

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 377
3270939

BETWEEN MARIKA PRETORIUS
 Applicant

AND TAUPO INTERMEDIATE
 SCHOOL
 Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Liz Lambert, advocate for the Applicant
 Kiri Harkess, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 19 April 2024 from the Applicant
 3 May 2024 from the Respondent

Determination: 25 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves the preliminary question of whether Marika Pretorius can pursue a new claim in the Authority against her former employer, Taupo Intermediate School (the School). This claim is recorded in the statement of problem as a common law wrongful dismissal based on an alleged unilateral variation to Ms Pretorius' employment agreement. It arises from Ms Pretorius' dismissal on 31 January 2022. She seeks damages and compensation.

[2] Ms Pretorius' employment was terminated because she was not vaccinated and her employment as a teacher, at that time, was covered by the COVID-19 Public Health Response Order for mandatory vaccinations for

education that came into effect on 25 October 2021 (the Order). The Order imposed a duty on Ms Pretorius not to carry out work unless she was vaccinated.

[3] Submissions on behalf of Ms Pretorius now accept the claim as set out in the statement of problem cannot proceed in light of s 113 of the Employment Relations Act (the Act) because the Authority would not have jurisdiction unless it was advanced as a personal grievance claim, given it relates to her dismissal.

[4] Further issues arise because Ms Pretorius has already had a personal grievance claim dealing with her dismissal from the School determined by the Authority. In addition, that Authority determination is the subject of a challenge in the Employment Court.

[5] In submissions on behalf of Ms Pretorius an application has now been made to amend the statement of problem to a claim Ms Pretorius was unjustifiably disadvantaged in her employment when she asked a question of her employer and did not receive an answer. The question alleged to have been asked was about whether there was requirement for vaccination in Ms Pretorius employment agreement.

[6] This question is said to have been raised at the time but was never addressed by the School. As I understand the submissions, what transpired therefore amounted to a unilateral variation of the employment agreement. The amended claim based on that is set out as being an unjustified disadvantage to Ms Pretorius as follows in the submissions:

Thereby, the breach of contract complaint is a section 103(1)(b) grievance for a unilateral variation of the employment contract. This grievance is the mechanism by which the breach of contract is brought within s 113(1) of the Act.

[7] The School says the Authority does not have jurisdiction to consider Ms Pretorius' claim regardless of how it is set out and says these proceedings should be struck out on the basis they are frivolous and vexatious and an abuse of process. The Authority has already determined that Ms Pretorius raised the personal grievances for unjustified dismissal on 27 May 2022, which was out of time under s 114 of the Act, and that she did not raise any personal grievances

in time.¹ That Authority determination is the subject of a challenge before the Employment Court.²

[8] On 3 November 2023, the Employment Court made an order for security for costs and stayed the challenge until security was paid by Ms Pretorius. There is also an application to the Court of Appeal for leave to appeal the Employment Court's interlocutory decision.

[9] The School notes this current proceeding in the Authority was lodged after the Employment Court stayed the challenge pending Ms Pretorius paying security for costs. On that basis the School submits this proceeding is an abuse of process and indicated it will be seeking full indemnity costs with joint and several liability for the applicant and the Union representing Ms Pretorius.

The Authority's investigation

[10] By agreement with the parties, this preliminary issue was investigated on the papers. Those papers comprised of Ms Pretorius' statement of problem and submissions from her representative. The School was unrepresented at the case management conference (CMC) under the mistaken belief the CMC concerned the first proceeding involving the same parties. As a consequence no statement in reply was lodged but the matter has proceeded to submissions on the issue of jurisdiction.

[11] The issue for investigation and preliminary determination is whether the Authority has jurisdiction to deal with Ms Pretorius' claims and whether leave should be given to amend the statement of problem.

Ms Pretorius' employment and personal grievance claims

[12] Ms Pretorius was employed by the Board of the School as a science teacher and head of department from 27 June 2020. Her employment was terminated on 31 January 2022 because Ms Pretorius' work as a teacher at the School was covered by the vaccination order. The net effect of the vaccination

¹ *Pretorius v Board of Trustees of Taupo Intermediate School* [2022] NZERA 664.

² *Marika Pretorius v Board of Trustees of Taupo Intermediate School* [2023] NZEmpC 189 [3 November 2023].

order was that teachers working in schools were required to be vaccinated and Ms Pretorius wished to remain unvaccinated.

[13] On 6 December 2021, the School gave Ms Pretorius notice it would be terminating her employment because she was unable to comply with the vaccination order. Ms Pretorius' employment ended on 31 January 2022. Ms Pretorius lodged a statement of problem alleging she had been unjustifiably dismissed from her employment on 18 May 2022.

[14] In a determination dated 15 December 2022, the Authority found Ms Pretorius' communications with the School were insufficient to have raised an unjustified dismissal or any other personal grievance claim and that, even if they had been sufficient (and the Authority did not accept they were), such claims would have been anticipatory because the action or dismissal had not at that point occurred.³

[15] The Authority found the first communication raising a personal grievance was the service copy of Ms Pretorius' statement of problem, which was provided to the School on 27 May 2022. Because Ms Pretorius' employment had ended on 31 January 2021, the raising of her grievance was outside the 90-day time limit required by s 114 of the Act. It also found she had not sought leave to raise a personal grievance out of time. Accordingly, the Authority found the matter was then at an end.⁴

[16] Ms Pretorius challenged that determination electing a full hearing of the entire matter.⁵ The amended statement of claim is dated 10 February 2023 and the matter is currently before the Employment Court.

[17] On 3 November 2023, the Court issued an interlocutory decision ordering Ms Pretorius pay security for costs and issued a stay of proceedings until the security for costs was paid. The Court also declined an application from Ms Pretorius for a stay of execution of the costs order made by the Authority pending resolution of the challenge. An application from Ms

³ Above n1 at [55] – [56].

⁴ At [75].

⁵ Employment Relations Act 2000, s 179(3).

Pretorius for leave to appeal the Employment Court decision to the Court of Appeal is being heard in July 2024.

[18] On 22 December 2023 Ms Pretorius lodged this proceeding for common law wrongful dismissal in the Authority.

Common law wrongful dismissal and personal grievances

[19] Section 113 of the Act provides that the only way an employee can challenge a dismissal is by way of a personal grievance in the Authority. Section 113 states:

113 Personal grievance provisions only way to challenge dismissal

- (1) 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 to recover –
 - (a) Wages relating to a period of notice or alleged period of notice; or
 - (b) Wages or other money relating to the employment prior to the dismissal; or
 - (c) Other money payable on dismissal.

[20] The right not to be unjustifiably dismissed under s 103(a) of the Act replaced the right not to be dismissed in breach of contract.⁶ Section 113 of the Act is a statutory bar to common law wrongful dismissal claims which means the Authority has no jurisdiction to hear a claim of that nature.

Analysis

[21] Submissions on behalf of Ms Pretorius concede the claim was a common law wrongful dismissal claim. However, instead, it is now submitted a mistake was made and Ms Pretorius wishes to claim a disadvantage grievance apparently based on a breach of contract (because she did not receive an answer to her question), for which s113 of the Act would not act as a bar.

[22] The submissions refer to this claim as follows:

10. The personal grievance raised was about the fact that there was no requirement for vaccination within her employment

⁶ Employment Relations Act 2000, s 113, *Brown v New Zealand Basing Ltd* [2018] 1 NZLR 245 at [52] and *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128 at [22].

agreement. This was never addressed by the employer and so “survives the termination of the employment.”

11. Thereby, the breach of contract complaint is a section 103(1)(b) grievance for a unilateral variation of the employment contract. This grievance is the mechanism by which the breach of contract is brought within section 113(1) of the Act.

[23] Ms Pretorius’ representative seeks leave to amend the statement of problem to reflect this and says both that it was raised within the applicable 90-day time period⁷ and the 90-day period for raising a personal grievance in this situation was unclear and pleadings have often been required to be amended.⁸

[24] These submissions were advanced on the basis of an Authority case *Service and Food Workers Nga Ringa Tota v New Zealand Racing Board* which is a case about whether s 113 of the Act barred a claim from proceeding in the Authority.⁹ In that case, the claim was able to be amended and the matter did proceed, however, it involved quite distinct facts that are different from the circumstances and Ms Pretorius’ proceedings.

Matters before the Employment Court

[25] The earlier Authority determination refers to a disadvantage claim raised in reply submissions but records that the facts do not support that claim.¹⁰ I did not have information about the content of the reply submission but I was provided with the statements of problem for the earlier matter. They are almost identical subject to damages being included as a remedy in the second statement of problem (for this proceeding) and some additional detail about some of the facts. Overwhelmingly, they both cover the same factual matrix arising from Ms Pretorius’ dismissal from the School and her decision to remain unvaccinated.

⁷ Ms Pretorius’ submissions at [10].

⁸ Ms Pretorius’ submissions at [14].

⁹ *Service and Food Workers Nga Ringa Tota v New Zealand Racing Board* [2007] NZERA Wellington WA74/07

¹⁰ Above n1 at [45].

[26] To the extent that new matters are raised, the scope of a challenge in the Employment Court that is a full hearing (de novo) is not restricted to the claim that was investigated and determined by the Authority. In *Abernathy v Dynea New Zealand Ltd*¹¹ a full Court said:

[59] ...where a party elects to challenge a preliminary determination of the Authority which has had the effect of resolving the employment relationship problem before it, the entire employment relationship problem is then before the Court for resolution.

[27] The short point is that an earlier Authority determination resolved Ms Pretorius' personal grievance claims against the School connected with her dismissal. That determination is currently before the Employment Court and the Court of Appeal and in that way this current claim is outside the jurisdiction of the Authority.

Outcome

[28] This proceeding is at an end.

[29] The Authority has no jurisdiction to determine Ms Pretorius' common law wrongful dismissal claim.

[30] Leave to amend the statement of problem is declined because there is a de novo challenge to Ms Pretorius' grievance claims arising from the same facts in the Employment Court and an associated application for leave to appeal in the Court of Appeal.

Abuse of process, frivolous or vexatious proceedings

[31] The Authority has the power to dismiss frivolous or vexatious proceedings. An application was made to strike out the proceeding. It is submitted that lodging a new application after the Court order for security for costs amounts to an abuse of process.

[32] In order to consider and resolve that application, I would have needed further evidence and submissions. The matter has been able to be resolved on the basis the Authority has no jurisdiction to proceed with the claims set out in

¹¹ *Abernathy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC)

the statement of problem and leave to amend the claim has been declined. For that reason, it is not necessary to continue to consider that application.

Costs

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

[34] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Taupo Intermediate School 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 Ms Pretorius will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[35] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1