



Employment Court of New Zealand

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Hall v Fire and Emergency New Zealand [2024] NZEmpC 157 (21 August 2024)

Last Updated: 26 August 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2024\] NZEmpC 157](#)

EMPC 447/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an appearance under protest to jurisdiction
BETWEEN	KATRINA HALL Plaintiff
AND	FIRE AND EMERGENCY NEW ZEALAND Defendant

Hearing: 5 June 2024
(Heard at Auckland)

Appearances: V Corbett, counsel for plaintiff
S Brookes and M Henderson-Rauter, counsel for
defendant

Judgment: 21 August 2024

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK

(An appearance under protest to jurisdiction)

[1] These proceedings involve a challenge to a preliminary determination of the Employment Relations Authority.¹

[2] The Authority found Ms Hall failed to raise a personal grievance or personal grievances for unjustifiable disadvantage within 90 days of the alleged disadvantages occurring and so was unable to pursue them. It also found, however, that Ms Hall was able to pursue a penalty claim for an alleged breach of good faith relating to her

¹ *Hall v Fire and Emergency New Zealand* [\[2023\] NZERA 648 \(Member Larmer\)](#).

KATRINA HALL v FIRE AND EMERGENCY NEW ZEALAND [\[2024\] NZEmpC 157](#) [21 August 2024]

suspension without pay from 8 May 2022.² That claim was put on hold in the Authority pending the hearing of this challenge.

[3] The parties agreed that the Employment Court should consider whether the plaintiff raised a personal grievance or personal grievances within the 90-day statutory timeframe as a preliminary matter.

[4] The plaintiff has subsequently withdrawn the penalty claim in the Authority and, if successful in this preliminary matter, seeks to have the proceedings remain in the Court rather than referred back to the Authority.

[5] Accordingly, the parties have also asked the Court to determine, if it is found that the personal grievances were raised

within 90 days, whether the matter should be referred back to the Authority to determine the plaintiff's personal grievance claims, or whether they should remain with the Court to be determined there.

[6] The plaintiff's claims arise against the backdrop of COVID-19 and the [COVID-19 Public Health Response \(Vaccinations\) Order 2021](#) (Vaccinations Order).

[7] Fire and Emergency New Zealand (FENZ) determined that Ms Hall was covered by the order because she is a firefighter.

[8] Ms Hall did not obtain a COVID-19 vaccination.

[9] As an unvaccinated employee, she was stood down from duties, on special COVID-19 paid leave, from 30 November 2021 until 8 May 2022.

[10] From 8 May 2022 until 23 July 2022, she remained suspended but without pay. She was able to use some of her leave entitlement over this period.

2. There was some inconsistency in the documentation before the Court as to whether pay ceased on 7 or 8 May 2022. However, it is not material to the proceeding and does not have any bearing on the outcome. I refer to it as 8 May 2022 in this judgment.

[11] On 30 June 2022, the Vaccinations Order was amended to take effect from

11.59 pm on 7 July 2022.³ This meant that from 8 July 2022, FENZ employees would no longer be required to be vaccinated under the Order.

[12] Ms Hall returned to work on 23 July 2022.

[13] Ms Hall says the stand-downs and the way in which they were carried out were unjustifiable and disadvantaged her in her employment.

[14] FENZ denies its actions were unjustified but says that, in any case, Ms Hall raised her grievances outside of 90 days and that it does not consent to her raising them out of time.

[15] The focus of this judgment is the issue of when Ms Hall sought to raise personal grievances, not the substance of those grievances.

Issues

[16] The issues for determination by the Court are:

- (a) whether Ms Hall raised a grievance of unjustified disadvantage in relation to the defendant's decision to stand her down/suspend her from 30 November 2021 until 8 May 2022 within 90 days;
- (b) whether Ms Hall raised a grievance of unjustified disadvantage in relation to the defendant's decision to stand her down/suspend her on unpaid special leave from 8 May 2022 until 23 July 2022 within 90 days; and
- (c) if either of the above questions is answered affirmatively, whether the matter should be referred back to the Authority to determine the plaintiff's personal grievance claim(s).

3 [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 5\) 2022](#).

The law

[17] Under s 114 of the Employment Relations Act (the Act), an employee wishing to raise a personal grievance with his or her employer must usually do so within the 90-day employee notification period.⁴

[18] Under s 114(2), a personal 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.

[19] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the Court summarised principles from earlier cases about what is required to raise a personal grievance:⁵

[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.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred 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.

[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 grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[20] However, although the employer must know what it is responding to, it is unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Authority.⁶

4 [Employment Relations Act 2000, s 114\(7\)](#).

5. *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

6 *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 (EmpC) at [37].

