

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 364  
3214359

BETWEEN

HILARY SEYMOUR  
Applicant

AND

THE CHIEF EXECUTIVE OF  
ORANGA TAMARIKI –  
MINISTRY FOR CHILDREN  
Respondent

Member of Authority: Rowan Anderson

Representatives: Liz Lambert and Erika Whittome, advocates for the  
Applicant  
Joe Perrot, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 19 May 2023 from Applicant  
23 June 2023 from Respondent

Determination: 10 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The respondent in this matter is the Chief Executive of Oranga Tamariki – Ministry for Children (Oranga Tamariki). Hilary Seymour was employed as a youth worker for Oranga Tamariki in Wairoa, having commenced her employment in May 2021. Ms Seymour’s last day at work was 10 January 2022 and on 25 January 2022 she was issued a letter giving one months’ notice of termination.

[2] The dismissal of Ms Seymour from her employment followed the introduction of the COVID-19 Public Health Response (vaccinations) Order 2021 (Public Health Order). Ms Seymour chose to remain unvaccinated following a process which included

notification by Oranga Tamariki that it could not legally permit Ms Seymour to perform her role.

[3] Ms Seymour has lodged a statement of problem seeking remedies in relation to various claims including that she was unjustifiably dismissed from her employment, that she was unjustifiably disadvantaged in her employment, and that she was subject to coercion and that Oranga Tamariki contravened s 92 of the Health and Safety at Work Act 2015.

[4] Ms Seymour sought an order, on an interim basis, that she be reinstatement to her employment. On 9 June 2023 I issued a preliminary determination declining Ms Seymour's application for interim reinstatement.

[5] Oranga Tamariki say that Ms Seymour did not raise any of her claimed personal grievances within the statutory 90-day period. This determination deals only with the issue as to whether Ms Seymour raised her claimed personal grievances within the 90-day period as required by s 114(1) of the employment Relations Act 2000 (the Act). The question for determination is whether Ms Seymour made Oranga Tamariki aware, or took reasonable steps to make Oranga Tamariki aware, that she alleged personal grievances that she wanted it to address.<sup>1</sup>

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

[6] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' with affidavits and written submissions having been lodged.

[7] At a case management conference held on 14 April 2023 I issued directions that included a timetable for the lodgement of written submissions and affidavits. Both parties lodged affidavit evidence and written submissions.

[8] Affidavits were lodged from Ms Seymour, and from Karl Severinsen, Acting Regional Manager of Youth Justice Central for Oranga Tamariki.

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<sup>1</sup> Employment Relations Act 2000, s114(2).

[9] 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**

[10] 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.

[11] 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.

[12] 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:<sup>2</sup>

- (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.

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<sup>2</sup> *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;

[13] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:<sup>3</sup>

[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.

### **Ms Seymour's personal grievance claims**

[14] Ms Seymour's statement of problem was lodged with the Authority on 17 March 2023. In terms of claimed personal grievances, there are four relevant claims identifiable from the statement of problem:

- (a) Ms Seymour claims she was unjustifiably dismissed in terms of s 103(1)(a) of the Act, including on the basis that the Public Health Order did not have application to her role and that alternatives to dismissal were not exhausted.
- (b) Ms Seymour claims she was unjustifiably disadvantaged in terms of s 103(1)(b) of the Act. Ms Seymour says that she was harassed and threatened and that Oranga Tamariki breached various sections of the Health and Safety at Work Act 2015 having regard to its actions associated with implementing the Public Health Order.
- (c) Ms Seymour claims that Oranga Tamariki engaged in adverse conduct for a prohibited health and safety reason and contravened s 92 of the Health and Safety at Work Act 2015 (which prohibits coercion and inducement). Ms Seymour claims that she was subject to coercion by Oranga Tamariki, including in that she was excluded from the workplace because she did not have a vaccine pass.

### **Communications said to comprise the raising of the personal grievances**

[15] Ms Seymour wrote to Mr Severinsen on 19 November 2021 recording that she was seeking an exemption from the Director of Health in relation to the Public Health Order. That followed a letter from Oranga Tamariki sent the same day as to the requirements of the Public Health Order and the impact of that in relation to Ms Seymour's role with Oranga Tamariki. That correspondence followed earlier notifications as to the same subject matter, including a letter dated 10 November 2021.

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<sup>3</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [38].

[16] Ms Seymour's email of 19 November 2021 advised that she had not received a COVID-19 vaccination and advised as follows (without correction):

Currently I am seeking an Exemption from the Director of Health Dr Bloomfield

I am surprised that noting about the conditions I set out for additional information was forthcoming.

I am also a realist and the main reason for the Vaccination Order is that I am based at a Maori Health Organisation. Maybe instead of forcing the jab we negotiate a way that I can be based at the local OT office.

I do not have COVID-19 Delta or its variants.

Have tested negative since being tested negative I believe in Natural Immunity and have worked from home to keep my bubble Small. My bubble includes my 82 year old Aunty who has been double vaccinated!! I note that with the traffic light system nz, You can travel nationally provided you have had your double vaccination or a negative Covid test.

[17] Mr Severinsen confirmed in his affidavit that Ms Seymour's correspondence on 19 November was accompanied by a letter dated 11 November 2021 sent to him asking him to forward what was described as a "conditional acceptance" to the Minister of Health for "...an exemption or exception for the vaccination order to be waived on [her] case".

[18] I need not set out the content of the 11 November 2021. However, I make the following observations as to its content:

- (a) The letter was provided to Mr Severinsen but asks that it be forwarded to the Minister of Health and Minister for Children.
- (b) The content reflects it being a request of an exemption to the "Vaccination Order". However, the letter is also described as a "conditional acceptance" of receiving the vaccination subject to receiving requested information and being satisfied of various matters.
- (c) The letter asks that the Minister of Health answer several questions as to vaccinations, the content of vaccines, adverse reactions, and other similar matters.
- (d) Question 6 contained in the letter asks the Minister of Health to confirm that Ms Seymour "...will not be under duress from [her] employer, in compliance with the Nuremburg Code...".
- (e) A 'condition' contained in the letter asks for confirmation that, in the event Ms Seymour were to "...decline the Vaccination Order" that it would "...not

compromise [her] position and that [she] will not suffer prejudice and discrimination as a result...”

[19] By letter dated 25 January 2022, Oranga Tamariki wrote to Ms Seymour giving her one months’ notice of the termination of her employment from 21 January 2023. That letter also responded to various proposals as an alternative to dismissal.

[20] On 10 February 2022 Ms Seymour received a letter from the Ministry of Social Development stating that Ms Seymour’s manager had advised that her employment had concluded and detailing Ms Seymour’s final pay.

[21] Ms Seymour sent an email to Mr Severinsen and another employee of Oranga Tamariki on 11 February 2022, as follows (without correction):

Hi Karl,  
I hope this email finds you well and in good health.  
Please accept this email as notification that i will be filling a Personal Grievance(PG) regarding my employment etc.  
Just giving notice before the ninety days period is up from the 20<sup>th</sup> of January 2022.  
F.Y.I i am also seeking to have my position and employment reinstated as part of my PG.  
At the moment i am seeking legal representation and putting together my PG.  
I also just had a thought that perhaps my pay is not forthcoming because I still have work from home equipment.  
I will return to the Wairoa OT office this morning.  
A heads up as other World leaders are dropping the mandates and ILLEGAL ORDERS, it is only a matter of time that this happens in NZ especially I know that NZ Doctors Speaking On Science are in the Wellington High Court in beginning of March 2022 to revoke ALL mandates.  
...

[22] Ms Seymour further referred to emails sent on 7 March 2022 and 25 March 2022. The 7 March 2022 email referred to other unrelated proceedings relating to ‘mandates’ and also general reference to persons having been dismissed from their employment in relation to ‘mandates’ being reinstated. The 25 March 2023 email referred to her earlier writing to inform Oranga Tamariki that she was ‘putting in a personal grievance within the 90-day period’, that presumably being a reference to the 11 February 2022 email.

[23] On 10 May 2022, Mr Severinsen emailed Ms Seymour seeking the return of Oranga Tamariki equipment and property. That email advised that Mr Severinsen had considered Ms Seymour’s choosing not to return work equipment as previously requested. Ms Seymour responded on 22 July 2022 stating that a laptop and phone

would be returned “[a]fter the result of my PG Mediation or Settlement out of Court or Further Action in Court...” (quoted without correction).

### **Ms Seymour’s position**

[24] Ms Seymour submits that she objected to being vaccinated and communicated that to Oranga Tamariki in various meetings that took place on or before 20 January 2022. She also says that she raised safety concerns by way of her correspondence on 11 November 2021 and 19 November 2021, and that that constituted the raising of a grievance for the purposes of s 103(1)(j) of the Act and unjustified disadvantage.

[25] Ms Seymour says that in her correspondence of 19 November 2021 she raised safety matters under the Health and Safety at Work Act 2015 and a personal grievance for ‘unjustified disadvantages’. In her statement of problem, Ms Seymour says that no response to the safety concerns was received and that she was subsequently subjected to adverse conduct for a prohibited health and safety reason.

[26] Ms Seymour also submits that a personal grievance for unjustified dismissal was raised within the relevant 90-day period, including by reference to her 11 February 2022 email.

### **Oranga Tamariki’s position**

[27] Oranga Tamariki submits that there are four potential claims identifiable from the material provided by Ms Seymour. It says that the first three, those being a claim as to health and safety and two claims of unjustified disadvantage, were not raised at all within the required 90-day period. Oranga Tamariki submit that the final claim, that of unjustified dismissal, was not raised within the required 90-day period given a lack of sufficient particulars as to the grounds for disagreement making it unclear as to how Oranga Tamariki could address the matter.

### **Discussion and analysis**

[28] I have outlined above the primary communications by which Ms Seymour submits she raised personal grievances. I now turn to the consideration of those communications, both separately and ‘in totality’.

[29] The letter dated 11 November 2021 sought answers to several questions and sought various guarantees. Whilst the notification of a personal grievance need not

necessarily refer to the statutory type of grievance, the letter does not in my view establish the basis for a grievance of any description. Instead, it merely makes enquiries, albeit in a form and tone that suggests they are rhetorical. In Ms Seymour's words the letter expressed a "...desire to be fully informed and appraised of all the facts before going ahead...". The letter also, arguably sarcastically, states that the vaccination requirements may be acceptable to Ms Seymour should certain conditions be met.

[30] Viewed objectively, the correspondence of 11 November 2021 cannot be said to have constituted the raising of a personal grievance having regard to s 114(2) of the Act. In terms of what Ms Seymour now claims, aside from a prospective comment about possible 'prejudice and discrimination' the letter in no way communicates that Ms Seymour:

- (a) considered, at that time, that she was being disadvantaged in her employment;
- (b) disputed the application of the Public Health Order to her role;
- (c) considered that Oranga Tamariki were acting in breach of the Health and Safety at Work Act 2015;
- (d) took issue with any Oranga Tamariki's actions in relation to the subject matter of any of the sections of the Safety and Health at Work Act 2015 mentioned in her statement of problem;
- (e) held concerns about harassment, coercion, or inducement.

[31] Whilst Ms Seymour's representatives have submitted that Ms Seymour raised a personal grievance in terms of s103(1)(j), concerning the engagement in adverse conduct for a prohibited health and safety reason or contravention of the Health and Safety at Work Act 2015 as to inducement and coercion, there is nothing to support the proposition that Ms Seymour considered she had such a concern, as at 11 November 2021. Such a concern was not expressed to her employer and was certainly not done so in a manner that could have reasonably put Oranga Tamariki on notice that she had a personal grievance that she wanted it to address.

[32] The email correspondence of 19 November 2021 noted that Ms Seymour hadn't received a response to her 11 November 2021 letter and that she was in the process of seeking an exemption. It also raised several matters as to the views held by Ms Seymour. It is apparent from Ms Seymour's email that she was opposed to the 'forcing

of the job' and that there should instead be some negotiation as to how she might continue in her employment by being based at the local office. It should have been reasonably apparent to Oranga Tamariki that Ms Seymour did not agree with the implementation of the Public Health Order. However, the references to 'forcing the job' and negotiating alternatives, even when read in the context of the communications Ms Seymour was receiving and responding to, was in my view was not sufficient to put her employer on notice that she alleged a personal grievance.

[33] When taken together, I find that the correspondence dated 11 November 2021 and 19 November 2021 expresses a view that Ms Seymour did not agree with steps being taken by Oranga Tamariki in relation to the Public Health Order. The communications, at least impliedly, expressed some dissatisfaction or disagreement. However, I am not satisfied that they, in any way, communicated that Ms Seymour was raising a personal grievance, or personal grievances, that she wanted Oranga Tamariki to address.

[34] Setting aside the issue of the alleged unjustified dismissal claim for the moment, the correspondence and relevant communications referred to in evidence and submissions did not, whether considered individually or in totality, raise any personal grievance. Viewed objectively, they simply cannot be said to have indicated a claim for unjustified disadvantage on the basis asserted in the statement of problem lodged. Whilst the specific type of statutory personal grievance does not necessarily need to be referenced in raising a grievance, the correspondence of 11 and 19 November 2021 makes no mention at all of the Health and Safety at Work Act 2015, breaches of workplace health and safety obligations, coercion, inducement, consultation, good faith, hazards or risks in the workplace, or any other matters that might conceivably be relevant to the basis of either the unjustified disadvantage or s 103(j) claims as articulated in the statement of problem lodged.

[35] I find Ms Seymour, having regard to her communications individually and in totality, did not raise any personal grievance in relation to either s 103(1)(b) of the Act or s103(1)(j) of the Act within the 90-day period required by s 114(1) of the Act. As such, Ms Seymour is not able to progress those claims.

[36] Ms Seymour's claim of unjustified dismissal is of a different category. I find that, viewed objectively, Ms Seymour raised a personal grievance for unjustified dismissal by sending the emails of 11 February 2022 and 25 March 2022. Whilst the first email arguably did not contain a great amount of detail as to the basis of her concerns, I find that it sufficiently identified the nature of her personal grievance such as to enable Oranga Tamariki to respond. By referencing reinstatement in the email, it was clear that Ms Seymour wanted Oranga Tamariki to address her concerns.

[37] In the first email, Ms Seymour noted that she would be filing a personal grievance regarding her employment. She referred specifically to the 90-day requirement in the Act, and to reinstatement, which I consider objectively leaves no doubt that she was raising a personal grievance for unjustified dismissal. The email of 25 March 2022 confirmed the position. Further, whilst on one view the first email speaks of a prospective claim yet to be filed, I consider that merely a reference to the future lodgement of an application in the Authority. It cannot, when read objectively, be read as simply conveying that a personal grievance may be raised with the employer at some time in the future.

[38] Whilst the emails of 11 February 2022 and 25 March 2022 contained little in terms of explaining the reasons for Ms Seymour taking issue with her dismissal, it was clear enough, particularly having regard to the pre-termination communications received by Oranga Tamariki, that she took issue with the implementation of the Public Health Order and that the consideration of alternatives to dismissal was insufficient.

[39] I find that Ms Seymour did raise a personal grievance of unjustified dismissal within the required 90-day period. She is entitled to have that claim investigated in the Authority.

## **Conclusion**

[40] I find that Ms Seymour raised a personal grievance of unjustified dismissal within the 90-day period provided for at s 114(1) of the Act.

[41] I find that Ms Seymour did not raise any personal grievance in relation to either unjustified disadvantage or under s 103(j) of the Act within the 90-day period provided for at s 114(1) of the Act.

**Costs**

[42] Costs are reserved pending consideration of Ms Seymour's substantive claims.

**Case management conference**

[43] My preliminary view is that, having regard to the findings made, it would be appropriate for the parties to attend further mediation to seek to mutually resolve the grievance. However, a further case management conference will be scheduled to discuss that, and the conduct of the Authority's investigation, with the parties.

Rowan Anderson  
Member of the Employment Relations Authority