

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 756  
3225679

BETWEEN	JESSICA HANLON First Applicant
AND	SCOTT POOL Second Applicant
AND	KAITLYN WATT Third Applicant
AND	SHONTEL ROBERTS Fourth Applicant
AND	MUSEUM OF NEW ZEALAND TE PAPA TONGAREWA BOARD Respondent

Member of Authority:	Natasha Szeto
Representatives:	Garry Pollak, counsel for the Applicants Jordan Boyle and Paddy Miller, counsel for the Respondent
Investigation:	On the papers
Evidence and submissions received:	1 September and 30 November 2023 from the Applicant 22 September and 4 December 2023 from the Respondent
Date:	18 December 2023

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] The Applicants were members of E tū union employed as Casual Waiting staff at Te Papa Museum and worked on a roster system. They had started their employment

with Te Papa at varying times from 2018, with Ms Hanlon being employed for the longest period of the four.

[2] The Applicants began to have concerns about how they were being treated compared to contractors who also worked for Te Papa. They say they formally and collectively raised concerns about being disadvantaged on 4 October 2022 at a staff kōrero.

[3] On or about 19 October 2022 the Applicants were automatically signed out of Te Papa's team system and deleted from their scheduled rosters, which meant that they could not sign up for further shifts.

[4] When asked for an explanation, Te Papa told one of the Applicants it was reviewing its pool of casual staff and had decided not to offer him further work.

[5] The Applicants allege they raised personal grievances with Te Papa starting with the concerns they raised at a kōrero on 4 October 2022 which amounted to grievances for disadvantage. They say they were later unjustifiably dismissed when they could no longer access the roster and sign up for shifts. Te Papa accepts that Ms Hanlon validly raised a personal grievance for unjustifiable dismissal on 22 November 2022 but says the other three Applicants are outside the 90-day timeframe for raising a grievance.

[6] This is a determination about whether the Applicants were in time to raise personal grievances, and if not, whether the Authority should grant leave for the grievances to be raised out of time.

### **Procedural History**

[7] The Authority convened a Case Management Conference on 14 June 2023 with the parties. The parties consented to this matter being determined on the papers. I received affidavits from each of the Applicants, as well as from Shane Pasene and Michael Gilchrist from E tū. For Te Papa, I received affidavits from Andrew Dorrington, General Manager of Venues and Hanne Petersen-Hardy, Senior HR Advisor. I received submissions from both parties. The parties provided me with brief memoranda in response to my question about the number of union members. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated

findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

### **The Issues**

- [8] The issues to be investigated and determined are:
- (a) Whether the Applicants raised a personal grievance within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred, including what the nature of the personal grievance was.
  - (b) If not, whether the Authority should grant leave to raise a personal grievance after the expiration of the 90-day period, on the basis that the delay in raising the personal grievance was occasioned by exceptional circumstances and that it is just to do so.

### **Relevant background**

[9] The Applicants are all Casual Waiting staff at Te Papa Museum. Ms Hanlon was employed as a casual Te Papa Hospitality Crew Member. Ms Roberts, Ms Watt and Mr Pool were employed as casual Waiters. Three of the Applicants – Ms Hanlon, Ms Roberts and Ms Watt - were also members of E tū union throughout the relevant events and employed under coverage of a Collective Agreement between Te Papa and E tū. Mr Pool was employed on an individual employment agreement, and became a member of E tū on 19 October 2022.

[10] In September 2022, Ms Hanlon and Ms Roberts approached E tū union organiser Shane Pasene with concerns they had about their employment. This principally related to the rates of pay of Te Papa Casual Waiting staff compared to TRN (The Recruitment Network) labour hire staff, and their status as permanent part-time or casual employees.

[11] Mr Pasene requested a meeting with Te Papa which was arranged by Hanne Petersen-Hardy, Senior HR Advisor and scheduled for 3:00 pm on 4 October 2022. Mr Pasene sent Ms Petersen-Hardy a list of the four topics to be discussed at that meeting:

- (a) Casual pay rates waiting staff
- (b) Rostered work for TP casual staff
- (c) Catering Operations Manager – Reynolds
- (d) Venue Culture report.

[12] Ms Watt was unable to attend the meeting on 4 October due to a university commitment. Ms Hanlon and Ms Roberts were represented by Mr Pasene at the meeting with Te Papa representatives Ms Petersen-Hardy, Andrew Dorrington (General Manager of Venues) and Reynold Henkel (Manager, Venues Operations).