[21] The goal of the personal grievance process is to allow parties to raise and discuss problems directly to help ensure that they are resolved quickly and successfully.⁷ There is no place for rigid formal procedures at this stage.⁸ On that note, the United Kingdom Employment Appeal Tribunal provides helpful comments in the context of a similar provision which is now repealed:⁹

... the need for parties to understand each other's position before proceedings are launched (and the opportunity for resolution short of litigation) is to be welcomed, but what must be guarded against, once such legislation has been enacted, is that it can create its own hostage to fortune and, in fact, introduce an entirely and, we are satisfied, unintended result of creating undue technicality and over-sophistication, which can result in problems for both sides.

[22] The Act also acknowledges that there is a fundamental inequality of power in employment relationships.¹⁰ The inequality of power includes an inequality in terms of knowledge. Most employees can intuit which actions of their employer were unfair, but many will not be able to articulate clearly why those actions are unfair in legal terms. It would be inconsistent with the purposes of the Act to require employees to identify, with particulars, the legal basis for their personal grievance or, for example, to draw distinctions between substantive and procedural errors.¹¹

[23] Of course, it is helpful and even ideal for an employee to provide grounds as to why they consider an action of an employer is unjustified – it would certainly be inconsistent with the duty of good faith for personal grievances to intentionally obfuscate. The personal grievance process is for matters to be resolved quickly and informally; it is not aimed at preserving rights to litigate past or current injustices at some indefinite future time.¹²

[24] Where an employee does provide grounds in a personal grievance, it cannot be the case that they are bound to pursue their grievance solely on the basis of those grounds. When parties obtain the assistance of an adviser, their understanding of the

7 [Employment Relations Act, s 101\(ab\)](#).

8 [Section 101\(a\)](#).

9 *Shergold v Fieldway Medical Centre* [2005] UKEAT 0487_05_0512; [2006] ICR 304 (UKEAT) at [27].

10 [Employment Relations Act, s 3\(a\)\(ii\)](#).

11 See *Shergold v Fieldway Medical Centre*, above n 9, at [15]–[17] and [30].

12 *Creedy v Commissioner of Police*, above n 6, at [39].

situation often changes, and their pleadings necessarily reflect those changes.¹³ The provision of disclosure can also inform (for better or worse) the grounds of a grievance.

[25] Ultimately, if an employee informs an employer that they consider a certain action affecting them to be unfair, that

will generally be sufficient for an employer to go away and address, with an adviser if necessary, whether the action was substantively justified or supported by a fair process for the purposes of [s 103A](#) of the Act.¹⁴ That is all that [s 114](#) requires.¹⁵

[26] This provides a helpful framework for analysis in the circumstances of this case.

The facts

[27] Ms Hall has been employed as a firefighter by FENZ since July 2019. She continues to be employed in that role.

[28] On 11 October 2021, the New Zealand Government said it would be amending the Vaccinations Order to cover a wider range of workers than were previously covered, including:

- (a) people who conducted high-risk work in the health and disability sector (who would need to be fully vaccinated by 1 December 2021); and
- (b) staff and people who had contact with children and students in schools and early learning services (who would need to be fully vaccinated by 1 January 2022).

13 See [ss 122](#) and [157\(1\)](#) of the [Employment Relations Act](#) which indicate that there is flexibility, even at a late stage, for the Authority and Court to recast the type of grievance claimed. For further discussion of this issue, see *Shergold v Fieldway Medical Centre*, above n 9, at [35]–[36].

14 The approach may be slightly different for personal grievances that do not concern a claim of unjustified disadvantage or dismissal given [s 103A](#) only applies to those types of grievances.

15 See *Disabilities Resource Centre Trust v Maxwell* [[2021](#)] NZEmpC 14, [[2021](#)] ERNZ 47 at [8] and [20]–[22]; *Saipe v Bethell* [[2021](#)] NZEmpC 33, [[2021](#)] ERNZ 74 at [19] and [39]; and *Urban Decor Ltd v Yu* [[2022](#)] NZEmpC 56, [[2022](#)] ERNZ 225 at [36]; but see *Idea Services Ltd (in stat man) v Barker* [[2012](#)] NZEmpC 112, [[2012](#)] ERNZ 454 at [46]–[47]; and *Underhill v Coca-Cola Amatil (NZ) Ltd* [[2017](#)] NZEmpC 117, [[2017](#)] ERNZ 693 at [40].

[29] On 25 October 2021, the Vaccinations Order was amended as advised.¹⁶

[30] During October and November 2021, FENZ consulted with relevant unions, associations and its workforce about the Vaccinations Order.

