

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 138
3171302

BETWEEN	CARL BERRYMAN Applicant
AND	FONTERRA CO- OPERATIVE GROUP LIMITED Respondent

Member of Authority: Rowan Anderson

Representatives: Alexandra Miller, counsel for the Applicant
Rebecca Rendle, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 25 October 2022 and 15 November 2022 from Applicant
8 November 2022 and 21 December 2022 from Respondent

Determination: 20 March 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Carl Berryman was employed by Fonterra Co-operative Group Limited (Fonterra) as a Tanker Operator. Mr Berryman claims that he was unjustifiably dismissed from his employment on 1 April 2022 because he was not vaccinated against COVID-19. Mr Berryman also claims that that he was unjustifiably disadvantaged, that Fonterra breached its obligations of good faith, and that Fonterra discriminated against him based on the prohibited ground of disability.

[2] A preliminary issue arises as to whether Mr Berryman raised a personal grievance as to discrimination within the 90-day period prescribed by s 114 of the Employment Relations Act 2000 (Act). In the alternative, Mr Berryman claims that Fonterra impliedly consented to the raising of the grievance out of time, and also that leave should be granted for the personal grievance to be raised out of time on the basis of exceptional circumstances.

[3] Mr Berryman submits that he raised a discrimination personal grievance with Fonterra by way of letter dated 8 April 2022. He says that the content of that letter was sufficient to raise the personal grievance.

[4] Fonterra submits that the 8 April 2022 letter did not raise a discrimination personal grievance in terms of s 114 of the Act and that Mr Berryman did not otherwise raise a discrimination personal grievance within the relevant 90-day period as required. Fonterra does not consent to Mr Berryman raising a discrimination personal grievance out of time and denies it impliedly consented to the grievance being raised out of time. Fonterra also says that there are no exceptional circumstances justifying the delay such as would justify the Authority granting leave for the personal grievance to be raised out of time.

The Authority's investigation

[5] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' based on affidavits and written submissions. Affidavits were lodged on behalf of Mr Berryman, and Anmol Shankar, Employment Relations Manager Fonterra, and submissions lodged by both parties.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant principles

[7] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[8] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (2) 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.

[9] There are several principles relevant to whether a personal grievance has been raised in accordance with s 114 of the Act. I summarise them as follows:¹

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more, will be insufficient.

[10] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:²

[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 is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[11] For reasons that will be apparent from the content of this determination below, I do not set out the principles relevant to the issues of implied consent and exceptional circumstances.

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517;

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [38].

Communications said to comprise the raising of the personal grievances

Letter dated 8 April 2022

[12] Mr Berryman submits that a discrimination personal grievance was raised by letter to Fonterra on 8 April 2022. It is accepted by Fonterra that the letter validly raised a personal grievance for unjustified dismissal.

[13] The letter of 8 April 2022 raised a number of issues, including:

- (a) Breach of contract;
- (b) Workplace bullying;
- (c) Various issues in relation to the Health and Safety at Work Act 2015;
- (d) The Crimes Act 1961;
- (e) Unjustified dismissal; and
- (f) The Bill of Rights Act 1990.

[14] The letter also arguably included various references to discrimination, including:

- (a) Reference to Fonterra continuing to “demonise and discriminate” unvaccinated employees; and
- (b) Numerous references to the effect that Fonterra had made decisions contrary to Mr Berryman’s interests because he chose not to be vaccinated.

[15] The main reference to discrimination contained in the 8 April 2022 letter is as follows:

You and Fonterra need to be aware of Section 104 (Discrimination), Employment Relations Act 2000 says.....

(1)

(a) **refuses or omits to offer or afford to that employee the same terms of employment, conditions of work**, fringe benefits, or opportunities for training, promotion, and transfer **as are made available for other employees of the same** or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) **dismisses that employee or subjects that employee to any detriment**, in circumstances in which other employees employed by that employer of work of that description are not or would not be dismissed or subjected to such detriment; or

...

[16] Fonterra accepts, appropriately in my view, that the letter of 8 April 2022 included various references to discrimination. The primary issue taken with the letter, or more relevantly with Mr Berryman's assertion that a discrimination personal grievance was raised in the letter, is that it contained general references to discrimination rather than raising a personal grievance on that basis, and nor did it provide sufficient specificity to support such a claim.

Amended Statement of Problem and Second amended Statement of Problem

[17] Mr Berryman lodged a statement of problem in the Authority on 30 April 2022. An amended statement of problem (the First Amended Statement of Problem) was then lodged on 8 July 2022, containing reference to a claim that Fonterra had acted unlawfully on the basis of discrimination.

[18] In an amended statement in reply (First Amended Statement in Reply) lodged on 25 July 2022, Fonterra opposed the raising of a personal grievance for alleged unjustified disadvantage on the basis of discrimination, whilst also noting, on a without prejudice basis, that Mr Berryman had not specified the alleged disability said to have formed the grounds of discrimination.

[19] Mr Berryman lodged a further amended statement of problem (Second Amended Statement of Problem) on 22 September 2022. That followed a case management conference during which I issued directions for the lodgement of an amended statement of problem on the basis that the First Amended Statement of Problem was not sufficiently clear as to the legal basis of Mr Berryman's claims.

[20] The Second Amended Statement of Problem provided some detail as to Mr Berryman's claim of discrimination. That included:

30. Discrimination on the prohibited ground of disability is in two parts:

30.1. First, physiological function, which is the functions of living organisms and their parts, includes the immune system.

30.2. In implementing the Vaccination Policy, the Respondent relied on the claimed benefit of the COVID-19 vaccine, that it causes the immune system to respond to the COVID-19 virus in a way that reduces the risk of infection, and reduces the severity of the disease.

30.3 Unvaccinated people have a different immune response than vaccinated people, or in other words, a loss or abnormality of a physiological function compared to vaccinated people.

30.4. Second, the presence of organisms in the body capable of causing illness is within the definition of "disability".

30.5. Part of the claimed purpose of vaccination is to prevent the presence of organisms in the body, and this is what the Respondent sought to achieve through the Vaccination Policy.

30.6. The Respondent acted on its belief that unvaccinated people are at more risk of having an organism capable of causing disease, namely the virus that causes COVID-19, in their body.

30.7. Because the Applicant was unvaccinated, the Respondent subjected him to detriment, in circumstances in which other employees employed by the Respondent on work of the Applicant's description were not subjected to such detriment.

30.8 The detriment was the same matters relied on in the grounds of breach of good faith, disadvantage, and unjustified dismissal.

30.9. The detriment was not justified or reasonable in the circumstances.

30.10. Discrimination due to vaccination status was fairly brought to the attention of the Respondent, as raised by the Applicant in his response to termination. This was within 90-days of his dismissal.

Summary of submissions received

[21] Submissions of behalf of Mr Berryman were made noting Mr Berryman's dismissal on 1 April 2022, the letter of 8 April 2022, and the references contained in that letter to s 104 of the Act and discrimination against unvaccinated employees. It was submitted that a personal grievance of discrimination was raised in that letter despite the words 'personal grievance' and 'disability' not being specifically referenced.

[22] Mr Berryman submits that despite those terms not being used, the personal grievance was raised in that he took reasonable steps to make Fonterra aware of the problem he wanted addressed, that the issue was raised with sufficient specificity to allow Fonterra to respond, and that the specific ground of disability need not have been mentioned as it is a legal question rather than an issue as to whether Fonterra was provided sufficient detail such as to allow it to respond.

[23] Fonterra submit that both the 8 April 2022 letter and First Amended Statement of Problem were insufficiently specific such as to amount to the raising of a personal grievance on the basis of discrimination. Fonterra referred to *Creedy v Commissioner of Police*³ submitting that Mr Berryman, by referring to 'discrimination' and s 104 of the Act generally, provided even less information than what would be the case if the statutory type of grievance were specified.

[24] Fonterra also submit that simply referring to a section of the Act is insufficient, and that it was not provided with sufficient specificity in that the specific grounds of the discrimination were not included in the letter of 8 April 2022.

³ *Creedy v Commissioner of Police*³ [2006] 1 ERNZ 517.

Analysis and discussion

[25] The letter of 8 April 2022 contained more than merely a reference to ‘discrimination’ and s 104 of the Act. However, it is also correct, as submitted on behalf of Fonterra, that the letter did not specify the grounds for the alleged discrimination which are now asserted, that being the prohibited ground of disability which is included at s 105(1)(h) of the Act.

[26] The letter of 8 April 2022 raised numerous issues and contained substantial references to the alleged actions of Fonterra in relation to Mr Berryman’s unvaccinated status. That included information relevant to other complaints and/or personal grievances contained in the letter. Additionally, the letter, prior to referring to s 104 of the Act, asserted Fonterra had demonised and discriminated against unvaccinated employees. The letter then proceeded to bring to Fonterra’s attention s 104 of the Act.

[27] Whilst the letter of 8 April 2022 does not specifically refer to one of the grounds of discrimination in s 105 of the Act, it asserted, when read in context of the full letter, that Fonterra had unlawfully discriminated against Mr Berryman because he was unvaccinated. The letter made clear that the discrimination claim was based on actions taken in response to Mr Berryman not being vaccinated. I also consider it was sufficiently clear that Mr Berryman had a personal grievance that he wanted Fonterra to address.

[28] I consider that the letter contained sufficient information as to Mr Berryman’s discrimination grievance such as would have afforded Fonterra an ability to respond to his claim on its merits. Whilst vaccination status itself is not a prohibited ground of discrimination I do not consider it was necessary for Mr Berryman to have asserted that his unvaccinated status constituted a disability as such. The detail required of Mr Berryman when raising the personal grievance was not such as might be required, and in this case was required, in relation to the statement of problem lodged with the Authority.

[29] Mr Berryman would need to establish that his unvaccinated status amounted to a disability for the purposes of s 105(1)(h) of the Act if his substantive claim is to be successful. That is yet to be determined. However, I do not consider such specificity was necessary when he raised the personal grievance. Indeed, one response open to Fonterra may have been that it considered vaccination status was not one of the

prohibited grounds for discrimination and that it considered his grievance was without merit.

[30] I find that Mr Berryman provided sufficient detail in the letter of 8 April 2022 such as to constitute the valid raising of a personal grievance for discrimination for the purposes of s 114 of the Act. Mr Berryman's substantive claims are yet to be determined, including whether he was in fact and in law discriminated against in his employment.

Implied consent and exceptional circumstances

[31] Given I have found that Mr Berryman raised his discrimination personal grievance within 90 days I do not need to consider the issues of implied consent or exceptional circumstances.

Conclusion

[32] I find that Mr Berryman validly raised a personal grievance in terms of s 103(1)(c) of the Act within the 90 day period in compliance with s 114 of the Act.

Costs

[33] Costs are reserved.

Substantive claims

[34] A further case management conference will be scheduled to discuss administrative arrangements for the hearing of Mr Berryman's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority