

Note: This determination includes orders at paragraphs [12] and [14] prohibiting publication of some information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 408
3173643

BETWEEN SHELLEY GOLDIE
Applicant

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

AND GREGORY BENNETT
Additional party

Member of Authority: Robin Arthur

Representatives: Victor Corbett, counsel for the Applicant
David Traylor, counsel for the Respondent

Investigation Meeting: 11 August 2022

Determination: 23 August 2022

DETERMINATION OF THE AUTHORITY

- A. Shelley Goldie’s application for leave to raise a personal grievance with the Chief Executive of the Department of Corrections after the expiry of the 90-day period is declined.**

- B. Costs are reserved with a timetable set for memoranda if a determination of costs is needed.**

Employment Relationship Problem

[1] Shelley Goldie applied for leave to raise a personal grievance about the termination of her employment as an administration support officer at the Northern Region Correctional Facility operated by the Department of Corrections (the Department). The Department gave her notice of dismissal on 9 December 2021 because it said Ms Goldie had not complied with the requirements of the Covid-19 Public Health Response (Vaccinations) Order 2021 (the Order). The Order required certain Corrections staff members to be vaccinated against Covid-19 by 8 December 2021. The notice given to Ms Goldie said the Department considered alternatives to vaccination, such as working from home, were not sustainable. She was paid four weeks' notice so the end of her employment came into effect on 9 January 2022.

[2] Ms Goldie's present legal representative advised the Department on 6 May 2022 that she wanted to pursue a grievance about the end of her employment, some 117 days earlier. In response the Department said notice of her grievance was outside the required 90-day period to raise a grievance. It declined to consent to Ms Goldie raising her grievance out of time.

[3] Ms Goldie then applied to the Authority under s 114 of the Employment Relations Act 2000 (the Act) for leave to pursue the grievance on the grounds of exceptional circumstances. She said she had asked a previous representative to raise her grievance and that representative had failed to do so in time.

The Authority's investigation

[4] The Authority's investigation of Ms Goldie's application for leave began with arrangements for the lodging of evidence, in affidavit form. An investigation meeting was then convened, by audio-visual link, to hear oral submissions from counsel for both parties. Counsel spoke to written submissions they had lodged the day before. Their submissions addressed the factual issues and the legal principles relevant to determining whether exceptional circumstances had occurred and, if so, it would be just to grant leave to raise the grievance after the expiry of the 90-day period.

[5] As provided for by s 174E of the Act this determination has not set out a record of all evidence and submissions received but states relevant findings of fact and legal

principles and expresses a conclusion on the leave application. Along with the parties' submissions, the evidence and information considered comprised:

- (i) The statement of problem and the statement in reply and documents attached to those statements;
- (ii) Affidavits lodged by Ms Goldie dated 26 May 2022 and 21 June 2022; and
- (iii) A memorandum dated 5 August 2022 and a sworn affidavit dated 10 August lodged by Greg Bennett, the former representative that Ms Goldie said failed to raise her grievance in time.

[6] The Department was given but opted not to use an opportunity to lodge an affidavit from a witness on its behalf responding to Ms Goldie's affidavit evidence.

Request for orders prohibiting publication of some information

[7] In his memorandum and affidavit Mr Bennett asked for an order prohibiting publication of information about some serious family health issues he described in those documents and, to protect the identity of a family member, an order for "permanent name suppression" of his own name in this determination. He also asked that if the Authority declined those requests, temporary orders be made "to allow the matter to be appealed to the Employment Court".

[8] Mr Bennett operates a business providing employment advocacy services and trading under the name Bennett & Associates Employment Law. In directions made as part of the Authority investigation Mr Bennett was given the opportunity to lodge an affidavit providing any relevant evidence from him about his dealings with Ms Goldie. This opportunity was provided because Ms Goldie, in her application, made comments critical of failures in the services she had arranged for him to provide to her. Mr Bennett was sent Ms Goldie's statement of problem, her two affidavits and accompanying documents so he was aware of what she said about what had happened. He was also offered the opportunity to attend the investigation meeting by audio visual link to be heard further on the matter.

[9] In his affidavit Mr Bennett said he had given Ms Goldie an undertaking, on or about 6 December 2021, to raise her personal grievance with the Department. Broadly paraphrased, his evidence was that personal health issues of his own, along with other serious family health matters that he had to attend to at the relevant times, had caused

him stress and affected certain brain functions so that he was not able to prioritise certain tasks. He said he had sent the Authority and counsel for the parties a copy of an assessment by health specialists of his condition but no such document was received by the Authority in these proceedings. He said he had “dropped” the task of raising Ms Goldie’s grievance because of effects on his brain function when under pressure.

[10] Both parties, through counsel, advised they would abide by whatever determination the Authority made about Mr Bennett’s requests to prohibit publication of family health matters and of his own name in relation to this matter. However counsel for Ms Goldie noted some personal health information regarding Mr Bennett was already a matter of public record in a decision on another case where there were shortcomings in the advocacy services Mr Bennett had provided to a client.¹

[11] The principle of open justice is recognised as fundamental to public confidence in the impartial administration of justice. Where circumstances require some departure from that principle, the limits imposed must be only to the extent necessary to serve the ends of justice. The party (or other person) seeking the order must show specific adverse consequences sufficient to justify an exception to the fundamental principle.²

[12] Safety and security of a family member, if sufficiently grave and demonstrated in the evidence, is recognised as a circumstance that may meet the high standard required to depart from the fundamental principle of open justice and justify an order for non-publication of certain information.³ Mr Bennett’s affidavit was not accompanied by any documentary evidence corroborating the serious family health matters he referred to but there was no reason relating to public confidence in the administration of justice which required any details of that information to be included in this determination. For that reason it was also appropriate to protect that information by ordering that the family health matters referred to in Mr Bennett’s memorandum and affidavit, including the name of the family member, are prohibited from publication in relation to these proceedings. This order is made in exercise of the power to prohibit publication given to the Authority by clause 10 of Schedule 2 of the Act.

[13] That limit was the extent necessary to serve the ends of justice. The protection for family health information did not appropriately extend to Mr Bennett’s own health

¹ *Bennett v Employment Relations Authority* [2020] NZEmpC 54 at [19], [24], [46]-[49] and [55].

² *Erceg v Erceg* [2016] NZSC 135 at [2], [3] and [13].

³ *Erceg*, above n 2, at [21](c).

information or his identity. Both that information and his identity were relevant to assessing Ms Goldie’s application and, by reference to earlier cases involving Mr Bennett,⁴ the likelihood of her explanation of how her grievance came not to be raised. And, because of the considerable responsibility that representatives in employment law matters have to the people or businesses they represent, there were public policy reasons that Mr Bennett’s omission in her case should not be suppressed or hidden.⁵ Neither would an order of the kind that Mr Bennett sought regarding his own identity change the fact that relevant aspects of his own personal health information, and its effect on his practice, were already a matter of public record. In an earlier case involving Mr Bennett, the Employment Court endorsed an Authority finding that suffering ill-health did not excuse his conduct in not progressing a client’s case. As the Court explained, “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”.⁶

[14] Mr Bennett’s application for “permanent name suppression” of his name in relation to this matter is declined. However, as Mr Bennett asked for a “temporary” order to allow any such conclusion “to be appealed to the Employment Court”, two steps have also been taken. Firstly, Mr Bennett is joined as an additional party to these proceedings on the Authority’s own motion under s 221 of the Act. This addresses the observation of the Employment Court in the earlier case involving Mr Bennett that a person directly affected by the Authority’s determination of an issue should be added as a party so that person is able to challenge that specific determination.⁷ Secondly, and separate from the other order regarding family health information, publication is prohibited of Mr Bennett’s name in relation to these proceedings for 14 days from the date of issue of this determination. The order expires after 14 days unless a further order is made, either by the Authority or the Court.

How Ms Goldie’s employment came to end

[15] Ms Goldie had worked for Corrections since 2017. In early October 2021 the Government announced mandatory Covid-19 vaccination would be extended to a number of public service sectors, including prisons. The amendment of the Order affecting staff members of Corrections prisons came into effect from 6 November 2021.

⁴ See *Davidson v Great Barrier Airlines Limited* [2016] NZERA Auckland 403 at [28]-[30] and *McBride v ANZCO Foods Ltd* [2020] NZEmpC 234 at [19] and [20].

⁵ *Bennett*, above n 1, at [55].

⁶ *Bennett*, above n 1, at [55].

⁷ *Bennett*, above n 1, at [40] and [41].

[16] During October and November Ms Goldie and other workers were provided with information about which Corrections staff were covered by the extended order and the dates by which they were expected to have received vaccination shots.

[17] On 15 November Ms Goldie attended a meeting called by the prison director. The director and a human resources advisor confirmed earlier advice to Ms Goldie that Corrections considered her role was covered by the requirements of the Order. She was provided with a form about how to seek redeployment, if other roles were available, and was told two vaccination shots using the Pfizer vaccine had to be completed by 8 December. Ms Goldie was also told she would be given four weeks' notice of the termination of her employment if she was not fully vaccinated by 8 December 2021. In the following week she was also advised that an alternative option, using the AstraZenica vaccine, was available and, if taken, would extend dose deadlines into March 2022.

[18] On 7 December Ms Goldie sent a signed notice to a Department representative headed "Notice of Conditional Acceptance". The notice had a list of items about which she asked the Department to provide her with evidence. This included evidence that the Covid-19 virus exists, the vaccine was safe and not toxic, and wearing masks was effective for preventing transmission of the virus. The notice said the requested evidence had to be provided to her within 10 days and that if it was not, this "will be proof that the alleged virus is a hoax and you as the enforcer of this alleged vaccine have no lawful/legal or moral right to force upon me any medical procedure I don't consent to".

[19] By 8 December Ms Goldie had not provided confirmation she had received the vaccination doses required by the Order. A letter sent to Ms Goldie on 9 December gave her four weeks' notice of the termination of her employment. The notice was paid and she was told not to carry out any duties or attend any of the Department's premises.

[20] The notice of termination included the following information: "If you feel aggrieved by this action, you have the right to take a personal grievance in terms of the Employment Relations Act 2000".

Arranging representation

[21] Ms Goldie had already taken steps to have Mr Bennett represent her in, firstly, challenging the application of the order to Corrections staff and, secondly, to raise a grievance on her behalf if she was given notice of the termination of her employment.

[22] On 3 November Ms Goldie had provided Mr Bennett with a signed copy of a form headed “Authority to act”. It said she instructed Bennett & Associates Employment Law to act for her in “a class action” that involved her employer, she agreed to Bennett & Associates acting for her under s 236 of the Act and she understood she was “part of a class action against my employer”. She said a work colleague had given her the form. An email reply from Mr Bennett acknowledged he had received the form.

[23] On 6 December Ms Goldie emailed Mr Bennett saying the same work colleague had told her Mr Bennett intended representing Corrections staff “for wrongful dismissal”. She asked for more information. In her affidavit evidence Ms Goldie said Mr Bennett rang her that evening and spoke to her and her husband, who was also a Corrections staff member. She said they spoke to Mr Bennett for more than 40 minutes about what was needed “to submit a case against the Department for wrongful dismissal”. She said Mr Bennett told her that he was representing several Corrections officers who were looking at taking action if they were dismissed under the vaccine mandate. She said Mr Bennett was very supportive and adamant she would have a case if the Department terminated her employment under the mandate.

[24] Ms Goldie said that “what seemed to initially be some sort of group action had turned into Greg actually representing me personally”.

[25] The following day, 7 December, Ms Goldie sent Mr Bennett an email message saying she and her husband were happy for him to represent them in a case against the Department. On 8 December Mr Bennett replied asking if Ms Goldie wished to return to the Department. By this time Ms Goldie had been away from work on paid leave for several weeks because she had not had the first vaccination required in November. Mr Bennett wrote: “If you do not [wish to return] then I will make your application as an unjustified dismissal”. He also asked for some details about her employment and her dealings with Department representatives over the vaccination issue. Ms Goldie replied that she did not have any other employment and wrote: “As I said on the phone to you,

I wish to take the Department to court for unjustified dismissal and are (sic) happy for you to take action on this”.

[26] By text on 8 December Mr Bennett also asked for the prison manager’s email address, which Ms Goldie provided, presuming it was needed to make contact about her grievance.

[27] Ms Goldie sent further emails to Mr Bennett on 10, 13 and 16 December without receiving any response from him. On 18 January 2022 she telephoned Mr Bennett and spoke to him for around four minutes. She said Mr Bennett told her he was close to submitting her claim but had a bit more work to undertake and would update her later.

[28] She had not heard from him by 8 February and tried phoning again, without success. She made a further unsuccessful attempt to contact Mr Bennett by telephone on 25 February. Ms Goldie said she was “quite anxious at this point”. She said Mr Bennett’s lack of contact “made me feel there was no progress being made on my grievance or I had possibly been scammed”. She said she “also remembered that there was a timeline to stick to – but wasn’t exactly sure of the dates”.

[29] On 16 March Ms Goldie succeeded in making telephone contact with Mr Bennett who said he was driving and would update her at 11am the next day. This was the last time she spoke to Mr Bennett. She tried to contact him by telephone, without success, on 17, 23, 24 and 29 March and 7 April. She also sent him further emails, without response.

[30] Ms Goldie said that, by this time, it seemed to her that Mr Bennett “had disappeared” and she decided she needed alternative legal assistance. She said the fact that her advocate stopped contacting her seemed unusual and she had expected good communication and a professional service from Mr Bennett.

[31] On 13 April she had an initial consultation with her present counsel. In submissions Ms Goldie’s counsel, Mr Corbett, confirmed he then sought to contact Mr Bennett about handing over the file, but without success. Mr Corbett then provided some advice to Ms Goldie and, after receiving her instructions, wrote to the Department on 6 May 2022 seeking to raise her grievance.

The requirements for leave

[32] Ms Goldie submitted her circumstances met the requirements of s 114 and s 115 to be granted leave:

114 Raising personal grievance

- (1) ...
- (2) ...
- (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.
- (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—
 - (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
 - (b) considers it just to do so.

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

- (a) ...; or
- (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; or
- (c) ...; or
- (d) ...

[33] The Supreme Court, in considering these statutory provisions, described the short limit of 90 days to raise a grievance, and the potentially serious consequences for workers of not being able to bring a grievance, as supporting an interpretation that did not limit unduly the power to extend time. However, it also emphasised that Parliament imposed a 90 day limit to ensure employers were notified promptly of alleged grievances. Time should therefore only be extended if exceptional circumstances were truly established and, in addition, the overall justice of the case (including taking account of the position of the employer facing a late claim) required.⁸

⁸ *Creedy v Commissioner of Police* [2008] NZSC 31 at [32] and [33].

[34] For Ms Goldie to establish exceptional circumstances, the evidence had to show she had made reasonable arrangements to have her grievance raised by Mr Bennett and he had then unreasonably failed to ensure it was raised within the required time. This required attention to the facts of what Ms Goldie had done, her interactions with Mr Bennett and what she did when faced with repeated and continued difficulties in getting a response and information from him about what, if anything, he had done to raise her grievance.

[35] There was no doubt that by 8 December 2021 Ms Goldie had, as outlined above, made a straightforward arrangement for Mr Bennett to represent her in pursuing a grievance against the Department over the termination of her employment.

[36] Contrary to the Department's submission on this point, it made no practical difference that Ms Goldie made those arrangements before she got the formal notice of the termination of her employment on 9 December 2021. The trajectory of her employment inevitably ending under the Order had been clear for some weeks before the formal process was complete. The Department had clearly set out what had to be done and the consequences if Ms Goldie was not vaccinated within the required period and no viable redeployment options could be provided. Equally clearly Ms Goldie had unequivocally set her path of either declining to divulge her vaccination status or declining vaccination. The notice she sent to the Department on 7 December demonstrated that reality.

[37] On 8 December her email to Mr Bennett was sufficiently specific about what she was asking of him as a representative: "... I wish to take the Department to court for Unjustified Dismissal and are (sic) happy for you to take action on this". In subsequent days what she did by providing further information and records to Mr Bennett showed her intention and understanding.

[38] The conversation they had on 18 January could, accepting Ms Goldie's account of it, reasonably have given her confidence she had made the arrangements necessary for her grievance to be raised on her behalf by an employment advocate. Up to this point it could, on the facts, be fairly said that she had made "reasonable arrangements" of the type referred to in s 115(b) of the Act to have her grievance raised by an agent.

[39] However that confidence and reliance could not reasonably be maintained on Ms Goldie's account of her endeavours in the following weeks to have Mr Bennett

confirm he had taken the necessary steps. This is apparent from her evidence that by 25 February she felt “quite anxious” about Mr Bennett’s lack of communication and she felt “like there was no progress being made” on her grievance.

[40] And while Ms Goldie said she knew “there was a timeline to stick to” but was not sure of the exact date that timeline ran to, her multiple telephone calls and emails to Mr Bennett between 17 March and 7 April confirmed she was no longer confident that arrangements she could rely on were in place and being actioned.

[41] It is on this factual point that Ms Goldie’s application for leave due to exceptional circumstances fails. Her notice period expired and her employment ended on 9 January 2022. The 90-day period to raise a grievance ran from then, ending on 9 April 2022. As a matter of likelihood Ms Goldie probably knew about the 90 day period to raise her grievance, or should have done. The termination letter given to Ms Goldie referred directly to the right to raise a grievance under the Act and her collective agreement had a specific clause headed “Time Limit for Raising a Personal Grievance”.

[42] From 17 March, when Mr Bennett did not answer the call that she had arranged with him on the previous day, Ms Goldie could not reliably be said to have reasonable arrangements in place to have her grievance raised. There was, by then, still some 23 days to run before the 90-day period expired. While Ms Goldie persisted in trying to get hold of Mr Bennett in the following weeks, his repeated failure to answer her calls or respond to her emails meant she could not have reasonably relied on the arrangement she believed she had in place with him earlier.

[43] Ms Goldie’s submissions posed the question: what more could she have reasonably done when Mr Bennett “disappeared” after 16 March? The answer to that question is found in Ms Goldie’s own affidavit describing how she decided she needed alternative assistance. She said she had continued to try to contact Mr Bennett “under the impression my case was still viable until early April” but then decided to contact her present counsel. However her own account of events showed the need to do so was apparent to her much earlier, from late February at least and certainly by 17 March. No reasonable arrangements were therefore in place from those dates to have her grievance raised before the expiry of the 90-day period on 9 April 2022, although there was ample time to do so.

[44] Accordingly Ms Goldie has not established that the delay in raising her personal grievances was occasioned by exceptional circumstances. Her application under s 114(4) of the Act is declined.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed the Department may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Goldie would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[46] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Robin Arthur
Member of the Employment Relations Authority

⁹ See www.era.govt.nz/determinations/awarding-costs-remedies..