IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2026] NZEmpC 27
EMPC 27/2025

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NICHOLAS JOHNSTON Plaintiff
AND	TE WHATU ORA – HEALTH NEW ZEALAND Defendant

Hearing:	7 August 2025 (Heard at Auckland)
Appearances:	A Fechney, advocate for plaintiff A Russell, counsel for defendant
Judgment:	18 February 2026

JUDGMENT OF JUDGE KATHRYN BECK

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[1] The plaintiff, Mr Johnston, was employed by the defendant, Te Whatu Ora – Health New Zealand (Te Whatu Ora), as a community occupational therapist from 10 January 2022 until he was dismissed on 6 December 2022.

[2] Mr Johnston raised a personal grievance with Te Whatu Ora and filed a statement of problem in the Employment Relations Authority. He applied for the matter to be removed to the Court for resolution; however, the Authority declined the removal application.[1] Mr Johnston filed an application for special leave of the Court for an order that the matter be removed.

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1 *Johnston v Te Whatu Ora – Health New Zealand* [2024] NZERA 420.

[3] On 18 December 2024, I considered that the removal of proceedings was appropriate in all the circumstances and ordered that the proceedings be removed to the Court.[2]

[4] On 7 August 2025, a hearing was held to address two preliminary matters agreed between the parties:

(a) whether Mr Johnston raised a personal grievance for discrimination in time and, if not, whether the discrimination grievance could otherwise proceed to a substantive hearing; and

(b) whether there are any employment obligations on an employer when making notifications about an employee to a professional body, being the "responsible authority" under the Health Practitioners Competence Assurance Act 2003 (HPCAA).

[5] This judgment now resolves those preliminary issues.

Background

[6] Mr Johnston was a community occupational therapist employed by the defendant, pursuant to a collective agreement between Te Whatu Ora and the Public Service Association (PSA).

[7] When Mr Johnston commenced employment, he was subject to a three-month orientation period, during which concerns were raised about his ability to perform the functions of his role.

[8] In May 2022, Mr Johnston contracted COVID-19 and experienced brain fog on his return to work. Te Whatu Ora advised him to take time to recover but it denies having knowledge of his brain fog.

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2 *Johnston v Te Whatu Ora – Health New Zealand* [2024] NZEmpC 253.

[9] A preceptorship plan was then implemented for seven weeks in June and July 2022, which was followed by a support and development plan from 25 July 2022. The support plan was developed due to Te Whatu Ora's concerns around Mr Johnston's performance.

[10] The support and development plan involved a number of outcomes, including weekly review meetings with Mr Johnston's line manager, Ms Skelton. However, it was Te Whatu Ora's belief that while there was some improvement in performance, it was not significant during this period.

[11] In a weekly meeting with Ms Skelton on 5 August 2022, Mr Johnston raised health concerns and the prospect of ADHD as a diagnosis for himself. An occupational health assessment was suggested, which he agreed to.

[12] In early August 2022, Ms Wallis, professional and clinical lead occupational therapy, contacted the Occupational Therapy Board of New Zealand (OTBNZ) about Mr Johnston's performance concerns and inquired into whether making a notification of concern was required under the HPCAA. Following a discussion with OTBNZ, Ms Wallis decided that a formal notification was likely necessary.

[13] During a weekly meeting on 12 August 2022, Ms Skelton identified improvement in Mr Johnston's performance, but noted that there remained a lack of progress and that he continued to require significant one-on-one support. She informed Mr Johnston that Te Whatu Ora considered it was required to report its concerns to OTBNZ and invited him to a further meeting on 18 August 2022 with her and Ms Wallis.

[14] On 15 August 2022, a report from occupational health was received and reviewed by Ms Skelton. The report advised that until Mr Johnston had been assessed and an appropriate management plan implemented, he would continue to require a high degree of support to remain in the workplace. It set out strategies that may assist in the interim. It stated that at that stage he was not currently able to carry out all the duties for which he had been employed.

[15] The same day, Mr Johnston responded to an email from Te Whatu Ora containing the notes of the 12 August meeting and a reminder of the 18 August meeting. He believed the meeting notes contained a number of inaccuracies, and advised he was not prepared to attend the 18 August meeting without support people present. Mr Johnston later confirmed that he would not be attending the meeting as he was unable to arrange a support person.

[16] On 18 August 2022, Ms Wallis rang Mr Johnston and informed him of the requirement to notify OTBNZ and confirmed that she would be making such notification. She asked if he would consent to her providing OTBNZ with a copy of his occupational health report, which he declined. Ms Wallis then wrote to OTBNZ making a notification of concern under ss 34 and 45 of the HPCAA. Her letter outlined competency and health issues of concern and concluded that it was Te Whatu Ora's belief that Mr Johnston was unable to work as an occupational therapist within the service without one-on-one supervision and support at all times.

[17] Mr Johnston was provided with a copy of the notification. OTBNZ asked for his response. He responded in writing. Te Whatu Ora was provided with a copy of that response and given an opportunity to respond to his comments. It did so by way of a letter dated 8 September 2022.

