

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 578
3203559

BETWEEN PENNY JACKSON & OTHERS
Applicant

AND FLETCHER DISTRIBUTION
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Victor Corbett, counsel for the Applicant
Rebecca Rendle and Matthew Austin, counsel for the
Respondent

Investigation: On the papers

Submissions and other
information received: 12 June and 29 August 2023 from the Applicants
11 and 29 August 2023 from the Respondent

Date of Determination: 4 October 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The nine Applicants in this matter are Penny Jackson, Muslim Badami, Aaron Burns, Romel De Guzman, Louis Godinet, Lucy Smith, Travis Wernimont, Linda Burroughs and Nicholas Rumore (“the Applicants”).

[2] These nine Applicants were employed by Fletcher Distribution Limited (“FDL”) until they were dismissed in early 2022 for being unable to comply with the Covid-19 Procedure that required all employees in the Fletcher Building group of companies (referred to as “the Group”), of which FDL is one, to be fully vaccinated against Covid-19 by 15 February 2022.

[3] The Applicants claimed FDL unjustifiably dismissed them and breached its good faith obligations. Five of the nine Applicants (Ms Jackson, Mr De Guzman, Mr Wernimont, Mr Godinet and Ms Smith, together referred to as “the five Applicants”) also claimed they had been discriminated against in their employment.

[4] FDL disputed that the Authority had jurisdiction to investigate the discrimination grievances. It said none of the five Applicants raised discrimination personal grievances within the 90-day statutory time limit required by s 114(1) of the Employment Relations Act 2000 (“the Act”). FDL did not consent to any personal grievances being raised out of time.

[5] The five Applicants claimed they had raised their discrimination personal grievances within time.

Amended Statement of Problem

[6] The Statement of Problem (“SoP”) was lodged with the Authority by Frontline Law on 7 December 2022. An Amended SoP (“the ASoP”) was also lodged that same day. The ASoP attached documents that had not been attached to the SoP.

[7] The SoP and ASoP FDL were served on FDL by the Authority on 12 December 2022. FDL said that service of SoP and ASoP was the first time any specific claim for discrimination had been advanced. It was also first time the Leave Policy FDL had implemented in October 2021 was said to have been discriminatory.

[8] Although the ASoP referred to a claim for discrimination on “*religious grounds*”, it did not identify which Applicants were claiming they had been subjected to disability discrimination by FDL.

[9] The ASoP set out the following three separate claims of discrimination:

- (a) Mr De Guzman, Mr Godinet, Ms Jackson and Mr Wernimont claimed they had been discriminated against on “*religious grounds*”, because one of the main reasons they were unvaccinated was due to their religious beliefs, and FDL had failed to consult with them about that;
- (b) Some unnamed Applicants had been discriminated against on the grounds of disability because FDL dismissed them for having “*organisms capable of causing illness in their bodies*”, because they were unvaccinated; and

- (c) FDL discriminated on the grounds of disability against some unnamed Applicants, who “*had an abnormality or loss of physiological or anatomical structure or function (being the lack, or suspected lack, of vaccine in their system)*”, by implementing a Leave Policy in October 2021 that provided vaccinated staff with further sick leave options.

The Authority’s investigation

On the papers investigation

[10] During the Case Management Conference (“CMC”) held on 26 April 2023 it was agreed the disputed jurisdiction issues would be determined ‘on the papers’, prior to an investigation of the Applicants’ substantive claims.

[11] The Authority discussed with the parties the nature of the evidence it required on the jurisdiction issues. An agreed timetable was set for the lodging of evidence and submissions. FDL lodged submissions on the disputed jurisdiction issues, but the Applicants did not.

Directions regarding relevant evidence

[12] The four Applicants (Ms Jackson, Mr de Guzman, Mr Wernimont and Mr Godinet) who claimed they had raised discrimination personal grievances on the grounds of religious belief (referred to as “*the religious discrimination grievance*”), were asked to set out in each of their affidavits:

- (a) The date the discrimination grievance arose or came to their attention, whichever was the latest;
- (b) The date the Applicant raised their religious discrimination grievance with FDL;
- (c) Identification of who had raised their religious discrimination grievance with FDL;
- (d) To whom their religious discrimination grievance was raised; and
- (e) How they raised it (copy of document raising it required, if it was raised in writing). If raised verbally, then details of exactly what was said and done to raise the religious discrimination grievance were to be provided.

[13] Ms Smith appeared to be wanting to pursue a disability related discrimination grievance, but when her counsel was asked during the CMC for clarity about the nature of her

claims or particulars of the disability and discrimination she relied on, he was unable to provide that information.

[14] Ms Smith was therefore directed to provide the particulars of the specific discrimination grievance she had raised with FDL, so that the legal and factual basis of her discrimination grievance could be properly assessed.

[15] The Authority noted during the CMC, and recorded in the DoA, the following observations that arose from the ASoP:

- (a) The ASoP did not refer to Ms Smith having an alleged discrimination grievance;
- (b) Paragraph 5.2 of the ASoP, which identified the claims the Applicants wanted to pursue against FDL, only referred to religious discrimination and an allegedly discriminatory Leave Policy. It did not refer to disability discrimination, and it did not name Ms Smith;
- (c) Paragraphs 27 to 30 under the heading “*Unlawful discrimination*” in the ASoP did not name Ms Smith and the disability discrimination claims made in this section were unclear;
- (d) Ms Smith was not named in paragraph 29 of the ASoP, which dealt with alleged disability discrimination of unnamed Applicants which had occurred due to “*their right to refuse medical treatment*”. These unidentified Applicants alleged that by remaining unvaccinated they were “*considered to have organisms capable of causing illness in their bodies by [FDL]*”, which they said amounted to disability discrimination;
- (e) Ms Smith was not named in paragraph 30 of the ASoP, which alleged that a Leave Policy discriminated on the grounds of disability against unnamed Applicants “*who had an abnormality or loss of physiological or anatomical structure of function (being the lack or, or suspected lack, of vaccine in their system)*”;
- (f) Paragraph 59.9 of the ASoP, which dealt with documents relevant to Ms Smith’s claim, did not refer to any medical, discrimination or disability related documentation. That contrasted with Ms Jackson and Mr de Guzman, who both

recorded their “*religious grounds letter*”, as being attached to the SoP as a “*relevant document*”.

[16] The letter dated 18 March 2022 that Frontline Law sent Placemakers Limited (referred to as “the PG Letter”), which the five Applicants said had raised their personal grievance claims, did not name Ms Smith as someone who had been subjected to disability discrimination.

[17] The PG Letter attached numbered Schedules for each named employee. Schedule 12 set out Ms Smith’s personal circumstances. However, it did not refer to “*disability*”, “*discrimination*”, “*disadvantage*”, “*disadvantage grievance*”, “*disability discrimination*” or “*discrimination grievance*”.

[18] During the CMC the Authority said that if Ms Smith was claiming (based on the Applicants’ memorandum dated 31 March 2023) that her previous infection with Covid-19 in March 2020 and/or post viral symptoms was a “*disability*” or had created a disability that amounted to a prohibited ground of discrimination under the Human Rights Act 1993 (“the HRA”), then she had to provide the specific details and medical evidence that supported her disability claim.

[19] Alternatively, if Ms Smith’s case was that she had raised a disability discrimination grievance, because she was one of the unnamed Applicants referred to in paragraphs 29 or 30 of the ASoP, then she had to:

- (a) Identify the “*disability*” she said she had with reference to the particular “*presence of organisms capable of causing illness*” that had been referred to in paragraph 29 of the ASoP by explaining what “*organisms*” she was relying on; and/or
- (b) Identify the “*loss or abnormality of psychological, physiological or anatomical structure or function*” referred to in paragraph 30 of the ASoP she had, if she said that meant the Leave Policy had caused her to be discriminated against because of her disability.

[20] During the CMC, and in the DoA that was issued after it, Ms Smith was asked to provide medical evidence that established she had the disability/disabilities she was relying on in her disability discrimination grievance claim.

[21] Ms Smith was also asked to explain when (with reference to the date) and how (verbally or in writing) and to whom (name and position) she had informed FDL she had a “*disability*” that fell within the prohibited grounds of discrimination in s 105 of the Act and s 21(1) of the HRA. In particular, Ms Smith was asked to:

- (a) Set out in detail the information she had given FDL about the nature of her “*disability*”;
- (b) Explain/identify what specific information (including medical information) she had disclosed about her disability when:
 - (i) She notified first FDL of her disability; and
 - (ii) She raised her disability discrimination grievance with FDL;
- (c) Identify:
 - (i) The date her disability discrimination grievance claim arose or came to her attention, whichever was the later;
 - (ii) Who she raised her discrimination grievance with; and
 - (iii) What she said and did to raise her discrimination grievance.

