

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2024] NZEmpC 236
EMPC 117/2024**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN VICKY LEE DEVINE
 Plaintiff

AND HEART KIDS NEW ZEALAND
 INCORPORATED
 Defendant

Hearing: On the papers

Appearances: E Lambert and E Whittome, advocates for plaintiff
 AF Drake and RG Judd, counsel for defendant

Judgment: 2 December 2024

**JUDGMENT ON A PRELIMINARY ISSUE OF JUDGE K G SMITH
(Whether personal grievances were raised within time)**

[1] Vicky Devine was employed as a Community Family Support – Taituarā by Heart Kids New Zealand Inc from 5 March 2018 until she was dismissed on 7 December 2021. On behalf of Heart Kids, she was responsible for supporting children with congenital and acquired heart conditions.

[2] What led to the dismissal was that Heart Kids considered Ms Devine had not complied with a policy it introduced requiring certain staff to be vaccinated against COVID-19. Ms Devine was not opposed to being vaccinated. However, on medical advice, she considered she could not tolerate the vaccine then available and was waiting for the arrival in New Zealand of a vaccine appropriate for her.

[3] The Employment Relations Authority dismissed Ms Devine's claims for unjustified dismissal and unjustified disadvantage because they were not raised within the time allowed under s 114 of the Employment Relations Act 2000 (the Act). The Authority also concluded there were no exceptional circumstances justifying an extension of time being granted to pursue those grievances.¹ The remainder of Ms Devine's claims also failed.

The challenge

[4] Ms Devine challenged the Authority's determination. She elected to have a full hearing of the matters that were investigated. Despite the request for a full hearing the pleading in the amended statement of claim appears confined to pursuing allegations that Ms Devine was subjected to unjustified disadvantages in the course of her employment. The nature of those disadvantages is only generally described but it is sufficient for this judgment to record that they include:

- (a) An alleged failure to investigate the safety or efficiency of vaccination as required to comply with the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.
- (b) Alleged bullying by a senior employee.
- (c) A failure to comply with the duty to be a good employer in s 4 of the Act.
- (d) A breach of the duty to provide a safe workplace.
- (e) Discrimination.

[5] There is no pleading specifically challenging the Authority's decision about Ms Devine's alleged unjustified dismissal. However, in seeking a full rehearing, it may be intended that the scope of the challenge is sufficient to encompass that claim. For the purposes of this decision an assumption has been made that all personal grievances that were before the Authority are being pursued.

¹ *Devine v Heart Kids New Zealand Inc* [2024] NZERA 122 (Member Szeto).

[6] For completeness, Ms Devine's amended statement of claim included causes of action that are not personal grievances. They are not dealt with in this judgment.

[7] Heart Kids does not accept that any personal grievance claims were raised with it by Ms Devine within time. There was no application to extend time.

Agreed approach

[8] Heart Kids identified as a preliminary issue whether Ms Devine's personal grievances were raised within time. At a conference on 12 August 2024, Ms Lambert and Mr Drake agreed on an approach to resolve that issue. Given that there was no material disagreement over what happened, they proposed that it could be dealt with in a preliminary way with evidence by affidavit and an exchange of submissions. Directions were made accordingly. Affidavits were filed. Neither party gave notice seeking to cross-examine and the submissions were therefore based on uncontested evidence.

What happened?

[9] Heart Kids is a registered charity, providing care and support for children, young people and their families impacted by childhood heart defects.

[10] On 5 March 2018, Ms Devine was employed to work part-time by Heart Kids. In March 2020, New Zealand was placed into lockdown for the first time in response to the COVID-19 pandemic. A vaccine against COVID-19 became available in New Zealand in early 2021, and was distributed in a managed way beginning with health care and border workers.

[11] Many of Heart Kids' members are, because of their health, medically vulnerable. Some of its staff are also vulnerable because they work in an environment with a higher risk of exposure than other people in the community.

[12] In August 2021, the Board of Heart Kids decided to introduce a COVID-19 vaccination policy. Consultation with staff followed and the policy came into effect on 23 September 2021. In it, Heart Kids encouraged staff to be vaccinated. The policy confirmed that staff would be supported to access vaccinations, including being

permitted to have time away during work hours to be vaccinated. Additionally, the policy advised employees that there would be some roles where vaccination might become a condition for performing work.

[13] On 12 October 2021, Dr Ruth Gorinski, who was at that time Heart Kids' Chief Executive, wrote to staff to inform them about the Government announcement of an intention to mandate vaccinations for workers in education and health care. While waiting for confirmation about whether Heart Kids' employees in the Community Family Support – Taituarā area were to be covered by the mandate, staff members were asked to disclose to her confidentially whether they were vaccinated. A reminder about this request was sent on 17 October 2021. A copy of a vaccination passport was requested. Ms Devine received a copy of this letter.

[14] On 21 October 2021, Ms Devine wrote to Dr Gorinski disclosing that she was not vaccinated and explaining why. She did not decline to be vaccinated. From 25 October 2021 Ms Devine was an "affected person" under the COVID-19 Public Health Response (Vaccinations) Order.

[15] On 27 October 2021, Heart Kids conducted a risk assessment for each of its roles. As a consequence, it decided that Community Family Support – Taituarā employees were in positions that were "medium to high" risk and would need to be vaccinated.

[16] On 1 November 2021, Dr Gorinski wrote to Heart Kids' staff, including Ms Devine, informing them that it was proposing to vary its policy to require vaccination against COVID-19. The letter advised all staff that the varied policy would provide for termination of employment for any employee who did not supply written confirmation of having received the first dose of the vaccination by 1 December 2021. A copy of the draft policy was supplied with this letter. Heart Kids updated its vaccination policy on 8 November 2021 and vaccination became compulsory.

[17] Ms Devine's unvaccinated status and Heart Kids' proposed actions in response were discussed at several meetings.

The meetings

[18] On 8 November 2021, Ms Devine was invited to a meeting with Dr Gorinski to discuss her vaccination status. The meeting occurred on 16 November 2021 and at it Ms Devine was assisted by her union. During it Ms Devine confirmed that she remained unvaccinated. At this meeting she proposed that potential changes to her role might be possible so she could continue to work. Dr Gorinski was prepared to consider those proposals and asked her to put them in writing. However, Dr Gorinski informed her that, if a first dose of the vaccine was not administered by 1 December 2021, and no redeployment options were available, she might be stood down from employment. The minutes of the meeting do not explain what being stood down involved but an adverse impact on continued employment was implicit.

[19] A further meeting was held on 22 November 2021. Ms Devine was again assisted by her union. The purpose of this meeting was to discuss any change in her vaccination status, options for redeployment, or any grounds that might exist for a medical exemption to vaccination.

[20] Before the meeting Ms Devine provided her proposals to change the role so she could continue to work without being vaccinated. The proposed changes were directed towards Ms Devine being able to work remotely. There was a discussion about those proposals which Heart Kids did not accept were workable. No resolution was achieved at this meeting but an agreement was made to meet again, on 2 December 2021. However, the need to have received the first dose of the vaccine by 1 December 2021 remained unchanged.

[21] The 2 December meeting took place as planned. Ms Devine was still not vaccinated and she was stood down immediately on paid leave until further notice. In taking this step Heart Kids considered that it was complying with the vaccination policy.

[22] There was a further meeting on 6 December 2021 but, as before, the position remained unchanged. At this meeting Ms Devine was advised that a preliminary decision had been made to terminate her employment because she was unwilling or

unable to comply with Heart Kid's policy. An opportunity to comment on the preliminary decision to dismiss her was provided before she was dismissed on 7 December 2021. She was paid in lieu of notice.

Personal Grievances

[23] Personal grievances are provided for in pt 9 of the Act. For the Court to have jurisdiction to consider any personal grievance it must have been raised by the employee with the employer during the notification period as specified in s 114 of the Act.

[24] The relevant notification period is in s 114(7)(b); it is 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, whichever is later.²

Were the alleged grievances raised within time?

[25] It is common ground that the statement of problem which was lodged in the Authority on 24 May 2022 was the first occasion on which any formal steps were taken to communicate to Heart Kids that personal grievances existed. Ms Devine does not rely on her personal grievances being raised in the statement of problem. Instead, she considers that enough was done during her interaction with Heart Kids leading up to the dismissal to constitute raising her personal grievances as required by s 114 of the Act.

Defendant's submissions

[26] Mr Drake's submissions were prefaced by a comment that the pleadings and evidence did not specify the actions said to provide the grounds for establishing that personal grievances were raised with Heart Kids. The absence of that evidence was therefore fatal.

² The notification period for all personal grievances is 90 days except those under s 103(1)(d) where it is 12 months pursuant to s 114(7)(a).

[27] Mr Drake's submissions relied on the discussion about s 114 in *Creedy v Commissioner of Police*.³ In that case, the Court held that the employer must know what is to be responded to and to be given sufficient information to address the grievance on its merits, with a view to resolving it as soon as possible and informally.⁴

[28] Heart Kids considered that it was not on notice that it faced any personal grievance claims at any time before the statement of problem was lodged. It calculated the time within which a personal grievance might have been raised as expiring on 7 March 2022. That meant by the time the claim was lodged, the notification period had elapsed.

[29] In anticipation of the argument that personal grievances were raised during the meetings, Mr Drake submitted that in each one of them the subjects discussed were Ms Devine's vaccination status, Heart Kids' policy or alternative ways for Ms Devine to work, but the conversations went no further.