[18] The Notifications Assessment Committee of OTBNZ referred Mr Johnston for medical assessment. The assessor provided a report dated 18 October 2022. Mr Johnston provided a written response to the report on 31 October 2022.

[19] On 9 November 2022, OTBNZ made an order suspending Mr Johnston's registration as an occupational therapist. It notified Te Whatu Ora as the employer, along with other agencies, under s 35 of the HPCAA.

[20] On 14 November 2022, Te Whatu Ora invited Mr Johnston to a meeting to discuss the implications of the notification. It advised that he may be given notice of termination on the grounds that he was no longer able to fulfil his role.

[21] The parties met on 16 November 2022. They discussed a number of matters including the requirement for Mr Johnston to be registered, the support provided by OTBNZ, Mr Johnston's concerns with the way in which the notification had been made to OTBNZ, next steps, and whether there were any redeployment opportunities.

[22] Mr Johnston was invited to a further meeting which took place on 6 December 2022. At that meeting, Mr Johnston was notified that his employment would be terminated on notice on the basis that he did not currently hold registration as an occupational therapist and his suspension appeared to be indefinite.

[23] On 7 December 2022, the day after the meeting, the PSA wrote to Te Whatu Ora on behalf of Mr Johnston, raising a personal grievance for unjustified dismissal. The letter stated that the decision to terminate Mr Johnston had been made in haste, was pre-determined, and that there was a desire to remove him "from his role without meeting the obligation to support someone with a disability". The letter further clarified:

> The decision and how he has been treated has had a huge impact on his health and wellbeing. His already low confidence has been compromised. It is really disappointing to see an organisation take this punitive approach rather than being supportive of someone with a genuine disability to help him perform his role.
>
> Please consider this email as notification of a Personal grievance for unjustified dismissal.
>
> As remedy to this matter, we ask
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> That [Mr Johnston] is redeployed to a new role that is suitable, where he can be provided with support to meet any conditions outlined by the OT board

[24] Mr Johnston's PSA representative, Mr Wealleans and Ms Stevenson, HR manager for Te Whatu Ora, discussed matters further.

[25] The outcome of the 6 December meeting was confirmed in a letter dated 15 December 2022.

[26] The PSA sent a further letter dated 19 December 2022, without having read the letter from Te Whatu Ora. It recorded Mr Wealleans' understanding from his discussion with Ms Stevens. It stated, amongst other things:

> [Mr Johnston] has been diagnosed with some conditions that has directly affected his ability to meet his employment obligations.
>
> A fair and reasonable employer cannot discriminate someone with a disability and has an obligation to support them and remove barriers in order for them to carry out their role.
> …
> There was agreement that we needed to wait for information from the professional body on how to proceed with the PG and we would need to park the conversation till then. As part of parking that conversation I understood any decision to terminate would be suspended.

[27] On 20 December 2022, Ms Stevenson responded, setting out her recollection of the discussions, confirming the reason for termination, advising that there was no agreement to "park" the termination, but agreeing to discuss the matter further. She stated, amongst other things:

> My perception from reading your personal grievance letter was that perhaps you thought that his employment was terminated on grounds of medical incapacity, and I wanted to clarify that that was not the case. The reason for termination was solely that his registration is currently suspended.

[28] It is unclear what happened from that point. The next document before the Court was a letter from Ms Fechney, Mr Johnston's advocate, dated 10 November 2023, advising that she was instructed to progress the personal grievance raised by the PSA on his behalf. The letter states:

> 2. I have been instructed to progress [Mr Johnston's] personal grievance, raised on 7 December 2022 through his representative with the Public Service Association ("PSA"). In this personal grievance, [Mr Johnston] expressly raised a personal grievance for unjustified dismissal, and impliedly raised a personal grievance for discrimination, on the basis that his employment was terminated in circumstances that were unfair and unreasonable, and for reasons relating to his disability; being Attention Deficit Hyperactivity Disorder ("ADHD").
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> 3. It is my view that [Mr Johnston] is able to progress a personal grievance for discrimination, in accordance with sections 122 and 160 of the Employment Relations Act 2000. [Mr Johnston's] personal grievance outlines that his disability has directly influenced his ability to carry out his role and argues that Te Whatu Ora should have provided him an opportunity to explore the accommodations he required to be able to meet Te Whatu Ora's expectations.

[29] On 27 November 2023, Ms Stevenson wrote in response, stating Te Whatu Ora's disagreement and that there were no grounds for a grievance or remedies.

Is the plaintiff's personal grievance claim for discrimination out of time?

[30] Te Whatu Ora says a personal grievance for discrimination was not raised at the time and is now outside the 90-day time limit.

Law

[31] Section 114(1) of the Act requires an employee to raise his or her grievance with an employer within 90 days of the action alleged to amount to a personal grievance occurring or coming to the notice of the employee.

[32] Section 114(2) of the Act provides that:

> … 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.

