

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 213  
3252379

BETWEEN                      BRENDAN HAMILTON-GIBBS  
Applicant

AND                              TAIKURA RUDOLF STEINER  
SCHOOL BOARD  
Respondent

Member of Authority:        Sarah Kennedy-Martin

Representatives:              Theresa Tudor, advocate for the Applicant  
Myriam Mitchell, counsel for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        9 November 2023 and 15 February 2024 from the  
Applicant and Te Riu  
22 December 2024 from the Respondent

Determination:                15 April 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Hamilton-Gibbs was dismissed by Taikura Rudolf Steiner School Board (the Board) and raised a dismissal grievance, on 14 August 2022 outside the prescribed time period. He applies for leave to raise his grievance after the expiration of 90 days.<sup>1</sup>

[2] Mr Hamilton-Gibbs' application relies on two grounds he says amount to exceptional circumstances causing the delay in raising his grievance. His mental health was such that he was so affected or traumatised he was unable to properly consider raising his grievance within the 90-day period and he relied on an agent who failed to act on his behalf.

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<sup>1</sup> Employment Relations Act 2000, s 114(1), (3) and (4).

**The Authority's investigation**

[3] The parties agreed this application could be heard on the papers. I have received affidavits from Mr Hamilton-Gibbs, David Martin, NZEI Te Riu Roa and Jacqui Hunt, psychotherapist. Kelly Sutton provided an affidavit on behalf of the Board. NZEI Te Riu Roa (the Union) were given a further opportunity to make further submissions because of the potential for adverse comment. Written submissions were lodged from both parties.

**Dismissal for failing to be vaccinated against COVID-19**

[4] Mr Hamilton-Gibbs was employed by the Board from 2004 until he was dismissed on 17 December 2021. Over that time, he held several different roles including management positions. His evidence was that he and his family were very integrated into the school. He had held management roles within the school and spent a term on the Board as a staff representative. He was heavily involved in extracurricular activities and was committed to using his time to benefit to the students as well and as contributing to building a positive community school.

[5] In early October 2021, the Government announced that mandatory COVID-19 vaccinations would be extended to a number of public service sectors, including volunteers and unpaid workers in education services. The vaccination order came into effect for education services on 25 October 2021. As a registered school, all of the Board's teachers were covered by the vaccination mandate.

[6] This directly affected Mr Hamilton-Gibbs because he was not intending to be vaccinated. Ultimately, he was dismissed because he was not vaccinated, and he raised a dismissal grievance in a statement of problem lodged in the Authority on 14 August 2022. The Board did not consent to the raising of the personal grievance outside the 90 days.

[7] The letter of termination records 17 December 2021 as the last day working day. The two-month notice period specified in the Collective Agreement was two months. On review of the provisions of the Collective dealing with termination, and the letter of termination, my interpretation is that the last day of employment was 17 March 2022.

[8] The grievance was raised on 14 August 2022 and was therefore raised well outside the 90-day time frame.

**Exceptional circumstances**

[9] Where an employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the grievance out of time. The Authority may grant leave if it is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and it considers it just to do so.

[10] While the exceptional circumstances set out in s 115 of the Employment Relations Act 2000 (the Act) are not exhaustive, meaning there could be exceptional circumstances that do not fit within any of the four examples given in s 115, Mr Hamilton-Gibbs relies on two of the grounds as the basis for his application:

- (a) Where an employee has been so affected or traumatised by the matter giving rise to the grievance, that he or she was unable to properly consider raising the grievance within the period specified in s 114(1);
- (b) Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee and the agent unreasonably failed to ensure that the grievance was raised within the required time.

**The parties' submissions**

[11] Mr Hamilton-Gibbs submits there is evidence in his medical record from his general practitioner and the letter from a psychotherapist attached to the statement of problem to show he shut down mentally after being told by the union he could not challenge the mandate. This meant he was not in a position to consider whether the advice from his union was correct or to decide if he could or should take further action. He says this affected him in a way that was more than everyday depression following his dismissal. The overall impact was that he felt rejected by society and abandoned which meant he could not think straight or make any logical decisions, let alone take legal action against his employer.

[12] Mr Hamilton-Gibbs says he was also let down by the union when it failed to act and advised him he could not challenge the mandates. Both these things, it was submitted, have been accepted as exceptional circumstances in the past.<sup>2</sup>

[13] It was also submitted the union failed to consider the provisions in the Act relating to Covid-19 vaccinations. This required employers to ensure all reasonable alternatives that would not lead to termination of the employee's employment be exhausted before giving a termination notice to an employee, when termination was because of the employee's vaccination status.

