

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 425  
3156381

BETWEEN	KIRSTY HILFORD Applicant
AND	WHANGAREI BOYS' HIGH SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority: Alastair Dumbleton

Representatives: Allan Halse, advocate for Applicant  
Richard Harrison, counsel for Respondent

Investigation meeting: 17 June 2022

Determination: 29 August 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. Kirsty Hilford did not raise within 90 days an unjustified disadvantage personal grievance with the Whangarei Boys' High School Board of Trustees.**
- B. Kirsty Hilford did raise within 90 days an unjustified dismissal personal grievance with the School.**
- C. The Authority will investigate and determine whether she has an unjustified dismissal grievance, and if so the remedies to settle that.**
- D. Costs are reserved.**

## **Employment relationship problem**

[1] Kirsty Hilford has applied to the Authority for an investigation and determination of personal grievance claims.

[2] She seeks a determination that she was unjustifiably disadvantaged and unjustifiably dismissed by the Whangarei Boys' High School Board of Trustees, her employer.

[3] Mrs Hilford applied to the Authority on 17 November 2021 by lodging a statement of problem (SOP).

[4] The SOP alleges she was unjustifiably disadvantaged by the actions of her employer in failing to investigate complaints that she was being bullied while working at the school.

[5] The SOP further alleges that the same actions or inactions of the employer in relation to bullying, led to her unjustifiable dismissal.

[6] The employer Board of Trustees (the BOT) responded to Mrs Hilford's application with a statement in reply (SIR). In it, the BOT denied Mrs Hilford had been bullied in her employment, and it denied failing to engage with Mrs Hilford about any complaints made by her or failing to properly address them.

[7] The SIR also claimed that Mrs Hilford's grievance claims had been raised with the BOT outside the 90 day period prescribed by s 114 of the Employment Relations Act 2000 (the ER Act).

[8] The BOT did not consent to her grievances being raised out of time.

[9] Mrs Hilford has not applied under s 114 for the leave of the Authority to raise them out of time.

[10] Unless her grievances are found to have been raised in time or leave has been given, the Authority cannot investigate and determine whether she has a grievance of any kind.

[11] The 90-day issue has been investigated as a preliminary matter. Evidence was given by Mrs Hilford, her partner James Hilford, her supporter Dr Patte Randal, the Principal of Whangarei Boys' High School, Karen Gilbert-Smith, and NZ School Trustees Association (STA) employment advisor, Korina Pascoe. Submissions were received from advocate Allan Halse and counsel Richard Harrison.

[12] In giving this written determination, not all the evidence heard and submissions made have been set out or referred to. The Authority is guided by s 174E of the ER Act in that regard.

### **Unjustified disadvantage grievance**

[13] In a letter written by her representative to the Principal of the School on 14 April 2021, Mrs Hilford expressly raised an unjustified disadvantage grievance, complaining that she had been bullied.

[14] She maintains the grievance was raised earlier, in 2020 and in any case well before the letter of 14 April 2021 was sent.

[15] Section 114(2) of the ER Act provides that a grievance is raised with an employer as soon as the employee has made the employer (or representative of the employer) aware that the employee alleges a personal grievance that the employee wants the employer to address.

[16] The requirements of s 114(2) of the ER Act have been restated by the Employment Court in *Chief Executive of Manukau Institute of Technology v Zivaljevic*<sup>1</sup>. A grievance can be raised orally or in writing, and it can be raised cumulatively via a series of communications, provided the totality of them conveys the substance of the complaint to the employer.

[17] To be effective, the communication of a grievance should provide sufficient information to inform the employer what the employer is being asked to respond to. The employer must be put in a position to be able to respond on the merits to the grievance, with a view to resolving it speedily and informally.

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<sup>1</sup> [2019] NZEmpC 132, at [36]-[38]

### **Mrs Hilford's employment by the School**

[18] Mrs Hilford's employment began in October 2019 when she was appointed as a part time Learning Support Assistant (LSA). She worked in the same role in the following year, 2020.

