

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 327  
3086854

BETWEEN                      NATASHA OLIVER  
Applicant

AND                              SPOTLESS FACILITY SERVICES (NZ)  
LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Natasha Oliver in person  
Sue Perry, advocate for the Respondent

Investigation Meeting:      Telephone meeting 19 May 2020

Further information and      Affidavit from AM sworn 22 June 2020  
submissions received:        Submissions from both parties 27 July 2020

Date of Determination:      20 August 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**A        The application to raise a personal grievance after the expiry of the 90 day period specified by s 114 of the Employment Relations Act 2000 is declined.**

**Amendment to the name of the Respondent**

[1]        An issue about the identity of the employer was raised and considered at the investigation meeting on 19 May 2020. Mark Bodman is the General Manager of Catering – Vbase at Spotless Facility Services (NZ) Limited and was named as the respondent in the statement of problem.

[2] Having been provided with the applicant's employment agreement I am satisfied that the applicant was employed at the material time by Spotless Facility Services (NZ) Limited and not by Mr Bodman.

[3] The respondent's name is amended to Spotless Facility Services (NZ) Limited (Spotless).

### **Employment Relationship Problem**

[4] Natasha Oliver applies to the Authority under s 114(3) of the Employment Relations Act 2000 (the Act) for leave to raise a personal grievance of unjustified dismissal outside of the 90 day statutory period.

[5] Section 114(4) provides:

- (4) On an application under subsection 3, the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –
  - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in s 115); and
  - (b) considers it just to do so.

### *Exceptional circumstances*

[6] Ms Oliver says that an exceptional circumstance that occasioned her delay in raising the personal grievance is in s 115(b) of the Act as follows:

- (b) 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; or..

[7] Spotless does not believe that there are exceptional circumstances and it says Ms Oliver was a casual employee and she cannot bring a valid personal grievance of unjustified dismissal in the circumstances.

[8] The Supreme Court in *Creedy v Commissioner of Police*<sup>1</sup> preferred the meaning of exceptional circumstances as “unusual – outside of the common run” to “something more than special and less than extraordinary.”

### **Raising of the Personal Grievance**

[9] A letter was received by Ms Oliver on 24 September 2019 from Mr Bodman. It provided as follows:

Dear Natasha,

Re: Casual Employment at Vbase venues

I refer to your previous employment with Spotless as a casual employee at the Vbase venues in Christchurch.

As you are aware, your employment with the Company has been on an as-and-when-required basis and as such there is no reasonable expectation of employment beyond any one assignment.

Following your last assignment with us, we held an informal meeting with you in regard to your conduct.

We have now reviewed information pertaining to the meeting and in doing so have taken into account that there is no reasonable expectation of employment beyond your last assignment. Therefore, I think it appropriate to advise you that we are unlikely to utilise your services in the future.

[10] The 90 day period under s 114(1) of the Act commenced with the receipt of the letter of 24 September 2019. It was sent by email that day. The 90 day period ended on Tuesday 24 December 2019. Ms Oliver raised a personal grievance on 6 January 2020 that she had been unjustifiably dismissed and sought remedies. The grievance was raised outside of the 90 day period.

[11] On 6 January 2020 Ms Perry from Human Resources responded to Ms Oliver and acknowledged receipt of the personal grievance letter. She wrote that she did not believe there were exceptional circumstances that warranted the consideration of the personal grievance outside of the 90 days. Spotless did not consent therefore to the grievance being raised outside of the 90 day period.

### **The Investigation Process**

[12] The Authority heard from Ms Oliver and Mr Bodman and Ms Perry by way of telephone call and was provided with relevant documents.

---

<sup>1</sup> *Creedy v Commissioner of Police* [2008] ERNZ 109 at [26]

[13] Ms Oliver said in her evidence that the agent who failed to raise the grievance within a reasonable time was a union organiser who I shall refer to as AM. The Authority advised it would seek further information from AM about what had occurred. The Authority wrote to AM providing a draft of its letter beforehand to Ms Oliver and Ms Perry and no changes were suggested. AM provided an affidavit and the Authority provided a copy of the affidavit to Ms Oliver and Ms Perry. Some further submissions were received and have been taken into account.

### **The Issues**

[14] The Authority is required firstly to determine whether the delay in raising the personal grievance was occasioned by exceptional circumstances and then whether it would be just to grant leave. This will involve considering:

- (i) Did Ms Oliver make reasonable arrangements to have the grievance raised on her behalf by AM?
- (i) Did AM unreasonably fail to ensure that the grievance was raised within the required time?
- (ii) Do the circumstances after 17 December constitute exceptional circumstances?
- (iii) Would it be just to grant leave to raise a grievance outside of the statutory timeframe?

### **Did Ms Oliver make reasonable arrangements to have the grievance raised on her behalf by AM?**

[15] AM had represented Ms Oliver at a meeting the day prior to the 24 September letter from Spotless. After receipt of the letter dated 24 September 2019 AM sent an email to Ms Perry advising of a dispute about whether Ms Oliver was in fact a casual employee. AM requested wage and time records and “time target entries” for Ms Oliver for the duration of her employment with Spotless. There was an indication in the email that after reviewing information AM would be back in touch to discuss issues in relation to fair process.

[16] On 2 October 2019 AM emailed Ms Perry and copied in Ms Oliver attaching an authority to act for Ms Oliver as requested. AM asked in the email for copies of Ms Oliver's work records.

[17] On 4 October 2019 AM spoke by phone with Ms Perry on 4 October 2019 with a view to reinstating Ms Oliver. Ms Perry advised that there had been further posts on Facebook which she considered negative about Spotless and she considered a line had been crossed and the relationship was broken. Ms Perry sent AM an email that same day that contained the information discussed by telephone and the work records.

[18] On 15 October 2019 AM passed that information and the work records onto Ms Oliver in an email. He expressed a view about the Facebook issue and that the focus would need to be on whether Ms Oliver was a casual employee or not. He asked Ms Oliver to do the work to assess the total hours worked each week over the period of employment. On the same day Ms Oliver collated a summary of dates and hours she had worked over her period of employment and provided those to AM. In his affidavit AM deposes to Ms Oliver advising that she wished to pursue a claim for compensation and continuing to maintain that she had been "fired."

[19] Ms Oliver made reasonable arrangements following receipt of the 24 September letter to have the Union pursue a claim of unjustified dismissal. That aspect of s 115(b) is satisfied.

**Did AM unreasonably fail to ensure that the grievance was raised within the required times?**

[20] Ms Oliver said that she would check with AM each week initially to get an update but phone calls and text messages went unanswered. She said in evidence that she was left unclear as to what was happening after 15 October 2019 and nothing further was heard from the Union about her claim until 17 December 2019. At that date she says it was clear for the first time the Union would not be helping her with her case.

[21] AM deposed to receiving the information from Ms Oliver on 15 October 2019 and then seeking advice from a Union lawyer about whether the summary of hours/days worked was indicative of permanent or casual employment. Advice was received and AM deposes to telling Ms Oliver to the effect that she was a casual employee.

[22] AM states in his affidavit that Ms Oliver then asked if she could pursue a breach of privacy in relation to the Facebook post. AM deposes to consulting two senior colleagues about the privacy breach and then reporting by phone on 29 October 2019. He said that whilst he did not make a note of that conversation his recollection was that he said there was nothing further the Union could do.

[23] AM states in his affidavit that Ms Oliver continued contacting him by phone during November 2019. His recollection is that the tenor of the phone calls was that he kept reiterating the previous advice but Ms Oliver wanted to pursue matters. AM stated in his affidavit that he had a conversation with his manager and advising that Ms Oliver kept calling him but “wasn’t hearing what he was telling her.” He deposed to sending his file on to his manager on 9 December 2019 and had no further contact with Ms Oliver after that date.

[24] AM said in his affidavit that he had reflected on his discussions with Ms Oliver. He stated that his consistent messaging was that there was no case to pursue because of the casual nature of employment. He deposed to routinely informing members in those circumstances that they are free to take the matter further independently but cannot recall with one hundred percent certainty if he said that to Ms Oliver.

[25] Ms Oliver said in her evidence after she received an email from the Union dated 17 December 2019 there were only three days before her family headed away on Christmas holidays and one week left before the end of the 90 day period. She said that she was left with very little time to put together supporting documents and was not sure if she could raise a personal grievance.

[26] The employment status of Ms Oliver assumed some importance in this matter. The letter from Spotless on 24 September 2019 specifically referred to the causal nature of employment. Emails that day and thereafter from AM to Ms Oliver and Spotless are consistent with a focus on establishing the status of employment. The status of Ms Oliver as an employee for example was referred to by AM in the 15 October 2019 email to Ms Oliver as “our only argument.” It was a matter that was to be considered on a preliminary basis.

[27] I conclude that AM was more likely in those circumstances to have discussed with Ms Oliver the information she had provided about her hours and days of work after 15 October 2019. He deposed to having asked the Union lawyer for an opinion and it is less likely that that matter went unaddressed by AM until 17 December. Ms Oliver was hopeful that the

Union would still pursue her matters and continued to explore that. She continued to pay her Union membership fees although there is no evidence that matter was specifically addressed by the Union. I note that Ms Oliver did query in an email to the Union whether she should maintain the payments however there did not appear to be any response.

[28] I conclude it was more likely than not that there was some engagement between AM and Ms Oliver after 15 October and before 17 December 2019 to the effect that the Union would not be taking her case forward. Consistent with that Ms Perry heard nothing further from AM about Ms Oliver after 4 October 2019 until Ms Oliver raised a personal grievance on 6 January 2020.

[29] I do not conclude that the second aspect of s 115(b) is satisfied that AM failed unreasonably to ensure the grievance was raised within the required time. The Union concluded that there was no argument about a key aspect of the claim and in all likelihood advised Ms Oliver in a reasonably timely manner before 17 December 2019 that it would not be pursuing the claim on her behalf and the reasons why.

#### **Were there exceptional circumstances after 17 December 2019?**

[30] I have considered whether there would be exceptional circumstances if Ms Oliver had not properly understood earlier than 17 December 2019 that the Union was not taking her case. The difficulties with the time of the year and the holiday season are acknowledged. I do not however conclude that those difficulties are exceptional circumstances within the meaning of being unusual or outside the common run.

[31] I was satisfied from Ms Oliver's evidence that she had an awareness of the 90 day period within which to raise a grievance including at the time she was dealing with AM. The clear advice from the Union on 17 December 2019 left her with a week to raise a personal grievance and Spotless confirmed that its operations continued over that period.

#### *Conclusion*

[32] In conclusion I am not satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances for the reasons set out above.

[33] Therefore I do not need to determine whether it would be just to allow Ms Oliver to raise the grievance out of time.

**Costs**

[34] I do not anticipate there will be any issues of costs. Out of an abundance of caution I reserve the right for Ms Perry to confirm otherwise within five working days from the date of this determination.

**Helen Doyle**  
**Member of the Employment Relations Authority**