[31] On or about 29 October 2021, FENZ decided which of its workers would be covered by the Vaccinations Order. This included Ms Hall because she was employed as a firefighter. This was on the basis that her role (amongst others) could require her to be within two metres, for more than 15 minutes, of a health practitioner providing health services to the public and/or to work in education services where there is contact with children or students. This decision was communicated to all staff via a national commander's update on 29 October 2021.

[32] Ms Hall was notified on 30 October 2021 that she had been identified as a person covered by the Vaccinations Order.

[33] On 12 November 2021, the Vaccinations Order was amended to provide additional time for FENZ personnel to be vaccinated.¹⁷ Ms Hall was notified of this extension by email on 13 November 2021.

[34] On 17 November 2021, Ms Hall was advised that if she did not obtain a COVID-19 vaccination by 29 November 2021, she would be directed to stop work from, and including, 30 November 2021.

[35] Ms Hall stopped work in accordance with the direction from FENZ.

[36] The evidence of FENZ was that Ms Hall was on paid sick leave and annual leave between 24 November 2021 and 18 January 2022.

[37] On 15 January 2022, she commenced special paid COVID-19 leave and remained on that leave until 8 May 2022.

16 [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 3\) 2021](#).

17 [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 4\) 2021](#).

[38] On 28 February 2022, FENZ implemented a vaccinations policy which provided that “Only fully vaccinated personnel and visitors will be permitted to enter Fire and Emergency premises from 28 February” unless particular exceptions applied. This policy was separate to the Vaccinations Order and was in force until 23 May 2022. The policy had the effect of excluding Ms Hall, as an unvaccinated person, from the workplace.

[39] On 28 February 2022, Ms Hall wrote to FENZ. That letter referred to the fact that due to not being vaccinated, she was

no longer able to attend FENZ property from 1 March 2022. In the letter she said she regarded that as unlawful discrimination. She took issue with the lawfulness of the mandates and the proportionality of the measures taken by FENZ. She further stated that FENZ's position was in breach of the New Zealand Bill of Rights Act 1990 (NZBORA) and the [Human Rights Act 1993](#) (HRA). She then sought confirmation that she was entitled to continue to attend FENZ sites and callouts.

[40] At this stage, Ms Hall had been suspended for 91 days. There is no evidence before the Court of any response from FENZ. However, I note that the Authority determination records a response dated 4 March 2022, stating that the decision in *Yardley v Minister for Workplace Relations and Safety* (which the letter refers to and relies on in part)¹⁸ did not apply to FENZ personnel.¹⁹ The suspension continued.

[41] In March 2022, there was some discussion and correspondence between Ms Hall and FENZ as to whether there were alternative duties that she could undertake. These discussions, including a meeting on 22 March 2022 between Ms Hall, her union representative and Mr Matchitt for FENZ, were not fruitful.

[42] In May 2022, as the special paid COVID-19 leave was coming to an end, further discussion was then held as to what options were available to her, including taking an agreed period of unpaid discretionary COVID-19 leave. While classifying it as unpaid leave, FENZ's evidence is that Ms Hall was able to manage

¹⁸ *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 19 NZLR 125.

¹⁹ *Hall v Fire and Emergency New Zealand*, above n 1, at [82].

the financial impact by using a combination of annual holidays, alternative holidays and unpaid leave from 8 May 2022.

[43] It is common ground that both parties wanted to do what they could to maintain Ms Hall's employment.

[44] On 30 June 2022, the types of roles covered by the Vaccinations Order that were required to be vaccinated were amended.²⁰ The amendments were effective from 11.59 pm on 7 July 2022. FENZ considered that, as a result, FENZ personnel were no longer required to be vaccinated under the Vaccinations Order. FENZ then immediately contacted Ms Hall on 1 July 2022 to arrange her resumption of duties.

[45] On 8 July 2022, Frontline Law Ltd (Frontline) wrote to FENZ, as the representative for 68 FENZ employees and volunteers (including Ms Hall), to raise personal grievances on their behalf. I will come back to the content of that letter later.

[46] FENZ says this was the first time there was any mention of Ms Hall having a personal grievance and that, while the letter purported to raise grievance(s), it did not meet the requirements for doing so.

[47] On 19 July 2022, through its solicitors, FENZ wrote to Frontline, advising that it did not consider that any personal grievances had been raised because each individual person's specific personal grievance had not been set out (they had been raised as a group). Its solicitors also argued that there was a real issue as to whether most or all of the personal grievances were out of time and advised that it would not consent to any grievances being raised outside the 90-day time limit.

[48] Ms Hall returned to work on 23 July 2022 as agreed on 1 July 2022.

