IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 238
EMPC 119/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NICOLA PREECE Plaintiff
AND	SYNLAIT MILK LIMITED Defendant

Hearing:	6 September 2024 (Heard via audio-visual link)
Appearances:	E Lambert, advocate for the plaintiff J C Sanders and P Goredema, counsel for the defendant
Judgment:	2 December 2024

JUDGMENT OF JUDGE J C HOLDEN

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[1] At the end of 2021, Synlait Milk Ltd instituted a COVID-19 health check plan. This plan included a vaccination policy covering all staff onsite.

[2] Nicola Preece disagreed with that policy and did not get vaccinated, so her employment was terminated by Synlait.

[3] Ms Preece has three personal grievance claims:

(a) She says she suffered an unjustifiable disadvantage arising from her not being allowed to remain on site because of Synlait's vaccination policy.

(b) She says she was unjustifiably disadvantaged by Synlait's alleged failure to address concerns she raised in an email dated 30 January 2022.

(c) She says her dismissal was unjustifiable.

[4] The Employment Relations Authority found that none of Ms Preece's personal grievances were raised within the 90-day period provided for in s 114 of the Employment Relations Act 2000.[1] Ms Preece has challenged that determination.

[5] Ms Preece does not seek an extension of time for raising her personal grievances; her claim is simply that the personal grievances were raised within the required period.

Vaccination policy implemented

[6] From January 2018, Ms Preece was employed by Synlait as a café assistant. She worked as a "red line" cleaner.

[7] In November 2021, Synlait advised staff that it was considering what tools it could use to protect them from COVID-19 at work. It proposed introducing rapid antigen testing and a vaccination policy for staff and contractors. It sought feedback from staff including through:

(a) questions in its quarterly Gallup engagement survey;

(b) drop-in information sessions, where staff could receive information on the risk assessments conducted by Synlait and the proposed approach to managing those risks; and

(c) an opportunity to hear from experts and ask questions on vaccination and rapid antigen testing with an occupational physician on livestream.

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1 *Preece v Synlait Milk Ltd* [2024] NZERA 131 (Member Gane).

[8] Ms Preece completed the survey questions and also asked for a risk assessment to be completed for her own role. She was advised that Synlait's risk assessments were not role-specific, but were for the whole company.

[9] Synlait put in place its COVID-19 health check plan in December 2021. This included a traffic light framework, provision for rapid antigen testing and the vaccination policy. The vaccination policy required all employees to be fully vaccinated against COVID-19 by 31 January 2022. Staff were advised that if they did not provide evidence of their vaccination, they would be asked to meet with their manager and with the HR business manager to talk about their situation.

[10] On 30 January 2022, Ms Preece emailed Synlait's chief executive, copying in her manager. Ms Preece refers to that email as her "section 83 letter".[2] That letter commenced "I am writing to you because I am very concerned that you require me to be vaccinated to work at Synlait Milk Limited". Ms Preece continued, alleging that the Pfizer vaccine was a serious hazard that Synlait had introduced into the workplace without proper consultation or process and that it had "coerced its workforce into accepting, at the risk of losing [their] jobs". In her email, Ms Preece said that Synlait "may become liable to me for personal grievance claims for breach of contract and discrimination" on the basis of its "demands for masking, testing and for vaccinations", noting that there is nothing in her employment agreement that allowed Synlait to make such demands. Ms Preece advised that she refused to work at Synlait, until "the risk conditions of the workplace are remedied or mitigated". Ms Preece asked to be kept fully informed on the progress of any testing or test results in workplaces that she "will come in contact with in the future".

[11] Ms Preece's manager called her the next day at which time she advised that she was not going to take any legal action against Synlait but that she was not planning to return to work. The manager's report of the conversation recorded that Ms Preece said that was due to the health and safety risk posed by the Omicron strain of COVID-

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[2] Ms Preece was referencing s 83 of the Health and Safety at Work Act 2015, which enables an employee to cease, or refuse to carry out, work if the employee believes that carrying out the work would expose the employee, or any other person, to a serious risk to the employee's or other person's health or safety arising from an immediate or imminent exposure to a hazard.

19, and the failure to provide effective rapid antigen testing and procedures to manage the risk for staff shared within sites.

[12] Ms Preece and her manager had a further conversation a couple of days later, which included a discussion about possible additional health and safety measures that could be put in place. On 3 February 2022, Ms Preece emailed her manager confirming she would not be returning to Synlait, even with the offer of additional health and safety measures, including extra personal protection gear. She said she needed to stand by her beliefs and apologised for the inconvenience caused to her team. She then noted: "I have not yet received my termination letter?".

[13] Ms Preece had a further conversation with her manager on 9 February 2022. Ms Preece's manager recalls that Ms Preece asked about the termination of her employment, and he referred her to Synlait's HR business partner. Ms Preece called the HR business partner on 11 February 2022. The HR business partner recalls that, in that conversation, Ms Preece confirmed that she would not be getting vaccinated and that she wanted finality. Ms Preece asked for her letter of termination. Ms Preece says that in both conversations she raised her email of 30 January and identified both the COVID-19 hazard and the hazard of the vaccine itself.

[14] Ms Preece's employment was terminated through a letter dated 18 February but sent by email on 21 February 2022 (the delay being because her manager did not initially have Ms Preece's personal email address). Synlait says Ms Preece's employment ended on 25 February 2022, which was the end of the fourth working week since the introduction of the vaccine requirement. She was paid up until that date.[3]

[15] Synlait heard nothing further from Ms Preece until 2 June 2022 when she emailed her former manager:

> I sent this letter, attached a week ago and have had no response. Just checking that you have received it.

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[3] I understand Ms Preece has ongoing proceedings in the Authority, including claims for breach of contract with respect to the imposition of the vaccination policy and with respect to what she says was a shortfall in her notice payment.

[16] The evidence shows that Synlait had not received a letter from Ms Preece prior to then. The letter referred to, dated 25 May 2022, was received by Synlait on 2 June 2022.[4] That letter advised that Ms Preece intended to file a personal grievance in the Authority but invited Synlait to attend mediation with her first.

[17] She said that the basis of her grievance was that from the time of Synlait's adoption of its "mandate policy" it had breached her employment agreement, in that she did not have a clause in it where she agreed to have any medical procedure such as vaccination, masking or testing of her body. She asserted that Synlait had unilaterally changed her employment agreement. Ms Preece also claimed that Synlait had breached legislation related to her workplace.

[18] Ms Preece lodged her statement of problem with the Authority on 27 April 2023, and that was served on Synlait the next day. The statement of problem referred to alleged unjustifiable disadvantage personal grievances and an alleged unfair dismissal.

[19] The issue for me is whether the various personal grievances were raised within the required 90 days.

The parties disagree on when the grievances were raised

[20] Ms Preece says that all her personal grievances were raised within time, and no later than 2 June 2022, which she says was within 90 days of her employment ending.

[21] Ms Preece says the unjustifiable disadvantage personal grievances were raised on a number of separate occasions beginning around 30 January 2022 and concluding around 11 February 2022.

[22] She submits that her employment actually ended on 21 March, rather than 25 February 2022, which was the date in the termination letter. She relies upon the notice period provision in her employment agreement and the termination letter to

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[4] It was not attached to the email but was sent later that day.

support that position.[5] She says her personal grievance for unjustifiable dismissal was raised in her letter dated 25 May 2022 (sent on 2 June 2022), which was within 90 days of the termination of her employment.

[23] Alternatively, she says that her personal grievance for unjustifiable dismissal was effectively raised prior to the end of her employment at a time when she had knowledge of the consequences of her decision and when there was a sufficient degree of certainty about it. Ms Lambert, advocate for Ms Preece, says this level of certainty distinguishes Ms Preece's case from other cases where the Court has held that a personal grievance cannot be raised in advance of the action being taken.[6]

[24] Ms Lambert relies on an Authority determination: *Pike v Nelmac Ltd.*[7] In that case, Mr Pike raised concerns regarding his impending dismissal for failing to comply with Nelmac's vaccination policy in advance of his employment being terminated. The Authority Member distinguished that situation from the situation in *Creedy* as Mr Pike knew the consequences of his decision not to be vaccinated and there was a sufficient degree of certainty that dismissal was a likely outcome. Accordingly, the employer was on notice he was contesting the legality of the decision to dismiss him and the employer's approach to that decision.[8]

[25] Ms Lambert also suggests that Ms Preece's disadvantage grievance, which she says was raised prior to her dismissal, morphed into an unjustifiable dismissal. She relies on *New Zealand Automobile Assoc Inc v McKay*.[9]

[26] In *New Zealand Automobile Assoc Inc v McKay*, Mr McKay had raised a concern regarding his dismissal after he had been given notice but before the dismissal took effect. The Court determined it could be considered as a disadvantage grievance pursuant to s 34 of the Employment Contracts Act 1991, which allowed the Employment Tribunal or Court to find that a personal grievance was of a type other

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5 Initially 18 March 2022 was relied upon, but this was later amended to 21 March 2022, being four weeks after the letter of termination was sent.

6 See for example *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [28]–[30]. This point was not challenged on appeal.

7 *Pike v Nelmac Ltd* [2024] NZERA 461 (Member Beck).

8 At [40]–[43].

9 *New Zealand Automobile Assoc Inc v McKay* [1996] 2 ERNZ 622 (EmpC).

than that alleged.[10] It was also suggested that s 34 may be used to consider the "logically consequential" unjustifiable dismissal grievance if that was appropriate on the facts of the case.[11]

[27] Synlait says that Ms Preece's employment ended on 25 February 2022. It says, therefore, that any personal grievance claim for unjustifiable dismissal had to be raised by 25 May 2022. It says that the personal grievance for unjustifiable dismissal was not raised until Ms Preece's statement of problem was served on 28 April 2023. It says that the letter dated 25 May 2022, sent on 2 June 2022, did not raise a personal grievance for unjustifiable dismissal.

[28] Synlait says that the unjustifiable disadvantage claim arising from Ms Preece allegedly not being allowed onsite due to the vaccine mandate had to be raised by 1 May 2022, being 90 days after the requirement that all employees be fully vaccinated against COVID-19 took effect, but that it was not raised until 28 April 2023.

[29] Synlait then says that the unjustifiable disadvantage claim arising from Synlait's alleged failure to address the concerns raised by Ms Preece in her email dated 30 January 2022 had to be raised by 25 May 2022, being 90 days after her employment ended. Synlait says it was raised in the letter that was emailed to Synlait on 2 June 2022.

[30] As Synlait has not consented, and does not consent, to any personal grievance being raised out of time, it says Ms Preece cannot now raise her personal grievances.

The Court has previously considered what constitutes the raising of a grievance

[31] Pursuant to the Act, a personal grievance must be raised within the 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 later.[12] A grievance is raised with an employer as soon as the employee has made, or has taken

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10 Equivalent to the Employment Relations Act 2000, s 122.
11 *New Zealand Automobile Assoc Inc v McKay*, above n 9, at 633 and 647.
12 Employment Relations Act, s 114(1) and (7)(b).

reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.[13]

[32] The goal of the personal grievance process is to allow parties to raise and discuss problems directly to help ensure that they are resolved quickly and successfully, without the need for rigid formal procedures.[14] Not every criticism of an employer, or the culture within a workplace, will, however, constitute a personal grievance.[15]

[33] The issue of what constitutes the raising of a personal grievance has been considered by the Court and the Authority on many occasions. I set out the key principles in *Chief Executive of Manukau Institute of Technology v Zivaljevic*:[16]

> [36] 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.
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> [37] 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.
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> [38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

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13 Section 114(2).

14 Employment Relations Act, s 101(a) and (ab); *Hall v Fire and Emergency New Zealand* [2024] NZEmpC 157 at [21].

15 *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

16 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

There are several communications to consider

[34] The vaccination policy was put into effect in December 2021, as part of Synlait's health check plan.

[35] Ms Preece objected to the vaccination policy in her email of 30 January 2022 and sought the risk she attributed to the Pfizer vaccine to be remedied or mitigated. In the meantime, she refused to attend the workplace. She claims she first raised her grievance in this email.

[36] While Synlait accepts that the email made it clear that Ms Preece was concerned about the vaccination policy, it says her disadvantage grievances were with respect to her alleged exclusion from the workplace and the failure to respond to the email of 30 January 2022.

[37] It says that 1 February 2022 was the effective date for the alleged exclusion and that no personal grievance was received about that within the 90 days following that date.

[38] I consider that approach to be too narrow a formulation of Ms Preece's personal grievance. Her concerns are in respect of the vaccination policy, which was put in place in December 2021, and which required all employees to be fully vaccinated against COVID-19 by 31 January 2022.

[39] The question then is whether the email of 30 January raised a personal grievance with respect to the adoption of the vaccination policy. The Authority considered the email but found it did not go as far as actually raising a personal grievance.[17]

[40] On balance, I reach a different view. While I acknowledge that not every complaint or criticism of an employer will constitute a personal grievance, before the Court, Synlait accepted that Ms Preece's email made it clear that she objected to the vaccination policy and wanted Synlait to stop requiring people to be vaccinated.

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17 *Preece v Synlait Milk Ltd*, above n 1, at [20].

Although the email was framed as a "s 83 letter" and referred to a potential personal grievance in the future, it was sufficient to raise a personal grievance about the vaccination policy, and in particular about the requirement in the policy that Ms Preece be vaccinated to work at Synlait. Ms Preece may not have intended to raise a grievance at the time she sent the email, but that is not determinative.[18] Having raised her grievance within the required timeframe, and in the absence of a settlement of that grievance, Ms Preece is entitled to pursue it in the Authority.[19]

[41] The email of 30 January 2022 did not, however, purport to raise a grievance in respect of a foreshadowed dismissal; it did not refer to the issue of dismissal. I do not consider it can be treated as raising a personal grievance in respect of the dismissal that later occurred. Nevertheless, if the implementation of the vaccine policy is found to be unjustifiable, the dismissal may still be relevant to the ultimate outcome of the case.[20]

[42] The concerns raised in discussion with her manager a couple of days later appear to be in relation to Ms Preece's safety in the workplace, given the prevalence of the Omicron variant of COVID-19. It did not raise any personal grievances.

[43] The email of 3 February 2022 confirmed Ms Preece would not be returning to work but does not raise any issues for Synlait to address (apart from providing her with a termination letter). It does not raise a grievance.

[44] In the conversations on 9 February and on 11 February 2022, Ms Preece again explained her position, confirmed her vaccination status and sought finality from Synlait, including a letter of termination. She did not seek resolution from Synlait in

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18 *Chief Executive of Manukau Institute of Technology v Zivaljevic*, above n 16, at [37]; and *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].

19 Being well within the timeframe in the Employment Relations Act 2000, s 114(6).

20 See *New Zealand Automobile Assoc Inc v McKay*, above n 9; and *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [52] where the Court stated it was "arid to debate whether the real grievance is about unjustified action because, without the actions complained of, there may have been no dismissal. The broad argument is that the unjustified action was so closely bound up with the dismissal in terms of both time and causality that the dismissal is tainted by it and cannot be separated from it.". That point was not disturbed on appeal, see *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [46]–[47]. See generally *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA) at 294–295; and *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397, [1999] 1 ERNZ 85 (CA) at 407.

respect of an alleged exclusion from the workplace or an alleged failure to respond to her concerns. Neither conversation raised further personal grievances.

[45] For completeness, I have considered the communications from 31 January to 11 February 2022 in their totality but find that they did not raise a further grievance; they were consistent with Ms Preece's advice that she was not going to take legal action.

[46] The letter Ms Preece sent on 2 June 2022 alleged that Synlait had "omitted to remedy the situation" that Ms Preece had identified in her email of 30 January 2022. As acknowledged by Synlait, the letter sent on 2 June 2022 was sufficient to raise a grievance in respect of Synlait's alleged failure to respond to Ms Preece's concerns. It was, however, sent more than 90 days after 25 February 2022, which was when engagement between the parties ceased, and so was the date by which it became clear that Synlait had allegedly failed to address Ms Preece's concerns.[21] To the extent it raised a new grievance, additional to that raised on 30 January 2022, it was too late.

[47] I acknowledge that there remains an argument as to the effective date of the termination of Ms Preece's employment. Any personal grievance for unjustifiable dismissal would have to have been raised within 90 days of the ending of her employment.

[48] The letter sent on 2 June 2022 did not refer to the termination of Ms Preece's employment, nor did it refer to her alleged exclusion from the workplace. It did not raise a personal grievance for unjustifiable dismissal.

[49] The statement of problem, filed and served in April 2023, referred to claims of alleged unjustifiable disadvantage and alleged unjustifiable dismissal. It was sufficiently detailed to raise the unjustifiable dismissal personal grievance. However, it was well out of time. It is immaterial whether Ms Preece's employment ended in February 2022 or March 2022.

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[21] Noting that there was no evidence before the Court suggesting "reasonable steps" were taken to raise the grievance prior to 2 June 2022.

[50] Accordingly, I find that Ms Preece did raise an unjustifiable disadvantage personal grievance about the adoption of the vaccination policy in her email of 30 January 2022, which was within the requisite 90-day period from the adoption of that policy in December 2021. No other personal grievance (for unjustifiable disadvantage or unjustifiable dismissal) was raised within 90 days of the relevant action.

[51] As the Authority is still seized of Ms Preece's breach of contract claims, it is able to deal with the surviving unjustifiable disadvantage personal grievance, which overlaps with the breach of contract claims. In reaching that view, I consider the phrase "employment relationship problem" must be interpreted broadly, to avoid the situation where the overall problem is split between the Authority and the Court, which I do not accept would have been the intent of Parliament in the circumstances of this case. [22]

Costs may be applied for

[52] My preliminary view is that costs should lie where they fall due to the mixed degree of success. If, however, either party seeks costs and they cannot be agreed, they may apply for costs by filing and serving a memorandum by 4pm on Friday 31 January 2025. The other party is to respond by memorandum filed and served within 21 days of receipt of the memorandum applying for costs, with any reply to be filed and served within a further 7 days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 4pm on 2 December 2024

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[22] *Ale v Kids at Home Ltd* [2015] NZEmpC 209, [2015] ERNZ 1021 at [42]–[43]; and *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [59]–[62].