[14] This is relevant because Mr Hamilton-Gibbs says he was entitled to a leave of absence, being refreshment leave set out in clause 5.7 of the Collective Agreement, but this was declined for no just reason and therefore not all reasonable alternatives had been exhausted before he was terminated.

[15] The Board relying on the Supreme Court decision in *Creedy v Commissioner of Police* emphasised that Parliament had imposed a time limit to ensure employers were notified promptly of alleged grievances and time should only ever be extended if exceptional circumstances were truly established in the overall justice of the case (which includes taking account of the position of an employer facing a late claim).<sup>3</sup>

[16] Mr Hamilton-Gibbs also said he was unaware of the technicalities to do with the statutory time frame for raising personal grievances.

[17] The Board submits that exceptional circumstances pursuant to either 115(a) or 115(b) do not exist and therefore the applicant's delay in raising the personal grievance cannot have been occasioned by an exceptional circumstance.

### **First ground – the agent's actions**

[18] After the vaccination mandate came into force, Mr Hamilton-Gibbs received a generic letter from the Board dated 29 October 2021, advising employees they could not attend onsite work from Tuesday 16 November 2021 if they were not vaccinated. This was in accordance with the vaccination mandate. On 10 November Mr Hamilton-Gibbs and the principal (on behalf of the Board) met to discuss the vaccine mandate,

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<sup>2</sup> *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Limited* [2006] 7 NZELC 98, 123 (ERA).

<sup>3</sup> *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109.

progress in Mr Hamilton-Gibbs' medical exemption application and his vaccination status, given the mandate was in force. An alternative arrangement through to the end of the term was proposed. Mr Hamilton-Gibbs could work two days a week to finish the work he could do off site and take three days leave or two weeks sick leave could be applied for.

[19] On 26 November, a period of sick leave ended, and Mr Hamilton-Gibbs was invited to a formal meeting to discuss his vaccination status. The Board considered matters to be at a point where termination of Mr Hamilton-Gibbs' employment needed to be considered because he was required to be vaccinated to work in his role.

[20] They met on 30 November and Mr Hamilton-Gibbs confirmed he did not intend to be vaccinated but signalled he wanted to apply for long term discretionary leave or Refreshment Leave under the Collective Agreement. As a solution, the principal proceeded with the alternative arrangement of two days paid work and three days leave without pay until the end of the term as a place holder while Mr Hamilton-Gibbs applied for discretionary leave. His application for discretionary leave had to be in by 6 December because that was when the Board papers for the final meeting of the year had to be submitted by.

[21] On 14 December 2021 Mr Hamilton-Gibb's application for Refreshment Leave was declined and being unable to identify any suitable long term alternative arrangements given his vaccination status, a decision had been made to terminate Mr Hamilton-Gibbs' employment. The last working day was 17 December 2021 with his two months' notice to be paid in lieu.

[22] Mr Hamilton-Gibbs had contacted the Union on 24 November prior to termination. He contacted the union twice more and then again on 15 December after he received his termination letter on 14 December. The Union had advised him to get in touch if he was terminated. He says he emailed all his information from the school on 20 December and asked the Union to go over the letters and documents in his correspondence with the school so he could get some advice on what to do. Mr Hamilton-Gibbs says he complained to the Union that he believed the school had not acted in good faith and asked for the union's help with this matter.

[23] The advice Mr Hamilton-Gibbs says he received was that the school had followed due process with unvaccinated staff.

[24] Mr Hamilton Gibbs says he was looking to the Union to advise him on how he could raise a grievance especially when it was his belief the school was being unfair in not granting him refreshment leave and he feels misled and let down by the lack of support. As a result of the communications with the Union Mr Hamilton-Gibbs believed his termination could not be challenged and the Union would not support him to challenge it. His evidence was also that he understood he did not receive legal advice from the Union.

[25] David Martin, manager, NZEI Te Riu Roa, provided two affidavits setting out the Union's communications with Mr Hamilton-Gibbs and explaining the process followed with union members. What emerges is a number of contacts with different officers in the Member Support Centre who provided information and guidance to Mr Hamilton-Gibbs about practical steps and suggestions to assist him to resolve the issue himself in the first instance. On 15 December Mr Hamilton-Gibbs is recorded as calling twice. In one call he outlined that his employer was proposing to terminate his employment, and he was seeking support. In the second call he was looking to speak to a particular officer who was going to provide an email address for Mr Hamilton-Gibbs to send information to. The officer who spoke to him recorded the call in the log as follows:

Brendan was looking to speak to a Matthew who was going to send them an email so that Brendan could respond with his query about notice period and annual leave and being declined refreshment leave because of his vaccination status.

I provided my email, advised that we need a timeline of the process, his documents of termination, his request for refreshment leave and the schools response etc and that we would review that without legal team and get back to him asap.

[26] It is unclear whether the last line of the entry above is supposed to convey review with the legal team. That would seem to be the logical sequence as set out in Mr Martin's affidavits.

[27] On 17 December, the day his employment was terminated, he also asked about the "next part of the process".

[28] On 20 December he sent in a timeline and the correspondence he had received from the Board and said:

I want to know if they have followed the steps correctly. I am disturbed by the emotive language they used and their reasons for not granting me the refreshment leave that I had requested for Term 1 next year. I do not feel that they have acted in good faith.

[29] He received the following response on the same day:

Thank you for your email. It does look [sic] the school has followed the due process with unvaccinated staff. They look to have had regular communication with yourself regarding the mandate and what this would like [sic]. Did you apply for the unpaid refreshment leave after you were excluded from working on site?

[30] In any event Mr Hamilton-Gibbs had already sent in the information requested. The email response was a comment from the union offering an opinion that it looked like the school had followed due process and asking whether he had applied for Refreshment Leave. A copy of the relevant clause in the Collective Agreement about Refreshment Leave was provided. There were no further communications between them until on 8 March when Mr Hamilton-Gibbs called to cancel his Union membership because he was no longer working.

[31] I was informed the record of contacts with Mr Hamilton-Gibbs held by the union is as complete as it can be but it is likely there are some communications missing. This was a busy time because of the Covid-19 vaccination mandate covering the education sector. However, Mr Martin's affidavit is generally consistent with Mr Hamilton-Gibbs description of his relevant communications with the union.

[32] What emerges is a discussion between Mr Hamilton-Gibbs and the union that had not progressed past the initial provision of information about his situation and a suggestion he consider applying for Refreshment Leave which of course he had already done. That was the end of the dialogue between them. Mr Hamilton-Gibbs was waiting to hear from the union after asking for advice but there is no evidence the Union was asked to lodge a personal grievance on his behalf. Had the dialogue continued a grievance might have been lodged but I need to be satisfied firstly that Mr Hamilton-Gibbs made reasonable arrangements with the union to raise a grievance and secondly that the union unreasonably failed to ensure the grievance was raised within the required time.

[33] The parties refer to various court decisions that touch on agent's actions as a ground for exceptional circumstances including *Melville v Air New Zealand Ltd*. *Melville* is a case in which the Court declined to grant leave, finding the employee gave

general and broad instructions for the union to take the necessary steps to pursue her grievance but she did not give an express instruction in this regard to ensure her grievance was raised within time.<sup>4</sup> However, as noted in *Davies v Dove Hawkes Bay Inc*<sup>5</sup> although leave to appeal the Employment Court's decision in *Melville* was declined, the Court of Appeal said that it could not accept, as a matter of law, that there must always be an express instruction by the claimant to the agent to bring a claim in time. The Court of Appeal said that would amount to a quite unwarranted narrowing down of the statutory provision setting out the employee has to make "reasonable arrangements" to have their grievance raised on their behalf.<sup>6</sup>

[34] The essence of Mr Hamilton-Gibbs' submission is that he should have been informed by the Union, when he was declined refreshment leave, that this was likely to have been in breach of the recent amendment to the Act requiring employers to have exhausted all reasonable alternatives before terminating an employee's employment because of their vaccination status. He could then have made reasonable arrangements to lodge his personal grievance. I was referred to a quote from the then Chief Judge Colgan in *Davies*, that if an applicant engages a qualified, knowledgeable agent to advise on and protect his interests, it should no longer be required for that applicant to formally instruct them to raise the grievance on their behalf.<sup>7</sup>

[35] Mr Davies' lawyer had already written to his employer advising that he was represented and was considering his options and seeking further information related to the dismissal. A letter raising a grievance on Mr Davies behalf was drafted by the lawyer who then took no further steps. The lawyer also conceded her errors and responsibility for the grievance not being raised in time.

[36] While something less than an express instruction to bring a claim will suffice, reliance by Mr Hamilton-Gibbs on *Davies* fails on the facts. While there may have been a misunderstanding between the Union and Mr Hamilton-Gibbs, the dialogue between them does not establish engagement of an agent to act on behalf of Mr Hamilton-Gibbs. There was no instruction express or otherwise given to the union to raise a grievance. Mr Hamilton-Gibbs' communications with the union did not progress

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<sup>4</sup> *Melville v Air New Zealand* [2010] NZEmpC 87.

<sup>5</sup> *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83 at [20].

<sup>6</sup> *Melville v Air New Zealand* [2010] NZCA 563.

<sup>7</sup> *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83.

past an initial discussion about his situation and provision of further information. When no further information was provided, the union did not initiate any further contact with Mr Hamilton-Gibbs and Mr Hamilton Gibbs took no further steps to follow up with the union.

[37] The submission that he received incorrect advice when it was conveyed to him in an email that the mandates could not be challenged does not take this application for exceptional circumstances any further. Mr Hamilton-Gibbs evidence was that he was aware he had not had legal advice and the evidence from the union was that the Member Advisory Officers (MAO) only refer matters to the legal team for consideration of lodging a personal grievance when a member is seeking direct intervention and representation and the Union considers that to be warranted.

[38] This makes it difficult for Mr Hamilton-Gibbs to advance this application on the basis an agent failed to act on his behalf.

[39] It was also submitted that Mr Hamilton-Gibbs was unfamiliar with the 90-day time limit. I note in the affidavit from Kelly Sutton, Deputy Principal, setting out that Mr Hamilton-Gibbs was a union representative at the school for a number of years from approximately 2016 to 2019. If that is correct, it would be difficult for Mr Hamilton-Gibbs to maintain he was unaware of the timeframe for raising grievances.

[40] In conclusion on this ground, I find no reasonable arrangement was made to have the union raise a personal grievance.

### **Second ground - so affected or traumatised**

[41] The threshold is high for finding that an employee has exceptional circumstances because they were so affected or traumatised by the matter giving rise to the grievance, which in this case, is Mr Hamilton-Gibbs' dismissal. The Court in *Telecom New Zealand v Morgan* sets this out:<sup>8</sup>

[25] So interpreted, the statutory test for this exceptional circumstance requires a high standard of proof to be met by an applicant. Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than three months, most cases are unlikely to meet that test...

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<sup>8</sup> *Telecom New Zealand v Morgan* [2004] 2 ERNZ 9 at [25].

[42] *Morgan* was a case where the applicant obtained alternative employment within the 90-days and although the Court did not doubt the psychological effects of the dismissal on Mr Morgan, he was suffering clinical symptoms of depression as a consequence of the distress to him of his impending redundancy. Despite this he was not found to be “so affected or traumatised” by his dismissal that he was unable to properly consider raising the grievance for much, let alone all of the 90-day period.

[43] The Board in the present case says there is no medical evidence that Mr Hamilton-Gibbs was affected to the level required or beyond the 90-day period. It says he was able to function by 26 April because he was applying for new roles at that date. Mr Hamilton-Gibbs’ evidence is that he declined a full-time job in September 2022 but he did not provide any detail about when he started to apply for roles.

[44] Mr Hamilton-Gibbs has provided evidence from his general practitioner showing he was affected to the extent he saw his general practitioner on approximately four occasions from December 2021 to June 2022. He was given advice on psychological support and techniques. However, in *Morgan* it was also held that “so affected or traumatised” in s 115(a) connotes substantial injury. Furthermore, an inability to “properly consider” raising the grievance means the employee must suffer the inability for the entire 90-day period. The fact that an employee is able to “properly consider” raising the grievance at some point during the 90-day period means the test will not be satisfied.

[45] I have no doubt this was a very difficult period for both Mr Hamilton-Gibbs and his family, given the matters set out in his affidavit. On review of the medical record in the three-month period after termination, there is evidence of stress and emotional struggle. No diagnosis is recorded. The stress is recorded as flowing from a combination of factors including the vaccination mandates, Mr Hamilton-Gibbs’ decision not to be vaccinated, his family’s ability to cope during this period with both his decision and their own decisions about vaccination, as well as his termination of employment.

[46] I also note the information and relevance of the fact Mr Hamilton-Gibbs applied for at least one position in 2022 at some time prior to September when he says he declined the role. That shows a motivation and ability to engage with recruitment processes and a new employer either within or shortly after the 90 day period expired

on 17 May 2022. That makes it harder for Mr Hamilton- Gibbs to demonstrate that he was so affected he was unable to consider raising his grievance during the 90-day period.

[47] For the reasons set out above I am not satisfied, on the balance of probabilities, that Mr Hamilton-Gibbs was so affected or traumatised by his dismissal and the circumstances giving rise to it, that he was unable to properly consider raising the grievance. I am also not satisfied that he had made reasonable arrangements to have his grievance raised by the Union on his behalf.

### **Conclusion**

[48] These being the only two grounds relied on by Mr Hamilton-Gibbs for leave to extend the time for bringing his personal grievance under s 114(5) of the Act, he has not established the existence of “exceptional circumstances”, the necessary first step for the granting of such leave. Leave is declined.

### **Costs**

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Board may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Hamilton-Gibbs will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[51] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)