

**Attention is drawn to the order in paragraphs [1] - [4] prohibiting publication of certain information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 294  
3109338

BETWEEN            ENF  
                                 Applicant  
  
AND                    TVG  
                                 Respondent

Member of Authority:      Rachel Larmer

Representatives:          Catherine Goode, counsel for the Applicant  
                                 Paul Robertson and Saskia Mautner, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      11 and 25 March 2022 from the Applicant  
                                 7 April 2022 from the Respondent  
                                 9 May 2022 from the Applicant  
                                 13, 17, 20 and 30 May 2022 from the Applicant

Date of Determination:      5 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1]      The Authority has issued a non-publication order in accordance with clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of:

- (a) The names of, and identifying information about, any of the children who are involved in, or the subject of:
  - (i) The complaints that resulted in the Applicant's dismissal; and
  - (ii) Any other complaints made to the Respondent about or involving its students.
- (b) The contents of specialist medical reports, including the medical report from the Consultant Psychiatrist dated 26 November 2019 and any updates or amendments made to that, with the exception of any medical information that is quoted in the Authority's determinations;
- (c) The Applicant's medical information, with the exception that this medical information may still be referred to by the parties in their evidence, submissions and interactions with the employment institutions or by the Authority in its determinations.

[2] The Authority has made this non-publication order subject to the condition that it does not apply to the employment institutions in accordance with its power under clause 10(2) of Schedule 2 of the Act to impose conditions on a non-publication order.

[3] The Authority also issued an interim non-publication order, to apply until further order, prohibiting publication of the Applicant's and respondent's names in order to align with name suppression orders that have been granted by another jurisdiction or will be applied for in another jurisdiction.

[4] The parties have therefore been identified by three randomised letters that bear no relation to their names.

### **Employment relationship problem**

[5] The Applicant sought leave under s 114(3) of the Act to raise disadvantage grievances after the expiration of the 90 day period required by s 114(1) of the Act. The Respondent objected to the Authority granting the Applicant leave under s 114(4) of the Act to raise any disadvantage grievances out of time.

[6] This determination deals with that leave application only.

**Authority's investigation**

[7] By agreement with the parties, the Authority conducted a 'on the papers' investigation into the leave application.

[8] Both parties filed affidavit evidence and submissions. The Applicant also provided the Authority with a medical report from a Consultant Psychiatrist.

[9] The Authority received affidavits from the Applicant, his brother, the Applicant's former union representative and a retired primary school principal who supported the Applicant. The Respondent filed an affidavit from an Executive Administrator that addressed the various discovery requests and disclosure of documents that had occurred.

**Preliminary indication of outcome**

[10] The Authority informed the parties in an email dated 13 June 2022 that the leave application had not been successful. That was done prior to the issuing of this determination to ensure the parties knew the outcome of this leave application at the earliest opportunity, because they are in the process of preparing their evidence for the upcoming substantive investigation that will be held in early August 2022.

**Issues**

[11] The following issues are to be determined:

- (a) Has the Respondent impliedly consented to any disadvantage grievances being raised out of time?
- (b) What disadvantage grievances has the Applicant sought leave to raise out of time?
- (c) When did each disadvantage grievance occur or come to the Applicant's notice, whichever is the later?
- (d) When did the Applicant raise each disadvantage grievance?
- (e) Was the Applicant's delay in raising the disadvantage grievances due to exceptional circumstances?
- (f) If so, is it just to grant leave?
- (g) If so, should any conditions be attached to the grant of leave?

- (h) How should the new breach of contract claims be dealt with?
- (i) What if any costs should the successful party be awarded?

### **Material background**

#### *6 March 2017 personal grievances*

[12] The Applicant is a teacher and the Respondent is the Board of Trustees at the school he taught at before he was dismissed. The Applicant was placed on paid special leave on 15 September 2017 as a result of complaints made to the Respondent that involved allegations he had scratched two children (“*the scratching complaint*”).

[13] The Applicant was dismissed on 13 December 2017 for “*misconduct and serious misconduct*” relating to the scratching complaint as well as for other issues that came to light during the Respondent’s investigation into that.

[14] The Applicant’s brother raised personal grievance claims on behalf of the Applicant in a letter dated 6 March 2018. The personal grievances raised on 6 March 2018 were an unjustified dismissal and “*disadvantage he [the Applicant] suffered during the alleged serious misconduct investigations.*” These grievances were raised within the 90 day time limit required by s 114(1) of the Act.

#### *Statement of Problem – 15 June 2020*

[15] The Applicant lodged a Statement of Problem on 15 June 2020 that raised unjustified disadvantage and unjustified dismissal grievances. Paragraph 2 of the Statement of Problem set out the disadvantage grievances the Applicant wanted to pursue. These were summarised by the Authority in paragraph [8] of its Minute to the parties dated 4 November 2021.

#### *Case Management Conference – 26 July 2021*

[16] The jurisdiction issues were addressed during a Case Management Conference (CMC) the Authority held with the parties on 26 July 2021. The Authority pointed out that it did not have jurisdiction to investigate grievance claims that had not been raised within the 90 day period required by s 114(1) of the Act, unless;

- (a) The employer consented; or
- (b) The Authority granted leave under s 114(4) of the Act to raise the grievance out of time.

[17] The Respondent made it clear it did not consent to disadvantage grievances being raised out of time. The Authority pointed out that the Applicant had not applied for leave to raise any grievance out of time as required by s 114(3) of the Act. He was told that was necessary if he wanted the Authority to exercise its power under s 114(4) of the Act to grant him leave to raise grievance(s) out of time.

[18] The Authority noted that separate disadvantage grievances did not need to be raised regarding issues related to the dismissal, because the Authority's investigation into the dismissal grievance would encompass that and such matters were also already covered by the 6 March 2018 personal grievance letter.

[19] The Authority informed the Applicant that if an application for leave to raise grievance out of time was to be made, then he had to identify what new disadvantage claims he wanted to raise out of time, when they arose or came to his attention, and explain why there had been a delay in raising the grievance.

[20] The Authority also noted that it expected to receive evidence about the delay that would include medical evidence as well as evidence about the Applicant's representation by his union, or other representatives, such as his brother, regarding the raising of grievance claims.

*Authority's Minute dated 4 November 2021*

[21] The Authority issued a Minute dated 4 November 2021 identifying the jurisdiction issues associated with the Applicant's unjustified disadvantage claims. It pointed out that the details of when each disadvantage grievance had occurred, or had come to the Applicant's attention, had not been provided.

[22] The Authority repeated its previous advice that if the Applicant wanted to pursue disadvantage claims that had not been raised within the 90 day time limited required by s 114(1) of the Act then he would have to seek the Authority's leave to raise the grievances out of time, because the Respondent had not consented to that.

[23] The Respondent had also advised the Authority that it would oppose any leave application by the Applicant to raise disadvantage grievances out of time. The Respondent had expressed concern to the Authority that ongoing delay was causing it prejudice because many of the staff involved in events in issue had left the Respondent's employ.

*Amended Statement of Problem – 29 November 2021*

[24] The Applicant lodged an Amended Statement of Problem on 29 November 2021.

[25] It was hard to discern what new disadvantage grievances the Applicant wanted the Authority to investigate and determine because there was no heading in that document identifying the specific unjustified disadvantage grievance(s) he wanted to pursue.

[26] The headings used in the Amended Statement of Problem were “*Unjustified dismissal*” “*Breach of contract*”, and “*Breach of good faith*”. It did not contain consecutive paragraph numbers, with the same paragraph numbers being used multiple times within the document, making it hard to follow. There were no references to specific “*disadvantage grievance*” in the Amended Statement of Problem apart from those quoted below.

[27] A discrimination claim is to be pursued as a disadvantage grievance in accordance with s 103(1)(c) of the Act, so the references to “*discrimination*” in the Amended Statement of Problem are taken to refer to unjustified disadvantage grievances.

[28] Paragraph 8 on page 4 of the Amended Statement of Problem claimed the Applicant had been subjected to “*discrimination on prohibited grounds by the respondent, s 103(1)(c), s 105(1) for gender, ethnicity and illness arising from a work related injury.*”

[29] Paragraph 13 on page 13 of the Amended Statement of Problem said that:

After the Applicant saw and heard Respondent witnesses give evidence and read submissions in the NZTC hearing in 2020-2021 he realised he had also been subject to discrimination by the Respondent on prohibited grounds of disability and, likely, gender given the events of 30 October 2017.

[30] Paragraphs 1 and 2 on page 16 of the Amended Statement of Problem claimed a female teacher was seen “*grabbing and pulling*” a child who would not go with the teacher. The Applicant said that was “*a restraint in breach of the Rules*” that the Respondent did not treat as an incident of misconduct by the female teacher.

[31] Paragraph 32 on page 21 of the Amended Statement of Problem claimed “*the unilateral variation of the role which the [Classroom Relief Teacher] job involved and the manner in which [Respondent] sought to obtain agreement to this variation was an unjustified disadvantage.*”

[32] Paragraphs 33 on page 21 of the Amended Statement of Problem claimed the Respondent had made assumptions about the Applicant's health and competency to determine he was no longer suitable to teach. Paragraph 36 on page 21 of the Amended Statement of Problem claimed "*these assumptions formed the basis for the actions by [Respondent] and NZSTA and are an unjustifiable and discriminatory treatment of him [...].*"

[33] Paragraph 38 on pages 21 and 22 of the Amended Statement of Problem referred to disadvantage claims set out in the Statement of Problem lodged on 15 June 2020, that related to allegations involving the Respondent's:

- (a) Investigation of the Applicant's absences for injury and illness;
- (b) Solicitation of complaints about the Applicant because it wanted to terminate his employment in 2017;
- (c) Failure to support the Applicant with adequate leave to enable him to recover properly from his ill health or with support through the Teacher's Council impairment process.

[34] The Applicant said in the Amended Statement of Problem that the delay in raising the disadvantage grievances set out above was due to a dispute he had with his union NZEI over an obligation to file a Statement of Problem after NZEI had been given new information.

#### *Statements in Reply*

[35] The Respondent has filed three Statements in Reply. The first was lodged on 17 July 2020, the second Statement in Reply was lodged on 17 September 2020 and the third Statement in Reply was lodged on 21 December 2021. The third Statement in Reply is referred to in this determination as "*the Amended Statement in Reply*".

[36] In all of its Statements in Reply the Respondent objected to any grievance(s) being raised out of time.

#### *Applicant's submissions*

[37] The disadvantage grievances the Applicant sought leave to raise out of time related to events that occurred in 2017. Although the specific timing of the various disadvantage grievances was unclear, they appeared to have occurred between March 2017 and November 2017.

[38] In March 2017 concerns were raised with the Applicant about the “*learning environment*” in his classroom. On 10 March 2017 the parties agreed the Applicant would take on a Classroom Relief teacher (CRT) role so he did not have the responsibility of his own classroom. Part of that was to assist him to focus on his health.

[39] On 15 September 2017 the parties agreed the Applicant would take paid special leave. He did not return to work after that because he was dismissed on 13 December 2017. The Applicant was paid up to his dismissal and he still had paid sick leave entitlement available to him at the time he was dismissed.

(i) March submissions

[40] The Applicant’s submissions filed on 25 March 2022 did not make it clear what the newly discovered disadvantages were, other than submitting they had been raised in May 2020 “*after the school provided disclosure of emails and other documents disclosing the disadvantages*”.

[41] However, there was no evidence presented to the Authority about how and when and to whom these new disadvantage claims were raised or what exactly was said and/or done in May 2020 (if anything) to raise the new disadvantage grievances.

[42] There was no analysis of how the emails and other documents disclosed disadvantage grievances the Applicant was not previously aware of. Nor was that covered in the Applicant’s affidavit evidence.

(ii) May reply submissions

[43] After the Respondent took issue with the lack of clarify regarding the Applicant’s claims, his reply submissions set out his disadvantage grievances as follows:

- (a) The Respondent’s investigation that was undertaken in February and March 2017 that resulted in his removal from teaching his class;
- (b) The Respondent’s treatment of the Applicant’s health issues in 2017;
- (c) The Respondent’s investigation into the Applicant’s health issues in August/September 2017 including the breaches of privacy and misrepresentations to the NZSTA;
- (d) The Respondent’s unlawful suspension of the Applicant on 15 September 2017 and the investigation and reporting to the New Zealand Teachers Council and up to the date of dismissal.

[44] The Applicant's submissions did not refer to his unjustified disadvantage on the grounds of discrimination grievance claims.

[45] The Applicant's Statement of Problem and Amended Statement of Problem did not raise claims about the Respondent's February 2017 investigation. The February 2017 investigation was raised for the first time in the Applicant's reply submissions that were filed on 9 May 2022.

#### *Discrimination grievances*

[46] Although it was not addressed in the Applicant's evidence or submissions in support of the leave application, the Authority noted that paragraph 8 on page 4, paragraph 13 on page 13 and paragraph 36 on page 21 of the Amended Statement of Problem referred to "*discrimination*".

[47] The Authority has therefore considered whether leave should be given to raise any/all of these alleged instances of various types of discrimination as unjustified disadvantage grievances on the grounds of the various types of discrimination the Applicant identified in the Amended Statement of Problem.

#### **Relevant law**

[48] Section 114 of the Act deals with raising personal grievances. Section 114(1) of the Act requires an employee to raise a personal grievance with their employer within 90 days beginning with the date on which the alleged action occurred or came to the employee's notice, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[49] Section 114(2) of the Act provides that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or its representative aware that the employee alleges that they have a personal grievance that they want the employer to address.

[50] Section 114(3) of the Act provides that where an employer does not agree to a personal grievance being raised after the expiration of the 90 day period, an employee may apply to the Authority for leave to raise a personal grievance after the expiration of that period.

[51] Section 114(4) of the Act enables the Authority to grant leave, 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.

[52] Section 114(5) of the Act requires the Authority to direct the parties to mediation if it grants leave under s 114(4) of the Act for an employee to raise a grievance after the expiration of the 90 day period required by s 114(1) of the Act.

[53] Section 114(6) of the Act provides that no action in relation to a personal grievance may be commenced in the employment institutions more than three years after the date on which it was raised.

[54] If the Authority grants leave to raise a personal grievance after the expiration of the 90 day period, then the three year period in s 114(6) of the Act runs from the date on which the Authority has granted leave.

[55] Section 115 of the Act sets out four examples of exceptional circumstances for the purposes of s 114(4)(a). For the purposes of the Applicant’s leave application in this matter, he sought to rely on s 115(a) of the Act that states:

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 period specified in section 114(1).

### **Medical evidence**

[56] The only medical evidence filed in support of the claim the Applicant had been “*so affected or traumatised by the matter giving rise to the grievance*”, as required by s 115(a) of the Act, was the medical report from a Consultant Psychiatrist prepared on 26 November and amended on 20 December 2019 (referred to as “*the medical report*”).

[57] This medical report dated 26 November 2019 and amended on 20 December 2019 was obtained at the end of 2019 to establish whether or not the Applicant was fit to participate in the Complaints Assessment Committee (“*the CAC*”) hearing of the New Zealand Teachers Disciplinary Tribunal (“*the NZTDT*”) that was due to commence in January 2020.

[58] The CAC hearing was held on 30 and 31 January 2020, 3-5 February 2020, 1-12 November 2020, 24 March 2021 and 29 April 2021. The CAC decision was recorded as having “*deliberation and decision on 20 August 2021*” and “*publication date on 19 January 2021*”. The reference to 2021 was an error because the CAC’s decision was issued on 19 January 2022.

[59] The medical report concluded the Applicant was of sufficient capacity and fitness to be able to be prosecuted. The medical report noted the Applicant was:

Experiencing clinically significant emotional symptoms; however, these are not associated with cognitive impairment that might impact on his ability to understand the charges that have been brought against him and make decisions relating to the proceedings.

[60] The Consultant Psychiatrist’s conclusion that the Applicant was sufficiently fit to be able to understand and give instructions regarding the CAC proceedings established that the Applicant could have also given instructions about the raising of personal grievances at that time.

[61] There was no evidence produced to the Authority that established the Applicant had ever been too unwell, either before the November/December 2019 medical report or after it, to have raised unjustified disadvantage personal grievance claims. The omission meant there was no medical evidence in support of the Applicant’s claim his delay in raising grievances had been caused by the exceptional circumstance identified in s 115(a) of the Act.

### **Applicant’s evidence**

[62] The Applicant filed sworn affidavits with the Authority on 11 March 2022 and 30 May 2022. During 2017 the Applicant was the NZEI representative for the Respondent. The Applicant also held another NZEI position of responsibility but that has not been identified in this determination due to the interim non-publication order.

[63] In his March 2022 affidavit the Applicant said:

I now know, because of eventual disclosure of documents and evidence in the NZTDT hearing [...] that the [Respondent] had commenced employment and disciplinary investigations and constructive dismissal action against me during 2017.

[64] The Applicant did not explain:

- (a) What documents and evidence he was referring to;
- (b) When the documents he referred to had been disclosed to him;
- (c) When the evidence he had referred to had become known to him;
- (d) What the employment and disciplinary investigations he referred to related to, if they were unrelated to the serious misconduct investigation/dismissal;
- (e) What action he claimed amounted to “*constructive dismissal*” and why that was relevant given he was actually dismissed on 13 December 2017, meaning there was no dispute about why his employment had ended.

[65] In his March 2022 affidavit the Applicant said he was told on 15 September 2017 that the Respondent was investigating his employment. He also said that “*I was later told in a letter that my ill health and absences were being investigated and the conduct and health investigations would be combined.*”

[66] Although the Applicant did not say what date that letter was, the Authority has a letter the Respondent sent him dated 19 September 2017 that contained that information, so presumably that is what the Applicant was referring to.

[67] The Applicant in his affidavit filed in March 2022 said his NZEI union representative stopped representing him during November 2017, after submissions to the NZTDT that the Applicant’s practising certificate should not be suspended were unsuccessful. No date was provided for that.

[68] The Applicant’s affidavit filed in May 2022 said he was represented by his union from 20 September 2017 to 1 December 2017. The Applicant also said that after meetings on 26 and 30 October 2017, during which he was represented by his union, NZEI “*later advised him it would not take a personal grievance on my behalf.*”

[69] That evidence therefore established the Applicant was able to properly consider raising personal grievances at that time, because he appeared to have asked his union to do that for him.

[70] The Applicant in his affidavit filed in March 2022 said that in 2020 his lawyer was provided with copies of the Respondent’s Board Minutes. The Applicant did not provide the date that had occurred. The Applicant said the Minutes showed he had admitted to the

disciplinary allegations and would not be back teaching. The Applicant said that misinformation resulted in pre-determination by the Respondent of his dismissal.

[71] The Board Minutes were not linked by the Applicant to any of his disadvantage grievances. Instead they related to his view that his dismissal was unjustified because it had been pre-determined without him being heard prior to that decision being made by the Respondent.

[72] The Applicant in his affidavit filed in March 2022 said that:

Once it became clear to NZEI that what was represented to us by the sub-committee and NZSTA consultant about the disciplinary process was not true, and that I had no opportunity to be heard prior to the decision on my employment being made, NZEI did offer to take a PG for me to a mediation.

[...]

I said I could not agree to mediate with NZEI as my representative as it would not agree to issue a statement of problem and go to an investigation, if required.

[73] The date of this offer of mediation assistance was not stated, other than to later in the Applicant's March 2022 affidavit that said although "*in mid-2020 NZEI offered to take a PG on the Board Minutes*" he had lost trust in the union.

[74] In his affidavit filed in May 2022 the Applicant said:

I discussed with NZEI the Board Minutes that showed that in September 2017 [name redacted] told the full Board that I admitted involvement in all allegations, and even [name redacted] said I would not be back teaching at the school.

[75] The Applicant then related the same evidence from the affidavit he filed in March 2022, about NZEI offering to take a personal grievance to mediation but him refusing the offer because the union would not agree to issue a statement of problem or pursue Authority proceedings on his behalf, if necessary.

[76] This evidence therefore established the Applicant did discuss raising personal grievances with his union after he had received full disclosure of all of the Board Minutes, even though the union's offer to raise a grievance was rejected. The Applicant must therefore have been able to have properly considered raising grievances at that point.

[77] The Applicant in his affidavit filed in March 2022 said:

I did not have the knowledge the [Respondent] was planning [action] against me throughout 2017 until I heard the evidence and had the opportunity to read the transcript of [Respondent's] witnesses in the CAC hearing.

[78] The Applicant did not explain:

- (a) What knowledge he obtained after;
  - (i) Hearing the evidence of the Respondent's witnesses at the CAC hearing;
    - or
  - (ii) Reading the transcript of the Respondent's witnesses in the CAC hearing;
- (b) Which of the Respondent's witnesses he was referring to;
- (c) What information (knowledge) he gained from each of the Respondent's witnesses he was referring to that he did not already know;
- (d) When he obtained that knowledge, in terms of specific dates;
- (e) How the knowledge he gained from each specific Respondent witness was relevant to any of his disadvantage grievances;
- (f) What he did to raise each new disadvantage grievance after becoming aware of this knowledge;
- (g) The date on which he raised each disadvantage grievance that arose from this new knowledge he claimed he had gained in 2020.

[79] The Applicant in his May 2022 affidavit said:

I now know, because of disclosure of email documents just before the CAC hearing in 2020, and the Board Minutes in 2019 and then seeing and hearing the witnesses from the [Respondent] give their evidence in the NZTDT hearing [...] that the [Respondent] had shared personal information they held about me to NZSTA, and carried out employment investigations and constructive dismissal against me throughout 2017 without telling me.

[80] The Applicant explained he found out when he saw emails the Respondent sent in August and September 2017 that it was trying to start "*an employment process related to my [injury/illness/absences]*". He did not give a date on which he saw these emails.

[81] The Applicant said he was informed after misconduct allegations were made against him about the investigations into his health but he did not find out the details of that until he

saw the emails in 2020 and heard the witnesses during the CAC hearing. He did not say what witnesses he had heard, when he had heard that evidence, what the relevant new evidence was, or how it related to any of his disadvantage claims.

[82] The Authority was aware the Applicant was told by the Respondent around 12-19 September 2017 that his absences were being investigated because he was called to a meeting on 27 September 2017 to discuss that.

[83] However, the 27 September 2017 meeting to discuss the Applicant's absences did not occur because it was superseded by the serious misconduct allegations that resulted in his dismissal. The Applicant was never subject to disciplinary action regarding his absences and all of his sick leave was paid sick leave up to his dismissal.

[84] The Applicant's disadvantage grievance claim relating to his agreement to become a CRT appeared based on evidence given during the NZTDT that as a CRT he had more behavioural issues of unsettled children to deal with and larger classes when he had to relieve combined classes.

[85] The Applicant did not explain what date during the NZTDT he heard that evidence. Nor did he explain why that evidence about him facing more behavioural issues and sometimes larger classes (when relieving combined classes) was not known to him as the CRT actually doing that work during 2017.

[86] The Applicant in his May affidavit said his brothers had stood by him and represented him at the CAC and NZTDT processes during 2018 – mid 2019. That included making discovery requests that the Applicant said were complied with "*in late 2019 and early 2020 during preparation for the NZTDT hearing.*" The Applicant did not provide the date on which his counsel became involved or explain why he was unable to instruct his counsel regarding his disadvantage grievance claims.

[87] The Applicant did not identify what documents were provided in late 2019, or if/how those were relevant to his disadvantage grievances or what documents were provided early 2020 or if/how those were relevant to his disadvantage grievances.

[88] The Applicant in his May 2022 affidavit said:

I do not consider that I have been in a position to bring the employment relations claims that the [Respondent] claims are time barred. I did not have knowledge that the school was planning constructive dismissal action against me throughout 2017 until I heard the evidence and had the opportunity to read the transcript of the school witnesses in the CAC hearing in April – May 2020 and discuss (sic) these matters with NZEI and lawyers.

[89] The Applicant did not explain:

- (a) What disadvantage grievances he did not have knowledge of before he lodged;
  - (i) His Statement of Problem on 15 June 2020; and
  - (ii) The Amended Statement of Problem on 29 November 2021;
- (b) Why he did not have knowledge of each specific disadvantage grievance before he lodged each separate Statement of Problem;
- (c) How and when (with reference to date(s)) he obtained the specific knowledge he had to have to be able to raise each of his disadvantage grievance claims;
- (d) What specific knowledge he obtained for each disadvantage grievance;
- (e) The date(s) he discussed raising personal grievances with;
  - (i) NZEI;
  - (ii) His brother;
  - (iii) His lawyers;
  - (iv) The Respondent;
- (f) Why over the period 10 March 2017 to 13 December 2017 he was apparently unable to properly consider raising disadvantage grievances but was able to;
  - (i) Work as a teacher;
  - (ii) Undertake his role as the union's local union representative;
  - (iii) Continue in a leadership position and undertake leadership duties for the union;
  - (iv) Instruct his union to defend the proposed suspension by the NZTDT of his practising certificate in November 2017;
  - (v) Participate in the disciplinary process that ran from 15 September 2017 until his dismissal on 13 December 2017;

- (vi) Instruct his brother to raise personal grievance claims on his behalf on 6 March 2018, including for unjustified disadvantages related to his dismissal, but was unable to instruct him to raise any of his other disadvantage grievance claims;
- (vii) Meet with the CAC in August 2018 regarding the allegations that had been made against him;
- (viii) Participate in the CAC's investigation (concluded in October 2018) into the mandatory report that had been made to the Teachers Council;
- (ix) Participate in a medical assessment by a Consultant Psychiatrist in November, and possibly December, 2019;
- (x) Pursue and participate in a number of interlocutory matters with the NZTDT in 2019, that resulted in the NZTDT Chair's decision being issued on 31 October 2019;
- (xi) Instruct his counsel to discuss the Respondent's Board Minutes with NZEI in 2020 (likely sometime between February and June 2020) and whether the union would support a personal grievance claim(s);
- (xii) Participate in the applications to the NZTDT that resulted in the amendment of charges by the CAC, and issues associated with Evidential Video Interviews conducted by Police, that resulted in the Deputy Chair issuing a Minute dated 6 November 2020;
- (xiii) Participate in the NZTDT hearing held on various dates during March – November 2020 and in March and April 2021;
- (xiv) Instruct counsel to prepare written submissions for the NZTDT hearing that had concluded hearing its evidence on 29 April 2021;
- (xv) Instruct counsel to lodge a Statement of Problem in June 2020 that included disadvantage grievances;
- (xvi) Attend mediation in September 2020;
- (xvii) Instruct counsel to attend case management conferences (CMCs) with the Authority to discuss his claims that were held on 26 July 2021 and 4 November 2021;

- (g) Why there was no medical evidence to support his claim that he was unable to properly consider raising his disadvantage grievances within time;
- (h) Why he was able to discuss but not “*properly consider*” raising personal grievances with NZEI in;
  - (i) Late October/November 2017;
  - (ii) After the Board Minutes were disclosed in January 2020;
  - (iii) Mid-2020;
- (i) Why he was able to raise the disadvantage grievances in the Statement of Problem he lodged on 15 June 2020 but not the disadvantage grievances he raised in the Amended Statement of Problem he lodged on 29 November 2021.

[90] In his May 2022 affidavit the Applicant said he asked the Respondent “*to consent to the out of time matters in May 20202, but [it] told me to file a statement of problem first.*” The Applicant did not say:

- (a) What date he asked for the Respondent’s consent to raise personal grievances out of time;
- (b) How he asked for consent (verbally or in writing);
- (c) What information he gave the Respondent in support of his request;
- (d) What specific disadvantage grievances he informed the Respondent he wanted to raise out of time;
- (e) When the grievances he wanted to raise out of time had occurred or come to his attention, which ever was the later;
- (f) Why he had not raised the grievances within the 90 day time period required by s 114(1) of the Act.

*Union representative’s evidence*

[91] The Applicant’s former NZEI union representative who assisted the Applicant during 2017 and who discussed the raising of personal grievance claims with the Applicant in 2020 (referred to as “*the union representative*”) filed an affidavit on 20 May 2022.

[92] The union representative confirmed that NZEI and Applicant “*parted ways*” on 1 December 2017 over the union’s decision not to support the Applicant to pursue personal grievance claims against the Respondent.

[93] The nature of the grievances referred to was not stated, but it must have been disadvantage grievances because the Applicant had not yet been dismissed and grievances cannot be raised in advance of the action or dismissal occurring. That evidence therefore established that the Applicant was able to properly consider taking personal grievance claims at that time.

[94] The union representative also said that in 2020 he was provided with the Respondent’s Board Minutes by the Applicant’s counsel and was told these had been disclosed in 2020 just before the NZTDT hearing. Although no date in 2020 was given by the union representative as to when he saw the Board Minutes, the NZTDT hearing started on 30 January 2020 so, disclosure must have been before that in January 2020.

[95] The union representative did not link the disclosure of the Board Minutes in January 2020 to any of the Applicant’s disadvantage grievance claims. Instead the union representative linked the Minutes to the dismissal grievance, by claiming the Minutes showed the Applicant’s dismissal had been pre-determined before he had been given an opportunity to be heard by the Respondent.

[96] The union representative said NZEI offered “*during 2020*” to take a personal grievance for the Applicant to mediation “*based on the Board Minutes*” but the Applicant did not accept the union’s offer.

[97] The union representative did not:

- (a) Say when (the date or month) he had seen the Respondent’s Board Minutes, other than “*in 2020*”;
- (b) Say when the Minutes had been disclosed, other than saying that had occurred “*just before the NZTDT hearing*”. The Authority noted that the timing of the NZTDT hearing meant disclosure of the Board Minutes must have occurred in January 2020;

- (c) Identify what personal grievance claims the disclosure of the Board Minutes were relevant to;
- (d) Link the Board Minutes, or for that matter any other disclosed documents, to any of the Applicant's disadvantage grievances;
- (e) Provide the date of the union's offer to support the Applicant to take a personal grievance;
- (f) Give the date the Applicant declined the offer of the union's support with his personal grievance;
- (g) Identify what personal grievance claims the union discussed with the Applicant and when those discussions occurred;
- (h) Explain why the union declined to support one of its long standing union members, who was also a local union representative and who also had a leadership role and duties in the union in raising personal grievance claims;
- (i) Give any evidence to support a claim that the Applicant was "*so affected or traumatised by the matter giving rise to the grievance*" that he was "*unable to properly consider raising*" any of his disadvantage grievances within time.

*Applicant's brother's evidence*

[98] The Applicant's brother filed a sworn affidavit on 13 May 2022. The Applicant's brother said the Applicant had told him in September 2017 that the Respondent was investigating his sick leave and was starting a disciplinary process, and they assumed that was related to the sick leave concerns but it turned out to be misconduct allegations.

[99] The Applicant's brother said they did not find out about the misconduct investigation until he saw "*those emails in 2020*". He did not say what emails he saw, who they involved or how "*those emails*" related to any of the disadvantage claims.

[100] The Applicant's brother did say that misconduct allegations were "*[...] first raised with [the Applicant] on 15 September 2017 by [name redacted] before school.*" The Applicant's brother referred to himself and another brother supporting the Applicant at disciplinary meetings at the school.

[101] The Applicant's brother then quotes from the 27 September 2017 Board Minutes that recorded the Applicant;

- (a) Was on "*special leave until the end of term*";
- (b) "*still had 8 days sick leave owing*"; and
- (c) "*would not be back teaching at our school*".

[102] None of this information was specifically linked to any of the disadvantage grievances. However, the Authority considered it:

- (a) Relevant to disadvantage grievance regarding the 'special leave' versus 'suspension' issue; and
- (b) Showed the Applicant was not left out of pocket by the way the Respondent dealt with his sick leave in 2017, because he still had paid sick leave entitlement owing to him when he was dismissed.

[103] The Applicant's brother did not say when he and/or the Applicant first became aware of this information that was recorded in the 27 September 2017 Board Minutes.

[104] The Applicant's brother also detailed an incident he and the Applicant had observed, when he and the Applicant attended for one of the disciplinary meetings, held on either 26 or 30 October 2017. The Applicant's brother implied, but did not clearly state, that the Applicant's union representative attended one or both disciplinary meetings. The union representative did not address that in his affidavit.

[105] The Applicant's brother said while waiting in the school's foyer before one of the disciplinary meetings, he observed a female teacher "*restraining a young male student*", who was not responding to her commands. The Applicant's brother claimed the female teacher grabbed the child by the wrists and physically dragged the student away from the foyer area (referred to as "*the foyer incident*").

[106] The Applicant's brother said he advised the Respondent of the foyer incident and asked if it wanted an incident report to be submitted. He said the Respondent firstly ignored him then dismissed the incident as "*minor*".

[107] The Applicant's brother said the Respondent's response to being told about the foyer incident:

[...] highlights the school culture around poor processes and inconsistency around physical restraint/restraining protocols. Basically with the female teacher practising a restraint, and pulling the child, the school couldn't be bothered with this MOE process.

[108] The Authority assumed the foyer incident was likely to be the evidence that supported the Applicant's "*discrimination on the grounds of sex*", disadvantage grievance claim.

[109] The Applicant's brother did not say whether the alleged different treatment by the Respondent of the female teacher and the Applicant for restraining children was raised during the disciplinary process or if not, why not. Presumably it was raised because it was witnessed by the Applicant and his brother and at the time of the foyer incident the Applicant was still represented by his union.

[110] Neither the Applicant or his brother explained why this incident that occurred on either 26 or 30 October 2017 did not also "*come to the notice of*" the Applicant on the same day the incident arose, given he had personally witnessed it.

[111] The Applicant's brother said the foyer incident was not recorded in the Board Minutes or deemed important enough to be a Ministry of Education (MoE) incident because "*later in 2018 and 2019 all of the school's MoE incident reports over this time were requested by [the Applicant] and he did not get any.*"

[112] The Authority was not told:

- (a) When the MoE incident reports were requested, other than "*in 2018 and 2019*";
- (b) When the MoE incident reports were disclosed to the Applicant;
- (c) Why the Applicant could not raise a disadvantage grievance involving the foyer incident until 29 November 2021;
- (d) When this discrimination grievance came to the Applicant's notice, if that occurred later than the date of the incident; or
- (e) Why the Applicant's discrimination grievance had not come to his attention at the time of the incident, given his grievance is that he and a female teacher had been treated differently (for reasons his grievance attributed to sex, because he is male and the other teacher was female) when they had both allegedly restrained students.

[113] The Applicant's brother referred to the fact he had raised the Applicant's grievances on 6 March 2018 and stated:

I am not a lawyer but I did not know what had gone on at the school until after I saw the emails that were discovered by the school and put into the NZTDT hearing in January 2020. In particular I refer to the emails of the principal and NZSTA representative that referred to [the Applicant] and the process, including the Board Minutes and disciplinary meetings that we never got the minutes from.

[114] The Applicant's brother annexed to his affidavit undated notes of evidence from the NZTDT hearing. The Authority was not told what hearing date(s) the transcript related to or when that evidence first came to the Applicant's attention if it was not when that evidence was given during the NZTDT hearing. The relevant parts of the transcript were not identified or explained to the Authority.

[115] The Applicant's brother did not link the information disclosed in connection with the January 2020 hearing to any of the Applicant's disadvantage grievances.

[116] It appeared that the Applicant's brother's evidence related to the disciplinary process that resulted in the Applicant's dismissal. It seemed to suggest that at least by the start of the NZTDT hearing on 30 January 2020 the Applicant had been provided with all information relating to his employment in 2017.

[117] The Applicant's brother said that the Applicant's claims were "*not discoverable by us until after we got those emails from the school in January 2020 and heard the school's evidence during 2020 in the NZTDT Tribunal.*" He did not identify what emails or evidence he was referring to, the dates he first saw the emails or heard the evidence during the NZTDT hearing or how that was relevant to the disadvantage claims.

[118] The delay in raising the disadvantage grievances was not adequately explained. Nor was there any evidence to establish the Applicant was "*so affected or traumatised by the matter giving rise to the grievance*" that he "*was unable to properly consider raising the grievance*" within time.

*Other evidence*

[119] The retired principal who filed a signed but not sworn affidavit on 11 March 2022 was supportive of the Applicant but did not provide evidence that assisted the Authority with the issues it had to consider under s 114(4) of the Act, when assessing this leave application.

[120] The Respondent's Executive Administrator set out that the first request for documents was made by the Applicant's counsel on 17 June 2019. This is the same counsel who filed these Authority proceedings. There was no explanation of the delay between counsel being instructed by the Applicant and the filing of the two Statements of Problem in this matter.

[121] The requested documents were couriered to the Applicant's counsel on 20 June 2019 and had been delivered to the Herne Bay Post Shop on 21 June 2019 for her collection. On 9 October 2019 the Applicant's counsel queried why there were no incident reports from when the Applicant was employed in 2017.

[122] On 14 October 2019 the Applicant's counsel reiterated the request for "*all serious incident reports made by the school in 2017 to the MoE under the Education Act that concerns the incidents involving him.*" The Respondent replied that same day saying it had already disclosed the Applicant's whole file.

[123] On 20 November 2019 the Applicant's counsel asked for copies of all of his emails from and with the school. The Respondent replied that all emails it had were included in the paper file that had been disclosed. On 21 November 2019 the Applicant's counsel asked for all email communications between [named individuals] that mentioned the Applicant from 1 August to 13 December 2017.

[124] On 4 December 2019 the Respondent couriered the Applicant's emails to his counsel.

[125] The Authority was provided with an email from the Applicant's counsel to the Applicant dated 5 December 2019 that said "[...] *if you want to run an employment case now you should get your union involved [...]*".

[126] That showed that the Applicant must have raised the prospect of Authority proceedings with his counsel around then.

[127] On 3 January 2020 the Applicant's counsel asked for one email attachment. That was provided to her on 5 January 2020. The Authority was not told how that attachment provided

on 5 January 2020 related to any of the Applicant's disadvantage grievances, if at all. The Authority also noted there was no evidence filed by the Applicant identifying any new documents coming to light for the first time after 5 January 2020.

### **Power under s 160(3) of the Act**

[128] Section 160(3) of the Act gives the Authority the power to resolve an employment relationship problem, however described, meaning it is not bound to treat the matter as being the matter of the type described by the parties.

[129] The Authority is already able to investigate all matters relating to the dismissal grievance, without the Applicant needing to file separate unjustified disadvantage claims for each concern he had about the disciplinary/dismissal process.

[130] Section 160(3) of the Act meant that if the Applicant's unjustified dismissal grievance did not succeed, the Authority could still determine that the facts that gave rise to the dismissal grievance, while not establishing his dismissal was unjustified, had instead established that he had been unjustifiably disadvantaged in his employment.

[131] This was explained to the parties during two Case Management Conferences and confirmed in the Authority's subsequent Minute and later email communications.

### **Has the Respondent impliedly consented to disadvantage grievances being raised out of time?**

[132] The Applicant's submission that the Respondent impliedly consented to his grievances being raised out of time because it attended mediation did not succeed. The parties were twice directed to mediation by the Authority.<sup>1</sup> It was appropriate for directed mediation to occur because the Authority clearly had jurisdiction over the dismissal grievance.

[133] What was said and done at mediation is confidential. The Respondent's attendance at mediation amounted to no more than compliance with the Authority's directions to do so. The Respondent has never changed its position that it did not consent to grievances being raised out of time. Attendance at mediation was therefore without prejudice to the Respondent's objections to jurisdiction.

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<sup>1</sup> Directions to mediation were issued by the Authority on 5 August 2020 and 11 April 2022.

**What disadvantage grievances has the Applicant sought leave to raise out of time?**

[134] This leave application has been determined based on the Authority’s reading of the Amended Statement of Problem and the identification of the specific disadvantage grievances set out in the Applicant’s reply submissions. These are as follows:

- (a) February 2017 investigation, that resulted in a verbal warning and a list of agreed undertakings (referred to as “*the February 2017 investigation*”);
- (b) March 2017 investigation, that resulted in the Applicant taking on a CRT role (referred to as “*the March 2017 grievance*”);
- (c) Respondent’s treatment of Applicant’s health issues in 2017 (referred to as “*the 2017 health issues*”), involving failure to support him;
  - (i) With adequate leave to recover properly;
  - (ii) Through the Teacher’s Council impairment process;
- (d) August 2017 investigation into Applicant’s absences (referred to as the “*the August 2017 grievance*”);
- (e) September 2017 investigation into complaints about the Applicant (referred to as “*the September 2017 grievance*”);
- (f) 15 September 2017 agreement regarding paid special leave, that the Applicant claimed was a suspension (referred to as “*the suspension grievance*”);
- (g) Investigation and reporting to New Zealand Teacher’s Council (NZTC) (referred to as the “*the report to NZTC*”);
- (h) Discrimination relating to (referred to as “*the discrimination grievances*”) discrimination on the grounds of:
  - (i) Sex under s 105(a) of the Act, involving the 30 October 2017 restraint of a child by a female teacher. The Applicant referred to this as discrimination on the grounds of “*gender*” in his Amended Statement of Problem;<sup>2</sup>
  - (ii) Disability under s 105(h) of the Act, relating to assumptions made about his health and competency in August/September 2017 and regarding the

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<sup>2</sup> Paragraph 13 on page 13 of the Amended Statement of Problem.

30 October 2017 restraint by a female teacher. The Applicant referred to this as discrimination based on “*illness*” in his Amended Statement of Problem;<sup>3</sup>

- (iii) Ethnic or national origins under s 105(g) of the Act, relating to his workplace injury. The Applicant referred to this as discrimination based on “*ethnicity*” in his Amended Statement of Problem.<sup>4</sup>

**When did each disadvantage grievance occur or come to the Applicant’s notice, whichever is the later?**

*February 2017 investigation*

[135] The Authority does not have a disadvantage grievance claim involving the February 2017 investigation before it. There is no evidence to date that a grievance about that has been raised as the Applicant’s reply submissions were insufficient to have raised a grievance as required by s 114(1) of the Act.

*March 2017 grievance*

[136] The March 2017 investigation was concluded on 10 March 2017 by the parties agreeing the Applicant would become a CRT. The Applicant was happy with variation of his role at that time. Any disadvantage grievance the Applicant had about his change in role (from classroom teacher to CRT) had to have come to his attention by 10 March 2017, being the date he agreed in writing to that change.

*The 2017 health issues*

[137] The alleged lack of support for health issues occurred in 2017. The Applicant must have been aware of the Respondent’s alleged failure to provide him with adequate leave to support his recovery in 2017, when the sick leave was being taken. There was no evidence that established the Applicant was not aware of the facts that gave rise to this grievance until later than 2017.

[138] The Authority was not given any evidence or information about the Teachers Council “*impairment process*”, but assumed it must have occurred in 2017, before the Applicant was

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<sup>3</sup> Paragraph 8 on page 4 and paragraph 36 on page 21 of the Amended Statement of Problem.

<sup>4</sup> Paragraph 8 on page 4 and paragraph 13 on page 13 of the Amended Statement of Problem.

dismissed. There was no evidence this grievance did not come to the Applicant's attention until after 2017.

*The August 2017 grievance*

[139] This grievance related to the information about the Applicant's absences being collated by the Executive Administrator and disclosed to the Principal (who sought advice about it from NZSTA) and Board Chair. These events occurred in August 2017 as the Applicant was made aware of the Respondent's concerns about the level of his absences in a letter it sent him dated 19 September 2017.

[140] Even on the most generous interpretation to the Applicant, he must have known all of the details about this when the Respondent disclosed its emails about that. Those were couriered to his counsel on 4 December 2019 and she picked them up on 3 January 2020. The evidence established the Applicant had seen the emails before the NZTDT starting on 30 January 2020.

*The September 2017 grievance*

[141] This referred to the complaints about, and/or incidents involving, the Applicant that were investigated by the Respondent over the period 8 – 13 September 2017. The Applicant should have known about these on 15 September 2017 when they were raised with him before school that day. Even if the Authority was wrong about that, the Applicant had received all of the emails about those events by January 2020, at the very latest.

*The suspension grievance*

[142] The Applicant had to have known the facts that gave rise to his suspension related disadvantage grievance on 15 September 2017 when it occurred because that was the date he had agreed to take paid special leave from work.

*The report to NZTC*

[143] The Respondent apparently made a mandatory report to the Teachers Council about the Applicant's conduct before it dismissed him on 13 December 2017. The Authority was not given evidence about when that occurred or came to the Applicant's attention.

[144] However, the chronology the Authority was given said that the NZTDT suspended the Applicant's practising certificate on 1 December 2017, so he had to have known before then

about the mandatory report that Respondent had made. There was no evidence to establish that the Applicant did not know about this disadvantage grievance until after 1 December 2017.

*The discrimination grievances*

[145] The sex discrimination grievance related to an incident the Applicant and his brother observed on 26 or 30 October 2017. It is not clear if/why this came to the Applicant's attention after that date.

[146] In so far as the Applicant wants to base his knowledge about this grievance on a lack of MoE incident reports for incidents that occurred at the School in 2017, then he knew that by 14 October 2017 at the latest when his counsel queried why no MoE incident reports had been disclosed to him.

[147] The disability discrimination claim appeared to relate to the way his absences for injury/illness were treated in 2017 and/or to the investigation of his sickness/injury related leave records.

[148] There was no evidence produced to the Authority;

- (a) That the Applicant had informed the Respondent that he was suffering a disability; or
- (b) To establish when the Applicant first became aware he had a disability discrimination related disadvantage grievance.

[149] Even on the most generous possible reading of the evidence, at the latest the Applicant must have been aware of the evidence he was basing this claim on by January 2020 when he received copies of all emails from August to December 2017 that named or identified him.

[150] Ethnic or national origins under s 105(g) of the Act is a potential ground of discrimination. The Applicant appeared to want to raise that grievance in relation to his workplace injury as he referred to it as discrimination based on "*ethnicity*" in his Amended Statement of Problem.<sup>5</sup>

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<sup>5</sup> Paragraph 8 on page 4 and paragraph 13 on page 13 of the Amended Statement of Problem.

[151] The Authority was not aware of what the ethnicity discrimination grievance was based on or when it occurred or came to the Applicant's attention because his evidence did not address that.

#### *Senior Leadership Conduct*

[152] The Applicant's reply submissions filed on 9 May 2022 stated that when the Respondent was approached in May 2020 for its consent for '*conduct by the respondent's Senior Leadership Team (SLT) in 2017*' (referred to as "*the SLT conduct*") to be raised as disadvantage grievance(s), the response was that he would need to file a Statement of Problem.

[153] It is not clear from the Applicant's evidence or submissions what the SLT conduct he raised with the Respondent in May 2020 was, or when it had occurred or came to the Applicant's attention. However, the fact his counsel asked for the Respondent's consent to raise grievances out of time meant he must have known he had disadvantage claims that that involved the SLT by May 2020 at the very latest.

#### **When did the Applicant raise each disadvantage grievance?**

[154] There was no evidence that the Applicant raised any grievances (other than the 6 March 2018 grievances) prior to lodging his Statement of Problem with the Authority on 15 June 2020. The Statement of Problem was served on the Respondent on 24 June 2020.

[155] The 24 June 2020 date of service, was therefore the date the Applicant raised disadvantage grievances with the Respondent relating to:

- (a) The August 2017 investigation;
- (b) Lack of support in 2017 with adequate leave to recover properly;
- (c) Lack of support through the Teacher's Council impairment process;
- (d) Investigation from 8-12 September 2017 of complaints about, incidents involving, the Applicant;
- (e) The 15 September 2017 alleged suspension.

[156] Service of the Amended Statement of Problem occurred by email on 29 November 2021, so that is when the Applicant raised unjustified disadvantage grievances for:

- (a) Discrimination on the grounds of sex, disability and ethnicity;

- (b) February and March 2017 investigations;
- (c) Breaches of privacy and misrepresentations to the NZSTA related to the August 2017 investigation into his absences and the September 2017 investigations into complaints about or incidents involving him;
- (d) Investigation and reporting to the NZTC.

**Was the Applicant's delay in raising the disadvantage grievances due to exceptional circumstances?**

*Reasons for delay*

[157] The Applicant failed to adequately explain the delay in raising each of his disadvantage grievances.

*Evidence of exceptional circumstances*

[158] There was no evidence to establish that any of the delay by the Applicant in raising any of his disadvantage grievances was due to him being so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising grievances within 90 days of them occurring or coming to his attention, whichever was the later.

[159] The Applicant has failed to establish that the failure to raise any of his (non-dismissal related) disadvantage grievances was due to exceptional circumstances. Therefore there is no need to consider whether it would be just to grant leave, as required by s 114(4)(b) of the Act.

**How should the new breach of contract claims be dealt with?**

[160] The Applicant raised a number of breaches of contract claims in his Amended Statement of Problem, however there were no 'remedies' claimed for these new breach of contract claims.

[161] The remedy for a breach of contract is a penalty and/or where appropriate possibly damages. The Applicant is out of time to claim penalties. The Applicant received his full salary up to the date of dismissal so there cannot be any damages claim for financial loss, because there has not been any loss.

[162] The Authority will already be considering any breach of contract claims that are relevant to its assessment of justification of the Applicant's dismissal. Any financial loss the

Applicant incurred due to breach(es) of contract that made dismissal unjustified can be compensated by the usual remedies that are associated with the unjustified dismissal claim.

[163] The Applicant is legally aided. As the Authority has already pointed out to the parties during the November 2021 case management conference, in its Minute dated 4 November 2021 and in subsequent emails, there is little point in using time and resources to pursue, investigate and determine claims that do not have any remedy/penalty associated with them.

[164] While it is the Applicant's right to pursue claims the Authority has jurisdiction over, he is encouraged to reconsider his desire to pursue stand-alone breach of contract claims that are unrelated to the dismissal grievance.

[165] It is already going to be challenging to get through the substantive investigation into the dismissal grievance in the allocated time, so there is no additional investigation meeting time available to devote to new breach of contract claims that have no remedy associated with them and that are unrelated to the dismissal grievance.

[166] Therefore, if the Applicant elects to pursue such claims then these will not form part of the Authority's substantive investigation which is scheduled to start in early August 2022. He will need to pursue these at a separate investigation meeting, that will be scheduled for next year.

**What if any costs should be awarded?**

[167] The Respondent as the successful party would normally be entitled to a contribution towards its actual costs in relation to this leave application. However, because the Applicant is legally aided it is not appropriate to make a costs order, at least at this stage.

[168] There are some limited circumstances in which a legally aided person may be required to pay costs, so the Authority has decided to adjourn the issue of costs on this leave application *sine die*, pending the resolution/determination of the substantive claims.

**Rachel Larmer**  
**Member of the Employment Relations Authority**