[30] To show that Ms Devine knew she was out of time, Heart Kids produced an email between her and a union delegate dated 21 March 2022; that is, before the statement of problem was lodged and after the notification period ended. The email was about a possible claim of unjustified dismissal. In it she acknowledged knowing such a claim was outside the required 90 days and, therefore, exceptional circumstances needed to be shown to pursue it. The email was silent about other potential grievances.

Plaintiff's submissions

[31] Ms Lambert concentrated on establishing that the communications during the meetings between Ms Devine and Heart Kids were sufficient to constitute raising personal grievances. She submitted that Heart Kids was informed on eight occasions that its policy could not in good faith be applied to Ms Devine.

[32] In these submissions, the argument appears to be that Heart Kids' knowledge of Ms Devine's medical situation, coupled with that subject being discussed at several

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC).

⁴ At [36].

meetings, showed sufficient was done to raise personal grievances. To support these submissions, Heart Kids' reference to possible termination of employment in the absence of vaccination was described both as a threat and "the first shot in [sic] across the bows". The proposition was that a reasonable employer should have been on notice that Ms Devine "was objecting to the prospect of termination every time that [Heart Kids] demanded her vaccination status". A related submission was that Ms Devine's proposals to alter her role to work remotely "rose to the level of personal grievances because they were all unreasonably rebuffed".

[33] To support a passage of events being sufficient to raise a grievance, two decisions of the Court were relied on, *Chief Executive of Manukau Institute of Technology v Zivaljevic* and *Taniwha v Te Runanga o Toa Rangatira Inc.*⁵

Analysis

[34] What is required to raise a personal grievance under s 114 was explained in *Creedy* and has been applied many times since then. *Zivaljevic* reviewed s 114 to distil and summarise the key principles that have emerged since *Creedy*. In *Zivaljevic*, the Court held that the grievance process is informal and flexible. A personal grievance may be raised orally or in writing and there is no particular formula of words to use.⁶ The Court went on to say that in a series of communications, not only would each one be examined to consider whether it constituted raising a personal grievance but the totality of them might also achieve that outcome.⁷

[35] *Zivaljevic* is also authority for the proposition that it does not matter what an employee intended the complaint to be or whether the employer recognised the complaint as a personal grievance.⁸ The issue is whether its nature was within the meaning of s 103 of the Act and, if so, if the communication complied with s 114(2). In that case, a series of communications between the employer and employee were analysed to conclude that it would have been clear to the employer that grievances were being presented for resolution.

⁵ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132; *Taniwha v Te Runanga o Toa Rangatira Inc* [2023] NZEmpC 140 [2023] ERNZ 545.

⁶ *Zivaljevic*, above n 5, at [36].

⁷ At [36].

⁸ At [37].

[36] *Taniwha* adopted the analysis in *Creedy* and *Zivaljevic*. I agree with *Creedy*, *Zivaljevic* and *Taniwha*.

[37] The difficulty confronting Ms Devine's claim is the absence of any evidence that she did or said anything within the notification period from which it could be discerned that any personal grievance existed that Heart Kids needed to address.

[38] What happened shows steps being taken by Heart Kids to respond to significant health risks caused by the pandemic, seeking information from its staff about their vaccination status, and communicating what it would do in response.

[39] At the meetings between Ms Devine and Heart Kids there were discussions about the vaccination policy, its application to her, and the consequences of not satisfying it. However, there was no evidence that the meetings went any further so that Heart Kids was on notice, as explained in *Creedy* and *Zivaljevic*, that grievances existed and needed to be addressed.

[40] The frequency of the meetings is not a substitute for assessing what happened at them. The alleged "threat" of termination of employment does not advance Ms Devine's case. Undoubtedly, the risk of termination was significant, although Dr Gorinski may have seen it as a statement of the obvious given the responses to the pandemic. In any event, Heart Kids announcing what it would do does not displace the statutory requirement for Ms Devine to raise her personal grievances with it.

[41] No doubt the meetings were upsetting for Ms Devine. She was attempting to obtain an alteration to her work to accommodate her inability to receive the vaccine then available. However, Dr Gorinski's view was that the proposed changes to Ms Devine's role were unworkable. While the suitability of those proposals is not material to this assessment, the exchanges between them show the discussions did not reach the level Ms Lambert relied on. Further, rebuffing a proposal to alter the way work under an existing agreement is to be done cannot, without more, be a communication about the existence of a personal grievance.

[42] The submission that the employer did not consider in good faith Ms Devine's attempts to preserve the relationship also fails to grapple with the requirements of s 114.

Conclusion

[43] I am satisfied that the alleged personal grievances in the statement of claim were not raised by Ms Devine within the notification period required by s 114(7)(b). It follows that this aspect of the challenge fails.

[44] Costs are reserved. If agreement about them cannot be reached memoranda may be filed.

[45] The Registrar is to organise a telephone directions conference to deal with progressing the remaining claims.

K G Smith
Judge

Judgment signed at 4.30 pm on 2 December 2024