

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 625  
3167223

BETWEEN HONE HEKE TANIWHA  
Applicant

AND TE RŪNANGA O TOA  
RANGATIRA INC  
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Liz Lambert, representative for the Applicant  
Blair Scotland, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further  
Evidence Received: Up to and including 9 November 2022

Date of Determination: 25 November 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Taniwha was employed by Te Rūnanga o Toa Rangatira Inc (the Rūnanga) until his employment was terminated by the Rūnanga on 16 November 2021. Mr Taniwha’s last day of employment was 13 December 2021 when his notice period expired.

[2] Mr Taniwha’s employment was terminated because the Rūnanga says Mr Taniwha’s role came under the Covid-19 Public Health Response (Vaccinations) Order 2021 and Mr Taniwha had decided not to be vaccinated. The Rūnanga says it accordingly reached a conclusion that the only roles available for Mr Taniwha required people who were vaccinated in accordance with the above order and accordingly a formal decision to terminate Mr Taniwha’s employment on notice had been made.

[3] Mr Taniwha says that his dismissal was unjustified and has put forward a number of reasons supporting that position. In his substantive action, Mr Taniwha seeks remedies for what he says was an unjustified dismissal. However, the Rūnanga claims that Mr Taniwha did not raise his grievances within the statutory 90-day timeframe provided for in the Employment Relations Act 2000 (the Act). It says further that it does not consent to Mr Taniwha raising such a grievance out of time. Mr Taniwha disputes this saying that he raised his grievances on more than one occasion, and within the 90 day period.

### **The Preliminary Issue**

[4] The parties have asked that the Authority address the issue as to whether or not Mr Taniwha's personal grievances were raised within the 90 day statutory timeframe separately as a preliminary issue. They have also agreed that this aspect should be dealt with on the papers. The sole question to be addressed at this stage is whether pursuant to s 114 of the Act, Mr Taniwha's personal grievances were raised in time. The parties have asked the Authority to determine this preliminary issue on the papers. Each party has filed an affidavit with Mr Taniwha's affidavit sworn on 14 October 2022 and an affidavit on behalf of the Rūnanga was sworn by Mr William Jedlowski Raymond Tamaki, the Rūnanga's HR Manager, on 28 October 2022. Mr Taniwha has also supplied a recording of a conversation between the parties on 10 November 2021.

[5] As Mr Taniwha argues that his personal grievances were raised in time, he has not applied for leave to file his personal grievances outside the 90-day period based on the existence of exceptional circumstances.

[6] The starting point for the question of whether Mr Taniwha's personal grievances were raised in time, is the Act. Section 114(1) of the Act requires any person wishing to raise a personal grievance, to do so within 90 days of when the action giving rise for the grievance occurred, or when it came to the notice of the employee. Section 114(2) of the Act sets out what constitutes the raising of a personal grievance. It provides that a grievance is raised when the employee has taken reasonable steps to make the employer or a representative of the employer aware that the employee alleges a personal grievance.

[7] Accordingly, I need to identify the actions giving rise to the personal grievances, the date on which they occurred or came to Mr Taniwha's notice, and whether or not Mr Taniwha raised his grievances within the 90-day period.

[8] There is no dispute that Mr Taniwha held diametrically opposed views to that of the Rūnanga regarding the need to be vaccinated against Covid-19. On 15 October 2021, the Rūnanga advised Mr Taniwha that he would need to be vaccinated against Covid-19 as a result of the Covid-19 Public Health Response (Vaccinations) Order 2021 (the Order). On 10 November 2021, Mr Taniwha wrote a very detailed letter making it clear he did not wish to be vaccinated and set out detailed reasoning in support of his position. His letter concluded by saying “I am not able to give my full consent to undergo a medical procedure ...”. Reasons for this were again set out.

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

[10] Mr Taniwha has also provided a recording of a telephone conversation of him discussing his concerns with the Rūnanga. It is explained to him that the Rūnanga has communicated to staff recently regarding the situation in relation to vaccinations and the Rūnanga’s position.

[11] Mr Taniwha is told that the Rūnanga states that vaccinations have to be completed by 15 November and that staff need to be vaccinated by that date or have had their first jab. It is explained to Mr Taniwha that his role falls under the Public Health Response Vaccinations Order and accordingly this will apply to him.

[12] It is again clear that Mr Taniwha has diametrically opposed views in respect of the Order. He points out his rights under the Bill of Rights to refuse treatment. He says that his contract contains nothing about the COVID-19 Response Act and that people still have rights.

[13] Mr Taniwha comments that he could still take the Rūnanga to Court but pulls back slightly saying “*I just want clarification [on the suspension]*”. He then says he has until 15 November to respond.

[14] The Rūnanga advised Mr Taniwha during the phone call, that it would write a formal letter and Mr Taniwha could take the necessary steps he mentioned in relation to an exemption.

[15] The next stage in the procedure was the Rūnanga's 16 November 2021 letter terminating employment. Mr Taniwha's last day of work was 13 December 2021 and accordingly the 90-day period in which Mr Taniwha could file a personal grievance ran from that date and would have expired 13 March 2022.

[16] On 14 March 2022, one day past the time Mr Taniwha had for raising his personal grievance, he emailed the Rūnanga stating:

Mark ... I Hone Heke Taniwha will be lodging a personal grievance for unfair dismissal. A corresponding letter will be forwarded to you and the Employment NZ.

[17] Mr Taniwha then lodged a Statement of Problem with the Employment Relations Authority, which was received on 21 March 2022, eight days outside the 90-day period.

[18] The Rūnanga responded in its Statement in Reply on 4 April 2022 particularly raising the point that Mr Taniwha had failed to raise his personal grievance within the statutory 90-day timeframe. The Rūnanga stated it would also oppose any application by Mr Taniwha for leave to raise his personal grievance out of time.

### **The evidence and discussion**

[19] As indicated above, both parties filed evidence by way of affidavit. Mr Taniwha has not applied to have his personal grievance heard outside the 90-day period and has not advanced any submissions indicating "exceptional circumstances". Mr Taniwha's view is straightforward, he says he raised a number of personal grievances of unjustified disadvantage prior to his dismissal.

[20] In his evidence, Mr Tamaki states he recalls having a telephone discussion with Mr Taniwha on 10 November 2022. He says he has no recollection of any personal grievances being raised in the discussion. He says the discussion was in respect of health and safety risk assessments regarding the requirement to be vaccinated. He goes on to say however, that assessments in this conversation were irrelevant given that Mr Taniwha's role fell within the requirements of the Covid-19 Public Health Response (Vaccinations) Order 2021 and the obligations of the Rūnanga under the Health and Safety at Work Act 2015.

[21] There were three times prior to the expiry of the 90-day period when Mr Taniwha says he raised his personal grievances.

### **The 10 November phone call**

[22] Mr Taniwha had a phone call on 10 November 2021 during which he says:

I told Remu Tamaki I refused to put my good health and safety at risk for an experimental vaccine. I raised the matter of it being a breach of the New Zealand Bill of Rights Act 1993 [NZBORA] and that it was not in my contract to have any vaccines. The respondents HR Manager said that it was the law that I had to have it done. I disagreed and said I can take this to the Employment Court, where upon TW agreed and said yes, you can take it to the Authority – absolutely.

[23] Having listened to the recording of the telephone discussion, it was clear it was a reaction to the earlier letter, but Mr Taniwha was still expecting a reply. Nothing in the conversation indicates a personal grievance was advised. Rather, and consistent with his other statements, Mr Taniwha was making it clear he had rights and may exercise them at some future date.

[24] I find reading Mr Taniwha's affidavit, Mr Tamaki's affidavit in response and considering the 10 November 2021 letter from Mr Taniwha, no personal grievance was raised. The correspondence makes it clear he had not raised any grievances at the time of the telephone conversation. Further, in his affidavit, Mr Taniwha again reserved his rights if the Rūnanga made a decision he did not agree with. Although the Rūnanga may have been aware that Mr Taniwha was not happy with its approach to his vaccination issue, it was not notified he was raising a grievance.