[33] The issue of what amounts to raising a personal grievance has been dealt with by the Court on many occasions, and the parties refer to a number of authorities. Some key principles emerge and have been usefully summarised in *Chief Executive of Manukau Institute of Technology v Zivaljevic*:[3]

> [36] 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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> [37] It does not matter what an employee intended their complaint to be, or the 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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> [38] 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

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3 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]–[38].

> grievance, that is to respond to it on its merits with a view to resolve it soon and informally, at least in the first instance.
>
> (footnotes omitted)

[34] This passage was adopted in *Teddy and Friends Ltd v Page*,[4] and it is endorsed here.

Submissions

[35] Mr Johnston submitted that the approach to s 114 is broad. There is a relatively low threshold test to establish that a personal grievance has been made in time, which ensures that employees are not unfairly barred from raising grievances due to formalistic requirements, aligning with the overall purpose of the Act.[5] He said his personal grievance was raised within one day of the notification of termination and raised concerns about predetermination and discrimination. Further, the notification Te Whatu Ora made to OTBNZ was the starting point of a continuous process that culminated in the plaintiff's termination, which he claimed was both unjustified and discriminatory.

[36] During the hearing, Ms Fechney noted that the remedies sought in the 7 December letter (redeployment),[6] and the clarification made in the 19 December letter,[7] indicate that Mr Johnston was raising a discrimination grievance.

[37] Te Whatu Ora argued that the 7 and 19 December letters did not raise a personal grievance for discrimination. It said that while there is no precise formula for raising a personal grievance, the nature of the personal grievance should be specified sufficiently to enable the employer to address it.[8] In her affidavit, Ms Stevenson considered that the 7 December letter raised a personal grievance of unjustified dismissal, not any other personal grievance. Te Whatu Ora maintained that it was not

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4 *Teddy and Friends Ltd v Page* [2022] NZEmpC 129 at [19]–[20].
5 Citing *Board of Trustees of Te Kura Kuapapa Motuhake o Tawhiua v Edmonds* [2008] ERNZ 139 (EmpC) at [42].
6 See above at [23].
7 See above at [26].
8 Referring to *Chief Executive of Manukau Institute of Technology v Zivaljevic,* above n 3, at [38]; and *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

at all obvious from the communications that a personal grievance for discrimination was being made and therefore there is no jurisdiction to consider this claim.

[38] During the hearing, Mr Russell, counsel for Te Whatu Ora, further submitted that an authorised representative such as the PSA bears a higher onus for raising a personal grievance explicitly. He argued that the personal grievance in relation to dismissal was explicit, but disability was only raised in the context of the unjustified dismissal and a discrimination grievance could not be implied. He also noted that not every criticism of an employer or workplace culture will constitute a personal grievance.[9]

[39] Mr Russell referred to *Disabilities Resource Centre Trust v Maxwell,* where the Court distinguished between alleging unjustifiable disadvantage in circumstances where the employer may not know what actions are being complained of, and an explicit dismissal where the action about which the employee is complaining is the dismissal by the employer.[10]

[40] Te Whatu Ora further submitted that the alleged personal grievance constituting a continuous cause of action is irrelevant, and that s 122 of the Act, which would allow a finding that a personal grievance is of a type other than that alleged, is not applicable.

Analysis

[41] In some cases the failure of authorised representatives to raise a personal grievance may constitute exceptional circumstances justifying a departure from the notification period.[11] However, there is no higher onus on an authorised representative, such as the PSA, to explicitly articulate a personal grievance. The test is one of sufficiency.

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9 *Preece v Synlait Milk* [2024] NZEmpC 238, [2024] ERNZ 1141 at [32]; and *Shaw v Bay of Plenty District Health Board* [2022] NZCA at [19].

10 *Disabilities Resource Centre Trust v Maxwell* [2021] NZEmpC 14 at [18].

11 See for example *Creedy v Commissioner of Police*, above n 8, at [63]–[65].

[42] It is well established that raising a grievance is distinct from the more formal requirements attached to the filing of a statement of problem or statement of claim.[12] The issue is whether the employer has been provided with sufficient detail of the complaint for it to respond to it.

[43] Mr Russell disputed that it was the intention of the PSA to raise a personal grievance for discrimination and maintained that Te Whatu Ora did not recognise the complaint as raising a personal grievance for discrimination. However, it does not matter what the employee intended their complaint to be or whether the employer recognised the complaint as a personal grievance.[13]

[44] Here, Te Whatu Ora was informed that Mr Johnston had been diagnosed with conditions that may impact his ability to work. The 7 December letter alleged that Te Whatu Ora had taken a punitive approach rather than being supportive of his disability and helping him to perform his role. The 19 December letter is clearer, adding to the totality of communications; it refers to diagnosed conditions, the obligation to support and remove barriers to performance, and the prohibition on discrimination.

[45] The framing and language of a personal grievance for discrimination, or any personal grievance, is not required to correspond with the statutory language of the Act, although the 19 December letter specifically refers to the obligation on an employer not to discriminate and to remove barriers to employment. When viewed objectively, the letter put Te Whatu Ora on notice that it had a positive obligation to support Mr Johnston as an employee with a disability, and that he believed that its failure to do so constituted discrimination.