[49] On 28 July 2022, Frontline replied to FENZ, disputing the legal issues raised in terms of whether grievances could be raised as a group (including

²⁰ [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 5\) 2022](#).

referring to the provision of each individual's name and ID number, current status, position and harm suffered), and whether an individual could be represented by the union and Frontline at the same time.²¹ It did not otherwise supply any further information in relation to the alleged grievances.

[50] On 5 August 2022, FENZ's solicitors wrote to Frontline, restating its view that group personal grievances were not available (as opposed to a representative or class action) and that the grievances had not been sufficiently or validly raised because "details of the specific personal grievance sought to be raised by each employee and the remedies each person is seeking" had not been provided. They again noted that there was an issue as to whether the grievances were out of time.

[51] On 29 August 2022, Frontline responded to FENZ, disagreeing with the position taken by FENZ and reiterating that each individual had "sufficiently brought the issue to FENZ's attention". It also provided proof of its authority to act for the

individuals.

[52] There appears to have been no further communication until Ms Hall filed her statement of problem in the Authority on 15 March 2023, which alleged she was unjustifiably disadvantaged by:

- (a) FENZ's failure to consult her about the implementation of the Vaccinations Order;
- (b) FENZ's failure to provide her with relevant information regarding the suspensions; and
- (c) FENZ's decisions to suspend her:
 - (i) with pay from 30 November 2021 to 8 May 2022; and
 - (ii) without pay from 8 May 2022 to 23 July 2022.

21. Some individuals, including Ms Hall were members of the New Zealand Professional Firefighters Union.

[53] As already noted above, the Authority found that these grievances were not raised in time.

Analysis

Nature of the grievances claimed

[54] In her statement of claim in the Court, Ms Hall says that she was unjustifiably disadvantaged for the following reasons:

23.1 Breach of good faith: The Defendant breached its obligation of good faith by failing to communicate and consult with the Plaintiff on the implementation of the Order law which the Defendant relied on in requiring her to be vaccinated.

23.2 Unjustifiable suspension:

23.2.1 From duties on 30 November 2021, on pay.

23.2.2 From duties from 8 May 2022 without pay.

23.2.2 The Defendant failed to provide all relevant information to the Plaintiff to allow her to respond, failed to invite input from the Plaintiff, and failed to properly consider or respond to the limited comment the Plaintiff was able to make.

23.2.3 The Defendant misinterpreted the Order which alleged to have mandated the vaccination of the Plaintiff. The Order did not require the vaccination of firefighters.

23.3 Breach of contract:

23.3.1 The Defendant unjustifiably withheld payment of wages owed to the Plaintiff during the unlawful suspension.

23.3.2 The Defendant breached its duty to be a good employer and act in good faith.

[55] These claims are worded slightly differently from those in the Authority, but as this is a de novo hearing, it is not uncommon for the details of an alleged grievance to be refined. There is also some overlap between the alleged unjustified actions/breaches which resulted in the disadvantage.

[56] The essence of Ms Hall's grievance is that she was unjustifiably disadvantaged by what she says was her unlawful suspension from work.

[57] The key issue in this proceeding is whether her communications to FENZ in the various correspondence amounted to raising a grievance or grievances and, if so, whether they were raised within 90 days.

Did Ms Hall take reasonable steps to make FENZ aware that she had a personal grievance she wanted it to address in relation to her suspension?

[58] During the hearing, Mr Corbett, counsel for Ms Hall, primarily relied on the 8 July 2022 letter as raising the grievance.²² However, in the statement of claim, Ms Hall claims she can be seen to have raised her grievance in two ways, either through the totality of the correspondence leading up to and including 8 July 2022 or through the 8 July 2022 letter.

[59] While Mr Corbett did not actively pursue what I will refer to as the totality of communications submission, Mr Brookes, counsel for the defendant, did deal with it in his submissions. As a matter of equity and good conscience, I consider it is appropriate to consider whether the totality of the communications in this case constituted raising the grievance.²³ In this case, the total communications would include the letter dated 28 February 2022 and the letter of 8 July 2022.

[60] The letter of 28 February 2022 was written against the backdrop of FENZ introducing a policy excluding all non-vaccinated persons from its properties. While Ms Hall was already suspended from work at this stage, there is nothing in the notice that required her to stop work, or in any other communication,²⁴ that prevented her from attending the

workplace. Accordingly, there was potential for the policy to impact her adversely. I note that there was no evidence before the Court as to whether she had attended the site during her suspension. However, for the purposes of this particular analysis, that is not relevant.²⁵

[61] While the word “grievance” is not used in the letter of 28 February 2022, it clearly states that not being able to attend FENZ properties and the intention to “exclude [her] from the service” was regarded by Ms Hall as unlawful discrimination.

22 See above at [45].

23 *Chief Executive of Manukau Institute of Technology v Zivaljevic*, above n 5, at [36].

24 On the documentation before the Court.

25 The issue being whether a grievance was raised, not the substance of that grievance.

She stated that FENZ’s position of not allowing non-vaccinated people to attend its properties was a breach of both the NZBORA and the HRA.

[62] She also stated that following the High Court’s decision in *Yardley v Minister for Workplace Relations and Safety*, FENZ could no longer rely on the health orders, that its approach could no longer be justified on health and safety grounds, and that it needed to establish that the measures it was taking were proportional on an ongoing basis as the situation changed.²⁶

[63] By way of conclusion, she required confirmation that she would be entitled to continue to attend FENZ sites and callouts. She indicated that if FENZ continued on its path, she would instruct counsel to pursue compensation as a result of “these breaches”.

[64] On the face of it, this is more than sufficient to raise a grievance. However, Mr Brookes submitted that any grievance it may have raised was about FENZ’s policy, not Ms Hall’s suspension. He noted that Ms Hall is not pursuing a grievance about the policy.

[65] I accept that is correct to a degree. In her evidence, Ms Hall stated that it was “largely a templated letter” that a friend had given her which she then sent. It does appear to have been prompted by the notification of the policy. However, her evidence was that it was not solely about the policy but also her suspension. She described it as an “attempt by me to stop my suspension”. Mr Brookes submitted that this evidence is disingenuous and that the letter was always about the policy and not the suspension. The essence of the defendant’s argument is that Ms Hall is retrospectively relying on the letter as raising a grievance when it was never written for that purpose.

[66] FENZ’s view of the purpose of the letter is an assumption on its part. The letter FENZ sent in response was not before the Court.²⁷ There is no evidence of it seeking clarification at the time. Further, it does not matter whether Ms Hall intended her

26 *Yardley v Minister for Workplace Relations and Safety*, above n 18.

27 See above at [40].

complaint to be a personal grievance or whether FENZ recognised it at the time as one.²⁸

[67] I agree, however, that it does matter whether Ms Hall intended to also complain about the suspension as opposed to just the policy. I accept that if she did not intend to complain about the suspension (which would be unlikely), then it would be inequitable for her to rely on it as relating to her suspension. However, as accepted by Mr Brookes in discussion with the Court, it is an available interpretation of the letter that Ms Hall was raising the fact that she considered her suspension to be discriminatory and unfair. She specifically asked FENZ to confirm that she could not only attend FENZ sites (which the policy would have prevented), but also callouts (which was prevented by her suspension).

[68] The question is, do the contents of the letter amount to a complaint about her suspension? I consider the answer is yes.

[69] The next relevant contact between Ms Hall and FENZ was a meeting on 22 March 2022 about the possibility of alternative duties. Other than referring to emails exchanged following the meeting, which illustrate that Ms Hall was keen to return to work, neither party provided evidence as to the content of the meeting. Accordingly, it does not seem to be relied on as part of the communications raising the grievances.

[70] The next piece of correspondence in the “totality of the communication” is the letter dated 8 July 2022 from Frontline

to FENZ. Alternatively, the plaintiff says this letter on its own was sufficient to raise the grievance.

[71] As already stated above, the purpose of this exercise is not to look at the strength of any claims or whether they are sustainable, but to determine whether Frontline, on behalf of Ms Hall, raised a complaint in the nature of a grievance.

[72] It is fair to say that this was not the perfect personal grievance letter. However, at the outset it stated:

28 *Chief Executive of Manukau Institute of Technology v Zivaljevic*, above n 5, at [37].

PERSONAL GRIEVANCE

1. We represent 68 Fire and Emergency New Zealand (FENZ) employees and volunteers who are identified in Schedules 1-68 of this letter (the **Group**).
2. The purpose of this letter is to raise a personal grievance on their behalf.

[73] Under the heading “**Background**” it ran through a chronology of events from 22 October 2021 to 8 July 2022. This included reference to the various steps taken by FENZ in relation to the 22 October 2021 Vaccinations Order, the issuing of the “stop work” letter to unvaccinated employees on 22 November 2021,²⁹ the introduction of the Vaccinations Policy, the alternative work arrangement guidelines, changes to the Vaccinations Policy on 23 May 2022, the [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 5\) 2022](#), which meant that FENZ personnel were no longer covered by the Order, and finally, the FENZ re-employment processes.³⁰

[74] Under the heading “**Basis of the Personal Grievance**” there were a number of subheadings.

