

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 124  
**3340000**

BETWEEN      DIANNE OLIVE KELSO  
Applicant

AND            HEALTH NEW ZEALAND-TE WHATU  
ORA  
Respondent

Member of Authority:      David G Beck

Representatives:            Elizabeth Lambert, advocate for the Applicant  
Anne Wilson, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      20 February 2026 from the Applicant  
25 February 2026 from the Respondent

Date of Determination:      3 March 2026

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Kelso worked for an aggregate of around 26 years as a registered nurse for what was formerly the Canterbury District Health Board, at Christchurch Hospital until 20 December 2021, when her employment ended due to the operation of the COVID-19 Public Health Response (Vaccinations) Order 2021. At the time of the employment ending, Ms Kelso was covered by the “District Health Boards/NZNO Nursing and Midwifery Multi-Employer Collective Agreement – 4 June 2018 – 31 July 2020” (the DHB-MECA).

[2] Ms Kelso initially lodged an application to the Authority on 19 November 2024, asserting that her employment had been “unfairly terminated”. Ms Kelso claimed her employer had upon dismissing her, failed its responsibility to inform her of the need to identify a personal grievance within 90 days.

[3] Health New Zealand - Te Whatu Ora, formerly Canterbury District Health Board (HNZ-TWO), says in reply, that Ms Kelso has not raised her personal grievance within the statutory 90-day timeframe pursuant to s 114 (1) of the Employment Relations Act 2000 (the Act) and they do not consent to it being raised out of time.

[4] In my Authority directions notice to the parties of 24 September 2025, I resolved:

The Authority will deal with a preliminary issue of the applicant's claims being allegedly outside the 90 days' timeframe as set out in s 114 of the Employment Relations Act 2000 (the Act) as agreed, by submissions only. The respondent accepted that the applicant has not made a formal application under s 114(3) of the Act and while maintaining its position that they do not consent for the personal grievance proceeding out of time, is prepared to allow the Authority to determine the preliminary matter on written submissions. Both parties declined an opportunity to speak to their submissions so there will be no investigation meeting.

### **The preliminary issues**

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on the identified issues, but I do not fully traverse all submissions received.

[6] The broad issue to be addressed, emerged as whether Ms Kelso either raised a personal grievance within time and/or whether Ms Kelso has established sufficient exceptional circumstances, and that it is just, that I grant leave to have the personal grievance proceed out of time. An additional related issue if the personal grievance is to proceed, is in what format it must be determined as.

### **First issue: Was a personal grievance identified that Ms Kelso considered she had been unfairly dismissed, raised within the relevant 90-day period**

[7] Despite being directed to concentrate submissions on whether Ms Kelso could identify exceptional circumstances that may allow the personal grievance to proceed outside of the 90-day restriction, her advocate Ms Lambert switched emphasis in her submissions to predominantly assert Ms Kelso's personal grievance was initially raised within the 90-days. I have chosen to deal with this issue first before for completeness, addressing the issue of whether any exceptional circumstances prevail.

[8] Section 114(2) of the Act relevantly states:

.... 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 representation of the

employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[9] In the context of the above provision, I was provided with the sole piece of relevant communication Ms Kelso had with HNZ-TWO just prior to her dismissal. This was an email responding to a letter from the Director of Nursing of 15 November 2021, that had asked Ms Kelso if she was pursuing a medical exemption to the requirement she be vaccinated and, noted Ms Kelso was to be stood down on paid special leave from the day of the letter, while a process was worked through to address the fact she had failed to comply with the extant vaccination order.

[10] Ms Kelso responded by email of 18 November, stating she did not meet the medical exemption criterion (impliedly confirming she had not sought or intended to seek, an exemption) and reiterated her concerns about adverse vaccine side effects and concluded: “Therefore I am not able to consent to have the Pfizer Covid 19 vaccine”. Ms Kelso then indicated:

I do not consider that the CDHB has acted as a fair and reasonable employer, nor have they acted in good faith by removing me from my employment for not consenting to have the Pfizer Covid 19 vaccine.

[11] The crucial issue pursuant to s 114(2) of the Act, is was the above communication just prior to Ms Kelso’s dismissal being communicate on 22 November 2021, sufficient to make the district health board aware that there was a personal grievance that Ms Kelso wanted them to address as no subsequent personal grievance alleging, she was unjustifiably dismissed was identified until 15 November 2024 when the matter became the subject of an application to the Authority.

[12] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the Employment Court summarised some key principles the court has adopted:

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

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

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 it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.<sup>1</sup>

[13] A key issue here is whether the communication exchange cited above between Ms Kelso and the district health board, was of a nature that was sufficient to alert them that Ms Kelso was raising a personal grievance that was sufficiently informative to respond to, with a view to potentially resolving matters in a timely fashion.<sup>2</sup> In *Hone Heke Taniwha v Te Runanga O Toa Rangitira Inc*, the Employment Court described this question as one of whether a communication threshold had been passed, but emphasised the court's role at this stage, was:

.... not to determine whether Mr Taniwha raised a valid disadvantage grievance. Rather, the question is whether he raised a personal grievance within the 90 days beginning with the day on which the action alleged to amount to a grievance occurred or came to the notice of the employee.<sup>3</sup>

#### *Assessment.*

[14] In addressing the issue, I must consider the communication exchanges cited above, their timing and, then assess what Ms Kelso did raise as her concerns. I am also conscious that all cases are fact and context specific. The test is an objective one, but it is, as the Employment Court in *Urban Décor Ltd v Yu* noted, "not ignorant to context" and the totality of the circumstances.<sup>4</sup> I must consider in all the circumstances prevailing, whether a reasonable employer could have appreciated that Ms Kelso was raising a personal grievance and what was it about.

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<sup>1</sup> *Chief Executive of Manakau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].

<sup>2</sup> At [36]-[38].

<sup>3</sup> *Hone Heke Taniwha v Te Runanaga O Toa Rangitira Inc* [2023] NZEmpC 140.

<sup>4</sup> *Urban Décor Ltd v Yu* [2022] NZEmpC 56 at [30]. See also *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175.

### *The context*

[15] As I alluded to generally in *Pike v Nelmac*,<sup>5</sup> several unique features were at play during the period Ms Kelso's employment ended, principally the uncertain, unprecedented, and pressured Covid environment and the 'unchartered waters' it created for all parties from an employment relationship perspective.<sup>6</sup> However, the *Nelmac* case is distinguished on its facts as Ms Wilson has highlighted for HNZ-TWO - it involved a private sector employer grappling with applying their own vaccination policy and Mr Pike engaged in significantly more correspondence and meetings to identify his likely unjustified dismissal grievance and, there was evidence that Nelmac was constructively aware of Mr Pike displaying genuine health issues in the period leading up to his dismissal.

[16] Here, the district health board had a clear statutory obligation imposed on them to ensure all vulnerable patient/public facing, health workers were vaccinated and the evidence shows regarding Ms Kelso, they met this obligation and properly explored redeployment options (a factor Ms Kelso has not subsequently identified as at issue in her alleged unfair dismissal). At the point Ms Kelso raised a general concern that the district health board had in her view, not acted as a fair and reasonable employer, she had not been dismissed. The latter fact is apparent as in the same email (of 18 November) Ms Kelso says: "When the stand down period is finished, does this restriction still apply" (referring to a stricture she should not enter the workplace). At best, Ms Kelso was challenging the process that had been enacted prior to her dismissal and why she had been stood down, but she did not identify any health issues beyond her vaccine hesitancy or pursue this challenge any further until effectively nearly three years later.

### **Finding**

[17] In all the circumstances, I am not satisfied that Ms Kelso sufficiently identified with any particularity, a personal grievance within 90 days pursuant to s 114(2) of the Act.

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<sup>5</sup> *Pike v Nelmac* [2024] NZERA 461.

<sup>6</sup> Schedule 3A, 3(4) Employment Relations Act 2000: inserted on 26 November 2021.

**The second issue – are there any exceptional circumstances that would allow Ms Kelso to pursue her personal grievances ‘out of time’?**

[18] As I am not satisfied Ms Kelso identified her personal grievance within 90 days of her termination of employment, I must consider if it may be raised out of time. A worker failing to raise a personal grievance within the 90-day statutory time limit where the employer has refused to grant leave for it to be raised, may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it:

- i. is satisfied that the delay in raising the personal grievance is occasioned by exceptional circumstances
- ii. considers it just to do so.

[19] The Supreme Court in *Creedy v Commissioner of Police*<sup>7</sup> addressed the definition of “exceptional circumstances” as:

“[31] In *Wilkins & Field*, the Court of Appeal treated ‘exceptional circumstances’ as those which are ‘unusual, outside the common run, perhaps something more than special and less than extraordinary.’ This formulation appears to combine two different meanings, the first being that of being unusual (the ‘exception to the rule’) and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As *Lord Bingham of Cornhill said in R v Kelly* [1999] 2 All ER 13 (CA), when construing a reference to ‘exceptional circumstances’:

‘We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

“Secondly, it will be easier to apply. The very language of *Wilkins & Field* implies both uncertainty (‘perhaps’) and lack of precision (‘Something more than special and less than extraordinary’). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.”

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<sup>7</sup> *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

[20] Ms Lambert's submissions failed to identify exceptional circumstances under s 115 of the Act as an alternative ground, but in her initial statement of problem Ms Kelso impliedly alluded to s 115(c) of the Act by suggesting her employer had not apprised her of the 90-day time limit for raising a personal grievance and effectively alleged they had a duty to do so. Section 15(c) of the Act provides where the employee's employment agreement does not contain an explanatory provision concerning the resolution of employment relationship problems it may be a ground for the Authority allowing the personal grievance to proceed out of time. However, this claim falls at the first hurdle, as the relevant collective agreement (DHB-MECA) did contain a compliant and prominent, explanatory provision headed "Resolution of Employment Relations Problems" that detailed a personal grievance as including a claim where the covered worker has been "unjustifiably dismissed" and:

If the employment relationship problem is a personal grievance, the employee must raise the personal grievance with the employer within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter.

[21] Objectively, it was highly unlikely that Ms Kelso was unaware of what a personal grievance entailed as she also used language in her 18 November 2021 email that referenced an employer's obligations to act in a fair and reasonable manner and adhere to good faith principles. I also must consider that being covered by the collective agreement entailed Ms Kelso being a union member, but I had no evidence that she accessed this available support mechanism. Further, Ms Kelso is not asserting her union failed to pursue the matter on her behalf.

[22] I find it is not reasonable in this situation to assert it is an employer responsibility to bring the existence of a 90-day deadline to an employee's attention when the applicable employment agreement has a compliant provision unless there are some other capacity factors not here identified.

### **Is it just to grant leave?**

[23] In assessing whether exceptional circumstance exist, s 114 (4)(b) of the Act requires that I also must be sure that in granting leave, I consider "it just to do so". In this respect, I need to look at factors that I group under the following headings.

*The length of the delay and prejudice to HNZ-TWO*

[24] I have found Ms Kelso did not raise a personal grievance prior to her dismissal (that was effective 20 December 2021), and thereafter HNZ-TWO was not placed on notice of the existence of a personal grievance until 15 November 2024. This was an inexplicable delay. A further delay occurred in bringing this matter forward with an amended statement of problem being filed by Ms Lambert on 15 July 2025 and subsequent delays in filing submissions after my directions notice of 24 September 2025 led to submissions only being received in mid-February 2026. I also note a scarcity of documented evidence, so recollections of the parties may well entail significant recollection statements that due to the elapse in time is significantly problematic.

[25] In all the circumstances, I find the significant delay would unduly prejudice HNZ-TWO – in particular, too much time has elapsed to expect witnesses to have a clear recollection of any disputed meetings.

*The merits or otherwise, of Ms Kelso's personal grievance*

[26] On the documentation provided and lack of any countervailing matters raised by Ms Kelso, it is apparent that procedurally, the then district health board, did fairly engage with Ms Kelso about the reasons for the employment ending. The final decision to end Ms Kelso's employment was after placing her on notice that her vaccination status was at issue, and the district health board explained the reasons why this was so. Ms Kelso was afforded ample opportunities to engage during the process, but in submissions it has not been made clear she did so.

[27] Ms Kelso has sought to put in issue, the efficacy of the vaccine then available – a premise that has consistently not been a successful argument that the Authority and the courts have accepted as reasonably founding a successful personal grievance action.<sup>8</sup>

[28] I find Ms Kelso has not identified any significant procedural or substantive issues that would bring the decision to dismiss her into doubt in the unusual circumstances that prevailed. While the burden of showing that they acted in a fair and reasonable manner falls

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<sup>8</sup> See for example a recent decision of member van Keulen, *Mary Bastion v Cashmere Primary Te Pae Kereru School Board* [2025] NZERA 841.

on HNZ-TWO this was a dismissal involving significantly difficult and externally imposed circumstances.

[29] Ms Lambert amended Ms Kelso's initial unjustified dismissal claim to add what essentially is a common law breach of contract claim. This is despite the Authority making it clear that s 113(1) of the Act is specific in stating a personal grievance action is the only means of challenging an unjustified dismissal claim under the Act. I reiterate this provision as preventing common law actions in the Authority where a dismissal is at issue.

[30] I find that on the evidence and submissions made, Ms Kelso's prospect of establishing that she was unjustifiably dismissed or disadvantaged is so remote as to make it unjust to allow this matter to proceed.

#### *The longstop*

[31] For completeness, I need to address Ms Lambert's additional submission, that Ms Kelso has submitted her personal grievances in the time allowed under s114(6) of the Act, with Ms Lambert claiming this denotes a three year 'longstop' for the submission of a personal grievance.

[32] Section 114(6) of the Act states:

No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[33] The fatal flaw in the above submission, is to trigger the 'longstop', the personal grievance must be raised within 90-days of its occurrence or when it came to Ms Kelso's attention and I have found that Ms Kelso did not raise her grievances within 90-days of their alleged occurrences. Therefore, s 114(6) of the Act does not apply.

#### **Finding**

[34] I find that Dianne Kelso's personal grievance claims were not raised within 90 days pursuant to s 114(2) of the Employment Relations Act 2000 and I have declined to grant leave pursuant to s 114(4) of the Employment Relations Act 2000, that would allow the personal grievance claims to proceed out of time, on the basis Ms Kelso has not identified any exceptional circumstances.

## **Costs**

[35] Costs are reserved.

[36] The parties are encouraged to resolve any issue of costs between themselves.

[37] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Health New Zealand-Te Whatu Ora may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Dianne Keslo will then have 14 days to lodge a memorandum in reply.

[38] On the request of either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[39] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

