

NOTE: An order at paragraph [1] prohibits publication of certain information in these proceedings.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 680
3219799

BETWEEN	LZG First Applicant
AND	CORRECTIONS ASSOCIATION OF NEW ZEALAND Second Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority: Robin Arthur

Representatives: Kirby Kleingeld, counsel for the Applicant
Nikki Farrell, counsel for the Respondent

Investigation Meeting: 24 August 2023 by telephone conference

Determination: 17 November 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. LZG raised a personal grievance of unjustified disadvantage on 8 April 2021.**
- B. The parties are directed to attend further mediation to address the grievance.**
- C. Costs are reserved.**

Order prohibiting publication of certain information

[1] Publication is prohibited in relation to this matter of the following information referred to in the evidence provided for the Authority investigation: the name of the applicant, the names of prisoners and a gang and (apart from anything specifically described in this determination) details of security measures implemented at the home of a Corrections Officer. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). It is made for the purpose of protecting the personal security of the applicant who had been assessed in a Department of Corrections review in 2018 as being the target of threats of physical violence from prisoners associated with that gang.¹

[2] The applicant is referred to in this determination as LZG, letters generated randomly and not related to his name.

Employment relationship problem

[3] LZG applied to the Authority for findings that he had a personal grievance of unjustified disadvantage caused by the Department of Corrections (the Department) not doing enough to protect his safety when a prisoner who had previously made threats to harm LZG was being released from prison. LZG said he had raised this grievance in conversation with a responsible officer of the Department, and in an email then sent to that officer, both on 8 April 2021. A letter sent to the Department on 22 July 2021 by lawyers acting for LZG sought to pursue and resolve that grievance.

[4] LZG and his union, the Corrections Association (CANZ), also sought findings that what the Department had done, or not done, about his safety concerns breached the Department's obligations under their collective agreement, an agreement on health and safety measures and provisions of the Health and Safety in Work Act 2015.

[5] The Department denied breaching any obligations. It said it took reasonable steps to address the concerns LZG mentioned on 8 April 2021 but his email and his conversation with his manager that day had not referred to raising a personal grievance, had not said he intended to take the process any further and had not expressed any possible remedies to resolve his grievance. The Department said the letter from LZG's lawyers on 22 July 2021 was out of time to raise a grievance about the concerns he

¹ *Erceg v Erceg* [2016] NZSC 135 at [2]-[3] and [13]

mentioned on 8 April 2021. The Department did not consent to the grievance being raised outside the permitted statutory period of 90 days. It asked the Authority to find LZG was not entitled to pursue his grievance.

[6] In response to that preliminary issue LZG asked the Authority to find he had raised a grievance in time but that, even if he had not, the Department's subsequent dealings with him over those concerns, including by attending mediation with him about them, meant it had consented to the grievance being raised after the 90-day limit had ended.

The Authority's investigation

[7] This preliminary issue was investigated on the basis of what was said in the statement of problem, the statement in reply, relevant background documents lodged by the parties, an affidavit from CANZ industrial officer Alan Whitley and written submissions from the parties' counsel. Oral argument on those submissions was held by telephone conference.

[8] As permitted by s 174E of 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.

The relevant provisions in the Act and the collective agreement

[9] Every employee who wishes to raise a personal grievance must raise the grievance within 90 days. This period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the employee's notice, whichever is the later, unless the employer agrees to the grievance being raised after 90 days.² The Act describes what must be done to raise a grievance in this way:³

... [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.

² Employment Relations Act 2000, s 114(1).

³ Section 114(2).

[10] The Act defines 12 categories of claims that may be a personal grievance. The relevant category in this case is any grievance that an employee may have against their employer “because of a claim”:⁴

that the employee’s employment, or 1 or more conditions of the employee’s employment ... is or are or was ... affected to the employee’s disadvantage by some unjustifiable action by the employer.

[11] LZG’s terms of employment were set by a collective agreement in place at the time between the Department and CANZ. The agreement included the following clause about the time limit for raising a personal grievance:

If an employee wishes to raise a personal grievance that must be done within 90 days of the date when the alleged grievance occurred or came to the employee’s attention, whichever is the later. The grievance is ‘raised’ as soon as the employee has informed the Department that the employee considers they have a personal grievance they want addressed.

[12] The agreement defined the phrase “personal grievance” as “a claim by the employee against the Department” including one that “the employee has been disadvantaged in employment by an unjustifiable action of the Department”.

[13] The agreement’s terms on health and safety noted the Department and employees were mutually responsible for health and safety in the workplace. The Department’s responsibilities were listed as including “providing and maintaining a healthy and safe working environment” and “making sure working arrangements are not hazardous”.

[14] The statement of problem lodged by LZG and CANZ also referred to a Worker Engagement, Participation and Representation Agreement, dated December 2018, made between the Department and three unions, including CANZ. A clause in that agreement said the Department would “engage workers directly through normal business channels” to ensure they had input into their health and safety through direct discussion with management and staff and inclusion in decisions on their safety.

The relevant principles about raising a grievance

[15] The key principles on the issue of what amounts to raising a grievance are:⁵

⁴ Section 103(1)(b).

⁵ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]-[38]. Footnotes omitted.

- The grievance process is designed to be informal and accessible.
- A personal grievance may be raised orally or in writing.
- No particular formula of words must be used.
- Where there has been a series of communications, each communication may be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
- It does not matter what an employee intended her or his complaint to be, or her or his preferred process for dealing with it in the first instance.
- It also does not matter whether the employer recognised the complaint as a personal grievance. 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.
- It is insufficient for an employee simply to advise an employer that the employee considers that she or he 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.

How LZG's concerns arose

[16] In his work as a Corrections Officer LZG was reported to have been involved in seven incidents of prisoner violence in 2016 and 2017, including four where he was assaulted. In early 2018 Department intelligence reports identified LZG as a potential target of members of a gang to which a number of prisoners belonged. Two of those prisoners were reported to be planning on their release to "pay a visit" to the houses of LZG and another officer. The prisoners were said to have got LZG's home address from documents disclosed to them by Police in criminal cases about assaults on Corrections officers. One of those prisoners, referred to in the rest of this determination as Prisoner A, was serving a sentence for killing a Corrections Officer and the threat he was said to have made was taken seriously.

[17] In March 2018 the Department commissioned a risk assessment of LZG's house and then arranged for installation of security equipment and other security measures at the property. This included paying for monitoring of a security alarm for a set period.

[18] In early April 2021, after the set period had expired, LZG was asked if he wanted to pay for continuation of the monitoring. He replied: "If [the Department] won't pay for my security, just cancel it. I'm not paying it".

[19] A day or so later LZG learned that Prisoner A was due to be released from prison the following week. In an email to a departmental security officer he said an updated threat assessment should be carried out before his home security was "cancelled" as Prisoner A was "one of the ones that is meant to carry out the attack on my family home".

[20] The security officer responded that he agreed an updated threat assessment should be carried out but denied the Department had cancelled LZG's home security. He said the monitoring had been set for a certain period which had ended.

[21] LZG spoke on 8 April with the security officer about his concerns with his situation at that time. They agreed LZG would send an email outlining those concerns. LZG's email message, sent that day, said he was concerned "that these threats by gangs are outstanding and ongoing. It is my understanding that these kind of hits don't just disappear because of time".

[22] He said he was disappointed he had only learnt of Prisoner A's imminent release from work colleagues, not his managers or Police, and he was concerned that his current manager had, in a recent conversation, described his previous experience of prisoner violence as "historical issues". He said he saw "a huge issue here with the continuation of my safety of myself and my family being overlooked and dismissed by the Department, especially by managers at [the] prison". He referred to a rekindling of the symptoms of PTSD he had developed after earlier instances of violence. He asked for confirmation that another risk assessment would be carried out and he would be given information about what would be done about its findings.

[23] He also asked for three further steps to be taken to address his concerns: firstly, "some kind of system" to inform him when "critical events" such as prisoner releases occurred; secondly, "some form of humane response" from the Department to show his concerns about the safety of himself and his family were taken seriously; and, thirdly, for there to be "someone" identified as in charge of his safety and who would be able to brief new managers and other staff about his situation.

[24] In following weeks managers met with LZG and reviewed the threat assessment. They concluded there was no new information that the threat previously made by Prisoner A was current but arranged for security systems at LZG's home to be checked and for the Department to continue to meet the costs of alarm monitoring at his house for a further set period.

[25] LZG's lawyers' letter of 22 July 2021 referred to him claiming on 8 April that he was unjustifiably disadvantaged by the Department's failures to provide information about Prisoner A's release and to ensure his safety from the gang threat. It sought a payment of compensation for the distress caused by what it called the Department's "nonchalant attitude" to LZG's safety.

[26] The Department responded to that letter on 6 October 2021. The crux of its response was the Department did not accept LZG's 8 April conversation and email had raised a personal grievance for unjustified disadvantage:

The email does not articulate that he intends to raise a personal grievance or take this process further or any information about possible remedies that would resolve his concerns.

[27] Over three detailed pages the Department's letter then set out its account of the background and steps taken to respond to LZG's concerns. It concluded by stating the Department's view that no "valid personal grievance" was raised on 8 April 2021, declining the compensation remedy sought in his lawyers' letter of 22 July and stating "nothing in [the Department's] letter should be taken as consent to raise a personal grievance out of time". It acknowledged there was, however, an ongoing employment relationship and it agreed to meet LZG to talk about updating the threat assessment and any further information he sought.

[28] Later correspondence indicated that the parties had met in mediation in August 2022 to seek to resolve the concerns LZG had raised. By that time Prisoner A was again in the Department's custody and the Department undertook to update LZG with information about Prisoner A's release dates. It had also updated its threat assessment and made ongoing arrangements about security measures for LZG's home.

Assessing whether LZG had raised a personal grievance

[29] The issue, for preliminary determination, was solely whether what LZG said and did on 8 April 2021 had been enough to raise a grievance as defined in s 103 of the Act and to meet the requirements of s 114(2) of the Act to communicate the substance of his complaint to the Department. At this stage of the proceedings, the issue was not about whether the Department had then done enough to address the concerns LZG communicated to it on 8 April 2021. The Department's case, as set out in its statement in reply and its submissions on the preliminary issue, was that it had taken his concerns seriously and took a number of steps to address them. Its evidence about those actions only becomes relevant if LZG had a valid personal grievance from that date.

[30] The cause of action for the grievance was the upset to LZG resulting from him finding out around 6 April 2021 about the imminent release of Prisoner A and the lack of information or forewarning of that event from Department managers. Taking that as the relevant date for time to run on raising a grievance within 90 days, the lawyers' letter of 22 July 2021, sent some 105 or so days later, was sent too late to have raised that grievance.

[31] Taking the summary of key principles listed earlier in this determination as a guide, and for the following reasons, it was sufficiently clear that LZG's communication on 8 April 2021 had met the statutory requirements for raising a personal grievance at that time.

[32] Firstly, it was not decisive that LZG's email and conversation did not use the phrase 'personal grievance' or 'raising a personal grievance'. Neither the Act nor the terms of his employment agreement required those particular words to be used. Rather, the Act and the employment terms defines a grievance as being about a "claim". The real question was whether a claim of the necessary type or character was made.

[33] Secondly, it was clear that what LZG said in his email did claim his conditions of employment had been affected to his disadvantage by the Department doing less than it reasonably should to protect him.

[34] This related to the terms in the collective agreement about the Department's obligations to provide a safe working environment. The evidence about what the Department did in carrying out threat assessments and sometimes providing security

measures at officers' homes showed it understood those obligations sometimes extended to the safety of officers in their homes, not just within the four walls of the workplace.

[35] LZG's concerns about notice of a prisoner release and security measures at his home amounted to an allegation that the Department had not done what a fair and reasonable employer could have done on both aspects, that was an allegation of an unjustified action.

[36] Thirdly, what LZG said in his email was clearly a "claim" within the scope of the definition of a grievance given in the Act and the collective agreement.

[37] It did not matter that LZG had not labelled it as a personal grievance or that the Department did not recognise the complaint he made met the requirements of being a claim of the type amounting to a personal grievance.

[38] There are, as the Department submitted, practical difficulties if it has to consider whether every complaint received from among its 10,000-strong workforce may be a personal grievance. However this is a consequence of the statutory requirements, as interpreted in case law, emphasising the content of the communication rather than any label used in it. The Department could not impose or require a different standard than every other employer in the same situation.

[39] Fourthly, and contrary to the Department's submission that the email was "silent on resolution", LZG had given sufficient information about how he wanted his claim to be addressed and resolved.

[40] In the email LZG asked for "some kind of system" to give him notice about release of prisoners who were involved in making threats about him, for acknowledgment from the Department of his safety concerns and for a person to be identified as responsible for monitoring his safety and passing on the information about his previous traumatic work experiences to new managers. In that way he had, in his 8 April email, let the Department know what he considered would resolve his grievance.

No implied consent

[41] As a result of the conclusion LZG had raised a personal grievance through his communication on 8 April 2021, with the necessary detail and within the 90 day period,

it was not necessary to determine his alternative argument that the Department had nevertheless consented to him raising a grievance out of time because of its subsequent dealings with him over many months to seek to resolve his ongoing concerns. If it had been necessary to determine that point, the Department had the stronger argument.

[42] The Department was clear, from the outset of learning that LZG considered he had raised a grievance, that it did not consent to him raising one outside the 90-day time limit. It said so directly in its October letter to LZG's lawyers.

[43] Over many months the Department nevertheless continued to discuss his concerns with him, and his representatives, and took some steps to ensure sufficient security measures were in place at his house and to ensure he had notice of any future releases of concern.

[44] If such discussions and measures were too readily seen as amounting to consent to raising a grievance out of time, it could discourage employers from taking practical and ongoing steps to address employees' concerns.

[45] It would not be consistent with the Act's object of building productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.⁶

[46] This may include attending mediation to address the concerns. Doing so does not, in and of itself, amount to a concession that a personal grievance has been raised. It is better that employers are encouraged to keep talking with employees and attempting to resolve their concerns than pause for fear those endeavours may be taken as consenting to a grievance proceeding out of time.

Direction to mediation

[47] While the parties have already attended mediation about LZG's concerns, they did so when the question of whether a grievance was validly raised was still in dispute. As foreshadowed with the parties at the outset of investigating the preliminary issue, they are directed to further mediation to discuss whether they can now resolve this matter between themselves in light of the finding that a grievance was validly raised.

⁶ Employment Relations Act 2000, s 3.

[48] Following mediation, LZG is further directed to promptly advise the Authority whether the matter has been resolved or, if not, whether he wishes to proceed with an investigation of his application.

Costs

[49] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority