

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 664  
3172485

BETWEEN

MARIKA PRETORIUS  
Applicant

AND

BOARD OF TRUSTEES OF  
TAUPO INTERMEDIATE  
SCHOOL  
Respondent

Member of Authority: Rachel Larmer

Representatives: Erika Whittome and Karen Glass, advocates for the  
Applicant  
Kiri Harkess and Anna Brookman, counsel for the  
Respondent

Investigation Meeting: On the papers

Submissions Received: 25 August 2022 from the Applicant  
21 September 2022 from the Respondent  
5 October 2022 from the Applicant  
7 October 2022 from the Applicant  
4 November 2022 from the Respondent  
11 November 2022 from the Applicant

Date of Determination: 15 December 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On 18 May 2022 the Applicant, Ms Marika Pretorius, lodged a Statement of Problem that alleged she had been unjustifiably dismissed from her employment as a teacher at Taupo Intermediate School by the Board of Trustees of Taupo Intermediate School (“*the Respondent*”).

[2] Ms Pretorius was employed as a Science Teacher and Head of Department at Taupo Intermediate School (the School). She was employed as a full time permanent teacher from 27 January 2020 to 31 January 2022.

[3] On 6 December 2021 the Respondent gave Ms Pretorius notice that it would be terminating her employment because she was unable to comply with the Government's requirements in the COVID-19 Public Health Response Order for mandatory vaccinations for education, that came into effect at 11:59 pm on 25 October 2021 ("*the Order*").

#### *Effect of the Order*

[4] The Order was mandatory, so Board was required to comply with it.

[5] The effect of the Order was that all employees working in the School were required to be vaccinated, and to provide evidence of vaccination, in order to continue working at the School, unless they had an exemption.

[6] As a Science Teacher who was teaching at the School, Ms Pretorius was an "*affected person*" under the terms of the Order, so the vaccination mandate applied to her.

[7] The Principal of the School, Mr William Clarke, commenced consultation with staff regarding the vaccine mandate on 18 October 2021. He advised staff that he was not in a position to comment on the legitimacy of the mandate or on the vaccine itself, so his consultation was about implementing the Order (i.e. the mandate) only.

[8] Mr Clarke communicated to staff that in accordance with the Government's requirements they would need to have a COVID-19 vaccine, or an exemption to being vaccinated to work at the School.

[9] Mr Clarke invited staff who wanted to discuss their situation with him on a one-on-one basis to do so. A number of staff took up that option, including Ms Pretorius.

#### *Communications with the Applicant*

[10] On 27 October 2021 Ms Pretorius sent Mr Clarke three letters and she confirmed with him on 29 October 2021 that he had received those (which he had, and he did confirm).

[11] On 2 November 2021 Mr Clarke emailed all staff advising them of the requirements under the Order and of the process that the School was going to follow regarding the collection of vaccination records.

[12] Mr Clark also informed staff that a formal consultation process would be started with employees who did not disclose their vaccination status, which could potentially result in the termination of their employment.

[13] On 4 November 2021 Ms Pretorius spoke with Mr Clarke about her concerns about the Order. He communicated to her that the vaccine requirements were simply the School following the Government guidelines in relation to the Order. Mr Clarke advised Ms Pretorius that if she wanted an exemption then it was up to her to seek that with her medical practitioner.

[14] On 6 November 2021 Ms Pretorius sent a letter to Mr Clarke that advised, among other things, she would be seeking an exemption from the requirement for her to be vaccinated. This is something she had also mentioned verbally to Mr Clarke on a number of occasions. However, Ms Pretorius never provided an exemption to Mr Clarke or to the Respondent.

[15] On 9 November 2021 Mr Clarke provided all staff with information he had received regarding applying for medical exemptions from vaccination.

[16] On 12 November 2021 Ms Pretorius sent Mr Clarke a medical certificate stating she was unfit to work until 26 November 2021.

[17] Ms Pretorius's sick leave ended on 26 November 2021. Ms Pretorius had not at that point communicated that she intended to be vaccinated, so on 30 November 2021 Mr Clarke wrote to her asking if she had received the vaccine or an exemption. He also set out the employment process that would apply if she was unable to comply with the requirements of the Order.

[18] Ms Pretorius did not wish to meet with Mr Clarke to discuss the matters raised in his 30 November letter.

[19] On 6 December 2021 Mr Clarke gave notice to Ms Pretorius, on behalf of the Respondent, advising her that it would be terminating her employment on 21 January 2022.

[20] Although Ms Pretorius' notice period expired on 21 January 2022, the Respondent extended her termination date to 31 January 2022.

### *Dismissal*

[21] Ms Pretorius's employment ended on 31 January 2022.

[22] On 18 May 2022 Ms Pretorius lodged a Statement of Problem ("SoP") that alleged she had been unjustifiably dismissed from her employment.

[23] The SoP was served on the Respondent by the Authority on 27 May 2022. That was the first time that the Board or Mr Clarke had been made aware that Ms Pretorius had a personal grievance claim that she wanted the Respondent to address.

### *Jurisdiction issue*

[24] The Respondent said that the Authority did not have jurisdiction to investigate Ms Pretorius's personal grievance claim because she did not raise it within the 90-day time period required by s 114(1) of the Employment Relations Act 2000 (the Act).

[25] The Respondent did not consent to Ms Pretorius raising a personal grievance out of time. It communicated that to her in the Statement in Reply that was lodged on 10 June 2022 and via memoranda that its counsel filed with the Authority on 8 June 2022 and 8 August 2022.

[26] Ms Pretorius claimed she raised her personal grievance claim within the 90-day time period required by s 114(1) of the Act.

### **The Authority's investigation**

[27] The jurisdiction issues were discussed with the parties during a case management conference (CMC) that was held on 10 August 2022. As a result of discussions during the CMC it was agreed that the 90-day issue would be dealt with as a preliminary issue, prior to a substantive investigation.

[28] By agreement, the preliminary jurisdiction issue was dealt with 'on the papers'.

[29] Ms Pretorius filed three affidavits;

- (a) The first affidavit was sworn on 24 August 2022, and filed with the Authority on 25 August 2022;

- (b) The second affidavit was sworn on 9 November 2022, and filed with the Authority on 11 November 2022; and
- (c) The third was sworn on 9 November 2022, and filed with the Authority on 11 November 2022.

[30] Mr Clarke filed an affidavit that was sworn on 21 September 2022 and filed with the Authority that same day.

[31] Ms Pretorius filed written submissions on 7 October and 11 November 2022. The Respondent filed its written submissions on 4 November 2022.

### **Issues**

[32] The following issues are to be determined:

- (a) Did Ms Pretorius raise her personal grievance claim within 90-days of it occurring, or coming to her attention, whichever was the later?
- (b) If not, has she sought leave to raise a personal grievance out of time?
- (c) If so, have the requirements in s 114(4) of the Act been met?
- (d) What, if any, costs should be awarded to the successful party?

### **Did Ms Pretorius raise her personal grievance within the 90-day time limit?**

#### *Relevant law*

[33] Section 114(1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[34] Section 114(2) of the Act states:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[35] Whether or not the employee has raised a personal grievance claim within time is a factual matter that is to be objectively determined by the Authority. A grievance cannot be

raised in anticipation of an event. It must relate to an event that has occurred or is occurring in accordance with the Employment Court decision in *Creedy v Commissioner of Police*.<sup>1</sup>

[36] For an unjustified dismissal grievance, the grievance needs to be raised after the dismissal has occurred because s 103(1)(a) of the Act expressly requires the employee to have been dismissed in order to pursue a personal grievance for unjustified dismissal.

*What is required to raise a grievance?*

[37] There is no specific form of words or method required for the raising of a personal grievance claim. What is required is that the employee puts the employer on notice orally and/or in writing that they have a personal grievance claim. This requires the employee to provide the employer with sufficient information about their personal grievance, so that the employer is aware of the nature of the grievance and is therefore in a position to be able to respond to it.

[38] The level of detail required is not what would be expected to be included within a Statement of Problem, but it is insufficient for the employee to simply state that they have a grievance or to specify the type of grievance without providing further information.<sup>2</sup>

[39] The Authority may have regard to a series of communications, and it may find that the totality of all communications have in effect adequately raised a personal grievance claim. Whether that is the case will involve a factual inquiry to determine what the employer would reasonably have known as a result of the totality of the communications between the parties.

[40] The purpose of raising a grievance with the employer is so that if it wants to, it is in a position to be able to address the grievance and to respond on its merits, with a view to resolving the grievance expeditiously and informally.<sup>3</sup> It therefore follows that the employer must know what it is that it is being asked to address.

*What did the Applicant do to raise her grievance?*

[41] Ms Pretorius was given notice of termination on 6 December 2021 with her employment ending on 31 January 2022.

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<sup>1</sup> [2006] ERNZ 517 at [28]-[30].

<sup>2</sup> *Creedy* at [36] and [37], above n1.

<sup>3</sup> *Malcom v Chief Executive of the Department of Corrections* [2021] NZERA 489 at [79].

[42] Ms Pretorius and Mr Clarke exchanged emails on 12, 19 and 21 December 2021 and on 25 and 26 January 2022. The Authority noted that all of these communications occurred before her employment had ended.

[43] The content of these communications were around Ms Pretorius attending the School to collect her personal effects. She also requested an amended letter concerning the extension that had been made to her termination date (from 21 to 31 January 2022). The communications in January 2022 related to payment issues, including leave without pay and final pay.

[44] None of these communications raised a grievance or had anything to do with an unjustified dismissal claim.

[45] In her submissions Ms Pretorius said that it was the Order that “*gave rise to [her] personal grievance claim against [the Respondent]*”. However, the Statement of Problem only identified one personal grievance and that was for unjustified dismissal. Although it was claimed in reply submissions that Ms Pretorius had raised an unjustified disadvantage grievance, the facts did not support that submission.<sup>4</sup>

[46] In terms of the communications (the emails Ms Pretorius sent Mr Clarke) on 27 October 2021 and on 6 November 2021, at that point the Respondent (and for that matter Mr Clarke) had not taken any actions regarding Ms Pretorius’s employment.

[47] The Applicant also said she had spoken to Mr Clarke in the hallway of the school office on or around 29 October 2022. However, there was no evidence that a personal grievance claim was raised verbally at that time, or that the Respondent had been put on notice of the grievance that Ms Pretorius believed needed to be resolved.

[48] Ms Pretorius did not say what was discussed, other than alleging that Mr Clarke told her not to send him “*anti-vax emails.*” Mr Clarke’s evidence was that Ms Pretorius had simply asked him if he had received her previous emails, and he confirmed to her that he had.

[49] This ‘corridor conversation’ could not reasonably be viewed as having put the Respondent on notice that Ms Pretorius had raised an unjustified dismissal personal grievance claim.

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<sup>4</sup> Reply submissions dated 11 November 2022, page 7 at 5.0.

[50] Ms Pretorius' focus in the emails she sent her employer involved challenging the Order and in particular the safety of vaccines and the need for vaccination. She described herself as "*gravely concerned about the safety of the vaccine*" as she considered there was limited safety data available.

[51] Ms Pretorius believed the vaccination requirements breached her human rights, was a breach of the New Zealand Bill of Rights Act 1990 ("*the NZBoR*") and were contrary to the principles of the Nuremburg Code 1947. The Authority noted that these concerns were all outside the scope of the Respondent to address, so they did not constitute the raising of a personal grievance claim.

[52] On 6 November 2022 Ms Pretorius advised Mr Clarke that she would "*be seeking an exemption pursuant to clause 7A of the Amended Order*" so she would not have to take the vaccine, but that did not actually occur. Saying she would be seeking an exemption was not the same as raising a personal grievance claim.

[53] On 9 November 2022 Ms Pretorius said she asked Mr Clarke to apply for an exemption for her under s 12A of the Order, but he declined to do so. Mr Clarke said he told Ms Pretorius that if she needed an exemption then she would have to raise that with her own medical practitioner. The GP Ms Pretorius consulted declined to provide her with a medical certificate that would have supported an exemption.

[54] Asking Mr Clarke to apply for an exemption for her was insufficient to have raised a personal grievance claim.

#### *Authority's findings*

[55] The Authority finds that the communications Ms Pretorius had (by email and verbally) were insufficient either individually or collectively to have raised an unjustified dismissal or for that matter any other personal grievance claim.

[56] Even if the communications had been sufficient to have raised a personal grievance (and the Authority did not accept they were), such claims would have been anticipatory because the action or dismissal had not at that point occurred.

[57] No action had been taken that had actually disadvantaged Ms Pretorius and she had not been given notice of termination of her employment, and her employment had not ended. The

raising of a personal grievance claim must relate to an action or dismissal that has already occurred, it cannot be anticipatory.

[58] None of these communications used the phrase personal grievance, none of the communications identified what it was that she needed resolved, or how she wanted it resolved (in terms of the remedies she was requesting).

