

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 841
3329960

BETWEEN MARY BASTION
 Applicant

AND CASHMERE PRIMARY TE PAE
 KERERU SCHOOL BOARD
 Respondent

Member of Authority: Peter van Keulen

Representatives: Elizabeth Lambert for the Applicant
 Paul Robertson and Joy Walpole for the Respondent

Investigation Meeting: On the papers

Submissions and Further 31 July 2025 and 19 September 2025 from the Applicant
Information Received: 4 September 2025 from the Respondent

Date of Determination: 22 December 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mary Bastion was employed by Cashmere Primary Te Pae Kereru Board (the Board) from 2014 as a Primary Teacher.

[2] On 6 November 2021 the government amended the Covid-19 Public Health Response (Vaccinations) Order 2021 (the Vaccination Order) such that employees employed in the education sector were unable to work unless they were vaccinated against Covid-19.

[3] Ms Bastion was not vaccinated against Covid-19 and for personal reasons she decided not to get vaccinated; because of the Vaccination Order and Ms Bastion's non-

vaccination the Board terminated Ms Bastion's employment, giving her two months' notice of termination on 14 December 2021.

[4] Ms Bastion lodged a statement of problem in the Authority on 21 October 2024. This statement of problem set out an employment relationship problem comprising:

- (a) An unjustified action causing disadvantage personal grievance.
- (b) An unjustifiable dismissal personal grievance.
- (c) Breaches of express and implied contractual obligations in Ms Bastion's employment agreement.
- (d) Breaches of the Health and Safety at Work Act 2015.
- (e) Breach of the duty to act in good faith;¹ this being a basis to claim damages.

[5] The Board lodged a statement in reply. In the statement in reply, the Board said, amongst other things, that Ms Bastion's personal grievances were not raised in time. And it raised concerns about the Authority's jurisdiction to investigate the employment relationship problem.²

[6] In a case management conference on 25 March 2023, we discussed the respondent's concerns about the employment relationship problem. As a result, I agreed with the parties' representatives that I would investigate the jurisdictional issues with the employment relationship problem as a preliminary matter to determine what parts, if any, of the problem I would investigate. I noted this in the Directions of the Authority dated 25 March 2025 as follows:

[3] The respondent has raised concerns about whether the Authority has jurisdiction to investigate and determine this employment relationship problem, particularly whether personal grievances have been raised within the requisite 90-day period.

[4] These issues are to be resolved as a preliminary matter, in order that I can determine whether there is an employment relationship problem that I have jurisdiction to investigate and determine. My investigation and resolution of this

¹ Employment Relations Act 2000, s 4.

² Employment Relations Act 2000, s 114(1).

preliminary matter will be done on the basis of submissions from the parties' representatives.

[5] The issues raised regarding jurisdiction that arise that need to be addressed in the preliminary matter include:

- a. Whether the applicant has raised appropriate personal grievances within the requisite time frame.
- b. Whether there is a basis for a breach of contract, identifying what the contractual term is, how it was breached and what the loss is that flows from that breach.
- c. Whether there can be a claim based on a breach of good faith that seeks damages.
- d. Whether the Authority has jurisdiction to consider breaches of the Health and Safety at Work Act 2015.

The Authority's investigation

[7] I investigated the jurisdictional issues for this employment relationship problem by receiving written submissions from the parties' representatives. I also received an affidavit from Gavin Burn, the Principal at Cashmere Primary Te Pae Kereru.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions that I received in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of this employment relationship problem, and then I have specified the orders made as a result.

Do I have jurisdiction to investigate Ms Bastion's employment relationship problem?

[9] In the submissions lodged by Ms Bastion's representative, Ms Bastion withdrew her claim seeking damages for alleged breaches of the duty of good faith.

[10] This leaves three jurisdictional aspects to consider:

- (a) Did Ms Bastion raise relevant personal grievances within 90 days of the events complained of?
- (b) Is there a basis for the alleged breaches of actual and/or implied terms of Ms Bastion's employment agreement?

(c) Can I consider an action based on alleged breaches of the Health and Safety at Work Act 2015?

Were personal grievances raised in time?

Ms Bastion's personal grievances

[11] Ms Bastion's personal grievance for unjustified action causing disadvantage to her employment is based on the Board requiring her to be vaccinated against Covid-19 for her to continue working at the school. Ms Bastion says this arises because she was not required by her employment agreement to be vaccinated against Covid-19, the safety of the vaccine was questionable, the Board failed to consult properly to meet its obligations as a PCBU under the Health and Safety at Work Act 2015, and Ms Bastion could not give informed consent to subject herself to an experimental control.

[12] The difficulty that arises with parts of this personal grievance is that the component part – being the action of the Board that is complained of as being unjustified – is not an action the Board is responsible for and/or it cannot be said to have acted unjustifiably. This is because the Board was obliged as a matter of law to act as it did based on the Vaccination Order.

[13] The Vaccination Order was very clear on an employer's (expressed as the PCBU in the Vaccination Order) obligations; the Vaccination Order stated that a relevant PCBU "must not allow" employees covered by the order to carry out work unless they are vaccinated against Covid-19, or exempt. There was no discretion.

[14] The validity of the Vaccination Order has been tested by judicial review. The High Court held the Vaccination order was justified when it was implemented and remained justified for the period until it was revoked.³ And the lawfulness of the Vaccination Order was upheld by the Court of Appeal, also in the education sector.⁴

[15] Based on this the Authority has determined that if an employer is subject of the Vaccination Order, then it must comply with it. And, importantly, the Authority does not

³ *NZDSOS Inc v Minister for Covid-19 Response* [2022] NZHC 716.

⁴ *NZTSOS Inc v Minister for Covid-19 Response* [2022] NZCA 74.

have jurisdiction to determine if an employer's actions were unjustified when the actions complained of are those of the employer complying with the Vaccination Order.⁵

[16] In this employment relationship problem, Ms Bastion worked for an education service covered by the Vaccination Order, her work was covered by the Vaccination Order, and she was an affected person under the Vaccination Order, so the Board could not allow her to work unless she was vaccinated against Covid-19 (or exempt – which she was not). The Board was legally required to comply with the Vaccination Order and not allow Ms Bastion to carry out work at the school.

[17] In these circumstances I find that I do not have jurisdiction to investigate a personal grievance based on the implementation of Vaccination Order by the Board. So, for example Ms Bastion's personal grievance based on the implementation of the Vaccination Order being unjustified because the safety of the relevant Covid-19 vaccination was questionable is not something I can investigate and determine. The Vaccination Order has been found to be lawful in the Education sector by the High Court and the Court of Appeal, it applied to the parties and all the Board did was meet its statutory obligation.

[18] So, in terms of any personal grievance Ms Bastion may have raised with the Board that I can investigate, I am left with only with actions based on how the Board applied the Vaccination Order.⁶

[19] Personal grievances relating to the application of the Vaccination Order normally sound as unjustified dismissal grievances; dismissal being the consequence for unvaccinated employees that are covered by the Vaccination Order. That principle applies here – Ms Bastion was an unvaccinated employee covered by the Vaccination Order and the result of that was dismissal. So, it follows that any complaint about how the Board implemented the Vaccination Order for Ms Bastion ultimately relates to her dismissal.

[20] My conclusion is that for this employment relationship problem the only personal grievance I have jurisdiction over is unjustified dismissal.

⁵ Pretorius

⁶ *GF v Comptroller of New Zealand Customs Service* [2022] NZEmpC 130.

[21] Therefore, the question regarding whether a personal grievance has been raised in time is whether Ms Bastion raised a grievance based on her dismissal, effective 14 February 202.

The legal position in respect of raising a personal grievance

[22] Section 114(1) of the Act sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[23] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

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.

[24] So, there are two parts to raising a personal grievance:

- (a) Whatever communication being relied on as raising the personal grievance must be made within 90 days of the action giving rise to the grievance occurring or coming to the employee's notice.
- (b) The communication must make the employer aware that the employee is alleging a personal grievance.

[25] The key principles for establishing if a communication, which the employee says raises a personal grievance, has sufficient detail to make the employer aware that the employee is alleging a personal grievance have been addressed in various court decisions:⁷

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.

⁷ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.
- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.

[26] Putting all this together the questions for me to answer for the raising of a personal grievance are :

- (a) What communications does Ms Bastion rely on as raising her personal grievance for unjustified dismissal?
- (b) Did these communications occur within 90 days of the termination of her employment?
- (c) Did these communications sufficiently outline Ms Bastion's complaints, in line with the principles above, so that that the Board was aware that Ms Bastion was raising a personal grievance for unjustified dismissal?

What communications does Ms Bastion rely on as raising her personal grievance for unjustified dismissal?

[27] Ms Bastion says her personal grievance was raised in communications with the Board of 18 October 2021, 29 October 2021, 5 November 2021, 11 November 2021, 15 November 2021, 22 November 2021, 6 December 2021 and 13 December 2021.

Did these communications occur within 90 days of the termination of her employment?

[28] The Board gave Ms Bastion notice of termination of her employment on 14 December 2021. The termination date based on this notice was 14 February 2022.

[29] Clearly all the communications relied on by Ms Bastion to raise her personal grievance were made before the event giving rise to the grievance, i.e., before her dismissal.

[30] Ms Bastion's representatives argue that an unjustified dismissal grievance can be raised in anticipation of dismissal, as has been held by the Authority.⁸ They also say that the Employment Court has affirmed this position in two cases.⁹

[31] The Board's representatives argue that the anticipatory raising of a grievance is not possible.¹⁰

[32] I do not accept that Ms Bastion could raise an unjustified dismissal personal grievance in advance of the termination of her employment. I do not read the relevant Employment Court cases as supporting the proposition in *Pike* and I am not bound by *Pike*.

[33] I find that Ms Bastion did not raise a personal grievance for unjustified dismissal within 90 days of her dismissal being 14 February 2022.

Did these communications sufficiently outline Ms Bastion's complaints, in line with the principles above, so that that the Board was aware that Ms Bastion was raising a personal grievance for unjustified dismissal?

[34] Given my decision on the timing of raising an unjustified dismissal personal grievance it is not necessary for me to consider the communications and determine if these

⁸ *Pike v Nelmac* [2024] NZERA 461.

⁹ *Preece v Synlait Milk Limited* [2024] NZEmpC 239; and *Pretorius v The Board of Trustees of Taupo Intermediate* [2023] NZEmpC 189.

¹⁰ *Creedy v Commissioner of Police* (2006) 3 NZELR 293.

raised a personal grievance. However, I do want to acknowledge the comprehensive analysis of the communications by the Board as set out in the affidavit of Mr Burn. And, I record for completeness that I accept the submission based on this analysis, that in any event, the concerns Ms Bastion raised with the Board were about the merits of the Covid-19 vaccine and the Vaccination Order and not concerns about the impact of implementation of the order on her.

Conclusion

[35] I conclude that Ms Bastion did not raise a personal grievance for unjustified dismissal.

[36] In addition, I note there that I do not have jurisdiction to investigate a dismissal claim as a breach of contract.¹¹

[37] So I do not have jurisdiction to investigate and determine an employment relationship problem based on Ms Bastion's dismissal.

Breach of actual and/or implied terms of Ms Bastion's employment agreement

[38] Ms Bastion's representative clarified, in submissions, the basis for the breach of contract claims:

- (a) Clause 1.1 of Ms Bastion's employment agreement relating to variation of her terms of employment.
- (b) The requirement to provide unpaid refreshment leave (clause 4.9.1 of the applicable collective agreement).
- (c) Employment protection and surplus staffing provisions in the applicable collective agreement.
- (d) The Hepatitis B immunisation clause (clause 2.4 of the applicable collective agreement).

¹¹ Employment Relations Act 2000, s 113.

(e) Obligation to act as a good employer under clause 2.1 of the applicable collective agreement.

(f) Implied duty to provide safe workplace.

[39] I have considered whether there is a basis for advancing the alleged breaches as part of the employment relationship problem.

[40] I can deal with all the terms of Ms Bastion's employment that she references, collectively as the same principal applies to all. There are two straight forward findings that I make:

(a) None of these terms can give rise to a breach of contract claim as the clauses are not engaged by the events that occurred – broadly the Board applying the Vaccination Order resulting in Ms Bastion's dismissal.

(b) Any breaches of contract are ultimately breaches that give rise to dismissal and such claims (if the appropriate causes were engaged) cannot be advanced in the Authority pursuant to s 113 of the Act.

[41] For these two reasons I find I do not have jurisdiction to investigate the employment relationship problem as alleged breaches of contract.

Breach of the Health and Safety at Work Act 2015

[42] The Authority does not have jurisdiction to investigate problems concerning breaches of the Health and Safety at Work Act 2015.¹²

Summary

[43] I find that:

¹² Acknowledging that the Authority does have jurisdiction to consider unjustified disadvantage grievances and contractual claims based on the implied duty to provide a safe workplace – which have been addressed in this determination.

- (a) I do not have jurisdiction to investigate an employment relationship problem based on unjustified action causing disadvantage as that relates to the Vaccination Order.
- (b) Ms Bastion did not raise a personal grievance for unjustified dismissal in time and I do not have jurisdiction to investigate the employment relationship problem based on the termination of her employment.
- (c) I do not have jurisdiction to investigate the employment relationship problem based on alleged breaches of contract.
- (d) The Authority does not have jurisdiction to consider alleged breaches of Health and Safety at Work Act 2015.

[44] For these reasons I do not have jurisdiction to investigate any part of Ms Bastion's employment relationship problem.

Conclusion and orders

[45] I do not have jurisdiction to investigate Ms Bastion's employment relationship problem against the Board and it is struck out.

Costs

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

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

[48] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

Peter van Keulen
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1