

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 122  
3171842

BETWEEN VICKY LEE DEVINE  
Applicant

AND HEART KIDS NEW  
ZEALAND INCORPORATED  
Respondent

Member of Authority: Natasha Szeto

Representatives: Karen Glass and Dora Smith, representatives for the  
Applicant  
Anthony Drake and Rosie Judd, counsel for the  
Respondent

Investigation Meeting: 19 October 2023 in Christchurch

Submissions and information received: 26 October and 10 November 2023 from the Applicants  
1 November and 6 December 2023 from the Respondent

Date: 1 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] Vicky Lee Devine was employed by Heart Kids New Zealand Incorporated (Heart Kids) as a Community Family Support – Taituarā on 5 March 2018.

[2] She was dismissed on 7 December 2021 because she had not been vaccinated against COVID-19 as required by Heart Kids' internal COVID-19 vaccination policy.

[3] Ms Devine says she raised personal grievances with her employer on 21 October 2021, 9 November 2021, 22 November 2021 and 2 December 2021 before lodging a Statement of Problem with the Authority on 23 May 2022. If personal grievances were

not raised in time, Ms Devine says this was due to her representative from the PSA union.

[4] Heart Kids says no personal grievances were raised with it in time and in accordance with the Employment Relations Act 2000 (the Act), and it does not consent to personal grievances being raised out of time.

[5] This determination is about whether Ms Devine raised personal grievances in time, and if not, whether the Authority should grant leave for grievances to be raised out of time on the basis that exceptional circumstances occasioned the delay. It also addresses a claim in relation to holiday pay.

### **Procedural History**

[6] An investigation meeting was held with the parties on 19 October 2023 in Christchurch. The Authority received statements from Ms Devine and for Heart Kids, from Chief Executive Ruth Gorinksi, and Head of Operations Denise Kitto. All witnesses attended the investigation meeting and answered questions from me under oath or affirmation.

[7] On 26 October 2023, after the investigation meeting, Ms Devine applied for leave under s 144 of the Act to raise a personal grievance out of time on the basis of exceptional circumstances under s 115(b) of the Act.

[8] Ms Devine also claimed a breach of her employment contract pursuant to sections 133 – 140 and 162 of the Act.<sup>1</sup>

[9] As permitted by s 174E of 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.

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<sup>1</sup> Application for Leave under s144, 26 October 2023.

## **The Issues**

- [10] The issues to be investigated and determined are:
- (a) Whether Ms Devine raised a personal grievance in time for unjustifiable disadvantage by way of discrimination, coercion and/or unjustifiable dismissal (in reliance on the 21 October 2021 email, and 22 November 2021 and 2 December 2021 meetings); and
  - (b) If not, given the Respondent does not consent to a personal grievance being raised out of time, whether the Authority should grant leave for a personal grievance to be raised out of time due to exceptional circumstances.
  - (c) If Ms Devine has a personal grievance, whether she was unjustifiably disadvantaged by Heart Kids' actions, whether she was unjustifiably dismissed, whether there was discrimination and whether there was coercion for a prohibited health and safety reason.
  - (d) Whether Ms Devine is owed wage arrears including accrued annual leave payments or holiday pay.

[11] Ms Devine confirmed at the investigation meeting that she was withdrawing her claim of a breach of good faith on the basis of a privacy breach (relating to a 21 November 2021 blokarting event).

[12] A number of remedies were sought in the original Statement of Problem which the Authority does not have jurisdiction to grant. Ms Devine confirmed at the investigation meeting that the remedies she is seeking are compensation under s 123(1)(c)(i) of the Act, and for her annual holiday pay claim to be resolved.

## **Background Facts**

[13] Ms Devine was employed by Heart Kids as a Family Support Worker on 5 March 2018.

[14] On 23 September 2021, Heart Kids shared its proposed COVID-19 Vaccination Policy with staff. On 12 October 2021, it followed up with an email to all staff saying that it was still awaiting confirmation of coverage of the policy. Then five days later

on 17 October 2021, Heart Kids requested confirmation of vaccination status from staff (including the Family Support Team) by 21 October 2021.

