of their claims, meant that it was in the public interest for Issue 2 (personal grievances) to be removed to the Court.

[37] The Respondents pointed out that the resolution of Issue 2 is largely continent on the outcome of Issue 1, so in the interests of expediency the Respondents submitted that the

Authority's investigation and determination of Issue 2 (personal grievances) should be stayed, until Issue 1 had been resolved by the employment institutions.

Jurisdiction of the Authority

[38] The Authority is a creature of statute, so it has no inherent jurisdiction. The Authority's jurisdiction comes solely from s 161 of the Act. This provides that the Authority has "*exclusive jurisdiction to make determinations about employment relationship problems generally*".

[39] Section 4(2) identifies the "*employment relationships*" that are covered by the Act. Section 5 of the Act defines an "*employment relationship problem*". Section 6 of the Act sets out the meaning of an "*employee*".

[40] The Supreme Court considered the jurisdiction of the Authority arising out of s 161 in the recent judgment of *FMV v TZB*.[1] The Supreme Court stated that s 161 of the Act:

> […] reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about "problems generally", not specific causes of action. **The only requirement is that the problem must be an "employment relationship" one; that is, it must relate to or arise from the "employment relationship"** in its entire sense […] (emphasis added.)

Does the Authority have jurisdiction to investigate and determine the legality of Issue 1 - the Order?

[41] Mr Bennett submitted that the claims do not require the Authority to determine the lawfulness of the Order, because it was agreed "*that is the role of the High Court*." He said that the Applicants "*accept that the Order is lawful*".

[42] The Applicants claim that:

> […] being required to be vaccinated by their respective employers is a breach of the Human Rights Act (HRA) and the Employment Relations Act 2000 (the ERA), and the Health and Disability Commissioner Act 1964 (the HDC) and the New Zealand Bill of Rights Act 1990 (the BORA).

[43] Notwithstanding the position now adopted by the Applicants in their submissions, it is clear from the Amended Statement of Problem that the Applicants' case is based on a belief that the Order is unlawful.[2] The Applicants are asking the Authority to determine that their

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1 [2021] NZSC 102.

2 Paragraphs 7; 29; 35-37, 46; 47; 50; 51; 57 and 67 of the Amended Statement of Problem.

employers' compliance with the Order is in breach of the employers' obligations under specified legislation.

[44] The application for removal to the Employment Court includes statements that demonstrate that the fundamental basis for the Applicants' claims is that the Order is unlawful because they sought:[3]

> An injunction to prevent the New Zealand government from directing that the applicants must provide details of whether or not they have been vaccinated, and that if they have not then they are liable to be dismissed from their employment without recourse to a personal grievance.

[45] Paragraph 2.8 of the removal application claims that:

> The New Zealand government, in mandating that everyone must be vaccinated with COVID-29 vaccine, has failed to recognise that its actions are not only unlawful but fail to address fundamental human rights of the applicants and any other person within NZ who does not wish to be vaccinated with COVID-19 vaccine.

[46] Notwithstanding their concession that the Order is lawful, these quotes from the Applicants' filings make it clear that they are effectively seeking to challenge the legality and lawfulness of the Order, regardless of the 'label' they have put on their claims.

[47] The Applicants have linked the Order to the alleged breaches of the other legislation they identified. Adopting a 'but for' test, if there was no Order then the Applicants would not be pursuing claims that relied on alleged breaches of the legislation they identified or personal grievances for unjustified dismissal and/or discrimination.

[48] A fundamental element of the Applicants' claims is that they are asking the Authority to determine that an employer's lawful compliance with the Order automatically breaches their terms and conditions of employment. Although that did not necessarily have to be the case, that is how the Applicants elected to plead their claims.

[49] While the Applicants could have pursued claims that focused on how their own employer's actual implementation of the Order had breached their statutory and/or contractual employment obligations, the Amended Statement of Problem does not do that. Instead it is highly focused on criticising the government's implementation of the Order.

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[3] Paragraphs 2.3; 2.7-2.11 and 2.14 of the Amended Statement of Problem.

[50] The Authority agrees with the Respondents that, to the extent the Amended Statement of Problem raised issues relating to actions taken by a Minister, the Prime Minister or the New Zealand Government, such actions cannot be imputed to the Respondents.

[51] In order to determine the current claims, the Authority would be required to consider and adjudicate on the lawfulness or otherwise of the Order. It cannot make the findings, or grant the remedies sought, by the Applicants other than by doing so. However, the Authority does not have jurisdiction to do that. Any such a claim would need to be made to the High Court by way of judicial review.[4]

[52] The lawfulness of the Order has already been challenged in two separate judicial review proceedings in the High Court, one of which found the Order was lawful and the other which has been heard and the decision is pending.[5]

[53] In *GV v Minister of COVID-19 Response*, Justice Churchman stated:[6]

> **The Authority has no jurisdiction to declare legislation invalid**. Consequently, the applicant commenced judicial review proceedings in this Court challenging the lawfulness of the Vaccination Order […]. (Emphasis added.)

[54] The Employment Court in *"Employees" v Attorney-General* stated:[7]

> **[…] the validity of the Order is for the High Court to consider on an application for judicial review.** This Court has a judicial review function but is limited to certain matters. Inquiring into the validity of an Order made by a Minister pursuant to another Act is not one of them. Nor do I regard s 189 [of the Act] as otherwise broadening out the reach of those powers.

[55] To the extent that the Applicants seek to base their claims on alleged breaches of the Human Rights Act 1993 and/or the New Zealand Bill of Rights Act 1990, such claims relate to whether this legislation was appropriately considered when the Order was made by the Minister. This again requires determination of the lawfulness of the Order, and as such, it is outside the jurisdiction of the Authority.

[56] To the extent that the Applicants have based their claims on personal grievances involving alleged discrimination, their claim is a general one that relates to the requirement of

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4 *"Employees" v Attorney-General* [2021] NZEmpC 141.
5 *GF v Minister of COVID-19 Response* [2021] NZHC 2526.
6 Above note 5.
7 Above note 4.

the Order that only vaccinated people perform certain work, rather than to any individualised discriminatory actions taken against them personally by their employer.

[57] That approach means that the Applicants are asking the Authority to determine that an employer's compliance with the Order is automatically discriminatory, because the discrimination claims are not linked to any personal information or circumstances.

[58] Paragraph 35 of the Amended Statement of Problem states:

> The applicants claim that the respondents are discriminating against them on one or more of the prohibited grounds of discrimination, one such ground is under religion, however other grounds exist […].

[59] None of the Applicants explained why they believed that their employer was aware that their personal situation fell within one of the protected categories set out in s 105 of the Act. Nor did they explain what the acts of alleged religious discrimination consisted of. There was also no information about the unidentified "*other grounds*" the Applicants implied they may be relying on as instances of discrimination.

[60] Employers are bound to follow New Zealand laws. Whether the Order itself is discriminatory, or was created due to or resulted in automatic blanket discrimination, is not within the Authority's jurisdiction to investigate and determine.

[61] The issue of whether the Order is inherently discriminatory or automatically breaches other legislation can only be addressed by way of an application for judicial review in the High Court. It is therefore not a matter the Respondents or Authority have the power to determine.

[62] The Authority finds that, as currently pleaded in the Amended Statement of Problem, none of the claims made by the Applicants, including those involving specified legislation or grounded in generic discrimination, could proceed independently of a finding regarding the lawfulness of the Order.

[63] They are all part of the same underlying claim, in the sense that they are the reasons why the Applicants say that the employer's implementation of the Order breaches their rights. There is (as yet) no separate cause of action that can be considered independently of this fundamental issue.

[64] The Authority therefore concludes that it does not have jurisdiction to consider Issue 1, and nor does the Employment Court. This claim must therefore be dismissed, so it is not capable of being removed to the Employment Court.

Does the Authority have jurisdiction to investigate and determine Issue 2 – personal grievance claims for unjustified disadvantage and/or discrimination?

Section 103 of the Act

[65] It is clearly within the Authority's jurisdiction to investigate and determine the personal grievances identified in s 103 of the Act.

[66] The Applicants say they "*have been unjustified disadvantaged by all of the respondents, either individually, or jointly*, […]".[8] They further claim that "*the respondents are discriminating against them on one or more of the prohibited grounds of discrimination, one such ground is under religion, however other grounds exist* […]."[9]

[67] The personal grievance claims for unjustified disadvantage and/or discrimination must involve the Applicant and their employer, or former employer, as stated in s 103(1) of the Act. It is therefore not possible for all of the Applicants to be jointly disadvantaged and/or discriminated against by all of the Respondents.

Alleged discrimination grievance

[68] Section 104 of the Act defines "*discrimination*". Section 105 of the Act sets out the "*prohibited grounds of discrimination for the purposes of s 104 of the Act*". These grounds of discrimination have the meanings given under the Human Rights Act 1993.

[69] This list of prohibited grounds of discrimination does not include different treatment of a non-vaccinated employee on the grounds of their vaccination status. In fact the Order mandates different treatment of certain specified workers, on the grounds of vaccination status.

[70] The Applicants must therefore base their discrimination grievances on one of the prohibited grounds of discrimination listed in s 105 of the Act.

[71] However, the Amended Statement of Problem does not identify:

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8 Paragraph 8 of the Amended Statement of Problem.
9 Paragraph 35 of the Amended Statement of Problem.

(a) Who of the Applicants are claiming to have a personal grievance on one or more of the prohibited grounds of discrimination;

(b) What prohibited grounds of discrimination (if any) each Applicant relies on;

(c) What specific actions or omissions are alleged to have been discriminatory or what detriments the Applicants claim they have personally been subjected to;

(d) Why the treatment is alleged to arise from discrimination and is not simply due to the employer's compliance with the lawful Order;

(e) What collective employment agreements and/or individual employment agreements the Applicants claim have incorporated the legislation the Applicants' rely on as a term and condition of their employment;

(f) How the Applicants allege the Respondents breached their contractual obligations, particularly where the Order provides for a mandated worker to apply for an exemption where appropriate;

(g) Which (if any) Applicants have applied for an exemption and the outcome of their exemption application.

Section 114 of the Act

[72] Section 114 of the Act requires an employee to raise a personal grievance claim with their employer, or former employer, within 90 days of the action arising or coming to the employee's notice, whichever is the later.

[73] The Respondents submitted that the Applicants had not properly raised their personal grievance claims with their respective employers, which was the pre-requisite for such claims being put before the Authority for investigation and determination.

[74] There is no particular form of words that needs to be used to raise a grievance. Nor does it have to be raised in a particular way. The Amended Statement of Problem could potentially have raised personal grievance claims, if the information conveyed was sufficient to have meet the requirements of s 114(1) of the Act.

[75] The only information about raising a grievance was in paragraph [8] of the Amended Statement of Problem. That says:

> This claim acts as formal notice of rising (sic) a personal grievance against employers who are requiring the applicants to be vaccinated for Covid-19 against their wishes […].

[76] That in itself was insufficient.

[77] The Employment Court in *Creedy v Commissioner of Police* stated in regards to the obligation in s 114 of the Act:[10]

> It's the notion of the employee wanting the employer to address the grievance that means that it **should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance** or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment […].
>
> As the Court determined in cases under the previous legislation **for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address**. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[78] In *Creedy* the Employment Court held that a letter from the employee's lawyer, advising the employer that a personal grievance was being raised based on unjustified disadvantage, did not meet the statutory requirements for raising a grievance.

[79] The same reasoning applies to the personal grievance claims the Applicants appear to want to pursue. Mere references to disadvantage and/or discrimination grievances in the Amended Statement of Problem are insufficient in themselves to validly raise such grievance with an employer.

[80] The Applicants' employers cannot read the Amended Statement of Problem and know what the employment relationship problem is that it is being alleged by their employee. The Amended Statement of Problem does not identify when the claim arose, who was involved, what the specific claim is, what facts their employee is relying on for each of their claims, the nature of the alleged grievance (i.e. disadvantage or discrimination), the grounds of

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10 [2006] ERNZ 517 at [36].

discrimination relied on, or even if the alleged ground of discrimination on the grounds of religion applied to their employee.

[81] That level of uncertainty and lack of clarity is inconsistent with the requirement to give the employer sufficient notice of the problem, so they are in a position to be able to address it.

[82] The Amended Statement of Problem is 49 pages long, most of which is not relevant to a personal grievance claim. The grievances are mentioned almost in passing and with barely any detail.

[83] The Amended Statement of Problem lacks the core details required to enable any personal grievance to be raised, considered and addressed by an employer. On that basis, the Authority has concluded that there is no personal grievance claims currently before the Authority which is capable of being investigated and determined.

[84] The Amended Statement of Problem purports to raise personal grievances for unjustified disadvantage:

> By all the respondents, either individually or jointly, by the respondents failing to comply with the Human Rights Act, the Employment Relations Act 2000, the New Zealand Bill of Rights Act 1990, the Medicines Act 1981, the Health and Disability Commissioner Act 1994 and associated regulations to the above Acts. [11]

[85] The Amended Statement of Problem also purports to raise personal grievance:

> Against the employers who are requiring the applicants to be vaccinated for COVID-19 against their wishes and in breach of the above Acts and regulations, and against one or more of the complaints [sic] personal views based on religious and/or ethical grounds.[12]

[86] The requirement for specified workers to be vaccinated in order to continue performing certain specified work, which the Applicants are seeking to challenge by way of personal grievance claims, stems from a legislative instrument (being the Order), and not from any independent action by or omission of the Respondents.

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11 Paragraph [8] of the Amended Statement of Problem.
12 Paragraph [9] of the Amended Statement of Problem.

[87] The Applicants have filed generic personal grievances, that fails to identify what specific actions have been taken by a particular employer, against a specific employee, or the facts that each Applicant relies on in support of each claim against their employer.

[88] The fact that one of the remedies claimed is a finding by the Authority that the "*vaccination mandate is unlawful*" demonstrates that, as currently pleaded, the grievances are unavoidably linked to an attempt by the Applicants to challenge the lawfulness of the Order.

[89] The Applicants claim that the Respondents' compliance with the Order has automatically unjustifiably disadvantaged and/or discriminated them in their employment is misconceived.

[90] The claim that the Respondents have determined that the Applicants will "*potentially be dismissed*" is anticipatory and is not sufficiently detailed to enable each Respondent employer to provide a substantive response to the purported grievance at this time.[13]

[91] The Amended Statement of Problem does not contain the individual circumstances or personal experiences of any of the Applicants, meaning there is insufficient detail to enable a Respondent to properly consider and, more importantly, substantively address the alleged grievance.

[92] The vague reference in the Amended Statement of Problem to "*employers who are requiring the applicants to be vaccinated*" is insufficient to identify the employment relationship, including the specific employment agreement, on which the grievances are based.

Personal grievance claims not yet "raised" by Applicants

[93] These fundamental omissions mean that the Amended Statement of Problem is insufficient to have validly raised personal grievance claims on behalf of any of the Applicants, in accordance with the requirements of s 114 of the Act.

[94] There is currently no valid personal grievance claim currently before the Authority that it has jurisdiction to investigate and determine.

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13 Paragraph [9] of the Amended Statement of Problem.

[95] If a particular employer has engaged in acts or omissions that have disadvantaged and/or discriminated against one or more of their employees, then that needs to be raised as a personal grievance by the employee(s) with their own employer.

[96] Where an employee has raised a personal grievance in accordance with the requirements of s 114(1) of the Act, the Authority may investigate the process the employer has used to comply with an existing law. That would include an examination of whether or not the employer has complied with its statutory good faith, procedural fairness and contractual obligations.

[97] The s 103A justification test in the Act would apply to the employer's actions. However, the Authority does not have the jurisdiction to be able to determine that an employer's actions were substantively unjustified, merely because the employer acted in compliance with an existing law, such as the Order.

Actions taken by the government

[98] The Amended Statement of Problem sets out in detail the Government's public health response to the COVID-19 pandemic, specifically the actions, comments and policies of the Prime Minister and the Minister of COVID-19 Response.[14]

[99] To the extent that the Applicants have claimed in the Amended Statement of Problem that "*no jab no job is unlawful and not an action a fair and reasonable employer could have taken in all the circumstances when considering the law*", the investigation of that claim involves consideration of the lawfulness or otherwise of the Order. That falls outside the Authority's jurisdiction.[15]

[100] The Respondents were and are required to comply with the law, as it stands, at all material times. The Authority can look at the process the employer used to comply with the Order but it cannot revisit the Order to decide that the employer's compliance with it was substantively unjustified.

[101] Likewise, claims that the Government, in the person of the Prime Minister and/or named Ministers, have subjected the Applicants to unjustified actions is outside the Authority's

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14 Paragraphs [7], [36] and [37] of the Amended Statement of Problem.
15 Paragraph [67] of the Amended Statement of Problem.

jurisdiction, unless the parties involved in the claim are in, or were in, an employment relationship.

[102] Insofar as any personal grievances that the Applicants wish to pursue are based on the acts or omissions of the Government, and specifically the Prime Minister and/or the Minister of the COVID-19 Response, this cannot give rise to a valid personal grievance claim because:

(a) There is no employment relationship between the Prime Minister or the Minister of the COVID-19 Response and any of the Applicants; and

(b) The Government's implementation of the Order is not attributable to any of the Respondents;

(c) The Respondents are unable to address the alleged unlawfulness and/or illegality of the government's, Prime Minister's and/or any other Minister's actions connected to the Order, through the personal grievance mechanisms in the Act.

[103] The Amended Statement of Problem claims that comments reportedly made by the Prime Minister and the Minister of COVID-19 on or around 12 October 2021:

> [..] directly or indirectly, knowingly involved a breach of the employment standards between each of the applicants and their respective employers.

[104] Mr Bennett's submissions say that the Applicants want the Authority to determine "*Whether Jacinda Arden, Christopher Hipkins and Ashley Bloomfield have breached s 142W(1)(a) to (d) of the* [Act]."

[105] However, none of these three individuals are a party to these proceedings, so the Authority cannot investigate claims against them. Accordingly, there is no jurisdiction to investigate the alleged involvement in breaches of employment standards by the people Mr Bennett identified in his submissions.

Removal to the Employment Court

[106] Section 178(1) of the Act provides a mechanism for the Authority to remove part or all of a matter to the Employment Court to hear in the first instance. Section 178(2) of the Act sets out for possible grounds for removal.

[107] The Authority does not consider that the employment institutions have jurisdiction regarding Issue 1 – the lawfulness of the Order. It is therefore not susceptible to removal under s 178(1) of the Act.

[108] The personal grievance claims have not been properly raised by each Applicant with their own employer, as required by s 114 of the Act. Accordingly, the Authority does not currently have valid personal grievance claims before it, which would be capable of being removed to the Employment Court in the first instance.

[109] Even if there was a valid claim before the Authority, it is necessary for one of the grounds in s 178(2) to be met before the removal can occur. The Applicants failed to establish that any of the permitted grounds for removal in s 178(2) of the Act exist.

[110] The removal application does not succeed.

Other

[111] The jurisdiction issues and the removal application have been dealt with by the Authority with urgency.

[112] Having determined that the Authority does not have jurisdiction regarding the claims identified in the Amended Statement of Problem, there are no substantive claims currently before the Authority that could be granted urgency or be removed to the Court.

Outcome

[113] The Respondents' challenge the Authority's jurisdiction to investigate and determine the issues in the Amended Statement of Problem succeeds. The Authority does not have jurisdiction to investigate:

(a) The lawfulness of the Order;

(b) Alleged personal grievance claims that have not been "*raised*" as required by s 114(1) of the Act;

(c) Claims against the non-respondent individuals named in the Amended Statement of Problem and/or identified in Mr Bennett's submissions.

[114] Accordingly, the Applicants' removal application does not succeed, because there is currently no substantive claim before the Authority that is capable of being removed to the Employment Court under s 178(1) of the Act.

Costs

[115] The Respondents as the successful parties are entitled to a contribution towards their actual legal costs.

[116] The parties are encouraged to resolve costs by agreement. If that is not possible then the Respondents may file a cost application within 7 days of the date of this determination. The Applicants have 7 days within which to file their costs submissions. The Respondents the have a further 7 days within which to file any reply submissions.

[117] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are invited to identify any factors that they say should result in the notional daily tariff being adjusted to reflect the particular circumstances of this case. This may include, but is not limited to, any conduct that has unreasonably increased the parties' actual legal costs.

Rachel Larmer
Member of the Employment Relations Authority