[46] Accordingly, I find that having regard to the totality of the correspondence, Mr Johnston raised a personal grievance for discrimination within the 90 days prescribed by s 114(1) of the Act.

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12 *Idea Services Ltd (In Stat Man) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].
13 *Chief Executive of Manukau Institute of Technology v Zivaljevic,* above n 3, at [37].

Are there any employment obligations on an employer when making notifications about an employee to a responsible authority under the HPCAA?

[47] Whether an employer, such as a healthcare provider, is required to comply with employment obligations before making notifications under the HPCAA is a matter of statutory interpretation. Accordingly, it is appropriate to consider this question in light of established principles.

Law

[48] Section 10(1) of the Legislation Act 2019 requires the meaning of the HPCAA to be ascertained from its text and in the light of its purpose and context.

[49] The purpose of the HPCAA is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.[14]

[50] The HPCAA creates a framework within which each health profession establishes and monitors professional practice to protect the health and safety of members of the public.[15] The task of establishing and meeting the required standards of professional conduct is then left to each health profession.

[51] The OTBNZ is an authority under the HPCAA appointed to be responsible for the practice of occupational therapists.[16] Its functions are set out in s 118 of that Act. It follows that all occupational therapists must adhere to the practice-related requirements and ensure compliance with the HPCAA.[17]

[52] Part 3 of the HPCAA provides mechanisms to deal with, and improve, the competence of health practitioners who practise below the required standard of competence or who are unable to perform the required functions. Among the

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14 Health Practitioners Competence Assurance Act 2003, s 3.
15 Section 3.
16 Sections 5(1) and 114, and sch 2.
17 Section 185.

mechanisms under pt 3 are notifications which are made under ss 34 and 45 of the HPCAA. Section 34 states:

> **34 Notification that practice below required standard of competence**
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> (1) If a health practitioner (health practitioner A) *has reason to believe* that another health practitioner (health practitioner B) *may pose a risk of harm to the public by practising below the required standard of competence*, health practitioner A *may* give the Registrar of the authority that health practitioner B is registered with written notice of the reasons on which that belief is based.
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> …
>
> (3) Whenever an employee employed as a health practitioner resigns or is dismissed from his or her employment for reasons relating to competence, the person who employed the employee immediately before that resignation or dismissal *must* promptly give the Registrar of the responsible authority written notice of the reasons for that resignation or dismissal.
>
> (4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.
>
> (emphasis added)

[53] Notifications made under s 34(1) are made by an individual health practitioner who, in this case, was Ms Wallis. Notifications are discretionary, with the exception of s 34(3) which requires employers to notify the responsible authority where an employee has resigned or has been dismissed from employment for reasons relating to competence.

[54] What is meant by a "a required standard of competence" under s 34 is defined as "… the standard of competence reasonably to be expected of a health practitioner practising within that health practitioner's scope of practice."[18] Notifiers are immune from civil or disciplinary proceedings in relation to the notice; immunity is qualified and does not extend to notifications which are made in bad faith. Bad faith is not defined under the HPCAA.

[55] Where a notification is made under s 34, the responsible authority must make inquiries into, and may review, the competence of a health practitioner registered with the authority and who holds a current practising certificate.[19] However, the

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[18] Health Practitioners Competence Assurance Act 2003, s 5.

[19] Section 36.

responsible authority is not required to inquire into the notice if there is reason to believe that the notice given under s 34 is frivolous or vexatious.[20]

[56] Section 45 of the HPCAA states:

> **45 Notification of inability to perform required functions due to mental or physical condition**
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> (1) Subsection (2) applies to a person who—
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> (a) is in charge of an organisation that provides health services; or
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> (b) is a health practitioner; or
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> (c) is an employer of health practitioners; or
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> (d) is a medical officer of health.
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> (2) If a person to whom this subsection applies *has reason to believe that a health practitioner is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition*, the person *must promptly* give the Registrar of the responsible authority written notice of all the circumstances.
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> (3) If any person has reason to believe that a health practitioner is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition, the person may give the Registrar written notice of the matter.
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> …
>
> (6) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.
>
> (emphasis added)

[57] Section 45(2) imposes mandatory reporting upon certain persons,[21] including employers, where they have reason to believe that a health practitioner is unable to perform the functions required because of a mental or physical condition.

[58] Like s 34, the notifier is immune from civil or disciplinary proceedings unless they have acted in bad faith.

Parties' submissions

Plaintiff

[59] Ms Fechney, for Mr Johnston, focused her submissions on the formation of a "reason to believe". She submitted that employer obligations under the Act must be

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20 Health Practitioners Competence Assurance Act 2003, s 36(3).

21 Section 45(1).

satisfied before a healthcare provider or a person acting on behalf of the healthcare provider can properly form a reason to believe that a notification is warranted under ss 34(1) or 45(2). She said it requires a sound and objectively supportable basis for concern, reached through a procedurally fair inquiry.

[60] The plaintiff submitted that this, in turn, requires a fair and reasonable employment process, as required by ss 4 and 103A of the Act (which may be informed by obligations under the Human Rights Act 1993), before a reason to believe can be formed that an employee's competence or fitness to practise has fallen below the required standard.

[61] Ms Fechney cited several authorities demonstrating the Court's jurisdiction to interpret other statutes in the employment context and where the Court has been required to interpret and apply provisions in other legislation to resolve employment relationship problems.[22] She said the Court's power to interpret the HPCAA is no different.

[62] Referring to cases involving the Nurses Act 1977, Ms Fechney suggested that an employer must first investigate and substantiate its concerns through a procedurally fair process.[23] She submitted that while the legislative framework has changed, there is an underlying expectation that a fair employment process must precede notification to a professional body.

[63] This approach is also seen in case law addressing when and how an employer may involve external agencies in employment matters, such as referrals to police. By analogy, Ms Fechney argued that referrals under the HPCAA cannot be made without first affording the employee a proper opportunity to respond, as this risks undermining the good faith obligations underpinning the employment relationship.

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22 Referring to *Air Nelson Ltd v Neil* [2008] 1 ERNZ 483 (EmpC); *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347; *Fox v Hereworth School Trust Board* [2013] NZEmpC 219; *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205, [2021] ERNZ 1210; *Amos v Canterbury District Health Board* ERA Christchurch CA 53/06, 19 April 2006; and *Health Waikato Ltd v Tebbutt* [2003] 2 ERNZ 398 (EmpC) at [77].

23 *Amos v Canterbury District Health Board,* above n 22; and *Health Waikato Ltd v Tebbutt,* above n 22.

[64] Ms Fechney also suggested that principles in the labour hire context are applicable in the present case; namely, when an employer refers an employee to a professional body in a way that may lead to suspension, investigation or reputational damage, the employer cannot disclaim responsibility for the consequences. The duty of good faith requires the employer to ensure that referrals are made only after a fair and reasonable process has been followed.

[65] In respect of the statutory immunity provisions, Ms Fechney submitted that they amount to an ouster clause and accordingly should be construed narrowly: a "person" should be interpreted to mean the individual person that made the notification, immunity should only apply to notices given where forming a reason to believe follows an employment process, and bad faith should be interpreted as the absence of good faith to ensure consistency with the purpose of the Act.

Defendant

[66] Te Whatu Ora argued that there are no employer obligations relating to notifications under the HPCAA. It said that the notification is not an employment relationship problem under the Act, either factually or legally. It referred to the Supreme Court's articulation of an employment relationship in *FMV v TZB*:[24]

> The question is simply one of fact. If the controversy arises during the course of the employment relationship *and* in a work context, then it will be an employment relationship problem. That is because the expectations arising out of an employment relationship apply only in a work context. This does not necessarily mean only "at work during work hours", though if the problem arises in that context, it will almost certainly be an employment relationship problem.

[67] Factually, it said Mr Johnston had not raised or pleaded a personal grievance in relation to the notification. At best, it may form part of the background of the dismissal; however, any causal link between the notification and the dismissal was broken by OTBNZ's independent investigation and unilateral decision to suspend his registration.

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[24] *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [93].

[68] In relation to the jurisdictional issues, it noted that there may be instances of overlapping statutes creating the possibility of competing jurisdictions. However, as noted in *FMV*, it said that this is a question of statutory interpretation.

[69] Te Whatu Ora argued that the HPCAA displaces the Act and employment obligations contained in it because it is a specific statute, passed later in time than the Act, and therefore displaces the general provisions of the Act in respect of employer obligations.

[70] On the text and purpose of the HPCAA, Te Whatu Ora noted that neither s 34 nor s 45 refers to employment obligations, and ss 34(3) and 45(2) in particular are mandatory obligations to notify the responsible authority. It also highlighted that the notification in s 34(1) was made by Ms Wallis, another health practitioner, and that there is no ability to pursue her as an individual. Te Whatu Ora emphasised that notifications made by health practitioners are treated differently, which further demonstrates that notifications under the HPCAA are not employment relationship problems which support importing employment obligations.

[71] Te Whatu Ora submitted that the central purpose of the HPCAA (protection of the public) is not contemplated to be through, or by, the employer of the health practitioner (although this will happen in practice in many cases through employment processes). It argued that nowhere does the HPCAA envisage a further overlay to its processes being provided in the employment environment by the Authority or the Court. Importing employment obligations would be contrary to the plain wording of ss 34 and 45 and would undermine the purpose of the HPCAA.

[72] That submission is supported by the statutory immunity and notification requirements in ss 34 and 45, which are set at a deliberately low threshold akin to a prima facie case and/or allegations that have an evidential basis. "Reason to believe" is considered a subjective test.

[73] In *Evans-Walsh v Southern District Health Board* which concerned a notification under s 34(3), the Court held:[25]

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[25] *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46, at [41].

> I agree that s 34 requires a causal connection between dismissal or resignation and notice, but Ms Thomas' submissions would result in the test being too narrow and would be inconsistent with the HPCAA. The words "… relating to …" suggest no more than that the subject of competence was raised or played some part in the decision to end a nurse's employment. It was not necessary for the DHB to establish a competence issue, or to attempt to take into account Ms Evans-Walsh's views about the complaints against her, or to try to ascertain why she had resigned before notifying. *Requiring that level of inquiry would involve the DHB in reaching conclusions about complaints or undertaking steps that are the antithesis of the investigation procedure created by the HPCAA.* If that were the case a nurse could avoid notification, perhaps in all but very serious cases, by the expedient step of resigning while frustrating a DHB's inquiry by disputing a complaint to prevent adverse conclusions being reached. That is not what s 34(3) intends and also explains why s 34(4) provides protection from civil liability; to prevent repercussions from notification that does not result in action by the Council.
>
> (emphasis added)

[74] Te Whatu Ora said that while s 34(3) is not dealing with a reason to believe as a prerequisite for making a notification, the approach taken by the Court in *Evans-Walsh* is consistent with how notifications generally should be considered.

[75] It said it would be contrary to the text, purpose and context of the HPCAA that an employer be required to formalise its concerns, complete an employment process with an employee and make findings before it could contemplate providing a notification. It also referred to the Health and Disability Commissioner Act 1994 which stresses that healthcare providers are responsible for their employees.[26]

[76] The defendant also referred to the parliamentary debates on the HPCAA, which it said demonstrate that the health and safety of the public was its primary justification, which can be contrasted with the fundamental obligation of good faith under the Act.

[77] Te Whatu Ora also relied on *Auckland City Council v New Zealand Public Service Assoc Inc,* where the Court held that conduct to which obligations of good faith adhere in one context will not necessarily lead to the same obligations in another context.[27] It submits that here, good faith obligations which arise under the Act are displaced by the HPCAA. The decision to notify was not one which would have or

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[26] See for example Health and Disability Commissioner Act 1994, s 72.

[27] *Auckland City Council v New Zealand Public Service Assoc Inc* [2002] 2 NZLR 10, [2003] 2 ERNZ 386 (EmpC) at [21].

was likely to have an adverse effect on the continuation of employment as Te Whatu Ora had no control over whether it would affect the continuation of employment. Rather, it was exercising a statutory obligation or right.

[78] Addressing broader public policy considerations, Te Whatu Ora suggested that treating employer obligations as mandatory under the HPCAA may open the "floodgates" of litigation, create a chilling effect and extend to other professional bodies.

[79] Overall, it submitted that there are limits to the obligations contained in the Act and in cases of inconsistency, a principled approach is preferable. Failing to adhere to this approach may create a two-tier system of notifications under the HPCAA (contrary to its intention) as "reason to believe" under ss 34 and 45 will have different requirements depending on whether a health practitioner is an employer.

[80] Lastly, Te Whatu Ora offered a set of principles it considered relevant to this principled approach but which go beyond the scope of these proceedings.

Analysis

Reason to believe

[81] Sections 34 and 45 of the HPCAA do not contain any express reference to employment obligations under the Act. The question is whether such obligations can be read in before a "reason to believe" can be properly formed.

[82] "Reason to believe" is not defined under the HPCAA; however, in *D v Physiotherapy Board of New Zealand*,[28] the High Court remarked on this threshold issue in the context of an appeal pursuant to s 113 of the HPCAA.

[83] The High Court considered the scope of appeals under s 106 and noted that the terms of s 38 were relevant. Section 38(1) provides that where the authority has reason to believe a health practitioner fails to meet the required standard of competence, it

[28] *D v Physiotherapy Board of New Zealand* HC Wellington CIV 2006-485-1980, 15 October 2007.

must make one or more of the range of orders specified. In relation to what may constitute a reason to believe under s 38, it stated:[29]

> … The prerequisite is that the authority has "reason to believe" that a health practitioner fails to meet the required standard of competence. It is not a finding of fact that the health practitioner does not meet the required standard. That is an important distinction in considering whether the right of appeal is intended to include that aspect. It is common place for an appellate court to have to consider whether the evidence is sufficient to justify a finding of fact which has been made by a tribunal. The test is a purely objective one. There are clear guidelines, both statutory and at common law, as to the role of an appellate court in reviewing findings of fact. *But here the required finding is not a finding of fact, but a finding that the authority "has reason to believe". The test is not an objective one. It is at least partly subjective.* If s 106 applies to that issue, then it would not be appropriate for the appellate Court to substitute its own view as to whether it had reason to believe that the required standard of competence was not met…
>
> (emphasis added)

[84] While *D v Physiotherapy Board of New Zealand* was determined under a different provision, I consider the statements are instructive as to what is required when considering whether there is a "reason to believe".

[85] In light of those observations, having "reason to believe" can be understood as a threshold requirement or prima facie case. It does not require a conclusive determination or finding of fact that a health practitioner has fallen below competence or fitness to practise. It is partly subjective, focused on the notifier's state of mind.

[86] While Ms Fechney submitted that a s 103A process must be undertaken before a "reason to believe" can be formed, I do not agree. Section 103A applies where the Court is reviewing an employer's actions, not their state of mind. Given the purpose of the HPCAA and the findings above in relation to the threshold nature of forming a "reason to believe", a formal process, as contemplated by s 103A, is not required before an employer is able to say they have "reason to believe".

[87] However, this does not mean that good faith and other obligations are suspended. They continue to apply to both parties throughout the employment relationship.

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[29] At [18].

[88] Having determined what is required to have a reason to believe, it is then necessary to look at what that means in the context of notifications under ss 34 and 45. Sections 34 and 45 are separate and quite different provisions and need to be approached accordingly.

Section 34 HPCAA

[89] In relation to s 34, the obligation to notify, which is discretionary, is on individual health practitioners. A health practitioner is defined as "a person who is, or is deemed to be, registered with an authority as a practitioner of a particular health profession."[30]

[90] Under s 34, a health practitioner "may" make a notification. The wording requires the exercise of a discretion on the part of an individual in their individual professional capacity. Section 34(1) does not explicitly contemplate *employers* of health practitioners making notifications relating to competence.

[91] The HPCAA maintains a distinction between "health practitioners" and "employers of health practitioners". In respect of notification provisions, mandatory notifications under s 45(2) apply to both health practitioners as well as employers of health practitioners, and s 34(3) specifies a separate mandatory reporting obligation on "the person who employed the employee". The omission of any reference to employers in s 34(1) is therefore intentional. The discretionary duty to notify attaches solely to health practitioners in their individual capacity, as does the ability to claim statutory immunity.

[92] Consistent with the context and purpose of the HPCAA, s 34(1) provides a pathway for individual health practitioners to raise concerns relating to the competence of other professionals, independent of any disciplinary or employment process. The provision contemplates situations within an organisation where an employee notifies the registrar of an authority that another employed health practitioner may pose a risk of harm to the public, and gives the reasons on which that belief is based, without (necessarily) any reference to the employer first. Statutory

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30 Health Practitioners Competence Assurance Act 2003, s 5(1).

immunity also protects the individual notifier against disciplinary proceedings and retaliation from their employer or by the healthcare practitioner who is the subject of the notification.

[93] Where the health practitioner is also the employer,[31] or an agent/representative of the employer, such as a manager,[32] any immunity extends only to notifications made in their individual capacity as a health practitioner, rather than as an employer. As an employer, the health practitioner has obligations which are parallel to the HPCAA and are not suspended or displaced by it.

[94] Where the health practitioner is the employer, they retain a discretion about whether to make a notification. Where that decision to notify will or is likely to have an adverse effect on continuation of employment of the employee (which will be a question of fact in each case), the employer is required to comply with s 4(1A)(c) of the Act in making a decision about whether to notify. Having reviewed the wording of the HPCAA, there is nothing in it that displaces that requirement. Such requirement does not undermine the purpose of the HPCAA and, if anything, such requirement will assist in better decision making with full information.

Section 45 HPCAA

[95] Likewise, where an employer has concerns about the impact of a health practitioner's mental or physical condition on their ability to perform required functions, it has ongoing employment obligations which are parallel to those under the HPCAA. However, given the wording of s 45, which makes notification mandatory, I agree with Te Whatu Ora that, once the subjective threshold is reached, and an employer has reason to believe that a health practitioner is unable to perform the functions required for the practice of their profession because of some mental or physical condition, there is no requirement to undergo a formal process before notifying. Nor, as already noted above, given the subjective prima facie nature of "reason to believe", is a formal process required before reaching that belief. Unlike with s 34(1), the decision as to whether to notify is taken away from the employer.

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31 As may often be the case in a medical practice.
32 Such as, in this case, with Ms Wallis.

The employer or other persons referred to in s 45(1) must notify; it is not discretionary. Further, the requirement is to notify promptly. To impose an employment process as a prerequisite could put an individual health practitioner or employer in breach of the HPCAA and undermine the purpose of that legislation.[33]

[96] The purpose of notifications under the HPCAA is to provide a mechanism to notify responsible authorities about concerns relating to a health practitioner's competence or fitness to practise. Once a notification is made, it is then the role of the responsible authority to make inquiries, provided the notification is not vexatious or frivolous (under s 34).[34] An employer who makes a notification under s 45, or s 34(3), does not have control over the outcome or decision of the responsible authority.

[97] That is not to say that the normal employment obligations of good faith are suspended or dissipated; they continue to apply. The parties must be active and constructive in maintaining a productive employment relationship.[35] The immunity lies only in relation to the notification and the notifier. The employer's conduct surrounding that notification remains governed by the obligations of good faith and any other obligations arising under the applicable employment agreements. This is consistent with the carveout for notifications made in bad faith.

Jurisdiction

[98] Te Whatu Ora submitted that the Court does not have jurisdiction to consider matters arising out of notifications under the HPCAA.

[99] The right of appeal in the HPCAA to the District Court relates only to decisions or directions of an authority.[36] I accept that this Court has no jurisdiction in relation to such decisions. As noted above, once a notification is made, the consequences of that notification are out of the employer's or employee's control except to the extent that an employer may continue to engage with an authority.

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33 *Evans-Walsh v Southern District Health Board*, above n 25, at [41].
34 See above at [55].
35 Employment Relations Act 2000, s 4(1A)(b).
36 Health Practitioners Competence Assurance Act 2003, s 106.

[100] However, the HPCAA does not displace employment obligations under the Act, except to the extent set out above, or prevent the Court from exercising jurisdiction over employment relationship problems raised in the context of a notification. Te Whatu Ora has referred to this legislation as specific compared to the Act, which it describes as general. That may be correct in relation to the specific requirements of the HPCAA. However, there is nothing in the wording of the HPCAA that expressly or impliedly displaces the jurisdiction of the Court in relation to employment relationship problems. This Court has exclusive jurisdiction in such circumstances.[37]

[101] Te Whatu Ora argued that the reference to bad faith within ss 34 and 45 appears superficially linked to the obligations of good faith under the Act. However, it maintained that it is a separate test applying in different situations, and it is not the same as an absence of good faith in the employment context. It also suggested that the jurisdiction to determine whether there is bad faith in making a notification rests with the District Court, which has jurisdiction over most aspects of the HPCAA.

[102] I agree that the absence of good faith does not amount to bad faith.[38] However, while the right to appeal a decision of an authority rests with the District Court, there is nothing to suggest that establishing whether a notification was made in bad faith, where there is an employment relationship, rests with the District Court. The language in ss 34 and 45 is broad, simply referring to immunity from any "civil or disciplinary proceeding". The HPCAA does not set out where jurisdiction for determining the existence of bad faith lies. In those circumstances, it is common sense that such determination sits with the court which has jurisdiction for the proceedings within which the claim of bad faith is made. In the case of proceedings arising from an employment relationship, that is this Court.

[103] I consider that this Court has jurisdiction to determine bad faith for the purposes of whether statutory immunity is engaged. Establishing bad faith is an

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37 *FMV v TZB*, above n 24, at [105].

38 See for example *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28, [2024] ERNZ 43 at [60]–[61].

evidential question. There is no reason why this Court cannot determine that factual issue as a preliminary matter.

[104] I reiterate that there is no suggestion that the notifications by Te Whatu Ora were made in bad faith. Accordingly, it is not necessary to identify the threshold for bad faith in this proceeding, although Te Whatu Ora suggests that bad faith connotes maliciousness or at least recklessness. If bad faith is established, the notifier is no longer subject to immunity. Where the notifier is an employer, the employer's actions in making a notification in bad faith fall squarely within the jurisdiction of this Court. It is likely that making a notification under s 45 in bad faith will be a breach of good faith under the Act; however, whether the notification itself was made in bad faith is a distinct, threshold inquiry to determine whether immunity is applicable.

[105] Further, where there is an employment relationship, the issue of immunity is likely to arise in the context of the proceedings where there are multiple claims, not limited to the issue of notification. It would be nonsensical to split proceedings between different jurisdictions, and entirely inconsistent with the approach of the Supreme Court in *FMV v TZB*.

Outcome

[106] Accordingly, the answer to question (a)[39] – whether Mr Johnston raised a personal grievance for discrimination in time and, if not, whether the discrimination grievance could otherwise proceed to a substantive hearing – is that Mr Johnston did raise a personal grievance for discrimination within the 90 days prescribed by s 114(1) of the Act and it may therefore proceed to the substantive hearing.

[107] The answer to question (b) – whether there are any employment obligations on an employer when making notifications about an employee to a professional body, being the "responsible authority" under the HPCAA[40] – is as follows:

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39 See above at [4](a).
40 See above at [4](b).

(i) Forming a reason to believe under ss 34(1) or 45(2) is a threshold requirement which is partly subjective, focusing on the notifier's state of mind.

(ii) Section 34(1) is directed at individual health practitioners, not employers. Health practitioners who are also employers may make notifications in their individual capacity; however, their obligations as employers are not displaced and when they are considering whether to exercise their discretion and make a notification, they must comply with s 4(1A)(c) of the Act.

(iii) Where an employer has reason to believe that a health practitioner employee is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition, the obligation to notify promptly is mandatory under s 45(2) of the HPCAA and no specific formal process is required of an employer before doing so.

(iv) Where the question of immunity arises in the context of an employment relationship problem, the Employment Court has jurisdiction under the Act to determine the issue.

[108] Both parties have been partially successful on these preliminary matters and the questions were brought before the Court as important questions of law. In those circumstances, I consider that costs should lie where they fall.

Kathryn Beck
Judge

Judgment signed at 4.30 pm on 18 February 2026