[59] While it is not always essential for the remedies to be specified in order for an employee to raise a grievance, there is a requirement on the employee to make it clear that there is a specific personal grievance claim or claims that is/are being raised. That did not occur in this case.

[60] The Authority finds that Ms Pretorius was unhappy about the Order and the requirement for people in her role to be vaccinated. However, the lawfulness of the Order was outside the scope of the Respondent and/or the Authority.

[61] The legal position is that if an employer is subject to the Order, then it must comply with it. The requirement for employees to be vaccinated in order to continue performing specified work stems from a legislative instrument, and not from any independent act or omission by the employer.

[62] The Authority does not have jurisdiction to determine if an employer's actions were unjustified merely because the employer acted in compliance with the terms of the Order. It therefore follows that complaints by employees about the lawfulness of the Order, the vaccine mandate or the safety and efficiency of the vaccine cannot therefore be complaints in the nature of a personal grievance claim under s 103 of the Act.

[63] To be able to raise a valid personal grievance claim, the substance of the employee's complaint must be about the manner in which the employer implemented the Order and/or the process it used to comply with the Order and/or about how it dealt with employment issues involving the individual employee who has brought a claim.

[64] In terms of the timing of the Respondent's actions regarding the Applicant's unjustified dismissal claim, all of these occurred after the 29 October conversation and 6 November 2021 email communications. Therefore it follows that none of these communications could have in law validly raised a personal grievance for unjustified dismissal.

*Outcome*

[65] The Authority finds that the first communication the Respondent received from Ms Pretorius in terms of raising a personal grievance was when it received a service copy of her Statement of Problem from the Authority, and according to Mr Clarke's affidavit that occurred on 27 May 2022.

[66] Because Ms Pretorius' employment had ended on 31 January 2021, the raising of her grievance on 27 May 2022 was outside of the 90-day time limit.

[67] The Authority therefore finds that Ms Pretorius did not raise her personal grievance claim within the 90-day time period required by s 114(1) of the Act.

**Has the Applicant sought leave to raise a personal grievance out of time?**

[68] During the CMC the Authority explained the need for the applicant to apply for leave to file a personal grievance out of time if she had not raised a grievance within the 90-day period, because her employer did not consent to the late raising of a grievance.

[69] Ms Pretorius (who attended the CMC with her advocate) was encouraged to apply for leave when she filed her evidence and submissions on the jurisdiction issue, if grounds existed for her to do so.

[70] The Authority noted that Ms Pretorius' representative was resistant to that, preferring to wait until after jurisdiction had been determined. The Authority pointed out during the CMC that delay could weigh against the applicant, so it was preferable for a leave application to be filed sooner rather than later.

[71] Ms Pretorius in her affidavit sworn on 24 August 2022 at paragraph [15] noted "*the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period*", meaning the 90 day period required by s 114(1) of the Act. That made it clear Ms Pretorius understood the legal requirement to apply for leave, as was discussed at the CMC.

[72] However, she did not actually apply for leave.

[73] Ms Pretorius' affidavit sworn on 9 November 2022 did not mention a leave application. Nor did she provide evidence in support of an "*exceptional circumstances*" claim under s 114(3) of the Act.

[74] The Applicant's representative expressly noted in her submissions that "*the application for leave is to be considered at a later date.*" That was a choice made by the Applicant, it was not a direction made by the Authority.

[75] Ms Pretorius has not sought leave to raise a personal grievance claim out of time. The only issue to be determined was jurisdiction and she did not succeed in establishing the Authority had jurisdiction. This matter is therefore now at an end.

#### **What if any costs should be awarded**

[76] The Respondent as the successful party is entitled to a contribution to its actual legal costs.

[77] The Authority adopts its usual notional tariff based approach to costs. The current daily tariff is \$4,500 for the first day of an investigation meeting.

[78] This was a standard 'on the papers' investigation into jurisdiction. This matter should therefore be treated as a half day investigation meeting, for the purposes of assessing costs. The notional starting point for assessing costs is \$2,250, being half of the notional daily tariff for a one day investigation meeting.

[79] The Authority is not aware of any factors that should result in the notional starting tariff being adjusted. Accordingly, to bring finality to this matter the Authority orders Ms Pretorius to pay the Respondent \$2,250 towards its actual legal costs within 28 days of this determination.

Rachel Larmer  
Member of the Employment Relations Authority