

[2] Claudia Grott-Zanicotti was employed as a registrar by Capital Coast District Health Board (CCDHB), now known as Te Whatu Ora. All references in this determination to CCDHB, and Hutt Valley District Health Board (HVDHB) refer to what is now Te Whatu Ora.

[3] Dr Grott-Zanicotti was an overseas trained doctor who had previously practised medicine as a consultant psychiatrist in Brazil. In February 2011 Dr Grott-Zanicotti immigrated to New Zealand and gained a masters in clinical psychiatry from the University of Otago. She worked as a Professional Practice Fellow and later as a Lecturer/Research Fellow. During her time on the faculty, she says she was the convenor for the final year medical students in the department, was involved in teaching, changes to the medical curriculum, assessments and research. In June 2016 she left Otago University to focus on her exams and to get her general medical registration in New Zealand.

[4] Dr Grott-Zanicotti accepted an offer of employment in Wellington from CCDHB for the position of Psychiatry Registrar commencing in December 2019. At the time there was a current Multi Employer Collective Agreement (MECA) between the parties. Clause 8 of the MECA dealt with salaries and wages and set out the various salary steps for registrars and house officers. In issue in this case is cl 8.6 which provides the mechanism for considering previous experience for the purpose of determining the salary commencement step on the registrar scale:

8.6 On appointment to a registrar position all experience as an acting registrar, or other service which is considered by the CEO to be directly relevant shall be credited for the purposes of determining the commencement step on the registrar scale. Guidelines for assessing relevant experience shall be agreed between the parties.

[5] Dr Grott-Zanicotti had questions about the salary scale and the step she was placed on when she commenced employment. Noting her prior experience and qualifications, she indicated by email these should have been considered. She says CCDHB did not engage with her in relation to those questions. She continued to work for CCDHB, transferred to the Hutt Valley District Health Board (HVDHB) from 8 June 2020 to 21 January 2021 and then back to CCDHB.

[6] The COVID-19 pandemic occurred and on 15 October 2021 Dr Grott-Zanicotti resigned. Her last day of employment was 30 January 2022. She says her resignation was because she was disillusioned about the way in which her questions regarding her salary allocation were dealt with by her employer.

[7] On 29 March 2022 Dr Grott-Zanicotti lodged her claim in the Authority that comprised a number of claims including an unjustified disadvantage claim, a breach of contract claim and a breach of good faith.

Issues

[8] Dr Grott-Zanicotti wishes to pursue a number of grievances, and breaches of contract and statute in connection with her registrar's commencement salary step. As indicated earlier, this determination only deals with the alleged personal grievances. Dr Grott-Zanicotti says she was disadvantaged by Te Whatu Ora's unjustified actions when it:

- (a) failed to consider her experience and qualifications in setting an appropriate salary scale;
- (b) failed to consult with her at the commencement of her employment to agree on what guidelines are appropriate to assess her experience in setting an appropriate salary scale;
- (c) failed to engage with her on her salary allocation since 23 January 2020, when she confirmed she did not agree with the salary scale;
- (d) failed to act as a fair and reasonable employer in the circumstances;
- (e) caused stress and hurt to her; and
- (f) caused disparate and adverse treatment because some of her experience was not obtained in a comparable or competent health authority.

[9] Te Whatu Ora summarised the disadvantage grievances as follows:

- (a) placing her on an incorrect step on the registrar pay scale;
- (b) failed to engage with her when she queried this initially; and

- (c) failed to engage with her after her representative wrote to the Respondent on 12 July 2021, advising that she had a personal grievance.

[10] Should I conclude the unjustifiable disadvantage claims cannot proceed because they were raised outside the statutory time limit for commencing a personal grievance, counsel has indicated Dr Grott-Zanicotti will apply for leave to raise a personal grievance after the expiration of the 90-day period.

[11] There is, however, an additional issue arising in this matter, that may also prevent the personal grievance claims from proceeding. That is whether or not what was raised by Dr Grott-Zanicotti with CCDHB were in fact grievances and this will be discussed further below.

[12] There is a further dispute between the parties. It is submitted on Dr Grott-Zanicotti's behalf that her claim applies equally for the period that she worked at HVDHB. Te Whatu Ora disagrees stating each time a registrar rotates between different DHBs they end employment with one and commence employment with the new one. The relevant clauses in the MECA confirms the position that employment ended within one month of resigning from each DHB although service was considered to be continuous for the purposes of clinical training and entitlements under the MECA.¹

The Authority's investigation

[13] The Authority held an investigation meeting in Wellington and both parties provided written evidence and oral and written submissions.

Background

[14] On 24 July 2019, Dr Grott-Zanicotti accepted a position as a registrar with CCDHB. The parties exchanged brief emails about how her salary would be calculated. She was told once she accepted the role and her run allocation was finalised that would determine what salary step she would start on.

¹ Multi Employer Collective Agreement 1 April 2018 to 31 March 2021, cl 2.0 and 5.0.

[15] On 26 November her run description and salary details were confirmed. She was commencing work as a registrar on 9 December 2019 at Step 1 of the registrar scale, category D.

[16] Two days later Dr Grott-Zanicotti emailed regarding her pay scale allocation:

Just two questions:

- 1) How should I proceed to discuss my pay scale (considering my previous experience in psychiatry/relevant to the position and stage of training). For example, I am at Stage 2, with 15 months accepted by RANZCP and with Scholarly Project (one of the assessments) also accepted by RANZCP? Would that be with you?

...

[17] On 18 December CCDHB responded:

In terms of your pay scale – this is based on when you started your NZREX role in November 2017 and then you moved on from there as the other experience is not relevant or counted for this as it was NOT obtained in a comparable or competent health authority. So in theory your NZ pay scale starts from a PGY1 year and the (sic) you move on from there each year.

[18] On 23 January 2020, Dr Grott-Zanicotti emailed stating she wished to start “formal negotiation” regarding her current pay scale and set out her reasons: her previous experience overseas had been accepted by the RANZCP, she was a consultant psychiatrist in Brazil, she holds a clinical masters degree from Otago University in psychiatry, her masters degree had exempted her from undertaking one of the summative assessments of the RANZCP Fellowship Programme and her teaching experience at Otago University.

[19] On 3 March 2020 having not heard anything, Dr Grott-Zanicotti emailed again:

...

Also regarding my previous email about pay scale and previous relevant experience, how should I proceed to discuss this? If not you, who should I discuss it with?

[20] On 12 March CCDHB responded saying it did not have a “final direction yet”.

[21] Dr Grott-Zanicotti moved to a different hospital in the Hutt Valley (HVDHB) and after she received her attachment letter and run description for that placement she responded on 27 May 2020 by email:

I also have a question regarding pay scale. I initially contacted CCDHB but did not hear back. This is regarding my previous experience and stage of training (currently stage 2, started in Sec 2018 and had a brake (sic) in training until I restarted in Dec 2019.

[22] On 2 June 2020 HVDHB replies:

I have referred your enquiry onto administration whom have calculated which step you should begin on the 8th June 2020 it has been confirmed that Step 1 is the correct step; your salary will increase on the 27th November 2020 to step 2.

[23] On 27 November 2020, Dr Grott-Zanicotti moved to Step 2 on the registrar pay scale. On 17 December 2020, as she was returning to CCDHB, she was emailed her salary letter, run description and further paperwork for her return to CCDHB commencing on 1 February 2021, confirming her salary this time would be at Step 2 of the registrar scale, category D. On 18 December 2020, Dr Grott-Zanicotti emailed the signed documents and confirmed her placement at CCDHB.

[24] There were no further communications from Dr Grott-Zanicotti about salary until her representative at that time wrote to CCDHB on 12 July 2021 raising a grievance on her behalf regarding CCDHB's lack of engagement on the allocation of her salary scale, and its assessment of her relevant experience for allocation of her salary scale.

Was a grievance raised within 90-days?

[25] Section 114(1) of the Act provided that a personal grievance must be raised with an employer within 90 days, beginning on the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employer, whichever was the later date, unless the employer consented to the personal grievance being raised after the expiration of that period.

[26] A grievance raised outside of the 90 days can be pursued by leave of the Authority or with the employers consent and a grievance is considered to have been raised with an employer as soon as the employee makes or takes reasonable steps to make the employer or its representative aware that the employee alleges a personal grievance that the employee wants the employer to address.

The Applicant's submissions

[27] It is submitted on behalf of Dr Grott-Zanicotti:

- (a) She was not required to raise her grievance within 90 days because the failure of Te Whatu Ora to respond constitutes continuous conduct which continued until termination of her employment and beyond to the present day; and/or
- (b) Because Dr Grott-Zanicotti is yet to receive relevant information about placement on the salary step, the statutory limitation period has not yet commenced; and/or
- (c) She raised a personal grievance within 90 days.

[28] The paramount submission is that the personal grievance issues remained throughout employment and were still live issues when employment ended on 13 January 2022 (and beyond to the present day). This is the “continuing course” submission and if successful the 90-day timeframe in s 114 of the Employment Relations Act 2000 (the Act) has not commenced meaning Dr Grott-Zanicotti’s grievances were notified in time.

[29] The “continuing course” submission is based on the fact there can be no obligation on an employee to continue to raise a disadvantage grievance if the disadvantage is ongoing.² But it was submitted there was an obligation on the employer to engage with Dr Grott-Zanicotti which continued at least up to the date the employment relationship ended. A statement of problem was filed within 90 days of employment ending meaning her grievances were raised in time.

[30] Furthermore Dr Grott-Zanicotti first raised the matter on 23 January 2020 and sought redress. With reference to three cases³ it was submitted there was no date of incorrect salary as the “elements of the course of action” were said to be “plainly based on a continuous course of conduct.”

² *Premier Event Group Ltd v Beattie (No 3)* [2012] NZEmpC 79.

³ *Emmerson v Northland District Health Board* [2019] NZEmpC 34, *Panapa v Spotless Facility Services* [2021] NZEmpC 88 and *Young v Spotless Facility Service (NZ) Ltd* [2020] NZERA 270.

[31] Alternatively, it was also submitted that if Dr Grott-Zanicotti was correct and her salary was not right, then each time her salary was paid incorrectly that constituted a disadvantage. An analogy was drawn with penalties for non-compliance in the Act. Penalties can be awarded for each occasion the breach occurs.

[32] Similarly, it is argued that because Dr Grott-Zanicotti is yet to receive information as to why she was allocated a certain salary step, the statutory limitation period under s 114 of the Act has also not yet commenced.

[33] The final submission was that what was raised initially on 23 January 2020 was sufficient to raise a personal grievance. In raising the matter with her employer Dr Grott-Zanicotti was very clear about the nature and substance of her dispute and the fact that she wanted engagement with her employer about her pay rate. This equals a clear expression of her grievance. When all the steps are taken into account, there is nothing Dr Grott-Zanicotti said or did that detracts from what was a clear expression of a grievance. This was the third way in which it was submitted the grievances could proceed and why there was no issue as to the 90-day statutory time frame.

The Respondent's submissions

[34] Te Whatu Ora does not consent to the raising of what it refers to as the first two grievances out of time and has expressly reserved its position on the 90-day time limit. Te Whatu Ora submits:

- (a) It does not matter that any disadvantage was ongoing, otherwise an aggrieved employee could sit on a grievance for many years before pursuing it;
- (b) In this case, to the extent Dr Grott-Zanicotti raised an issue about pay, she was still out of time (because CCDHB responded on 18 December 2019);
- (c) The time line and events were interrupted. Dr Grott-Zanicotti queried her pay in December 2019 and again in May 2020 and in each case received responses shortly afterwards. She did not question her pay again or raise a complaint until July 2021, more than a year later. Again

that would mean an employee could question something, say nothing for years, and then raise a grievance later.

- (d) The lack of a substantive response to the 12 July letter is related but a distinct and different issue as to whether her placement on the scale was lawful.
- (e) There was a change of employer when Dr Grott-Zanicotti moved from CCDHB to HVDHB in June 2020, and then again when she moved back to CCDHB in February 2021. Any “course of conduct” ceased with each change of employer, and Dr Grott-Zanicotti did not raise any grievance with, or issue proceedings against HVDHB.

[35] Te Whatu Ora says what was raised initially was not a grievance because the initial communication from Dr Grott-Zanicotti is more akin to a dispute about terms and conditions of employment. Dr Grott-Zanicotti used the word “negotiate” with reference to the allocated salary step as set out in the emails between the parties. Te Whatu Ora submits this is an insufficiently clear statement by an employee to be considered to be a communication that raised a personal grievance.

[36] However, in the event the claims are considered to be personal grievances, then the first two are out of time because they were not raised within the required 90-day period. Te Whatu Ora, having uncovered a further set of emails in June 2023, now accepts the third grievance, namely failing to engage with Dr Grott-Zanicotti after the 12 July letter, was raised in time. The validity or otherwise of that claim is not dealt with in this determination.

[37] There are two reasons why Te Whatu Ora says the first two grievances are out of time. The letter of 12 July 2021 was the first time a grievance was raised by Dr Grott-Zanicotti and that was more than 90-days from the time she was placed on the salary step. Secondly, the letter of 12 July was also more than 90 days from the last communication CCDHB had with Dr Grott-Zanicotti about her salary step.

[38] In relation to the continuing conduct submission, Te Whatu Ora says the questions around salary allocation from Dr Grott-Zanicotti were answered so the correct analysis must be to calculate from what point in time either a grievance was raised or the employee had sufficient knowledge in order to know there was a

grievance. To do otherwise would be inconsistent with the provisions and scheme of the Act.