Applicants’ position

[22] All five Applicants lodged individual affidavits.

[23] The five Applicants claimed they had raised their discrimination grievances with FDL in the PG Letter dated 18 March 2022. None of the five Applicants claimed to have raised discrimination grievances outside of that.

FDL’s position

[24] FDL disputed that any of the five Applicants had raised any form of discrimination grievance within the 90-day time limit required by s 114(1) of the Act.

[25] FDL lodged an affidavit from Ms Helen Ottaway, who is employed as the General Manager – People and Performance for PlaceMakers, which is a trading name for FDL.

[26] Ms Ottaway said the PG Letter was received by FDL on 26 April 2022, and that she prepared FDL’s response which was dated 8 June 2022.

[27] FDL's evidence about the PG Letter not being received until 26 April 2022 was not disputed by the five Applicants, so it has been accepted by the Authority. Although there was no explanation from the Applicants for the 39 days delay, because the PG Letter was stated to be "*delivered by post*", the Authority assumed it had been posted much later than it had been dated.

[28] Ms Ottaway said FDL's response to the PG Letter did not make any reference to discrimination grievances, because no discrimination grievances had been raised by any employees (including the five Applicants) in the PG Letter, or prior to that.

The Issues

[29] The following issues are to be determined:

- (a) Did any of the Applicants raise a religious discrimination grievance within the 90-day time limit required by s 114(1) of the Act?
- (b) Does Ms Smith have a disability, as defined in the HRA and Act?
- (c) Did Ms Smith inform FDL she had a disability before she was dismissed?
- (d) Did Ms Smith raise a disability discrimination grievance within the 90-day time limit required by s114(1) of the Act?
- (e) Did any of the five Applicants raise a disability discrimination grievance regarding the Leave Policy within the 90-day time limit required by s 114(1) of the Act?
- (f) Does the Authority have jurisdiction to investigate any of the discrimination grievances the five Applicants wish to pursue?
- (g) What costs should be awarded?

Material Background

Background

[30] The Covid-19 Procedure ("*the Procedure*") was introduced by Fletcher Building Limited ("FBL") on 20 December 2021. This required all employees across the Fletcher Building Group of companies to be fully vaccinated against Covid-19 by 15 February 2022.

[31] FDL implemented the Procedure in its business. Following an individual consultation process with each of the Applicants, their employment was ended because they were not vaccinated against Covid-19, and did not intend to become vaccinated, which meant they could not meet the requirements of the Procedure.

The PG Letter

[32] The PG Letter dated 18 March 2022 was sent by post by Mr Corbett of Frontline Law to PlaceMakers Limited (“PML”). It stated that Frontline Law represented a group of 14 PML employees, which the letter described as “*members*”, who were identified in the schedules enclosed with the letter.

[33] The schedules did not mention discrimination, with the exception of Schedule 6 in which Mr de Guzman described the “*harm caused/effects of dismissal*” on him as “*anxiety, stress, feeling discriminated against*”.

[34] The PG Letter claimed that all members in the schedule had been unjustifiably dismissed because of “*the Vaccination Policy*” (meaning the Procedure). It then set out some particulars, which for the purposes of this claim included an allegation that PML had “*discriminated (directly or indirectly) against some members based on their disability and religious belief*”.

Personal grievances referred to in the PG Letter

[35] The PG Letter stated:

Although this personal grievance sets out the main reasons as to why each member was unjustifiably dismissed, the situation may vary imperceptibly from member to member. Those details can be found in the attached member schedules to this grievance which identify the members of the group – and if further and better particulars are required, PML may request this.

[36] The PG Letter had a section headed “*Discrimination*”, which stated:

PML, in accepting and enforcing the policy crafted by FBL, directly or indirectly discriminated against some members of the group because of disability and/or religion. This information is contained in the member schedules attached to this grievance.

References to discrimination in the ASoP

[37] The ASoP included (among other things) reference to:

Second ground: Unlawful discrimination. Some of the Applicants raised religious grounds in their decision not to be vaccinated. The respondent failed to consider these grounds. It also introduced a leave policy which was discriminatory.

[38] The ASoP in a section headed “*Unlawful discrimination*” said:

The first respondent was advised by applicants Penny Jackson, Romel de Guzman, Louis Godinet and Travis Wernimont that one of the main reasons they were refusing the vaccine was on religious grounds.

The first respondent failed to consult with those applicants on that, which resulted in discrimination pursuant to s 105(1)(c) of the Act, and this is factual subject to s 119.

The applicants who relied on their right, (subject to s 11 of the Bill of Rights Act 1990) to refuse medical treatment, and therefore remain unvaccinated, were considered to have organisms capable to causing illness in their bodies by the first respondent. That thought was so strong in its nature, the first respondent terminated the Applicants employment. This amounts to discrimination pursuant to s 105(1)(h) of the Act, and this is factual subject to s 119.

The first respondent implemented a leave policy designed by the second respondent which discriminated against the applicants who had abnormality or loss of a physiological or anatomical structure or function (being the lack, or suspected lack, of vaccine in their system). Those who had the vaccine in their system were afforded more flexibility in their sick leave options. This amounts to discrimination pursuant to s 105(1)(h) of the Act, and this is factual subject to s 119.¹

References made to Ms Smith in the ASoP

[39] The ASoP did not claim Ms Smith had raised a discrimination grievance with FDL.

[40] The ASoP made included very limited references to Ms Smith. It recorded her name and contact details as an Applicant, it said she had been unjustifiably dismissed on 15 February 2022, and it said it had attached as “*relevant documents*” a meeting invitation dated 3 February 2022, a preliminary outcome letter dated 10 February 2022 and a dismissal letter dated 15 February 2022.

Memorandum dated 31 March 2023

[41] On 31 March 2023 the Applicants’ counsel sent a memorandum to the Authority that set out the details of the Applicants’ claims in schedules attached to it (“the memorandum”).

¹ The reference to “*second respondent*” is to FBL which is not, and has not been, a Respondent, as the Applicants’ application to join it as a controlling third party was unsuccessful. See *Jackson & Ors v Fletcher Distribution Ltd* [2023] NZERA 507.

Mr Corbett stated the purpose of the memorandum was to “*provide information about the jurisdiction issues with reference to specific applications and each of their personal grievance claims.*”

[42] The memorandum was sent in response to a request from the Authority for clarification about the specific claims each Applicant wanted investigated.

[43] The memorandum did not specifically record that Ms Smith had a disability discrimination grievance, although it did refer to “*medical*” discrimination, which is not a prohibited ground of discrimination under the HRA or Act.

[44] The schedule in the memorandum that related to Ms Smith did not record a disability discrimination grievance. It referred to one personal grievance having been raised, which was presumably her unjustified dismissal grievance. Ms Smith’s personal schedule listed the documents that had been attached to the ASoP for her and noted her employment had ended on 15 March 2022.

[45] The references to “*disability discrimination*” in the memorandum did not make the particulars of the disability discrimination grievance claim(s) clearer. It stated:

As it relates to the applicants claim of disability – religious claims need not be evidenced, if the person holding the belief genuinely holds those beliefs. In part [38] of the statement of problem, it states that the first respondent failed to allow applicants to get ‘informed consent from their GP’. This means that the respondent never left an avenue open for the applicants (sic) go to their doctors so that an informed opinion could be given by their healthcare professionals.

The following persons have raised disability claims, and these are discussed below, with relevant evidence being attached, if any.

[46] The memorandum ended by stating Ms Jackson, Mr de Guzman, Ms Smith, Mr Wernimont and Mr Godinet were “*the only persons raising discrimination in this claim under either medical or religious grounds.*”

[47] However, the affidavits of Ms Jackson, Mr de Guzman, Mr Wernimont and Mr Godinet lodged did not refer to them having raised disability discrimination grievances, as their affidavits addressed the raising of religious discrimination grievances only.

[48] The information in the memorandum regarding Ms Smith stated:

In an email (subsequently hand delivered letter) to Daryn Banks dated 22/12/21 Lucy stated the following: ‘The control measure suggested by Fletcher Building (the COVID-19 vaccine) has inherent associated risks up to and including permanent injury and death. These risks will need to be carefully considered against my personal health profile which includes a serious adverse event following a childhood vaccination.’ In a response email dated 3 February 2022, Daryn said “You indicated you had concerns about the vaccine, that it may not be medically safe for you to get the vaccine due to a medical condition. [...]”

[49] Again, there was no reference to Ms Smith having a disability or having raised a disability discrimination grievance with FDL.

Relevant law

Relevant legislation

[50] Section 114 of the Act states:

- (1) Every employee who wishes to raise a personal grievance must, subject to sub-sections (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.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employer 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

[...]

