

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 11
3335500

BETWEEN

JACKIE ROBINSON
Applicant

AND

CROMWELL COLLEGE BOARD
OF TRUSTEES
Respondent

Member of Authority: Peter van Keulen

Representatives: Elizabeth Lambert, advocate for the Applicant
Richard Harrison, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 8 October 2025 from the Applicant
1 September 2025 from the Respondent

Date of Determination: 8 January 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jackie Robinson was employed by the Cromwell College Board of Trustees (the Board) from 29 October 2012 as a Resource Teacher of Learning and Behaviour.

[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 Robinson was not vaccinated against Covid-19 - because of this, pursuant to the

Vaccination Order, the Board terminated Ms Robinson's employment, giving her two months' notice of termination on 2 December 2021.

[4] Ms Robinson lodged a statement of problem in the Authority on 4 November 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 contractual obligations in Ms Robinson's employment agreement.
- (d) Breach s 61 of the Health and Safety at Work Act 2015 (HSW Act).
- (e) Breach of the duty to act in good faith, giving rise to a claim for damages.

[5] The Board lodged a statement in reply. In the statement in reply, the Board said, amongst other things, that Ms Robinson's personal grievances were not raised in time.¹ And it raised concerns about the Authority's jurisdiction to investigate the employment relationship problem.

The Authority's investigation

[6] In a case management conference on 14 March 2025, after discussing the respondent's concerns about the employment relationship problem I agreed with the parties' representatives that I would investigate the jurisdictional issues as a preliminary matter.

[7] In the Directions of the Authority dated 14 March 2025 I recorded the following:

[4] These [jurisdictional] 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 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.

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

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.

[8] As part of the material and submissions to be considered in my investigation and determination of the preliminary matter Ms Robinson lodged an amended statement of problem that identified the jurisdictional basis for the component parts of the employment relationship problem. The amended statement of problem set out a revised employment relationship problem comprising:

(a) An unjustified action causing disadvantage personal grievance.

(b) An unjustifiable dismissal personal grievance.

(c) Breaches of contractual obligations in Ms Robinson's employment agreement, including for failing to provide a safe workplace and unilateral variation.

(d) Breaches of s 36 of the HSW Act and s 44(4) of the HSW Act and other unspecified obligations under the HSW Act.

[9] I investigated the jurisdictional issues for this employment relationship problem by considering the amended statement of problem and considering the written submissions from the parties' representatives.

[10] 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 Robinson's employment relationship problem?

[11] In the amended statement of problem lodged Ms Robinson no longer seeks damages

for alleged breaches of the duty of good faith.

[12] This means there are three jurisdictional aspects that I need to consider:

- (a) Did Ms Robinson raise relevant personal grievances within the requisite 90 days?
- (b) Is there a basis for the alleged breaches of Ms Robinson's employment agreement?
- (c) Can I consider an action based on alleged breaches of the HSW Act?

Were personal grievances raised in time?

Ms Robinson's personal grievance for unjustified action causing disadvantage

[13] At its simplest, Ms Robinson'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.

[14] Ms Robinson says this action is unjustified because she was not required by her employment agreement to be vaccinated against Covid-19, the Board should have known that vaccination against Covid-19 was not a practicable control to be used in a workplace, the safety of the vaccine was questionable, and the Board failed to consult properly to meet its obligations as a PCBU under the HSW Act.

[15] The issue with Ms Robinson's unjustified action personal grievance is that the action complained of is the Board requiring Ms Robinson to be vaccinated against Covid-19 to continue working at the school. But the Board did not require this, the New Zealand government did when it amended the Vaccination Order. The Board's action that she complains of as being unjustified is not an action the Board is responsible for and there is no basis or reason to assess the justification of the action.

[16] 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.² And the lawfulness of the Vaccination Order was upheld by the Court of Appeal, also in the education sector.³

[17] In this case the Vaccination Order clearly expressed the Board's obligations (as the PCBU in the Vaccination Order); 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.

[18] It follows then that the Board's obligations under the Vaccination Order applied to Ms Robinson. Ms Robinson 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 Ms Robinson 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 Robinson to carry out work at the school.

[19] So, given that the Vaccination Order was lawful, and the Board was covered by the Vaccination Order in respect of Ms Robinson the Board was obliged to comply with it, and it did so; there is no question of the Board having to justify its action as it had to comply.

