

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 71
3207439

BETWEEN ROWENA MOANA BEATON
Applicant

AND THE CHIEF EXECUTIVE OF
ORANGA TAMARIKI –
MINISTRY FOR CHILDREN
Respondent

Member of Authority: Philip Cheyne

Representatives: Liz Lambert and Karen Glass, advocates for the
Applicant
Joseph Perrott, counsel for the Respondent

Investigation Meeting: 11 October 2023 in Invercargill

Submissions received: 30 October 2023 and 10 November 2023 from the
Applicant
3 November 2023 from the Respondent

Determination: 9 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rowena Beaton has worked for Oranga Tamariki (OT) and its predecessors since August 1996.

[2] On 25 October 2021, the Covid-19 Public Health (Vaccination) Order 2021 was amended to include certain persons who performed certain work in the health and disability education sectors. The Order prohibited an affected person from carrying out certain work unless they were vaccinated or an exempt person. Oranga Tamariki had a duty under the Order not to allow an affected person to carry out certain work unless satisfied that the person was vaccinated. OT considered that Ms Beaton was an affected person because some of her work was covered by Part 9 of Schedule 2 to the Order. OT believed Ms Beaton could lawfully continue to perform the work covered by the Order only if she was vaccinated for Covid-19 and disclosed that to OT.

[3] OT wrote to and met with Ms Beaton. Ms Beaton chose not to be vaccinated and advised OT of that. Discussions between OT and Ms Beaton resulted in an agreement to rearrange Ms Beaton's work so that she would not be an affected person under the Order.

[4] OT later adopted an organisation-wide policy based on duties under the Health and Safety at Work Act 2015 and a health and safety risk assessment. The policy required kaimahi in front-line roles to be vaccinated. Proof of vaccination was required to enter OT premises.

[5] There were further communications with Ms Beaton about the agreement to rearrange her duties to avoid the effect of the Order. OT then came to the view that Ms Beaton could no longer legally perform a significant portion of her duties and could not perform her role remotely. OT gave her a month's notice of dismissal.

[6] During the notice period, Government changes caused OT to reconsider its vaccination policy and the extent to which the Order affected Ms Beaton's ability to perform her work. OT extended Ms Beaton's notice period several times and then withdrew the notice of dismissal. Ms Beaton is still employed by OT.

[7] Ms Beaton commenced this action in the Authority in December 2022. Ms Beaton says that she suffered coercion and humiliation from OT management and fellow employees as a result of OT's Covid-19 policy that allowed the identification of vaccine free employees. Ms Beaton further says that OT coerced her in an attempt to get her to have medical treatment. Harassment and coercive conduct were the repeated threats to end her employment.

[8] Ms Beaton says the threatened dismissal and other disadvantages and harassment give rise to a personal grievance as defined by s 103(1)(b) of the Employment Relations Act 2000. There is a claim for \$25,000.00 compensation for hurt and humiliation.

[9] Ms Beaton says that OT breached specified sections of the Health and Safety at Work Act 2015. There is a claim for the exemplary damages in an amount as assessed by the Authority.

[10] Ms Beaton says that OT refused to address the hazards in the workplace and exacerbated them by attempting to coerce her to be vaccinated. Under s 103(1)(j) of the Employment Relations Act 2000, OT has engaged in adverse conduct for a prohibited health and safety reason and/or has breached s 92 of the Health and Safety at Work Act 2015. There is a claim for the exemplary damages in an amount as assessed by the Authority.

[11] Ms Beaton seeks compensation for a breach of s 88 of the Health and Safety at Work Act 2015 and for 10 days long service leave she says she was forced to take as a result of unjustified actions by OT.

[12] Ms Beaton seeks compensation for the cost of changing travel arrangements to return home from holiday a day earlier in November 2021 when she was advised by her team leader about the effect of the Order on her work from 15 November 2021.

[13] Ms Beaton seeks a penalty against OT for breach of employment agreement, based on it requiring vaccinations, mask wearing and testing to be enforced by sanctions when these requirements were not terms of the employment agreement.

[14] OT says that Ms Beaton did not raise personal grievances within time, but its actions did not amount to any personal grievance if Ms Beaton had raised any grievance within time. OT opposes any remedies.

[15] Despite mediation, matters were not resolved.

The Authority's investigation

[16] An investigation meeting was necessary, whether or not OT is correct that grievances had not been raised within time. The meeting was scheduled without prejudice to OT's timeliness defence.

[17] The parties co-operated to provide a joint bundle. Much of what happened is apparent from the documentary record. A recording and transcript of a meeting is also in evidence.

[18] Ms Beaton gave evidence and answered questions. Ms Beaton's team leader (David Jenkins), her manager (Andrew Gibbs) and two other OT managers gave evidence and answered questions.

[19] Submissions were later provided in writing.

Issues

[20] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders. The Authority needs to determine the following issues:

- (a) Were grievances raised within time?

- (b) If so, are any personal grievances established?
- (c) If so, what remedies are appropriate?
- (d) Is OT liable for a penalty for breach of employment agreement?
- (e) What other matters should be determined?

[21] It will be useful to set out more fully the context from which these issues arise.

The context

[22] Ms Beaton at relevant times was employed as a Youth Justice Family Group Conference Coordinator. Her work included in-person meetings at the offices of health and education providers. As a union member, Ms Beaton was covered by a collective agreement.

Tasks performed by Ms Beaton became covered by the Order

[23] The COVID-19 Public Health Response (Vaccinations) Order 2021 required “affected persons” to be vaccinated to perform specified work. Amendments to it effective on 25 October 2021 extended the list of “affected persons” to include workers who carry out work where health services are provided and to those who carry out work at education services. The Order created a duty on affected persons not to carry out certain work unless vaccinated or if an exempt person; and a corresponding duty on a “relevant PCBU¹” not to allow an affected person to carry out certain work unless vaccinated or if an exempt person. The PCBU also had a duty to notify each affected person of their duty to be vaccinated.

[24] OT was a PCBU with respect to Ms Beaton’s employment.

¹ Person conducting a business or undertaking.

[25] The amendment brought Ms Beaton within the list of “affected persons”, as her work included attending health services and education services in circumstances covered by the amended Order.

[26] Chappie Te Kani is Chief Executive of OT. Mr Te Kani sent an email about the Order to all staff on 1 November 2021. He referred to the requirement for kaimahi in “certain roles” to have had a first vaccination by 15 November 2021.

[27] By 4 November 2021, OT managers had confirmed that Family Group Conference Coordinators were included, based on tasks they performed.

[28] Ms Beaton was on leave in early November 2021. David Jenkins was her team leader. On 5 November 2021 Mr Jenkins called or messaged Ms Beaton to alert her to the development. Mr Jenkins sent a letter to Ms Beaton on 8 November 2021 to her work email address. He also sent a txt to her personal phone that there was a letter for her.

[29] Ms Beaton changed flights back to Invercargill and returned to work from leave a day earlier than she had intended.

[30] Mr Jenkins in his 8 November 2021 set out OT’s view that Ms Beaton was an “affected worker”, the Order’s requirement for her to have received a first dose of vaccine by 15 November 2021 and the second dose by 1 January 2022, together with the need for her to provide OT with information about her vaccination status. Mr Jenkins said that OT could not allow Ms Beaton to perform tasks covered by the vaccination requirement if she was not vaccinated or exempt or if she had not disclosed her vaccination status. In those circumstances it would need to consider other options including whether it could continue to employ Ms Beaton.

Ms Beaton's 15 November letter

[31] Ms Beaton sent a letter by email to Mr Jenkins on 15 November 2021. Ms Beaton said she had returned home at her expense, having been contacted while on leave. Ms Beaton described OT's vaccination requirement as a "unilateral request of ... [its] own volition". The purpose of the letter was to explain why she would not be vaccinated. Ms Beaton canvassed points about the "novel mRNA vaccine", its "trial phases", its New Zealand "provisional consent" status, whether it prevents infection or transmission of the virus and reported significant adverse events. Ms Beaton considered that OT should have considered whether vaccination makes a "quantifiable difference" in addressing Covid-19 risks.

[32] Ms Beaton referenced rights under the New Zealand Bill of Rights Act 1990 and the Code of Health and Disability Services Consumers' Rights. Ms Beaton considered that informed consent was not possible.

[33] Ms Beaton described arrangements for family group conferences to manage the risk of transmission and undertook to isolate and test if experiencing symptoms, noting that isolating and testing was required regardless of vaccination status.

[34] Ms Beaton asked OT to "revoke the Vaccination Request" or if not, to answer a series of questions. Ms Beaton concluded with a summary of her concerns about the vaccination and her view that OT had not undertaken an objective analysis or followed a proper process before issuing the "Vaccination Request", giving her reasonable grounds to exercise the right not to be vaccinated.

[35] The "Conclusion" included:

Should my choice not be respected, and the terms of my employment are negatively affected because of this choice, then I may exercise my right to file a personal grievance.

[36] Mr Jenkins wrote to Ms Beaton on 15 November 2021. He did not directly reply to Ms Beaton's letter but knew she had decided that she would not be vaccinated. Mr Jenkins referred to the Order requiring Ms Beaton to be vaccinated and to confirm her vaccination status. Mr Jenkins invited Ms Beaton to meet to discuss the Order and its effect on her ability to carry out her duties. He encouraged her to be supported or represented at the meeting.

18 November meeting

[37] The meeting was attended by Mr Jenkins, Ms Thompson (HR advisor), Ms Beaton and her support person. It was recorded. The recording and a transcript are in evidence. I need only summarise what was said.

[38] Mr Jenkins confirmed his understanding that Ms Beaton did not intend to be vaccinated for the reasons set out in her correspondence. He said that he was not able to revoke the vaccination request and that OT considered that the coordinator role was covered by the Order. Mr Jenkins said that OT wanted to have Ms Beaton working there and he considered that the purpose of the meeting was to "figure that out". Ms Beaton made the point that, unlike safety equipment, she could not remove the vaccination when she was not at work. There was some comment about whether adverse effects would be covered by ACC. Ms Thompson confirmed that they wanted to work with Ms Beaton to find ways for her to do her job, respecting her choice not to be vaccinated. Mr Jenkins considered that he would need to put in writing OT's views about how Ms Beaton could continue in her work. There was some discussion about how the work was being done and could be done in several situations, including Ms Beaton's acting role, in compliance with the Order. The meeting ended with Mr Jenkins to confirm arrangements in writing.

[39] On 23 November 2021, Mr Jenkins wrote to Ms Beaton setting out what had been agreed. Mr Jenkins concluded that arrangements would be reviewed in a month.

[40] Mr Jenkins advised that an external agency at which Ms Beaton attended a weekly meeting as part of her acting role had confirmed its requirement for visiting OT staff to be vaccinated. Mr Jenkins asked Ms Beaton to discuss “alternatives” with him to cover the remaining time in that acting role. In the meeting, Ms Beaton had also said that she had stopped attending another external agency. Mr Jenkins said he would check with that agency as to its requirements. However, visiting the agencies was not a “key requirement” for Ms Beaton’s role.

[41] In evidence, Ms Beaton characterises this as being “locked out” from part of her role. I return to the point later.

[42] Mr Jenkins arranged a review meeting, held on 15 December 2021. Mr Jenkins then wrote to Ms Beaton on 16 December 2021. He described arrangements by which Ms Beaton had continued to perform her work including in her acting role, together with his expectation that Ms Beaton would be able to continue in her substantive role in compliance with the Order. He anticipated meeting again near the end of January 2022 to review matters.

[43] The letter also referred to OT’s current process regarding consultation about the adoption of a vaccination policy.

Oranga Tamariki’s vaccination policy

[44] On 6 December 2021, in his email to all staff Mr Te Kani foreshadowed a consultation process concerning a vaccination policy that would require all OT kaimahi to be fully vaccinated to continue in their roles and to present their My Vaccine Pass to enter OT sites. This was followed by a consultation document dated 7 December 2021 setting out details of the proposal seeking a response by 16 December 2021 before a final decision by 22 December 2021.

[45] Mr Te Kani later wrote to all staff on 22 December 2021 to advise that he had decided to adopt the Covid-19 Vaccination Policy. Mr Te Kani opened by saying:

Kia ora koutou

Being vaccinated against COVID-19 is the most important thing we can do to protect each other and the tamariki, rangatahi, whanau and communities we work with from COVID-19.

[46] Ms Beaton's evidence is that she felt Mr Te Kani "misrepresented and attempted to coerce or induce" her to be vaccinated. I return to the point later.

[47] OT also published a comprehensive document outlining the consultation and the outcome. In summary, OT would require all kaimahi to have a first vaccination by 1 February 2022 and to be fully vaccinated by 1 March 2022 to remain in their roles. From 1 March 2022 all kaimahi would be required to produce their My Vaccine Pass to enter OT sites they were visiting. Case-by-case exceptions would be considered. Staff had commented on concern about adverse reactions during consultation. OT would pay for staff to visit their GP to get medical advice tailored to them.

[48] As a result of the policy, Ms Beaton had to work remotely from February 2022.

Notice of termination

[49] Andrew Gibbs is OT's Manager – Youth Justice and was the line manager for Ms Beaton at relevant times. Mr Gibbs sent a letter dated 31 January 2022 to Ms Beaton to initiate a further review of her rearranged duties. He had been told by Mr Jenkins that Ms Beaton had said she did not wish to meet but required written correspondence. Mr Gibbs expressed concern as the issues around the implications of the Order were better dealt with by meeting.

[50] Mr Gibbs' letter invited Ms Beaton to meet to discuss her vaccination status and any support she required to be vaccinated or obtain a valid exemption. If Ms Beaton remained unvaccinated, Mr Gibbs would need to discuss "the next steps in relation to your employment". That could include whether OT could continue to

accommodate Ms Beaton's inability to perform certain aspects of her role, whether her redeployment within OT or the public service was possible, whether as a last resort OT may need to consider terminating her employment and the impact for her of OT's COVID-19 vaccination policy. Mr Gibbs advised Ms Beaton of "the seriousness of the situation regarding your ongoing employment", even if she declined to meet with him. Ms Beaton could email her views to Mr Gibbs if she did not wish to meet.

[51] Ms Beaton's evidence is that Mr Gibbs "announced" that she could not perform some of her role without being vaccinated, but she says this was not true. She relies on clause 12A of the Covid-19 Public Health Response (Vaccinations) Order 2021. Ms Beaton says the letter was "direct coercion" to get her vaccinated. Ms Beaton also says that the Human Rights Act 1993 is supposed to protect her from "perceived disability". I return later to these points.

[52] Ms Beaton declined the meeting invitation and advised that she would send a letter.

[53] Mr Gibbs emailed Ms Beaton on 4 February 2022 as he had not received the promised letter. He set out options he had intended to raise. Mr Gibbs also included a copy of OT's Covid-19 health and safety risk assessment which had informed its policy.

[54] Mr Gibbs received Ms Beaton's 2 February 2022 letter on 9 February 2022.

[55] In this letter, Ms Beaton referred to her 15 November 2021 letter and said she had not received a response to her questions. Ms Beaton said she found Mr Gibbs' letter "quite distressing and aggressive". She had declined the meeting as she found them quite stressful. Ms Beaton mentioned "inconsistent messaging" not being allowed to discuss "health and science" in the 18 November 2021 meeting and to be told that OT did not need a risk assessment. A recent OT risk assessment did not

include anything about vaccine harm, so was only “coercion”. Ms Beaton said that the Policy was “coercion” to inject something experimental into your body and the Order did not specify her role.

[56] Ms Beaton referred to her lengthy loyal service. Despite that, it appeared that her employment might be terminated from 1 March 2022 because she chose not to “put something into my body that is experimental” and had caused harm. It was unlike safety equipment as it could not be removed at the end of the workday. Ms Beaton considered it was “unfair, unjust not tika and highly discriminatory”. It was in breach of the “Bill of Rights, Universal Declaration of Human Rights ..., the Nuremburg code (1947), the Health and Safety act 2015” and other laws. Ms Beaton characterised it as “medical discrimination”. OT’s actions were said to be the opposite of its values.

[57] In a message to all staff, Mr Te Kani on 28 February 2022 referred to a potential shift in the current approach to vaccinations and announced a pause on employment processes for non-vaccinated kaimahi, except for those covered by the Order. The pause did not apply to Ms Beaton.

[58] Mr Gibbs wrote to Ms Beaton on 8 March 2022. Mr Gibbs’ letter set out the sequence of events. OT considered it could not permanently accommodate Ms Beaton working in her role remotely. No suitable redeployment opportunities within OT were available. The employment process pause (as above) did not apply to Ms Beaton. The letter constituted one month’s notice of termination of Ms Beaton’s employment, with her last day of work 8 April 2022. Mr Gibbs would continue to consider redeployment opportunities. He outlined available support. Ms Beaton would continue to work from home during the notice period as the Policy prevented her from attending the OT office. Mr Gibbs confirmed that OT would withdraw its notice if Ms Beaton chose to be vaccinated during the notice period.

Withdrawal of notice of termination

[59] The New Zealand Government announced on 23 March 2022 that some vaccine mandates would be removed from late Monday 4 April 2022. Part of the Order applicable to Ms Beaton (the Education sector) would be discontinued, before the end of the notice period.

[60] There were emails between Ms Beaton and Mr Gibbs on 7 April 2022. Mr Gibbs alerted Ms Beaton to the view that the Order was no longer a significant restriction on her ability to perform her role but the policy remained. An announcement about the policy was pending, so an extension of her notice period to 22 April 2022 had been agreed by OT.

[61] Mr Gibbs' email was followed by his letter dated 6 April 2022. He referred to the removal of the mandate in the Education sector and Ms Beaton's ability to perform her role without accessing "health settings" which remained subject to a mandate. Mr Gibbs said that justification for the termination had changed from the Order to the Policy. He therefore deferred the termination date to 22 April 2022 while Mr Te Kani considered changes to OT's policy.

[62] On 14 April 2022 Mr Gibbs spoke with Ms Beaton and confirmed in an email of that date that the termination date had been "pushed out" to 29 April 2022 while they waited for Mr Te Kani's announcement about the policy.

[63] Mr Gibbs wrote to Ms Beaton on 27 April 2022 and further extended the termination date to 31 May 2022 for the same reason.

[64] In early May 2022, there was an exchange between Ms Beaton and Mr Gibbs about a piece of work. Mr Gibbs decided that Ms Beaton could not do the work as it would have involved face-to-face meetings not permitted by the Policy.

[65] Ms Beaton sent an email to Mr Gibbs on 18 May 2022. It summarised some events since November 2021 and referred to “Termination dates” which Ms Beaton said she had been given “thus far”. Ms Beaton referred to contact and an email dated 29 April 2022 she had received from Mr Jenkins. Mr Jenkins had initially arranged for Ms Beaton to do some work, then advised her that the Policy prevented her from having in-person contact with clients. Ms Beaton questioned the change, even though she had worked with clients safely since November 2021.

[66] Ms Beaton also referred to a call from Mr Jenkins on 12 May 2022 in which she was asked to take annual leave despite being subject to notice of termination. Ms Beaton was very critical of the approach.

[67] Mr Gibbs sent an email to Ms Beaton on 19 May 2022. Mr Gibbs said that a revised vaccination policy would be released shortly for consultation and feedback. Ms Beaton’s “current termination dates” would be extended “once again”. No specific date was given.

[68] On 8 June 2022 by email Mr Gibbs acknowledged Ms Beaton’s correspondence and the impact the “drawn out and constantly changing” guidance had had on her. Mr Gibbs further advised that the outcome of the policy consultation would be communicated on 13 June 2022.

[69] Mr Te Kani by email on 17 June 2022 advised all staff that with some exceptions the policy requirement for kaimahi to be vaccinated would be removed with effect from 22 June 2022.

[70] Mr Gibbs wrote to Ms Beaton on 23 June 2022 advising her that as a result of the policy announcement she could undertake all tasks required in her role, including face-to-face meetings. Ms Gibbs scheduled a meeting for 28 June 2022 to discuss Ms Beaton’s return-to-work plan.

[71] Ms Beaton met with Mr Gibbs and Mr Jenkins on 28 June 2022. It was arranged that Ms Beaton would work from home for two days, take two days annual leave and return to working based in the office from Monday 4 July 2022. Nothing further was said about setting aside the notice of termination of Ms Beaton's employment.

[72] Ms Beaton's evidence is that Mr Gibbs attempted to "pressure" her to take annual leave. I return to the point later.

[73] Ms Beaton returned to work in accordance with the 28 June 2022 arrangements.

Subsequent events

[74] Ms Beaton wrote to Mr Gibbs on 13 September 2022 to ask whether OT would attend mediation "first", as she intended to file in the Employment Relations Authority about a personal grievance. Ms Beaton explained that the basis of her grievance was that OT breached her contract, which did not include her agreement to any "medical procedure such as vaccination", by its adoption of the "mandate policy".

[75] Ms Beaton also referred to s 103(1)(j) of the Employment Relations Act 2000 and stated:

I have been discriminated against because of refusing an experimental medical procedure, bullied, locked out of the workplace, received many letters of differing termination days and suffered much harm in all kinds of ways over an eight month period and beyond.

[76] OT's Regional Manager (Rachel Hohaia) replied on 20 September 2022. OT raised its view that Ms Beaton had not raised a personal grievance within time, but without prejudice to that view was willing to meet.

[77] There was a meeting on 5 October 2022. Ms Beaton was represented.

[78] Ms Hohaia wrote to Ms Beaton on 18 October 2022. Ms Beaton's concerns and the remedies she sought during the meeting were summarised in the letter. It is not necessary to set them out here. OT stood by its previous decisions, but repeated this was without prejudice to the timeliness point.

Were grievances raised within time?

[79] To paraphrase the Act,² a grievance is raised with the employer as soon as the employee has made the employer aware that they allege a personal grievance that they want the employer to address.

[80] No particular form of words is required. A grievance may be raised orally or in writing by one communication or through several communications taken together. It does not matter whether the employer recognised the complaint as a personal grievance. The issue is whether the nature of the complaint was a personal grievance as defined in the Act and whether the communication(s) conveyed the substance of the complaint to the employer. The employer must be given sufficient information to address the grievance, by responding to it on its merits with a view to resolving it soon and informally, at least in the first instance.³

[81] Ms Beaton relies on several communications.

15 November 2021 letter

[82] The letter sets out Ms Beaton's complaint that her employment agreement had no express provision that required her to undergo a medical procedure, that she had been contacted while on leave about the pending requirement and that OT had decided to include her role in its requirement for staff to be vaccinated.

² Employment Relations Act 2000 s 114(2).

³ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

[83] Ms Beaton set out her reasons for declining to be vaccinated and sought revocation of the “Request” or answers to her question and information. Ms Beaton said as part of her conclusion that should her choice not to be vaccinated not be respected and her employment was negatively affected, then she “may exercise” her right to “file a personal grievance”.

[84] The meeting and discussion on 18 November 2021 added nothing of substance to Ms Beaton’s complaint outlined in her letter.

[85] To the extent to which OT’s actions following the Order had affected Ms Beaton’s employment to her disadvantage as at 15 November 2021, I find that Ms Beaton raised her personal grievance by her 15 November 2021 letter.

2 February 2022 letter

[86] The letter was received by OT on 9 February 2022. This was the 90th day of the period beginning with 12 November 2021.

[87] Ms Beaton’s letter followed Mr Gibbs’ 31 January 2022 letter. Mr Gibbs signalled the “next steps in relation to your employment” including consideration of terminating the employment by reason of the Order and Ms Beaton’s vaccination status.

[88] Ms Beaton referenced her views and questions from 15 November about the vaccine and complained about the lack of an answer. Ms Beaton complained about the 31 January 2022 letter from Mr Gibbs and OT’s actions regarding health and safety risk assessments. Ms Beaton characterised OT’s December 2021 vaccination policy as “coercion”. Ms Beaton raised various objections to the foreshadowed termination of her employment and considered OT’s actions were the opposite of the values it espouses.

[89] To the extent to which OT's actions based on the Order and the Policy had affected Ms Beaton's employment to her disadvantage from 12 November 2021 to 9 February 2022, I find that Ms Beaton raised her personal grievance by her 2 February 2022 letter.

18 May 2022 letter

[90] The letter was received by OT on 18 May 2022, on the 90th day of the period beginning with 18 February 2022.

[91] Ms Beaton summarised events from 5 November 2021 following the Order and from December 2021 following the Policy. Ms Beaton referred to "the ever changing termination dates", the advice from Mr Jenkins that she could no longer have any face-to-face client contact and the exchange over taking leave during the notice period. Ms Beaton complained about that, especially in light of her service. She characterised OT's actions as "trampling " on her and her ancestor's dignity and ended with "Where are the values of Oranga Tamariki?"

[92] To the extent to which OT's actions based on the Order and the Policy had affected Ms Beaton's employment to her disadvantage from 18 February 2022 to 18 May 2022, I find that Ms Beaton raised a personal grievance by her 18 May 2022 letter.

Are any personal grievances established?

[93] Whether OT's actions were justifiable must be determined on an objective basis by assessing whether OT's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether OT sufficiently investigated matters considering available resources; whether OT raised its concerns before deciding to take the action; whether OT gave Ms Beaton a reasonable opportunity to respond to the concerns beforehand; and whether OT genuinely considered any response before deciding to take the action.

[94] I may consider other factors, if appropriate.

[95] OT as a crown entity had resources available to fully and fairly investigate matters before taking action against Ms Beaton.

15 November 2021 letter

[96] OT contacted Ms Beaton in early November 2021 while she was on leave to alert her to the issues raised in its 8 November 2021 letter that OT considered that her position was affected by the Order that came into effect on 25 October 2021. OT decided it was not able to allow Ms Beaton to perform some tasks unless she was vaccinated or had obtained an exemption.

[97] Ms Beaton raised concerns and questions about the vaccination requirement. OT and Ms Beaton met. They agreed to vary Ms Beaton's work tasks to accommodate her decision not to be vaccinated. Ms Beaton characterises this as being "locked-out". However, it is not necessary to describe any resulting disadvantage to Ms Beaton.

[98] With respect to its actions affecting Ms Beaton in November 2021, OT raised its concerns before taking any action, gave her a reasonable opportunity to respond and genuinely considered Ms Beaton's responses. The arrangement to vary Ms Beaton's tasks so she was not performing work covered by the Order was a reasonable response taking account of her concerns, so was a justified action by OT. In circumstances where OT had to respond to the pandemic, no personal grievance arises as a result.

[99] Ms Beaton objected to being contacted and alerted to the 8 November 2021 letter while she was on leave. Ms Beaton paid to change her flight home so she could review the letter.

[100] The disadvantage relied on by Ms Beaton is the cost she incurred to change her flight. I do not accept that this was an action by OT. Ms Beaton chose to change her flight without that action being required or encouraged by OT. No personal grievance arises as a result.

[101] A point relied on now by Ms Beaton is her assertion that it was “not true” that she could not perform some of her role without being vaccinated. Ms Beaton points to s 12A of the Covid-19 Public Health Response (Vaccinations) Order 2021. Section 12A permitted a PCBU to apply to the Minister for an exemption from provisions in an order. However, the Order covered part of Ms Beaton’s work and she never requested OT to seek an exemption. Instead, they reached an agreement about work tasks to avoid doing work covered by the Order. No personal grievance arises.

2 February 2022 letter

[102] OT adopted its vaccination policy on 22 December 2021. By its letter of 31 January 2022 OT initiated a review of whether it could continue with the variation of Ms Beaton’s tasks.

[103] Ms Beaton in her letter referenced her concerns about the status, safety and efficacy of the vaccine, criticised OT’s Policy and questioned whether the Order applied to her role. Ms Beaton claimed that OT’s actions and the prospect of her dismissal breached various laws and was inconsistent with OT’s values.

[104] Ms Beaton says⁴ that she has a personal grievance under s 103(1)(b) of the Employment Relations Act 2000 arising from alleged breaches of various sections of the Health and Safety at Work Act 2015. Unspecified exemplary damages are sought.

⁴ Statement of problem paragraph 3 B.

[105] The claim for exemplary damages fails. It cannot overcome the principle confirmed in *Prinz v Tirohanga Group Ltd* that exemplary damages are not available for breach of an employment agreement.⁵

[106] However, Ms Beaton raised a personal grievance claim of unjustified disadvantage with respect to OT's decision to adopt its vaccination Policy.

[107] The documentation establishes that OT proposed to Ms Beaton that it was considering the adoption of the policy and gave her a reasonable opportunity to respond. The views set out in Ms Beaton's 15 November 2021 letter as to the status, safety and efficacy of the vaccine, which reflected feedback during consultation, were responded to by OT's reliance on Ministry of Health advice.

[108] In a submission, something is made of the mention of Te Kawa Mataaho Public Service Commission advice in the policy documentation, by reference to s 54 of the Public Service Act 2020. The mention is not evidence of "interference" by the Commission in Mr Te Kani's decisions about the Policy or in OT's actions with respect to Ms Beaton.

[109] I return below to matters regarding the Health and Safety at Work Act 2015.

18 May 2022 letter

[110] Ms Beaton says⁶ she was threatened with dismissal for no just reason and suffered disadvantages and harassment on occasions in March, April and May 2022 in breach of s 103(1)(b) of the Employment Relations Act 2000. Ms Beaton seeks compensation of \$25,000.00 for the threats of termination. The claim in the statement of problem follows on from Ms Beaton's 18 May 2022 letter.

⁵ *Prinz v Tirohanga Group Ltd* [2006] ERNZ 321 at [80].

⁶ Statement of Problem paragraph 3 A.

[111] By letter dated 8 March 2022, Ms Beaton was given a months' notice of termination of her employment, accompanied by advice that OT was willing to withdraw the dismissal if she chose to be vaccinated during the notice period.

[112] There is a submission that Ms Beaton should have been given the benefit of the "pause" in employment processes, like employees whose work was affected only by the Policy. However, as at 8 March 2022, there was a reasonable basis under the Order for OT to take this step against Ms Beaton.

[113] However, on 7 April OT decided to extend Ms Beaton's notice period to 22 April 2022. On 14 April 2022 that date was pushed out to 29 April 2022. On 27 April, the date was further extended to 31 May 2022. OT sought to get Ms Beaton to take annual leave during the notice period.

[114] On 29 April 2022 Ms Beaton was instructed that she could not undertake a specific task because she was no longer able to meet face-to-face with clients.

[115] For present purposes (except as below), I accept that Ms Beaton's employment, or one or more conditions of her employment was affected to her disadvantage by OT's action in giving her notice of dismissal, extending it, declining her offer to undertake the specific work and asking her to take annual leave.

[116] OT's actions met the requirement to sufficiently investigate matters before taking any action against Ms Beaton.

[117] OT raised its concerns about the potential effect on Ms Beaton's continued employment as a result of the Order affecting part of her work by its letter of 31 January 2022. Ms Beaton was given a reasonable opportunity to respond to the concern. Ms Beaton declined to meet but responded by her letter dated 2 February 2022.

[118] OT genuinely considered Ms Beaton's response, as is apparent from Mr Gibbs' 8 March 2022 letter. For example, OT said that it relied on the guidance from the Ministry of Health about the safety and efficacy of vaccination against Covid-19. A fair and reasonable employer was entitled to do so.

[119] Against the background of the application of the Order to part of the work Ms Beaton was employed to perform, OT's decision that it could no longer accommodate reassigning the work and its action in giving notice of dismissal to Ms Beaton were those of a fair and reasonable employer in the circumstance at the time.

[120] Ms Beaton characterises the notice, OT's preparedness to withdraw it if she decided to be vaccinated, the extensions to the notice and OT's general and specific encouragement for staff and her to get vaccinated as threats and/or harassment. I do not accept these communications by OT were threats to or harassment of Ms Beaton. All these communications were within the actions available to a fair and reasonable employer in the circumstances at the time.

[121] OT's actions in extending the period of notice were also the actions of a fair and reasonable employer, reacting to circumstances as they changed at the time. In any event, Ms Beaton was not disadvantaged by the extensions, except to the extent that they created some uncertainty for her about when her employment would end. Ms Beaton could have turned down the extensions, but did not.

[122] To the extent that OT's process with respect to deferring the termination dates amounted to a defect in process, the defects were minor and did not result in Ms Beaton being treated unfairly. The extensions were based on a mutual preference for the employment not to come to an end. They were not "recycled to harass Ms Beaton" as submitted.

[123] I accept that Ms Beaton was offended by being asked if she would take leave during the notice period. However, no actionable personal grievance arose. Whether

or not Ms Beaton took leave was her decision. Ms Beaton's employment was not disadvantaged in any substantive way.

[124] Ms Beaton in her statement of problem refers to various provisions of the Health and Safety At Work Act 2015 (HSWA), to which I now turn.

HSWA s 88

[125] Ms Beaton seeks compensation for an alleged breach of s 88 of the HSWA, said to have caused loss of ten days long service leave.

[126] Section 88 of the HSWA defines adverse conduct for the purposes of subpart 5 of that Act. Actions such as dismissing an employee or subjecting them to detriment are captured by the definition.

[127] Ms Beaton took some long service leave after having been given notice of dismissal. I do not accept that taking this leave had a detrimental effect on Ms Beaton's employment, job performance or job satisfaction.

[128] The additional difficulty with the claim is that s 88 is simply a definition provision. It sets the "conduct" part of the definition. Section 89 of the HSWA sets the "role" part of the definition. The person who is subject to the conduct also has to have some role exercising powers under that Act.⁷ Together s 88 and s 89 create the elements for liability on conviction for a fine under s 90 of the HSWA for the person who engages in adverse conduct for a prohibited health and safety reason. The Employment Relations Authority has no jurisdiction for such a claim.

⁷ See *Lee v The Board of Trustees Otamatea High School* [2018] NERA Auckland 270 at [42].

HSWA s 92

[129] The statement of problem refers to s 92 of the HSWA together with s 103(j)(i) and (ii) of the Employment Relations Act 2000 in support of a claim for exemplary damages.

[130] I adopt what is said elsewhere in this determination about exemplary damages not being available. More needs to be said with respect to whether there is a personal grievance.

[131] To paraphrase, s 92 of the HSWA prohibits a person from taking action against another person to induce/coerce them or a third person to take (or not take) steps or some responsibility under the HSWA. A person who contravenes the section is liable on conviction to a fine. The Employment Relations Authority has no jurisdiction for such a claim.

[132] However, the Authority has exclusive jurisdiction over a personal grievance claim under s 103(1)(j)(i) Employment Relations Act 2000 that a person's employer has engaged in adverse conduct against them for a prohibited health and safety reason. Adverse conduct for a prohibited health and safety reason is defined by s 110A of the ERA. It captures conduct broadly similar to that set out at s 88 of the HSWA. Section 110A(2) of the ERA then provides that the conduct is engaged in for a prohibited health and safety reason if it is engaged in for one of the reasons described by s 89 of the HSWA. There is a grievance if that is a substantial reason for the conduct. It is presumed to be a substantial reason unless the employer proves that it was not the reason for the conduct.

[133] The claim that there is a personal grievance under s 103(1)(j)(i) fails because Ms Beaton held none of the roles described by s 89 of the HSWA. The only exception is that Ms Beaton might say she raised her concern about health and safety

with OT as her PCBU, within s 89(h) of the HSWA. That claim must fail because OT's actions were not caused by Ms Beaton raising her concerns.

[134] Ms Beaton also refers to a personal grievance as defined by s 103(1)(j)(ii) Employment Relations Act 2000. That is a claim that OT contravened s 92 of the HSWA which prohibits coercion or inducement. The claim also fails. OT's actions against Ms Beaton were not with intent to coerce or induce her (or anyone else) to perform a function, exercise a power or refrain from undertaking a role under the HSWA.

Remedies

[135] As no personal grievance has been established, I do not need to consider what remedies have been proven.

Is OT liable for a penalty for breach of employment agreement?

[136] Ms Beaton says that OT insisted on vaccination and medical interventions (mask wearing and testing), despite her employment agreement not including a requirement as to these matters. There is a claim for a penalty for breach of contract.

[137] Every party to an employment agreement who breaches that agreement is liable to a penalty.⁸

[138] I was not taken to any provision in the collective agreement that applied to Ms Beaton that prohibited OT from implementing the Order, adopting its Policy, encouraging Covid-19 vaccinations or adopting controls such as mask wearing and testing. I could not identify any provision that had that effect.

⁸ Employment Relations Act 2000 s 134.

[139] I find that OT's actions with respect to the Order, its Policy and the control measures were not a breach of the employment agreement. The claim for a penalty must fail.

What other matters should be determined?

[140] There is a claim that OT breached various provisions of the HSWA: s 36(3)(a); s 58(1)(b); s 59(1)(a) and (b)(i) & (ii); s 60(a), (b), (d), (e)(ii) & (iii) & (iv); and s 61(3)(g).

[141] The last-mentioned provision (s 61 of the HSWA) establishes a duty for a PCBU to provide reasonable opportunities for workers to participate in improving health and safety in the business or undertaking. It creates liability for a fine on conviction of a person who contravenes the duty. "Reasonable opportunities" is defined to include (amongst other matters) a consideration of the duty of good faith required by s 4 of the Employment Relations Act 2000.

[142] The Authority does not have jurisdiction to determine that OT breached s 61 of the HSWA. However, it does have jurisdiction to determine whether OT complied with its duty of good faith.

[143] I find that OT complied with its duty of good faith owed to Ms Beaton throughout its dealings with her. OT did not deceive or mislead Ms Beaton. OT did nothing that was likely to mislead or deceive Ms Beaton. OT was active and constructive in maintaining a productive employment relationship. When considering the continuation of Ms Beaton's employment, OT provided her with access to relevant information it held and an opportunity to comment before it made any decisions.

[144] Section 36 of the HSWA creates a primary duty of care for a PCBU. Section 58 creates a duty to engage with workers and sets standards for the nature of that engagement under s 59. Section 58 also creates an offence and liability on conviction

for a fine if a person contravenes the section. Section 60 describes circumstances when engagement with workers is required.

[145] Whether or not OT breached these provisions is a matter beyond the Authority's jurisdiction. It is not for the Authority to determine the effect of the District Court's judgment in *Worksafe v National Emergency Management Agency*,⁹ dismissing charges against the Agency under s 36(2) of the HSWA arising from the harm to tourists and tour operators with respect to activities on Whakaari/White Island.

[146] There are submissions to the effect that OT through its "mandate" was on the "wrong track" and an implication that it breached s 93(1) of the HSWA, presumably because it was not empowered as a regulator under that Act. The submissions are misdirected. Schedule 3A of the Employment Relations Act 2000 came into effect on 26 November 2021. It covers the situation where an employer might dismiss an employee because of a duty imposed by a statutory provision (such as the Order) or a determination by the employer (such as the Policy) Covid-19 regarding vaccinations.

[147] To the extent the foregoing provisions are advanced in support of claimed personal grievances, I repeat my earlier finding that no grievances have been established.

[148] In the 15 November 2021 letter, Ms Beaton referred to the New Zealand Bill of Rights Act 1990 (Right not to be subjected to medical/scientific experimentation without consent, right to refuse medical treatment), the Code of Health and Disability Services Consumers' Rights (right to be fully informed and right to give informed consent). In the 2 February 2022 letter, Ms Beaton referred to the Bill of Rights, the Universal Declaration of Human Rights (Articles 1, 3, 23 & 27) and the Nuremberg Code (1947).

⁹ [2022] NZDC 8020.

[149] These provisions do not advance Ms Beaton's personal grievance claims. The vaccine was authorised for use in New Zealand in accordance with law. Its use under that authority was not an experimentation. Ms Beaton refused the vaccination, in accordance with her right. The Code was not engaged as Ms Beaton did not receive services from a "provider". The Declaration provisions were not a bar to OT complying with the Order, agreeing to rearrange Ms Beaton's work, developing and implementing its vaccination policy, applying the policy to Ms Beaton with respect to its premises, giving notice of termination to Ms Beaton because it could no longer sustain the rearranged duties, deferring the notice of termination because of partial repeal of the Order and reconsideration of its Policy, and deciding to rescind the notice of termination.

[150] In evidence, Ms Beaton has characterised OT's actions as discriminatory, saying that the Human Rights Act 1993 is supposed to protect her.

[151] The Authority has jurisdiction over a personal grievance claim that an employee has been discriminated against in their employment. Section 104 of the Employment Relations Act 2000 sets out the definition of discrimination. To paraphrase, discrimination includes not affording the same terms of employment, dismissing the employee or subjecting them to detriment by reason (directly or indirectly) of a prohibited ground of discrimination. Prohibited grounds include disability. The definition of disability in the Human Rights Act 1993 is brought over into the Employment Relations Act 2000. The element presumably relied on here is the presence in the body of organisms capable of causing illness.

[152] OT's actions, summarised above, were not directly or indirectly by reason of a prohibited ground of discrimination. OT's actions were based entirely on Ms Beaton's compliance with and its obligations arising from the Order initially and then the Policy.

[153] Ms Beaton does not have a personal grievance under s 103(1)(b) of the Employment Relations Act 2000 for reasons out above. Now characterising it as discrimination adds nothing to the resolution of Ms Beaton's employment relationship problem.

Summary

[154] Ms Beaton raised personal grievances within time.

[155] The claims for exemplary damages cannot succeed.

[156] None of Ms Beaton's personal grievances are established. Her claims for compensation are dismissed, as is her claim for a penalty.

[157] Costs are reserved. If there is a claim for costs, OT may lodge and serve written submissions within 14 days. Ms Beaton may lodge and serve submissions in reply. I will determine costs with regard to those submissions and the Authority's standard practice with regard to costs.

Philip Cheyne
Member of the Employment Relations Authority