

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 717
3329960

BETWEEN SUSAN FERGUSSON
 Applicant

AND AKAROA HEALTH LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Elizabeth Lambert and Erika Whittome for the Applicant
 Jo Appleyard for the Respondent

Investigation Meeting: On the papers

Submissions and Further 8 May 2025 and 12 August 2025 from the Applicant
Information Received: 9 June 2025 and 12 August 2025 from the Respondent

Date of Determination: 10 November 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Susan Fergusson was employed by Akaroa Health Limited from 1 May 2019 until 19 October 2021. Ms Fergusson worked as a Chef for Akaroa Health in 2021.

[2] In September 2021 Akaroa Health undertook a health and safety assessment of the impact of Covid-19 on its workplace. Subsequently it began consultation with its employees over the possible introduction of a Vaccination Policy requiring employees to be vaccinated against Covid-19.

[3] On 12 October 2021 Ms Fergusson wrote to Akaroa Health raising concerns about the proposed Vaccination Policy. In addition, Ms Fergusson gave notice under s 83 of the Health and Safety at Work Act 2015 that she refused to work until the risks she perceived to be

present in the workplace were mitigated and/or remedied (the Section 83 Notice).

[4] Akaroa Health engaged with Ms Fergusson over the Section 83 Notice and established that Ms Fergusson was concerned over the presence of Covid-19 in the workplace; Ms Fergusson wanted testing carried out on the work surfaces to establish whether Covid-19 was present in the workplace.

[5] Despite further discussion and reassurance provided by Akaroa Health regarding the possible presence of Covid-19 in the workplace Ms Fergusson did not return to work.

[6] Having exhausted the avenues of engagement with Ms Fergusson over the Section 83 Notice, Akaroa Health commenced a disciplinary process concerning Ms Fergusson's refusal to return to work. As a conclusion from this process, Akaroa Health determined that Ms Fergusson had abandoned her employment from 19 October 2021 and was therefore deemed to have resigned, effective 19 October 2021.

[7] It appears that Ms Fergusson had concerns about Akaroa Health's response to the Section 83 Notice, but no substantive steps were taken regarding this until 14 October 2024 when Ms Fergusson lodged a statement of problem in the Authority.

[8] The employment relationship problem articulated in the statement of problem has two parts:

- (a) A claim that Ms Fergusson was employed until 8 November 2021, not 18 October 2021 as Akaroa Health determined.
- (b) A claim that Akaroa Health breached the obligations it owed to Ms Fergusson to protect her health and safety; the breaches arising by the introduction of a Vaccination Policy requiring Ms Fergusson to be vaccinated against Covid-19.

[9] In terms of the first limb of the employment relationship problem this can only be investigated by the Authority as a personal grievance for unjustified dismissal.¹

[10] For the second limb of the employment relationship problem Ms Fergusson says the obligations imposed on Akaroa Health that have been breached are:

¹ Employment Relations Act 2000, s 113.

- (a) An obligation to act justifiably; there being an unjustified action causing disadvantage personal grievance.
- (b) Contractual obligations arising as express and/or implied terms of her employment agreement.
- (c) Obligations under the Health and Safety at Work Act 2015.
- (d) The duty to act in good faith;² there being a basis to claim damages for this breach.

[11] Akaroa Health lodged a statement in reply. In this statement, Akaroa Health says I do not have jurisdiction to investigate Ms Fergusson's employment relationship problem because:

- (a) Ms Fergusson's personal grievances, that inform the problem, were not raised in time.³
- (b) There is no basis for the alleged breach of contract claims.
- (c) The Authority does not have jurisdiction to consider breaches of the Health and Safety at Work Act 2015.
- (d) The Authority cannot award damages for a breach of the duty of good faith.

[12] Akaroa Health has applied to have this employment relationship problem struck out on the basis that the Authority does not have jurisdiction.

The Authority's investigation

[13] I investigated the application to strike out by receiving written submissions and holding a conference call with the parties' representatives on 12 August 2025.

Do I have jurisdiction to investigate Ms Fergusson's employment relationship problem?

[14] I will consider the issue of my jurisdiction in each of the component parts of the employment relationship problem. I will consider, in turn:

² Employment Relations Act 2000, s 4.

³ Employment Relations Act 2000, s 114(1).

- (a) Did Ms Fergusson raise a personal grievance for unjustified dismissal within 90 days of her dismissal?
- (b) Did Ms Fergusson raise a personal grievance for unjustified action causing disadvantage within 90 days of the events complained of?
- (c) Is there a basis for the alleged breaches of actual and/or implied terms of Ms Fergusson's employment agreement?
- (d) Can I consider an action based on alleged breaches of the Health and Safety at Work Act 2015?
- (e) Can I award damages for a breach of the duty of good faith?

Was a personal grievance for unjustified dismissal raised within 90 days of the dismissal?

[15] Ms Fergusson's representative has not identified any communication that raises a personal grievance for unjustified dismissal.

[16] If Ms Fergusson says her unjustified dismissal personal grievance was raised by her communications of 25 August 2021 and the Section 83 Notice on 12 October 2021 (see para [24] below) then the three-year prohibition applies (see paras [25] and [26] below).

[17] As far as I can ascertain from the documents lodged with the statement of problem there is one other possibility for a communication that might have raised a personal grievance for unjustified dismissal – this is an email Ms Fergusson sent to Akaroa Health's lawyer (at the time) on 12 January 2022.

[18] In this email Ms Fergusson says (amongst other things):

- (a) That she had not received notice of termination and therefore she was still employed.
- (b) She was therefore entitled to be paid her usual wages or salary.
- (c) And, Akaroa Health had not complied with the Section 83 Notice.

[19] In response to this email Akaroa Health provided Ms Fergusson's representative with a copy of its decision regarding her resignation (dated 8 November 2021) and as she had resigned from 19 October 2021 Akaroa Health had no ongoing obligations to her in terms of wages/salary and health and safety.

[20] There does not appear to be any further correspondence or communication by Ms Fergusson or her representative on the issues raised and addressed in the correspondence.

[21] Assessing the exchange identified above I do not consider Ms Fergusson's email raises a personal grievance for unjustified dismissal – her email does not question Akaroa Health's dismissal of her rather she is saying she has not been dismissed because she has not received any notification. Then when Akaroa Health explains that she has been treated as having resigned she does not respond with any objection.

[22] In my view there is no communication identifying that Ms Fergusson disputed Akaroa Health's decision that she had resigned effective 19 October 2021 – in fact her silence once this was clarified suggests she accepted the notification of this.

[23] I conclude that Ms Fergusson did not raise a personal grievance for unjustified dismissal.

Was a personal grievance for unjustified action causing disadvantage raised within 90 days of the action complained of?

[24] Ms Fergusson says, through her representative, that she raised her personal grievance for unjustified action causing disadvantage to her employment in two pieces of correspondence; an email dated 25 August 2025 and the Section 83 Notice.

[25] The problem that arises here is that on Mr Fergusson's best-case scenario she raised her personal grievance on 12 October 2021 (the date of the Section 83 Notice). Ms Fergusson's statement of problem was then lodged on 14 October 2024. This means that if Ms Fergusson did raise her grievance for unjustified action on 12 October 2021 and this was within 90 days of the events that give rise to her grievance, she is subsequently outside of the three-year time frame for commencing an action in the Authority based on this grievance, as that was done on 14 October 2024.⁴

[26] So, ultimately, I cannot determine the 90-day issue for the personal grievance of unjustified action causing disadvantage purportedly raised on 12 October 2021, as the action cannot be commenced; I do not have jurisdiction to consider this action.

⁴ Employment Relations Act 2000, s 114(6).

Is there a basis for a breach of actual and/or implied terms of Ms Fergusson's employment agreement?

[27] Ms Fergusson's breach of contract claim is based on Akaroa Health breaching actual or implied terms of her employment agreement by introducing a vaccination policy requiring her to be vaccinated against Covid-19 to continue working.

[28] However, it is not clear from the statement of problem what terms of her employment agreement Ms Fergusson claims have been breached. I requested clarification on this point. Ms Fergusson, through her representative's, failed to set out the terms of her employment agreement (actual or implied) that she says Akaroa Health breached.

[29] Notwithstanding this failure there is a bigger issue for Ms Fergusson's breach of contract claim. Put simply, the action giving rise to the alleged breach by Akaroa Health did not occur for Ms Fergusson as she resigned before Akaroa Health implemented a vaccination policy. There can be no breach of contract for Ms Fergusson based on the introduction of a vaccination policy by Akaroa Health as Ms Fergusson was not an employee when the policy was implemented.

[30] I note here that this conclusion also holds for Ms Fergusson's alleged breaches of the Health and Safety Act 2015 and the alleged breach of the duty of good faith; both sets of breaches are also based on the implementation of a vaccination policy, requiring employees to be vaccinated against Covid-19.

Can I consider an alleged breach of the Health and Safety at Work Act 2015

[31] For completeness I record here, in any event, that the Authority does not have jurisdiction to investigate problems concerning breaches of the Health and Safety at Work Act 2015.⁵

Is there a basis to award damages for a breach of the duty of good faith?

[32] I also note here that there is no ability for the Authority to award damages for the breach of good faith between an employer and an employee – such breaches give rise to penalties.⁶ Ms Fergusson has not sought a penalty, rather she seeks damages. So, even if there was a basis for me to find that Akaroa Health did breach the duty of good faith this would be

⁵ Acknowledging that the Authority does have jurisdiction to consider unjustified disadvantage grievances and contractual claims based on the implied duty to provide a safe workplace.

⁶ *Wiles v The Vice Chancellor of the University of Auckland* [2024] NZEmpC 123.

futile and a penalty has not been sought and damages are not available.

Summary

[33] I find that:

- (a) Ms Fergusson did not raise a personal grievance for unjustified dismissal and I do not have jurisdiction to investigate the employment relationship problem based on the termination of her employment as at 19 October 2021.
- (b) I do not have jurisdiction to investigate an employment relationship problem based on unjustified action causing disadvantage as this was not commenced within three years of a relevant personal grievance being raised (if it was, in fact, raised).
- (c) Akaroa Health did not introduce a vaccination policy prior to Ms Fergusson's resignation so there was no obligation on her to become vaccinated against Covid-19 to continue to work for Akaroa Health. This means there is no basis for an alleged breach of contract either actual terms or implied. This also applies in respect of the allegations of breach of the Health and Safety at Work Act 2015 and breach of good faith.
- (d) The Authority does not have jurisdiction to consider alleged breaches of Health and Safety at Work Act 2015.
- (e) I cannot award damages for a breach of the duty of good faith and there is no claim for a penalty for breach of good faith. So, there is no basis to investigate the employment relationship problem concerning an alleged breach of good faith.

[34] For these reasons I do not have jurisdiction to investigate any part of Ms Fergusson's employment relationship problem.

Conclusion and orders

[35] I do not have jurisdiction to investigate Ms Fergusson's employment relationship problem against Akaroa Health and it is struck out.

Costs

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

[37] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Akaroa Health 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 Fergusson 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.

[38] 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.⁷

Peter van Keulen
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1