

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 643  
3293200

BETWEEN

TONY LAFOTANO  
Applicant

AND

THE VICE-CHANCELLOR  
OF THE UNIVERSITY OF  
AUCKLAND  
Respondent

Member of Authority: Robin Arthur

Representatives: Ronald Jones, advocate for the Applicant  
Rebecca Rendle and Jessica Greenheld, counsel for the Respondent

Investigation: On the papers

Submissions and further information: From the Respondent on 9 July and 2 August 2024 and from the Applicant on 23 July 2024.

Determination: 29 October 2024

---

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This determination concerns whether Tony Lafotano raised a personal grievance about the end of his employment at the University of Auckland (the university) within the 90-day period required under s 114 of the Employment Relations Act 2000 (the Act). If the grievance was raised outside that time and the delay was not caused by some exceptional circumstance, the Authority cannot investigate the employment relationship problem.

[2] The assessment concerns only whether the grievance Mr Lafotano wished to pursue was raised in time, or not. It is not about the merits, or otherwise, of his grievance.

[3] By letter on 14 August 2023 a university representative notified Mr Lafotanoa he was dismissed from his employment, effective 15 August 2023. The dismissal followed a disciplinary investigation during which a university representative concluded he had committed serious misconduct. This concerned use of sick leave and attending an activity at another university when his university managers understood he was ill at home.

[4] In a letter to a university representative dated 15 November 2023 Mr Lafotanoa's advocate, Ron Jones, wrote:

we formally advise that we are raising a personal grievance in terms of section 103 of the Employment Relations Act 2000 – in that he was subject to unfair disadvantage, breach of good faith, unjustified dismissal.

[5] Mr Jones' letter alleged the university had conducted a "rudimentary" investigation, had not provided sufficient supporting evidence about Mr Lafotanoa's actions, had not provided him with copies of notes made and statements taken during the disciplinary investigation, had not given enough weight to Mr Lafotanoa's explanations, had not met with him again after advising of the dismissal outcome to discuss his view that the outcome was pre-determined, and had not given him adequate notice of his dismissal.

[6] The letter was sent 92 days after the effective date of the termination of the employment. The 90-day period ended on 12 November 2023.

[7] When Mr Lafotanoa applied to the Authority in April 2024 for an investigation of his personal grievance, the university's statement in reply objected on the grounds that his grievance had been raised outside the required 90-day time frame.

[8] The university accepted some earlier email messages Mr Lafotanoa and Mr Jones had exchanged with a university representative between 21 August and 9 November 2023 did refer to the prospect of raising a grievance. However, the university said that correspondence lacked details necessary to be able to address his claim so had not properly raised a grievance within the 90-day limit.

### **The Authority's investigation**

[9] By agreement with the parties this preliminary issue has been determined 'on the papers', considering written submissions from their representatives and what could

be seen from the documents accompanying the statement of problem and statement in reply.

[10] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Legal principles**

[11] Under s 114 of the Act:

- (1) Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer **within the period of 90 days** ... unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[12] The following principles guide the assessment of whether a grievance has been raised in a way that meets these requirements of the Act:<sup>1</sup>

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

---

<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

[13] What is sufficient to make the employer “aware” of what the employee wants to have addressed, therefore, must be more than a mere label such as ‘unjustified disadvantage’.<sup>2</sup> The communication made by or for the worker wanting to raise a grievance must identify some action, omission or event which is said to have amounted to or caused that disadvantage. Plain words about having done or not done something right or fairly is enough.

[14] Saying a grievance will be raised, in the future, is not raising a grievance.<sup>3</sup>

#### **No sufficient information communicated before 15 November**

[15] Copies of correspondence provided by the parties showed Mr Lafotanoa had raised the prospect of pursuing a personal grievance from 21 August 2023. Careful reading of that correspondence, however, show Mr Lafotanoa did not communicate sufficient information about the nature and basis of his grievance until his advocate’s letter of 15 November 2023.

[16] By email on 21 August 2023 to the university’s human resources manager Elin Angvén, Mr Lafotanoa wrote:

Thank you for the email and attached letter of outcome.

I have spoken to [my employment advocate] regarding the circumstances and process to which has led to the decision, the way in which I have been treated and the wholly unjustified decision has left me distraught with my mana and career in ruins.

I am now following the process to challenge this decision and lodge a personal grievance against the dismissal, can you please advise on the process by which I can forward this application.

[17] He copied his message to his advocate. Significantly he did not say he was raising a grievance. He asked for advice on how to raise one.

[18] In a reply by email on the same day, copied to Mr Jones, Ms Angvén wrote: “Please send your personal grievance directly to me. I will acknowledge receipt of this once it comes through and advise of the process from there”.

[19] The following day, in an email also copied Mr Jones, Mr Lafotanoa wrote to Ms Angvén:

---

<sup>2</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>3</sup> *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71 at [26].

Thank you for the email reply and guidance.

I would like to lodge a personal grievance complaint citing 'Unjustified Dismissal', the details of my challenge will be outlined once I have received the process and forms from you to respond accordingly.

Thank you in advance.

[20] Responding on the same day, in an email again also copied to Mr Jones, Ms Angvén wrote:

I understand you want to submit a personal grievance with a claim for unjustified dismissal. However, we do not have a form for you to complete.

In general terms, the employee or former employee would outline their claim and why they believe they have been unjustifiably dismissed or whatever they are claiming.

I can refer you to the section in the employment agreement which covers employment relationship problems; the excerpt is included below, with the relevant sections highlighted around a personal grievance.

I recommend that you seek advice from your employment advocate on constructing your personal grievance. Once you are ready to submit your personal grievance, please send this directly to me, as indicated earlier.

[21] The excerpt from the employment agreement that Ms Angvén included with her email set out the following provisions:

If the Employee believes there is a problem with his or her employment relationship with the University, the Employee should tell the Employee's manager, either personally or through another representative as soon as possible:

- that there is a problem;
- the nature of the problem; and
- what action the Employee wishes to be taken in relation to the problem.

In the case of a personal grievance, the Employee must raise the matter with the Employer within 90 days of the grievance occurring or coming to the Employee's notice, whichever is the later. A written submission is preferable but not necessary.

[22] The next communication was the letter Mr Jones sent Ms Angvén on 9 November:

Please be advised we have been retained by Mr Lafotanoa to assist him with his employment issue with Auckland University.

We advise that ... Mr Lafotanoa has authorised us to act for him in respect of an employment relations problem with Auckland University.

On our client's behalf, we formally advise that he is raising a personal grievance in terms of section 103 of the ... Act, and he also did that initially in an email to you on 21 August 2023 – the grievance being that he was subject to unfair disadvantage, breach of good faith and unjustified dismissal.

A more complete letter outlining his grievance will follow this email shortly.

[23] Ms Angvén responded, on the same day:

Thank you for advising that Tony Lafotanoa is raising a personal grievance including that he was subject to unfair disadvantage, breach of good faith, unjustified dismissal and that you are his representative.

We will await the complete letter outlining the grievance.

[24] Mr Jones sent that letter on 15 November. It repeated the allegation made in the 9 November email that Mr Lafotanoa had been “subject to unfair disadvantage, breach of good faith, unjustified disadvantage.” It continued with a two page ‘background’ account of the events that had led to the disciplinary investigation and then set out further details on what Mr Lafotanoa’s grievance “related to”. Under the heading ‘unjustified disadvantage’ the letter said this comprised failing to provide all information to him, refusing to meet him to discuss the dismissal letter and giving one day’s notice of his dismissal. Those “acts and omissions” were identified as amounting to the alleged breach of good faith principles. Under the heading ‘unjustified dismissal’ the letter alleged the university had failed to follow a full and proper process, failed to consider alternatives to dismissal, acted in haste, failed to give sufficient weight to Mr Lafotanoa’s answers and had reached a predetermined outcome.

### *Analysis*

[25] Mr Lafotanoa’s August emails clearly communicated an intention to raise a grievance but did not say enough to have met the requirement of s 114(2) to identify what it was he wanted the university to address. His second message expressly said “details of my challenge” would be given later.

[26] Ms Angvén’s responses to both August messages had been prompt and provided information useful to raising a grievance on time. They were also appropriately copied to Mr Jones, so that information was available to him too. Neither message suggested Ms Angvén considered Mr Lafotanoa’s emails had done enough to raise a grievance, with the necessary detail, at that stage.

[27] The 9 November email from Mr Jones did identify the nature of the alleged grievance – unjustified disadvantage, breach of good faith and unjustified dismissal.

[28] It was submitted to the university within the 90-day time frame. It did not, however, either on its own or read together with the August emails, provide enough information to make the university aware of what events, acts or omissions were said to comprise the reason for Mr Lafotanoa's grievance. It provided only labels.

[29] Again, Ms Angvén's response to the 9 November email, promptly made, did not give a misleading impression that the university accepted sufficient information had been provided to make it aware of what Mr Lafotanoa wanted the university to address. Rather, her response expressly identified that the university was awaiting a complete letter outlining the grievance.

[30] The 15 November letter was sufficiently specific about what Mr Lafotanoa said was unfair and unreasonable treatment of him through the disciplinary process and the decided outcome. It was, however, sent outside the required timeframe.

[31] The university had not, at that time or since, consented to Mr Lafotanoa's grievance being raised after the end of the 90-day period.

[32] On a straight-forward application of the requirements of s 114(1) and (2), and in the absence of consent otherwise by the university, Mr Lafotanoa was out of time to raise his grievance and the Authority cannot investigate it.

[33] Before confirming that conclusion, two other aspects required consideration. One concerned the date from which the 90-day period ran. The other concerned the Act's provisions regarding exceptional circumstances.

#### **Not extended by time taken to get last pay**

[34] Mr Lafotanoa submitted the 90-day period to raise a grievance should be taken from the day he received his final pay from the university (on 23 August), not the effective date of his dismissal (on 15 August).

[35] His submission relied on two cases where an employee had been dismissed on notice or remained on the employer's pay roll until annual leave entitlements were used up. In those situations, the employment relationship remained 'on foot' even if the

employee was not at work and the dismissal did not take effect until the notice period or leave ended. And the 90-day period, in those cases, ran from that last date.

[36] In Mr Lafotanoa's case, however, he was dismissed for serious misconduct, effective the following day. Its implementation, the day after the dismissal letter, was described as agreed to allow him time to return his university access card, mobile phone and laptop computer. The effective date of the dismissal was not providing the notice period set in the employment agreement. Rather, while an employer dismissing a employee for serious misconduct may elect to do so on notice, an employment agreement typically allows for summary dismissal in such circumstances, as effectively happened here.

[37] The dismissal was effective on 15 August and that was the date from which the 90-day period to raise a grievance appropriately ran.

#### **No exceptional circumstances**

[38] Leave may be given to pursue a grievance raised outside the 90 days where the reason for the delay arose from exceptional circumstances.<sup>4</sup>

[39] Mr Lafotanoa did not seek leave on those grounds. Nothing said in the statement of problem, statement in reply, documents provided, or submissions made suggested any such exceptional circumstances applied.

[40] Both Mr Lafotanoa and his representative were aware from Ms Angvén's email responses in August of the requirements for raising a grievance within 90 days of the dismissal. They provided no information or explanation about the delay from 22 August until 9 November before a further message was sent to the university about the intention to raise a grievance. Neither was there any explanation of why the "complete letter" promised in the 9 November email was not sent by 12 November, that is within the 90-day frame, rather than on 15 November, outside the 90 days.

#### **Outcome**

[41] Mr Lafotanoa did not raise a personal grievance within 90 days of the relevant event or action. The Authority cannot investigate his application.

---

<sup>4</sup> Employment Relations Act 2000 s 114(3) & (4).

## **Costs**

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

[43] If unable to do so, and an Authority determination on costs is needed, the university 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 Lafotanoa would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup> As an initial indication, subject to submissions or other information, the starting point for assessing costs in this particular matter determined ‘on the papers’ would likely be one quarter of the daily tariff.

Robin Arthur  
Member of the Employment Relations Authority

---

<sup>5</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).