

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 131  
3225419

BETWEEN                      NICOLA PREECE  
   Applicant  
  
AND                              SYNLAIT MILK LIMITED  
   Respondent

Member of Authority:            Andrew Gane  
  
Representatives:                Liz Lambert and Erika Wittombe, advocates for the Applicant  
   Scott Wilson, counsel for the Respondent  
  
Investigation Meeting:         5 December 2023 by AVL  
  
Submissions and further  
information received:         20 November 2023 from the Applicant  
   27 November 2023 from the Respondent  
  
Determination:                 5 March 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Nicola Preece was employed by Synlait Milk Limited (Synlait) as a café assistant on 16 December 2017. Ms Preece claims that she was unjustifiably disadvantaged and unjustifiably dismissed from her employment on 25 February 2022 because she was not vaccinated against COVID-19.

[2]     A preliminary issue arises as to whether Ms Preece raised her personal grievances within the 90-day period under s 114 of the Employment Relations Act 2000 (Act).

[3] Ms Preece claims that she first raised a disadvantage and unjustified dismissal personal grievance with Synlait in an email dated 30 January 2022 and in the following discussions with Synlait management. She said she formally raised her personal grievance by letter dated 25 May 2022. She says that the content of email, discussions and the letter were sufficient to raise the personal grievances. In the alternative Ms Preece claims Synlait impliedly consented to Ms Preece raising a personal grievance out of time.

[4] Synlait says that Ms Preece did not raise any of her personal grievance claims within the statutory time frame. Synlait does not consent to Ms Preece raising a personal grievance out of time and denies it impliedly consented to the grievance being raised out of time. Synlait also said there are no exceptional circumstances justifying the delay by Ms Preece in raising a personal grievance.

### **The Authority's Investigation**

[5] For my investigation, an affidavit was lodged in the Authority by Ms Preece in support of her application. On behalf of Synlait, affidavits from Deepak Gehlot, technical implementation manager and Nathan Kennedy, IT service desk lead were lodged in the Authority.

[6] During the investigation meeting on 5 December 2023 submissions were heard from the parties' representatives.

[7] As permitted by s 174E of the Act this preliminary determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

### **Issues**

[8] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[9] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

(2) For the purposes of subsection (1), 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.

[10] There are several principles relevant to whether a personal grievance has been raised in accordance with the Act. I summarise them as follows:<sup>1</sup>

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is, “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more detail, will be insufficient.

[11] Therefore, the issue is whether Ms Preece raised a personal grievance against Synlait in accordance with s 114(1) of the Act?

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<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517.

## **Background**

[12] On 7 December 2021 Synlait's chief executive officer, John Penno, mandated all staff on site to be vaccinated by 31 January 2022. The policy came into effect on 1 February 2022.

### *30 January 2022 email*

[13] On 30 January 2022 Ms Preece sent an email to Mr Penno and senior management. In her email she alleged Synlait had failed to comply with the Health and Safety at Work Act 2015. The 30 January 2022 email included the following passage;

You will note, John and Grant, that the employer is NOT responsible for my personal health and indeed you as my employer may become liable to me for personal grievance claims for breach of contract, and discrimination.

[14] There were a number of telephone conversations between Ms Preece and Mr Gehlot on 31 January 2022, 2 February 2022 and 9 February 2022. On 11 February 2022 Ms Liz Kevey of human resources spoke to Ms Preece regarding the 30 January 2022 letter.

### *Termination letter 21 February 2022*

[15] On 21 February 2022 Mr Gehlot emailed a termination letter to Ms Preece. The letter was dated 18 February 2022. Mr Gehlot said the delay was because he did not have Ms Preece's personal email address. The termination letter refers to Ms Preece's employment ending on 25 February 2022.

This letter constitutes four weeks' notice of the termination of your employment. Your employment with Synlait will end on 25 February 2022. Due to the requirement that all staff attending Synlait sites must be vaccinated by 31 January 2022. At the end of your notice period, you will be paid your final pay including holiday pay owing to you.

Please let us know if you become vaccinated and are willing to disclose your vaccination status during your notice period as we may cancel your notice of termination if this is practicable. Otherwise, we thank you for your efforts while employed at Synlait and wish you well in your future endeavours.

### *25 May 2022 letter*

[16] On 2 June 2022, Ms Preece emailed Mr Gehlot saying she had "sent the attached letter to him previously". There was no attachment to the email and Mr Gehlot responded to Ms

Preece by saying that the attachment was missing and that he had not received any letter or email from her previously. Mr Preece then sent an email attaching a letter dated 25 May 2022

[17] In the letter, Ms Preece stated that:

The basis of my grievance is that from the time of your adoption of the a 'mandate policy' you have breached not only my contract, in that I do not have a clause in it where I agree to have any medical procedure such as vaccination masking or testing of my body, but also other breaches under legislation related to my workplace. This change made by you unilaterally changed my contract.

### **Did Ms Preece raise a personal grievance in accordance with s 114(1) of the Act?**

#### *Discussion and analysis*

[18] Ms Preece's statement of problem sets out three possible personal grievance claims:

- (a) An unjustified dismissal claim under sections 103(1)(a) and 103(1)(j) of the Act.
- (b) An unjustified disadvantage claim under section 103(1)(b) arising from Ms Preece being excluded from the work site due to the vaccine mandate.
- (c) An unjustified disadvantage claim under section 103(1)(b) arising from Synlait's alleged "failure to address Ms Preece's concerns" raised in her email of 30 January 2022.

[19] Synlait accepts that the content of Ms Preece's statement of problem, was sufficient to raise personal grievances relating to the dismissal, alleged exclusion from the workplace, and alleged failure to address the concerns raised in the 30 January 2022 email.<sup>2</sup> However, it said the statement of problem was not lodged in the Authority and served on Synlait until 27 April 2023, outside the 90-day limitation period.

[20] Ms Preece claims she first raised her personal grievances in the 30 January 2022 email. The email advises of a potential for a personal grievance if Synlait did not address her concerns regarding compliance with the Health and Safety at Work Act and related issues. I find the email does not go as far as actually raising a personal grievance.

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<sup>2</sup> *Pollard Contracting v Donald* [2014] NZEmpC 137 at [15].

[21] Ms Preece further submitted she raised the personal grievances during telephone calls with Mr Gehlot and Ms Kevey in January and February 2022. Synlait dispute that Ms Preece raised the personal grievances during these calls.

[22] In Mr Gehlot's affidavit he stated that during the conversation with Ms Preece she confirmed that she was not pursuing claims and was just raising concerns with her email of 30 January 2022. This is consistent with the wording of 30 January 2022 email which referenced that Synlait may become liable for personal grievance claims for breach of contract, and discrimination. Ms Preece's affidavit does not refer to the telephone conversations with Mr Gehlot and Ms Kevey.

[23] On the evidence before me I do not find that Ms Preece raised the personal grievances during her telephone conversations with Mr Gehlot and Ms Kevey in January and February 2022.

[24] In her letter dated 25 May 2022, Ms Preece refers to Synlait's alleged actions regarding the implementation of the mandate policy. Ms Preece stated she intends to file in the Employment Relations Authority a personal grievance about the employment relationship, but suggested attending mediation first. She references breaches of contract and particular sections of legislation, however she did not make reference to being disadvantaged, being dismissed or excluded from the workplace by Synlait.

[25] The letter also references Synlait's alleged failure to address the concerns raised in the 30 January 2022 email. Synlait accepts that had the reference to the email been raised within the 90-day period, this would have been sufficient to raise a personal grievance.

[26] In Mr Gehlot's affidavit he states that he did not receive the letter dated 25 May 2022 until 2 June 2022. He provided an email trail between him and Ms Preece on 2 June 2022 that is consistent with him not having received the letter until 2 June 2022.

[27] Ms Preece has not been able to provide a copy of any communication to Mr Gehlot on 25 May 2022 and her submissions states that she "is unable to locate evidence that she did send or email the letter but believes she did".

[28] In Mr Kennedy's affidavit he states there is no record of any email from Ms Preece's email address entering the respondent's system during the period 25 May to 1 June 2022

[29] I find there is no evidence to support Ms Preece's contention that she sent the 25 May letter to Synlait prior to 2 June 2022.

*Relevant dates for the personal grievances*

[30] The calculation of the 90-days is based on the statutory wording, "begins with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee".<sup>3</sup>

- (a) The actions comprising the dismissal claim occurred or came to Ms Preece's knowledge on 25 February 2022 at the latest. This means that the 90<sup>th</sup> day was 25 May 2022.
- (b) The actions comprising the exclusion claim occurred or came to Ms Preece's knowledge on 1 February 2022 (implementation of the mandate policy) at the latest. This means that the 90<sup>th</sup> day was 1 May 2022.
- (c) The actions comprising the alleged failure to address the concerns raised in the 30 January 2022 email occurred or came to Ms Preece's knowledge on 25 February 2022 at the latest. This means that the 90<sup>th</sup> day was 25 May 2022.

*Totality of communications*

[31] Ms Preece submits that the totality of communications both oral and written communications specified the exact issues raised as personal grievances. However, based on the evidence I find that the substance of the communications in total, excluding the 25 May 2022 letter, do not amount to raising a personal grievance.

[32] The allegations contained in the 25 May 2022 letter, which may have raised a personal grievance, were not raised with Synlait until 2 June 2022.

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<sup>3</sup> Employment Relations Act 2000, s114(1).

*Did the termination letter extend Ms Preece's employment?*

[33] The letter of termination provided an offer to vacate the termination over a four-week notice period if Ms Preece got vaccinated during this time. The wording of the letter is ambiguous and Ms Preece submits that the letter extended her employment until 25 March 2022. If this was correct the 90-day period for raising the personal grievance would be extended to 24 June 2022. The letter dated 25 May 2022, received by Synlait on 2 June 2022 would be inside the 90-day period for raising a personal grievance.

[34] The letter explicitly stated Ms Preece's employment would end on 25 February 2022. Ms Preece received her final pay on 27 February 2022. I find Ms Preece's employment with Synlait ended on 25 February 2022.

*Implied consent*

[35] The parties attended mediation in January 2023. Ms Preece claims this illustrates that Synlait has impliedly consented to the late raising of the personal grievance. Synlait submits that this did not constitute Synlait giving consent to Ms Preece raising personal grievance claims out of time.

[36] Synlait submits that its attendance at mediation was in response to the invitation contained in Ms Preece's letter dated 25 May 2022. The letter raised a number of claims not subject to the 90-day limitation period including breach of contract, which is not a personal grievance and does not have to be raised within 90 days.

[37] Mediation is the primary problem-solving mechanism under the Act. I find that Synlait in trying to resolve employment issues through mediation was not evidence that Synlait consented to Ms Preece's personal grievances being raised out of time.

*Leave to raise a personal grievance out of time*

[38] Ms Preece did not apply to the Authority for leave to extend the employee notification period. There is also no evidence to support a finding of exceptional circumstances in this case.

I therefore do not need to decide whether exceptional circumstances occasioned Ms Reece's delay in raising the personal grievance.<sup>4</sup>

### **Conclusion**

[39] Ms Preece has not raised her personal grievances in time in accordance with s 114 of the Act. Synlait does not consent to the personal grievances being raised out of time. The personal grievance claims cannot proceed.

### **Next Steps**

[40] The Authority will convene a case management conference to set timetable directions for the investigation of Ms Preece's outstanding claims.

### **Costs**

[41] Costs are reserved pending the outcome of the Authority's substantive investigation.

Andrew Gane  
Member of the Employment Relations Authority

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<sup>4</sup> Employment Relations Act 2000, s114(3)&(4).