### **The 10 November letter**

[25] On 10 November 2021 Mr Taniwha emailed Mr Tamaki his letter. Paragraph 42 of that letter states:

Should my choice not be respected, and the terms for my employment are negatively affected because of this choice, then I may exercise my right to file a personal grievance.

[26] And then in paragraph 43:

I trust that you will take into consideration the important information outlined in this letter for the sake of the safety and wellbeing of your employees.

[27] The 10 November letter set out in detail Mr Taniwha’s view that he was not required to be vaccinated contractually and he set out his basis for not wanting to be vaccinated. However, the most important point is his statement that at some future date he “*may* exercise my right to file a personal grievance”. The 10 November letter therefore on plain reading does not raise a personal grievance.

### **The email of 14 March 2022**

[28] In this email, Mr Taniwha informs the Rūnanga again that at a future date he will be lodging a personal grievance for unfair dismissal. The email is clear that he is not raising the grievance there and then. He says a corresponding letter will be forwarded to the Rūnanga and the Employment NZ (sic). He does not raise a personal grievance.

### **The Statement of Problem dated 20 March 2022 filed on 21 March 2022**

[29] The Statement of Problem could be seen as raising personal grievances. Again however, Mr Taniwha reserves his position stating, “The applicant will provide a timeline to support this personal grievance at the time of mediation”. The Statement of Problem however was not filed at the earliest until 20 March 2022. It was not copied to the Rūnanga and accordingly the Rūnanga would have received it in the normal course of events when it was sent to it by the Authority.

[30] Mr Taniwha has not raised an argument of exceptional circumstances. Instead, he relies on the communications mentioned above as evidencing the raising of personal grievances. This is a case where there is clear evidence as to what occurred and what steps were taken by Mr Taniwha which he now says raised his personal grievances. A personal grievance can be raised in writing or orally or by a series of communications. However, those communications must convey the substance of the complaint such that the employer knows what it is responding to and can address the merits with a view to resolving the complaint. In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic*<sup>1</sup>, the Court summarised the key principles for establishing whether or not a grievance had been raised with Judge Holden saying:

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula or words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might

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<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to on its merits with a view to resolving it soon and informally, at least in the first instance.

[31] The Rūnanga knew that Mr Taniwha did not agree with the approach it was taking in respect of the Covid vaccinations and knew he did not agree with the order. However, in the context of this case, that is a long way from advising the Rūnanga he had grievances and what those personal grievances were. For instance, there is no mention of bullying other than what Mr Taniwha said during the 10 November telephone conversation. Bullying is mentioned in the Statement of Problem which was filed on 20 or 21 March 2022, but this is outside of the 90-day period prescribed under s 114 of the Act.

### **Conclusion**

[32] For the above reasons I find that Mr Taniwha did not raise personal grievances during his telephone conversation of 10 November 2021 nor did he raise personal grievances in his correspondence of 10 November 2021 and his later email of 14 March 2022. In fact, the written correspondence makes it clear in the first instance that Mr Taniwha "may" be raising personal grievances and in the second, although it says he will be "lodging a personal grievance", his letter indicates that this will be at some future date. Whilst it could be said that Mr Taniwha raised personal grievances in his Statement of Problem dated 20 March 2022, this was outside the statutory time limit of 90 days and exceptional circumstances supporting an application for leave out of time were not pleaded and do not appear to exist.

[33] Accordingly, I find that Mr Taniwha cannot proceed with his personal grievances because they were not filed within the statutory timeframe.

**Costs**

[34] Costs are reserved. The parties are encouraged to resolve any issues of costs between themselves but if they are not able to do so and an Authority determination on costs is needed, the Te Rūnanga o Toa Rangatira Inc may, having been successful, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date, Mr Taniwha will 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.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**