Relevant caselaw

[51] The Employment Court has issued a number of decisions regarding how s 114 of the Act should be applied. The leading authority is the Employment Court decision in *Creedy v Commissioner of Police* in which the Employment Court held:²

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying a statutory type of the personal grievance

[...]

² [2006] ERNZ 517 at [36]-[37].

That is not to find, however that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[...]

An employer must be given sufficient information to address the grievance, that it is to respond to on its merits with a view to resolving it soon and informally, at least in the first instance.

[52] In *Disabilities Resource Centre Trust v Maxwell* the Court referred to *Creedy* and stated that:³

Specifying a statutory type of the grievance as, for example, unjustified disadvantage in employment, may not be sufficient, where an employer may have no idea what actions it has taken that are being complained of.

[53] The Court compared this type of personal grievance with a personal grievance for unjustified dismissal where it is easier to identify the nature of the actions that are being complained of, being the dismissal of the employee by the employer.

[54] In *Manukau Institute of Technology v Zivaljevic* the Court stated “[t]he grievance process is designed to be informal and assessable, noting that no particular order or form of words needs to be used in order to raise a personal grievance.”⁴ However, the Court went on to add (at [37]):

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance.

[...]

The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[55] The Employment Court in *Hawkins v Commissioner of Police* held that the test in s 114(2) of the Act as to how a grievance must be raised is “[o]bjective and requires a communication sufficient to enable the employer to address and remedy the grievance or for the parties to settle it in discussion.”⁵

³ [2021] NZEmpC 14 at [18].

⁴ [2019] NZEmpC 132 at [36].

⁵ [2007] ERNZ 762 at [14].

[56] In *Idea Services Limited (in Stat Man) v Barker* the Court held that “[s]imply setting out a number of sections of the Act which the defendant asserted had been breached does not amount to adequate particularisation of a grievance.”⁶

[57] In *Lane v Gateway Housing Trust* the Authority held that the following letter from the employee was insufficient to have raised a grievance:⁷

Our client has instructed us to formally advise you of an additional personal grievance, that is in breach of s 103(1)(c) Employment Relations Act 2000, unlawful discrimination based on disability and/or medical grounds.

[58] The Authority in *Lane* concluded that the information conveyed to the employer was insufficient, because it did not make it clear what the nature of the employee’s grievance was.

Did any of the Applicants raise a religious discrimination grievance within the 90-day time limit required by s 114(1) of the Act?

Mr Godinet

[59] Mr Godinet was a driver for Placemakers in Kerikeri. His employment ended on 14 March 2022, so 90 days from then was 11 June 2022.

[60] Mr Godinet in his affidavit said he felt discriminated against when FBL imposed the vaccine mandate, which occurred on 20 December 2021. He also said “[i]t became apparent at my 2nd meeting [...] that I was being discriminated against.” The date of this meeting was not provided, but it had to have occurred before he was given notice on 11 February 2022.

[61] In an email dated 20 December 2021 that Mr Godinet sent FDL, he stated:

As a Maori and a Christian I am disappointed that a company that prides itself on not discriminating will choose to discriminate against those of us who do not wish to have a vaccine that uses aborted baby cells in any part of its making.
[...]

[62] Mr Godinet’s personal situation was recorded in Schedule 11 to the PG Letter that was received by FDL on 26 April 2023. Mr Godinet was not named in the PG Letter and his personal schedule did not refer to discrimination on religious grounds, or discrimination at all.

⁶ [2012] ERNZ 454 at [46].

⁷ [2013] NZERA Christchurch 130 at [17].

[63] In terms of Schedule 11, beside the questions:

(a) **“Termination process and dismissal date”** Mr Godinet stated:

Was asked about vaccination status in early December, advised PlaceMakers of religious grounds for not taking vaccine. Was later advised that the policy only sought grounds for medical exemption, not religious.

(b) **“Reason for declining vaccine”** was written *“Medical choice, religious grounds”*.

[64] The totality of these communications was inadequate for Mr Godinet to have raised a religious discrimination grievance with FDL, within the statutory 90-day time limit in s 114(1) of the Act.

Mr De Guzman

[65] Mr De Guzman was employed as the Department Head – Plumbing Waiheke, Placemakers. His employment ended on 30 March 2022, so 90 days after that was 27 June 2022.

[66] Mr De Guzman in his affidavit said the PG Letter and Schedule 6 raised his religious discrimination grievance. He was not named in the PG Letter.

[67] Schedule 6 did not refer to a religious discrimination grievance, although it recorded beside the questions:

(a) **“Reason for declining vaccine”**, *“It is against my Christian belief. The vaccine contains cell-lines from an aborted foetus”*; and

(b) **“Harm caused/effects of dismissal”**, *“Anxiety, stress, feeling discriminated against.”*

[68] The totality of Mr De Guzman’s communications with FDL did not put it on notice within the 90-day time limit required by s 114(1) of the Act that he had raised a religious discrimination grievance.

[69] Mr De Guzman had merely communicated his Christian belief was the reason he had declined to be vaccinated. That limited explanatory information fell short of raising a religious discrimination grievance claim with FDL.

Ms Jackson

[70] Ms Jackson was a Branch Administrator at PlaceMakers in Waiheke. Ms Jackson's employment ended on 31 March 2022, so 90 days from then was 28 June 2022.

[71] Ms Jackson in her affidavit said:

I realised I had been discriminated against when my employer terminated me after I had given explicit religious grounds for not being vaccinated, and they failed to consider those.

[72] Ms Jackson was given notice of termination on 3 March 2023 so, according to her affidavit, her knowledge that she had been discriminated arose around that date.

[73] Ms Jackson said she raised her religious discrimination grievance in the PG Letter and Schedule 7, which set out her personal situation. The PG Letter did not name Ms Jackson.

[74] In terms of the information in Schedule 7, beside the headings:

- (a) **“Termination process and dismissal date”** Ms Jackson recorded *“On 1 March 2022, Penny made it clear to PlaceMakers that she was not going to be vaccinated. One of those reasons was because it was against her Christian beliefs.”*
- (b) **“Reason for declining vaccine”** she stated *“Medical choice, religious grounds”*.

[75] Ms Jackson's personal schedule did not refer to religious discrimination, or any other discrimination. The identification of *“medical choice, religious grounds”* as her reason for not wanting to be vaccinated was put forward as an explanation for her decision. That information fell short of what is required in order to raise a religious discrimination grievance.

[76] Accordingly, the totality of Ms Jackson's communications with FDL did not put it on notice that she had raised a religious discrimination grievance within the 90-day statutory time limit in s 114(1) of the Act.

Mr Wernimont

[77] Mr Wernimont was a Pole Shed Specialist at Placemakers Motueka, Nelson. His employment ended on 21 March 2022, so 90 days from then was 18 June 2022.

[78] Mr Wernimont in his affidavit said the PG Letter and Schedule 8, which dealt with his personal situation, had raised his religious discrimination grievance. He was not named in the PG Letter.

[79] Schedule 8 did not refer to religious discrimination, or any form of discrimination. Beside the question “**Reason for declining vaccine**” in Schedule 8 Mr Wernimont recorded “*Medical choice, religious grounds*”.

[80] The totality of Mr Wernimont’s communications with FDL were insufficient to amount to the raising of a religious discrimination grievance, or for that matter any other discrimination grievance, within the statutory 90-day time limit in s 114(1) of the Act.

Does Ms Smith have a disability, as defined in the Act or HRA?

Statutory definition of disability

[81] Section 105 of the Act sets out the prohibited grounds of discrimination for the purposes of a discrimination grievance under s 104 of the Act. This includes the reference to “disability” in s 105(1)(h) of the Act. “*Medical*” discrimination, as referred to in the Applicants’ 31 March 2023 memorandum, is not one of the prohibited grounds of discrimination listed in s 105 of the Act.

[82] Section 105(2) of the Act says that the prohibited grounds of discrimination have the meanings given to them in s 21(1) of the HRA.

[83] Section 21(1)(h)(ii) of the HRA says that “*disability*” means “*physical illness*” and s 21(1)(h) (v) of the HRA says “*disability*” includes “*any other loss or abnormality of psychological, physiological, or anatomical structure or function*”.

Ms Smith's evidence regarding her disability

[84] Ms Smith in her affidavit said:

I have adverse reactions to some proteins and adjuvants that are commonly found in most vaccines. This is a physical illness or other loss of abnormality of physiological or anatomical structure or function, falling under s 21(1)(h)(i) or (v) of the HRA, in that it is not normal to have an adverse reaction to vaccinations.

[85] While Ms Smith reported that at the age of six months old she had experienced a serious adverse reaction to a vaccination, and her mother was advised by the consulting doctor to avoid vaccinations in future, it was unclear if that event had resulted in her now having a disability under the Act and HRA.

[86] Ms Smith did not refer to the alleged disability that was referred to in the Applicants' 31 March 2023 memorandum, namely the failure "*to allow the Applicants to get informed consent from their GP.*"

[87] Ms Smith's affidavit also did not link her disability to a previous Covid-19 infection in March 2020 or to ongoing post viral symptoms following that, which were reasons recorded in the 31 March 2023 memorandum and attached schedules for her not being vaccinated.

[88] Other than a letter from Dr Reeves, no medical records or medical information about the disability was provided. Although Ms Smith said her mother would be providing an affidavit in support of her evidence, that did not occur.

No medical evidence of the disability

[89] Ms Smith in her affidavit acknowledged that although she had been asked to provide medical evidence about her disability she did not have it. She said:

I have never been tested for these things per se as no reliable, conclusive tests are available to ascertain this condition.

[90] There was no evidence produced to the Authority that Ms Smith had applied for a medical exemption to being vaccinated, which was the logical step for her to have taken, if she had a disability that meant she could not be vaccinated.

[91] The only medical information Ms Smith produced to the Authority was a letter from Dr Maria Reeves. Dr Reeves said it would be "*medically inappropriate and medically unsafe*

for Lucy Smith to be vaccinated with the Pfizer Novavax and Astra Zeneca Covid-19 vaccine". No explanation was provided for that conclusion, nor was the evidence it was based on identified or explained.

[92] Dr Reeves' letter:

- (a) Was obtained by Ms Smith on 30 March 2022, following the termination of her employment on 15 March 2022;
- (b) Was not provided to FDL until 31 March 2023, more than a year after Ms Smith's employment had ended;
- (c) Made no reference to Ms Smith having a disability;
- (d) Did not refer to the childhood vaccination 'adverse reaction' incident; and
- (e) Did not identify the medical condition and/or disability that made vaccination "*medically unsafe*" for Ms Smith.

No reference to Ms Smith's disability in the PG Letter

[93] The PG Letter dated 18 March 2022 did not say that Ms Smith had a disability. Schedule 12, which dealt with her personal situation, did not use the word "*disability*", "*discrimination*" or "*disability discrimination grievance*".

Finding on disability issue

[94] Based on the currently available evidence, it was not clear that Ms Smith has a disability, as defined by the Act and HRA. If she did have a disability, then the nature of her particular disability was unclear.

Did Ms Smith inform FDL she had a disability before she was dismissed?

[95] Ms Smith informed FDL that she did not want to get vaccinated because she was concerned the vaccine was not medically safe for her, due to an adverse reaction she had at age six months to a childhood vaccination.

[96] Ms Smith in her affidavit stated "*My employer, through my assertions, had knowledge of and at least suspected that I had a disability, yet took no action.*" However, Ms Smith did not explain what "*assertions*" she had made to FDL about her medical condition, apart from

recording that she had noted “*her reluctance to take the vaccine due to childhood vaccine adverse reason*” to FDL’s General Manager.

[97] In a letter dated 3 February 2022, FDL acknowledged to Ms Smith that she had disclosed concerns about the vaccine not being medically safe for her, on account of “*a medical condition*”.

[98] However, there was no evidence produced to the Authority of Ms Smith giving FDL any information about her “*medical condition*”, other than advising FDL that she had suffered a serious adverse reaction to a vaccination she had when she was six months old.

[99] Ms Ottaway said FDL was not aware before Ms Smith’s employment ended of her making any reference to having a physical illness that amounted to a disability or of having provided any information to FDL in support of her claim that her adverse reaction to some proteins and adjuvants that are commonly found in most vaccines constituted a “*physical illness or other loss or abnormality of physiological or anatomical structure or function*”, as she now claimed.

[100] That evidence was accepted, because no evidence to the contrary was provided to the Authority.

[101] Given the novel nature of the disability that Ms Smith seems to be claiming, namely that an adverse reaction to a vaccine that she had at approximately six months of age had created “*a physical illness*” or “*other loss or abnormality of physiological anatomical structure or function*” in her to the extent it amounted to a “*disability*”, under the Act and HRA then that needed to have been clearly communicated to FDL, but it was not.

[102] Ms Smith’s reference to the adverse vaccine reaction when she was six months old was in itself insufficient to have put FDL on notice that she considered she had a disability, as defined by s 105 of the Act and s 21(1)(h)(ii) or (v) of the HRA.

[103] To the extent that Ms Smith relied on the PG Letter as having conveyed information about her disability to FDL, that was not received by FDL until 26 April 2022, six weeks after her employment had ended.

[104] The Authority therefore considered it more likely than not that FDL was not aware Ms Smith had a disability, as defined by s 105 of the Act when it gave her notice of termination of her employment.

Did Ms Smith raise a disability discrimination grievance within the 90-day time limit required by s 114(1) of the Act?

[105] Ms Smith worked in the Garden Centre at the Waiheke Island, Placemakers. Her employment ended on 15 March 2022, so 90 days from that was 12 June 2022.

[106] Ms Smith in her affidavit said the PG Letter and Schedule 12 had raised her disability discrimination grievance with FDL.

[107] Ms Smith was not named in the PG Letter, which FDL received on 26 April 2022. Her personal schedule did not refer to disability discrimination or to any other form of discrimination.

[108] Schedule 12 stated that Ms Smith's "**Reason for declining vaccine**" was:

Reaction to childhood vaccine (seizures and loss of consciousness at six months old, parent advised by GP not to give any other vaccines).
Previous infection with Covid-19 (March 2020).
Ongoing post viral symptoms following infection including chest pains and irregular/racing heartbeat.

[109] The first time that Ms Smith appeared to have specifically identified that she had a discrimination grievance was in the memorandum Frontline Law lodged with the Authority on 31 March 2023.

[110] However, that memorandum referred to "*medical*" discrimination and alleged that FDL had not allowed the Applicants "*to get 'informed consent' from their GP*". That is completely different from the alleged disability discrimination grounds Ms Smith set out in her affidavit, which did not mention anything about her inability to get "*informed consent*" from her GP.

[111] The evidence regarding Ms Smith's communications with FDL was insufficient to amount to the raising of a disability discrimination grievance, within the statutory 90-day time limit required by s 114(1) of the Act.

[112] Accordingly, the Authority does not have jurisdiction over any discrimination claims Ms Smith may want to pursue.

Did any of the five Applicants raise a discrimination grievance regarding the Leave Policy within the 90-day time limited in s 114(1) of the Act?

[113] The Leave Policy was implemented in October 2021. The first time discrimination allegations were made about the Leave Policy was when the ASoP was served on FDL on 12 December 2022, almost ten months later.

[114] None of the five Applicants addressed the Leave Policy in their affidavits. None of the five Applicants said they had raised a disability discrimination grievance claim about the Leave Policy with FDL.

[115] None of the five Applicants raised a disability discrimination grievance about the Leave Policy within the 90-day statutory time limit required by s 114(1) of the Act. Accordingly, the Authority does not have jurisdiction to consider that claim.

Does the Authority have jurisdiction to investigate any of the discrimination grievances the Applicants want to pursue?

[116] The evidence did not establish that any of the five Applicants had raised any discrimination grievances within the 90-day time limit required by s 114(1) of the Act and FDL has not consented to the raising of any personal grievance claims out of time.

[117] Accordingly, the Authority does not have jurisdiction to investigate any of the five Applicants' discrimination grievances.

What costs should be awarded?

[118] FDL as the successful party is entitled to a contribution towards its actual legal costs in connection with this preliminary jurisdiction determination.

[119] FDL said it wished to be heard on costs, so it is appropriate for costs to be determined based on an exchange of cost submissions.

[120] FDL has 14 days from the date of this determination within which to lodge costs submissions. The five Applicants then have 14 days from receipt of FDL's costs submissions within which to file their costs submissions.

[121] No submissions will be accepted outside of this timetable, except with the prior leave of the Authority.

[122] Costs are likely to be assessed in accordance with the Authority's usual notional daily tariff-based approach to costs.

[123] Subject to the parties' submissions, the Authority's preliminary view is that this matter should be treated as having involved a half-day investigation meeting. In which case, the notional daily tariff would be \$2,250, being half of the \$4,500 notional daily tariff for the first day of an investigation meeting.

[124] Consideration would then need to be given to whether that notional starting tariff should be adjusted to reflect the particular circumstances of this case, and about how an award of costs should be apportioned between the five Applicants. The parties are involved to specifically address those issues in their costs submissions.

Rachel Larmer
Member of the Employment Relations Authority