[19] No work as an LSA was performed by her in the 2021 school year. She had wanted to continue as an LSA that year, and the School advised her it intended offering a number of hours work each week, but no accord was reached leading to any work beginning.

[20] The employment relationship became a troubled one during 2020 on a number of fronts. In the latter part of the year Mrs Hilford disagreed with a grading assessment made of her by the School under her employment agreement. The BOT has acknowledged to the Authority that this disagreement remains unresolved and needs to be addressed as a dispute about the application or operation of Mrs Hilford's employment agreement. If a higher grading is assessed, she is likely to be entitled to back pay for 2020.

[21] Later on in 2020 the NZ Educational Institute (NZEI) represented Mrs Hilford in the grading dispute and other issues that arose about her relationships with some of her colleagues.

[22] Among the information Mrs Hilford provided to the Authority in support of her disadvantage grievance is a letter she drafted around the end of September and the beginning of October 2020, to send to the Principal of the School. It was a draft response by Mrs Hilford to an email she had received from the Principal outlining a number of concerns the School had about her conduct. The letter was not sent, probably because Mrs Hilford heeded advice from an NZEI officer that it might not be in her best interests to share with the School what she had written.

[23] As an unsent communication the letter is not capable of providing evidence that Mrs Hilford raised a grievance about bullying. The letter refers to 'bullying' and other behaviour that might fall within the generally understood meaning of the term bullying. Had the letter been sent, it is arguable whether or not it raised a grievance about bullying. What is said about bullying is expressed more by way of observation and

narrative, rather than by way of complaint and request for a problem to be addressed. Mrs Hilford referred to a restorative meeting after which she had regarded some of her concerns about bullying behaviour as having been ‘resolved and closed’.

[24] Upon completing the draft of the letter to the Principal, Mrs Hilford sent it to her NZEI advisor with whom, in email correspondence shown to the Authority, she mentioned her wish ‘to raise a PG’. She thought that her letter could be a template for ‘a PG’, and she noted that others advising her including her partner, had suggested ‘a PG ... numerous times’. Her views about a PG, the consideration she gave that and the assistance she sought and received from the NZEI, strongly indicate to the Authority that if she had raised a grievance it would have been in writing not orally, and raised directly with the Principal, either by Mrs Hilford or by the NZEI.

[25] Mrs Hilford appeared well informed as to the general nature of the personal grievance remedy available to employees. It was also clear to the Authority from the investigation meeting and the communications and activities of Mrs Hilford in the workplace of the school, that she was not shy about putting herself forward or confronting adversity where she encountered it. Dr Randal described her as having a strong sense of justice and a keen desire and passion to speak up for those who have no voices. Mrs Hilford demonstrated during her employment that she was a person quite capable of speaking her mind. During the investigation meeting she showed she could express herself very well in both speech and writing.

[26] On 21 October 2020, the Principal wrote to Mrs Hilford thanking her for meeting the previous day when there had been a discussion about concerns raised by staff about some of Mrs Hilford’s conduct. It was not a disciplinary meeting but a counselling session. It is clear that the Principal wrote the letter to follow up the meeting with a record of what was discussed and the outcome of the meeting. The Principal concluded her letter by encouraging Mrs Hilford to seek EAP support if she felt she needed help.

[27] That meeting and the way it was held appears to have offered a good opportunity for Mrs Hilford to raise any grievance about bullying in the workplace, especially when other staff had raised issues about her own conduct. Considering the modern role of Principal in a large school and the wide experience in that role of Mrs Gilbert-Smith,

the Authority considers it unlikely she would have tried to brush aside or dampen down a grievance from a staff member, if one had been raised or even suggested during the meeting.

[28] Communications Mrs Hilford had with the NZEI advisor show that she was thinking about raising a grievance, particularly about her grading disagreement and her employment for a limited term only. She told the Authority she had made it known to the NZEI that she desired to take a grievance, and her partner James Hilford confirmed that he had encouraged her to get the NZEI to raise a grievance. The NZEI in 2021 signalled clearly to the BOT that the raising of a grievance was being considered about the lawfulness of her employment with regard to its term being limited.

[29] To try and resolve their grading dispute the School and Mrs Hilford and the NZEI agreed to attend mediation on 25 February 2021. There is no suggestion from the correspondence prior to that mediation that a personal grievance to do with bullying and harassment had also been put on the table for mediation.

[30] On 17 December 2020 her NZEI advisor counselled Mrs Hilford that sending a PG might not be wise at that time, when one of her hopes was to have work with the School in 2021. The advisor considered a PG might have consequences contrary to her interests in securing further employment. Mrs Hilford wrote back to the advisor to say that she would work on a PG and send it to the advisor for his views.

[31] The Authority finds from her evidence that Mrs Hilford was aware of the general nature of a personal grievance claim and of the need for such a complaint to be communicated to her employer, if she wanted the complaint to be addressed. The Authority also finds that she received and followed advice from the NZEI about the content of the letter to the Principal she drafted but did not send.

[32] The evidence of the Principal, Mrs Gilbert-Smith, and the STA advisor, Mrs Pascoe, is consistent with the written information including emails provided to the Authority. I accept their evidence that the claims made in the letter of 14 April 2021 from Mrs Hilford's representative, came as a complete surprise to them, because those claims had not been raised before. As Mrs Hilford had not worked at the School since

December 2020, well over 90 days had gone by before a grievance was raised about bullying or harassment.

### **The Authority's discretion**

[33] Mrs Hilford's SOP advanced a view that the Authority has a discretion to accept evidence of bullying being complained of outside the 90-day period. The suggestion is that the nature of bullying and the harm it causes, deserves that complaints about that form of conduct should be exempt from the requirement to raise grievances inside 90 days. That view is not supported by the wording of the ER Act at s 114. The discretion the Authority does have is in relation to granting leave to raise a grievance out of time. No application for leave has been made by Mrs Hilford.

[34] While the view put forward in the SOP might be read as acceptance that the bullying and harassment grievance was not raised in time, the Authority has nevertheless considered all that was said by the witnesses and all the correspondence between the parties and their representatives, to see what communications there were to or from Mrs Hilford about being bullied, or any complaint about that.

[35] Mrs Hilford fervently believes that she was treated unjustifiably by the Principal and her employer the BOT while working at the school. The issue though is whether she communicated her beliefs or complaints about bullying or harassment adequately to her employer at any time before her letter of 14 April 2021 was received by the BOT, and whether she made it clear she wanted any complaints made by her resolved in some way.

[36] The Authority finds there was no communication conveying the substance of a bullying complaint and providing sufficient information to enable Mrs Hilford's employer to address the grievance. Details of when and how bullying and harassment had taken place and who the perpetrator was, might have been expected but were not to be found in any of the material seen by the Authority or any evidence heard by it.

[37] The Authority is satisfied from the information before it that Mrs Hilford did not raise a grievance about bullying or harassment with the Principal, the BOT or senior staff, at any time before her grievance letter was written on 14 April 2021. The opening

words of the letter state it is written ‘to raise a personal grievance’. The grievance was not raised within 90 days as required by s 114 of the ER Act.

[38] It seems likely to the Authority that Mrs Hilford consciously chose not to raise that grievance at any time before her representative wrote to the BOT on 14 April 2021. As to any relevant communications which may have been made during the 25 February 2021 mediation, they were subject to statutory mediation confidentiality applying between the parties and their representatives.

[39] Regrettably, the SOP lodged on behalf of Mrs Hilford disclosed, at paragraph [19], a communication allegedly made to her by the BOT during mediation about her employment status. Extensive disclosure was also made about the mediator and the mediator’s conduct of the mediation.

[40] While the mediation was without prejudice and confidential, outside of it the NZEI or Mrs Hilford could have written an open letter to the BOT raising a grievance based on past actions (inside 90 days) which were not subject to mediation confidentiality. No such letter has been seen by the Authority.

### **Unjustified dismissal grievance**

[41] A written individual employment agreement was signed by Mrs Hilford on 9 December 2019. An executive officer of the School had signed it a few days earlier on behalf of the BOT.

[42] The agreement provided for Mrs Hilford’s employment as an LSA. This was expressed to be a fixed-term part time position of 30 hours a week normally. The reason given for the limited term was that the position of LSA is externally funded to specific students’ needs, with the allocation of money being determined on a year-by-year basis. This could have been made clearer but the implication is that the term of employment is fixed for the school year.

[43] Mrs Hilford signed a subsequent agreement on 2 March 2020. This too had been signed on behalf of the BOT, a few days earlier in February 2020.

[44] From a notation at the bottom of the second agreement document, it appears to be derived from a template issued by the Ministry of Education on 13 December 2019, a few days after Mrs Hilford signed the first agreement.

[45] The later agreement made no reference expressly or impliedly to any fixed term applying. It provided for commencement from the date of signature of the agreement, but no end date was given and no reference was made to an annual funding round. It declared that its terms and conditions replaced any previous arrangements and understandings. Considered on the words of it alone, the agreement provides for continuous employment, unlimited by time or event.

### **Mrs Hilford remained employed after the end of 2020**

[46] The Authority finds that the individual employment agreement the BOT and Mrs Hilford signed on 27 February and 2 March 2020, was neither in form nor substance a fixed term agreement meeting the requirements of s 66 of the ER Act.

[47] Under s 66(4) of the ER Act a fixed term agreement must state in writing the way in which the employment will end and the reasons for ending the employment in that way. The failure of Mrs Hilford's agreement to contain such a statement means that the agreement was an open-ended contract of continuous employment. The BOT cannot invoke the agreement in support of its claim that Mrs Hilford's employment ended in December 2020 at the end of the school year. The evidence of Mrs Gilbert-Smith to that effect is only correct insofar as the performance of work under the agreement goes. From the last day of the 2020 school year until the beginning of the first term of 2021, although work was not performed by her Mrs Hilford had a subsisting employment relationship, just as she had during the school year holidays when no work was required to be done.

[48] Mrs Hilford apparently joined the NZEI part way through the 2020 teaching year, and terms and conditions found in the collective agreement then applied to her. No argument has been presented to the Authority that joining the NZEI had any effect on the continuity of her employment, by returning her to a fixed term such as the 2019 agreement had purported to provide.

[49] The 2019 -2022 Support Staff in Schools collective agreement negotiated by the NZEI, E tu and the Secretary for Education, at clause 2.2.4 provided ‘all appointments shall be permanent unless identified as being for a fixed term’. In accordance with the ER Act, to be effective such identification must be in writing.

[50] The individual employment agreement entered into between the School and Mrs Hilford in early 2020 expressly replaced previous arrangements and understandings. It neither expressly nor impliedly identified her position as fixed term.

[51] If the School and Mrs Hilford had a common intention to sign a fixed term agreement, that is not the type of contract they executed. Without elaborating, Mrs Gilbert-Smith told the Authority that by error the wrong employment agreement template had been signed in March 2020. No legal argument was presented to the Authority about the presence and effect of unilateral or mutual mistake surrounding entry into the employment agreement at the beginning of 2020. No application has been made under any rule of law that may allow a contract entered into by mistake to be set aside or rectified.

[52] The law relating to fixed term agreements is relatively strict and is to be interpreted accordingly, as it permits a constraint on the right to work. The evidence favours Mrs Hilford that she was not bound by a fixed term agreement at the end of 2020. The Authority finds her employment relationship was maintained without a break into 2021, although it was not performed over the school holidays between 2020 and 2021.

### **Employment terminated in February 2021**

[53] At the beginning of February 2021 the NZEI requested the School to confirm that Mrs Hilford’s employment in 2020 had not been for a fixed term and was therefore a continuing relationship under which she was entitled to be offered work in 2021. The School’s refusal to affirm the employment as on-going was capable of amounting to a declaration that the employment had ended in 2020, in the employer’s view.

[54] The NZEI advisor concluded from the School’s negative responses that it did not want Mrs Hilford to return in 2021. The School treated Mrs Hilford as being employed under a fixed term agreement and was not prepared to offer her any hours until the matter had been discussed in the mediation planned for 25 February 2021. The

School was not entitled to unilaterally suspend her employment, even pending a mediation about to take place. The Authority finds that the employment ended at the beginning of February 2021 when the School continued to evade the issue the NZEI had clearly raised about the permanency of Mrs Hilford's employment.

[55] The problem was succinctly summarised in the NZEI advisor's email to the Principal sent on 4 February 2021

Kirsty has outlined to the school that she has disregarded her fixed term employment and she is ready and able to work. Therefore by right she should be provided with employment, that is the default position. If the school is not willing to provide her with work or pay her over this period we will consider that the employment relationship has been terminated and proceed with a further personal grievance for unjustified dismissal.

[56] Mrs Hilford was not required to assert the existence of a valid continuous employment agreement, as that was a matter of construction to be determined from the words of the agreement itself and any relevant law under the ER Act such as s 66. As employer, the School was expected to know its rights and obligations under the agreement and measure its actions accordingly.

[57] Mrs Hilford had no option but to view her employment as terminated when the School failed to perform the agreement, despite Mrs Hilford being ready to do so.

[58] The termination occurred within 90 days of 14 April 2021, when an unjustified dismissal personal grievance was raised on behalf of Mrs Hilford. She is therefore able to have the merits of her grievance investigated and determined. Justification for dismissal, if that is found to have occurred, will be for the School to establish.

### **Another type of grievance**

[59] Under s 122 of the ER Act, the Authority may find that a personal grievance is of a type other than that alleged. If Mrs Hilford is found not to have been unjustifiably dismissed, actually or constructively, it follows she will not have a grievance of the unjustified dismissal type. She may nevertheless have a grievance of the unjustified disadvantage type if the termination of her employment was accompanied by any unfair or unreasonable action of the BOT which occurred within 90 days before the unjustified

dismissal grievance was raised by letter on 14 April 2021. The test of justification to be applied by the Authority is at s 103A of the ER Act.

[60] Also remaining to be sorted is the dispute about Mrs Hilford's grading. This appears to be a dispute of rights rather than a grievance. The School has acknowledged it still has to be resolved.

### **Further mediation**

[61] On its factual and legal merits, the employment relationship problem seems entirely suitable for resolution by mediation.

[62] Before it directs the parties to further mediation, the Authority will consider their submissions about the concerns the Authority has raised with them, as to whether the confidentiality of an earlier mediation was breached through statements made in, and material attached to, Mrs Hilford's SOP. The SOP was lodged and signed on her behalf by Mr Halse.

[63] Before the Authority considers directing mediation, of course the parties are not prevented from agreeing to return to mediation.

### **Further investigation meeting**

[64] Subject to any resumption of mediation, whether by direction or voluntarily, the Authority will contact the parties to arrange a further investigation meeting for the unjustified dismissal grievance which remains unresolved.

[65] The Authority has been advised of an Employment Court challenge made to the compliance order issued by the Authority against Mrs Hilford, that required her to destroy pupil records belonging to the School which she has kept copies of. The challenge does not act as a stay and the outcome of the challenge would seem to have no bearing on the investigation and determination of the unjustified dismissal grievance. As Mrs Hilford has been advised, copies of the information she has been required to destroy will be retained securely on the Authority's file, where she may inspect it if she wishes.

**Costs**

[66] Costs are reserved until the Authority gives a determination of Mr Hilford's grievance claim of unjustified dismissal.

Alastair Dumbleton

Member of the Employment Relations Authority