IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 766
3284979

	BETWEEN	SCOTT WILLIAMS Applicant
	AND	WINSTONE WALLBOARDS LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Victor Corbett, counsel for the Applicant Rebecca Rendle and Gioja Buckleton, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	22 July and 16 September 2024 from the Applicant 22 July and 20 September 2024 from the Respondent
Determination:	20 December 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the employment problem?

[1] The preliminary issue this determination resolves is whether Scott Williams raised his personal grievance of unjustified dismissal with his former employer, Winstone Wallboards Ltd (WWB or the company) within the 90-day notification period of s 114 of the Employment Relations Act 2000 (the Act). In the alternative, Mr Williams says that if his claim is found not to have been raised in time, WWB's action of dismissing him on notice was an unjustified disadvantage.

[2] In response, WWB says that Mr Williams' application should be dismissed on the grounds that a personal grievance cannot be raised in anticipation and that no personal grievance was raised within the 90 days following the termination of his employment.

[3] For the reasons that follow, the Authority finds that Mr Williams failed to raise his personal grievance of unjustifiable dismissal and that his alternative argument of unjustified disadvantage was never raised either. The Authority further finds that there are no exceptional circumstances for leave to be granted for the grievance to be raised now. The application is unsuccessful and is dismissed.

How was the preliminary issue investigated?

[4] This employment problem was originally allocated to another Authority Member who made directions that the preliminary matter be dealt with 'on the papers'.

[5] Following a case management conference with the representatives on 16 September 2024, I have been provided with an affidavit and an affidavit in reply from Mr Williams and written submissions (22 July and 16 September 2024) from his counsel, Mr Corbett. For WWB, written submissions (22 July and 20 September 2024) from its counsel, Ms Rendle and Ms Buckleton and an affidavit from its former human resources manager, Suliana Mailangi, have also been received. For completeness, as requested by me, two emails (8 and 22 February 2022) between Mr Williams and Ms Mailangi have been provided.

[6] 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.

What are the relevant facts?

[7] From September 2016 to March 2022, Mr Williams worked as WWB's Area Sales Manager. In November 2021, Fletcher Building (FB) and WWB started consulting its employees about their COVID-19 policy. Mr Williams corresponded with Ms Mailangi regarding his concerns with the incoming policy which came into effect on 15 February 2022.

[8] Between 8 and 16 February 2022, there were emailed communications between Mr Williams and Ms Mailangi in which he stated that he was not medically able to receive the COVID-19 vaccine because it posed a significant risk to his health. In an email dated 8 February 2022, Mr Williams further stated that he was making a personal grievance in relation to FB's new vaccination policy which he considered breached

WorkSafe New Zealand's health, safety, and environment policies. It is understood that WWB, through Ms Mailangi, responded to that grievance.

[9] WWB consulted with Mr Williams but because of his inability to comply with its COVID-19 policy, he was advised by letter of 15 February 2022 of its preliminary decision to dismiss him unless his vaccination status changed. Mr Williams responded the following day reiterating that his medical practitioner had provided him with a letter of exemption and that his private health issues had nothing to do with him performing his role safely and satisfactorily.

[10] However, on 18 February 2022, the company advised Mr Williams in writing of its final decision to terminate his employment as he had not been able to provide it with a medical exemption certificate from the Ministry of Health. As Mr Williams' role involved him going out and meeting customers and building/maintaining relationships with key customers, his role was "high risk" and needed to be performed by a vaccinated person.

[11] The company's letter of dismissal further stated that all control measures had been considered but that it did not believe regular covid testing was a reasonable alternative to the vaccine as it did not protect people from the adverse effects of the virus or stop its spread when someone was asymptomatic. As Mr Williams had indicated that he did not intend to get vaccinated and therefore would not be able to meet its vaccination requirement, the decision to dismiss was confirmed and his employment was to end on 18 March 2022 after a four-week notice period. He was not required to work out his notice period and was placed on garden leave for the remainder of his employment.

[12] On 10 March 2022, eight days before Mr Williams' last day, he received an email from WWB's health and safety manager regarding COVID-19 Rapid Antigen Testing. This being new information, Mr Williams emailed Ms Mailangi on 10 March 2022 stating:

> With this new advice and the fact that I have had Covid and survived the cold without an inoculation [sic].
>
> Are you still going to continue to hold your position and terminate me on the 18th March 2022, even with all the new information?

> Look forward to your reply.
>
> Please note if this is the case I am claiming a PG of unfair dismissal.
>
> …

[13] Ms Mailangi responded by email later that same day stating:

> At this stage, the FB policy still stands, Im [sic] sorry. So your last day is 18 March 2022.

[14] WWB received no further correspondence from Mr Williams until it was provided with a letter (5 October 2023) from his representative alleging that his email of 10 March 2022 constituted the raising of a personal grievance of unjustified dismissal to which the company had not responded.

What is the relevant law?

[15] Section 114 of the Act sets out what is required of an employee to raise a personal grievance. With the exception of a personal grievance of sexual harassment in the employee's employment (in which case a period of 12 months applies),[1] the employee must raise any other personal grievance within the period of 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee, whichever is later. In the event that the employee fails to comply with the relevant employee notification period, the employer's consent or leave from the Authority is required for the personal grievance to be raised out of time.

[16] The Employment Court in *Creedy v Commissioner of Police* established that the relevant words and phrases of the legislation are in the past and present tenses so that the raising of a grievance is clearly contemplated as a grievance about an event that has occurred or is occurring.[2] The court further stated that the statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.

[17] These findings have been acknowledged by the Authority. More recently in *Devine v Heart Kids New Zealand Incorporated*, the Authority held that it is settled law that a grievance cannot be raised in anticipation of an action before its occurrence.[3] In

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[1] The Act, s 114(7).
[2] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [29].
[3] *Devine v Heart Kids New Zealand Incorporated* [2024] NZERA 122 at [29].

Lafotanoa v Vice Chancellor of the University of Auckland, the Authority held that saying a grievance will be raised, in the future, is not raising a grievance.[4] Reference was made to the Employment Court's decision in *Marx v Southern Cross Campus Board of Trustees* in which her Honour Judge Inglis as she then was held:[5]

> … As the cases make clear, purporting to reserve the right to raise a personal grievance at some later date or following some future event is not the same thing as raising a personal grievance for the purposes of s 114.

Discussion

[18] Mr Corbett submits that the mischief addressed in *Creedy* focussed on 'crystal ball gazing' of grievances raised in anticipation that holds an employer hostage to indeterminable events. Counsel further submitted that it is not suggested that Mr Williams had a valid grievance of unjustified dismissal at any point before his termination but that the prospect of his termination became increasingly determinable after WWB's dismissal letter of 18 February 2022.

[19] Counsel points out that Mr Williams took steps to confirm matters by asking Ms Mailangi on 10 March 2022 whether, in spite of new information regarding the use of rapid antigen tests, that she was still going to hold to her position and terminate his employment on 18 March 2022. When Ms Mailangi effectively confirmed this to be case, it has been submitted that there was simply no way the company was going to change its mind after that.

[20] While the submission has heft, the ending of the employment relationship in this case was atypical because it related to the COVID-19 vaccination mandate. On 26 November 2021, some three-and-a-half months before Mr Williams email of 10 March 2022 (in which he claims to have raised his grievance of unjustified dismissal), Sch 3A to the Act came into force.

[21] The Schedule specifically deals with COVID-19 vaccinations including employees who have a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work unless they are vaccinated; or are required to

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[4] *Lafotanoa v The Vice-Chancellor of the University of Auckland* [2024] NZERA 643 at [19].
[5] *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71 at [26].

undergo medical examination or testing for COVID-19; or otherwise permitted to perform the work under a COVID-19 order.[6]

[22] In addition, the Schedule applies to an employee whose employer has determined that the employee must be vaccinated to carry out the work.[7] This was the case for Mr Williams whose role as Area Sales Manager was rated high risk by WWB which necessitated the need for the work to be performed by a vaccinated person.

[23] Schedule 3A was another requirement that WWB would need to consider in its termination of Mr William's employment particularly cl 4 which stated that as an employer, it must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted. A reasonable alternative to termination in my view must include an employer's readiness to cancel their termination notice to an employee should circumstances change before the period to which the notice relates. This is effectively what is required of an employer by cl 5 of Sch 3A.

[24] From Mr Williams perspective, after receiving Ms Mailangi's email of 10 March 2022, the company had confirmed its position that his employment would end eight days later. While the door to the employment relationship ending had seemingly closed as of 10 March 2022, cl 4 and 5 of Sch 3A ensures that it needed to be kept ajar until the very end of the notice period being 18 March 2022. The door could not be closed before then. Had circumstances changed for Mr Williams before the notice period ended, WWB would have been obliged to cancel its termination notice as required by the cl 5 of the Schedule and its good faith obligations under the Act.

[25] It may be that this determination is regarded as overly technical and harsh but it is also important to bear in mind the broader context. First, insofar as having raised a personal grievance of unjustified dismissal, Mr Williams' email of 10 March 2022 had more in common with potentiality as opposed to actuality. His statement that "if" this was the case (that WWB was to hold to its position to terminate), Mr Williams was claiming a PG of unjustified dismissal. I consider the use of the word "if" by Mr Williams as a statement of intent or a foreshadowing of what he might do if his

[6] The Act, Sch 3A, cl 3(1)(a)(i)-(iii).
[7] At cl 3(1)(b).

employment ended on 18 March 2022. Ms Mailangi correctly understood the email that way and expected a personal grievance of unjustified dismissal to follow but it was never made.

[26] Second, there was essentially radio silence from Mr Williams for the better part of 19 months before his representative contacted WWB and alleged that the email of 10 March 2022 constituted his raising of a personal grievance for unjustified dismissal. I disagree. As time inevitably marched on, it was reasonable of WWB to surmise that Mr Williams had changed his mind about raising a personal grievance of unjustified dismissal which his email of 10 March 2022, for the reasons given above, does not do.

[27] It was submitted in the alternative that even if Mr Williams could not claim for unjustified dismissal, his grievance substantively concerns the unjustified disadvantage caused by WWB's implementation of its COVID-19 policy and its notice to dismiss him, the effect of which was akin to a written warning. However, this argument shares the same difficulty as it was simply not raised with the company within the 90-day period of s 114 of the Act. As a result, the submission cannot be taken any further.

Conclusion on raising of an unjustified dismissal grievance

[28] *Creedy* makes clear that a personal grievance for unjustified dismissal cannot be raised before the dismissal occurs. Put differently, the grievance cannot be raised in anticipation of the relevant event or action. For the reasons given, Mr Williams' claims of unjustified dismissal and, in the alternative, of unjustified disadvantage, must be dismissed as neither have been raised with WWB in time for the Authority to be able to investigate them.

No exceptional circumstances

[29] Because Mr Williams failed to raise his personal grievance of unjustified dismissal in time, and as WWB has not consented to it being raised now, leave from the Authority is required.[8] It was submitted that WWB's rigid interpretation of the grievance timing has placed Mr Williams at a procedural disadvantage.

[8] The Act, s 114(3) & (4) and s 115.

[30] In order for leave to be granted, I must be satisfied that the delay in raising the personal grievance was occasioned by one or more exceptional circumstances and that it would also be just for leave to be granted.[9]

[31] It is acknowledged that the list at s 115 of the Act as to what constitutes exceptional circumstances is inclusive and non-exhaustive. Even so, the submission that WWB's rigid approach as to the timing of Mr Williams' grievance cannot amount to an exceptional circumstance. As noted above, the delay here is in the order of approximately 19 months and it remains unclear to the Authority why it has taken Mr Williams that long to follow up on matters. Nor has it been shown how the alleged rigidity on WWB's timing of the grievance contributed to the delay, if any.

[32] As there are no exceptional circumstances, I need not consider the question of whether it would also be just to grant leave. Even so, given the delay and the prejudicial impact this is likely to have on the availability of key witnesses for WWB, I would have needed convincing of the second limb to s 114(4).

Outcome

[33] I find that Mr Williams did not raise a personal grievance of unjustified dismissal, or in the alternative, one of unjustified disadvantage within 90 days of the relevant event being the last day of his employment on 18 March 2022. Nor has it been demonstrated that the delay in raising the grievance was occasioned by exceptional circumstances for leave to be granted to investigate the grievances now. It follows that the Authority cannot investigate this employment problem as it has no jurisdiction to do so under ss 114 and 115 of the Act.

What about costs?

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

[35] If they are unable to do so, and an Authority determination on costs is needed, WWB 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, Mr Williams

[9] The Act, s 114(4).

will then have 14 days to lodge any reply memorandum. If requested by either party, an extension of time to resolve costs between themselves may be granted.

[36] 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. [10] As an initial indication, subject to submissions or other information, the starting point for assessing costs in this particular matter determined 'on the papers' would likely be one quarter of the daily tariff.

Peter Fuiava
Member of the Employment Relations Authority

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