

**NOTE: See orders at paragraphs [3]-[8] prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 584  
3001443

BETWEEN	FMV Applicant
AND	TZB Respondent

Member of Authority:	Robin Arthur
Representatives:	Ms A, advocate for the Applicant from 20 February 2017 to 9 May 2024; and from 10 May 2024, Applicant in person Tim Clarke, counsel for the Respondent
Investigation:	On the papers
Determination:	3 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This determination concerns what have become complex jurisdictional questions about whether FMV could go ahead with a personal grievance against her former employer, TZB, or is prevented by the statutory time limits set for pursuing such claims. The grievance FMV wants to have investigated concerns the circumstances in which she resigned from her employment on 21 January 2010 – more than 14 years ago.

[2] FMV says her resignation resulted from how her managers treated her or dealt with concerns about how other employees treated her, causing her mental ill-health and other distress. She says this means the end of her employment with TZB should really

be seen as a form of constructive dismissal, caused by unfair treatment, rather than her freely choosing to resign.

### **Order prohibits publication of names of the parties and a representative**

[3] An order prohibiting publication of the names of the parties, made by the Authority on 12 April 2017, remains in place.<sup>1</sup> A wider suppression order was made later by the High Court.<sup>2</sup> The Supreme Court subsequently amended that wider order to, again, suppress only the identity of the parties and to stipulate that its order was to remain for only so long as the Authority's order remains in force.<sup>3</sup>

[4] The grounds on which the Authority's original order were made have shifted to some degree over the following seven years. However, the nature of the case, and the content of some evidence, make it appropriate for the order to remain in place on an ongoing basis.

[5] Open justice is of fundamental importance and may be departed from only for sound reasons necessary to serve the ends of justice. One such reason is where evidence or reasonable inference shows specific adverse consequences could reasonably be expected to occur if an order prohibiting publication of certain information is not made.<sup>4</sup>

[6] In this case there were concerns expressed on FMV's behalf, including in the most recent submissions on jurisdictional issues considered in this determination, about potential adverse effect on her mental health of releasing information about her health. There were also potential reputational concerns for TZB from the allegations made by FMV about how she was treated during her former employment. Those allegations have not been tested by an investigation or hearing because the proceedings in the various jurisdictions have concerned procedural and jurisdictional issues rather than the substance of FMV's case.

[7] Weighing those factors, in the context of what is apparent or can be reasonably inferred from the documentary evidence available, the circumstances are such that the Authority can, on its own motion, reasonably exercise its discretion to continue the

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<sup>1</sup> *FMV v TZB* [2017] NZERA Auckland 112. (ERA determination).

<sup>2</sup> *FMV v TZB* [2018] NZHC 1131 at [67] (High Court judgment).

<sup>3</sup> *FMV v TZB* [2021] NZSC 102 at [139] and [140]. (Supreme Court judgment).

<sup>4</sup> *Erceg v Erceg* [2016] NZSC 135 at [15] and *MW v SPIGA Limited* [2024] NZEmpC 147 at [87]-[89] and [94].

prohibition on publication of the names of the parties.<sup>5</sup> No public interest in open justice is unreasonably compromised by this order, particularly as information on which conclusions are drawn in this determination, and the reasons for those conclusions, remain part of the public record.

[8] In one aspect only, the order is also extended to prohibit from publication, in relation to this matter, the name of FMV's mother, who acted as her representative from early on in the application to the Authority. While her surname is different from FMV and is a common surname, the risk that the order regarding FMV's identity might be compromised can be further reduced by prohibiting publication of her mother's whole name in relation to this matter. Instead FMV's mother, including in her role as a representative, is to be referred to only as Ms A.

### **This matter has a long history**

[9] Litigation about FMV's claim now has a long and complicated history. It has been the subject of decisions in the Employment Relations Authority,<sup>6</sup> the High Court,<sup>7</sup> the Court of Appeal,<sup>8</sup> and the Supreme Court.<sup>9</sup> Some related issues regarding access to documents under the Privacy Act 2020 were also the subject of proceedings in the Human Rights Review Tribunal.<sup>10</sup>

[10] The proceedings in the High Court, the Court of Appeal and the Supreme Court concerned whether FMV could pursue "parallel claims" in the High Court or whether the Authority had exclusive jurisdiction over all the claims FMV wished to pursue against TZB as her former employer. All three courts held jurisdiction rested solely with the Authority under s 161 of the Employment Relations Act 2000 (the Act).

[11] The Supreme Court's decision set out a thorough summary of the background to FMV's claims and the proceedings.<sup>11</sup> For this determination it is enough to note FMV's employment with TZB began in February 2009 and lasted just under one year.

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<sup>5</sup> Employment Relations Act 2000, Sch 2, cl 10(1).

<sup>6</sup> *FMV*, above n 1.

<sup>7</sup> *FMV*, above n 2.

<sup>8</sup> *FMV v TZB* [2019] NZCA 282.

<sup>9</sup> *FMV*, above n 4.

<sup>10</sup> Citations for decisions in those HRRT proceedings, and appeals on them in the High Court and the Court of Appeal, are not listed here as they do not anonymise the names of the parties so reference to them here could compromise orders made by the Authority and the Supreme Court about party names in this proceeding.

<sup>11</sup> *FMV*, above n 4, at [6]-[20].

She resigned on 21 January 2010, on one month's notice, so the employment ended on 10 February 2010. More than six years later, in December 2016, FMV lodged a statement of problem in the Authority and filed a statement of claim in the High Court.

[12] Around four months earlier, in August 2016, FMV had also raised her employment issues through a discrimination complaint made to the Human Rights Commission under the Human Rights Act 1993.

[13] As part of preparing for a mediation about that complaint, counsel acting for FMV at that time wrote to TZB setting out FMV's claims that she was subjected to severe harm from bullying, discrimination over her disability of ill-health, an unsafe workplace and constructive dismissal. TZB said this letter, dated 29 November 2016, was the first time FMV had raised a personal grievance claim.

[14] The letter from FMV's counsel also referred to advice from a consultant psychiatrist that FMV could attend mediation but was "unable to manage any legal issues". The Commission postponed its scheduled mediation after TZB raised concerns about FMV's capacity to take part in that process in light of what her psychiatrist had said about her fragile mental health and ability to handle legal issues at the time.

[15] The Human Rights Act claim was subsequently not pursued further but when FMV's application was lodged in the Authority in December 2016 TZB's response raised two issues about whether the matter could go ahead. One issue concerned FMV's capacity to take part in the process. The other concerned time limitation issues in pursuing personal grievance claims more than five years after the employment had ended.

#### *Authority issues stay of proceedings in 2017*

[16] The capacity issue was addressed in a preliminary determination of the Authority issued on 12 April 2017. After hearing from the parties, this issue was resolved by putting in place a stay of proceedings until FMV could provide an appropriately verified and comprehensive medical report that she had the necessary capacity to proceed with her application.<sup>12</sup> This outcome was said to balance FMV's right to appear and to pursue her claim with the potential harm or prejudice both parties could suffer if she lacked, at that time, the capacity to make binding decisions that might

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<sup>12</sup> *FMV*, above n 1, at [33].

be needed for taking part in the legal process. The process being referred to in that context included attending any prior mediation directed by the Authority and, if not resolved there, preparing for and taking part in an Authority investigation.<sup>13</sup>

[17] Significantly, for reasons to be addressed in greater detail later in this determination, that earlier determination also noted FMV's claims would still face some difficulty if she established her capacity to proceed. This was because she would need to establish exceptional circumstances had delayed her pursuit of a personal grievance for so many years. Doing so would also involve providing relevant medical information to support her claim. This information was needed to show that the mental ill-health she said resulted from how she was treated while working for TZB had left her unable to properly consider raising her personal grievance for more than five years. This period runs from sending the resignation letter to TZB on 21 January 2010 through to 29 November 2016, when counsel acting for her at that time sent TZB a letter which raised her personal grievance.<sup>14</sup>

[18] The 2017 preliminary determination noted case law about the standard of proof needed to establish exceptional circumstances of the kind that would then warrant use of the statutory discretion to permit the grievance to be raised and pursued well beyond the 90-day period allowed for in the Act.<sup>15</sup>

[19] The exceptional circumstance FMV sought to rely on is described in the Act as where an employee "has been so affected or traumatised by the matter given rise to the grievance that he or she was unable to properly consider raising the grievance within the [90-day] period".<sup>16</sup> FMV claimed the trauma she experienced as a result of how she was treated at work fitted that category of exceptional circumstance.

#### *FMV pursues issues in civil jurisdiction*

[20] In the months following the preliminary determination the Authority made efforts to secure the necessary confirmation about capacity and medical information relevant to the full range of FMV's claims. Those efforts were not successful.<sup>17</sup> By

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<sup>13</sup> FMV, above n 1, at [29].

<sup>14</sup> FMV, above n 1, at [31]-[32].

<sup>15</sup> *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [25].

<sup>16</sup> Employment Relations Act 2000, s 114(3) & (4) and s 115(a).

<sup>17</sup> See, for example, Member's Minutes of 14 July and 17 July 2017; emails of Authority to counsel for Auckland District Health Board, 20 July and 25 July 2017; email of Ms A to counsel for ADHB opposing

December 2017 FMV had turned her attention to pursuing a tort claim in negligence in the High Court.

[21] On 21 May 2018 the High Court ordered FMV's application in that jurisdiction be struck out.<sup>18</sup> Soon after FMV moved to have the Court of Appeal rehear her case.

[22] In a memorandum to the Authority dated 1 August 2018 Ms A said FMV was "happy for her personal grievance to be stayed awaiting the outcome of the High Court proceeding" and requested the Authority "to put the matter on hold until further notice".

[23] By email message sent later that day the Authority confirmed the matter remained stayed under the terms of the 12 April 2017 determination.

[24] During the following three years, at the Authority's request, the parties provided some updates on progress with proceedings in the Court of Appeal and the Supreme Court. Throughout that period FMV did not ask to continue the proceedings in the Authority. By the time the Supreme Court issued its decision on 20 August 2021, four years and four months had passed since the Authority's initial determination in 2017.

[25] The Supreme Court, in confirming the High Court had no jurisdiction over FMV's claims, suggested she might wish to ask the Authority to revisit the question of whether a stay of her proceedings in the employment jurisdiction should continue.<sup>19</sup>

*FMV seeks continuation of Authority investigation*

[26] FMV did make that request. By email on 29 September 2021 Ms A wrote to the Authority saying FMV "needs to amend her personal grievance" in light of the Supreme Court's decision and sought "direction from the Member as to the next step before the Authority".

[27] TZB promptly objected to any continuation of Authority proceedings saying FMV had not satisfied the requirements of the Authority's April 2017 determination for lifting the stay and, because more than four years had passed while she pursued her

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provision of records, 25 July, 2017; and affidavit of psychiatrist Dr Ashok Malur, 6 December 2017, deposing that "FMV and her family do not wish to release her treatment file at the ... mental health centre [and] [i]t is my considered opinion that there is a possibility that her mental health might be compromised if her medical records are released".

<sup>18</sup> *FMV*, above n 2.

<sup>19</sup> *FMV*, above n 4, at [136].

claims in the courts, her personal grievance had to be treated as being withdrawn. The latter objection was a reference to clause 14 of Schedule 2 of the Act that states:

a matter before the Authority must be treated as having been withdrawn if no action on the matter has been taken by a party or the Authority for at least three years.

[28] Attending to FMV's request for further directions and TZB's objection to the proceedings carrying on in the Authority was delayed by Covid-19 Alert level restrictions in place at the time.

[29] In March 2022 TZB applied to the Authority for orders dismissing FMV's application. FMV, in turn, asked the Authority to decline TZB's application and proceed to investigate her personal grievance application.

### **The Authority's investigation on time-limitation issues**

[30] A case management conference was convened in November 2022 to discuss how to deal with the parties' requests for orders or directions on whether or not the proceedings in the Authority could continue.

[31] A Minute of the Authority issued in preparation for that conference noted that, as far back as February 2017, the Authority had already identified significant questions about what time limitations might apply to FMV's claim.<sup>20</sup> Those questions were summarised at that time as:

- (i) Is [FMV]'s claim time-barred under s 114(6) of the Act (no action within three years of raising a grievance); and
- (ii) If so, were there exceptional circumstances that warrant her now being granted leave to proceed (under s 114(4) and s 115 of the Act); and
- (iii) If so, is any claim for breach of contract barred under s 37 of the Limitation Act 2010?

[32] The third question regarding application of the Limitation Act 2010, which TZB had mentioned in its statement in reply, is not relevant for present purposes as the applicable limitation periods are those set by the Employment Relations Act 2000.<sup>21</sup>

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<sup>20</sup> Minute of the Authority, 7 February 2017 and Minute of the Authority, 16 September 2022.

<sup>21</sup> See Limitation Act 2010, s 40.

[33] At the November 2022 case management conference, held in person with Ms A and counsel for TZB, the parties agreed the Authority would investigate and determine the following time-limitation issues ‘on the papers’:

- (i) Should the Authority treat [FMV]’s application of 23 December 2016 as withdrawn on the grounds there had been no action on it in the three years preceding her request of 29 September 2021 for directions on amending her personal grievance (after the Supreme Court’s decision was issued on 20 August 2021) (*refer clause 14(2) of Schedule 2*)?
- (ii) If not treated as withdrawn, is [FMV]’s application of 23 December 2016 time-barred, because:
  - (a) a personal grievance was not raised within 90 days (*refer s 114(1)*),  
or
  - (b) if a grievance was raised, it was not pursued within three years (*refer s 114(6)*) or
  - (c) if relating to alleged breaches of her terms of employment (concerning a safe workplace and fair treatment in it), those claims were not raised within six years (*refer s 142 of the Act*)?
- (iii) If [FMV] was out of time in respect of the grievance claims (in (ii)(a) or (b) above), should she be granted leave to raise the grievance because the delay was occasioned by exceptional circumstances as described in s 115(a) of the Act?

[34] The papers referred to include the following:

- (i) FMV’s statement of problem (23 December 2016), TZB’s statement in reply (25 January 2017), TZB’s amended statement in reply (28 March 2017) and FMV’s amended statement of problem (25 June 2018);
- (ii) an affidavit of Harriet Wolk, a solicitor working for TZB’s lawyers (2 March 2022);
- (iii) an affidavit of FMV (dated 1 April 2022, affirmed 2 May 2022);
- (iv) documents provided with those pleadings and affidavits; and
- (v) additional documents called for by the Authority under s 160(1) of the Act (which included any correspondence between FMV and TZB at relevant times, medical records held by FMV (or Ms A) for the period up

to November 2015 and medical records from then to the date of her application to the Authority in December 2016); and

- (vi) written submissions lodged for FMV on 3 February 2023, for TZB on 3 March 2023 and in reply for FMV on 24 March 2023.
- (vii) Email messages to the Authority on 27 March 2023 from counsel for TZB and Ms A regarding contents of FMV's 24 March 2023 reply submissions.

[35] Ultimately FMV did not release the relevant medical records, referred to in paragraph [34](v) above, to the Authority. The importance of those medical records to the issues for resolution had been discussed at the November 2022 case management conference. Directions issued in writing after the conference included this explanation of that point:

By email to the Authority on 2 June 2017 [FMV]'s representative advised that [FMV] had her medical notes up to November 2015 "when her medical team finally agreed for her to go for her legal course" and she was "happy to provide the Authority with her medical notes that she has now held when the Authority starts its public investigation, e.g. whether she was so affected by ill health from January 2010 until December 2016 that she could not have pursued her employment grievances earlier". However [FMV]'s representative advises [FMV] now opposes providing those records. As explained at the case management conference I do not consider any valid grounds exist for withholding them from the Authority's investigation.

Those records likely comprise objective and contemporaneous assessments that are necessary and relevant for consideration of the leave Ms [FMV] has sought to pursue her personal grievance out of time on the grounds of exceptional circumstances. Specifically this concerns the criteria at s 115(a) of the Act of whether Ms [FMV] was so affected or traumatised by the matter giving rise to her grievances (of constructive dismissal, disadvantage and discrimination) that she was unable to properly consider raising those grievances within 90 days of her resignation in 2010. The inquiry includes the question of whether (or to what extent and how long) the effect or trauma continued before the employee could properly consider raising the grievance.

As I put in plain words during the conference, the time to disclose those relevant records is now. If Ms [FMV] does not provide them, she risks lacking evidence sufficient to support her claim that trauma or other effects continued and prevented her raising her grievances earlier. Equally, the records may contradict that claim but, even if that were so, it is nevertheless material that should be available to the Authority in considering the question raised by s 115(a) of the Act.

[36] Some documents with medical and health information (comprising assessments made by a company-appointed specialist in 2009 and assessments by a consultant psychiatrist in 2017) are amongst the evidence lodged. However, FMV has not

provided the Authority with the medical records she or Ms A are said to hold for a large part of the period relevant for the Authority's assessment on these time-limitation issues and has opposed gathering the records for the remainder of that period, including records from the former Auckland District Health Board (ADHB).

[37] As permitted by s 174E of 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. This determination has been issued outside the usual statutory period since the receipt of last information from the parties as the Chief of the Authority decided exceptional circumstances existed for the delay.<sup>22</sup>

### **Application treated as withdrawn as no action for three years**

[38] TZB submitted the Authority must treat FMV's application as withdrawn because more than three years passed without her taking any action on the proceedings in the Authority.

[39] Its submission relied on clause 14 of Schedule 2 of the Act:

#### **14 Withdrawal of matter**

- (1) Where any matter is before the Authority, it may at any time be withdrawn by the applicant or appellant.
- (2) For the purposes of subclause (1), a matter before the Authority must be treated as having been withdrawn if no action on the matter has been taken by a party or the Authority for at least 3 years.

[40] As TZB submitted, the requirements of clause 14(2) are mandatory. It states how the matter "must" be treated if the other elements of the clause are satisfied – that is, firstly "no action has been taken by a party or the Authority" and, secondly that inactivity has continued "for at least three years". A third element is implicit in the wording of the clause also. It concerns the "matter before the Authority" so is about the proceedings in that forum, not proceedings elsewhere.

[41] What constitutes "action" is not defined in the Act. As TZB submitted, the word "action" in this context is reasonably interpreted as a party seeking, or the Authority taking, some formal step to progress the matter through the Authority. It is

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<sup>22</sup> Employment Relations Act 2000, s 174D(3).

not some less formal activity such as the parties exchanging correspondence with one another or meeting privately, at their own volition, to discuss the matter between themselves.

[42] This interpretation is supported by reference to the explanatory note to a Bill which added this clause to the Act as part of amendments made in 2010.<sup>23</sup> The Explanatory Note gave the following reasons adding this clause:

*Enabling cases that have been inactive for 3 years in Authority to be treated as withdrawn*

The existence of an unresolved employment relationship problem and the prospect of it being “resurrected” at any point can be stressful for employers and employees or create uncertainty for them. The Bill provides that personal grievance claims that have not been actively pursued or progressed by a party within 3 years from the last action in respect of that claim be treated as withdrawn. Such a withdrawal would achieve closure for employers and employees in relation to an otherwise unresolved claim. This change is intended to remove a possible source of stress or uncertainty for employers and employees, and improve levels of fairness for them by preventing the pursuit of an historic claim (as the existing period of limitation for filing a claim at the Authority would prevent its re-litigation). Parties will have an incentive to actively pursue a claim knowing that it would be removed from the system at a certain point if they do not do so.

[43] The first relevant action in these particular proceedings was the lodging of FMV’s application in the Authority on 23 December 2016. A stay of the Authority’s investigation of that application was put in place on 12 April 2017 until FMV provided an appropriately verified and comprehensive report confirming she had the necessary capacity to proceed.<sup>24</sup>

[44] On 25 June 2018 FMV lodged an amended statement of problem. While, as TZB correctly submitted, this amended statement could only be considered if the stay was lifted, the amended statement set out more detail of what FMV said had happened and had amounted to unfair treatment, discrimination and her constructive dismissal from her employment with TZB. Importantly, however, lodging the amended statement did amount to an “action” of the type contemplated by clause 14(2) because it was a formal step taken by a party, in that instance with the clear intention of progressing the claim in the Authority.

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<sup>23</sup> Employment Relations Amendment Bill (No 2) 2010 (Bill 196-1).  
<https://www.legislation.govt.nz/bill/government/2010/0196/6.0/DLM3172503.html>

<sup>24</sup> FMV, above n 1, at [33].

[45] The last relevant action by FMV, taken on her behalf by Ms A, was lodging a memorandum on 1 August 2018 asking the Authority “to put the matter on hold until further notice” as FMV was “happy for her personal grievance to be stayed awaiting the outcome of the High Court proceeding”. By that date the High Court had already declined jurisdiction (on 21 May 2018) but steps were underway for an appeal by rehearing in the Court of Appeal.

[46] After considering correspondence from both TZB and FMV about her request, the Authority confirmed to the parties on 1 August 2018 that the matter remained stayed and a scheduled case management conference was postponed. The correspondence from TZB advised that the parties had agreed to engage in discussions between themselves to explore the possibility of resolving FMV’s employment relationship problem and asked that no further steps be taken in the proceedings until those discussions took place.

[47] The Authority’s 1 August 2018 message to the parties asked them to advise the Authority if their discussions resolved the matter but otherwise to “provide an update on the state of the various proceedings so I can then consider what steps, if any, should then be taken on the matter in the Authority”.

[48] TZB submitted FMV’s last relevant “action”, for the purposes of analysis in respect of the clause 14(2) limitation, should be taken as the lodging of her amended statement of problem on 25 June 2018. This would, in TZB’s submission, mean there was a period of just over three years and three months of inactivity between then and her request of 29 September 2021 for directions on “the next step before the Authority”.

[49] However, in my assessment, 25 June 2018 was not the correct date of the last relevant action by FMV. Rather, as explained above, this occurred on 1 August 2018 with her request to “put the matter on hold”. It was an application in respect of what formal steps the Authority could or should take to address the matter before it. It was specific and clear. It asked for nothing more to be done on the matter before the Authority until some uncertain future time.

[50] The Authority’s acceptance of that request, done on 1 August 2018, was also the last action by the Authority that was of any consequence in the following months and years up to and until Ms A sent FMV’s most recent request for directions on 29 September 2021.

[51] Communication from the parties in the intervening period of three years, one month and 28 days comprised only messages about progress of proceedings in the civil courts. Communication from the Authority acknowledged those messages but did not change the inactive status of the matter. Neither did either party ask for any further formal steps to be taken or for any change in the status of the matter during that time.

[52] Returning to the elements that must be satisfied for the mandatory treatment of a matter as withdrawn, the circumstances described above met all three requirements of clause 14(2). Neither FMV, TZB or the Authority took any steps to pursue or progress the matter in the intervening period. The period of inactivity was more than three years long. The inactivity related to the matter before the Authority. There had been activity in the Human Rights Review Tribunal, the Court of Appeal and the Supreme Court but they were about claims in those forums, related to FMV's attempts to pursue "parallel proceedings" in the civil jurisdiction.<sup>25</sup> It was not activity seeking to pursue or progress the matter in the employment jurisdiction that was before the Authority.

[53] Clause 14(2) does not give the Authority any discretion to extend the timeframe or apply some more flexible or less technical interpretation of its provisions. Because the circumstances objectively met the criteria for application of this clause, the Authority is obliged to treat FMV's application as withdrawn. It is an outcome required by the plain wording of the clause and is consistent with the parliamentary intent of the clause as enacted.

[54] While this conclusion is sufficient to end the Authority's consideration of this matter, other questions regarding the application of time limits have been considered in the remainder of this determination, in the alternative and in case the conclusion on this first question was not correct.

### **No personal grievance raised within 90 days of the resignation**

[55] In the statement of problem lodged in the Authority on 23 December 2016 FMV accepted she had not lodged a personal grievance, about how she was treated at work or how her employment came to end, within the required statutory period of 90 days from the relevant events.

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<sup>25</sup> *FMV*, above n 4, at [3].

[56] In that statement, and the later amended statement (lodged on 25 June 2018), FMV said she understood “my personal grievance has passed its legal time limitation” but that she “was so unwell and affected and traumatised” by her experiences at work that she was unable to properly consider her grievance until December 2016.

[57] She said those circumstances were exceptional circumstances and met the criteria for her to be given leave now to pursue her grievances.

[58] Before considering those arguments, it was useful to consider what did happen within the 90-day period from the day her employment ended.

[59] FMV resigned on 21 January 2010. Her letter of resignation said she was leaving her position on that date and thanked TZB for the opportunities provided. Because a one month notice period applied, TZB’s internal human resources records listed FMV’s employment as ending on 19 February 2010. That date is, technically, the relevant date for consideration in relation to the limitation periods.<sup>26</sup> The 90-day period from then ended on 20 May 2010, so was the date by which the Act normally requires a grievance to have been raised.

[60] Also for consideration under this heading was a submission by FMV that the 90-day limitation did not apply because TZB had later consented to her raising her grievance outside that period.

#### *Time limits set by the Act*

[61] Sections 114(1), 114(6) and 142 of the Act, as it was worded at the relevant times in 2010, set the following limitation periods for pursuing personal grievances or other actions:

#### **114 Raising personal grievance**

- (1) An employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer 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, which ever is the later, 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

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<sup>26</sup> *Para Franchising Ltd v Whyte* [2002] 2 ERNZ 120 at [32].

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

(3) ...

(4) ...

(5) ...

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

#### **142 Limitation period for actions other than personal grievances**

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[62] No particular formula of words is needed to raise a grievance. This can be done informally, in spoken or written words, but requires an intentional act of giving the employer enough information about the nature of the grievance for the employer to have an opportunity to address and resolve the grievance.<sup>27</sup>

#### *Time limits in FMV's case*

[63] FMV's initial statement of problem was lodged in the Authority on 23 December 2016, six years and ten months after the end of her employment on 19 February 2010.

[64] In August 2016 FMV made a complaint to the Human Rights Commission about disability discrimination during her employment by TZB. TZB was advised of the complaint by letter on 2 September 2016. The letter, from a commission mediator, said FMV alleged she was discriminated against by not being told that a doctor who TZB arranged for her to see had diagnosed her "as having a thought disorder that might progress to paranoid schizophrenia". She said if she or her parents were told of that diagnosis, "she could have sought treatment and potentially saved her employment chances".

[65] During preparation for mediation on this complaint, counsel acting for FMV at that time sent the letter of 19 November 2016 which TZB describes as the first notification it had received of her grievances.

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<sup>27</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [36]-[38].

- [66] Her subsequent statement of problem lodged in the Authority alleged:
- (a) Personal grievance claims for unjustified constructive dismissal and unjustified disadvantage, including by discrimination by failing to accommodate her disability of mental ill-health; and
  - (b) Claims of negligence and breach of contract by causing a hazardous work environment and failing to take proper care of her.

[67] Applying the limitation period relevant to FMV's personal grievance claims, under s 114 of the Act, the latest day she could raise a personal grievance was 20 May 2010 (being 90 days from her last day of employment on 19 February 2010).

[68] Applying the limitation period relevant to her claim that TZB breached its obligation as her employer to provide a safe workplace, under s 142 of the Act, the last day FMV could raise those claims was 19 February 2016 (being the end of the six-year period from her last day of employment).

*Communication in 2010 and 2011 did not raise a grievance within time*

[69] In a document attached to her 2016 statement of problem FMV said she had contacted TZB on 3 and 5 March 2010 by email because "she wanted to raise my personal grievance".

I contacted [TZB] on 3 and 5 March 2010 to ask for a meeting so to bring my complaint. I did not state my purpose in my emails because at that time I did not know I should have made a clear complaint to [TZB] in the first place. I thought I could explain my purpose after [TZB] responded. But [TZB] did not make response.

[70] There is no evidence confirming the sending or content of those March messages. FMV's submissions said she did not keep these messages. TZB said it had no record of this contact.<sup>28</sup> There is consequently no evidence on which to corroborate they were sent, as FMV claims, or to assess whether the content of any such messages, if sent, might be read as sufficient to have alerted TZB to FMV having a grievance she wanted to be addressed.

[71] FMV also contacted some TZB personnel by email in 2011. While this was clearly well outside the 90-day period, it is referred to here as part of a check on whether a personal grievance might have been raised at any time prior to 2016.

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<sup>28</sup> Memorandum of counsel for TZB, 12 December 2022.

[72] On 9 January 2011 FMV sent an email to TZB's chief executive and her former supervising manager. The email comprised the words "I hate [TZB]" repeated in lines that ran over three pages and ended with some sentences about her feelings, which included saying she regretted ever setting foot in TZB. It did not make a specific complaint or ask for a response.

[73] A human resources manager responded on TZB's behalf on 12 January 2011. His reply said he was sorry her experience with TZB was not positive from her personal perspective but said the nature of her communication was not appropriate and asked her not to contact TZB personnel. He asked that, if FMV had concerns about her previous employment, that she "use appropriate channels" and suggested she contact the Department of Labour, which was the relevant public agency at that time.<sup>29</sup> His message included the department's contact phone number and email address and a paragraph about the free information and mediation service it provided. He also TZB could arrange a referral to professionals through its Employee Assistance Programme if FMV would like some personal assistance or counselling.

[74] FMV responded on 13 January 2011 saying that she sincerely appreciated the offer of help but "I have my reasons, as before, that the Employee Assistance Programme or the Department of Labour will not work, nor are needed". She said she had wanted to talk to some named senior personnel.

[75] On 17 January and 16 April 2011 FMV sent other emails to her former supervising manager's email address. She referred in both messages to her deep concerns about her mother's well-being but did not raise a complaint about her employment at TZB.

[76] Other comments FMV made in those messages indicated she was experiencing some serious health issues, and which she described as making her "behave in hurtful ways" to her parents, other employers, friends and people in her community. TZB representatives did not respond directly to her emails but contacted the doctor who had previously assessed FMV at the company's request in 2009. The doctor then made contact with FMV's general practitioner about the concerns those messages raised about FMV's well-being at the time.

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<sup>29</sup> The Department of Labour was integrated into the newly-formed Ministry of Business, Innovation and Employment in July 2012.

[77] While health concerns were evident from those 2011 email messages, and expressed dissatisfaction with her experience at TZB, what FMV had written did not amount to raising a personal grievance about how her employment had come to end. If a complaint amounting to a personal grievance could be inferred from the content and context of those emails, it was nevertheless well outside of the 90-day statutory period for raising a grievance.

*TZB made aware of grievances in 2016*

[78] From this information, the earliest dates on which TZB could be said to have been made aware FMV was alleging grievances about what happened during her employment and that she wanted TZB to address were:

- (a) 2 September 2016, through the Human Rights Commission mediator's letter about her complaint of discrimination on the grounds of disability; and
- (b) 19 November 2016, through her counsel's letter setting out her grievances in advance of an anticipated Commission-initiated mediation; and
- (c) 23 December 2016, through her statement of problem lodged in the Authority.

[79] Those three instances all fell well outside the 90-day period required by s 114(1) of the Act for raising grievances.

*Claim about breaches also outside six-year limit*

[80] FMV's claims about breaches of the terms of her employment, to provide a safe workplace and properly care for an employee known to be unwell, are allegations about contractual breaches rather than personal grievances. They were made outside the six year time limit for actions other than personal grievances under s 142 of the Act.

*No consent by TZB to FMV pursuing her grievance*

[81] FMV submitted that TZB had "effectively ... consent[ed] for [FMV] to raise all her claims out of time by requesting to settle all her claims at mediation on multiple occasions".

[82] Her submissions referred to three occasions where mediation, or discussion about the prospect of mediation, amounted to such consent. The first was in preparation for a mediation initiated by the Human Rights Commission about FMV's complaint

lodged there in August 2016. That mediation did not go ahead because of concerns about FMV's capacity to fully participate. The second was a private mediation initiated in August 2018. From references to it in correspondence, this appears to have taken place in October 2018. The third was a mediation in August 2022, referred to as taking place with the assistance of Employment Mediation Services (EMS). According to FMV's affidavit, legal counsel who were representing her in the civil court proceedings underway at the time attended two of those mediations.

[83] TZB objected to the references to mediation made in FMV's submissions on the grounds that any mediations held were confidential, with discussions held subject to privilege from disclosure, and that her submissions had mischaracterised the relevant events.

[84] No inference may be taken, or implication made, from the bare fact of the parties arranging and attending mediation, either privately or with the assistance of EMS. The Act promotes mediation as the primary problem-solving mechanism for employment relationship problems. Voluntary or directed attendance at mediation, including in situations where the nature or content of the claims discussed there is disputed, does not of itself amount to consent to raising a grievance in the way described in s 114 of the Act.

[85] Rather, the question is whether, as a matter of fact and degree, an objective observer could reasonably regard the employer as having conducted itself in a way that could be taken as consenting to an extension of time for raising a grievance outside the 90-day period?<sup>30</sup> The assessment to be made in such cases has been described, metaphorically, as looking to see if the employer had a 'red light', or even an 'orange' showing, on the issue of the 90-day time limit for raising a grievance.<sup>31</sup>

[86] In this case, a review of all the pleadings and the extensive correspondence leaves no doubt that TZB has conducted itself throughout on the basis of not accepting and not consenting to FMV raising her personal grievance outside the 90-day period, or at any later time on the basis of exceptional circumstances. It showed a 'red light' on that issue from the beginning. Responding to FMV counsel's letter of 19 November 2016 that first raised her grievances, a letter from TZB's counsel on 1 December 2016

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<sup>30</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209 at [23] and [25].

<sup>31</sup> *Commissioner of Police*, above n 30, at [24].

said TZB “wishes to record its position that that these claims are time-barred pursuant to the ... Employment Relations Act 2000”. Its statement in reply, lodged in January 2017, reiterated its position and said TZB “does not consent to the raising of a personal grievance in relation to any of the allegations outside of the 90-day period, either impliedly or expressly”.

[87] In that context, no objective observer could reasonably regard TZB agreeing to or initiating mediation as amounting to consent to FMV raising her grievance outside the 90-day period. Rather, such an observer would more likely regard this as a rational measure by a party to a proceeding to explore the prospect of containing ongoing litigation costs and to give effect to the priority given in the Act to seeking to resolve any dispute, including over jurisdiction, by the primary problem-solving mechanism of mediation.

[88] The fact that the parties have attended mediation on these issues does not amount to implied or express consent to FMV raising her grievance outside the statutory time limits in the way contemplated in s 114(1) of the Act. TZB has asserted the confidentiality and its privilege from disclosure of discussions in those mediations. Whatever may have been said in those discussions cannot be taken account of as a relevant factor in assessing the effect of time limitations in this determination.

### **If grievances were raised in 2010 or 2011, no action taken within three years**

[89] If the conclusion that personal grievances were not raised in 2010 or 2011 is wrong, an alternative argument has been considered about the effect of the time limitation set in s 114(6) of the Act.

[90] If FMV had validly raised a grievance in 2010 or 2011, she had to then commence her proceedings in the Authority about that grievance within three years, that is by 2013 or 2014. Her 2016 application was, therefore, again well out of time, unless it met the one exception that s 114(6) allows for in its description of the three-year limitation as running from “the date of which the personal grievance was raised in accordance with this section” (underlined emphasis added).

[91] The exception is the path available, through s114(3), (4) and (5) for leave to be granted in “exceptional circumstances” to raise a grievance outside the 90-day period. There is no time limit within which such an application for leave to raise a personal

grievance after 90 days may be made.<sup>32</sup> If leave is granted under subsection (4), the date referred in subsection (6) as being when the grievance is “raised in accordance with this section” would be the date of the grant of that leave.

[92] The exceptional circumstances ground is considered later in this determination. Absent that leave, however, FMV would not be able to clear the three-year time limitation if she had raised grievances in 2010 and 2011.

*No application of s 219 to these circumstances*

[93] FMV submitted this s 114(6) three-year rule should not apply to her as the Authority should exercise its discretion under s 219 of the Act to extend the time limit or validate the ‘informality’ of not having met the timeframe.

[94] The submission needed to be considered in relation to both s 219 and s 221 of the Act and in light of clear case law about the exercise of the discretion those sections give for the Authority to extend timelines in some circumstances:

**219 Validation of informal proceedings, etc**

- (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

...

**221 Joinder, waiver, and extension of time**

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

- (a) direct parties to be joined or struck out; and
- (b) amend or waive any error or defect in the proceedings; and
- (c) subject to section 114(4), extend the time within which anything is to or may be done; and
- (d) generally give such directions as are necessary or expedient in the circumstances.

[95] As explained by the Employment Court in *Blue Water Hotel Ltd v VBS* the powers in s 219(1) and s 221 may not be used to extend the time limitation provisions in s 114. To do so would defeat Parliament’s clear intention of imposing precise time

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<sup>32</sup> *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128 at [25].

limits in respect of pursuing proceedings for personal grievances (three years) and all other actions (six years).<sup>33</sup>

[96] In reaching that conclusion the court also specifically considered a submission that this three-year time limit could lead to harsh and adverse consequences, for example, where an employee has suffered a disability such as post-traumatic stress disorder following a dismissal, impeding that person's ability to pursue a personal grievance within time.<sup>34</sup> The court noted however that Parliament had "acted deliberately" in allowing for the 90-day period to be extended in the exceptional circumstances where a worker was "so affected or traumatised by the matter giving rise to the grievance that she or he was unable to properly consider raising the grievance within that period, with "no time limit for doing so". It described this as a clear policy choice by Parliament. This choice allows for extensions to be made if they fit the criteria of exceptional circumstances under s 114(4) but, unless such leave is granted under that subsection, firmly forbids any other exception to the s 114(6) limitation "on any ground".<sup>35</sup>

[97] The point put shortly is this – there is a gate through the three-year wall for some grievance proceedings, but it is only reached through the s114(4) and (5) path, not the s 219 or s 221 route.

### **Action on alleged breaches of terms of employment is outside six-year limit**

[98] The limitation in s 142 applies to the same effect to FMV's claims arising from breaches of the terms of her employment, concerning safety and taking care of her health in the workplace.

[99] As the court noted in *Blue Water*, Parliament would have needed to enact an express provision if it wanted to allow the prescribed limitation periods in both s 142 and s 114(6) to be overridden. Applying the same reasoning the court used in analysing s 114(6), s 219(1) and s 221 cannot be used to extend the time limits in s 142.<sup>36</sup>

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<sup>33</sup> *Blue Water Hotel*, above n 32, at [96].

<sup>34</sup> *Blue Water Hotel*, above n 32, at [50]-[51].

<sup>35</sup> *Blue Water Hotel*, above n 32, at [54]-[55].

<sup>36</sup> *Blue Water Hotel*, above n 32, at [57].

[100] Section 142 is an absolute bar to proceedings going ahead on the causes of action about employment that ended in February 2010 and were more than six years old by the time FMV lodged her statement of problem in the Authority in December 2016.<sup>37</sup>

### **Insufficient evidence for exception to time limits on personal grievance**

[101] FMV submitted the Authority should grant her leave to raise her constructive dismissal and disadvantage grievances outside the 90-day period because she was so affected or traumatised by the matter giving rise to her grievance that she had been unable to properly consider raising her grievances within that period.

[102] FMV submitted she met the “high threshold” for being granted leave on that grounds, under s 114(4) of the Act, as her experience while working for TZB resulted in “career ending psychiatric damages”. She said she “never delayed her legal action and attempted to commence it when her mental health condition was relatively stable but still quite fragile”.

[103] FMV also submitted she should not be required to provide medical records for the periods in which she said she was unable to raise her grievance because doing so could impact adversely on her mental health and was contrary to her right to have privacy and dignity protected in this proceeding.

### *The statutory test of exceptional circumstances occasioning delay*

[104] Section 114(4), and the guidance found in case law about applying that provision, requires the Authority to carry out a factual enquiry assessing whether the applicant seeking leave on the grounds of exceptional circumstances under s 115(a) has established, on the balance of probabilities, that their decision-making ability was affected throughout the relevant periods.

[105] This statutory test required FMV’s application to establish the following six elements:

- (i) She was experiencing disabling effects and trauma during the relevant period;
- (ii) That trauma or effects related to the matter giving rise to her grievance (which, in her case, was how FMV said she was treated at work);

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<sup>37</sup> *Zara's Turkish Ltd (in liq) v Kocaturk* [2021] NZEmpC 117 at [47]-[48].

- (iii) The trauma or effects affected her ability to “properly consider” raising a grievance about those concerns;
- (iv) This effect on her ability continued throughout the 90-day period in which a grievance would ordinarily be raised;
- (v) Those disabling effects then continued as a reason for the delay in raising the grievance from the end of the 90 days until when FMV did raise the grievance; and
- (vi) It is just to grant leave to raise the grievance at the end of that longer period.

[106] Case law suggests a high standard of proof is required to show what gave rise to a grievance had affected or traumatised a person so much that they could not properly consider raising a grievance within 90 days of it occurring:<sup>38</sup>

Although it is not impossible to conceive of cases where the consequence of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than 3 months, most cases are unlikely to meet that test.

[107] In a recent case the court accepted a delay in raising grievances was occasioned by exceptional circumstances, not only for the initial 90 days but also through the following ten months before the grievance was raised. In making that decision, the court said it was “most unusual to sanction such a long period of delay” but did so in that case because the circumstances were “highly unusual”.<sup>39</sup>

#### *The importance of relevant medical evidence*

[108] In both cases referred to above the court had evidence from medical records and expert witnesses to assist its assessment of the employee’s ability to have properly considered matters in the relevant period and what they did during that time.<sup>40</sup>

[109] The importance of that medical information is demonstrated in another case which FMV had cited in support of her arguments.<sup>41</sup> In that case the applicant got leave

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<sup>38</sup> *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [25].

<sup>39</sup> *Cronin-Lampe v Board of Trustees of Melville High School* [2023] NZEmpC 144 at [520] and [522]: initial 90 days from 2 December 2010 until 2 March 2011 and then further ten months through to 26 January 2012 (when personal grievance letter sent).

<sup>40</sup> *Morgan*, above n 38, at [11], [26] and [27]; *Cronin-Lampe*, above n 39, at [399] and [429] (referring to reports of three health practitioners) and [432] (referring to detailed records maintained by the applicants’ GP).

<sup>41</sup> *Goel v The Director-General for Primary Industries* [2015] NZEmpC 54.

to pursue a grievance he had delayed raising because he had suffered a period of mental illness, after and probably connected with his dismissal. However, and contrary to the position FMV has taken in her own case about this issue, the evidence available to the court in making that decision included the applicant's medical records from a hospital mental health unit and his discharge report.<sup>42</sup>

[110] This has proved to be the stumbling block in FMV's application. While she, through Ms A, initially agreed to provide the necessary medical evidence, this position later changed to steadfastly refusing to provide the records she already had (said to be up to November 2015) and opposing release by ADHB of records for any care received after then.

[111] Providing this information, from doctors or any other registered health professionals involved in her care, was necessary for what it might disclose about:

- (i) FMV's mental state and capacity at the time that she gave her resignation (21 January 2010);
- (ii) Her perception of what was happening at work during 2009, which was "the matter giving rise to her grievance". In her application to the Authority FMV had referred to being ridiculed by her work mates, being monitored through her laptop, getting limited work and lower ratings than others who did not work as hard as her, and being treated differently because others believed she had a close personal relationship with her supervising manager;
- (iii) Whether the effects of her experience continued through the 90-day period from 19 February to 20 May 2010 to seriously impair her ability to properly consider raising a grievance;
- (iv) How long any such serious impairment then continued until she became able to properly consider raising a grievance?
- (v) Whether she remained able to raise her grievance from that point on?

[112] In not providing the medical records identified by the Authority as necessary for assessment of her 'exceptional circumstances' leave application, FMV relied in part on an opinion provided by a consultant psychiatrist who had been involved in her care through ADHB from July 2016.

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<sup>42</sup> *Goel*, above n 41, at [10]-[19].

[113] By affidavit sworn on 6 December 2017 Dr Ashok Malur deposed that he had been advised that FMV and her family did not wish to release the file on her treatment through a mental health centre “as they are convinced that release of these documents would be detrimental to her mental health”. Dr Malur said it was his considered opinion that there was a possibility that her mental health might be compromised if her medical records were released at that time. He continued:

The family and [FMV] are quite aware of the repercussions of her documents not being released to the appropriate legal authorities.

Under these circumstances it would perhaps be best to follow the advice given by [FMV] and her family and not release her documents.

[114] At the time of providing the Authority with Dr Malur’s affidavit, ADHB legal counsel also advised the Authority that she had “explained to [FMV] and her mother that this could adversely impact on their claim [and] they seem to understand this and accept it”.<sup>43</sup>

[115] A memorandum of counsel for TZB, lodged after seeing Dr Malur’s affidavit, submitted that:

the absence of FMV’s medical notes would make it impossible for the Authority to determine the time limitation issue as the applicant would need to show that at all times between her resignation on 21 January 2010 and 2016 she lacked sufficient capacity to raise the grievance.

[116] In July 2017 the Authority had proposed the necessary medical records could be lodged at the Authority office, with the parties and their representatives then having access to those records on an appointment-only basis.<sup>44</sup> This was put forward as a way of enabling FMV and her family to manage the distress she had described experiencing when looking at that material as well as providing some assurance that only a limited number of TZB’s lawyers, or expert medical witnesses preparing any requested reports, would see those records. FMV responded to that proposal, through Ms A, by advising ADHB that she did not agree to her medical records being provided to the Authority.<sup>45</sup>

[117] Against that background, where FMV’s position about providing records has not changed since then, the assessment of her application for leave has been made

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<sup>43</sup> Email of Auckland District Health Board (ADHB) legal counsel to the Authority, 7 December 2017 (copied to the parties’ representatives by the Authority, 7 December 2017).

<sup>44</sup> Email of the Authority to ADHB (copied to parties’ representatives), 25 July 2017.

<sup>45</sup> Email of Ms L to ADHB Legal Counsel, 25 July 2017.

without access to all the relevant objective, contemporaneous information from health professionals who treated or otherwise assisted her at the relevant times. From the early days of this proceeding, and through the subsequent years, the Authority has identified this missing information as essential to her case.<sup>46</sup>

[118] Because FMV said her own ability to assess certain things was impaired during some or all of that time, it was vital to have the contemporaneous evidence of whatever the registered health professionals caring for her had observed about what she could and could not have done or considered during those times.

[119] The absence of those records inevitably left a substantial and significant gap in the evidence FMV needed to positively establish elements of the statutory test, about the cause of mental health issues she was identified as experiencing in 2009 and whether this resulted in ongoing disabling effects on her ability to properly consider and raise a personal grievance, through the initial 90-day period and for some time after then.

[120] FMV's submissions that, in effect, the Bill of Rights protected her from having to provide that evidence was misguided. Providing medical records about assessments made and consultations held with her is not a form of medical experimentation or a medical treatment as referred to in s 10 and s 11 of the New Zealand Bill of Rights Act 1990.

[121] While FMV may prefer her records remain private to her, the evidence in them was essential to her claim. Concerns about privacy and disclosure of the content of those records could have been addressed through non-publication orders. The Authority, as noted above, had also proposed a means of limiting access to the records in a way that would have addressed some of those mental health concerns but that was not accepted.

[122] The Authority could have sought to exercise the coercive power of issuing witness summons to FMV or the ADHB to hand over those documents. This was not done because it was in FMV's hands to provide the material she needed to advance her own case.

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<sup>46</sup> See for example Minute of Authority, 1 June 2017 at [3] and Directions of the Authority, 4 November 2022 at [13]-[16].

[123] Directions issued on 4 November 2022 did use the Authority's powers under s 160(1)(a) of the Act to "call for evidence and information from the parties". The "call" made in those directions included providing the medical records. FMV did not comply with that call.

[124] As late as March 2023, in the submissions Ms A made on FMV's behalf, she said those records remained private and confidential, protected by the Privacy Act 2020. The information privacy principles under that legislation do, however, allow for use of personal information necessary for the conduct of proceedings before any court or tribunal. The matter before the Authority was proceedings of that type.

[125] Ultimately FMV's application for leave has had to be decided on the basis of her choice not to provide those documents, knowing they had been called for and were regarded as essential to her prospects for getting leave for her grievance to continue. It was a choice she and her family, according to Dr Malur's affidavit, made knowing that not releasing those documents could adversely affect the prospects for succeeding in her claim.

#### *Assessment of FMV's circumstances*

[126] In the light of that background, and the limited evidence on some of the relevant health issues, the available evidence has been assessed against the elements of the statutory test, set out in paragraph [105] above, for whether leave to raise the grievance could be granted.

##### *(i) The disabling effects or trauma*

[127] FMV was a well-qualified graduate when, aged 21, she began work for TZB in early 2009. She had been a very high-achieving student throughout her education in China, New Zealand and the United States.

[128] Her submissions said she suffered "psychiatric damages" from late June 2009. She said her "mental breakdown was caused by many factors, including ongoing workplace bullying, unfair and unjustified treatments, excessive workload, sexual harassment and calculated stresses".

[129] According to notes on her personnel file she reported some concerns about her work in June 2009. A human resources advisor said FMV reported hearing voices,

feeling that people were talking about her, thinking her laptop was being monitored and being under video surveillance.

[130] TZB sought advice from a specialist in occupational health medicine and asked FMV to meet with him to discuss her concerns. She did not agree to the request. After FMV told her parents about TZB's request, her father wrote to her supervising manager. Her father's message asked if the manager thought FMV needed to see a doctor or needed a long holiday. The manager replied that the suggestion of her seeing a doctor was for her and her father to discuss and offered to discuss any questions in person or by telephone.

[131] FMV took a period of leave and her father wrote again to her supervising manager, saying he appreciated what he and his team were doing for her. He wrote that he and FMV's mother "are quite sure [FMV] is fine" and she would talk to her work coach and supervising manager in the following week if she had any issues.

[132] This exchange was important because FMV and Ms A later alleged TZB had not raised any concerns about her health with her parents at the time she was working for TZB.

[133] The doctor TZB had wanted FMV to see also provided TZB with some written advice at that time. The doctor said the symptoms reported could be a form of thought disorder such as paranoid schizophrenia or a milder personality disorder but this was a matter of conjecture without a medical assessment of her. He said the current reported symptoms did not represent any danger to herself or co-employees and he would be happy for her to continue at work.

[134] On 20 November 2009 FMV did attend an appointment with this doctor. It was arranged after an incident at work when she became distressed. She consented to TZB being provided with a copy of the doctor's assessment of her health issues but not with the details of their discussion. She did not consent to TZB or the doctor providing any information to her parents at that time.

[135] The doctor's assessment concluded FMV had a persisting false belief thought disorder which might become paranoid schizophrenia. He said he did not feel her work was causing her any health problems or that conflicts with any managers or co-employees were causing her health issues at work. He said she was healthy enough to

be at work but should not take unauthorised breaks out of the office and, in order to limit pressure on her, should not be permitted to do any work at home or outside work hours in the weekends. If any further instances of concern occurred, the doctor recommended seeking medical and psychiatric advice and taking steps to ensure she was safely delivered home or to the hospital A&E department for assessment.

[136] The doctor's written report to TZB following the November assessment, dated 22 December 2009, concluded FMV was capable of continuing her work.

[137] There was no direct medical evidence available for the Authority investigation that indicated that her health had changed significantly, for the worse or better, by the time of her resignation in January 2010 or through the 90-day period from the formal end of her employment in February through to 20 May 2010.

[138] Along with her statement of problem lodged in December 2016 FMV provided a statement headed "My Capacity to Seek My Justice with [TZB]". In this statement FMV provided her description of some of what had happened in 2009 and 2010.

[139] FMV referred to applying for jobs "after leaving [TZB]". She did not identify a date for that activity but said she found it difficult to answer questions in those job applications about resigning from TZB. She said her "health continued to deteriorate very badly" and she found herself crying, not wanting to eat and sleeping for long periods. Again without specifying any dates, FMV said "it was from that period that my illness was deteriorating into a state that caused me to lose my capacity to seek my justice from [TZB]".

[140] Her statement does say, however, that it was not until June 2011 that any ongoing health issues were evident to her family. She wrote that it was "not until June 2011 that my mum figured out I was ill and immediately referred me to a specialist service and my case was opened straightaway".

[141] Looking back, then, to the period from the date of her resignation through to May 2010, it was therefore *possible* that the upset or illness reported by FMV did affect her ability to properly consider raising a grievance about how her employment ended. However, the available evidence on that point largely comprises FMV's own retrospective description of her condition at the time. Whatever corroborating or contradicting information that might be found in her medical and other health records

at the time has been withheld from the Authority. This meant there was not sufficient evidence to conclude, on the required balance of proof, that FMV was *probably* experiencing effects or trauma that was so severe that she had lost the ability to consider whether or not to raise a grievance about the end of her employment during the one month notice period and in the following 90 days from 19 February to 20 May 2010.

[142] This element of the test was not established.

*(ii) The effects related to the matter giving rise to the grievance*

[143] The statutory test requires the effects or trauma to be caused “by the matter giving rise to the grievance”.

[144] The grievances FMV wished to pursue arose from her perception of how she was treated at work. Notes and correspondence in the evidence from human resource advisors, reporting their interactions with her in June and November 2009, confirm FMV certainly had concerns about what was happening for her at work at those times. However, without checking the medical and other health evidence FMV had withheld, it was not possible to discount some other significant pre-existing or external causes for the distress she was experiencing at that time.

[145] This meant the causal link between the substance of her grievances, about how she was treated, and the distress she reported experiencing at the time could not be established as more likely than not. At best this factor, about the connection between the effects and the matter, was neutral.

*(iii) Did the effects disable proper consideration?*

[146] For the same reason, it could not reasonably be concluded FMV was left unable to properly consider raising her grievance. Something more by way of positive evidence would have been required to corroborate FMV’s assertions on that point.

*(iv) Did the effects continue through the 90-day period*

[147] Again, the evidence based on FMV’s assertions, and in the absence of whatever medical records there might be that shed light on her mental state during that period, it cannot reasonably be concluded that any effect or trauma she may have experienced in the 90 days from 19 February to 20 May 2010 did endure throughout that entire period.

*(v) Did the effects continue through the period of delay in raising the grievance?*

[148] If FMV should, nevertheless, be given the benefit of any doubt that she was so affected and traumatised over her work experiences that she lost the ability to properly consider doing something about it, the next question in this alternative scenario was whether that state of mind continued through the months and years from May 2010 until when her grievances were raised through correspondence and her statement of problem in the latter part of 2016.

[149] As noted in a recent Employment Court decision,<sup>47</sup> s 115(a) implies the exceptional circumstances must exist during the 90-day period, but

that requirement must be read within the context of s 114(4)(a) which requires a grievant to satisfy the decision maker that the delay, **in its entirety**, in raising the grievance was occasioned by exceptional circumstances. (**bold emphasis added**)

[150] As TZB submitted, this question concerned whether there were “lucid intervals” during those years where FMV was able to properly consider raising her grievance.

[151] While there may have been other intervals, the description given in her own 2026 “My Capacity” statement suggests FMV was able to properly consider and actively pursue raising a grievance from August 2015.

[152] In that statement FMV describes her personal grievance being “traced back” to TZB’s email of 12 January 2011 which she said asked her to contact the Department of Labour. By June 2011 she says was receiving specialist mental health care.

[153] And, according to her submissions, she was “under compulsory treatment” in December 2011. The details of the subsequent nature and duration of her care are not available because of the position FMV and Ms A took on providing relevant health records.

[154] Returning to the account given in her 2016 “My Capacity” statement, FMV refers to the events of June 2011 and says it was “from that time I want to take [TZB] to court for my justice” but “my medical team did not support me to go for a legal action because of my illness”. Her description continued:

During the past years, we talked with my medical team about the issue quite a few times but their attitude remained the same.

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<sup>47</sup> *Cronin-Lampe*, above n 40, at [473].

In August 2015 after my recovery began to stabilize, I insisted to my medical team that I could not make any further delay of my court case because I worried very much that I might be able to seek my justice from [TZB] forever if I also passed the six year legal time limitation.

[155] Her statement of problem, lodged 23 December 2016, said she was “seeking legal advice in 2015”. In an email to the Authority on 19 July 2017 Ms A described the discussion around that time in this way:

In August 2015 under legal advice [FMV] requested to [the mental health] centre for her medical file to prepare her legal course. Her medical team refused to release it because they had serious concerns about the negative impact on her mental health and then the matter was raised to the management team. In the end, it took more than 3 months till November 2015 for [the mental health] centre to finally agree to release it after than they met with [FMV’s] dad and me and repeatedly sought our assurance that we would do our best to limit the negative impact on [FMV].

[156] Other documents in evidence show FMV wrote to TZB in August and September 2015 seeking copies of her personnel files. She also arranged to collect her medical files from the doctor who the company arranged for her to see in November 2009.

[157] In October 2015 FMV complained to the Privacy Commissioner over whether TZB had properly disclosed all required information and records. Subsequent correspondence to the commissioner’s office on this issue ran into 2016.

[158] And, as noted in the extract from Ms A’s email above, by November 2015, she and FMV had talked with FMV mental health carers about continuing with her legal proceedings.

[159] FMV’s “My Capacity” statement refers to her health deteriorating again after then, with no specified date, so that she then did not lodge her statement of problem in the Authority until December 2016.

[160] What is significant about this account is that FMV was taking “legal advice” in August 2015 about employment issues. In the months of August, September, October and November 2015 she was actively gathering documents. It was clear from this activity that she was able to consider pursuing legal proceedings over her employment with TZB and how it came to end more than five years earlier. FMV did not, however, raise a grievance at that time.

[161] She said this was because she subsequently became too ill again. On the available information, and in the absence of the medical records FMV has withheld from the Authority, this relapse in her mental health appears to have occurred after November 2015. By August 2016 however she was, from her point of view, well enough to begin the complaint process in the Human Rights Commission.

[162] From that summary there were at least two periods in which FMV appeared to have been able to properly consider raising a grievance – August to November 2015 and from August 2016. This means, on her own evidence, FMV was twice able to consider raising a grievance well before she actually sought to do so by lodging a statement of problem in the Authority in December 2016. If the dates of the HRC mediator’s letter in September 2016 and her counsel’s letter to TZB of November 2016 are taken as slightly earlier instances of having raised grievances, this was still a significant delay after what appeared to be a sufficiently lucid interval during the third and fourth quarters of 2015.

[163] Accordingly, FMV has not established, in this element of the test, that her ability to properly consider raising a grievance remained impaired to the necessary degree during the entire period from the end of her employment in 2010 until late 2016. As a result, the delay until she did raise the grievance, another year after that period of sufficient ability, was “not occasioned by exceptional circumstances”. She has not been able to satisfy the criteria for leave to be granted to raise a grievance out of time.

(vi) *Just to grant leave?*

[164] As the first element of s 114(4) for granting leave was not satisfied, regarding what occasioned the delay, it was not necessary to reach a conclusion on whether it would have been just to grant the leave in those circumstance. If it had been necessary to consider that question, the prejudice to the prospect of a fair investigation after such a long delay would have been a significant factor. While there was some documentary evidence about events in 2009 and 2010, oral testimony on what people involved could recall would still have been essential. This would have been limited by the death, seven years ago, of FMV’s supervising manager and the likely dimming of the memories of other potential witnesses about events that happened 14 years ago.

## **Summary and orders**

[165] The order sought by TZB is granted. FMV's application is treated as withdrawn as no action was taken on the matter for more than three years (from 1 August 2018 to 29 September 2021) (Schedule 2 clause 14(2) of the Act applies).

[166] Even if the matter did not have to be treated as withdrawn, the Authority is not able to investigate and determine FMV's application. From the date it was lodged on 23 December 2016, it was already outside the following time limits set by the Act:

- (i) FMV did not raise her grievances about how and why her employment came to an end within 90 days of the end of that employment (s 114(1) of the Act applies).
- (ii) Alternatively, if FMV had, in fact, raised a grievance through communication with TZB in 2010 and 2011, she did not then commence an action in relation to the grievance within three years of raising it (s 114(6) of the Act applies).
- (iii) FMV did not commence an action in the Authority in relation to her claims of breaches of the terms of her employment within six years of when those breaches were alleged to have happened (s 142 of the Act applies).

[167] FMV has not established that the entirety of the delay from February 2010 until November 2016 before raising her grievance was occasioned by exceptional circumstances. Her application for leave, under s 114(4) of the Act, to raise a grievance on those grounds is declined.

## **Costs**

[168] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[169] If unable to do so, and an Authority determination on costs is needed, TZB may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, FMV would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[170] 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.<sup>48</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>48</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).