IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 594
3236920

	BETWEEN	MARK NEAL Applicant
	AND	NUMBER 8 WORKERS UNION OF NEW ZEALAND Second Applicant
	AND	THE VICE CHANCELLOR OF THE UNIVERSITY OF AUCKLAND First Respondent
	AND	THE TERTIARY EDUCATION COMMISSION Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Liz Lambert, advocate for the Applicant Rachael Judge and Hanna Tevita, counsel for the First Respondent Peter Chemis, counsel for the Second Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence:	
Joinder of Second Applicant:	22 September 2023 from the Second Respondent 25 September 2023 from the First Respondent 2 October 2023 from the Second Applicant
Joinder of Second Respondent:	14 September 2023 from the Second Respondent 11 October 2023
Out of time issue:	14 September 2023 from the Applicant 7 and 20 September 2023 from the First Respondent
Determination:	13 October 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The First Applicant, Mr Mark Neal, claims that he has personal grievances against the First Respondent, the Vice Chancellor of the University of Auckland (VUA), in respect of constructive dismissal and unjustifiable disadvantage in his employment.

[2] Mr Neal also claims that the Second Respondent, the Tertiary Education Commission (TEC) influenced VUA in the decision giving rise to his claim of unjustifiable disadvantage.

[3] VUA denies that Mr Neal was unjustifiably dismissed or unjustifiably disadvantaged in his employment, and claims that Mr Neal was justifiably dismissed from his employment after his employment became frustrated due to a prolonged period of absence from work.

[4] VUA claims that Mr Neal has raised his claim for unjustifiable disadvantage outside of the statutory 90 day time limit for doing so.

[5] VUA also claims that the Second Applicant, Number 8 Workers Union of New Zealand (No 8 Union), has no standing in the matter and should be removed as an applicant.

[6] The TEC claims that there is no jurisdiction for the First and Second Applicants to bring this claim against it, and it should be removed as the Second Respondent.

The Authority's investigation

[7] As permitted by s 174E of the Employment Relations Act 2000 (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.

Issues

[8] The issues requiring determination in this preliminary determination are whether or not:

- No 8 Union is properly joined as an applicant to Mr Neal's claims.
- The TEC is properly joined as a respondent to Mr Neal's claims.
- Mr Neal raised this claim for unjustifiable disadvantage within the statutory 90 day time limit.

Brief Background

[9] Mr Neal was employed by VUA as a Waste Management Specialist for Facilities Management at VUA.

[10] On 2 December 2021 Auckland moved into the 'Red' light setting of the New Zealand government's Covid-19 Protection Framework.

[11] On 9 December 2021 VUA wrote to Mr Neal advising him that, following consultation, it had decided to institute a Vaccination Policy. This meant that Mr Neal, who had been working from home due to the Covid-19 outbreak, would be unable to return to work onsite from 4 December 2021 unless he had either a valid My Vaccine Pass, or had received the first dose of an approved vaccine. That letter advised Mr Neal that: "for the period from now to 14 January 2022, it will mean that you will need to continue to work from home."

[12] During the period from 2 December 2021 and 21 December 2021 Mr Neal communicated with VUA, providing his feedback on the Vaccination Policy proposal which included a temporary arrangement for working from home.

[13] On 1 April 2022 the vaccination mandate was lifted and Mr Neal was advised that he could return to working at the VUA campus rather than continuing to work from home.

[14] Mr Neal did not return to work, and on 24 March 2023 after a prolonged period of absence, Mr Neal's employment with VUA was terminated.

Is No 8 Union properly joined as the Second Applicant?

[15] The Authority's jurisdiction in personal grievances is set out in s 161 of the Act which states:

> **161 Jurisdiction**
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally,

[16] Mr Neal is properly joined because he is an employee who believes he has a personal grievance.[1]

[17] A union may also raise a claim in relation to a dispute about a collective agreement to which it is a party.[2] In *E Tū Inc v Carter Holt Harvey LVL Ltd* the Employment Court confirmed

[1] Employment Relations Act 2000 s 102
[2] Employment Relations Act 2000 s 129 (1) and (2)

that a union may bring a claim against an employer where it is a party to a collective agreement with that employer and there is a 'dispute of rights' in relation to the applicant's application or operation. [3]

[18] The Court, finding that *E Tū* had no standing in the proceedings because the claim was not a dispute of rights claim stated:

> E Tū can, of course, represent its members in discussions with Carter Holt LVL, and an E Tū official or employee, can appear for them before the court. That does not elevate E Tū to having standing in relation to the claim that has been made. [4]

[19] Whilst Mr Neal is a member of No 8 Union, it is not a party to the collective agreement with VUA. Ms Lambert has cited an Authority case *Fry v Chief Executive of the Department of Corrections* as supporting her submission that the Union should be granted standing.[5]

[20] In *Fry* the Authority found that the Corrections Association of New Zealand Incorporated (CANZ) was held to be properly joined as a party to the claim because: "CANZ and Corrections are in an employment relationship and CANZ has raised a problem with that employment relationship for which it seeks resolution". [6]

[21] I find that No 8 Union is not a party to a collective agreement with VUA and therefore has no standing on that basis.

[22] Ms Lambert further submits that No 8 Union does not have standing deriving from its own employment relationship with the University, but should be granted standing because the situation is exceptional and the case will provide "clarification on the role of a union that has taken the personal grievance action and utilised it in a creative way to defend the employment relationship".

[23] The jurisdiction of the Authority is determined by statute and its jurisdiction is determined by s 161 of the Act.

[24] I find no statutory basis for joining No 8 Union to this action in its own right. This does not of course prevent it representing Mr Neal in his action against VUA.

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[3] *E Tū Inc v Carter Holt Harvey LVL Ltd* [2022] NZEmpC 141 at [58]
[4] Above n3
[5] *Fry v Chief Executive of the Department of Corrections* .[2023] NZERA 44
[6] Above n4 at [35]

[25] I determine that No 8 Union should be removed as the Second Applicant to Mr Neal's claim against VUA.

Is TEC properly joined as the Second Respondent?

[26] The TEC is a crown entity established under the Education Act 1989 with functions including administration of the funding of tertiary education and training programmes, monitoring the performance of the tertiary education sector, providing advice to the Minister and providing career services.

[27] TEC interacts with VUA in its capacity as a tertiary education institute in accordance with its statutory functions, but it has no employment relationship with either Mr Neal, or with No 8 Union.

[28] No 8 Union submits that the TEC funds VUA and via its bulletin updates to the tertiary education establishments came to the aid of VUA as Mr Neal's employer in its actions to:

a) Force Mr Neal to accept its terms and conditions of employment; and
b) Comply with the terms of his former employer VUA.

[29] As has been cited in paragraph [15] of this determination, the Authority's jurisdiction provides for it to make determinations about employment relationship problems. In the case of the TEC, I find there is no employment relationship between it and Mr Neal, or between it and No 8 Union.

[30] The TEC may in the bulletins have advised VUA and other tertiary education establishments about the requirements of government policy in regard to operating during the COVID-19 restrictions; however there is no evidence of coercion or of mandatory compulsion to comply in the bulletins.

[31] Moreover there is no evidence that the TEC moved beyond its statutory role to influence individual educational establishments about their daily operations, and/or interactions with individual employees.

[32] I determine that the TEC should be removed as the Second Respondent to Mr Neal's claim against VUA.

Did Mr Neal raise his claim for unjustifiable disadvantage within the statutory day time limit?

[33] Mr Neal claims that he was unjustifiably disadvantaged by the requirement that he work from home after 4 December 2021

Raising a personal grievance

[34] Section 114(1) of the Employment Relations Act 2000 the Act) states:

> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (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;
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> (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. …
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> (6) No action may be commenced in the Authority or court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[35] In order to raise a personal grievance for unjustifiable disadvantage related to the requirement that he work from home, Mr Neal had to do so within the 90 day statutory time limit as set out in s 114(1) of the Act.

[36] Mr Neal wrote two letters relevant to this matter to VUA. In the letter to VUA dated 2 December 2021 Mr Neal asked if his employment would be terminated if he chose not to be vaccinated between 2 and 4 December 2021 and asked for a clear outline of what procedure would be followed if he chose not to be vaccinated by 4 December 2021. I find that letter did not raise a personal grievance for unjustifiable disadvantage in relation to any requirement that he work from home rather than on site at the VUA campus.

[37] On 9 December 2021 VUA wrote to Mr Neal advising him of the requirement to work from home unless he was vaccinated or had at least one dose of a vaccine.

[38] In the letter to VUA dated 21 December 2021 Mr Neal wrote at length advising VUA that he chose not to get vaccinated at that stage, and discussing the duties, responsibilities and liabilities of VUA if he, at its insistence, had the vaccine and suffered an adverse reaction. Mr Neal made it clear that he wished to remain in employment with VUA, but does not raise a personal grievance for unjustifiable disadvantage relating to the requirement that he continue working from home in the letter.

[39] I find that the letters sent to VUA on 2 and 21 December 2021 do not raise a personal grievance for unjustifiable disadvantage in relation to Mr Neal working from home rather than onsite at the VUA campus.

[40] It is submitted on behalf of Mr Neal that there are three applicable notification periods for raising a grievance under s 103 of the Act. It is submitted that the unjustifiable disadvantage related to the alleged 'lock-out' personal grievance, was raised during the course of Mr Neal's employment which brings it under s 114(6) of the Act and the three year time limitation.

[41] It is submitted for VUA that Mr Neal did not raise a personal grievance for unjustifiable disadvantage at any time during his employment and not before claiming it in the Statement of Problem submitted on 27 June 2023.

[42] In *Creedy v Commissioner of Police* Chief Judge Colgan stated:

> [36] ….for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. 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.[7]

[43] In *Panapa v Spotless Facility Services Limited* the Employment Court stated:

> [23] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. The raising of a grievance is the first recognised step in the problem solving process.
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> [24] In order for a communication to constitute the raising of a personal grievance, it must make the employer sufficiently aware of the grievance to be able to respond to it.[8]

[44] I find that the language of s 114(2) of the Act as applied by the Employment Court in *Panapa v Spotless Facility Services Limited* makes it clear that it is necessary that:

(i) there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised;

(ii) the employee has taken reasonable steps to advise the employer that he/she is alleging a personal grievance he/she wants the employer to address; and

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[7] *Creedy v Commissioner of Police* [2006] ERNZ 517
[8] *Panapa v Spotless Facility Services Limited* [2021] NZEmpC 88

(iii) the communication about the personal grievance made the employer sufficiently aware of what it had to address.

[45] No particular order or words need to be used to raise a personal grievance, however as the Court went on to state in *Manukau Institute of Technology v Zivaljevic:*

> …. 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.[9]

[46] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer[10].

An action

[47] In the letter dated 9 December 2021, Mr Kirkham, Campus Operations Manager, advised Mr Neal of the impact on his ability to come onto the VUA campus to perform his role after 3 December 2021 unless he held a valid My Vaccine Pass (or the first dose of an approved vaccine). The letter stated:

> In a recent discussion, you confirmed that you are not able to provide a My Vaccine Pass or meet the single-dose requirement. Until you meet these requirements, you are not able to come onto campus.
>
> For the period from now to 14 January 2022, it will mean that you will need to continue to work from home.

[48] Mr Neal responded to the letter from VUA on 21 December 2021 providing his feedback to the proposal to implement the University's vaccination policy. It is clear that Mr Neal does not agree with the Vaccination Policy adopted by VUA, and has concern about his continued employment or his terms and conditions of employment, stating:

> Furthermore, by being advised that I could be potentially be terminated from my position at the University of Auckland, placed on leave without pay, being requested to potentially take on other duties if it was deemed necessary and/or reduce my hours of work and/or pay, these all being based upon if I remain unvaccinated, if any of these situations were to entail, it would mean that the University is in breach of section 88 Health and Safety at Work act 2015.

[49] The actions cited by Mr Neal may have caused him a disadvantage in his employment had they occurred, but they are referred to by Mr Neal as potential actions of the University,

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[9] *Manukau Institute of Technology v Zivaljevic:* [2019] NZEmpC 132 at (37)
[10] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

they had not occurred, nor was there any reference to them actually occurring at some future date. As stated in *Creedy v Commissioner of Police* the Employment Court observed:[11]

> The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.[12]

[50] I do not find that the letter dated 21 December 2021 raises a personal grievance for unjustifiable disadvantage in relation to the requirement that Mr Neal work from home on 9 December 2021.

[51] There is no evidence before the Authority that indicates that Mr Neal raised a personal grievance about the requirement that he work from home (the alleged lock-out) until the lodging of the Statement of Problem with the Authority on 22 June 2023.

[52] In order to raise his personal grievance for unjustifiable disadvantage arising from the requirement that he work from home, Mr Neal was required to do so within the statutory 90 day time limit. He did not do so.

[53] I determine that Mr Neal did not raise his claim for unjustifiable disadvantage within the statutory day time limit**.**

Should Mr Neal be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[54] VUA does not consent to Mr Neal raising his unjustifiable dismissal grievance outside the statutory 90 day timeframe.

[55] As set out in s 114(3) of the Act where an employer does not consent to a personal grievance being raised after the 90 day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(4) of the Act which states.

> On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –
>
> (a) Is satisfied that the delay, in raising the personal grievance was occasioned by exceptional circumstance (which may include any 1 or more of the circumstances set out in section 115); and
>
> (b) Considers it just to do so.

[11] Ibid at para [29]
[12] N 1 above at [29]

[56] No application has been made by Mr Neal to raise the personal grievance out of time.

Costs

[57] Costs are reserved pending the outcome of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority