

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 648  
3218459

BETWEEN

KATRINA HALL  
Applicant

AND

FIRE AND EMERGENCY NEW  
ZEALAND  
Respondent

Member of Authority: Rachel Larmer

Representatives: Victor Corbett, counsel for the Applicant  
Peter Chemis and Shaun Brookes, counsel for the  
Respondent

Investigation: On the papers

Submissions and further information received: 13 July, 21, 24 August and 19 September 2023 from the  
Applicant  
4 August, 15 and 29 September 2023 from the  
Respondent

Date of Determination: 3 November 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is a preliminary determination of the Authority's jurisdiction to investigate Ms Katrina Hall's claims against Fire and Emergency New Zealand ("*FENZ*").

[2] FENZ claimed that Ms Hall did not raise her disadvantage grievances within the 90-day time limit required by s 114(1) of the Employment Relations Act 2000 ("*the Act*"). FENZ also said Ms Hall's penalty claims were not commenced within 12 months of the breach becoming known, or when the cause of action should reasonably have become known to her, as required by s 135(5) of the Act.

[3] Ms Hall said she has raised her claims within the required statutory time limits.

### **Background facts**

[4] Ms Hall started work with FENZ in July 2019 and is employed as a Firefighter.

[5] Although the Authority was not told that Ms Hall was a member of the New Zealand Professional Firefighters Union Inc (“*the NZPFU*”), it has assumed that at the material times she must have been, because the documents provided to the Authority established she had been supported in meetings and by way of various communications with FENZ by a union representative.

[6] The Authority was also not provided with a copy of Ms Hall’s employment agreement, or Collective Agreement as the case may be, or with a copy of the clauses in her employment agreement that she alleged FENZ had breached.

[7] On 11 October 2021 the New Zealand Government said it would be amending the Covid-19 Public Health Response (Vaccinations) Order 2021 (“*Vaccinations Order*”) to cover a wider range of workers than were previously covered, including:

- (a) People who conducted high risk work in the health and disability sector (who would need to be fully vaccinated by 1 December 2021); and
- (b) Staff and support people who had contact with children and students in schools and early learning services (who would need to be fully vaccinated by 1 January 2022).

[8] On 25 October 2021 the Vaccinations Order was amended to apply to people working in the health and disability sector and affected education services. During October and November 2021 FENZ consulted with unions, associations and its workforce about the Vaccinations Order.

[9] On or about 29 October 2021 FENZ decided which of its workers would be covered by the Vaccinations Order, which included Ms Hall because she was employed as a Firefighter. This decision was communicated to all staff via a National Commander’s update on 29 October 2021.

[10] The Vaccination Order came into force for FENZ on 29 November 2021, as an extended date that was given only to FENZ in the Covid-19 Public Health Response (Vaccinations) Amendments Order (No 4) 2021.

[11] On 17 November 2021 Ms Hall was advised that if she did not get a Covid-19 vaccination by 29 November 2021 then she would be directed to stop work from, and including, 30 November 2021. As an unvaccinated employee Ms Hall was stood down from duties on 30 November 2021 on “*special Covid-19 leave paid*” until 8 May 2022.

[12] On 18 January 2022 FENZ met with the Ms Hall and her union representative and discussed the application of the Vaccinations Order on her.

[13] On 28 February 2022 FENZ implemented a Vaccinations Policy (“*the Vaccinations Policy*”). The Vaccinations Policy provided that:

Only fully vaccinated personnel and visitors will be permitted to enter Fire and Emergency premises from 28 February unless one of the below exceptions applies. [...]

[14] The Vaccinations Policy was separate to the Vaccinations Order. The Vaccinations Order prohibited certain work being done by unvaccinated workers. It did not prevent unvaccinated workers from attending FENZ workplaces and carrying out other duties that did not require vaccination. The FENZ Vaccination Policy prevented anyone who was unvaccinated, subject to the listed exemptions, from entering FENZ property.

[15] The FENZ Vaccination Policy was in force until 23 May 2022.

[16] On 8 July 2022 Frontline Law Limited (“*Frontline Law*”) wrote to FENZ, as the representative for 68 FENZ employees and volunteers, to raise personal grievances on their behalf. This letter stated that:

The main basis of the personal grievance relates to the unjustified actions FENZ took through its purported reliance on item 7.2 of Schedule 2 of the Vaccination Order, as it was written before 7 July 2022 (pre-July Item 7.2). FENZ therefore unjustifiably dismissed some group members: constructively dismissed some group members; and unjustifiably disadvantaged group members. In summary, the basis of our claim is that:

46.1 FENZ failed to exhaust all reasonable alternative options before terminating some group members,

46.2 FENZ wrong interpreted Pre-July Item 7.2 as covering FENZ personnel that it did not cover,

46.3 FENZ treated group members unfairly, and did not act in good faith towards these personnel, and

46.4 FENZ breached a range of other laws and codes, which are detailed below.

[17] The 8 July 2022 letter (among other things) alleged breaches of the Health and Safety at Work 2015 (“*the H&SAW*”), privacy breaches and alleged breaches of the New Zealand Bill of Rights Act 1990 (“*the NZBoRA*”), along with alleged breaches of FENZ’s values and code of behaviour. Each employee or volunteer had their own individual schedule attached to the personal grievance letter.

[18] On 8 July 2022 FENZ informed unvaccinated workers that they could return to work. Ms Hall returned to work on 23 July 2023.

### **Ms Hall’s substantive claims**

[19] In her Statement of Problem (“*SoP*”) that was lodged with the Authority on 15 March 2023, Ms Hall claimed she had been unjustifiably disadvantaged by:

- (a) FENZ’s alleged failure to consult her about the implementation of the Vaccinations Order;
- (b) FENZ misinterpreting the Vaccinations Order to require firefighters to be vaccinated;
- (c) FENZ’s decision to suspend her:
  - (i) With pay from 30 November 2021 to 8 May 2022; and
  - (ii) Without pay from 8 May 2022 to 23 July 2022;
- (d) FENZ’s alleged failure to provide her with relevant information regarding her suspension;
- (e) FENZ’s alleged failure to be “*a good employer*”.

[20] Ms Hall also claimed that FENZ:

- (a) Breached her employment agreement by:
  - (i) Suspending her with pay from 30 November 2021;

- (ii) Suspending her without pay from 8 May to 23 July 2022;
- (iii) Failing to be “*a good employer*”;
- (b) Had breached its good faith obligations to her:
  - (i) By unjustifiably suspending her;
  - (ii) Because it was not a constructive and communicative employer in enforcing its interpretation of the Vaccinations Order;
- (c) Should have penalties imposed on it for these breaches of good faith;

[21] Ms Hall did not seek penalties for the alleged breaches of her employment agreement.

### **The Authority’s investigation**

[22] By agreement with the parties, the preliminary jurisdiction issues were determined ‘on the papers’. Both parties lodged affidavit evidence. Ms Hall was her only witness and Ms Hastrop, Human Resources Consultant, lodged two affidavits on behalf of FENZ.

[23] It was also agreed that instead of attaching sworn exhibits to their affidavits, the parties would provide the Authority with an agreed Joint Bundle that contained all relevant documents (“*the JB*”), as that was the most efficient way of dealing with that evidence.

[24] Both parties also lodged submissions after the evidence had been lodged.

### **The issues**

[25] The following issues are to be determined:

- (a) When did each of Ms Hall’s alleged unjustified disadvantage grievances occur, or come to her attention, whichever is the later?
- (b) When did Ms Hall say she had raised each of her unjustified disadvantage personal grievance claims with FENZ?
- (c) When did Ms Hall raise each of her unjustified disadvantage personal grievance claims with FENZ?
- (d) Were any of Ms Hall’s disadvantage grievances raised within the 90-day time limited in s 114(1) of the Act?

- (e) What, if any, unjustified disadvantage grievances does the Authority have jurisdiction to investigate?
- (f) When did each of the alleged breaches of good faith become known, or ought reasonably have become known, to Ms Hall?
- (g) What, if any, penalty claims did Ms Hall commence within the 12 month statutory time-limit in s 135(5) of the Act?
- (h) What, if any, penalty claims does the Authority have jurisdiction to investigate?
- (i) What costs should the successful party be awarded?

### **Relevant law**

#### *Raising personal grievance claims*

[26] Section 114(1) of the Act states:

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.

[27] Section 114(2) of the Act states:

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.

#### *Statutory time-limits*

[28] Section 114(1) of the Act requires personal grievance claims to be raised within 90 days of the date on which the action occurred, or came to the employee's notice, whichever is the later. Section 135(5) of the Act requires penalty actions to be commenced within 12 months of the date the cause of action first became known, or ought reasonably have become known.

*Case law*

[29] The leading case on the raising of personal grievance claims is the Employment Court decision in *Creedy v Commissioner of Police*.<sup>1</sup> The Employment Court's decision was not disturbed by later appeals as a result of the Supreme Court decision on the issue of what constituted exceptional circumstances.

[30] The Employment Court in *Creedy* stated:

[...] 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 the statutory type of the personal grievance as, for example, unjustified disadvantage in employment [...] for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.

[...]

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

[31] In Chief Executive of *Manukau Institute of Technology v Zivaljevic* the Employment Court noted:<sup>2</sup>

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[32] Whether or not a personal grievance claim has been raised within time is a factual matter that is to be objectively determined by the Authority. A grievance cannot be raised in anticipation of an event. The Employment Court decision in *Creedy v Commissioner of Police* made it clear that a grievance must be raised about an event that has occurred or is occurring.<sup>3</sup>

*What is required to raise a grievance?*

[33] There is no specific form of words or method required for the raising of a personal grievance claim. What is required is that the employee puts the employer on notice orally and/or in writing that they have a personal grievance claim. This requires the employee to provide

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<sup>1</sup> [2006] ERNZ 517 at [36] ad [37].

<sup>2</sup> [2019] NZEmpC 132 at [38].

<sup>3</sup> Above n1.

the employer with sufficient information about their personal grievance, so that the employer is aware of the nature of the grievance and is therefore in a position to be able to respond to it.

[34] The level of detail required is not what would be expected to be included within a Statement of Problem, but it is insufficient for the employee to simply state that they have a grievance or to specify the type of grievance without providing further information.<sup>4</sup>

[35] The Authority may have regard to a series of communications, and it may find that the totality of all communications have in effect adequately raised a personal grievance claim. Whether that is the case will involve a factual inquiry to determine what the employer would reasonably have known as a result of the totality of the communications between the parties.

[36] The purpose of raising a grievance with the employer is so that if it wants to, it is in a position to be able to address the grievance and to respond on its merits, with a view to resolving the grievance expeditiously and informally.<sup>5</sup> It therefore follows that the employer must know what it is that it is being asked to address.

**When did each of Ms Hall’s alleged unjustified disadvantage grievances occur or come to her attention, whichever is the later?**

[37] Ms Hall in her affidavit said that FENZ’s failure to consult with her about the Vaccinations Order had come to her attention by “*at least by 17 November 2021*”.

[38] Ms Hall in her affidavit said that FENZ had “*sought to implement its own interpretation of the health order [Vaccinations Order] on me, at least from 29 October 2021.*” Her unjustified disadvantage grievance claim involving an allegation that FENZ had misinterpreted the Vaccinations Order to require firefighters to be vaccinated must therefore have come to her attention by that date.

[39] Ms Hall did not provide any evidence about when it came to her notice that FENZ had failed “*to be a good employer*”, because she did not address that personal grievance in her affidavit. However, because her complaint is focused on the fact she believed she was unfairly required to be vaccinated in order to continue attending work, it is likely she knew about this claim in October or at the latest by 30 November 2021.

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<sup>4</sup> Supra.

<sup>5</sup> *Malcom v Chief Executive of the Department of Corrections* [2021] NZERA 489 at [79].

[40] Ms Hall said that she was advised in a letter dated 17 November 2021 that if she remained unvaccinated after 29 November 2021 then she would be stood down on “*special Covid Leave – paid.*” She was suspended on pay from 30 November 2021. Ms Hall therefore knew by 17 November 2021 that she was required to be vaccinated and by 30 November 2021 that she could not attend work because she was not vaccinated.

[41] Ms Hall said that it came to her attention that she was going to be on an unpaid suspension on or around 8 May 2022, which was the date her unpaid suspension started.

[42] Ms Hall’s unjustified disadvantage claim involving an alleged failure by FENZ to provide her with relevant information is substantially similar to her unjustified disadvantage grievance claim for an alleged failure to consult with her. Although Ms Hall did not state in her affidavit when the alleged ‘failure to provide information’ claim came to her attention, it must have come to her notice at the same time as the alleged failure to consult claim did, i.e. by 17 November 2022.

[43] Ms Hall said she knew about her unpaid suspension on or around 8 May 2022, so her allegation that FENZ had failed to provide her with relevant information regarding her unpaid suspension must have come to her attention around then. Ms Hall was advised of her suspension on 30 November 2021, so her allegation that FENZ had failed to provide her with relevant information regarding her paid suspension must have come to her attention by then.

**When did Ms Hall say she had raised each of her alleged unjustified disadvantage personal grievance claims?**

[44] Ms Hall in her affidavit said:

10 I considered that the suspensions that took place were unreasonable and raised a personal grievance along with several other employees and volunteers on 8 July 2022. That grievance was raised directly with my employer.

11 I was seen by Julie Schmidt, of Frontline Law, who took my details and told me about the grievance she would be raising about my suspension.

12 Julie told me that while raising a grievance for my suspensions, she would also ask FENZ that staff who were stood down in reliance on the health order should be returned to work from a certain date, and if that didn’t happen it could constitute further grounds for a grievance.

[45] Ms Hall in her evidence therefore relied entirely on the letter dated 8 July 2022 Frontline Law sent FENZ to have raised her personal grievance claims. This letter included Schedule 57, that related to Ms Hall.

[46] Ms Hall's Schedule 57 identified she was on unpaid leave and it set out the harm she said not being able to work caused her. Her Schedule did not use the words "*unjustified disadvantage*", or "*personal grievance*" and it did not refer to any of her alleged unjustified disadvantage grievance claims. Schedule 57 just set out the effects not being able to work had on her.

[47] Ms Hall's affidavit referred to three specific paragraphs in the 8 July 2022 personal grievance letter, namely paragraphs 42, (which dealt with returning to duties), paragraph 44 (which she said dealt with unjustified suspension) and paragraph 46 which she said dealt with her unjustified disadvantage grievances. Ms Hall also referred to paragraph 117.2 in the 8 July 2022 letter, which sought recovery of pay related to vaccine-related suspensions, which included reimbursement of lost wages, leave entitlements, allowances and other lost income.

[48] Ms Hall's affidavit did not specifically state when she had raised her unjustified disadvantage grievances about:

- (a) FENZ's alleged failure to consult her about the implementation of the Vaccinations Order;
- (b) FENZ allegedly misinterpreting the Vaccinations Order to require firefighters to be vaccinated;
- (c) FENZ's alleged failure to "*act as a good employer*";
- (d) FENZ's alleged failure to provide her with relevant information about her suspensions.

[49] Ms Hall specially said in her affidavit that the letter dated 8 July 2022 raised her unjustified disadvantage grievances about:

- (a) FENZ's decision to suspend her on pay from 30 November 2021 to 8 May 2022;  
and
- (b) FENZ's decision to suspend her without pay from 8 May to 23 July 2022.

[50] Mr Corbett, in submissions lodged on Ms Hall's behalf, submitted that she had raised a personal grievance regarding the application of the Vaccinations Order to her role on 28 February 2022. However, Ms Hall did not provide any evidence to support that submission.

[51] Mr Corbett also alleged that FENZ was "on notice" during Ms Hall's suspension that she disagreed with the requirement for her to be vaccinated to carry out work. Mr Corbett relied on the following documents to support that submission:

- (a) Psychological reports dated 4, 5 and 17 November 2022;
- (b) Stop work notice dated 17 November 2021 from FENZ to Ms Hall;
- (c) Alternative duties request form dated 31 January 2022;
- (d) Email dated 28 February 2022 from the NZPFU to FENZ regarding the High Court's decision in *Yardley v Minister for Workplace Relations and Safety High*;<sup>6</sup>
- (e) Letter dated 28 February 2022 from Ms Hall to FENZ;
- (f) Letter dated 4 March 2022 from FENZ to NZPFU;
- (g) Letter dated 8 March 2022 from Ms Hall's union representative to FENZ;
- (h) Letter dated 16 March 2022 from FENZ to Ms Hall's union representative;
- (i) Email dated 23 March 2022 from Ms Hall's union representative to FENZ;
- (j) Email dated 30 March 2022 from FENZ to Ms Hall's union representative.

[52] Ms Hall did not refer to any of these documents in her affidavit.

**When did Ms Hall raise each of her unjustified disadvantage personal grievance claims with FENZ?**

*8 July 2022*

[53] The 8 July 2022 letter from Frontline Law said it covered 68 FENZ employees and volunteers. It was 17 pages long plus a one page Appendix that listed the role title of those in the Group, plus 68 individual schedules, so it was in excess of 86 pages as some of the

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<sup>6</sup> [2022] 19 NZELR 125.

schedules were more than a page long. It did not specify what grievance applied to which employee or volunteer. Nor did it specify what remedies each individual sought.

[54] The 8 July 2022 letter was sent 220 days after Ms Hall had been stood down on pay. It set out in detail the background to the Government vaccine mandates (between October 2021 and January 2022) and purported to raise personal grievances for employees and volunteers who had been unjustifiably dismissed.

[55] FENZ said it also understood the 8 July 2022 letter to be saying that if volunteers and employees who had been stood down were not permitted to return to work within two weeks of 8 July 2022, that that would amount to disadvantage grievances. That appeared to be an anticipatory grievance about an action/event that had not at that point occurred.

[56] Mr Corbett's submissions stated:

[...] the main basis of the personal grievance [letter dated 8 July 2022] relates to the unjustified actions FENZ took through its purported reliance on item 7.2 of Schedule 2 of the Vaccination Order. [...]

[57] The 8 July 2022 letter did not mention the Applicant's unjustified disadvantage grievance claim that FENZ had failed "*to act as a good employer*". Nor did it mention a disadvantage grievance that involved an alleged failure by FENZ to provide Ms Hall with relevant information regarding her suspensions.

[58] Ms Hall's Schedule 57 noted she was on "*unpaid leave*" but it did not refer to a personal grievance, so it failed to set out what specific personal grievance claims she was raising with FENZ, or what facts she was relying on or how she personally wanted her employment problem resolved.

[59] Ms Hall in her affidavit claimed her disadvantage grievance claims that related to her suspensions were raised in paragraph 44 of the 8 July letter. This stated:

If Group members who wish to return are not conducting their ordinary duties by 21 July 2022, this will form an additional ground of this personal grievance. This ground will be based on an unjustified disadvantage, through unjustified suspension or unjustified actions taken after terminating or constructively dismissal personnel.

[60] However, this did not raise an unjustified disadvantage personal grievance claim for Ms Hall. It did not refer to her suspension on pay on 30 November 2021 or without pay on 8

May 2022. Nothing at all was said about Ms Hall's own personal situation. It did not identify what actions or inactions by FENZ had allegedly unjustifiably disadvantaged Ms Hall or what her grievances were with FENZ that had allegedly caused her personal harm.

[61] Rather paragraph 44 of the 8 July 2022 letter was signalling, in a generalised group related way for a mix of employees and non-employees, a potential future personal grievance if those who had been stood down were not allowed to return to work in the following two weeks.

[62] Paragraph 44 of the 8 July 2022 letter therefore did not sufficiently raise a disadvantage grievance for Ms Hall because it was an anticipatory statement that was not sufficiently detailed about her situation to have enabled FENZ to respond to her personal situation. Instead, it simply alerted FENZ to the possibility that a grievance could be raised in future if the specified condition was not met.

[63] FENZ contacted Ms Hall on 1 July 2022 and agreed to her return to work. Having done so, FENZ was reasonably entitled to presume that Ms Hall was not going to raise a personal grievance as the stated condition that her lawyers had said could give rise to a personal grievance had not come to fruition. Ms Hall returned to work on 23 July 2022.

[64] Paragraph 46 of the 8 July 2022 letter states:

The main basis of the personal grievance relates to the unjustified actions FENZ took through its purported reliance on item 7.2 of Schedule 2 of the Vaccination Order, as it was written before 7 July 2022 (pre-July Item 7.2). FENZ therefore unjustifiably dismissed some group members: constructively dismissed some group members; and unjustifiably disadvantaged group members.

[65] This information was insufficient for FENZ to understand what it needed to respond to in relation to Ms Hall. FENZ alerted Frontline Law to the flaws in the approach to raising personal grievances that had been taken in the 8 July 2022 letter.

[66] FENZ's counsel wrote to Frontline Law on 19 July 2022 saying that it did not accept the letter of 8 July 2022 had validly raised personal grievance claims for the people named in the letter and that it did not consent to any purported personal grievance claims being raised outside the 90-day statutory time-limit. Frontline Law replied on 28 July 2022 rejecting that criticism. It did not 're-raise' any personal grievance claims for any of the people named in the 8 July 2022 letter.

[67] Despite being on notice that FENZ did not consider it could respond to Ms Hall's alleged grievance(s), Frontline Law did not provide any further details or information regarding her specific unjustified disadvantage grievance claims.

[68] The 68 employees and volunteers each had different personal circumstances. Some had been dismissed, some had resigned, some had remained employees. Volunteers were different again, and are not able to raise personal grievances.

[69] Because the letter intended to raise personal grievance claims with FENZ, and because personal grievance claims are personal to the individual involved, Frontline Law was required to identify what specific personal grievance claims each individual was making, what facts each individual relied on and how each individual wanted their problem resolved. FENZ could not know that information for each of the 68 individuals the 8 July 2022 letter was said to have covered.

[70] FENZ was therefore not provided with sufficient information to enable it to address Ms Hall's grievance "*on its merits with a view to resolving it soon and informally*". FENZ did not receive further information about Ms Hall's alleged grievances until it received a copy of the SoP she had lodged on 15 March 2023, nearly eight months after her return to work from Covid-19 leave, and well over a year after FENZ had made decisions about the vaccination mandates.

[71] Mr Corbett's claim made in submissions that FENZ was "*on notice*" of Ms Hall's personal grievance claims was not supported by an objective analysis of the available evidence (see below).

*Documents referred to in Mr Corbett's submissions*

[72] Ms Hall did not refer in her affidavit to any of the documents set out below, that Mr Corbett relied on in his submissions. That was a significant omission, because the purpose of her affidavit was to explain when she knew about each unjustified disadvantage grievance claim and when she raised each of her disadvantage grievance claims.

(a) Psychological reports dated 4, 5 and 17 November 2022

[73] These were confidential documents generated by Ms Hall that were not to be shared, so were only viewable by FENZ's Wellbeing Assessment Team. The restricted nature of her reports was made clear to Ms Hall on her completion of them. Accordingly, these did not, and could not have raised any personal grievance claims for her.

(b) Stop work notice dated 17 November 2021 from FENZ to Ms Hall

[74] This was an email FENZ sent to Ms Hall that advised her of the need to be vaccinated, and that if she was not vaccinated by 29 November 2021 then she would have to stop work on 30 November 2021. This email obviously did not raise a personal grievance on her behalf.

(c) Alternative duties request form dated 31 January 2022

[75] The alternative duties request form did not raise any employment relationship problem, and dispute or any personal grievance, so it could not have put FENZ on notice about any of her unjustified disadvantage grievance claims. It therefore did not raise any personal grievance claims for Ms Hall.

(d) Email dated 28 February 2022 from the NZPFU to FENZ regarding the *Yardley* High Court decision

[76] This email recorded the cancellation of the meeting that was to have been held with Ms Hall on the morning of 28 February 2022, so NZPFU could consider the High Court decision in *Yardley*.<sup>7</sup> NZPFU requested that paid special leave be continued for Ms Hall and others while that occurred. This email did not raise any personal grievance claims.

(e) Letter dated 28 February 2022 from Ms Hall to FENZ

[77] Ms Hall's letter to FENZ dated 28 February 2022 stated "*you are on notice that these actions are unlawful discrimination.*" Her focus was on how the High Court decision in *Yardley* meant that FENZ could not rely on the Vaccinations Order to require firefighters to be vaccinated. Ms Hall claimed FENZ was in breach of the New Zealand Bill of Rights Act 1990 ("*the NZBoRA*") and the Human Rights Act 1993 ("*the HRA*").

[78] Ms Hall's letter did not raise any personal grievance claims. It related to the Vaccinations Policy, which is not the subject of any claim in these Authority proceedings. It

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<sup>7</sup> Above n6.

did not mention personal grievance claims at all. This letter was therefore inadequate to have raised Ms Hall's various unjustified disadvantage grievance claims.

[79] Ms Hall's SoP and affidavit did not refer to the NZBoRA or to the HRA and these were not alleged breaches or claims she identified during the CMC, or subsequent to it, as unjustified disadvantage grievance claims that she wanted the Authority to investigate.

[80] Nor did Ms Hall make a discrimination claim in her SoP and when her counsel agreed during the CMC held on 27 June 2023 on the list of specific issues she wanted investigated, a discrimination claim was not on that list. Ms Hall's affidavit also did not refer to a discrimination claim. The only reference to discrimination was in the 28 February 2022 letter, then it is never raised again.

[81] The 28 February 2022 letter cannot be viewed as having raised any personal grievance claims for Ms Hall because it was unrelated to FENZ's application of the Vaccinations Order, as it related to the Vaccinations Policy only and no personal grievance claim has been made about the Vaccinations Policy. It was also sent more than 90 days after Ms Hall had been suspended on pay because she was unvaccinated.

[82] FENZ replied to Ms Hall's letter dated 28 February 2022 on 4 March 2022 and said that the *Yardley* decision did not apply to Fire and Emergency personnel.

(f) Letter dated 4 March 2022 from FENZ to NZPFU

[83] This letter dated 4 March 2022 from FENZ to NZFPU, that responded to the NZPFU letter dated 28 February 2022. It therefore could not have raised a personal grievance claim on behalf of Ms Hall.

(g) Letter dated 8 March 2022 from Ms Hall's union representative to FENZ

[84] This letter dated 8 March 2022 from Ms Hall's union representative queried decisions FENZ had made about alternative duties. It also asked for a scheduled meeting on 14 March 2022 to be postponed because of the *Yardley* decision and for the FENZ Governance Group to revise the decisions it had made about alternative duties. However, there was no unjustified disadvantage personal grievance claim before the Authority involving FENZ's decisions about alternative duties for Ms Hall.

[85] This letter dated 8 March 2022 therefore did not raise any personal grievance claims for Ms Hall.

(h) Letter dated 16 March 2022 from FENZ to Ms Hall's union representative

[86] The letter dated 16 March 2022 from FENZ to Ms Hall's union representative was a response to the union representative's email of 8 March 2022, which addressed the adjournment of the meeting with Ms Hall request and the alternative duties issues. It therefore could not have raised personal grievance claims on behalf of Ms Hall.

(i) Email dated 23 March 2022 from Ms Hall's union representative to FENZ

[87] The email dated 23 March 2022 from Ms Hall's union representative to FENZ advised that Ms Hall had tested positive for Covid, but was now well. It also said that because of that, Ms Hall's vaccination status was equal to that of a vaccinated person, so she wanted to return to work. It did not refer to, or raise, any personal grievance claims for Ms Hall.

(j) Email dated 30 March 2022 from FENZ to Ms Hall's union representative

[88] The email dated 30 March 2022 from FENZ to Ms Hall's union representative was a response to the union representative's letter dated 8 March 2022. It therefore could not have raised personal grievance claims on behalf of Ms Hall.

*Totality of the communications*

[89] Although none of the communications Mr Corbett identified in his submissions individually raised, or for that matter had even referred to, personal grievance claims the Authority has also considered whether the totality of these communications (along with the 8 July 2022 letter) were sufficient to have raised any of her personal grievance claims.

[90] The Authority concluded they did not. Even taken together, the totality of the communications Ms Hall, NZPFU and her union representative had with FENZ did not fairly, reasonably or appropriately put FENZ on notice of the particular personal grievance claims that she has now sought to pursue in these Authority proceedings.

[91] FENZ could not have known what it was that it was required to address or how Mrs Hall wanted her various personal grievance claims resolved, had it wanted to do so.

### *Findings*

[92] The Authority finds that Ms Hall did not raise any of her personal grievance claims with FENZ until it received a copy of the SoP she lodged on 15 March 2023.

#### **Were any of Ms Hall’s disadvantage grievances raised within the 90-day time limited in s 114(1) of the Act?**

[93] None of Ms Hall’s unjustified disadvantage personal grievance claims were raised within the statutory 90-day time-limit required by s 114(1) of the Act.

[94] Ms Halls’ claim that there had been a continuing course of conduct that extended the 90-day time-limit was not accepted, based on the particular facts of each of her unjustified disadvantage grievances. The requirement on her to raise her personal grievance claims crystallised when she became aware of them, or ought reasonably to have become aware of them. However, did not do so.

[95] The Authority has determined that each of her unjustified disadvantage grievance claims crystallised on the dates identified in paragraphs [37] to [43] of this determination, as that was when each cause of action that resulted in her unjustified disadvantage claims occurred or ought to reasonably have come to Ms Hall’s notice.

[96] In accordance with the finding in paragraph [92] of this determination, none of Ms Hall’s personal grievance claims were raised within 90-days of any of those causes of action occurring or coming to her attention, whichever was the later.

#### **What, if any, unjustified disadvantage grievances does the Authority have jurisdiction to investigate?**

[97] FENZ did not consent to any personal grievances being raised out of time.

[98] Ms Hall has not applied to raise any personal grievance claims out of time. Nor did she include any evidence in her affidavit that would have supported an “*exceptional circumstances*” claim, in accordance with s 114(4) and/or s 115 of the Act.

[99] Accordingly, there is no legal or evidential basis on which to extend the time-limit in s 114(1) of the Act for any of Ms Hall to raise any of her personal grievance claims.

[100] The Authority therefore does not have jurisdiction to investigate any of Ms Hall's unjustified disadvantage personal grievance claims.

**When did each of the alleged breaches of good faith become known, or ought reasonably have become known, to Ms Hall?**

[101] In so far as Ms Hall alleged that her unjustified disadvantage grievances also amounted to breaches of good faith, then the causes of action that attracted the potential penalties therefore arose on, or ought reasonably to have come to Ms Hall's attention by:

- (a) 17 November 2021 which was the date on which:
  - (i) FENZ advised her she was covered by the Vaccinations Order;
  - (ii) FENZ allegedly misinterpreted that the Vaccinations Order to require firefighters to be vaccinated;
  - (iii) FENZ allegedly failed to act as a good employer, because it required her to be vaccinated;
- (b) 30 November 2021, which was the date FENZ:
  - (i) Suspended Ms Hall on pay; and
  - (ii) Allegedly failed to provide her with relevant information regarding her suspension;
- (c) 8 May 2022, which was the date FENZ suspended Ms Hall without pay;

[102] Ms Hall did not identify when it became known to her that FENZ had breached good faith by allegedly failing to be a constructive and communicative employer in terms of enforcing its interpretation of the Vaccinations Order.

[103] The Authority therefore presumed that cause of action became known to Ms Hall, or ought reasonably to have become known to her, when she was advised on 17 November 2021 that the Vaccinations Order would apply to her and that she would be placed on paid suspension from 30 November 2021 if she was unvaccinated as at that date, because that forms the basis of her substantive claims.

[104] Ms Hall also claimed that the alleged breaches of her employment agreement by FENZ amounted to breaches of good faith that should attract penalties. The causes of action that

attracted the penalties therefore arose on, or ought reasonably to have come to Ms Hall's attention by:

- (a) 8 May 2022, which was the date she was suspended without pay;
- (b) 29 October 2021, which was the date FENZ allegedly failed to act as a good employer by concluding that the Vaccinations Order applied to firefighters.

**What, if any, penalty claims did Ms Hall commence within the 12 month statutory time-limit in s 135(5) of the Act?**

[105] Ms Hall did not commence her penalty claim until she lodged her SoP with the Authority on 15 March 2023.

[106] The only cause of action that Ms Hall has sought a penalty for that first became known to her, or ought reasonably have become known to her, within the 12-months prior to the lodging of her SoP (ie the period from 15 March 2022 to 15 March 2023) was her alleged breach of good faith relating to her unpaid suspension on 8 May 2022.

**What, if any, penalty claims does the Authority have jurisdiction to investigate?**

[107] Ms Hall may pursue a penalty claim for that one alleged breach of good faith claim. However, she may not claim a penalty for any of the other alleged breach of good faith claims, because they fell outside the statutory time-limit in s 135(5) of the Act. The Authority therefore does not have jurisdiction to investigate any of Ms Hall's other penalty claims.

[108] However, not every breach of good faith will attract a penalty. Section 4A of the Act sets out the threshold for the imposition of a penalty, so Ms Hall would still need to meet that standard, even if she did establish there FENZ had breached its good faith obligations to her regarding her unpaid suspension.

**Outcome**

[109] The Authority does not have jurisdiction to investigate any of Ms Hall's unjustified disadvantage grievances. It also only has jurisdiction to investigate one of her penalty claims. That is the penalty claim that relates to her allegation that FENZ breached its good faith obligations to her when it put her on an unpaid suspension on or around 8 May 2022.

**What costs should be awarded?**

[110] Costs are reserved. The Authority's preliminary view is that costs should lie where they fall, because both parties have had a measure of success. If the parties consider an alternative approach to costs should be adopted, then they have 14 days from the date of this determination within which to raise that with the Authority.

Rachel Larmer  
Member of the Employment Relations Authority