NOTE: This determination contains an order at paragraph [2] prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 38
3355523

	BETWEEN	YSI Applicant
	AND	HEALTH NEW ZEALAND – TE WHATU ORA Respondent

Member of Authority:	Robin Arthur
Representatives:	David Fleming, counsel for the Applicant Rachael Judge and Clara Evans, counsel for the Respondent
Investigation Meeting:	6 November 2025
Determination:	27 January 2026

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns whether the applicant raised personal grievances of unjustified disadvantage and unjustified dismissal within the statutory limit of 90 days or, if not, whether there were exceptional circumstances that made it just to allow her to pursue those grievances outside that time limit.

Order prohibiting publication of the applicant's name

[2] Publication of the applicant's name, in relation to this matter, is prohibited.[1]

[1] Employment Relations Act 2000, Sch 2 cl 10.

[3] This order was not requested by either party but, on preparing this determination and using the discretion given to the Authority to do so, I concluded departing from the usual principle of open justice was appropriate, at this preliminary stage, given some of the personal health information disclosed.

[4] If the matter were to proceed to investigation of substantive issues, the order would need to be reviewed, in light of evidence at that time, and could then be confirmed and extended, varied or removed entirely.

[5] The order relates solely to the applicant's name, not any other personal identifying details or the identity of anyone else referred to in the evidence. She is referred to as YSI, randomly selected letters unrelated to her actual name.

YSI dismissed for medical incapacity

[6] YSI was employed by Health New Zealand (HNZ) from 5 October 2020 to 7 May 2024. She worked as a theatre cleaner at Waitakere Hospital.

[7] She had been diagnosed with schizophrenia, a condition disclosed before she started work for HNZ. At some times she was placed under compulsory treatment orders made through the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992. According to information from her health records YSI was in hospital care 18 times between 1999 and 2024.

[8] In 2023 and 2024 YSI had some extended absences from work due to mental ill health.

[9] In late January 2024 an occupational health physician had assessed YSI as unfit to return to work as a cleaner in a clinical environment.

[10] On 8 April 2024 an HNZ operations manager met with YSI and her union organiser to discuss her prospects for returning to work. A letter sent to her by the manager following that meeting recorded YSI's view that she had been misdiagnosed and was fit for work. The letter also noted YSI had referred to taking steps to appeal her compulsory treatment order.

[11] The manager's letter then said YSI had two weeks to provide further information for a reassessment by the occupational health physician. It also advised

YSI that if there were no changes in the situation or further information provided by 22 April, HNZ would consider taking "the difficult next step of issuing a written two weeks' notice of termination due to medical incapacity".

[12] On 23 April the HNZ manager wrote to YSI again. The 23 April letter noted YSI had provided no updates or additional information. It then gave YSI two weeks' notice that her employment was to be terminated on the grounds of medical incapacity. The notice was paid in lieu but, formally, her employment did not end until 7 May.

[13] On 25 April YSI sent her manager an email saying she did not accept the decision which she described as racial discrimination, "unfair dismissal" and "being shoved out of a job". She also complained about receiving what she called "abusive text messaging" from two named health and safety staff members.

[14] In an email response on 29 April the HNZ manager thanked YSI "for reaching out and expressing your concerns regarding your employment status and the circumstances surrounding it".

[15] The manager's response concisely summarised her understanding of the concerns YSI had expressed. Those concerns were about:

- her recent diagnosis and the recommended compulsory treatment order;
- issues about cleanliness and interactions with colleagues;
- racial discrimination and mistreatment;
- getting leave entitlements; and
- abusive communication from two health and safety officers.

[16] The response set out the manager's view on what was expected or could be done about each concern.

[17] During May, July and August YSI was in touch with her union representative, a lawyer and a community law centre advisor about her concerns over the end of her employment. This contact was disrupted by a further stint in hospital care from 11 June to 24 July.

[18] Under the statutory requirement to lodge a personal grievance within 90 days of the relevant action by her employer, YSI had until 5 August if she wanted to raise a grievance about her dismissal on 7 May.

[19] She met with a community law centre advisor on 6 June and then again on 6 August to discuss her case but did not get written advice until 5 September 2024. The letter of advice noted she was already outside the 90-day period to pursue a personal grievance and, unless HNZ agreed to let her raise the grievance outside that time, she would need to seek leave from the Employment Relations Authority to pursue her claim. This advice explained the leave could be granted if she could prove the delay was due to exceptional circumstances.

[20] On 19 September YSI sent her former HNZ manager an email. This message said she was "disputing my termination". She said she would ask the Authority to allow her to raise a personal grievance because she had seen a lawyer within the 90-day period, had been "trapped in hospital" against her will and was unable to raise a grievance within 90 days because she was "traumatised by being around staff and patients" in a mental health unit. The references to being in hospital appear to refer to the period up to 17 May and then again from 11 June to 24 July when YSI was under in-patient hospital care.

[21] By letter in November 2024 YSI's present counsel sought to progress her personal grievance claims, referring to personal grievances raised in April 2024 "in respect of alleged discrimination and other events that occurred during her employment", the unjustified dismissal grievance raised by her 19 September email and exceptional circumstances which had delayed her doing so earlier.

[22] Responding in December 2024 HNZ denied YSI raised any grievance in April or September or that there were exceptional circumstances justifying the delay.

The Authority's investigation of preliminary issues

[23] After YSI lodged a statement of problem and HNZ lodged a statement in reply in February 2025 the Authority arranged to investigate and determine the preliminary issues concerning whether and when the alleged personal grievances were raised and, depending on the answer to those points, whether any exceptional circumstances made it just to allow YSI to pursue her claims outside the 90-day limitation periods.

[24] By consent these preliminary issues were investigated 'on the papers' with counsel for both parties being heard in person making submissions about the relevant facts and legal principles. The 'papers' comprised the statement of problem, the

statement in reply and relevant documents provided by the parties, including correspondence between them, as well some notes of communication with a lawyer, the union and the community law centre advisors.

[25] As permitted by s 174E of the Employment Relations Act 2000 (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.

The issues

[26] The issues for determination were:

(i) Did YSI raise personal grievances of unjustified disadvantage and discrimination in April 2024 which she was now entitled to pursue?

(ii) Did YSI raise a personal grievance of unjustified dismissal in April 2024 which she was now entitled to pursue?

(iii) If a dismissal grievance was not legitimately raised in April, were there exceptional circumstances such that it was just for YSI to be given leave to pursue the grievance she sought to raise out of time in September 2024?

Legal principles

Raising a grievance

[27] Section 114 of the Act sets the following requirements for raising a personal grievance:

> (1) Every employee who wishes to raise a personal grievance must … raise the grievance with his or her employer **within the period of 90 days** … unless the employer consents to the personal grievance being raised after the expiration of that period.
>
> (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 employee wants the employer to address.

[28] The following principles, as summarised by the Employment Court, guide the assessment of whether a grievance has been raised in a way that meets those requirements:[2]

[2] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [36]-[38] (footnotes omitted).

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

[29] What is sufficient to make the employer "aware" of what the employee wants to have addressed must, therefore, be more than a mere label such as 'unjustified disadvantage'.[3] The communication made by or for the worker wanting to raise a grievance must identify some action, omission or event which is said to have amounted to or caused that disadvantage. Plain words about, for example, not having done something right or fairly is enough.

[30] A grievance of unjustified *dismissal* cannot be raised until any notice period given has expired as the dismissal does not occur until that period has ended.[4] A grievance of unjustified *disadvantage*, about some action of the employer, may be raised during the notice period.[5]

Exceptional circumstances

[31] Section 114 of the Act also sets out the basis on which a personal grievance may be pursued outside the 90-day limit on the grounds of exceptional circumstances:

> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the employee notification period, the

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[3] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].
[4] *Poverty Bay Electrical Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC), at 420 and *Gibson v GFW Agri-Products Ltd* [1994] 2 ERNZ 309 (EmpC), at 314.
[5] *New Zealand Automobile Association Inc v McKay* [1996] 2 ERNZ 622 (EmpC), at 632-33.

employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[32] Section 115 sets a non-exclusive definition of exceptional circumstances:

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the applicable employee notification period under section 114; or

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[33] Other circumstances may also be so out of the ordinary or special that they can be deemed sufficiently exceptional grounds for granting leave. This may apply where "multi-factorial" causes of delay do not fit neatly into the four examples of exceptional circumstances given in s 115. If a combination of factors together amounted to being extraordinary, an employee's failure to correctly carry out steps necessary to raise the grievance in time may meet the statutory requirement of being "exceptional circumstances".[6]

[34] If an employee says the delay was the result of being so affected or traumatised by whatever caused their grievance, those effects must be proven to have existed for the entire period of the delay, not just in the 90 days following the dismissal or

[6] *Hokotehi Moriori Trust v Prater* [2019] NZEmpC 67, at [86].

disadvantaging action.[7] In YSL's claim of a grievance for unjustified dismissal, the entirety of that period runs not just to the end of the 90 days period on 5 August. It spanned from the day her dismissal came into effect on 7 May until she sent her 19 September email advising HNZ that she wanted to pursue a dismissal grievance.

Disadvantage grievances raised in April 2024

[35] HNZ submitted correspondence from YSI in the period before her dismissal, particularly in the month of April 2024, lacked enough information and details to properly raise the grievances of unjustified disadvantage she wished to pursue over how she was treated during that time.

[36] The correspondence which HNZ said lacked "sufficient specificity" to enable it to respond comprised:

- A 20 February 2024 email to an occupational health adviser where YSI said she had medical clearance from a doctor saying she was physically able to return to work, described the discretionary leave she had been placed on as amounting to "unfair dismissal" and said she would "be taking [HNZ] to court" if the issue was "not cleared up immediately".
- A 9 April 2024 email to her HNZ manager where YSI complained team leaders at the hospital giving preferential treatment to other staff members and she was not allowed to work despite providing "more than one medical certificate to return to work". It also complained about her experience as a patient in the mental health unit, for which she sought an apology;
- A 13 April 2024 email to another manager complaining of insults and abuse from work colleagues, naming one person, and saying she had been "completely unfairly treated".
- A 16 April email to her HNZ manager which again referred to her treatment as an in-patient but also complained of "mental abuse from people who cannot speak clear concise common English in the workplace".
- A 22 April email to her HNZ manager in which YSI said she was the subject of cyber bullying and discrimination.

[7] *Cronin-Lampe v Board of Trustees of Melville High School* [2023] NZEmpC 144, at [473].

[37] YSI's manager responded to those emails on at least three occasions – 11 April, 16 April and, as noted earlier in this determination, on 22 April. In those responses the manager made it clear that she could only deal with concerns about work-related matters, not YSI's concerns about her experience as a patient.

[38] Each of those response emails identified the work-related concerns and provided an explanation or clarification of HNZ's view or purpose. For example, on the subject of whether YSI had an adequate medical certificate to return to work, the manager said the certificate she had provided was for a separate illness and "not directly linked to the long-term health condition under consideration".

[39] Most significantly, none of those responses gave any indication that HNZ needed more information or did not understand the concerns YSI was expressing about how she was treated. There was also nothing in that chain of correspondence which indicated YSI accepted the explanations HNZ gave her or considered the concerns she was raising about how her employer was treating her had been resolved.

[40] Assessed objectively, the manager's responses indicated she understood YSI was saying she was being treated unfairly and wanted her employer to address those problems. YSI did not label her email messages as raising personal grievances for unjustified disadvantage but their content, read together, did enough to meet the requirements, as explained in case law, to give her employer sufficient information to be able to address and to seek to resolve those grievances.

[41] It is also important to note that the analysis required at this point is not about the *merits* of the alleged grievances or the *adequacy* of any steps that HNZ took to address them at the time. Rather, the assessment concerns solely whether enough was done and said to raise a grievance. If so, an employee, who was not satisfied with the outcome at the time, is entitled under the Act to later pursue those grievances through an application to the Authority, whatever their merit, or otherwise, might subsequently prove to be.

[42] For the reasons given, YSI had done enough in April 2024 to raise her alleged grievances of unjustified disadvantage. She is entitled to proceed to have them investigated and determined by the Authority.

Dismissal grievance unable to be raised before 5 May

[43] YSI submitted she had also raised a grievance of unjustified dismissal after she was given notice of dismissal on 23 April and before that dismissal took effect on 7 May. She also submitted that, if the Authority found such as grievance could not be raised until the end of the notice period, there were exceptional circumstances for why she had not told HNZ of her unjustified dismissal grievance until September, well outside the 90-day limitation.

[44] The email YSI sent on 25 April, after getting notice of dismissal on 23 April, described what had happened as "unfair dismissal" and said she was "being shoved out of a job".

[45] YSI submitted her grievance of unjustified dismissal should be taken as having been raised on 25 April because, from 23 April, HNZ had expressed its clear intention to dismiss her, was no longer only contemplating doing so and had done everything necessary for that dismissal to take effect on 7 May.

[46] Even if her 25 April message was enough to raise an unjustified dismissal grievance, YSI's submission could not overcome the principle firmly established in case law that a dismissal grievance cannot be raised before the termination of employment comes into effect.[8] Where a dismissal is on notice, not summary, it remains a future event until the notice period expires. Even where minds are firmly set and decisions declared, there remains the prospect that this could change during the notice period.

[47] As a result of the application of that principle, it is necessary to find that no effective personal grievance of unjustified dismissal was raised before the 90-day period expired on 5 August.

Exceptional circumstances not established

[48] YSI submitted three aspects of the circumstances in this case combined to amount to exceptional circumstances:

(i) She had tried to raise a dismissal grievance during her notice period, by email on 22 April, and got a response from her manager on 29 April but

[8] *Poverty Bay Electrical Power Board v Atkinson* and *Gibson v GFW Agri-Products Ltd*, above n 4 and *New Zealand Automobile Association Inc v McKay*, above n 5.

did not know about any rule of law that such a grievance could not be raised during the notice period.

(ii) She suffered a psychiatric disorder of sufficient severity to result in compulsory treatment orders, including at the time of her dismissal and after it, which had impeded her ability to pursue her claims.

(iii) She had instructed or attempted to instruct three different representatives before and during the 90-day period for raising a grievance and she was "entitled to rely on the legal knowledge and professionalism" of the community law centre advisors to either raise her grievance in time or tell her what she needed to do to preserve her rights.

Earlier notice

[49] YSI's 25 April email, responding to notice of the decision to dismiss her, clearly asserts her view that the decision "is unfair dismissal" and she is "being shoved out of a job". But for the principle regarding raising such grievances during the notice period, it would be enough, in the context of other communication, to make HNZ aware YSI was alleging a personal grievance that she wanted her employer to address.

[50] Her manager's reply on 29 April implicitly recognised YSI was seeking to invoke such a formal process in the following passage, specifically referring to resolving disputes:

> Lastly, if you feel the need to involve legal representation, we encourage open communication and cooperation. We're committed to resolving any disputes through fair and transparent processes.

[51] Reasonably, albeit mistakenly, YSI could have believed or understood she had done enough in her 22 April email to put her employer on notice that she was challenging the justification for her dismissal.

Disruption during the 90-day period

[52] YSI's intention to challenge her dismissal was apparent from her meeting on 6 June with a community law centre advisor. Notes of that discussion, taken by the advisor, indicate topics they discussed included the prospect of pursuing a personal grievance, along with other issues about her leave entitlements, other legal processes regarding her treatment order and also a tenancy matter.

[53] Her intention was confirmed by sending the advisor background documentation which YSI says she provided on 7 June. An undated post-it-note, said to be written by YSI at the time, described the documents as "evidence for unfair dismissal & personal grievance". The note then described the documents she provided as being copies of meeting notes with "HR" and occupational health staff, an email to an employment lawyer who "can no longer assist", copies of medical certificates and a psychiatric report.

[54] According to her health records, YSI was then placed in a mental health unit in the following week where she stayed from 11 June until 24 June. According to a later community law centre letter she had engaged the centre to assist her on 25 July, the first day after she was out of the unit.

[55] For unexplained reasons YSI did not meet with a centre advisor until 6 August, which was one day after the 90-day period to raise a dismissal grievance had expired.

[56] As submitted by HNZ, there is no evidence providing corroboration from an appropriate registered health professional that YSI was unable to properly consider raising a grievance or was otherwise incapacitated throughout the entire period of the 90 days or for the longer period from 5 May to 19 September when she attempted to raise her dismissal grievance out of time. Accordingly, the exceptional circumstance identified in s 115(a) of the Act does not apply.

[57] YSI, however, does not rely on that exception as a ground for the leave sought. As accepted in her submissions, she was able to contemplate raising a grievance, saying she took steps to do so before 11 June and sought to continue those steps from 25 June.

[58] Her argument focuses on alleged failure of representatives to do more to raise her dismissal grievance within time.

Reliance on representatives

[59] The instance of the exceptional circumstance relating to arrangements and representation, at s 115(b), has two elements for establishing that ground – firstly, reasonable arrangements being made by the employee and, secondly, the representative then unreasonably failing to raise the grievance in time.

[60] In this case, those elements do not apply to an employment law practice YSI had contacted in March 2025, well before she was dismissed. Copies of their correspondence show lawyers at that practice had clearly and plainly told YSI in March and April that they could not act for her. After learning YSI was subject to a compulsory treatment order, they had asked for, but were not provided with, confirmation from her psychiatrist that YSI had capacity to instruct the lawyers. YSI had continued to contact those lawyers as late as June despite repeatedly being asked not to do so. In those circumstances, no reasonable arrangements could be said to have been made by YSI for those lawyers to raise a grievance on her behalf or those lawyers could not be said to have unreasonably failed to raise her grievance in time.

[61] YSI was assisted by a union organiser in some of her dealings with HNZ over how her health issues were dealt with, including the 8 April meeting where she was told of the prospect of dismissal for medical incapacity.

[62] The union records of contact with YSI were provided as part of the documents available for the investigation of the preliminary issues. There was nothing in those records which indicated YSI had asked or expected the union to raise a grievance on her behalf. She had sent the union organiser an email on 4 May saying she "will not accept a termination" but she did not ask what she should do about that or ask the organiser to do anything.

[63] YSI's submissions acknowledged she had not asked the union to raise a grievance but suggested expressly making a request "was not a requirement" and, having "engaged the union to represent her, she was entitled to rely on them to do whatever was necessary to ensure her legal rights were protected".

[64] This submission relied on the Employment Court's decision in *Goldie v Chief Executive of the Department of Corrections* for the proposition that an express instruction was not always needed to raise a claim in time.[9] However YSI's situation was not the same as the circumstances found in the *Goldie* case. In that case an advocate had already been engaged to represent the worker in a different form of legal proceedings which had then "morphed" into a personal grievance claim. The court found the worker and the advocate had expressly talked about submitting a personal

[9] *Goldie v The Chief Executive of the Department of Corrections* [2023] NZEmpC 30 at [40]-[41], referring to *Melville v Air New Zealand Ltd* [2010] NZCA 563, at [27].

grievance but, despite repeated calls from the worker, the advocate then failed to do so in time.

[65] YSI had not shown any reasonable arrangement or expectation existed for the union to raise a grievance on her behalf, without a specific request, or that the union had unreasonably failed to do so without some specific request for it to do more to help her. The grounds in s 115(b) were not established in respect of YSI's interactions with the union organiser.

[66] The situation was more complex with the community law centre because the 6 June meeting with a centre advisor demonstrated YSI was seeking advice about taking some action over the termination of her employment. The notes of the meeting showed they talked about the issues and the gathering information and records needed to pursue a claim over the end of her employment.

[67] A further stint in hospital care disrupted those plans but the day after she was released on 24 July YSI took steps to engage the centre in progressing her concerns about how her employment came to end. It was not clear from available evidence why she then did not attend a meeting with the centre advisor until 6 August, one day after the 90-day period to raise a grievance had expired.

[68] There is, however, no reliable basis for the proposition that the centre should have known about that timeframe and taken action to raise the grievance without a specific request to do so. The evidence about those circumstances were not sufficient to hold YSI had made reasonable arrangements with the centre to raise her grievance and the centre had then unreasonably failed to ensure this was done in time.

Exceptional circumstances existed nevertheless

[69] As noted in the *Goldie* case exceptional circumstances may exist which do not fit with the four, non-exhaustive examples given in s 115 of the Act.[10]

[70] YSI's psychiatric disorder and the limitations of the compulsory treatment orders she was subject to during her two weeks' notice and during part of the 90-day period for raising a grievance were circumstances that were unusual and out of the ordinary course.[11] Those circumstances may not have existed to the same degree or

[10] *Goldie*, above n 9, at [50].
[11] *Creedy v Commissioner of Police* [2008] NZSC 31, at [30]-[33].

effect throughout the whole of that period but were, nevertheless, highly disruptive of her capacity and opportunity to raise a grievance. Her intention to get help to do so was apparent from communication she did attempt with potential representatives, when she was able to do so, including promptly contacting the community law centre after her release on 24 June.

[71] But for those exceptional circumstances, YSI would more likely than not have completed the process necessary to submit her grievance in time.[12]

[72] It was a situation analogous with the *Hokotehi Moriori Trust v Prater* case. In that case the court found the employee had a mistaken belief about how a personal grievance was to be raised with the employer and had not got the assistance he expected from representatives.[13]

[73] HNZ submitted YSI's situation was different because Mr Prater had specific medical evidence from his doctor about his mental health and how this impaired his ability to focus on what was needed to raise his grievance. HNZ said YSI had not provided any such evidence.

[74] It was not a compelling submission because YSI, unlike Mr Prater, did have a formally diagnosed condition at the relevant times. HNZ was fully informed of the condition from clinical and other health information available to it before and during the process that had led to its decision to end her employment on the grounds of medical incapacity.

[75] Like the *Prater* case, however, YSI's situation did not fit neatly into the examples given in s 115 of the Act. The reasons for her delay in raising her dismissal grievance were multi-factorial, combining factors which, taken together, were extraordinary and arose from the situation giving raise to the dismissal grievance. As a result YSI had been unable to complete steps she needed to comply with the statutory requirements.[14]

[76] Accordingly, YSI had established her delay in raising her dismissal grievance were occasioned by exceptional circumstances.

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[12] *Goldie*, above n 9, at [54].
[13] *Prater*, above n 9, at [47] and [80].
[14] *Prater*, above n 6, at [86].

Just to grant leave

[77] For the following reasons it was also just to grant her leave to raise the grievance now.

[78] Firstly, HNZ had not established it would be unfairly prejudiced by responding to claims about events said to have begun around September 2023, when its concerns about YSI's situation began. It said there were "no documented records" about those events and "several relevant employees" no longer worked for HNZ. This time span is not extensive by comparison with many Authority proceedings and witnesses can be assembled, by summons if necessary, from wherever they work or reside now.

[79] Secondly, HNZ submitted an investigation now would be inconvenient and costly. While it correctly noted its public funds must be used prudently, participating in personal grievance proceedings is necessary from time to time for all employers.

[80] Thirdly, YSI's claims met the relatively low threshold of an arguable case about whether her employer acted fairly and reasonably in dealing with the concerns she raised and its concerns over her health and in ultimately making the decision to dismiss her for medical incapacity. HNZ may, when the evidence is eventually tested, have the stronger case that it did act justifiably in all the circumstances at the time. At this stage, however, YSI has established she did raise disadvantage grievances in time and, by this determination, also has leave to raise her dismissal grievance. She is entitled to those claims assessed by an Authority investigation.

Summary and outcome

[81] The Authority may continue to investigate the disadvantage grievances raised by YSI in April 2024, as summarised in her manager's email of 29 April.

[82] The allegation of unjustified dismissal made in April 2024, during the notice period, was made too early to raise a grievance on those grounds.

[83] Exceptional circumstances delayed YSI raising her dismissal grievance after the end of her employment.

[84] Leave is granted for YSI to raise the dismissal grievance.

[85] As required by s 114(5) of the Act, where the Authority grants leave to raise a grievance on the grounds of exceptional circumstances, the parties are now directed to use mediation to seek to mutually resolve the grievance.

[86] If the matter is not resolved in mediation, YSI is directed to advise the Authority whether she then wishes to proceed with the next stage of these proceedings.

Costs

[87] Costs are reserved. If the matter is not resolved in mediation and proceeds to a substantive investigation meeting, costs for this preliminary matter would be considered along with costs for that meeting. If the matter does not proceed further, YSI may lodge a memorandum on costs in relation to the preliminary issues only. HNZ is to lodge any reply memorandum within 14 days of service of YSI's memorandum.

[88] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15]

Robin Arthur
Member of the Employment Relations Authority

[15] See www.era.govt.nz/determinations/awarding-costs-remedies.