[20] The Authority has previously determined that if an employer is subject of the Vaccination Order, then it must comply with it. And, importantly, the Authority does not 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.⁴

[21] 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 Robinson'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.

² *NZDSOS Inc v Minister for Covid-19 Response* [2022] NZHC 716.

³ *NZTSOS Inc v Minister for Covid-19 Response* [2022] NZCA 74.

⁴ *Pretorius v Board of Trustees of Taupo Intermediate School* [2022] NZERA 664; and *Bastion v Cashmere Primary Te Pae Kereru School Board* [2025] NZERA 841.

Ms Robinson's personal grievance for unjustified dismissal

[22] In contrast to my analysis above, I can investigate a personal grievance based on how the Board applied the Vaccination Order.⁵ Personal grievances relating to the application of the Vaccination Order sound as unjustified dismissal grievances if dismissal is the consequence for unvaccinated employees that are covered by the Vaccination Order.

[23] Ms Robinson was an unvaccinated employee covered by the Vaccination Order. As a result of the Board complying with the Vaccination Order the Board could not allow Ms Robinson to work at the school. As Ms Robinson was not allowed to work at the school the Board decided to dismiss her. The decision to dismiss is a decision the Board made because of the Vaccination Order; this was not part of complying with the Vaccination Order. Therefore, the Board can be required to justify its decision to dismiss Ms Robinson if this is challenged.

[24] My conclusion is that for this employment relationship problem the only personal grievance I have jurisdiction over is unjustified dismissal. And this means the question regarding whether a personal grievance has been raised in time applies only to whether Ms Robinson raised a grievance based on her dismissal, effective 4 February 2022.

The legal position in respect of raising a personal grievance

[25] Pursuant to section 114(1) of the Act, 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.

[26] Section 114(2) of the Act provides:

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.

[27] So, section 114 of the Act sets out two parts to raising a personal grievance:

(a) The communication being relied on as raising the personal grievance must be

⁵ *GF v Comptroller of New Zealand Customs Service* [2022] NZEmpC 130.

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.

[28] The questions to answer for the raising of a personal grievance by Ms Robinson are:

(a) What communications does Ms Robinson 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 Robinson's complaints, so that that the Board was aware that Ms Robinson was raising a personal grievance for unjustified dismissal?⁶

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

[29] Ms Robinson says her personal grievance was raised in communications with the Board of 3 November 2021, 5 November 2021, 11 November 2021, 15 November 2021, 16 November 2021, 19 November 2021 and 2 December 2021.

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

[30] The Board gave Ms Robinson notice of termination of her employment on 2 December 2021. The termination date based on this notice was 3 February 2022.

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

⁶ *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.

And I note here that all communications occurred before the notice of termination. In this regard the communication Ms Robinson relies on as occurring on 2 December 2021 was a meeting that took place before the Board issued the notice of termination on the same day.

[32] So, the question is, can Ms Robinson raise a personal grievance for unjustified dismissal in advance of the dismissal and if so did she do this?

[33] Ms Robinson's advocate relies on an Authority determination - *Pike v Nelmac* – to argue that an unjustified dismissal grievance can be raised in anticipation of dismissal, as has been held by the Authority.⁷ The advocate also says that the Employment Court has affirmed this position.⁸

[34] I do not accept that Ms Robinson could raise an unjustified dismissal personal grievance in advance of the termination of her employment.⁹ I do not read the relevant Employment Court cases as supporting the proposition in *Pike* and I am not bound by *Pike*. In any event I do not find the situation here to be analogous with *Pike* as there is no evidence to show that Ms Robinson advised the Board that if she was dismissed this would be unjustified.

[35] I find that Ms Robinson did not raise a personal grievance for unjustified dismissal within 90 days of her dismissal.

Conclusion on jurisdiction over Ms Robinson's personal grievances

[36] I do not have jurisdiction to investigate an employment relationship problem based on unjustified action causing disadvantage as that relates to the Vaccination Order.

[37] I conclude that Ms Robinson did not raise a personal grievance for unjustified dismissal within the required time frame and therefore I do not have jurisdiction to investigate this part of the employment relationship problem.

Breaches of Ms Robinson's employment agreement

[38] The first point to make is that an employee cannot bring a breach of contract claim in

⁷ *Pike v Nelmac* [2024] NZERA 461.

⁸ *Preece v Synlait Milk Limited* [2024] NZEmpC 239; and *Pretorius v The Board of Trustees of Taupo Intermediate* [2023] NZEmpC 189.

⁹ *Creedy v Commissioner of Police* (2006) 3 NZELR 293.

respect of their dismissal.¹⁰ In this regard, Ms Robinson’s advocate says the alleged breaches of contract for this employment relationship problem are not connected to dismissal.

[39] The breach of contract claims, that do not relate to dismissal, that are evident in the amended statement of problem and from the submissions of the advocate for Ms Robinson, are based on terms of the Secondary Teachers Collective Agreement in force from 3 July 2022 until 2 July 2025 (the STCA). They are:

- (a) Breach of clause 1.7 of the STCA regarding variation of terms and conditions of employment, which in turn breached s 68(2) of the Act in relation to unfair bargaining.
- (b) Breach of clause 3.4 of the STCA regarding teacher conduct and discipline.
- (c) Breach of part 12 clauses 12.1.1 and 12.1.3 of the STCA regarding the mutual obligation to achieve “good and safe working conditions through Health and Safety in the Workplace”, and the obligation on the Board to “take all reasonably practicable steps to eliminate or minimise the identified risk for the employee”.

[40] The key point here, as with the personal grievance for unjustified action, is to the extent the alleged breaches arise out of the Board complying with the Vaccination Order there can be no breach of Ms Robinson’s terms of employment. In particular:

- (a) Any term of employment relating to the variation of terms of employment cannot be breached because complying with the Vaccination Order was not a variation of Ms Robinson’s terms of employment by the Board. Nor can the Board’s actions in complying with the Vaccination Order be seen to be bargaining for terms and conditions of employment and therefore there can be no breach of s 68(2) of the Act.
- (b) Any term of employment relating to conduct and discipline cannot be breached because complying with the Vaccination Order was not the Board dealing with a conduct and/or disciplinary matter in relation to Ms Robinson.

¹⁰ Employment Relations Act 2000, s 113.

- (c) Any term of employment relating to the obligation to provide a safe workplace or comply with obligations under the HSW Act cannot be breached because complying with the Vaccination Order was not a failure by the Board to provide a safe workplace or a failure by the Board to meet other obligations under the HSW Act.

[41] In these circumstances there is no basis in fact or law for the alleged breaches of contract that form part of this employment relationship problem.

Breach of the Health and Safety at Work Act 2015

[42] The Authority does not have jurisdiction to investigate employment relationship problems concerning breaches of the HSW Act.¹¹ I do not have jurisdiction to investigate the alleged breaches of s 36 of the HSW Act, s 44(4) of the HSW Act and other unspecified obligations under the HSW Act that are said to be part of this employment relationship problem.

Conclusion and orders

[43] I do not have jurisdiction to investigate this employment relationship problem:

- (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 Robinson 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) There is no basis in fact or law for the alleged breaches of contract.
- (d) The Authority does not have jurisdiction to consider alleged breaches of Health and Safety at Work Act 2015.

¹¹ 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 – this being an obligation arising on the employer out of the HSW Act. This determination deals with these two aspects as they apply to this employment relationship problem.

Costs

[44] In their submissions both parties addressed costs, stating that costs should be assessed on the daily tariff.¹²

Costs in the Authority

[45] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.¹³

Costs for the Board

[46] The starting point is that costs should follow the event. As this employment relationship problem was resolved in favour of the Board it is entitled to an award of costs.

Applying the daily tariff

[47] I accept that it appropriate to apply the daily tariff to the assessment of costs in this matter notwithstanding that it was investigated and determined on the papers – there was no investigation meeting to use for applying the daily tariff.

[48] I will apply the daily tariff by assessing what the on the papers work corresponds to in terms of an investigation meeting i.e. is it the equivalent amount of work for a one-day investigation meeting or some other proportion.

[49] I assess the work involved for the representatives in this matter in comparison to the work involved in an investigation meeting and conclude that a half day of the daily tariff is appropriate. That is \$2,250.00

¹² The normal practice of the Authority when setting costs, is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff. The current rate of the daily tariff is \$4,500 for the first day of the investigation meeting and \$3,500 for any subsequent days.

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.

Adjusting the daily tariff

[50] Considering all of the circumstances of this matter there is no basis that I can see for adjusting the daily tariff.

Order for costs

[51] Ms Robinson is to pay the Board \$2,250.00 as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority