

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 443
3271101

BETWEEN

MELANIE THEODORE
Applicant

AND

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Rachael Judge and Rachel Nightingale, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions and other information received: Up to and including 23 April 2025

Determination: 23 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Melanie Theodore was employed by the Chief Executive of the Department of Corrections (Corrections). Ms Theodore has lodged a statement of problem seeking the Authority's assistance in resolving several personal grievance claims, including as to unjustified dismissal and unjustified disadvantage.

[2] A preliminary issue arises as to whether Ms Theodore raised her personal grievances with Corrections within the 90 day period prescribed by s 114 of the Employment Relations Act 2000 (Act).

[3] Ms Theodore contends that she raised each of her personal grievance claims within the 90 day period as required.

[4] Corrections accepts that Ms Theodore raised personal grievance claims on 22 September 2022 but says that no other personal grievance claims were raised by Ms Theodore within the relevant statutory 90 day periods.

Non publication

[5] Ms Theodore made an application for interim non-publication orders. The Authority dealt with that application, making some but not all of the interim orders sought, by Minute dated 27 September 2024. The following records the decision made as to the application for interim orders.

[6] Based on an email provided by Ms Theodore on 15 September 2024, the non-publication orders sought related to:

- (a) personal and family details; and
- (b) Ms Theodore's name and identifying details.

[7] The basis of the application, in effect recorded in the same email, was that Ms Theodore could be exposed to retaliation from employees of Corrections having regard to evidence she intends to disclose to the Authority.

[8] Corrections opposed the application, with the exception of the name of one of Ms Theodore's family members and any information concerning health issues and medical information.

[9] It is unlikely the Authority would grant access to any other party to the material on its file given the substantive investigation has not yet been held. Additionally, the power to prohibit publication has limitations and, for example, such orders would not necessarily prevent Corrections from obtaining instructions, or making enquiries as to documents or evidence produced by Ms Theodore, so far as is necessary in the context of the proceedings. The risk of any relevant details otherwise being publicly disseminated is minimal and the utility in any interim orders would have been, at best, extremely limited.

[10] I was not satisfied that there were sufficient grounds, even on an interim basis, to make broad sweeping non-publication orders as to Ms Theodore's identity. While

interim orders are not necessarily subject to the degree of scrutiny that permanent orders are, I was not satisfied that the basis for any risk had been sufficiently identified having regard to any actual or likely threat to, or impact on, Ms Theodore. On that basis, I declined to make any interim non-publication orders as to Ms Theodore's name and identity.

[11] Corrections also made an application for interim non-publication orders. The orders sought were in relation to the names and any identifying information of two individuals identified at paragraph [4] in its memorandum of 30 September 2024. The Authority dealt with that application by Minute dated 21 January 2025.

[12] After considering the submissions provided by both Corrections and Ms Theodore, I was satisfied that interim non-publication orders should be made on the grounds sought by Corrections. The basis for that included the nature of the material and allegations made, the relevant individuals not being party to the Authority's proceedings, and the potential for damage to those individuals as a result of any publication.

[13] I ordered, pursuant to clause 10 of the second schedule of the Act, and on an interim basis until any further order or determination is made, that the names, identity, and any identifying details of Employee A and Employee B (identified in Corrections' memorandum of 30 September 2024) be prohibited from publication.

[14] Interim non-publication orders as to the name of any family member of Ms Theodore and any details relating to medical records or health information are appropriate and I also ordered, on an interim basis pending any determination as to permanent orders, that the name of any family member of Ms Theodore and any details relating to medical records or health information not be published.

[15] The Authority's file is not to be inspected by any person without leave of an Authority Member.

The Authority's investigation

[16] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' based on written witness statements and submissions.

[17] An investigation meeting was previously set down to deal with both the preliminary issues and substantive issues without objection. Witness statements and documents were lodged in preparation for the investigation meeting. Having regard to a number of issues, including the material lodged, I ultimately determined that it would be appropriate for the investigation meeting to be adjourned so that the preliminary issues could be dealt with first.

[18] In dealing with the preliminary issues, I have had regard to the documents and submissions provided. The unsworn witness statements have provided some context and relevant background. However, I ultimately considered that in resolving the preliminary issues I did not need to rely to any significant extent on the witness statements given the documentary evidence which is not disputed.

[19] 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.

Relevant principles

[20] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[21] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (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 employer wants the employer to address.

[22] There are several principles relevant to whether a personal grievance has been raised in accordance with s 114 of the Act. I summarise them as follows:¹

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517;

- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more, will be insufficient.

[23] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:²

[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.

Further background

[24] Ms Theodore’s offer of employment dated 1 July 2021, signed by Ms Theodore on 7 July 2021, initially refers to the offer as being for full time employment. However, the document otherwise clearly shows that the employment being offered was said to be casual “as and when required” and that is how the relationship has been conducted by both parties, subject to a limited dispute as to whether Ms Theodore was “removed from an agreed period of shifts”. The offer noted Ms Theodore was not guaranteed any level or frequency of work and contained the following provision:

- 1.2 Should you not be required work during a six month period, either from the commencement of this agreement or from the last day of your most recent work assignment, unless otherwise agreed between both parties it will be deemed that no further work is available to you and this agreement will expire.

[25] The NZNO Health Services Collective Agreement 2021-2023 (the “Collective Agreement”) applied to Ms Theodore’s employment. Clause 1.7 of the Collective Agreement provides for the employment of casual employees.

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

[26] Ms Theodore had declined shifts between 12 and 14 April 2022. She had also at various times indicated that she was unable to work some of the shifts that were offered to her.

[27] Ms Theodore emailed Zhaobo Wei, then Health Centre Manager at Tongariro Prison, on 28 April 2022 enquiring about shifts and noting she had not been offered shifts despite her understanding that there had been many absences and that Corrections had been recruiting. The email says that she had been informed of rumours that she had resigned. Mr Wei responded the same day providing an explanation regarding available shifts based on Ms Theodore having declined other shifts, contingency arrangements, and an absence of needing casual staff at the time. He denied having heard any rumour as to resignation and sought to assure Ms Theodore that he would seek to put a stop to it if he became aware of it.

[28] Ms Theodore says that on 20 June 2022 she was offered permanent shifts each Monday until further notice.

[29] On 6 August 2022 Ms Theodore emailed Mr Wei submitting a complaint regarding an incident that occurred the previous night, on 5 August 2022.

[30] Mr Wei responded to Ms Theodore's complaint on 7 August 2022 thanking her for raising her concerns and advising that the matter had been escalated to the custodial management team. He advised that he would let her know further once he had heard from them. Ms Theodore responded the same day, noting she had spoken to the PCO, concluding "I found [the PCO] to be very sincere, and I am most happy and reassured by what he said".

[31] An internal email on 12 August 2022 indicates that there was some follow up in relation to the incident, and that a reminder was issued from the Prison Director to ensure that a custodial staff member was the last one out if there were no night watch staff. That communication does not appear to have been provided to Ms Theodore at the time. However, a letter from Corrections dated 4 October 2022, in response to Ms Theodore's first personal grievance notification, referenced the matter having been investigated and action taken. That response further noted that Mr Wei had discussed the outcome with her, that she had understood the explanation provided, and that no further action was required.

[32] On 22 September 2022, Ms Theodore emailed Corrections raising personal grievances of unjustified disadvantage and discrimination. She used those express terms in the email. The email referred to various alleged issues including not being offered any shifts for a period of four months, comments made to her by staff when she returned to work following a period of absence, an absence of follow up in relation to the prospect of fixed term and permanent work, and the incident of 5 August 2022 and subsequent complaint in relation to which she said she was unclear as to the outcome of. In terms of remedies, Ms Theodore was seeking, in effect, permanent part time work or continuity in her casual work as she perceived was the case for others.

[33] Corrections does not dispute that the personal grievances raised on 22 September 2022 were raised within time.

[34] The last shift worked by Ms Theodore was on 7 November 2022. Ms Theodore says that Mr Wei removed her from the roster and that she was offered no further shifts. She also says that subsequent emails she sent seeking an explanation were ignored. Mr Wei says that he emailed Ms Theodore on 7 November 2022 advising that he would contact her if there were any further shifts available, but that they did not have any further shifts available for her.

[35] Ms Theodore made a further complaint on 9 June 2023, referring to alleged bullying, discrimination, and harassment by Mr Wei and Employee A. The complaint also referred to the incident of 5 August 2022. Ms Theodore said she had been removed from roster by Mr Wei as a result of raising the personal grievances on 22 September 2022, had been denied work on an ongoing basis since, and alleged bullying. The complaint requested that a formal investigation into the matters be conducted.

[36] Ms Theodore says she became aware that she had been dismissed from her employment on 22 June 2023, when she was informed by a work colleague.

[37] Ms Theodore sought to raise further personal grievance claims, including as to unjustified dismissal, on 18 August 2023. Her correspondence commenced by referring to her complaint of 9 June 2023 as having been ignored and to the alleged termination of her employment. Ms Theodore claimed that she had been unjustifiably dismissed, unjustifiably disadvantaged, and discriminated against. Ms Theodore noted that she had not been informed by Corrections that her employment had been terminated.

Analysis and discussion

[38] Ms Theodore has lodged a statement of problem in the Authority seeking assistance to resolve employment matters, in her words:

...involving two unresolved Personal Grievances and two unresolved Formal Bullying Complaints that I submitted to Corrections between August 2022 and August 2023.

[39] The statement of problem lodged by Ms Theodore asks that the Authority help resolve the following matters:

- (a) a bullying complaint on 6 August 2022;
- (b) a personal grievance on 22 September 2022;
- (c) a second bullying complaint on 9 June 2023; and
- (d) a second personal grievance on 18 August 2023 (unjustified dismissal, unjustified disadvantage, and discrimination).

[40] In terms of the above, Ms Theodore wrote to Corrections on each of the above dates. That correspondence has been provided to the Authority and is said to comprise the raising of the relevant personal grievances.

[41] Corrections acknowledges that Ms Theodore's correspondence on 22 September 2022 raised personal grievance claims that were within time. It contends that any other personal grievance claims were not raised within time.

The complaint as to incident on 5 August 2022 - 6 August 2022

[42] The complaint of 6 August 2022 was one notifying of an issue in the course of employment and nothing about the correspondence indicates that Ms Theodore was asking Corrections to do anything other than to look into the issue on the basis that it was a health and safety concern.

[43] The 6 August 2022 complaint in of itself did not comprise the raising of a personal grievance. However, as noted below, a personal grievance was raised in September 2022 which included the handling of the 6 August 2022 complaint. That personal grievance was raised within the relevant 90 day period.

The 'first personal grievance' - 22 September 2022

[44] I am satisfied that Ms Theodore's correspondence of 22 September 2022 raised unjustified disadvantage personal grievances relating to the failure to offer shifts, an alleged lack of action regarding the complaint made on 6 August 2022, and Corrections'

actions or inaction regarding the comments made to Ms Theodore when she returned to work. She is entitled to pursue those claims.

The complaint as to bullying - 9 June 2023

[45] Corrections submits that this correspondence did not amount to the raising of a personal grievance.

[46] Ms Theodore had previously raised personal grievances with her employer. Taken in isolation, the correspondence on 9 June 2023 does not have the same character. Instead, the correspondence of 9 June 2023 arguably simply raised issues in the form of making a complaint and seeking that the complaint be investigated. As noted by Ms Theodore at the time, the complaint followed an offer to investigate any complaint made by Corrections on 3 February 2023. Ms Theodore was taking Corrections up on that offer.

[47] To the extent that the complaint of 9 June 2023 concerned alleged conduct in the nature of bullying by Employee A, the relevant events had occurred some significant time earlier in 2022. If considered a personal grievance, the raising of the issues was significantly out of time. Ms Theodore did not raise a personal grievance in relation to that alleged action within the relevant statutory period and is unable to pursue that claim.

[48] The complaint regarding alleged bullying by Mr Wei is of a similar nature, the relevant events having occurred some significant time prior, primarily in 2022. Ms Theodore did not raise a personal grievance in relation to that alleged action within the relevant 90 day period and is unable to pursue that claim. However, some of the events and alleged conduct may be relevant to the personal grievance claims that were validly raised on 22 September 2022 and may be considered in the context of those grievances.

[49] Ms Theodore had previously, and was on 9 June 2023, taking issue with her being declined shifts. She had already raised a personal grievance about that issue, albeit that the basis for the alleged actions changed and now included an allegation that she was denied shifts because she had raised a personal grievance. There was clearly an ongoing issue that had been identified by Ms Theodore on several occasions, that being that she was not being offered shifts. That issue, which involved alleged ongoing actions, had already been raised as a personal grievance. Ms Theodore is entitled to

pursue her personal grievance claim that she was unjustifiably disadvantaged in her employment by a failure to offer her shifts.

[50] I find that Ms Theodore did not raise any new personal grievance on 9 June 2023.

The 'second personal grievance' - 18 August 2023

[51] Ms Theodore says she raised several personal grievances on 18 August 2023 and that she did so within the relevant 90 day period. I deal with each of the claimed personal grievances separately.

[52] The correspondence of 18 August 2023 takes issue with Corrections lack of response to the complaint made on 9 June 2023. The action, or rather inaction, complained of in the 18 August 2023 correspondence related to the period from the date of complaint, being 9 June 2023, onwards. I find that any inaction following 9 June 2023 could not have disadvantaged Ms Theodore in her employment as she was no longer an employee at that time, her employment having ended either at the time of her last casual engagement on 7 November 2022, at the time at which it would have become apparent that she was not being offered ongoing shifts in November 2022, or at the expiry of the six-month period in the employment agreement on 7 May 2022. I deal with the issue of dismissal further below.

[53] Having regard to the timing issues I have otherwise identified in relation to the 9 June 2023 complaint, I am not satisfied that any personal grievance of unjustified disadvantage or discrimination was raised on 18 August 2023. The subject matter of those complaints related either to conduct that occurred in 2022 or otherwise to issues when Ms Theodore was no longer employed.

[54] I am not satisfied that any personal grievance claims were validly raised within time in terms of the second personal grievance letter on 18 August 2023.

[55] I consider the issue of whether any personal grievance was raised as to dismissal, including in the 18 August 2023 correspondence, separately below.

A personal grievance relating to dismissal?

[56] Ms Theodore claims that she validly raised a personal grievance within time relating to a dismissal from her employment. While that claim is apparently raised in

the context of the 18 August 2023 correspondence, I have also considered whether such a grievance was raised in other relevant communications, including when taking account of the totality of the communications.

[57] There is a question as to whether Ms Theodore was dismissed from her employment, and if so, when that occurred. The onus is on Ms Theodore in relation to that question.

[58] Ms Theodore's employment agreement states that the employment agreement will be terminated six months from the date of the last shift. Ms Theodore's last shift was on 7 November 2022, the six-month period therefore expiring on or about 7 May 2023.

[59] Ms Theodore contests having been a casual employment and says she was removed from roster during an agreed period of shifts. For present purposes, I accept that the shifts offered were likely expressed to be 'until further notice'.

[60] Ms Theodore says that on 22 June 2023 she was informed by a colleague that her employment had been terminated by Corrections. She further says that was confirmed by her discovering that her work email had become inactive between 8 and 23 June 2023. The timing of the advice Ms Theodore says she was given by her colleague is somewhat consistent with the timing of what would have been the expiry of the six-month provision, that date being 7 May 2023.

[61] Such as the six-month provision might be alleged to have amounted to a dismissal, I find that it did not constitute a dismissal at the initiative of Corrections. Instead, if it could be taken as the time at which Ms Theodore's employment terminated, it was by operation of the term in the employment agreement. The agreement otherwise reflects that the six-month period relates to the expiry of the casual agreement, as opposed to the employment.

[62] An alternative I have considered is whether Ms Theodore was dismissed from her employment by Corrections when it removed her from the roster in November 2022. However, that occurred over six months prior to Ms Theodore raising any concerns in June 2023, when her complaint made reference to constructive dismissal, or in August 2023 when she alleged unjustified dismissal. To the extent that Ms Theodore might have sought to challenge any removal from the roster as amounting to a dismissal, the

relevant 90 day period for doing so would have commenced at the time she became aware the shifts were withdrawn. That could have been no later than the week following 7 November 2022.

[63] I find the Ms Theodore's communications in June and August of 2023 could not have raised a personal grievance of unjustified dismissal within the relevant statutory 90 day period given the time at which she alleges she was removed from the roster.

[64] Ms Theodore contends that Mr Wei specifically stated that he would not allow a six-month period to pass without shifts being offered. She has indicated there is a relevant witness to that statement. However, I do not consider the issue needs to be resolved given that on any view Ms Theodore was well out of time for raising any personal grievance relating to dismissal.

[65] A further alternative, as Ms Theodore seems to suggest, is that there was a dismissal at some earlier time but that she did not become aware of it until 22 June 2023. I am not satisfied that that was the case. I find that if there was a dismissal at the initiative of Corrections, then that occurred in November 2022 and came to her attention in that she was not given the ongoing shifts she says had been offered.

[66] In summary, such as it is asserted there was a permanent part time arrangement in place, Ms Theodore must have known it was at an end in November 2022 after she was removed from the roster and not provided any shifts. The alternative is that Ms Theodore's employment ended at the conclusion of each casual engagement, or otherwise at the expiry of the six-month period in the employment agreement. On any of those scenarios, Ms Theodore did not raise a personal grievance within the relevant 90 day period.

[67] I am not satisfied that Ms Theodore raised any personal grievance as to dismissal within the relevant statutory timeframe.

Conclusion

[68] Ms Theodore is entitled to pursue the personal grievance claims raised on 22 September 2022.

[69] Ms Theodore did not otherwise validly raise any personal grievance in terms of s 103(1)(c) of the Act within the statutory 90 day period in compliance with s 114 of the Act. Those claims are out of time and Ms Theodore is not entitled to pursue them.

Substantive claims

[70] The remaining issues for investigation and determination are as follows:

- (a) Was Ms Theodore unjustifiably disadvantaged in her employment having regard to:
 - (i) Corrections' actions, and response, in relation to the incident of 5 August 2022;
 - (ii) Ms Theodore being removed from the roster and/or not being offered further shifts; and/or
 - (iii) Action or inaction by Corrections relating to comments made by other staff on Ms Theodore's return to work in June 2022?
- (b) Was Ms Theodore discriminated against on the basis of her family status and/or on the basis of disability (s 105(1)(h) and (i) of the Act) on the basis it was proposed she leave her employment and/or her removal from the work roster?
- (c) If Corrections' actions were not justified what remedies should be awarded?
- (d) Should any compliance order be made requiring Corrections to investigate Ms Theodore's complaints?
- (e) Should either party contribute to the costs of representation (if any) of the other party?

[71] A further case management conference will be scheduled to discuss the Authority's investigation of the above issues.

Costs

[72] Costs are reserved pending investigation of the remaining substantive claims.

Rowan Anderson
Member of the Employment Relations Authority