[13] Mr Pasene says that at the meeting:

I raised their grievances. Te Papa could not have been under any misapprehension that we were concerned about their status and about their employment being disadvantaged.

[14] A monthly staff meeting was held for casual staff to meet with Te Papa staff at 4:00 pm immediately following the 3:00 pm meeting. All four Applicants attended but Mr Pasene did not. Ms Hanlon says she re-raised the concerns from the 3:00 pm meeting, along with a concern about pay.

[15] On 13 October 2022, Mr Pool emailed the Te Papa Staffing Manager, advising them that open shifts had been uploaded and then disappeared. Mr Pool emailed again on 16 October 2022 to point out that the roster still was not up on teams and he indicated there were shifts he was going to sign up for in the next week.

[16] On 17 October 2022, Mr Dorrington replied to Mr Pool:

Te Papa is currently reviewing the casual pool and being more selective in its appointments.

[17] Mr Pool emailed Mr Dorrington back approximately half an hour later:

I don't quite understand what you mean, could you please elaborate?  
Some of us still don't have shifts available on our app while others do.

[18] Te Papa did not communicate further with Mr Pool. Mr Pool forwarded Te Papa's response to Ms Hanlon, Ms Roberts and Ms Watt, but they never heard directly from Mr Dorrington or Te Papa.

[19] On 19 October 2022, the Applicants were electronically signed out of the Microsoft Teams app and could not sign back in.

[20] Mr Pasene emailed Ms Petersen-Hardy that day:

Could you please explain why E tū's union members employed as casual waiting staff appear to be excluded from applying for rostered shifts. I am given to believe that members have been "blocked" from accessing the roster on Teams and cannot apply for shifts. This is distressing for them as they rely on rostered shifts to support themselves financially and without the ability to accept shifts staff are being disadvantaged.

When they have queried why, the reply was "Te Papa is currently reviewing the casual pool and being more selective in its appointments." We would appreciate clarification as to what Te Papa means by this statement as we are not aware of any formal process that would impact on members. Please could you follow up on this issue as we would like this resolved, so that E tū members are given the opportunity to apply for shifts.

[21] On 21 October 2022, Mr Pasene emailed Ms Petersen-Hardy:

In regards to the matter raised in my previous email 19/10/22 about clarification regarding exclusion of casual waiting staff specifically E tū members from rostered shifts, has there been any updates?

The reason I raise this with some urgency is that affected members rely on these shifts for their livelihood and we would appreciate clarification as to why the scheduled rosters or opportunities are not available...

[22] Ms Petersen-Hardy responded to Mr Pasene's emails on 21 October 2022:

...Te Papa has been undergoing a process in which it reviews its pool of casual staff and is more selective of which people it chooses to offer shifts to. As these individuals are not employees there is no obligation to consult with them in relation to this process. We do not agree that any individuals have been disadvantaged. Te Papa has never provided any guarantee or indication of ongoing work.

[23] On 22 November 2022, Michael Gilchrist of E tū sent a letter to Te Papa entitled: “Notification of Personal Grievance, Jessica Hanlon”. The first line of the letter stated:

We notify a grievance under Section 103(1)(a) of the Employment Relations Act 2000 for the unjustified dismissal of Jessica Hanlon.

[24] Dr Gilchrist’s evidence is that it is his custom to send a formal letter as the matter was going to mediation and was to be read by an MBIE mediator. Te Papa says the request to attend mediation was not made until 12 January 2023 so at this point, the notification cannot have been intended for the MBIE mediator. Irrespective of the dominant purpose of sending the letter, Dr Gilchrist said he did not intend the letter to raise a personal grievance because it had been raised previously.

[25] Te Papa responded to Dr Gilchrist’s letter on 14 December 2022. It acknowledged:

Your letter raises a personal grievance on behalf of Jessica Hanlon for unjustified dismissal in relation to Te Papa’s decision not to offer Jessica further employment as a casual employee.

[26] However, it also goes on to say:

Any concerns Jessica has in relation to the rostering system prior to the implementation of the Teams system in 2022 were not raised with Te Papa at the relevant time. Te Papa does not consent to any personal grievance being raised outside the 90 day period specified in s 114 of the Employment Relations Act 2000.

[27] On 16 December 2022 Ms Roberts emailed Te Papa asking for reasons why she had been dismissed:

If I’ve been “fired” can I please have the reasons why?

[28] Although Ms Roberts said she did not receive a response, Ms Petersen-Hardy said that she responded to Ms Roberts on 19 December 2022.

[29] There was no further communication between the parties until the new year.

[30] On 23 February 2023, Dr Gilchrist emailed Te Papa stating:

Further to our correspondence late last year, where we raised the issue of our members who were casual staff at Te Papa being blocked from their roster and effectively ‘let go’ and disadvantaged in their employment, I note that with respect to three members – Scott Pool, Kaitlyn Watt and Shontelle [sic] Roberts – this issue is unfortunately unresolved. They were not given access again to the roster and any further work. This is unreasonable and unjustified. This is in addition to Jessica Hanlon, who is in a similar position and whose case we are discussing in mediation with you on Tuesday.

[31] On 28 February 2023 Te Papa responded:

This is the first time you have raised concerns on behalf of these specific employees. Notwithstanding the substantive merits of the claim, Te Papa notes it has been over 90 days since this action occurred. Te Papa does not consent to a personal grievance being raised outside of the 90 day period required by s 114 of the Employment Relations Act 2000.

[32] Correspondence followed between the parties’ legal representatives. The Applicants lodged a Statement of Problem in the Authority on 24 April 2023.

### **Relevant Law**

[33] The Applicants in this matter were all employed as casual employees (Mr Pool on an individual employment agreement, and the other three Applicants under the Collective Agreement between Te Papa and E tū). Although it is outside the scope of this preliminary determination, E tū challenges the Applicants’ status as casual employees and says each of the Applicants had clear and reasonable expectations of ongoing work, while Te Papa’s position is that as casual employees, the Applicants cannot raise personal grievances in respect of not being offered further shifts, as they had no entitlement to ongoing employment.

[34] An employee must raise a personal grievance with their 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.<sup>1</sup> A personal grievance can only be raised outside that time with the employer’s consent, or with the

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<sup>1</sup> Section 114(1) and (2) of the Employment Relations Act 2000.

leave of the Authority which can only be granted in exceptional circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.<sup>2</sup>

[35] The case law supports that the grievance process is designed to be informal and accessible.<sup>3</sup> A grievance may be raised orally or in writing and there is no particular formula of words that must be used. Each communication in a series should be examined as to whether it might raise a grievance, but the totality of communications might also constitute raising a grievance.<sup>4</sup>

[36] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.<sup>5</sup> The employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to resolving the complaint informally and as soon as practicable. It is not necessary for the employee to state how they would like the matter resolved. Raising an employment relationship problem might constitute raising a personal grievance.<sup>6</sup>

[37] Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the grievance out of time. If leave is to be granted, the Authority must be satisfied that the delay was occasioned by exceptional circumstances, which can include – relevant to this matter:

(b) Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[38] The Authority must also consider it just to grant leave.

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<sup>2</sup> Section 114(6) of the Employment Relations Act 2000.

<sup>3</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

<sup>4</sup> Above n3.

<sup>5</sup> *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

<sup>6</sup> *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

## **Submissions**

[39] On behalf of the Applicants, E tū submits the totality of communications – starting with the meeting between two of the Applicants, the union, and Te Papa on 4 October 2022 – constitute the raising of personal grievances. E tū says it was only asked to represent the four Applicants who were the only four members of E tū who were Casual Waiting staff, and they were known by Te Papa to be union members. E tū further submits that Te Papa knows best who, of its employees, is a union member because it administers fee deductions.

[40] E tū says the 4 October 2022 meeting was convened to address concerns and the personal grievances first raised on 4 October 2022 were about the Applicants being disadvantaged by Te Papa’s policy of preferring or giving priority to contractors over its own staff. The outcome of that preference became evident two weeks after the 4 October 2022 meeting, when the fixed rosters expired and the Applicants were not able to access the new roster. E tū referred to that loss of access as “retaliation” by Te Papa.

[41] E tū also says personal grievances were raised in the emails from Mr Pasene on 19 and 21 October 2022. Mr Pasene says this email was “on behalf of our four members”. The Union says Te Papa could not have been under any misapprehension, given these email exchanges, that E tū was representing four members and their grievances were that they had each been disadvantaged in their employment and dismissed by way of a retaliation for raising issues a week or so earlier.

[42] E tū says that the notification of Ms Hanlon’s personal grievance on 22 November in a letter to Te Papa formalised (but did not raise for the first time) that Ms Hanlon had raised a personal grievance and what applied to Ms Hanlon was “equally applicable to the other three applicants”.

[43] E tū puts forward an alternative submission that if the Applicants are out of time to have raised their personal grievances, then the Authority should grant leave for an extension on the basis that it is E tū’s responsibility if the four applicants are outside the 90-day limit. That is, if E tū failed to ensure grievances were raised within the required time, this would constitute exceptional circumstances under the Act and justify the Authority granting leave for the personal grievances to be raised out of time.

[44] Te Papa accepts Ms Hanlon validly raised a personal grievance for unjustifiable dismissal within the 90-day period, but does not accept that she raised an unjustifiable

disadvantage claim within the 90-day period. Te Papa's position is that no personal grievance has been raised by or on behalf of the remaining three Applicants. It does not consent to any personal grievances being raised out of time.

[45] Of the four Applicants, Te Papa was aware that Ms Hanlon, Ms Roberts and Ms Watt were union members because they had completed the necessary paperwork, and their union fees were paid through payroll. However, at the time that some of the Casual Waiting staff were no longer offered shifts on the roster (which Te Papa says was 17 October 2022), Te Papa had 21 casual wait staff, six of whom were E tū union members. Te Papa says it only confirmed Mr Pool was a member of E tū union in March 2023.

[46] Te Papa says that at the 3:00 pm meeting on 4 October 2022 – which was only attended by two of the four applicants - broad statements were made about Ms Hanlon's and Ms Roberts' frustrations and this was not sufficient to raise a grievance. Concerns were expressed in a varied way, and not in a way that raised a collective personal grievance by the four applicants. Mr Dorrington – who was at both meetings - said that attendees asked questions and requested clarifications but he never considered personal grievances were raised at either meeting.

[47] Te Papa concedes that the emails from Mr Pasene on 19 and 20 October 2022 clearly raised concerns, but not in relation to any specific staff members. Te Papa says there was no “collective clarity in the concerns”, and it was not clear to Te Papa who the concerns related to.

[48] Te Papa said it first became aware that personal grievances had allegedly been raised by the four Applicants when it received the email from E tū on 23 February 2023. This was outside the 90-day timeframe.

[49] Te Papa further says that a personal grievance for unjustifiable dismissal could only have been raised after the date the Applicants say they were dismissed, which relates to the date the Applicants were no longer offered shifts on the casual roster (which Te Papa says is 17 October 2022). Te Papa says all four Applicants are out of time to raise grievances for unjustifiable disadvantage.

[50] In terms of the application for leave to be granted for grievances to be raised out of time, Te Papa says no exceptional circumstances appear to exist. There is no evidence that the Applicants made reasonable arrangements made to have the grievance

raised by an agent and the agent has unreasonably failed to ensure the grievance raised.<sup>7</sup> Accordingly, the application for leave must fail.

### **Analysis**

[51] I now apply the law and principles of raising a personal grievance to the facts of this matter.

#### *4 October 2022 meetings*

[52] The Applicants say their grievances were first raised on 4 October 2022. Ms Roberts said her grievance was raised on 4 October by Mr Pasense, and then in communications by Mr Pasene and Dr Gilchrist. Ms Watt says she was aware of what was to be discussed in the 3:00 pm meeting and that Mr Pasene was going to raise grievances on behalf of the Applicants “over primarily our rosters and status”.

[53] I have reviewed the transcripts of both the 3:00pm and 4:00pm meetings on 4 October 2022 and read the affidavits of the attendees.

[54] The purpose of the 3:00pm meeting as noted in the agenda was to raise disparate issues of concern noted by Casual Waiting staff with their union representative in attendance. The 4:00 pm meeting was a monthly staff meeting convened to address general matters of concern with Casual Waiting staff, which E tū did not attend. At the 4:00 pm meeting, all four Applicants raised issues of pay disparity and concerns relating to their treatment by - and compared to - TRN staff. Ms Roberts said that they had brought these matters to the attention of the supervisors previously but ended up going to E tū because “we didn’t feel anybody was listening to us”.

[55] Both parties accept that the words ‘personal grievance’ were not mentioned at either meeting. Although it is not necessary that the exact words be used, in a kōrero where general concerns are being raised and discussed, using the words ‘personal grievance’ would have clarified the Applicants’ position and intentions. It is relevant to my assessment that only two of the four Applicants attended the 3:00 pm meeting and at that time, Mr Pool was not a member of the union and did not attend. Further, the Applicants that did attend the 3:00 pm meeting were represented by their Union representative.

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<sup>7</sup> Section 114(4) and 115(b) of the Employment Relations Act 2000.

[56] Employers and employees have a mutual good faith obligation to be active and constructive in maintaining a productive employment relationship in which the parties are communicative.<sup>8</sup> There was no reason for Te Papa to have believed that personal grievances were being raised in either of the 4 October 2022 meetings. There was nothing in the agenda for the meeting to put Te Papa on notice that grievances may be raised. Although Te Papa acknowledged concerns were raised in the actual meetings, I accept these were generic in nature and principally related to disparity of treatment between Casual Waiting staff and TRN staff.

[57] If the Applicants had intended to raise personal grievances on 4 October 2022 – either prior to or at the meetings - given the context of the meetings, and the fact that not all Applicants attended, they needed to be clear that they were raising grievances and what those grievances related to. E tū says that Te Papa was in a better position than E tū to confirm which of its employees were union members. I accept that as a general proposition, but E tū needed to be clear with Te Papa about who it was representing and who was purporting to raise a personal grievance. I find that no personal grievances for unjustifiable disadvantage were raised by the Applicants at either of the meetings on 4 October 2022.

#### *19 and 21 October 2022 emails*

[58] Mr Pasene's emails of 19 and 21 October 2022 ask for an explanation as to why E tū's union members employed as casual waiting staff have been excluded from applying for shifts. He seeks clarifications. Mr Pasene says that staff are being disadvantaged without the ability to accept shifts.

[59] Te Papa says it was not aware which staff the E tū communications referred to. By this stage, Te Papa was aware of which of its Casual Waiting staff had not been offered the new roster. It must have therefore been aware that Ms Hanlon, Ms Roberts, Ms Watt and Mr Pool were affected by its actions. However, its actions were not limited to those four individuals. Te Papa said at this time it had 21 casual wait staff, six of whom were E tū union members. Five casual staff (union and non-union members) were no longer offered shifts on the roster and I find it would have been reasonable for Te Papa to have some doubt about which Casual Waiting staff were

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<sup>8</sup> Section 4(1A)(b) of the Employment Relations Act 2000.

represented by the union. This is particularly the case in relation to Mr Pool, who had only joined the union on 19 October 2022.

[60] E tū says it does not dispute that at the relevant time a further two employees were members of E tū, but these people were not represented by E tū in meetings or correspondence. There is no evidence before the Authority that E tū clearly communicated to Te Papa about who it was representing.

[61] E tū suggest it was incumbent on Te Papa to clarify who was raising a grievance if it was unsure. I agree that there may have been an obligation on Te Papa if a grievance had clearly been raised, but that was not the case because the emails from Mr Pasene did not state that grievances were being raised, and instead asked for explanations and clarifications. Despite Mr Pool's understanding that "from this time on, E tū was going to "continue taking up our personal grievances", this was not made clear to Te Papa.

[62] The emails of 19 and 21 October 2022 failed to identify the Applicants as the employees alleging the personal grievance, and therefore fail to meet the requirements of s 114(2).<sup>9</sup>

[63] I conclude that personal grievances were not raised in the emails of 19 and 21 October 2022.

#### *22 November 2022*

[64] The personal grievance for unjustifiable dismissal for Ms Hanlon was raised on 22 November 2022 and it was within time, as properly accepted by Te Papa.

[65] There is nothing express or implied in the 22 November 2022 letter that supports personal grievances were raised on behalf of any of the Applicants other than Ms Hanlon. I am therefore unable to accept that the 22 November 2022 letter raised personal grievances for Ms Roberts, Ms Watt or Mr Pool.

#### *23 February 2023 email*

[66] Acknowledging the dispute about the Applicants' status, I find that complaints that could potentially amount to personal grievances for unjustifiable disadvantage were raised by Ms Roberts, Ms Watt and Mr Pool on 23 February 2023 by Dr Gilchrist's

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<sup>9</sup> *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc & Ors v Carter Holt Harvey Limited*, WA 175/05.

email. This email mentioned all four Applicants by name, was specific about the disadvantages they had allegedly suffered, and sought further discussion with Te Papa to resolve the issues. The disadvantages were in respect of being blocked from their roster and effectively “let go”.

[67] However, this was more than 90 days after the date of the relevant action on 17 October 2022, following which the Applicants discovered they were electronically signed out of the Microsoft Teams app and could not sign back in.

*Did the totality of communications raise disadvantage grievances?*

[68] E tū says that the totality of communications within the 90 day period raised personal grievances for disadvantage. This includes the 4 October 2022 meetings and the 19 and 21 October emails from Mr Pasene. It does not include the 23 February 2023 email, which in any case may have been sufficient to raise a personal grievance on its own, had it been within time.

[69] I am not persuaded that the totality of communications has raised personal grievances for unjustifiable disadvantage for Ms Roberts, Ms Watt and Mr Pool within 90 days because it was not clear who had raised concerns, what the concerns were, and that the concerns were grounds for a personal grievance.

[70] When looked at in totality, E tū was not clear with Te Papa about who it was representing and who it was raising concerns on behalf of. At the relevant time, five Casual Waiting staff were not offered further shifts, only three of whom were known by Te Papa to be E tū union members. Mr Pool was not a union member on 4 October and so cannot have been represented by Mr Pasene at the initial meeting.

[71] Another reason that the totality of communications does not constitute raising a grievance is because the concerns raised by two of the Applicants during the meetings on 4 October were substantively different issues to those raised in the emails of 19 and 21 October. On 4 October, the concerns related primarily to disparity of pay and treatment between Te Papa Casual Waiting staff and TRN staff. On 21 October, they related to Casual Waiting staff being shut out of the roster and unable to access further shifts. The communications in the 4 October meetings were consistent with the employer and employees engaging with each other in an active, responsive and communicative way as required by the good faith obligations in s 4 of the Act, but the

19 and 21 October emails were more consistent with concerns being raised about continuity of employment.

[72] Standing back and looking at the communications in totality, I am not persuaded it was clear to Te Papa that personal grievances were being raised, who was raising a personal grievance and what it specifically related to in terms of the grounds for an unjustifiable disadvantage or dismissal claim under the Act.

[73] Ms Hanlon was the exception. She was present at both 4 October 2022 meetings, and raised her unjustifiable dismissal personal grievance formally in writing on 22 November. Te Papa denies that Ms Hanlon raised a disadvantage personal grievance in time. However Ms Hanlon was involved with raising concerns from the beginning of these events, was present in the meetings, and was the direct subject of the personal grievance letter of 22 November 2022. The circumstances of any alleged disadvantage (including what actions are relied on, when they happened, and whether they were raised with Te Papa) are likely to provide context for the unjustifiable dismissal claim that is within time. The Authority may find that a personal grievance is of a type other than that alleged.<sup>10</sup> For all these reasons, I consider it would be unnecessarily limiting to make a finding about whether Ms Hanlon raised a separate disadvantage grievance within time at this point in the investigation.

[74] No personal grievances for unjustifiable disadvantage were raised for Ms Roberts, Ms Watt or Mr Pool until 23 February 2023. That was outside the 90-day period allowed for under the Act.

#### *Conclusion on 90-day issue*

[75] I have found that Ms Roberts, Ms Watt and Mr Pool did not raise personal grievances for unjustifiable disadvantage or unjustifiable dismissal within time. These Applicants failed to comply with both the requirement to raise personal grievances within 90 days under s 114(1) and the requirement to take reasonable steps to make the employer aware of their grievances under s 114(2).

[76] Case law supports that valid raising of a personal grievance should not be construed too strictly or narrowly. The facts at the time need to be considered without the benefit of hindsight, and with a degree of pragmatism. It is helpful to stand back

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<sup>10</sup> Section 122 of the Employment Relations Act 2000.

and ask: did Te Papa know (or should it have known) that a grievance was being raised, and by whom?

[77] E tū's submission that Te Papa could not have been under any misapprehension that grievances had been raised by the four Applicants, is ambitious based on the evidence before the Authority. I am not persuaded that E tū clearly communicated to Te Papa that grievances were being raised, and by whom. Had it been clear that grievances were being raised, it may then have been incumbent on Te Papa to clarify who the grievances related to, but that is not the case on the facts before the Authority.