[75] Under the subheading “*Returning to Duties*” at paras 42–46, the letter states that because FENZ employees are no longer covered by the Vaccinations Order, all Group members who wish to return to their duties immediately should be permitted to do so without undertaking additional assessments. It says that if they are not back at work by 21 July 2022, it “will form another basis of this personal grievance, based on unjustified disadvantage through unfair and discriminatory behaviour.”³¹

[76] I read this as being separate from the next part of the letter. These paragraphs are dealing specifically with the impact of the [COVID-19 Public Health Response \(Vaccinations\) Amendment Order \(No 5\) 2022](#). Their purpose was to put FENZ on notice that if the employees were not permitted to return to work, it would add to the existing grievance.

29 Ms Hall’s email was dated 17 November 2021.

30 Which did not apply to Ms Hall as she was still employed.

31 Ms Hall returned to work on 23 July 2022 by agreement.

[77] I agree with FENZ that these paragraphs are anticipatory in nature and therefore do not raise a grievance.³² They are not referring to actions that FENZ has or has not taken. They are talking about what should happen in the future. As it happens, Ms Hall returned to work and so the circumstances did not arise.

[78] The plaintiff submitted that it is the paragraphs that follow that set out the grievance that existed at the time. The letter is lengthy and covers a number of areas that are not, on the face of it, relevant to Ms Hall’s situation. I will focus on those areas that I consider to be relevant to Ms Hall and therefore material to the current analysis.

[79] Under the subheading “*Main Basis of the Grievance*”, the letter states:

46. The main basis of the personal grievance relates to the unjustified actions FENZ took through its purported reliance on item 7.2 of Schedule 2 of the Vaccination Order, as it was written before 7 July 2022 (**Pre-July Item 7.2**). FENZ therefore unjustifiably dismissed some Group members; constructively dismissed some Group members; and unjustifiably disadvantaged Group members. In summary, the basis of our claim is that:
 - 46.1 FENZ failed to exhaust all reasonable alternative options before terminating some Group members.
 - 46.2 FENZ wrongly interpreted Pre-July Item 7.2 as covering FENZ personnel that it did not cover.
 - 46.3 FENZ treated Group members unfairly, and did not act in good faith towards these personnel, and
 - 46.4 FENZ breached a range of other laws and codes, which are detailed below.

[80] It then goes on to expand on these allegations.

Paragraphs 55–61

[81] In relation to the wrong interpretation of the Vaccinations Order, the letter claimed that FENZ was not captured by

the Order as it was not a health or disability care provider. It stated that it was therefore arguable that many, perhaps all, of the roles identified by FENZ as being covered, were not actually covered.

32 *Creedy v Commissioner of Police*, above n 6, at [29]–[30].

[82] While not specifically articulated in the letter, the natural implication of that claim is that to dismiss, constructively dismiss or disadvantage employees, on the basis of that flawed interpretation, was unjustified.

Paragraphs 65–66

[83] The letter claimed that because terminating or suspending staff had the effect that some stations could not respond and others were short-staffed, FENZ should have applied for an exemption under s 12A of the Vaccinations Order. It said that not applying for an exemption was not what a fair and reasonable employer could have done in all the circumstances.³³

[84] Again, while the wording of the letter is not easy, the implication was that because FENZ had not applied for an exemption, to dismiss, constructively dismiss or disadvantage in those circumstances was unjustified.

Paragraph 68

[85] The letter claims that in its application of the Vaccinations Order and the creation of its policy, FENZ failed to comply with its duty of good faith by failing to protect the integrity of individual choice of its employees.³⁴

Paragraphs 79–83

[86] The letter says that by failing to exhaust all reasonable alternative jobs available to unvaccinated personnel, FENZ has significantly injured the mental wellbeing of members of its workforce and so has breached one of its principal objectives which is to prevent or limit injury.

Paragraphs 87–92

[87] The letter states that the NZBORA applies to FENZ's decisions relating to suspending and otherwise disadvantaging unvaccinated employees. It further says that

33. In the letter Frontline notes that it is not aware whether an exemption was applied for or not but says if FENZ had done so, it is arguable it would have been granted.

34 [Employment Relations Act, s 3\(a\)\(iv\)](#).

enactments should be interpreted consistently with the rights and freedoms contained in the NZBORA. Therefore, FENZ should have interpreted the Vaccinations Order in a way that enabled employees to keep their positions, and not to do so was illegal.

Paragraphs 93–100

[88] The letter sets out a number of ways in which it alleges FENZ has breached its stated values and code of behaviour, including, amongst other things:

- (a) by excluding the employees “from entering FENZ premises and from being part of FENZ”;
- (b) by not creating a safe environment – the mental health and wellbeing of the members of the Group had been significantly negatively affected as a result of FENZ's exclusionary and unfair actions; and
- (c) by interpreting the Vaccinations Order incorrectly and taking actions that were not necessary, and thus were not “true, good or useful”.

Paragraphs 110–116

[89] The letter then sets out the harm it alleges the members of the group have suffered. This includes both hurt and humiliation and financial losses.

[90] It also sets out what redress or remedies are sought at para 117. Relevantly for Ms Hall, as someone who was suspended, that includes:

117.2 Pay all members of the Group what they would have been entitled to but for any vaccine-related suspensions, including:

117.2.1 Reimbursement of lost wages,

117.2.2 Reimbursement of personal leave entitlements that had to be exhausted to avoid transitioning to leave without pay, and

117.2.3 Reimbursement of allowances or other income lost as a result of vaccine-related suspensions and/or terminations (such as loss of on call leave or shift leave),

117.3 Pay the Group members compensation for the hurt and humiliation FENZ caused them, and

117.4 Apologise.

[91] In addition to the main body of the letter dealing with the generic issues, Ms Hall provided details as to her own situation and concerns:

Client's name: Katrina Hall

FENZ ID: ...

Katrina's position (either currently held or previously held): Green Watch

Whether Katrina is a career or volunteer FENZ member: Career

Katrina's current work status: Unpaid leave

Harm that not being able to work has caused Katrina: My overall wellbeing has suffered immensely since not being able to work.

*physically - being a highly trained fitness fanatic, my mental health has been affected due to lack of physical work and availability of a gym. The mental suffering has impacted my ability to maintain a good physical state. My ability to sleep well is also suffering.

*mentally/emotionally - (heart, mind, conscious thoughts and feelings) I have not only lost a partner due to the stress of this situation but also lost my work family and sense of belonging. I feel loneliness as a result.

*spiritually - (religion, higher purpose) My sense of purpose has diminished somewhat, not being able to serve others and make a positive difference to the community. Knowing I am unable to contribute to the workload of the station (my work family) also fuels guilt. My sense of identity has been shaken.

*financially - For a while I was limited to basic pay which didn't allow me to pay rent so I had to move my young family into my [parents'] home. This has caused undue stress on my parents as well as my relationship with my partner which has resulted in a break up. I am currently on unpaid leave and living from savings. Financially I am going backwards in life and suffering heavily during this cost of living crisis.

I have definitely lost faith in the leadership within FENZ. They do not live their own values. I had to unwillingly use all my leave entitlements in order to seek [counselling] services and healing practices to lessen the impact of this traumatic process. I have also had to unwillingly use all my leave entitlements, on the premise that the mandate will ease, as a method of retaining my employment.

My children are also suffering due to the uncertainty and instability.

[92] While the letter could have been drafted more clearly, when combined with Ms Hall's personal statement, it is clear that she is complaining about "not being able to work" – the situation caused by her suspension.

[93] The 8 July 2022 letter sets out various claims about why the suspension is allegedly unjustified, along with how she has been disadvantaged. It also sets out how the grievance could be remedied.

[94] I find that Ms Hall took reasonable steps to make FENZ aware that she had a personal grievance which she wanted it to address in relation to her suspension through the letter dated 8 July 2022.

Was the personal grievance raised within 90 days?

[95] Ms Hall was suspended by being told to "stop work" from 30 November 2021 to 23 July 2022. She was required to be away from work for the entire period; there was no break. The action that Ms Hall alleges amounted to a grievance was the steps taking by FENZ to prevent her from working or, in the words of the Frontline letter, the fact of her "not being able to work". The act of preventing her from working was continuous over the period of the suspension. When considering the key concern, which was not being able to work, it is artificial to break that period into two. Whether the suspension was paid or unpaid (but at points covered by various paid and unpaid leave) may be relevant to the issue of remedies (if required in the future), but that issue is not relevant to the concern at the heart of the grievance, which is the fact that FENZ prevented Ms Hall from working.

[96] Mr Brookes, counsel for FENZ, submitted that both the 28 February 2022 letter and the 8 July 2022 letter were too late; the 28 February 2022 letter because it was 91 or 92 days after the commencement of the suspension, and the 8 July 2022 letter because it was even later.

[97] I do not agree. The suspension of Ms Hall was a continuous act. The clock did not start to run at the beginning of the suspension and run out after 90 days even though the suspension continued. That would be nonsensical in the context of the Act. Section 114(7)(b) states that the period of 90 days begins with the date on which the action alleged to amount to a personal grievance occurred. The action with which Ms

Hall takes issue was still occurring at the time both the 28 February 2022 and the 8 July 2022 letters were sent.³⁵ Ms Hall was well within time.

Collective personal grievances

[98] Mr Brookes also made submissions about whether personal grievances must be raised individually rather than collectively.

[99] The parties did not identify any cases on this point, and it is not clear that the point has been addressed in our jurisdiction before.³⁶ The Act does not address the issue directly. Although the personal grievance provisions are written from an individual perspective, in comparison to the provisions on collective bargaining, there is nothing prohibiting employees from raising a personal grievance in a collective manner.

[100] Practically, where there are widespread breaches alleged against an employer, it will generally be more efficient for employees to raise a personal grievance as a group. As the Court emphasised in *Creedy v Commissioner of Police*, there is no particular formula of words that is required.³⁷ So long as the substance of the grievance has been raised, the form of the grievance is immaterial; it can be written or oral, individual or collective, simple or complex (with multiple grievances raised at once). Therefore, where, as here, an employee's representative has raised personal grievances in a collective manner, that will not by itself undermine the personal grievances. I find that the manner in which the personal grievance was raised is no bar to Ms Hall's claim.

[101] I find that Ms Hall raised a personal grievance of unjustified disadvantage in relation to the defendant's decision to stand her down/suspend her within 90 days.

³⁵ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257 at [20]. See also s 103(1)(b) of the [Employment Relations Act](#), which refers to disadvantages occurring both in the past and the present tense; that the present tense is an option allows for continuous courses of conduct such as that arising here.

³⁶ The issue of collective grievances has received more focus in the United Kingdom, see *Aitchison v South Ayrshire Council* [2011] CSIH 72, [2012] SC 444; and Advisory, Conciliation and Arbitration Service "Code of Practice on disciplinary and grievance procedures" (11 March 2015) Acas <www.acas.org.uk> at [47].

³⁷ *Creedy v Commissioner of Police*, above n 6, at [36].

Exceptional circumstances?

[102] Mr Corbett advised that if the Court was to find that the grievances had been raised out of time, the plaintiff wished to make an application to the Court to have the grievances heard out of time under ss 114–115 of the Act, and that timetabling should be set and the matter heard on the papers.

[103] As pointed out to counsel at the time, it is common for such applications to be made and heard contemporaneously with the 90-day issue. Further, no such application was made in the Authority.

[104] While there is nothing to prevent a plaintiff bringing a separate application, it is not an efficient use of time and resources. The indication from counsel was that the basis for such an application would be s 115(b), which states that exceptional circumstances include:

where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; ...

[105] It is ironic and unfortunate that such an application would be made this late in the proceeding. However, it is not necessary due to my findings above.

Next steps

[106] Having found that Ms Hall raised her personal grievances within 90 days, the next issue to determine is whether the matter should remain in the Court or go back to the Authority.

[107] In *Abernethy v Dynea New Zealand Ltd*, the Court held:³⁸

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

38 *Abernethy v Dynea New Zealand Ltd* [2007] NZEmpC 83; [2007] ERNZ 271 (EmpC) at [59].

[108] However, where part of a matter remains before the Authority or where the Authority's preliminary determination only pruned back the employment relationship problem before the Authority without disposing of it, there is no requirement for the Court to hear the substantive claim.³⁹

[109] Mr Henderson-Rauter, counsel for FENZ, submitted that the outstanding matters before the Authority were withdrawn rather than "resolved" for the purposes of the test in *Abernethy*. He submitted that the approach in *Abernethy* should not be followed and that the matter should be investigated by the Authority.

[110] That argument cannot succeed. The Authority resolved the disadvantage claims brought by Ms Hall in its preliminary determination. Once the related proceedings were withdrawn, the Authority no longer had the matter before it for resolution. As there is no power for the Court to remit the matter to the Authority, the problem remains before the Court for resolution.⁴⁰

Outcome

[111] In its determination, the Authority found that Ms Hall had failed to raise her alleged unjustifiable disadvantage grievances within 90 days of those alleged grievances arising and so was unable to pursue them.

[112] The Authority erred in fact and in law in reaching this conclusion, and insofar as its determination relates to that finding, Ms Hall's challenge is successful and this decision stands in its place.

[113] Because the proceedings remain in the Court, the plaintiff should now file and serve a statement of claim within 14 days of the date of this judgment.

[114] Costs are reserved. In the event the parties are unable to agree on costs, the plaintiff will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further

39 At [62]; and *Ale v Kids at Home Ltd* [2015] NZEmpC 209, [2015] ERNZ 1021 at [42]–[43].

40 *Abernethy v Dynea New Zealand Ltd*, above n 37, at [60] and [62].

14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck Judge

Judgment signed at 11.30 am on 21 August 2024