

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 411
3213079

BETWEEN YQD, KSW & EWD
Applicants

AND KIWIRAIL LTD
Respondent

3213039

BETWEEN RKH & BXN
Applicants

AND KIWIRAIL LTD
Respondent

Member of Authority: Peter van Keulen

Representatives: Mary-Jane Thomas, counsel for Applicants
Anthony Russell, counsel for the Respondent

Investigation Meeting: 11 May 2023 by audio-visual link

Submissions Received: 30 March 2023 and 19 July 2023 from the
Applicant
3 May 2023 and 26 July 2023 from the
Respondent

Date of Determination: 1 August 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Non-publication

[1] All five applicants seek non-publication orders in respect of their identity. They are concerned about negative publicity arising for them as individuals who chose not to be vaccinated against COVID-19.

[2] KiwiRail Ltd does not oppose non-publication orders being made.

[3] I accept that all five applicants have valid concerns, the question for me is if these valid concerns are sufficient to warrant non-publication orders being made.

[4] My discretion to make the non-publication order sought is broad but I must exercise it in line with the applicable principles. The key principle is that of open justice i.e. parties being named and identified in litigation. But that principle can be displaced by sound reasons.¹

[5] In *WN v Auckland International Airport Limited*, the Employment Court ordered non-publication of the plaintiff's identity primarily because of the adverse scrutiny and comment the plaintiff might suffer in relation to their views on COVID-19 vaccinations.²

[6] So, the concern about public scrutiny and comment on a party's vaccination status or views is a relevant and credible concern for an employee. I am satisfied that the concerns raised in this regard by the applicants support non-publication orders being made.

[7] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) I grant non-publication orders prohibiting the publication of name and identity of the applicants. For the purposes of this determination:

(a) The applicants in matter 3213079 will be referred to as YQD, KSW & EWD.

(b) The applicants in matter 3213039 will be referred to as RKH & BXN.

¹ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511; and *JGD v MBC Ltd* [2020] NZEmpC 193.

² *WN v Auckland International Airport Limited* [2021] NZEmpC 153. At [43] and [44].

Employment relationship problem

[8] YQD, KSW, EWD, RKH & BXN have lodged two statements of problem in the Authority setting out claims based on various personal grievances for unjustified action causing disadvantage.

[9] The various personal grievances relate to matters arising for each of YQD, KSW, EWD, RKH & BXN in their employment due to KiwiRail's vaccination policy and the implementation of that.

[10] KiwiRail responded to the two statements of problem with statements in reply. In the statements in reply it said, amongst other things, that one of the personal grievances referred to by each of YQD, KSW, EWD, RKH & BXN was not raised within the 90-day period.³

[11] The personal grievance in question is a grievance purportedly raised for KiwiRail failing to advise each of YQD, KSW, EWD, RKH & BXN whether, as part of its COVID-19 Vaccination Policy KiwiRail would require them to have the booster vaccination i.e., a third vaccination against COVID-19 (the Booster Grievance).

[12] The parties agreed that I would resolve the issue over whether the Booster Grievance was raised within the necessary time frame for YQD, KSW, EWD, RKH & BXN, as a preliminary matter.

The Authority's investigation

[13] I investigated this preliminary issue by receiving affidavit evidence and written submissions from the parties' representatives.

[14] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination. I have set out the relevant facts and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The preliminary matter

[15] KiwiRail's argument is that YQD, KSW, EWD, RKH and BXN failed to raise the Booster Grievance because the correspondence from their counsel, Ms Thomas,

³ Section 114 of the Employment Relations Act 2000.

purporting to do that did not name or identify each of YQD, KSW, EWD, RKH and BXN. In short, the Booster Grievance was raised for another person (also a client of Ms Thomas) as he was referenced in the letter and not YQD, KSW, EWD, RKH and BXN.

[16] Ms Thomas accepts that the correspondence it sent to KiwiRail raising the Booster Grievance was headed with a reference to another employee and that it referred to that employee when setting out the events giving rise to the Booster Grievance. However, Ms Thomas says it was clear that the Booster Grievance was raised for YQD, KSW, EWD, RKH and BXN by the reference in the letter to raising a personal grievance for the named employee and “in relation to all our clients”.

Issues for resolution of the preliminary matter

[17] 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 to the grievance occurred or when it came to the notice of the employee.

[18] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

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.

[19] So, the issue is whether each of YQD, KSW, EWD, RKH and BXN can be said to have made KiwiRail aware that they allege a personal grievance.

Analysis

[20] The key principles for establishing whether an employee has made the employer aware that they allege a grievance (as required s 114(2) of the Act) have been addressed in various court decisions.⁴ These principles set out the level of detail or particularity required in making an employer aware of a grievance.

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

[21] The correspondence that raised the Booster Grievance was a letter from Ms Thomas to KiwiRail dated 1 April 2022. That letter had the heading in two parts – the first line named an employee who is not one of YQD, KSW, EWD, RKH or BXN, and the second line stated “Our Reference; 261374/1”.

[22] The first point is the reference did not identify the letter as being relevant to any of YQD, KSW, EWD, RKH or BXN. But, to the extent the letter raised the Booster Grievance it is clear that it did so for the named employee.

[23] The letter set out some general statements about KiwiRail and its actions in relation to vaccinations, and some general statements about the COVID-19 booster vaccination. This part was then concluded with two statements:

Repeatedly, KiwiRail has stated that vaccination is necessary, which is the rationale for our client’s terminations. Ironically the employer on the one hand has terminated our clients yet on the other hand continued to employ those who (according to the Ministry of Health and Dr Ashley Bloomfield) are not adequately protected.

Our clients need to know whether, if they take two doses of vaccination (under duress in order to keep their livelihoods) they will face a requirement to continue being boosted infinitum.

[24] The letter then had a further five paragraphs dealing with specific events relating to the named employee. In the last of these paragraphs the letter set out that the named employee had still not received a response from KiwiRail regarding its expectations of booster doses and what it viewed as being fully vaccinated.

[25] The letter then concluded with:

We raise personal grievances on behalf of [named employee] and in relation to all our clients that they have been disadvantaged by the employer’s refusal to answer this very simple question.

[26] The second point is that the letter does raise the Booster Grievance more generally for Ms Thomas’s clients. This is so because of the references to:

- (a) Clients having their employment terminated yet others remaining employed when they are not adequately protected from COVID-19.
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- (b) Clients needing to know whether they will be required to continue getting booster vaccinations for COVID-19.
- (c) Clients not having an answer to whether the booster vaccination is required in order for an employee to meet the requirement of being fully vaccinated.

[27] Based on this it is clear that the Booster Grievance was set out with sufficient particularity such that KiwiRail knew there was a grievance being alleged by Ms Thomas's clients i.e., enough detail that KiwiRail knew it was expected to respond and what it needed to respond to such that it could engage in the merits of the complaint.

[28] So, the question is whether each of YQD, KSW, EWD, RKH and BXN can be said to have raised the Booster Grievance as they were not identified specifically in the correspondence and because the correspondence referred only to one other employee.

[29] The answer to this question is informed by two factors. First, Ms Thomas had identified in meetings that statements made on behalf of one client that applied equally to all of her other clients should be treated as such.

[30] And second, on 14 March 2022 KiwiRail had sent a letter to Ms Thomas in which it raised issues for all of Ms Thomas's clients who were employees and subject to discussions about their COVID-19 vaccination status. In particular KiwiRail referenced Ms Thomas's clients in the letter specifically asking her to "to ensure all your KiwiRail employee clients, as listed in the Schedule, are notified of this updated position." The letter went on to state, "... please confirm that those employees intend to receive the Novavax vaccine." And the letter concluded with:

If any of these employees no longer intend to receive the Novavax vaccine, we seek advice of such by Friday 25 March 2022 and this shall be regarded as non-compliance with the COVID-19 Vaccination Policy and termination of employment may result."

[31] For completeness, I note that YQD, KSW, EWD, RKH & BXN were included in the Schedule.

[32] I also note that other correspondence from KiwiRail used a general reference to “clients” when addressing issues that impacted all of Ms Thomas’s clients, an example being an email of 1 April 2022.

[33] These two factors show that both KiwiRail and Ms Thomas had adopted the approach of referring to Ms Thomas’s clients collectively where matters related to all of them, and it shows there was no doubt between them as to who these clients were, as they had, at least on one occasion, been listed and referenced.

[34] It is particularly apposite that KiwiRail used this approach when putting employees on notice that their conduct might amount to a breach of policy and this might result in the termination of their employment. If, for the purposes of putting employees on notice of pending termination of employment KiwiRail could refer to a list of Ms Thomas’ clients and subsequently reference them simply as “these employees” it seems less credible to suggest a similar approach was insufficient for raising a personal grievance.

[35] In any event, I am satisfied that in the particular circumstances where Ms Thomas’s clients had been identified and the parties had previously both referred to them in general terms for matters applying to all of them, then a reference to all clients for the purposes of raising a personal grievance was sufficient. Put simply I accept that KiwiRail knew the substance of the Booster Grievance and whom it was raised for, through Ms Thomas’s letter of 1 April 2022.

Conclusion

[36] YQD, KSW, EWD, RKH & BXN’s personal grievances for unjustifiable action causing disadvantage relating to the alleged failure by KiwiRail to advise them of its requirements regarding the COVID-19 booster vaccination, were raised within the required time frame and I do have jurisdiction to investigate and determine this aspect of their claims.

Costs

[37] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority