IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 173
3241679

	BETWEEN	PAUL SOUTHAM Applicant
	AND	TE WHATU ORA – HEALTH NEW ZEALAND Respondent

Member of Authority:	Rachel Larmer
Representatives:	Keziah Singleton, counsel for the Applicant Anthony Russell, counsel for the Respondent
Investigation:	On the papers
Submissions and other information received:	22 December 2023, 2 February, 1 and 8 March 2024 from the Applicant 26 January, 22 February and 6 March 2024 from the Respondent
Determination:	26 March 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This preliminary determination addresses disputed jurisdictional issues.

[2] It determines whether or not the Authority has jurisdiction to investigate the claims the applicant, Mr Paul Southam, made in the Statement of Problem he lodged with the Authority on 24 July 2023.

[3] The respondent, Te Whatu Ora – Health New Zealand, said there was no jurisdiction, while Mr Southam maintained the Authority had jurisdiction.

[4] Mr Southam is employed by Te Whatu Ora - Waitemata as a Mental Health Assistant. The respondent was previously known as the Waitemata District Health

Board (WDHB). It has therefore been referred to in this determination by that name for specific events that predated its name change to Te Whatu Ora.

Record of Settlement

[5] On 15 February 2022 the parties attended mediation and subsequently entered into a mediated settlement agreement, when the respondent was still known as the WDHB. The mediated settlement agreement (Record of Settlement) was signed by a mediator from Mediation Services under s 149 of the Employment Relations Act 2000 (the Act).

[6] In the lead up to the mediation held on 15 February 2022, Mr Southam had been working as a "casual employee" under the Auckland Region District Health Boards and PSA Mental Health and Public Health Nursing Multi-Employer Collective Agreement dated 15 December 2020 – 15 March 2023 (the Collective Agreement).

[7] At the time mediation occurred in February 2022, Mr Southam believed that he had become a permanent employee, as defined in clause 3 of the Collective Agreement (CA). The Record of Settlement resolved that employment relationship problem.

[8] Mr Southam signed the Record of Settlement on 15 February 2022, WDHB signed it on 18 February 2022 and the mediator from Mediation Services signed it on 14 March 2022.

[9] The material clauses in the Record of Settlement stated:

> Clause 2 - Waitemata District Health Board offers Paul Southam permanent full time employment and the terms of this to be discussed with Paul Southam and his manager as soon as possible.
>
> Clause 4 - This is a settlement of Paul Southam's status of employment from casual to permanent full time.

Claims made by Mr Southam in his SoP

[10] Mr Southam's Statement of Problem (SoP) recorded the problem he wanted the Authority to resolve as follows:

> 1.1 A dispute regarding the applicant's employment status;
> 1.2 Personal grievances for unjustified disadvantage; and
> 1.3 A claim for penalty for a breach of good faith.

[11] The SoP did not set out what alleged breach(es) of good faith Mr Southam relied on for his penalty claim. Nor did it identify the date on which the penalty cause of action first became known to him or when it ought reasonably to have become known to him.

[12] Mr Southam's SoP was lodged on 24 July 2023. That meant his penalty claim could only have potentially covered a breach of good faith that arose in the 12 months preceding that. Section 135(5) of the Employment Relations Act 2000 (the Act) requires a penalty action (for the purposes of this matter) within 12 months of it becoming known or from when it ought to have become known.

[13] No information was provided in the SoP to explain why Mr Southam believed his penalty claim met the requirements of s 4A of the Act, which sets a high bar for a penalty to be imposed for a breach of good faith.

The Respondent's position

[14] The respondent said the Authority lacked jurisdiction to investigate the problems Mr Southam had identified. It also denied all of his claims.

[15] Te Whatu Ora said that the only way a Record of Settlement could be brought before the Authority was for enforcement purposes, pursuant to s 149(3)(b) of the Act, meaning Mr Southam could not to commence a new action for the same claim that had already been settled.

[16] The respondent said there had been no breach of the Record of Settlement, nor was there any claim for enforcement of its terms by Mr Southam before the Authority.

[17] The respondent said Mr Southam's employment status had been the subject of settlement in the Record of Settlement, so that his claims involving that issue were subject to "res judicata", which meant the matter had already been adjudicated.

[18] The respondent further said that no personal grievance claims for unjustified disadvantage had been properly raised with it, or had been raised within 90 days as required by s 114(1) of the Act. It did not consent to Mr Southam raising any personal grievance claims out of time.

[19] The respondent sought indemnity costs in its Statement in Reply (SiR) on the basis Mr Southam's claim was an abuse of the Authority's procedure, because he had

attempted to bring a new action relating to the problem that had been settled in the Record of Settlement.

The Authority's investigation

[20] A lengthy Case Management Conference (CMC) was held with the parties on 27 November 2023. Considerable time was taken attempting to get clear on what specific claims Mr Southam wanted determined, and on how the various preliminary issues should be dealt with.

[21] As a result of the CMC, Mr Southam agreed to lodge an application for leave to be granted under s 114(4) of the Act to raise what was described as his "June 2022 unjustified disadvantage personal grievance" claim out of time.

[22] Mr Southam relied on s 115(b) of the Act, with the exceptional circumstance being that he had made reasonable arrangements with his then counsel to raise a grievance claim, but they had failed to do so.

[23] The parties were given an opportunity to lodge any relevant evidence with the Authority by way of affidavits and to provide written submissions on the preliminary jurisdiction issues. Mr Southam provided an affidavit. Te Whatu Ora elected not to lodge any affidavit evidence. However, it did provide some specific documents that the Authority had requested.

[24] The Authority also called for:

(a) Information from Mr Southam's previous counsel, Mr Mitchell KC, who voluntarily provided an affidavit to the Authority on 11 December 2023; and

(b) Specific documents which were considered relevant, but which had not been provided by the parties (these were referred to in paragraph [23] above).

[25] Both parties lodged written submissions. They were also given an opportunity to respond to the additional documents the Authority was provided with after the parties had lodged their submissions.

The issues

[26] It was agreed with the parties during the CMC that the preliminary jurisdiction issues were to be determined 'on the papers' and that the specific preliminary issues for determination were as follows:

(a) Did the Record of Settlement preclude Mr Southam from pursuing his 'employment status' claim, on the basis that issue had already been settled by the parties?

(b) Did Mr Southam raise any unjustified disadvantage personal grievance claim(s) within the 90-day time limit specified in s 114(1) of the Act?

(c) If not, should leave be granted to Mr Southam under s 114(4) of the Act to raise an unjustified disadvantage grievance out of time?

(d) What costs and disbursements should the successful party be awarded?

Did the Record of Settlement preclude Mr Southam from pursuing his 'employment status' claim, on the basis that issue had already been settled by the parties?

Mr Southam's position

[27] Mr Southam said that he made no claim regarding his employment status prior to the date of the Record of Settlement, and he accepted that the terms of the Record of Settlement would preclude him from doing so. However, he said the Record of Settlement did not remove his right to bring a claim in respect of the respondent's conduct that occurred after the Record of Settlement was entered into by the parties.

[28] Section 149(3)(b) of the Act provides that a Record of Settlement cannot be put before the Authority "whether by action, appeal, application for review, or otherwise." Mr Southam submitted that section needed to be narrowly construed. In particular, he said that the interpretation of the word "otherwise" in s 149(3)(b) of the Act should not be expanded to include a cause of action arising after the date of a mediated settlement.

[29] Mr Southam pointed out that the Record of Settlement did not attempt to compromise any future claims the parties may have. Nor could it have done so as the effect of that would amount to a contracting out of the Act, which is unlawful in accordance with s 238 of the Act.

[30] Mr Southam's position was therefore that although the Record of Settlement had settled the question of his employment status up to that date, it did not (within the context of an ongoing employment relationship) extend to the settlement of any issues that arose after that date.

Agreed material facts

[31] The parties agreed that there had been no material change to Mr Southam's terms and conditions or work arrangements since the Record of Settlement had been entered into. He had however been offered a permanent role.

[32] Mr Southam had been represented by Mr Mitchell KC at the mediation on 15 February 2022, which had resulted in the Record of Settlement, so he had the benefit of experienced legal advice before settling his employment status claim.

The respondent's position

[33] The respondent said that, in the absence of any material change that had occurred to Mr Southam's situation since the Record of Settlement was signed by the mediator on 14 March 2022, there is no new cause of action which has arisen. It therefore said that Mr Southam was attempting to revisit the same issue the parties had mediated on 15 February 2022, which had resulted in the Record of Settlement.

[34] The same 'employment status' issue had arisen prior to the February 2022 mediation, because Mr Southam had raised an employment relationship problem about his casual status, because he believed he should have been a permanent employee.

[35] That employment relationship problem had been raised by his then counsel Mr Mitchell KC, in a letter dated 23 November 2021. That was therefore the issue that the parties had mediated, and ultimately settled. Mr Southam confirmed that in his affidavit where he said that the 'status issue' about whether he was a casual or permanent employee was "the whole point of my claim and the reason I went to mediation".

Post mediation actions

[36] Following the mediation that was held on 15 February 2022, Ms Clare McCarten, who at that time was the then Rehabilitation Manager, Regional Forensics Psychiatry Services for Waitemata District Health Board, invited Mr Southam to meet

with her to discuss which Unit he would work in. The letter she sent to his then counsel confirmed "Paul will commence in a full time role on 1 April 2022."

[37] A meeting was held on 1 April 2022. The purpose of it was to offer Mr Southam full time employment in the Rata Inpatient Unit, following the settlement of his employment relationship problem at mediation. The minutes of the meeting recorded that its purpose was to let Mr Southam know he had been offered a full time Psychiatric Assistant (PA) position in Rata.

[38] In attendance at the 1 April 2022 meeting were Stuart Dysart – Charge Nurse manager (CNM) Rata, Ms McCarten – who was now the General Rehabilitation Manager and Bureau Manager, Mr Southam and his then representative Mr Graeme Cederman, who was employed by the respondent as a Registered Nurse – Bureau.

[39] The discussion section of the minutes of that meeting recorded that the full time PA position in Rata Unit was offered to Mr Southam, who said he had been expecting to be offered a choice of full time employment "between permanent Bureau and an inpatient". Mr Southam said he wanted to obtain advice, so that he could understand the offer before he accepted it.

[40] In an email dated 1 April 2022 that Ms McCarten sent to Jo Willdig – Human Resources Manager, Specialist Mental Health and Addiction Services/Facilities Services Group for Waitemata DHB, she said that when Mr Southam was "pressed on whether he was declining the permanent offer he said he would accept it but wanted to clarify with his lawyer/mediator and you."

[41] Mr Mitchell KC wrote to WDHB on 26 April 2022 stating that Mr Southam was not required to accept a permanent position in the Rata Unit, although he acknowledged that was not particularised in the Record of Settlement. Mr Mitchell KC said that Mr Southam "is willing to accept a permanent position but understands that the position offered to him was in the Bureau."

[42] Ms Willdig emailed Mr Mitchell KC on 27 April 2022 saying that the agreement was for Mr Southam to be offered either a permanent Bureau role or a permanent role within a Unit.

[43] However, at the time of mediation a permanent Bureau team had not been set up, so did not exist. At the time mediation occurred WDHB had intended to seek

approval to proceed with setting it up, so that was discussed with Mr Southam who was keen on that idea.

[44] Ms Willdig noted that because WDHB had agreed to offer Mr Southam a permanent position as soon as possible, he had been offered a permanent role in the Rata Unit as that was an existing vacancy.

[45] Ms Willdig proposed two options to Mr Mitchell KC in order to resolve Mr Southam's issue about the nature of his permanent role:

(a) Either, he could wait for the permanent Bureau team to be established, so he could be offered a position on that team. She estimated that would be set up by June 2022, however that did not occur;

(b) Or, he could accept the permanent PA role he had been offered in the Rata Unit.

[46] In a letter from his counsel to WDHB dated 28 April 2022, Mr Southam accepted the first option, which was to wait for the Permanent Bureau Team to be established. He also said he could be rostered to the Rata Unit, but did not want to be permanently based there.

Was Mr Southam's 'employment status' issue settled?

[47] The respondent submitted that prior to the mediation held on 15 February 2022, Mr Southam had sought a change of status from casual to permanent employment. It was agreed in the Record of Settlement he would be offered permanent employment, with the terms of such to be discussed.

[48] That offer was made by email on 24 February 2022 and the terms of it were discussed at the meeting held on 1 April 2022. However, because Mr Southam did not accept the offer of full time permanent employment in the Rata Unit, the parties did not discuss what rosters or start date he would have for that full time permanent role.

[49] The respondent's position was that Mr Southam turned down the offer of permanent employment in the Rata Unit, with the reasons for his decision about that being irrelevant. The respondent said it was the making of the offer that was the obligation it had committed to under the Record of Settlement, which it said it had complied with.

[50] Accordingly, the respondent maintained that the terms of the Record of Settlement settled the 'employment status claim' that Mr Southam had, so attempting to bring that same claim before the Authority now was not permitted. The respondent relied on "cause of action estoppel" to support that submission.

[51] The respondent submitted that Mr Southam's status claim was subject to "res judicata". It relied on the discussion of that concept, and the different aspects of it, by the Court of Appeal in *Joseph Lynch Land Company Limited v Lynch* which stated:[1]

> The expression "res judicata" means that the matter has been adjudicated. The concept of res judicata is often applied to both cause of action estoppel and issue estoppel. Traditionally its use was confined to the former. Cause of action estoppel is different from issue estoppel which can arise where a plea of res judicata in the strict sense is not open because the causes of action are not the same.
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> […]
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> Cause of action estoppel is more precise than issue estoppel. For there to be cause of action estoppel the cause of action sought to be estopped must be precisely the same as that upon which there has been an earlier adjudication.
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> Issue estoppel is concerned with the prior resolution of issues rather than causes of action.
>
> […]
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> The purpose behind cause of action estoppel and issue estoppel is that litigants should not be twice vexed by the same claim or point and it is in the public interest that there be an end to litigation.

The Authority's analysis

[52] The principles of res judicata, including the importance of finality, was affirmed for employment relationships in s 149(3) of the Act. Once a Record of Settlement had been affirmed by a mediator under s 149 of the Act it meant that it was final, binding and enforceable and except for enforcement purposes it could not be brought back before the Authority or Court.

[53] The Authority accepted the respondent's submission about that, based on the parties' agreement that there had been no material change to Mr Southam's employment situation or circumstances since the parties had entered into the Record of Settlement.

[54] Had there been a material change to the circumstances that had caused the parties to enter into the Record of Settlement, then that would potentially be a different

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[1] [1995] 1 NZLR 370.

situation. However, given the Record of Settlement has already settled the applicant's 'employment status' claim, then the situation is effectively akin to that of a cause of action estoppel.

[55] Mr Southam's affidavit stated "After the agreement [meaning Record of Settlement] was signed, things continued exactly as before." Apart from the offer of permanent employment as a PA in the Rata Unit that the respondent had given to Mr Southam, which he had rejected, nothing else had changed.

[56] Barring a material change to Mr Southam's employment and working situation, a further claim regarding his employment status is precluded by the Record of Settlement, because it has already been settled. Mr Southam cannot bring a new claim (however worded) that is effectively based on his employment status arising from the same situation that had caused the parties to enter into the Record of Settlement.

[57] Because Mr Southam's 'employment status' problem was settled by the Record of Settlement, then it remains settled. The whole point of the settlement was to resolve his claim that he was a permanent employee under the CA, and not a casual employee.

[58] It was effectively a prospective settlement to cover Mr Southam's future employment status following on from the mediation the parties attended on 15 February 2022. It was not a settlement that was primarily to compensate and/or provide remedies for previous employment problems.

[59] The Record of Settlement was not intended to settle all employment issues between the parties. It had a narrow focus on the 'employment status' issue only, which strengthened the respondent's argument that revisiting that exact same issue in the absence of any material change in circumstances was precluded by s 149(3) of the Act.

[60] Mr Southam still has the usual options available to him, if he believed the respondent has breached the Record of Settlement.

Did Mr Southam raise any unjustified disadvantage personal grievance claim(s) within the 90-day time limit in s 114(1) of the Act?

What disadvantage grievances did Mr Southam want to pursue?

[61] Mr Southam appeared to want to pursue two potential personal grievance claims for unjustified disadvantage:

(a) The communications the respondent had with him about the setting up of the 'Bureau' (the first disadvantage grievance); and

(b) Complaints by him about his manager's treatment of him, which he said were not properly addressed by the respondent (the second disadvantage grievance).

Relevant law

[62] Section 114 of the Act states:

> Section 114(1) of the Act requires an employee who wants to raise a personal grievance to do so within 90 days beginning with the period in which the action occurred or came to the employee's notice, which either is later, unless the employer consented to the personal grievance being raised after the expiration of the 90 day period.

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

> […], a personal 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.

[64] There is no precise formula required for the raising of a personal grievance by an employee, but there are certain requirements that need to be met.[2] The employer must:

(a) Know what it is meant to be responding to;

(b) Be given sufficient information to enable it to respond to the employee; and

(c) Be able to respond to the issue (problem) on its merits, with a view to resolving it soon and informally, should it wish to do so.

The first disadvantage grievance

[65] Mr Southam claimed he raised the first disadvantage grievance on 23 May 2023, regarding the respondent's communications about the setting up of the 'Bureau', and its effects on his employment options.

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[2] See *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [38].

[66] On 10 March 2022 the respondent wrote to Mr Southam, recording that he "has opted to wait until the establishment of a permanent Bureau pool. Currently […] the Bureau pool is planned to be established during this year."

[67] On 27 April 2022 Ms Willdig wrote to Mr Southam offering him the choice of either accepting the permanent role in the Rata Unit, or waiting for the anticipated upcoming Bureau opportunity to become available, which (at that time) she said was expected to occur by June 2022. Mr Southam elected to wait, but the Bureau team was not set up in June 2022 and has still not eventuated.

[68] On 26 August 2022 Ms McCarten informed Mr Southam that the permanent Bureau pool "is currently a conceptual proposal and has yet to be agreed".

[69] On 19 September 2022 Ms McCarten told Mr Southam "We continue to wait for the permanent Bureau pool to be established."

[70] On 30 November 2022 Ms McCarten told Mr Southam that "The permanent Bureau pool will likely be set up next year now."

[71] Mr Southam's then counsel's letter dated 26 May 2023 to the respondent claimed it had breached its obligation to communicate in good faith with him (Mr Southam) about the Bureau issues.

[72] Mr Southam said that was the basis for his first unjustified disadvantage grievance, which he said related to "an ongoing state of affairs which began in March 2022 and was continuing as at", 26 May 2023.

[73] The respondent disputed that the first disadvantage grievance involved an ongoing cause of conduct which justified extending out the 90-day time period from 24 February 2022 to 26 May 2023. It said Mr Southam had ample opportunity to raise a disadvantage grievance involving any issues he had about the respondent's communications regarding setting up of the Bureau well in advance of 26 May 2023.

[74] However, the respondent also submitted that this first disadvantage grievance claim was covered by the terms of the Record of Settlement, because any offer of permanent employment was made to him as a result of the Record of Settlement.

[75] As a consequence, the respondent said that the offer of employment was prescribed as per the terms of the Record of Settlement, which did not require:

(a) An offer of permanent employment specifically with the Bureau; and/or

(b) A requirement to advise Mr Southam about the Bureau position; and/or

(c) An obligation to even set up the Bureau.

[76] These submissions had merit. The first unjustified disadvantage grievance was associated with Mr Southam's complaints about the lack of good faith communication with him regarding the setting up of the Bureau. That was intrinsically linked to the Record of Settlement and its requirement for the respondent to offer him permanent full time employment.

[77] It would be artificial to treat it as something different, as it is the Record of Settlement that set out the rights and obligations of the parties regarding Mr Southam's permanent employment. It was therefore the Record of Settlement obligations that Mr Southam based his first disadvantage grievance on, namely an alleged obligation to communicate with him in good faith about setting up the Bureau.

[78] However, the Record of Settlement did not require the respondent to communicate with Mr Southam about the anticipated Bureau opportunities. The Record of Settlement defined what was to be offered to Mr Southam, so he cannot extrapolate out other obligations (or new claims), which do not appear in the Record of Settlement to get around the finality of the settlement he had agreed to.

[79] The Authority accepted the respondent's submission that any other issues in relation to the offer of permanent employment that has given rise to a claim by Mr Southam can only be determined based on the specific wording of the Record of Settlement, and not on any other implied or general statutory obligation.

[80] This first disadvantage grievance was not raised by Mr Southam within the statutory 90-day time frame, because it was subject to issue estoppel.

[81] Mr Southam could not raise a new personal grievance about a claim that the parties had already settled in the Record of Settlement. Instead, he had the option to bring a breach of Record of Settlement claim under s 149(4) of the Act, which has a penalty associated with it.

The second disadvantage grievance

[82] Mr Southam's claim that he had raised his second disadvantage grievance in an email to his manager dated 9 April 2022 did not succeed.

(i) The 9 April 2022 email from Mr Southam to his manager

[83] Although Mr Southam dated his email "Friday 8th April – 2022" it was sent to his manager Ms McCarten on 9 April 2022. The subject line of the email was "Your email of 08/04/2022 regarding removing me from the tech system". The email said:

> The Employment Relation (sic) Act states that an employee may take a personal grievance on the grounds of employment status if they are treated differently than other similar employees.

[84] The purpose of this email was to respond to Ms McCarten's 8 April 2022 email that advised Mr Southam his name had been removed from the 'text system' (which was the method for allocating approved overtime shifts) because he had been booked on shifts from 9 to 13 April 2022. He was told he would be reinstated to the text system on 14 April 2022.

[85] Mr Southam's complaint in his 9 April 2022 email was that he had been removed from the 'text system', meaning that he did not have the choice of accepting non-rostered shifts in excess of a certain number of hours worked per fortnight.

[86] However, his 9 April email was not stated to be a personal grievance, or the raising of an unjustified disadvantage personal grievance claim. Neither party treated it as a personal grievance at the time or immediately afterwards. It was not until over a year later that Mr Southam sought retrospectively to portray this communication as having raised his second disadvantage grievance.

[87] Mr Southam's reference in the 9 April email to the fact that an employee may take a personal grievance if treated differently was merely an indication that if he was not satisfied with the roster situation his manager had communicated to him, then he could at some future date take a personal grievance claim over it.

[88] In other words, it was an indication of the potential of a future grievance, which did not amount to the raising of a grievance. In order to be able to raise a personal grievance claim, the grievance must have actually occurred, as opposed to the grievance being some anticipated future event.

(ii) Involvement of counsel after the 9 April 2022 email

[89] Mr Southam did not say he had already raised a disadvantage grievance on 9 April 2022 when he instructed his then counsel to write to the respondent about the manager on 21 June 2022, some two months later.

[90] It was therefore more likely than not, that Mr Southam intended the 9 April email to be a communication to his manager about his dissatisfaction in being precluded from accepting any further overtime shifts, rather than the raising of his second unjustified disadvantage grievance claim.

[91] It was significant that when his subsequent counsel (Ms Singleton) was following up whether any personal grievance claims had been raised with the respondent (in light of its stance that they had not), she never referred to the fact that Mr Southam believed his email of 9 April 2022 had already raised his second unjustified disadvantage grievance claim.

[92] Ms Singleton's letter to the respondent dated 23 December 2022 did not identify the issues in Mr Southam's email dated 9 April 2022 as being of concern. The letter recorded that she was authorised to act "in relation to his personal grievance of June 2022, a claim for unpaid wages, and his ongoing concerns about the employment relationship." There was no reference in her 23 December 2022 letter to Mr Southam's 9 April 2022 email to his manager.

[93] The respondent replied to Ms Singleton on 13 January 2023 and stated (among other things) that it was not aware of Mr Southam raising any relationship issues/concerns with his manager directly or via his previous counsel or his union representative. Ms Singleton's response dated 10 February 2023 also failed to mention the 9 April 2022 email, or any concerns referred to in that email.

[94] These fundamental omissions led the Authority to conclude that Mr Southam did not consider he had raised his second unjustified disadvantage grievance with the respondent in his email to Ms McCarten dated 9 April 2022, because if he had then he would most likely have followed it up.

[95] Also the two counsel representing him, who on Mr Southam's instructions had both written to the respondent after 9 April 2022 about disadvantage grievance claims,

would also likely have referred to his 9 April 2022 email had he told them it had raised his second disadvantage grievance.

(iii) Ms Singleton's letter dated 26 May 2023 to the respondent

[96] Ms Singleton's letter dated 26 May 2023 was the first time it was contended by Mr Southam that he had raised a personal grievance claim with his manager on 9 April 2022. This was over a year later after the alleged personal grievance had arisen or had come to his attention. Nothing had been done about it over that more than thirteen months' period.

[97] The 26 May 2023 letter no longer contended that the 23 December 2022 letter from Ms Singleton had constituted the raising of a personal grievance. This remains the position currently, as no reliance was placed on the 23 December 2022 letter in the applicant's submissions lodged on this preliminary jurisdiction issue.

[98] It was significant that over this period Mr Southam was a member of the union, he was represented by a colleague (Mr Cederman), he was represented by very experienced senior counsel (Mr Mitchell KC) who he was in ongoing communication with regarding other legal issues, and he engaged new counsel (Ms Singleton) in December 2022.

[99] Mr Southam therefore had ample opportunity to have taken legal advice about any disadvantage grievances he believed he had already raised, and to have instructed his representatives to pursue that for him. His failure to do so therefore undermined the claim that his 9 April 2022 email had raised his second disadvantage grievance.

Finding on second disadvantage grievance

[100] The 9 April 2022 email was insufficient to have raised his second disadvantage grievance claim. That meant that those issues were not raised with the respondent prior to Ms Singleton's letter dated 26 May 2023, which was well outside the 90 day time limit required by s 114(1) of the Act.

Should leave be granted to Mr Southam raise an unjustified disadvantage grievance out of time?

Relevant law

[101] Section 114(3) of the Act enables the Authority to grant an employee leave to raise a personal grievance outside of the 90-day time limit, if an employer did not consent to that occurring.

[102] Section 114(4) of the Act provides that the Authority may grant leave, subject to any conditions it thinks fit, if it:

> (a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include one or more of the circumstances set out in s 115); and
>
> (b) Considers it just to do so.

[103] If leave is granted, then the Authority must direct the parties to mediation.

[104] Section 115 of the Act sets out examples of exceptional circumstances, for the purposes of s 114(4)(a).

[105] These include the example in s 115(b) of the Act where an employee made "reasonable arrangements" to have the grievance raised on their behalf by an agent, who unreasonably failed to ensure the grievance was raised within the 90-day time limit.

Did Mr Southam make reasonable arrangements to have his grievance raised by his then counsel?

[106] Mr Southam relied on s 115(b) of the Act. He claimed he arranged with Mr Mitchell KC on 21 June 2022 for him to raise a personal grievance about his manager's behaviour, but that Mr Mitchell KC failed to do so.

[107] Mr Southam had his friend and colleague, Mr Cederman, draft a personal grievance claim about his manager's behaviour. This alleged that she had removed Mr Southam's name from the text system, which was the way he could access approved overtime, when he had worked 120 hours in a fortnight.

[108] Mr Southam also claimed that his manager had removed a half an hour from every shift worked between 0700hr and 2300hrs for every casual staff member working at the Mason Clinic, which he said was done in order to save money. Mr Southam said

that had been done with warning or consultation with him, and that the hours of work for all permanent staff and other casual staff had remained unaffected.

[109] This personal grievance prepared by Mr Cederman was not sent to the respondent. Mr Southam emailed it to Mr Mitchell KC on 21 June 2022. His email stated "I have my personal grievance enclosed and wish to proceed with WDHB Clare especially. Also I key (sic) talking points we discussed this morning."

[110] Mr Southam in his affidavit said that he had talked to Mr Mitchell KC about those issues before emailing him the grievance letter that Mr Cederman had written. Mr Mitchell KC did not agree that had occurred.

[111] Mr Southam stated in his affidavit:

> I assumed Simon would just get on with things. I didn't know then that there was any time limit for grievances, so I didn't follow up at first.
>
> After a while I tried to contact Simon about it but he never responded to me.
>
> By December 2022 I decided that I needed a new lawyer and I instructed my current lawyer Keziah Singleton.

[112] On 16 December 2022 Ms Singleton emailed Mr Mitchell KC. Her email stated (among other things):

> Paul tells me that he instructed you to raise a personal grievance on his behalf in June this year, but to the best of his knowledge no grievance has yet been raised.
>
> As you will be aware, the 90-day timeframe for raising a grievance has now passed. If a grievance was not raised in June, I will therefore need to raise one immediately to prevent further prejudice to Mr Southam's position. Please urgently advise whether or not a grievance was raised, and forward any relevant correspondence.

[113] Ms Singleton says that she did not receive a response to this request. She then called Mr Mitchell on 22 December 2022 to follow up and was told that he was in the process of checking documents and would send her something he had written that day. However, that did not occur.

[114] On 2 February 2023 Ms Singleton wrote to Mr Mitchell KC asking to uplift Mr Southam's file and noting the request was urgent, as:

> There is an open question as to whether a personal grievance was raised by you in June 2022 as instructed by him, and the parties have agreed to go to mediation.

[115] However, Mr Mitchell KC in his affidavit to the Authority said his understanding of what was expected of him differed from Mr Southam's. Mr Mitchell KC said he understood the letter had been sent to the respondent, not that he had been instructed to raise an unjustified disadvantage grievance for Mr Southam.

[116] Mr Cederman was known to Mr Mitchell K|C, who said he understood that Mr Cederman was assisting Mr Southam with the matter, and that the letter Mr Cederman had drafted had been sent by him.

[117] Mr Mitchell KC simply received the email and that was it. Mr Mitchell KC said that Mr Southam did not raise the issue with him again after the email on 21 June 2022. That omission was significant, because Mr Mitchell and Mr Southam were in regular contact after 21 June 2022.

[118] Mr Mitchell KC said that in the months following 21 June 2022 he continued to communicate with Mr Southam in relation to another claim he was acting on (involving Mr Southam and others) against the WDHB.

[119] Despite their ongoing communications, Mr Southam did not say anything about the personal grievance letter. That omission undermined Mr Southam's claim he had made reasonable arrangements for Mr Mitchell KC to raise his second disadvantage grievance.

[120] Mr Mitchell KC also set out in his affidavit that he had also been in discussions with Mr Southam in the months following June 2022, in relation to another unrelated (non-employment related) legal matter. Mr Mitchell KC acknowledged that:

> I may have misunderstood what Mr Southam expected from me. My understanding was that the letter would be sent to the employer. I did not understand from the conversation that I was to raise a grievance but understood that his was being done by Mr Cederman's letter.

The Authority's analysis

[121] Section 115(b) of the Act has two limbs, both of which must be satisfied for exceptional circumstances to be held.

[122] The Supreme Court in *Cready v Commissioner of Police* stated:[3]

> Although, as we have already noted, the contents of s 115 are clearly not intended to be a comprehensive schedule of what will constitute "exceptional circumstances", they assist in determining whether circumstances exist and when they do not.
>
> More particularly, Parliament has specified in s 115(b) of the Act that reliance on an agent will result in "exceptional circumstances" if the requirements of that paragraph are met. It would tend to negate the purpose of that paragraph if other situations where an employee had mistakenly relied on an agent to ensure that a grievance was notified in time were readily treated as establishing "exceptional circumstances".

[123] The email that Mr Southam sent Mr Mitchell KC on 21 June 2022 was headed "Paul's grievance claim". The letter was not stated to be a draft. The email stated "grievance enclosed".

[124] Mr Southam stated in his email which attached the letter Mr Cederman had drafted his "wish to proceed with WDHB Clare especially". That was ambiguous as it could have been referring to the fact, as Mr Mitchell KC believed, that Mr Cederman was pursuing the matters referred to in the letter that he had drafted for Mr Southam.

[125] There was no express instruction from Mr Southam to Mr Mitchell KC to raise an unjustified disadvantage personal grievance claim for him. Nor did Mr Southam instruct him to raise a personal grievance using Mr Cederman's letter as a basis to do so. Nor was there any instruction from Mr Southam to Mr Mitchell KC to send the personal grievance letter as written to the respondent.

[126] Whether reasonable arrangements had been made by Mr Southam to have his second disadvantage grievance raised depended entirely on the email and accompanying letter sent on 21 June 2022.

[127] These were not clear enough to amount to Mr Southam making "reasonable arrangements" as required by s 115(b) of the Act for Mr Mitchell KC to raise an unjustified disadvantage grievance on his behalf.

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[3] [2008] NZSC 31 at para [28].

[128] To meet the requirements of s 115(b) of the Act clear instructions needed to have been given, and those were lacking in this case. Mr Mitchell KC was not even aware that he had been asked to raise a grievance.

[129] Mr Southam also failed to follow up with Mr Mitchell at all about what he claimed was his intended disadvantage grievance. His explanation that he was unaware of the applicable time limit was not accepted, because the 90-day requirement was clearly recorded in the Collective Agreement Mr Southam was covered by.

[130] It also undermined Mr Southam's claim that he had made 'reasonable arrangements' to have his grievance raised because he failed to ask Mr Mitchell KC to follow up a response from the respondent in the months following June 2022, particularly when they were in ongoing communications about other legal matters.

[131] As at 16 December 2022 Mr Southam had obviously informed his new counsel (Ms Singleton) that "to the best of his knowledge no grievance had been raised", because she recorded that in her email of that date. Mr Southam therefore knew no grievance had been raised by then at the latest.

[132] The sending of the 21 June 2022 email to Mr Mitchell KC by Mr Southam was insufficient to have amounted to "reasonable arrangements" to have his second disadvantage grievance raised by Mr Mitchell KC.

[133] Accordingly, the Authority was not satisfied that either limb of s 115(b) had been satisfied. The available evidence did not establish that there were exceptional circumstances for Mr Southam's second disadvantage grievance not being raised with the respondent within the 90-day time limit.

Would it be just for the Authority to have granted leave?

[134] Even if the Authority was wrong about that, and Mr Southam had made reasonable arrangements for Mr Mitchell KC to have raised his second disadvantage grievance, the second limb of the test under s 114(4)(b) of the Act was not satisfied, in terms of the Authority's discretion to grant leave.

[135] The Supreme Court in *Cready v Commissioner of Police* recognised the importance of the two limb test by stating that:

> […], we also emphasise that Parliament has imposed a 90-day limit to ensure that employers are notified promptly of alleged personal

> grievances. Time should therefore be extended only if exceptional circumstances are truly established and in addition, the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.