[39] In addition, there was a change of employer in June 2020 when Dr Grott-Zanicotti commenced employment at HVDHB meaning any continuing course of conduct by CCDHB ceased at that point.

[40] Te Whatu Ora relies on the case of *Wyatt v Simpson Grierson* to support its submission that the 90-day time frame must commence from a date when it can be shown Dr Grott-Zanicotti had sufficient information to form a belief, on reasonable grounds, that her employer had acted in an unjustified manner.⁴

[41] In *Wyatt*, a solicitor claimed he had been underpaid during the course of his employment, and that his annual salary reviews had been carried out unfairly. He was barred from bringing a grievance in relation to his salary reviews, as he was out of time. Mr Wyatt was advised what his salary would be for that year. Over two years later he alleged the level at which his salary was set was unfair because other colleagues in comparable positions were given higher salaries. The evidence showed by a certain date Mr Wyatt had a basic understanding of how salaries were set but he did not raise a grievance within 90-days of that date and his grievance was found to be out of time.

[42] Mr Wyatt argued he did not have sufficient knowledge to raise a grievance, because he had not been told explicitly what the salaries of his colleagues were. On that basis he submitted the 90-day timeframe had yet to commence. The Court did not agree. It said:

I do not accept this submission. It places the threshold at too high a level. As I have concluded earlier, the 90-day period will begin when the employee has sufficient information to form a belief on reasonable grounds that the employer has acted in an unjustified manner.

[43] In accordance with *Wyatt*, the date by which Dr Grott-Zanicotti had sufficient information to form such a belief was 18 December 2019. This is because on 26 November 2019, after Dr Grott-Zanicotti was advised of her salary she queried the salary step shortly afterwards with reference to the factors she believed ought to be

⁴ *Wyatt v Simpson Grierson* [2007] ERNZ 489.

taken into account. CCDHB then confirmed its decision regarding her salary step in its email to her dated 18 December 2019 saying it was not able to take those factors into account.

[44] It is accepted Dr Grott-Zanicotti asked to negotiate her pay rate but says even if that was sufficient to raise a grievance, 18 December 2019 is the date on which the 90-day period must have commenced. Therefore, Te Whatu Ora submits no grievance was raised within time.

Was a grievance raised?

[45] With reference to the applicable principles,⁵ having reviewed the communications between Dr Grott-Zanicotti and CCDHB, they do not appear to raise a personal grievance. Dr Grott-Zanicotti asked to “negotiate” in relation to the salary step she had been placed on. On two occasions CCDHB responded advising her that her placement on the salary step had been considered and confirmed the view that placement on that particular salary step was correct.

[46] In order to have raised a personal grievance, the complaint must be one that is a personal grievance within the meaning of s 103 of the Act:

103 Personal grievance

- (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee’s employer or former employer because of a claim:
 - (a) that the employee has been unjustifiably dismissed; or
 - (b) that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer;
- ...
- (3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application or operation, or disputed interpretation application or operation, of any provision of any employment agreement.

⁵ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

[47] Section 103(3) would prevent an unjustified disadvantage grievance from proceeding if the unjustifiable action by the employer derives solely from a dispute about the interpretation, application or operation of any provision of any employment agreement.

[48] There is little case law on this section, but it was discussed by Chief Judge Inglis in *Waikato District Health Board*:⁶

The scope of s 103(3) has not received much judicial attention. The purpose of s 103(3) is evidently to exclude from the definition of personal grievance, and accordingly the grievance procedures, actions which derive solely from the interpretation, application, or operation, or disputed interpretation, application, or operation of any provision of any employment agreement. But it is equally evident that claims of unjustified dismissal are not affected by s 103(3), given that it is expressed to relate to the sort of unjustified actions referred to in s 103(1)(b) (disadvantages), not s 103(1)(a) (dismissals). Section 103(3) is further limited in terms of scope by the use of the word “solely”. Accordingly, where an unjustifiable disadvantage does not derive *solely* from the interpretation and application of relevant provisions of the employment agreement, s 103(3) does not operate to close the door to pursuit of parallel claims, by way of a dispute and a personal grievance.

[49] What Dr Grott-Zanicotti raised is a single issue about placement on the salary scale with reference to what the MECA says can be considered prior to making decisions about the commencement step on the registrar’s pay scale. The MECA also sets out a discretion given to the CEO of the DHB to decide what experience is directly relevant such that it can be credited for the purpose of determining the salary step when registrars commence employment. The exercise of this discretion appears to be at the heart of this matter and the issues raised by Dr Grott-Zanicotti.

[50] The use of the word “negotiate” and the content of the emails from Dr Grott-Zanicotti are only about how the relevant provisions of the MECA were applied with respect to commencement steps on the salary scale. For this reason, I am satisfied this is a dispute solely about the application of the provisions of an employment agreement and therefore section 103(3) of the Act prevents such a claim from proceeding as a disadvantage personal grievance claim against an employer.

⁶ *Waikato District Health Board* [2017] NZEmpC 132 at 31.

[51] That means Dr Grott-Zanicotti's claim cannot proceed as a personal grievance. It is, however, also pleaded as a breach of contract which can proceed because such claims are not barred by s103(3) of the Act and the time limit for raising a breach of contract claim under the Act is six years.⁷

In the event a grievance was raised, was it raised in time?

[52] For completeness I will consider whether the pay issue as a potential grievance was raised within the 90-day time frame which includes a finding as to whether or not the time frame had commenced.

[53] As I understand the paramount submission, the grievance continued to run because the employer did nothing to address what was raised. The evidence clearly shows CCDHB answered the request to negotiate Dr Grott-Zanicotti's salary by email. There are no further communications for me to consider other than what was recorded in those emails.

[54] The evidence does not support the submission there was continuous conduct such that the 90-day time period had not commenced. The content of these emails includes confirming the employer's position as to what was taken into account and setting out its view that the correct salary step had been selected. While on 12 March 2020 the email response says it has not had a final direction, shortly afterwards in June 2020 Dr Grott-Zanicotti's employment ended with CCDHB when she transferred for the purposes of her clinical training to employment with the Hutt Valley DHB. Any alleged continuous conduct must have ended at that point.

[55] The question then becomes at what point in time could Dr Grott-Zanicotti have reasonably formed a belief her employer had acted in an unjustified manner. I note at this point it was submitted on behalf of Dr Grott-Zanicotti, the case of *Wyatt* relied on by Te Whatu Ora was distinguishable. If the Authority were to apply *Wyatt* to the circumstances of this matter, it was submitted the 90-day period had not commenced because the employee had not become aware of the circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

⁷ Employment Relations Act 2000, s 142.

[56] While it can be difficult to establish when a grievance has crystallised, the point at which it can be said Dr Grott-Zanicotti had enough information to form a reasonable belief that her employer had acted in an unjustified manner must be when it came to her notice that CCDHB would not take into account her previous experience. That date was 18 December 2019 and is well prior to 90 days before the grievances were first raised in the 12 July 2021 letter.

[57] Similarly for completeness the submission Dr Grott-Zanicotti is yet to receive relevant information about placement on the salary step meaning the 90-day period has not yet commenced also fails. The communications between the parties do not show any request for information. The request was to negotiate her placement on the salary step and CCDHB responded to that request.

[58] While it is clear from the Employment Court judgments that the acts or omissions alleged to constitute unjustified disadvantage are only able to be determined if they occurred within the period of 90 days preceding the raising of grievances,⁸ in some circumstances the Authority may also consider evidence that is not confined to the 90-day period to provide context to a personal grievance rather than as an “independent personal grievance.”⁹

[59] The evidence must be of a nature so as to constitute a continuous course of conduct. It may then inform whether there has been an unjustified disadvantage within the relevant 90-day period.

[60] However, I do not understand the submissions on behalf of Dr Grott-Zanicotti to have relied on a continuing course of conduct by the employer to provide context to a personal grievance raised later but rather the continuing course of conduct was relied on to form the basis for an “independent personal grievance”.

Conclusion

[61] In the overall circumstances of this matter there is an issue regarding the statutory time frame for raising grievances and Dr Grott-Zanicotti’s personal

⁸ *Premier Events Limited v Beattie* (No 3) [2021] NZEmpC 79 at [14] to [20] and *Davis v Commissioner of Police* [2013] NZEmpC 2265 at [46] to [52].

⁹ Above n 2, in *Premier* at [15].

grievance claims about placement on the salary step cannot proceed at this point for two reasons. Firstly, what was raised initially is more correctly a dispute about application by the employer of the MECA rather than a personal grievance. Section 103(3) of the Act means a dispute of that nature cannot proceed as a personal grievance claim, and secondly, even if a personal grievance was raised, it was raised outside the statutory time frame of 90-days.

Next steps

[62] A case management conference will be convened to discuss next steps.

Costs

[63] Costs are reserved until resolution of the substantive matter.

Sarah Kennedy-Martin
Member of the Employment Relations Authority