[15] On 21 October 2021 Ms Devine emailed Dr Gorinski confirming her non-vaccinated status and giving reasons.

[16] On 29 October 2021 Heart Kids confirmed that it needed to implement a mandatory vaccination requirement for Heart Kids workers under its COVID-19 Vaccination Policy. The policy had an effective date of 5 November 2021, and required all existing Heart Kids workers to have received their first dose of a COVID-19 vaccine by 1 December 2021 and their second dose by 1 January 2022.

[17] On 1 November 2021 Ms Devine received a letter from Heart Kids confirming an increase to her hours from 10 to 15 hours per week, and a 7% increase to her salary. The same day, Ms Devine received an email from Heart Kids confirming that it would be introducing a mandatory COVID-19 Vaccination Policy and that the policy would provide for termination of employment for any Heart Kids employees who have not provided written confirmation by 15 December 2021 that they have received the first dose of the COVID-19 vaccine.

[18] On 8 November 2021 Ms Devine was invited to a meeting to discuss her COVID-19 vaccination status. A day later on 9 November 2021 Ms Devine says she made her Line Manager aware of a health and safety incident report she had filled in, alleging “personal workplace harm was caused by participants expressing their personal vaccination views in a polarizing discriminatory way”. Ms Devine completed this form, but did not file it with Heart Kids.

[19] On 16 November 2021, Ms Devine and Tracie Palmer from the PSA, met with Dr Gorinski and Head of Operations Denise Kitto to clarify the process moving forward in relation to Heart Kids’ mandated policy for vaccination. The next day, Ms Devine was invited to a further meeting to discuss any change to her vaccination status, options for redeployment (if any) and any grounds that Ms Devine may have for a medical exemption to vaccination.

[20] The same parties met on 22 November 2021. The purpose of this further meeting was to check if there was any change to Ms Devine's vaccination status and discuss the outcomes of consideration in relation to the potential re-deployment that Ms Devine had submitted. Heart Kids sent Ms Devine a letter the next day setting out the discussion about the redeployment options, and inviting Ms Devine to a further meeting to confirm her vaccination status.

[21] The parties met again on 2 December 2021 and Ms Devine confirmed her unvaccinated status. She was stood down effective immediately. Heart Kids advised her that a preliminary decision would be made the following week.

[22] On 6 December 2021 the parties met over Zoom and Heart Kids asked Ms Devine for confirmation of her vaccination status. Ms Devine confirmed she was not vaccinated. Ms Devine was advised that she remained in breach of Heart Kids Vaccination Policy, and a preliminary decision had been made to terminate her employment. The same day, Ms Devine was given a letter: Preliminary Decision – Termination of Employment.

[23] The parties met one last time over Zoom on 7 December 2021. Ms Devine again confirmed her unvaccinated status. Heart Kids advised Ms Devine that her employment was terminated effective immediately, four weeks' salary would be paid in lieu of notice, and that any annual leave owing would be paid out in full in Ms Devine's final pay.

[24] Ms Devine lodged a Statement of Problem with the Authority on 23 May 2022, dated 6 May 2022.

### **Whether a personal grievance was raised in time - The legal framework**

#### *Section 114 of the Act*

[25] 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>2</sup> A personal

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

grievance can only be raised outside that time with the employer's consent, or with the 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>3</sup>

[26] The case law supports that the grievance process is designed to be informal and accessible.<sup>4</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>5</sup>

[27] 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>6</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>7</sup>

[28] 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>

[29] It is settled law that a grievance cannot be raised in anticipation of an action before its occurrence. Consequently the only communications between the parties that could potentially have raised a personal grievance for unjustifiable dismissal were those made on or after 7 December 2021.

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<sup>3</sup> Section 114(6) of the Employment Relations Act 2000.

<sup>4</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

<sup>5</sup> Above n4.

<sup>6</sup> *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

<sup>7</sup> *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

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

## **Submissions**

[30] Ms Devine says that Heart Kids was aware from the email of 21 October 2021, and meetings on 22 November and 2 December 2021 of her concerns around the particular vaccine available at the time, and these concerns ultimately led to her dismissal. She says that because Heart Kids was aware of her concerns, it was aware of her personal grievances.

[31] In relation to the unjustifiable dismissal claim, Ms Devine says as she was dismissed on 7 December 2021 with four weeks' notice, her last day of employment was 7 January 2022, and therefore she had until 4 April 2022 to raise a grievance.<sup>9</sup>

[32] Heart Kids says that no personal grievance was raised in any of the correspondence or meetings referred to. Dr Gorinski on behalf of Heart Kids said she understood Ms Devine's position that she could not be vaccinated and that was the problem – which was not an employment problem or grievance. Dr Gorinski said that if she had had a “sniff” of a personal grievance at the time, the parties would be in a different position. Heart Kids says the first time that personal grievances were raised with the organisation was on 24 May 2022 when it was served with Ms Devine's Statement of Problem, and this is out of time. It does not consent to grievances being raised out of time.

## **Analysis**

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

[34] Ms Devine relies on the following communications to say she raised personal grievances in time:

- (a) 21 October 2021 email
- (b) 9 November 2021 health and safety incident report
- (c) 22 November 2021 meeting

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<sup>9</sup> The date four weeks from 7 December 2021 was 4 January 2022, not 7 January 2022, but the difference between 4 and 7 January 2022 is not material to this determination. 90 days from 4 January 2022 is 4 April 2022.

(d) 2 December 2021 meeting.

*21 October 2021 email*

[35] On 21 October, Ms Devine says the issue she wanted to raise with Heart Kids was that she could not be vaccinated for health reasons. She did not say that she was not going to be vaccinated but she saw her actions as being proactive and in good faith, in letting Heart Kids know what the problem was, and why she could not be vaccinated.

[36] Dr Gorinski says that the 21 October email set out the reasons Ms Devine would not be vaccinated. Heart Kids did not see any connection to a personal grievance. Further, from Heart Kids' perspective, the 21 October email did not suggest any animosity by Ms Devine towards Heart Kids, but simply reiterated Ms Devine's position about vaccination.

[37] I have read the email in full. I conclude it has not raised personal grievances for a number of reasons. Firstly, it does not mention the words 'personal grievance'. That is not fatal to the claim, but having read the email, Ms Devine is seeking to advise her employer of her vaccination status and her reasons. I agree with Heart Kids' submission that it does not indicate that Ms Devine was unhappy with Heart Kids in any way. I conclude the 21 October 2021 email was consistent with the employer and employee engaging with each other in an active, responsive and communicative way as required by the good faith obligations in s 4 of the Act.

[38] No personal grievance for disadvantage was raised in the 21 October 2021 email.

*9 November 2021 health and safety incident report*

[39] On 9 November 2021 Ms Devine says she gave a health and safety incident report to her Team Leader alleging workplace bullying. Ms Devine says although she filed the report with her Team Leader, the Team Leader did not lodge the form as Ms Devine was in fear of the harassment escalating.

[40] Ms Devine stated in the form:

Personal workplace harm was caused by participants expressing their personal vaccination views in a polarizing discriminatory way. I did not take part in the discussion but felt emotionally harmed by the hurtful, threatening, disrespectful, and unprofessional way members were voicing their personal opinions...

...6/05/2022 I completed this Health and safety form but I did not file it in the end as I thought it would only make the hostile workplace relationships worse.

[41] Heart Kids says this allegation – relating to a hostile work culture – to the extent that this matter is justiciable, is best categorised as an unjustified disadvantage claim. I agree. To succeed in such a claim, Ms Devine must point to an action by the employer that resulted in a disadvantage to her. The employer must then show that its actions, and its process, were what a fair and reasonable employer could have done in all the circumstances.

[42] I find that based on the information before the Authority, the hostile work culture claim is not based on any alleged action by Heart Kids that resulted in a disadvantage to Ms Devine. There is no evidence that Heart Kids encouraged, prompted or even condoned any negative comments in relation to individuals' vaccination status or that comments allegedly made by other staff were directed at Ms Devine.

[43] However, even if there had been an action by Heart Kids, the 9 November 2021 incident has not been raised as a personal grievance within 90 days. The evidence before the Authority was that Ms Devine showed the form to her Team Leader, but it was Ms Devine's decision (or a mutual decision from them both) to "hold" the form and not file it with the organisation. That decision seems to have been recorded and confirmed by the insertion of the note on the form of 6 May 2022, approximately five months after Ms Devine's dismissal. Because the incident form was not filed and escalated within the organisation, at Ms Devine's instruction (or at least with her knowledge and consent) I am not persuaded that Heart Kids knew about the incident until after the Statement of Problem had been lodged, which was more than 90 days after the alleged action by Heart Kids.

[44] Further, the purpose of the incident report was to bring health and safety issues to the attention of the employer for the purpose of investigation. It was not for raising

a personal grievance. The report does not state that Ms Devine is raising a personal grievance. Ms Devine cannot now seek to rely on an incomplete and unfiled health and safety incident report to say that she raised a personal grievance with her employer.

*22 November 2021*

[45] On 22 November 2021, Ms Devine and Ms Palmer of the PSA (as “Support”), met with Dr Gorinski and Ms Kitto for Heart Kids. The stated purpose of the meeting as recorded in a File Note written by Ms Kitto (the File Note) was to:

Check if there was any change to Vicky’s vaccination status, and discuss the outcomes of consideration in relation to the potential re-deployment Vicky had submitted.

[46] Ms Devine said she had earlier made it very clear to Heart Kids that she could not be vaccinated and was unhappy about it.

[47] I have read the File Note in full as well as a follow up letter from Heart Kids to Ms Devine of 23 November 2021 recording the outcome of the meeting and the meeting notes of Ms Palmer attached to her affidavit. The File Note was accepted by both parties as an accurate record of the meeting. I conclude that personal grievances were not raised in the 22 November 2021 meeting for a number of reasons.

[48] Firstly, there is no mention of the words ‘personal grievance’. Again, that is not fatal to the claim, but having read the File Note and meeting notes, I conclude the meeting was consistent with the employer and employee engaging with each other in an active, responsive and communicative way as required by the good faith obligations in s 4 of the Act. Had a grievance or complaint been raised, this would likely have been recorded in the File Note and meeting notes because it would have been significant to both parties. Ms Devine was supported at this meeting by the PSA.

[49] Secondly, the purpose of the meeting was clearly stated: there was discussion about the introduction of an alternative vaccine, and about options for remote re-deployment based on an outline that Ms Devine had earlier provided to Heart Kids. While Ms Devine clearly did not agree with Heart Kids’ assessment of her role and potential “workarounds”, she did not raise a complaint or grievance at this time. The

meeting concluded with Ms Devine saying that she wanted to consider what had been discussed and Heart Kids reminded her of the availability of the Employee Assistance Programme.

[50] Thirdly, neither Ms Devine nor Ms Palmer raised any concerns about the Policy or its application by Heart Kids to Ms Devine.

[51] For these reasons, I find that no personal grievance for disadvantage was raised in the 22 November 2021 meeting.

#### *2 December 2021*

[52] On 2 December 2021 there was a further meeting between Ms Devine, Ms Palmer, Dr Gorinski and Ms Kitto (recorded in a File Note). Heart Kids followed up with a letter to Ms Devine on 2 December 2021 entitled “Stand down notification”.

[53] I have read the File Note in full as well as the meeting notes of Ms Palmer attached to her affidavit. The File Note was accepted by both parties as an accurate record of the meeting. At this meeting, Dr Gorinski advised Ms Devine to confirm her vaccination status. As Ms Devine remained unvaccinated, she was advised that she was in breach of Heart Kids mandatory vaccination policy, and she would be stood down “effective immediately”.

[54] The parties discussed forwarding Ms Devine’s personal contact details and a handover of Ms Devine’s cases. They also discussed progress to the preliminary decision on Monday 6 December, the likely outcome of which would be termination.

[55] I conclude personal grievances were not raised in this meeting for a number of reasons.

[56] Firstly, there is no mention of the words ‘personal grievance’. Again, that is not fatal to the claim, but having read the File Note and meeting notes there is no evidence to suggest that Ms Devine raised any grievance or complaint in this meeting. Had a grievance or complaint been raised, this would likely have been recorded in the File Note and the meeting notes, because it would have been significant to both parties. Again, Ms Devine was supported at this meeting by the PSA.

[57] Secondly, neither Ms Devine nor Ms Palmer raised any concerns about Ms Devine being in breach of Heart Kids' mandatory vaccination policy or the progress of the matter towards Ms Devine's likely termination.

[58] For these reasons, I find that no personal grievance for disadvantage was raised in the 2 December 2021 meeting.

*23 May 2022*

[59] The parties acknowledge that the Statement of Problem (dated 6 May 2022, but not lodged until 23 May 2022 with the Authority) did specify the grievances alleged. These included unjustifiable dismissal, unwillingness to work in good faith, hostile work culture, breach of personal information, personal injury due to loss of employment.

[60] Heart Kids says it received the Statement of Problem on 24 May 2022.

[61] Irrespective of whether Ms Devine's dismissal was on 7 December 2021, or 7 January 2022 (discussed further below) the Statement of Problem was lodged outside the 90-day period allowed for an employee to raise a personal grievance with their employer.

*Totality*

[62] I am not persuaded the totality of the communications has raised personal grievances for unjustifiable disadvantage. For the sake of completeness, I record that I have also considered the meeting of 16 November 2021 as part of the totality of communications – despite it not being specifically noted by the Applicant as a communication raising a grievance. The content of the meeting was recorded in a File Note by Heart Kids, and meeting notes provided by Ms Palmer. This communication did not raise a personal grievance for similar reasons to those given in relation to other communications.

[63] In relation to the specific communications set out above, I have found that personal grievances were not raised in accordance with s 114 of the Act.

[64] Considering the communications in totality does not assist Ms Devine in her claim because the nature of the communications concerned an employer and employee actively communicating about their employment relationship. The communications did not collectively raise personal grievances in accordance with s 114 of the Act.

*Conclusion on 90-day issue*

[65] I have found Ms Devine did not raise personal grievances for unjustifiable disadvantage, coercion, or unjustifiable dismissal within 90 days under s 114(1) of the Act, in that she did not take reasonable steps to make her employer Heart Kids aware of any personal grievances within 90 days under s 114(2).

[66] Ms Devine acknowledged that she was out of time in an email she sent to the PSA on 21 March 2022 where she states: “I know I am outside the 90 days to put in a PG”.

[67] 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 and ask: did Heart Kids know (or should it have known) that a grievance was being raised?

[68] The raising of a personal grievance is a threshold issue. The substantive merits of Ms Devine’s claims do not form part of my considerations. A lack of clarity that she has raised a grievance and lack of specificity as to what the grievance was about, is more than a mere 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 so it can resolve the complaint informally and as soon as practicable with its employee.

[69] Ms Devine’s case is distinguishable from *Milton v Vodafone NZ Ltd*<sup>10</sup> on which she seeks to rely. That is because in *Milton* the Authority found that the Applicant told his employer he thought the dismissal was wrong, and replied affirmatively to his employer’s question as to whether he had a personal grievance. In this case, the written

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<sup>10</sup> ERA Auckland [2004] AA334/04, 13 October 2004.

confirmation of dismissal was given to Ms Devine on 7 December 2021 and she did not raise a personal grievance with Heart Kids concerning her dismissal until she lodged her Statement of Problem in the Authority on 23 May 2022.

[70] In terms of the disadvantage claim relating to workplace bullying or harassment (or personal workplace harm as Ms Devine categorised it in the health and safety incident report), Ms Devine never filed the report on which she now seeks to rely. She did not bring any issues or concerns to Heart Kids' attention. Even if she had, I am not persuaded that filing the health and safety report would have been sufficient to raise a personal grievance given the purpose of an incident report is to potentially initiate a health and safety investigation.

[71] Ms Devine also says she was within time to raise a personal grievance because she had "initiated the appointment of PSA to try and have her grievances heard" within 90 days of 7 January 2022. Ms Devine's contact with the PSA on 21 March 2022 was not a matter that Heart Kids was or should have been aware of. It therefore cannot be relied on as raising a personal grievance with the employer.

[72] Stepping back to consider all the circumstances of this matter, I conclude that Ms Devine did not raise any personal grievance with Heart Kids in time and in accordance with the Act.

### **Exceptional Circumstances**

[73] On 26 October 2023, Ms Devine applied for leave under s 144 of the Act to raise a personal grievance out of time on the basis of exceptional circumstances under s 115(b) of the Act.

[74] Ms Devine says that she made reasonable arrangements to have her grievances raised on her behalf by her agent – Ms Palmer of the PSA – and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[75] At the investigation meeting, I asked Ms Devine to confirm whether she had asked Ms Palmer to raise a personal grievance for her. Ms Devine said that there were processes happening throughout New Zealand, and Ms Palmer was "au fait" with that,

having worked with the District Health Boards. Ms Devine hoped that she would be considered an exceptional case and accommodations would have been made for her.

[76] In determining whether Ms Devine has satisfied the Authority that exceptional circumstances exist, it is helpful to set out the timeline of events that followed Ms Devine's dismissal.

[77] Ms Devine's employment was terminated on 7 December 2021 and she was advised that her final pay would be paid the week of 6 December 2021.

[78] The letter Heart Kids sent to Ms Devine states:

Therefore your last day of employment with us will be today, 7 December 2021.

[79] Ms Devine submits that as she was dismissed on 7 December 2021 with four weeks' notice, her last day of employment was 7 January 2022, and therefore she had until 4 April 2022 to raise a grievance.

[80] On 21 March 2022, Ms Devine says she consulted with and formally instructed the PSA Union representative to raise a personal grievance. The email to the PSA states:

I am still upset at the way I was dismissed from Heart Kids. Enlight [sic] of the High Court quashing the unlawful mandating for police and defence staff. I feel that this is applicable to my case with Heart Kids NZ.

I am looking at putting in a PG to Heartkids for unfair dismissal and having a hostile work environment. I know I am outside the 90 days to put in a PG but this is an exceptional time and the law allows for PG to be filed outside the 90 day period if there are exceptional circumstances.

I am hoping that you are still working for the PSA and will still represent me in this matter.

Have you had many workers approaching PSA about this and is the PSA looking at taking a group action at any point.

I look forward to your response.

[81] Thirty-two minutes later, Ms Palmer responded:

The advice we have is that this case would not change your circumstance...

Unfortunately on the basis of this advice, this is not a PG we would look at pursuing. I'm sorry this is not the answer you were looking for.

Let me know if you would like a phone call, I could call you tomorrow.

[82] Ms Devine lodged a Statement of Problem with the Authority on 23 May 2022 (dated 6 May 2022), which was served on Heart Kids on 24 May 2022.

[83] On 15 June 2022, Ms Palmer emailed Ms Devine:

I have discussed with the relevant manager and advise that the PSA will not be assisting you with your application to the Employment Relations Authority, or with the mediation that has been directed. You filed the legal proceedings without involving or discussing with the union. The PSA would normally assess any case to ensure it has sufficient prospects of success before filing legal proceedings and potentially incurring costs, and it is our view that your case unfortunately does not meet this threshold.

[84] For the Authority's proceedings, the PSA filed an affidavit of Ms Palmer. Relevantly, Ms Palmer said:

I sought the advice of the PSA officials who advised against raising a personal grievance and informed Vicky of this on 21 March 2022.

[85] On the information before the Authority, I find that Ms Devine's last day of employment with Heart Kids was 7 December 2021. This was made clear in her termination letter. Ms Devine was paid four weeks salary in lieu of notice. If Ms Devine's employment had ended on 7 January 2022 as she now claims, her contact with the PSA would have been within 90 days of her dismissal. However, when Ms Devine contacted the PSA on 21 March 2022, she acknowledged that she was already outside the 90-day time period.

[86] Even if Ms Devine's dismissal date had been 7 January 2022 as she now claims, and her contact with the PSA was within 90 days of her dismissal, the correspondence set out above does not support that Ms Devine formally instructed the PSA Union representative to raise a personal grievance for her. I am therefore not persuaded that Ms Devine made reasonable arrangements with the PSA to have a grievance raised with Heart Kids on her behalf. This is because:

- (a) It is questionable whether Ms Palmer was Ms Devine's agent at the relevant time. In her email, Ms Devine says that she is "*hoping that you are still working for the PSA and will still represent me in this matter*". After Ms Palmer declined to raise a grievance on Ms Devine's behalf on 21 March 2022, Ms Devine cannot sensibly have been under any understanding that Ms Palmer was representing her or acting as her agent. Ms Palmer notified Ms Devine of this within an hour of Ms Devine raising it with her – stating: "*this is not a PG we would look at pursuing*". There was no delay on the part of Ms Palmer.
- (b) The tenor of the email communication is that Ms Devine was seeking advice about PSA's intentions. Ms Devine uses the specific words "*I am looking at putting in a PG to Heartkids*". This does not amount to a direction, instruction or even request to Ms Palmer or the PSA to raise a personal grievance on her behalf. When advised that PSA would not be pursuing a grievance on her behalf, Ms Devine took no further steps until 23 May 2022.

[87] I find that Ms Devine did not make reasonable arrangements to have a personal grievance raised on her behalf within the required time. When Ms Devine contacted the PSA on 21 March 2022, she was already outside 90 days, which - based on her dismissal date of 7 December 2021 - would have been 7 March 2022. Further, Ms Palmer and the PSA were not Ms Devine's agents at this time because they had clearly declined their involvement and communicated that to Ms Devine without delay. Related to this, there was no unreasonable failure by Ms Palmer and the PSA to ensure that grievances were raised within the required time.

[88] Ms Devine has provided an affidavit stating that she was not familiar with the Act nor did she have "the necessary language or understanding needed to advocate [her] position". I do not accept that Ms Devine was unaware of her employment rights including statutory timeframes. Ms Devine was clearly aware of a 90-day time limit, as she referred to it and acknowledged that she was out of time in her 21 March 2022 correspondence with Ms Palmer. She also then lodged the Statement of Problem herself on 23 May 2022, without the assistance of the PSA. Ms Devine attributes the delay

between 21 March 2022 and 23 May 2022 to being focused on the “improper pay issues” and financial struggles over this time. While this may be a reason for the delay, it does not amount to an exceptional circumstance.

[89] For all of the reasons given above, I am not satisfied that the delay in raising personal grievances was occasioned by exceptional circumstances. Because the first part of the test in s 114(4) has not been met, it is unnecessary for me to consider whether it would be just to grant leave.

### **Discrimination**

[90] Ms Devine raised a claim of discrimination in her amended Statement of Problem as part of the unjustifiable disadvantage claim. In her closing submissions, Ms Devine made a reference to discrimination under the heading of “unjustified dismissal”. The claim of discrimination was not particularised and was not advanced during the investigation meeting. Based on the information before the Authority, there is no legal or evidential basis for the claim, and to the extent that a discrimination claim was alleged to be a personal grievance under s 103 of the Act, it would also be out of time and not in accordance with s 114 of the Act. I find the claim was misconceived and cannot succeed.

### **Breach of Employment Contract**

[91] In her Application for Leave, Ms Devine claimed a breach of her Employment Contract pursuant to sections 133 – 140 and 162 of the Act.<sup>11</sup>

[92] The basis for this claim is unclear. Sections 133 to 140 of the Act relate to penalties and s 162 of the Act is the application of law relating to contracts. At the investigation meeting, Ms Devine confirmed that the only remedies sought were compensation and wage arrears in respect of holiday pay. I conclude that this claim is unclear, misconceived at law, and unsubstantiated on the facts. It cannot succeed.

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<sup>11</sup> Application for Leave under s144, 26 October 2023.

## **Annual Leave Arrears**

[93] Ms Devine says there was a breach of the Holidays Act 2003 and KiwiSaver Act 2006 as she was entitled to holiday pay on a pro rata basis until 7 January 2022, which was cut short.

[94] Ms Devine also says that when her employment was terminated, she had 19 days of accrued annual leave as shown on her payslip from 5 December 2021. She says that she was paid for 8 of those days, leaving a shortfall of 11 days. She does not understand why her accrued leave reduced from 19 days to nine days in her final payslip. Ms Devine has not quantified her claims in terms of unpaid holiday pay.

[95] Heart Kids says Ms Devine was paid correctly. Ms Kitto gave evidence that due to a payroll error, Ms Devine was accruing more leave than she ought to have been given her work pattern and this was not picked up until the end of Ms Devine's employment.

[96] Heart Kids has provided a "Final Holiday Pay" record from MYOB as well as a final pay record.<sup>12</sup> The final pay record notes that holiday pay has been calculated based on Ms Devine's annual salary to 3<sup>rd</sup> December, salary for Tuesday 7<sup>th</sup> December, and 4 weeks' notice. Based on this evidence, it is clear that Ms Devine's four week notice period has been accounted for in her final holiday pay.

[97] Heart Kids' payroll records show "Holiday Pay Owing" recorded in terms of days and not hours. From the beginning of her employment in 2018 when Ms Devine was working only two days per week, her annual leave was accruing at a rate of 0.667 days per month.<sup>13</sup> It should have been 0.417 days per month. When Ms Devine moved to working 15 hours a week on 1 November 2021, her leave should have accrued at 0.625 days per month.<sup>14</sup>

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<sup>12</sup> Page 107 of the Common Bundle.

<sup>13</sup> Above n12.

<sup>14</sup> Paragraph 5.2 of Ms Devine's Individual Employment Agreement states that the employee is entitled to four weeks annual leave per annum (pro rata). A full-time employee would accrue leave at a rate of 1.667 days per month (20 days per year). Ms Devine worked 10 hours (0.25 of full time 40 hours), she was entitled to 5 days of annual leave per year (being 0.25 x 20) and her annual leave should have accrued at a rate of 0.417 days per month (5 days / 12 months). When Ms Devine worked 15 hours per week (0.375 of full time 40 hours), she was entitled to 7.5 days

[98] I am satisfied that Heart Kids' final records were correct and that Ms Devine's accrued leave balance was actually 9.67 days and not the 19 days that had been represented on previous payslips. It is regrettable that this error was not identified until Ms Devine's final pay and she had expected her final payment to be more significant. However, I find that she has been paid her statutory entitlements and there are no wage arrears owing to her on the basis of her claim of unpaid annual holiday pay.

[99] Ms Devine's payslips do not disclose that she made contributions to KiwiSaver. A claim to wage arrears in respect of KiwiSaver has not been quantified or substantiated, and I find this claim must fail.

### **Findings**

[100] Ms Devine failed to raise a personal grievance with Heart Kids within the period of 90 days of an action alleged to give rise to a grievance. She has not raised a personal grievance in accordance with s 114 of the Act and Heart Kids does not consent to any personal grievance being raised out of time.

[101] The Authority is not satisfied the delay in raising a personal grievance was occasioned by exceptional circumstances and consequently I do not grant leave for Ms Devine to raise a personal grievance out of time.

[102] The discrimination and breach of contract claims cannot succeed.

[103] Ms Devine is not owed any arrears including holiday pay or accrued annual leave payments.

### **Costs**

[104] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act. As the successful party, Heart Kids is entitled to an award of costs.

[105] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a

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of annual leave per year (0.375 x 20) and her annual leave should have accrued at a rate of 0.625 days per month (7.5 days / 12 months).

memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>15</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>15</sup> Practice Direction of the Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>