[136] The Authority finds that:

(a) Mr Southam's delay in raising his personal grievance was not occasioned by exceptional circumstances, as defined in s 115(b) of the Act;

(b) There was a lack of clarity by Mr Southam in articulating what his actual personal grievance claim was, as evidenced by the amount of time and effort that was required to explore that during the case management conference held in September 2023;

(c) There has been considerable delay in him seeking leave to raise a disadvantage grievance out of time, because that did not occur until the leave application was lodged with the Authority on 31 October 2023;

(d) There has been no satisfactory explanation for that extensive delay. As early as 16 December 2022 Mr Southam advised his counsel that to the best of his knowledge no disadvantage grievance had been raised, so there was a more than 10 months' delay between that acknowledgement and his leave application;

(e) Mr Southam was clearly advised in the respondent's letter dated 13 January 2023 that no personal grievance had been raised in June 2022, which would have accorded with his own understanding of the position as expressed to his counsel as early as 16 December 2022;

(f) Despite that, Mr Southam's counsel contended in her letter of 10 February 2023 that a personal grievance had already been raised, but if not then leave would be sought to do so out of time. That was a surprising position, given her email of 16 December 2022 recorded that Mr Southam knew a personal grievance had not been raised;

(g) However, although aware as early as December 2022 that a leave application could be required (as per Ms Singleton's email dated 16 December 2022 to Mr Mitchell KC) more than nine months elapsed before a leave application was lodged. No explanation was provided for that delay;

(h) The Authority also raised the leave application issue with counsel during the case management conference held on 27 September 2022, so again there was a further unexplained delay of more than a month after that before the leave application was lodged;

(i) The respondent put Mr Southam on notice in its letter of 10 March 2023 that no personal grievance had been raised and it did not agree to one being raised out of time;

(j) Mr Southam finally raised the disadvantage grievance about his manager in a letter from his counsel dated 26 May 2023, but did so on the basis that it had been previously raised. However, there was no credible evidence to support that position;

(k) The Statement of Problem was lodged on 24 July 2023. The leave application could and should have been filed at that point, but was not. Again there was no explanation given for that omission.

[137] At the latest, by 13 January 2023 Mr Southam was clearly put on notice by the respondent that no personal grievance had been received or articulated by him. A delay of a further four months, when he knew that the respondent considered it had not received a personal grievance, compounded the initial delay.

[138] That led the Authority to conclude it would not have been just to have granted leave to Mr Southam to have raised his second disadvantage grievance so far out of time, even if he had been able to establish that the exceptional circumstance in s 115(b) of the Act had occurred.

[139] Not only is there delay, but it is combined with the failure to properly articulate what the second disadvantage grievance claim actually consisted of. There has been references to alleged failures of his manager, to breaches of good faith, to Mr Southam being dropped from the text service system for the allocation of shifts and/or for the allocation of approved overtime and to half hour of work being removed from some casual employees to achieve cost savings.

[140] It was not until the case management conference held on 27 September 2023 that Ms Singleton attempted to properly frame the second disadvantage grievance claim, and even then that still lacked clarity.

[141] The matter that constituted the disadvantage grievance Mr Southam wanted to raise could have been dealt with by the respondent closer to the time and more efficiently if it had been made aware of it, and if it had been properly articulated, between April 2022 and June 2022.

[142] Now nearly two years have passed with all the problems associated with such delay, including memories of witnesses, relevant documents and more entrenched views by the parties.

[143] The purpose of the 90-day time limit is to ensure that an employer was notified promptly of any personal grievance, to enable the grievance to be resolved quickly and successfully close to the time it arose.[4] Mr Southam's delay has compromised that objective.

[144] These factors considered along with the merits of his second disadvantage grievance claim as it has currently been presented (see discussion below), meant it would not have been appropriate for leave to be granted under s 114(3) of the Act in all the circumstances, even if he had been able to establish the delay in raising the grievance was occasioned by exceptional circumstances.

Assessment of the merits of the second disadvantage grievance

[145] Although Mr Southam outlined some concerns about his manager in his Statement of Problem lodged on 24 July 2023, these were not contained in his counsel's letter of 26 May 2023, nor the draft letter by Mr Cederman of 21 June 2022.

[146] Of the four concerns listed in the Statement of Problem about Mr Southam's manager, three of them were not in the previous correspondence and no other detail was provided about them. These issues involved allegations that his manager had:

(a) Repeatedly called him to meetings to raise minor issues;

(b) Contacted him with work related queries outside of working hours; and

(c) Spoken to him in an abrupt and condescending manner.

[4] See s101(ab) of the Act.

[147] It was also significant that Mr Southam failed to provide any further information about the concerns he had about his manager that had formed the basis of the second disadvantage grievance he had sought leave to raise out of time.

[148] Based on the currently available evidence, Mr Southam's concerns about his manager appear weak. Accordingly, the justice of the matter militated against leave being granted to Mr Southam to raise any unjustified disadvantage grievance claims out of time.

What costs should be awarded?

[149] The respondent's application for indemnity costs did not succeed. The Authority's usual notional daily tariff based approach to assessing costs is appropriate.

[150] The respondent as the successful party is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement.

[151] If agreement on costs is not reached, then the respondent may lodge costs submissions within 14 days of the date of this determination. Mr Southam may lodge his cost submissions within 14 days of service of the respondent's cost submissions on him. No submissions will be accepted by the Authority outside of this timetable, without the prior written permission of the Authority.

[152] This matter should be treated as if it was a half-day investigation meeting, for the purposes of assessing costs. The notional starting point for assessing costs is therefore $2,250, being half of the one day notional daily tariff of $4,500.

[153] The parties in their costs submissions are invited to identify any factors they say should result in the notional daily tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority