IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 461
3212039

	BETWEEN	STEVEN PIKE Applicant
	AND	NELMAC LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Simon Pankhurst, advocate for the Applicant Sarah Moon and Robert Brinkworth, counsel for the Respondent	
Investigation Meeting:	26 June 2024 by audiovisual link	
Submissions Received:	26 June and 19 July 2024 from the Applicant 16 June, 12 July, and 26 July 2024 from the Respondent	
Date of Determination:	30 July 2024	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Lifting of interim non-publication order

[1] Pursuant to a discretion available in s 10(1) Schedule 2 of the Employment Relations Act 2000 ("the Act") the Authority on an interim basis, resolved to not publish the parties' names, location of the employment and certain features of this dispute pending submissions from the parties on whether the order should be made permanent. In a submission of 12 July 2024 on behalf of Nelmac Limited, counsel set out opposition to the interim non-publication order being made permanent and in response Steve Pike's advocate in an email of 19 July 2024, indicated, Mr Pike was "no longer convinced a non publication order is necessary". In these circumstances I have resolved to lift the interim non-publication order and proceed to name the parties.

Employment relationship problem

[2] Mr Pike worked for Nelmac Limited (Nelmac) and its predecessor company as a gardener, from 2010 until 18 March 2022 when his employment ended in disputed circumstances after the company introduced a requirement that employees comply with a vaccination policy.

[3] The parties were engaged in discussions from early December 2021 on the introduction of a company COVID vaccination policy. A 28 January meeting occurred between Mr Pike and his team leader to discuss how the policy, that had been adopted four days earlier, might impact Mr Pike's ongoing employment.

[4] Once the vaccination policy became operative on 3 February 2022, Mr Pike sent Nelmac a somewhat discursive letter contesting the efficacy of vaccines and the need for him to be vaccinated to carry out his ongoing gardening role. Mr Pike also posited alternatives to him being required to vaccinate. Mr Pike's letter concluded by stating that "it is not unreasonable for me to exercise my rights to not receive the Injection at this stage" and he placed Nelmac on notice if his choice was not respected: "I may exercise my right to file a personal grievance".

[5] Nelmac responded by letter of 11 February, emphasising the vaccination policy was being implemented for health and safety reasons.

[6] Mr Pike's evidence was the 3 February letter did not result from legal advice and was downloaded from the internet. Mr Pike says around this time, when it became evident dismissal was a real prospect, he sought help from his union. At the time, Mr Pike was a union delegate and had been active in union affairs but the union president advised they would not assist Mr Pike in any dismissal proceedings as the union supported the company's vaccination policy stance.

[7] The parties met again on 14 February, then Nelmac signalled by letter of 18 February headed "Notice of Termination of Employment", that Mr Pike's employment would end on 18 March 2022.

[8] There were no further exchanges until 18 March, when Mr Pike emailed Nelmac suggesting their vaccination policy breached the New Zealand Bill of Rights Act 1990. Nelmac responded to Mr Pike expressing a view that no rights had been impinged and their email ended "regrettably your employment at Nelmac Ltd ends today."

The aftermath of the dismissal

[9] After the dismissal, Mr Pike engaged in no further contact with Nelmac and sought no legal advice other than being informed by a friend, that it was pointless going to the local community law centre as they were not pursuing cases for people refusing to be vaccinated. Mr Pike says at the time, he was too impacted by the dismissal and says he could not afford a lawyer. Mr Pike says he was feeling acutely socially isolated because of his stance and this was made worse by prevailing pro-vaccine sentiment and him residing in a small rural town.

[10] Eventually in mid-July 2022, Mr Pike says he felt confident and well enough, to engage an advocate, Simon Pankhurst. On 11 August 2022, without prior contact with Nelmac, Mr Pankhurst emailed a request to MBIE's Mediation Service seeking mediation assistance. Mr Pankhurst inexplicably did not produce a copy of the attached application he made to the mediation service or explain why he did not first contact Nelmac, so I am unable to conclusively determine how the grievance was initially categorised by Mr Pike's advocate.

[11] Correspondence disclosed shows the mediation service alerted Nelmac to the mediation request by email of 27 September 2022, saying: "We understand the mediation is due to disadvantage". By return email of the same day, Nelmac confirmed Mr Pike had left their employment on 18 March 2022 and that they had not been "notified of a personal grievance" and were not sure of any prior dealings with Mr Pankhurst.

[12] Nelmac indicated further they were "not inclined to attend mediation unless Mr Pankhurst could provide evidence that a PG was properly raised within the required 90 days". By email of 29 September the mediation service conveyed Nelmac's response to Mr Pankhurst.

[13] I was not provided with any correspondence or indication from Mr Pankhurst that he then communicated with Nelmac until on Mr Pike's behalf, he lodged an application with the

Authority (received on 24 February 2022) that indicated an employment relationship problem as follows:

> Unjustified dismissal due to a vaccine policy being implemented in an unmandated industry. This was done without proper consultation, process, adequate risk assessment, alternative measures or redeployment options considered.

[14] In submissions, Nelmac suggest it was only at the latter point in time when they became aware of the full extent of Mr Pike's personal grievance and his assertion of being unjustifiably dismissed. In their statement in reply filed in the Authority on 2 March 2023, Nelmac asserted that a personal grievance had not been raised within 90 days, denied that Mr Pike had been unjustifiably disadvantaged and/or unjustifiably dismissed and did not consent to the personal grievance being raised out of time.

[15] The parties were directed by the Authority to mediation on 27 March 2023 but by mid-May, the matter had not resolved. I held a case management teleconference on 28 June that resulted in a direction that if the matter was to proceed, Mr Pankhurst must file an application under s114(3) of the Act for leave to raise the personal grievance out of time and in doing so, identify on what grounds this was being sought.

[16] Inexplicably, it took Mr Pankhurst until 18 September 2023, to file an application to have the matter heard out of time. Mr Pankhurst in this application, also suggested Mr Pike had raised a personal grievance on 3 February 2022 and during a 14 February meeting with Nelmac prior to his dismissal.

[17] In addition, a breach of contract action was belatedly identified by Mr Pankhurst suggesting Nelmac's requirement that Mr Pike take a vaccine to maintain his ongoing employment was a 'breach of contract' that was not a personal grievance and could be pursued under s 146 of the Act within six years of Mr Pike's action arising. Mr Pankhurst then posited that Mr Pike could still establish grounds of exceptional circumstances set out in s 115(a)(b) and (c) of the Act to persuade the Authority that the personal grievance should proceed.

[18] After an October 2023 teleconference, timetabling of evidence exchanges was made and an investigation meeting was set for 15 February 2024 to determine the preliminary issue

of whether Mr Pike's grievance could proceed. Unfortunately, due to Mr Pankhurst having health issues a postponement occurred and after another 4 March teleconference, the investigation meeting did not take place until 26 June 2024.

The preliminary issues

[19] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on the identified issues but I do not record all evidence and submissions received. The discussion below attributes recollections and assertions made from written statements, the parties' submissions and attached documentation. I record that after the investigation meeting the parties were invited to, and did so, make further submissions on a discrete issue of whether a personal grievance had been identified prior to Mr Pike's dismissal and if so, how that grievance is to be categorised.

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

The law and what Mr Pike must establish

Was a personal grievance raised in time?

[21] The first issue is, has Mr Pike pursuant to s 114 of the Act, raised a personal grievance with Nelmac. Section 114 of the Act requires that:

> (1) Every employee who wishes to raise a personal grievance must … raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred … unless the employer consents to the personal grievance being raised after the expiry of that period.
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> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[22] In *Creedy v Commissioner of Police*, the Employment Court noted a person identifying a personal grievance needs to provide the employer with "sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance". [1]

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

> The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
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> It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
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> It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance. [2]

Was the personal grievance sufficiently identified by OGR by the 3 February letter and/or at the 14 February meeting?

[24] The crucial issue pursuant to s 114(2) of the Act is: was the communication just prior to the dismissal, sufficient to make Nelmac aware that there was a personal grievance that Mr Pike wanted them to address. In *Creedy* the court noted: "for an employer to be able to address a grievance as the legislation contemplates, the employer must know what it is it is addressing". [3]

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[1] *Creedy v Commissioner of Police* [2006] ERNZ 517.
[2] *Chief Executive of Manakau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].
[3] Ibid at [35].

Was a disadvantage grievance raised?

[25] A key question is, were the communication exchanges between Mr Pike and Nelmac engaged in between 28 January – 14 March 2022 of a nature that were sufficient to alert them that Mr Pike was in effect raising a disadvantage grievance and sufficiently informative for Nelmac to respond to, with a view to potentially resolving matters in a timely fashion [4]

[26] In *Hone Heke Taniwha v Te Runanga O Toa Rangitira Inc*, the Employment Court described this question as one of whether a communication threshold had been passed but emphasised in assessing this, the court's role at this stage was:

> …. not to determine whether Mr Taniwha raised a valid disadvantage grievance. Rather, the question is whether he raised a personal grievance within the 90 days beginning with the day on which the action alleged to amount to a grievance occurred or came to the notice of the employee. [5]

Assessment

[27] In addressing the above question, I must consider the communication exchanges cited above and assess what Mr Pike did raise as concerns. I am also conscious that all cases are fact and context specific. The test is an objective one but it is, as the Employment Court in *Urban Décor Ltd v Yu* notes, "not ignorant to context" and the totality of the circumstances. [6] I must consider in all the circumstances prevailing, whether a reasonable person could have appreciated that Mr Pike was raising a personal grievance and what was it about.

[28] Against this background, once Mr Pike was dismissed it was objectively unsurprising, he would later at some point seek to challenge that decision. In this context, the cited emails between the parties must be carefully assessed.

The context

[29] This case has some unique features, principally the uncertain, unprecedented, and pressured Covid environment and the 'unchartered waters' it created for all parties from an

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[4] At [36]-[38].
[5] *Hone Heke Taniwha v Te Runanaga O Toa Rangitira Inc* [2023] NZEmpC 140.
[6] *Urban Décor Ltd v Yu* [2022] NZEmpC 56 at [30]. See also *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175.

employment relationship perspective. This included the formulation of vaccination policies in an uncertain legal context and legislative change introducing a stricture for employers introducing a 'non-government mandated' vaccine requirement, that "all reasonable alternatives that would not lead to termination of employment have been exhausted". [7]

[30] Mr Pike was also in an avowedly distressed state at the time and Nelmac were likely aware of or constructively aware of this fact, as he visited his General Practitioner (GP) on 29 January 2022 to disclose anxiety symptoms and he took three weeks sick leave flowing from the pressure of emerging events. Mr Pike's GP says at the time she concluded Mr Pike "was suffering from work-related stress and I felt a period of stress leave from work was appropriate".

[31] The next engagement was Mr Pike's letter of 3 February that as well as proposing an alternative to him being vaccinated (essentially working in isolation outdoors, social distancing and wearing PPE), he made it clear that he contested the placement of his role being within the definition of a vaccination order (impliedly referring to Nelmac's policy).

[32] The parties further met on 14 February for approximately 40 minutes, to discuss issues Mr Pike had raised about how he could undertake the work without being vaccinated. At the meeting, that was attended by Nelmac's Divisional Leader Recreation; their People and Culture Business Partner; Mr Pike and his support person, it was made clear to Mr Pike after Nelmac confirmed their vaccination mandate policy was operational, that while they were considering his proposition of alternative arrangements (discussed in some depth and in a mutually respectful manner, during the meeting) if he was not vaccinated before 18 February, four weeks' notice of the job ending would potentially be issued. Mr Pike suggested he be allowed to work on with a 'non-contact contract' in place believing such an indulgence had been granted to an unnamed co-worker.

[33] While Mr Pike when asked, refused to confirm his vaccination status (while acknowledging he did not hold a vaccine pass) or suggest he was seeking a medical

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[7] Schedule 3A, 3(4) Employment Relations Act 2000: inserted on 26 November 2021.

exemption this led to Nelmac's manager, unchallenged, indicating he assumed Mr Pike was not vaccinated. Mr Pike then stated:

> Don't want to lose my job-family to feed. Under bill of rights, will take no part of medical experiment. Feel I'm being discriminated against if I lose my job. [8]

[34] By email of 16 February, Nelmac acknowledged Mr Pike's concerns and traversed but rejected the suggestion of a "non-contact contract" and posited the only option was a working from home one. However, this was followed by the 18 February notice of termination letter from Nelmac.

[35] Objectively, in the above exchanges, Mr Pike made it clear by articulating concerns, he was contesting the process that was inevitably leading to his dismissal including suggesting Nelmac was not acting in good faith in how they developed and shared information on the formulation of their vaccine mandate policy and he raised a suggestion of disparity in how others had been dealt with (that was later refuted in Nelmac's 16 February email).

Finding

[36] Consistent with the approach the court took in *Taniwha*, I am satisfied Mr Pike in his letter of 3 February 2022 and during the 14 February meeting, raised concerns (including legal issues) he wanted Nelmac to address relating to consequent events up to 14 March. I find such constitutes the raising of a personal grievance within 90 days, under s 114(2) of the Act.

[37] Whether the matters identified by Mr Pike might found a successful disadvantage action or unjustified dismissal grievance (discussed below) are speculative at this stage.

[38] A further issue I explore pursuant to s 122 of the Act [9] is the actual nature of the personal grievance raised that although not well developed by Mr Pike's advocate in

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[8] Notes of 14 February 2022 meeting.
[9] Section 122 Employment Relations Act 2000, Nature of personal grievance may be found to be a different type from that alleged - Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than alleged.

submissions, may be of a different nature to that alleged. Mr Pankhurst in his 18 September 2023 application did suggest:

> In fact, I contest that all through the termination process Nelmac Ltd knew of Mr Pike's hesitancy to take the vaccine (as is Mr Pike's right under NZBOR sections 10 and 110) and that if Mr Pike's employment became dependent on the vaccine he would be raising a personal grievance as mentioned in his afore said letter.

[39] Nelmac's counsel in submissions, suggested it is "well settled that a grievance for unjustified dismissal cannot be raised in advance of the dismissal". [10] While this has been an approach reinforced by the court in *Creedy* that it would be "a nonsense to permit the notification of an event that might or might not occur" [11] (as Mr Pike had alluded to in his 3 February letter), there are some distinguishing features here.

[40] *Creedy* involved a situation where Mr Creedy sought to predict the outcome of an un-concluded investigation, whereas here Nelmac's vaccine policy consultation period had been concluded by 3 February and the impact on Mr Pike was known (he was aware that a vaccine requirement was a likely condition of continued employment).

[41] So, by 14 February 2022, Nelmac was aware of what issues Mr Pike wanted them to address. This was not, as suggested by Nelmac counsel's additional submission, an analogous approach that the Authority recently took in *Hancock v Jones & Sandford Timber & Hardware (1990 Ltd)*, where Member Szeto rejected a submission that a disadvantage grievance had been raised in the context of uncompleted consultation on a draft Covid-19 policy. [12] In contrast here, while I accept there are distinguishing features in *Hancock*, the key difference is, Nelmac's vaccination policy had already been developed (the feedback deadline being 14 January) and the purpose of the 14 February meeting, was subtly different – it was to discuss the personal impact of an already formulated policy on Mr Pike's ongoing employment.

[42] While thereafter, Nelmac did respond in good faith to issues Mr Pike had raised, they would be fully aware that Mr Pike was contesting the legality of the decision to dismiss him

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[10] Citing *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 and *Hancock v Jones & Sandford Timber & Hardware (1999) Ltd* [2024] NZERA 35 at [32].
[11] Op-cit 3 at [30].
[12] *Hancock v Jones & Sandford Hardware (1999) Ltd* [2024] NZERA 35 at [80].

and that he disagreed with their approach. Nelmac retrospectively confirmed the purpose of the 14 February meeting in their 18 February termination letter to Mr Pike, by stating: "I write further to our discussions with you regarding the impact of Nelmac Kumanu's (Nelmac) COVID-19 vaccination policy and your ongoing employment."

[43] It is therefore not clear what further or additional scope of the employment dispute could have been raised for a response once the employment had ended. The issue in dispute did not change once Mr Pike was dismissed and left his employment (it was essentially his vaccination status). In my view, this was not as in *Creedy*, a speculative or 'crystal ball' type of grievance – Mr Pike knew the consequence of his decision not to be vaccinated and Nelmac had made it clear or there was a sufficient degree of certainty, that dismissal was a likely outcome (despite formal notice not being communicated until 18 February).

Format of grievance

[44] In an earlier decision, *New Zealand Automobile Association Inc v McKay*, the Employment Court did not rule out the possibility of a disadvantage grievance morphing into an unjustified dismissal grievance but suggested this could only occur if the issues raised were essentially consistent. [13]

[45] The Authority has also accepted a situation where a disadvantage grievance conceded as being raised prior to a dismissal, could change in nature in certain circumstances. In *Glenda Rees v Pacific Radiology Group Limited*, Member Baker utilised s 122 of the Act and found that an ostensible disadvantage grievance could proceed as an unjustified dismissal.[14] This was on the basis as is here, that prior to the dismissal, the worker (Ms Rees) had specifically identified issues that clearly opposed the eventual decision to dismiss her. Mr Pike took the same approach by identifying matters that constituted a challenge to the basis of the decision to ultimately end his employment (i.e., openly contesting the application of the vaccination policy colloquially known as 'no jab no job').

[46] I do accept (discussed further below) that Mr Pike had experience of raising a personal grievance in the past but reject that was to the extent of detailed knowledge of how to

[13] *New Zealand Automobile Association Inc v McKay* [1996] 2 ERNZ 633.
[14] *Glenda Rees v Pacific Radiology Group Limited* [2023] NZERA 266.

formally raise a personal grievance. At the time (14 February) Mr Pike had been abandoned by his union and was utilising a co-worker as an emotional support person at his meeting with Nelmac and not a representative. In any case, during the meeting the Nelmac manager made it clear that Mr Pike's support person could not advocate on his behalf.

Finding

[47] I find Mr Pike's personal grievance was raised within 90 days pursuant to s 114(2) of the Act and utilising the Authority's discretion under s 122 of the Act, I deem that the grievance should be categorised as one of a potential unjustified dismissal.

The breach of contract claim

[48] Section 113(1) of the Act prevents this claim proceeding on the basis a common law breach of contract action to challenge a dismissal is not permitted, it states:

> If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance. [15]

Exceptional circumstances

[49] If I am incorrect in the above finding that a grievance was identified under s 114(2) of the Act, it remains to be determined whether Mr Pike can pursue an unjustified dismissal grievance 'out of time'.

[50] An employee failing to raise a personal grievance within 90 days where the employer has refused to grant leave for it to be raised may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstance and considers it just to do so.

[51] A definition of 'exceptional circumstances' is set out in *Wilkins v Field & Fortune* as being those that are "unusual, outside the common run, perhaps something more than special and less than extraordinary." [16]

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[15] Section 113(1) Employment Relations Act 2000.
[16] *Wilkins v Field & Fortune* [1998] 2 ERNZ 70.

[52] In the Supreme Court decision, *Creedy v Commissioner of Police* [17] addressing the definition of "exceptional circumstances" the Court stated:

> In Wilkins & Field, the Court of Appeal treated 'exceptional circumstances' as those which are 'unusual, outside the common run, perhaps something more than special and less than extraordinary.' This formulation appears to combine two different meanings, the first being that of being unusual (the 'exception to the rule') and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.
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> First, it accords with ordinary English usage. *As Lord Bingham of Cornhill* said in *R v Kelly* [1999] 2 All ER 13 (CA) , when construing a reference to 'exceptional circumstances':
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> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.
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> Secondly, it will be easier to apply. The very language of Wilkins & Field implies both uncertainty ('perhaps') and lack of precision ('Something more than special and less than extraordinary'). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[53] While two other grounds were advanced in Mr Pike's application (discussed below) the exceptional ground upon which he predominantly seeks to rely upon and what the evidence was directed at, is set out in s 115(a) of the Act which states:

> For the purposes of section 114(4)(a), exceptional circumstances include-
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> (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1).

[17] *Creedy v Commissioner of Police* [2008] 1 ERNZ 109, see also *Hokotehi Moriori Trust v Prater* [2019] NZEmpC 67 for discussion on threshold to be adopted when considering s 115(2) Employment Relations Act 2000.

[54] In addition, given that it has been held by the Employment Court that s 115 of the Act is not an exclusive list of factors,[18] the Authority may take account of any other relevant matters that Mr Pike has identified.

Did Mr Pike make reasonable arrangements?

[55] I, however, need to first, briefly consider the second ground Mr Pike sought to rely upon, which was s 115(b) of the Act:

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

[56] Despite Mr Pankhurst alluding to the above as a ground Mr Pike was relying upon, I find it does not get past 'the first hurdle' – Mr Pike's evidence was he did not instruct any agent to raise his personal grievance within 90 days.

[57] The other ground that Mr Pankhurst alluded to was s 115(c) of the Act that provides where the employees employment agreement does not contain an explanatory provision concerning the resolution of employment relationship problems. Again, this claim falls at the first hurdle, as the relevant collective employment agreement did contain a compliant explanatory provision including clause 56.8 stating an employee:

> …. must raise a personal grievance with the employer and say they want something done about it within 90 days of the action complained of, or the date they became aware of it whichever is the later.

[58] Evidence also established it was highly unlikely that Mr Pike was unaware of what a personal grievance entailed as he had been involved in his own past personal grievance challenging a proposed action of his employer, while supported by a union provided lawyer. Mr Pike also had objectively more than a passing knowledge of the collective employment agreement, having been involved in its negotiation as a union delegate.

Assessment of s 115(a) ground

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[18] *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30 at [67].

[59] This leaves s 115(a) of the Act as the only exceptional ground Mr Pike can rely upon. There are two limbs to the test in s 115(a) of the Act. The first concerns whether Mr Pike was so impacted by the circumstances of his dismissal and the second limb is whether the impact caused Mr Pike to fail to ensure that the grievance was raised within the requisite time limit. However, in recently clarifying the application of s 115(a) the Employment Court in *Cronin-Lampe Board of Trustees of Melville High School* noted while this implies the exceptional circumstance pertains to the period within 90 days, this should 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." [19]

First Limb

[60] Mr Pike says that despite the dismissal being on notice and preceded by discussion over options, he was still shocked by Nelmac ending the employment and he strongly felt he had done nothing wrong to bring about the dismissal.

Second limb

[61] The second limb of the test in s 115(a) concerns whether thus impacted, was this on an ongoing basis, causative of Mr Pike not being able to raise a timely personal grievance.

[62] Mr Pike and his GP gave compelling evidence at the investigation meeting on the exceedingly difficult environment he experienced once his job ended. This included the twin pressures of difficult financial circumstances; the sense Mr Pike was failing to support and provide for his young family and deteriorating health issues impacting him. The circumstances were compounded by the unusual environment that prevailed that caused Mr Pike and his family to feel further socially isolated and excluded from his trusted support mechanism (the union).

[63] While there was some evidence that Mr Pike was unusually susceptible to a poor reaction to events that Nelmac had initiated and I do not criticise the position the company found themselves in, I find on questioning Mr Pike and his GP, that the trauma was genuine;

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

ongoing and the affect quite devasting on him. I conclude it was more likely than not, it left Mr Pike unable to function normally and focus on seeking help to raise a formal personal grievance within 90 days following his dismissal and beyond. Mr Pike's partner's evidence was naturally supportive but also confirmed by their GP, that Mrs Pike bore the greater responsibility to hold the family together.

[64] In this aspect, I find Mr Pike has made out an exceptional circumstance under s 115(a) of the Act and that unusual contextual matters also impacted by exacerbating Mr Pike's trauma at losing a job he found significantly fulfilling.

Is it just to grant the leave?

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

The length of the delay and prejudice to Nelmac Ltd

[66] If I am wrong about Mr Pike raising a personal grievance prior to the dismissal (that was effective on 18 March 2022), then Nelmac were not placed on notice of the existence of a personal grievance until Mr Pankhurst sought mediation and the Mediation Service alerted Nelmac of this on 27 September 2022. There was also an inexplicable further delay before Mr Pankhurst filed an application with the Authority on 24 February 2023. I accept this delay is significant but the reasons for such have been explored above. However, Mr Pike is not seeking reinstatement and Nelmac could have responded to the late grievance without any significant prejudice.

[67] Further, several disputed matters are documented and the length of delay that was inexplicably lengthened by Mr Pankhurst not filing an application under s 114 of the Act in a timely fashion, does not suggest that witness recall is at issue or that Nelmac would be unduly prejudiced by this matter proceeding. This is not an unusually complex matter requiring extensive witness recall of events.

Merits of Mr Pike's claim

[68] Whilst the Employment Court in *Austin v Silver Fern Farms* granted leave for Mr Austin to raise a grievance where ACC matters were at issue it did so after carefully analysing a situation where the employer had deceived him of his ACC entitlements and adopted a strategy to divest itself of rehabilitation responsibilities. [20] Here I do not see a parallel situation, as Nelmac, from correspondence divulged, made significant efforts to provide Mr Pike with an opportunity to comment on their vaccination policy and its application that led to his dismissal.

[69] Procedurally, Nelmac sought to fairly engage with Mr Pike about the reasons for his employment ending. The final decision to end Mr Pike's employment was after placing him on notice that his vaccination status was at issue and they explained how they had devised the policy that led to his termination of employment.

[70] Other than raising the impact of legislative changes that required exploration of alternatives to dismissal that I view as the central or only issue here in dispute, Mr Pike has arguably not identified any significant procedural or substantive issue that would bring the decision to dismiss him into doubt in the unusual circumstances that prevailed. While the burden of showing that they acted in a fair and reasonable manner falls on Nelmac this was a dismissal involving significantly difficult and externally imposed circumstances.

[71] However, I find that on the evidence and submissions made, Mr Pike's prospects of establishing that he was unjustifiably dismissed or disadvantaged are not so remote as to make it unjust to allow this matter to proceed.

Outcome

[72] I find that Steven Pike's personal grievance claims alleging an unjustified disadvantage and a potential unjustified dismissal were raised within 90 days pursuant to s 114(2) of the Employment Relations Act 2000.

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[20] At [67].

[73] In the alternative, I find that Steven Pike's application under s 114(3) of the Act to have his personal grievance heard out of time succeeds on the ground that he has made out exceptional circumstances pursuant to s 115(a) of the Act.

Next steps

[74] Utilising s 159(1)(b)(c) Employment Relations Act 2000, I direct the parties to attend mediation to explore resolution. Should the matter not resolve itself at mediation Mr Pike is to inform the Authority and a case management conference will be set up to determine how the substantive matters are to be dealt with.

Costs

[75] Costs are reserved and if mediation does not resolve matters costs will be dealt with following the substantive matter or if the matter does not proceed further, costs will be determined in the usual manner.

[76] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[21]

David G Beck
Member of the Employment Relations Authority

[21] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*