

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 672  
3053232

BETWEEN                    EVELYN PANAPA  
   Applicant  
  
AND                            SPOTLESS FACILITY SERVICES  
   (NZ) LIMITED  
   Respondent

Member of Authority:     Anna Fitzgibbon  
  
Representatives:           Adam Mapu, counsel for the Applicant  
   Rob Towner, counsel for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions [and further    18 October 2019 from the Applicant  
Information] Received:    3 and 31 October 2019 from the Respondent  
  
Date of Determination:    22 November 2019

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1]     The respondent Spotless Facility Services (NZ) Limited (Spotless) seeks a determination by the Authority on a preliminary issue. The issue for determination is whether the applicant, Ms Evelyn Panapa raised personal grievances as set out in her Statement of Problem, within 90 days as required by s 114(1) of the Employment Relations Act 2000 (the Act).

[2]     Spotless says that Ms Panapa did not raise grievances with them as required by the Act and it does not consent to her raising grievances out of time. Further, Spotless says there is no application by Ms Panapa before the Authority seeking leave of the Authority under s 114(3) of the Act to raise personal grievances after the expiration of the 90-day period.

Spotless says the Authority has no jurisdiction to investigate Ms Panapa's alleged claims against it.

### **Background**

[3] Ms Panapa has been employed by Spotless at Glen Brooke Steel Mill for approximately 18 years. There have been a number of workplace issues during this time involving Ms Panapa. Ms Panapa says she has been the subject of bullying and unfair treatment.

### **Ms Panapa's claims**

[4] Ms Panapa says that following an incident at work on 22 April 2018, she was bullied by a group of Spotless employees. A further incident occurred on 31 May 2018. Ms Panapa says that she complained to Spotless about the bullying.

[5] Ms Panapa and representatives from Spotless attended mediation on 24 January 2019 in relation to Ms Panapa's claim of bullying. At the mediation Ms Panapa says she became aware that she had a personal grievance. Mediation was not successful.

[6] On 5 February 2019, Ms Panapa filed a Statement of Problem in the Authority claiming that she was unjustifiably disadvantaged when Spotless failed to provide her with a safe working environment, free from bullying.<sup>1</sup> Ms Panapa's second claim was that Spotless was trying to constructively dismiss her and had failed to investigate and take steps to prevent bullying. As a result, Ms Panapa says she has not been able to return to work.<sup>2</sup> Ms Panapa has not been at work since June 2019.

[7] In its Statement in Reply filed on 15 May 2019, Spotless denies the claims and says they were not raised with it within the requisite 90-day period under the Act. With regard to the claim of constructive dismissal, Spotless denies this and says Ms Panapa is still employed by it.

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<sup>1</sup> 1.1 of the Statement of Problem.  
<sup>2</sup> 1.2 Statement of Problem.

### **Application by Spotless for the Authority to determine a preliminary matter**

[8] An Investigation meeting to investigate Ms Panapa's claims was timetabled by the Authority. A joint bundle of documents and witness statements from both parties were filed in the Authority.

[9] On 11 July 2019, an application was made by Counsel for Spotless requesting the Authority to determine whether Ms Panapa had raised personal grievance claims in accordance with s 114 of the Act, as a preliminary matter.

### **Investigation meeting**

[10] Counsel for Spotless relies on the Court of Appeal decision in *Skinner v Stay in Front Inc*<sup>3</sup> in support of the application that the Authority determine as a preliminary matter the issue of whether Ms Panapa raised her personal grievance claims within the requisite 90-day period.

[11] At paragraph 10 of *Skinner v Stay in Front Inc*, the Court of Appeal states:

We would have thought it self-evident that it was logical and sensible for the Authority, and the Employment Court on appeal, to determine as a preliminary question whether the personal grievances of the applicants were precluded by the settlement agreements into which they had previously entered with the respondents. Such an issue is often determined as a preliminary question, because if resolved in favour of the party relying upon the earlier agreement the litigation is brought to an end without putting the parties to the expense of a full hearing.

[12] The Authority regularly determines matters on a preliminary basis for these reasons.

[13] There was no opposition to the preliminary matter being determined on the papers. Accordingly, the Authority directed Counsel to each file a memorandum in respect of the preliminary matter, which they did. Reference was made by both Counsel to the evidence contained in the witness statements filed, in support of their respective positions.

[14] There was sufficient evidence available to the Authority to determine the preliminary matter on the papers.

### **Section 114 of the Employment Relations Act 2000**

[15] **Section 114 Raising personal grievance**

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<sup>3</sup> [2007] NZCA 154.

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (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.

### **Claims of bullying and constructive dismissal**

[16] Ms Panapa's representative says that problems were raised by Ms Panapa following the incidents in April and May 2018 which required investigation by Spotless. Ms Panapa's representative does not refer to a personal grievance ever being raised by Ms Panapa with Spotless within the requisite time.

[17] Ms Panapa's second personal grievance claim is that she has been constructively dismissed. However, Ms Panapa remains an employee of Spotless but since June 2019 has not returned to work.

### **Response by Spotless**

[18] Spotless says no personal grievance claims were ever raised with it within the requisite 90-day period and no consent was given for Ms Panapa to raise the grievances out of time.

[19] From the evidence filed it appears no personal grievance claim was in fact raised by Ms Panapa as required by s 114 of the Act. The correspondence from Ms Panapa to Spotless which was provided to the Authority does not identify a personal grievance under the Act which Spotless was required to address and if necessary, resolve.

[20] My view that Ms Panapa did not raise a grievance in accordance with the Act is confirmed by the memorandum filed in the Authority by Ms Panapa's representative. At paragraph 17 of the memorandum, he states:

The applicant has been relying on the respondent to deal with her concerns. It wasn't until mediation that the employee became aware that she had a personal grievance.

[21] At paragraph 21 of the memorandum Ms Panapa's representative states:

Given mediation did not resolve the issues, the Applicant became aware of a personal grievance and subsequently filed a Statement of Problem in the Authority on 5 February 2019.

[22] However, the matters that Ms Panapa claims amounted to a personal grievance were the incidents which occurred in April and May 2018, many months before the filing of the Statement of Problem. Therefore, the personal grievance claims were not raised within the requisite 90-day period (s 114 of the Act).

**Implied consent that Ms Panapa could raise her grievances out of time**

[23] Ms Panapa's representative says that the engagement by Spotless in mediation and involvement by it in the Authority's investigation process means that Spotless agreed that a grievance existed.

[24] I accept the submission made on behalf of Spotless that Ms Panapa raised a complaint of bullying and Spotless agreed that it was an issue that may benefit from mediation. Mediation was organised and held in late January 2019. This was not an unusual way to resolve complaints. This conduct did not amount to either an awareness that a grievance had been raised or that implied consent had been given by Spotless for the grievances to be raised out of time.

[25] The process carried out by Spotless was to consider the workplace complaint made by Ms Panapa and to investigate and attempt to resolve the complaint. Mediation was one of the dispute resolution techniques which it adopted in an attempt to resolve Ms Panapa's complaint.

[26] Ms Panapa has failed to establish on the balance of probabilities that she raised grievances with Spotless within the 90-day time frame specified in s 114 of the Act. Spotless has refused to consent to Ms Panapa raising her personal grievance claims out of time. There was no implied consent or acceptance by Spotless that Ms Panapa had raised grievances with it.

**Costs**

[27] Costs are reserved. Spotless has 14 days to file a memorandum as to costs. Ms Panapa has 14 days in which to respond.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**