[78] The raising of a personal grievance is a threshold issue. The parties have asked me to determine it as a preliminary matter, and consequently the substantive merits of the Applicants' claims do not form part of my consideration as to whether a personal grievance has been raised in time. The lack of specificity or clarity about who was raising a grievance and about what, is more than a technicality – it goes to the heart of the statutory framework and requirements for raising a grievance, which is to make the employer aware of the substance of the complaint to enable the employer to resolve the complaint informally and as soon as practicable with its employee. Even though there is obvious merit in similar concerns being dealt with collectively in the interests of pragmatism, there are also potential pitfalls which have manifested in the present case.

[79] A personal grievance is personal to the employer and the employee. The Applicants' circumstances were not identical and the impacts of Te Papa's actions were specific to each Applicant. The fact that Te Papa responded differently to Ms Hanlon by attending mediation with her - despite ongoing disputes as to her status and whether a disadvantage grievance was within time – also supports that she was the only one of the four Applicants Te Papa believed had raised a grievance. I also note the relative ease with which the Applicants could have identified both the names of the union members purporting to raise grievances and the nature of their grievances, as it did in its email of 23 February 2023.

[80] I find that even if personal grievances for disadvantage were raised by Ms Roberts, Ms Watt and Mr Pool on 23 February 2023 through Dr Gilchrist's email, this was outside the 90-day timeframe. Accordingly, the Applicants did not raise personal grievances within time.

## **Exceptional circumstances**

[81] E tū has applied for leave to raise personal grievances outside the 90 day period, because Te Papa does not consent to personal grievances being raised out of time. E tū says that if grievances have been raised out of time, it can only be because E tū has failed to ensure they were raised within time. E tū says that this would constitute exceptional circumstances and it would be just to grant leave taking everything into account including the strength of the Applicants' cases and fairness to Te Papa. E tū submits Te Papa is not prejudiced or disadvantaged in any way if leave is granted.

[82] Under s 114(4) of the Act, the Authority may grant leave if satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (a non-exhaustive list is provided in s 115 of the Act), and if the Authority considers it just to do so.

[83] The Applicants appear to rely on s 115(b) of the Act (or similar) which provides:

Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[84] Te Papa says there is no evidence that any of the Applicants made reasonable arrangements to have a grievance raised on their behalf, and that the agent (in this case, E tū) unreasonably failed to ensure the grievance was raised within the required time.

[85] I agree with Te Papa's submission. The Applicants have not satisfied the first limb of s 115(b), in that there is no evidence they made reasonable arrangements to have Mr Pasene or any organisers from E tū raise grievances on their behalf. Based on the evidence before the Authority, the Applicants (other than Ms Hanlon) understood that E tū was acting on their behalf to achieve a resolution to their concerns, which may have included an understanding that the union was raising personal grievances on their behalf. However, none of the Applicants have deposed that they asked or instructed the union to raise personal grievances on their behalf. There was no evidence before the Authority that the Applicants made reasonable arrangements to have grievances

raised on their behalf by the union and then the union unreasonably failed to ensure grievances were raised in time.

[86] For these reasons, I am not satisfied that any delay in raising grievances was occasioned by exceptional circumstances. Accordingly, I do not have discretion to grant leave for grievances to be raised out of time.

### **Findings**

[87] On the preliminary issue, Ms Hanlon is successful in that her personal grievance for unjustifiable dismissal was raised in time. Ms Hanlon may also have raised a personal grievance for unjustifiable disadvantage in time. However, a finding on whether the disadvantage was raised in time is unnecessary at this stage given the facts for this claim will be relevant context for her unjustifiable dismissal claim and will be investigated as part of that claim.

[88] On the preliminary issue of whether Ms Roberts, Ms Watt and Mr Pool raised personal grievances for unjustifiable disadvantage in time, I find that they did not.

[89] On the preliminary issue of whether Ms Roberts, Ms Watt and Mr Pool raised personal grievances for unjustifiable dismissal in time, I find that they did not.

[90] I am not satisfied the delay in raising personal grievances was occasioned by exceptional circumstances and consequently I do not grant leave for Ms Roberts, Ms Watt and Mr Pool to raise personal grievances out of time.

### **Orders**

[91] Ms Hanlon's personal grievance claim will now be set down for a Case Management Conference to progress the matter towards an Investigation Meeting.

[92] Costs are reserved pending the hearing of the substantive matter, or on earlier application by either party.

Natasha Szeto  
Member of the Employment Relations Authority