

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 313  
3115536

BETWEEN	CODY THOMAS Applicant
AND	VEHICLE TESTING NEW ZEALAND LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Emma Moss, representative for the Applicant David Patten, counsel for the Respondent
Investigation Meeting:	On the papers
Information and submissions received:	29 April 2021 from the Applicant 24 March, 13 May and 1 July 2021 from the Respondent
Determination:	21 July 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Cody Thomas says he was unjustifiably disadvantaged in his employment between 2018 and July 2020. He says Vehicle Testing New Zealand Limited (VTNZL) has engaged in a course of conduct which subjected him to bullying and failed to fairly investigate his complaint when it was raised in October 2018. It is understood that he says that until the outcome of his bullying complaint was known (23 July 2020) the personal grievance did not crystallise. He also says he has personal grievances for events in March 2020 involving unfair pay disparity and an unlawful suspension. He says he raised personal grievances for such within the statutory 90-day period or, in the alternative, he seeks leave from the Authority to raise personal grievances out of time.

[2] VTNZL says Mr Thomas raised personal grievances for unjustified action causing disadvantage by way of letter dated 3 October 2018 but that the scope of those personal grievances are limited to matters falling within the statutory 90 days prior to raising and does not consent to the remaining personal grievances being raised out of time. VTNZL opposes leave to raise any grievances out of time.

[3] This determination deals only with the preliminary jurisdictional issue of whether Mr Thomas has raised all his personal grievances within the statutory 90-day timeframe.

### **The Authority's investigation**

[4] By consent the preliminary issue is determined on the papers. The Authority has received affidavits from VTNZL Area Manager Paul Coggan and Human Resource Business Partner Robyn Rayner. Mr Thomas has not filed an affidavit. On 24 June 2021 the Authority referred the parties to a recent judgment of the Employment Court concerning raising of personal grievances based on a course of conduct and set a timetable for filing submissions.<sup>1</sup> VTNZL filed submissions. Mr Thomas did not.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

### **Issues**

[6] The issues requiring investigation and determination are:

- (i) Did Mr Thomas raise personal grievances for unjustified actions causing disadvantage within the statutory 90-day timeframe?
- (ii) If Mr Thomas' personal grievances are out of time, are there any grounds on which his claim could be permitted to progress?

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<sup>1</sup> *Panapa v Spotless Facility Services (NZ) Ltd* [2021] NZEmpC 88.

## Relevant law

[7] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins 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 outside the statutory timeframe.

[8] The grievance is raised with the 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 the employee wants the employer to address.<sup>2</sup>

[9] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) considers it just to do so.

[10] In personal grievances where the conduct leading to the grievance has continued over a period (as Mr Thomas alleges for part of his claim) the employee is required to submit the grievance within 90 days of the most recent occurrence. However, this may not preclude the Authority from taking account of the earlier incidents as part of a course of conduct or as being relevant to the amount of any compensation awarded. In a disadvantage grievance the Authority can hear evidence of events that occurred outside the 90-day period as long as these were connected to events within the period so as to establish a course of conduct that can be evaluated as the basis for the grievance.<sup>3</sup>

[11] In *Panapa* the Employment Court considered a personal grievance based on a course of conduct which was said to amount to workplace bullying:

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<sup>2</sup> Section 114(2) of the Act.

<sup>3</sup> *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79.

[37] In her primary position, the action that Ms Panapa complains about is the failure by Spotless to properly investigate her allegations of bullying and to take steps to ensure her safety at work. It is apparent that her grievance is not that she was bullied by her colleagues at work in May 2018, but rather is directed to Spotless' actions following that incident.

[38] Where a complaint is a continuing one, it is not straightforward to identify a particular date from when the 90 days runs. The question here is at what point can it be said that it came to Ms Panapa's notice that Spotless would not conduct the investigation she sought or take the steps she says were needed to make to workplace safe for her.

## **The parties' positions**

### *Mr Thomas' position*

[12] In his statement of problem Mr Thomas seeks resolution of four personal grievances for alleged unjustified actions of VTNZL which he says have disadvantaged him in his employment as follows:

- (i) representatives of VTNZL engaging in a course of conduct of bullying and disparate treatment between 2018 and July 2020 which include instances of breaches of privacy in respect of personal medical information, disparate treatment in respect of remuneration, work location and hours of work and being isolated and humiliated in the workplace;
- (ii) VTNZL's sustained breach of good faith by failing to deal with his medical condition fairly and reasonably and failing to investigate and conclude his complaints of bullying and disparate treatment;<sup>4</sup>
- (iii) failure of VTNZL to appropriately investigate and conclude the bullying complaint which Mr Thomas made in October 2018 and the outcome of which was communicated by VTNZL to Mr Thomas on 28 July 2020; and
- (iv) unjustified wage disparity and unlawful suspension on 23 March 2020.

[13] Mr Thomas submits he has raised personal grievances (i) – (iii) within the 90-day statutory timeframe by way of letter dated 3 October 2018 because:

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<sup>4</sup> Mr Thomas will need to establish a clear jurisdictional basis of a personal grievance based on an alleged breach of good faith.

- the employment is ongoing and the issues of bullying/disparate treatment are serious and ongoing;
- the letter clearly articulates Mr Thomas' concerns and conveys the context of the disadvantages with sufficient clarity to allow VTNZL to address those concerns; and
- in the alternative, if the 3 October is not sufficient to raise the personal grievances leave should be granted to Mr Thomas to raise his personal grievances out of time because of the delay in concluding and/or communicating to him the outcome of the October 2018 complaint until 28 July 2020 occasions an exceptional circumstance which would make it just to grant leave.

[14] In respect of personal grievance (iv) Mr Thomas says this was raised within the 90-day statutory timeframe by letter dated 9 July 2020 because the disciplinary issues related to the suspension were set out in a letter dated 28 May 2020 and this process (the disciplinary investigation into the issues raised by VTNZL in the letter 28 May 2020) was not concluded until 6 July 2020.

*VTNZL's position*

[15] VTNZL submits:

- Mr Thomas has raised two actions alleging disadvantage within the 90-day period;
- it does not consent to any personal grievances being raised out of time;
- no exceptional circumstances exist to grant leave to bring personal grievances out of time; and
- Mr Thomas' attempts to raise out of time disparate matters cumulatively in personal grievances is disingenuous because those matters are resolved or were not raised within 90-days of the alleged conduct arising.

[16] In particular VTNZL says:

- while it accepts Mr Thomas' 3 October letter raised personal grievances for alleged bullying matters any conduct beyond the 90 days prior to 3 October (that is 3 July 2018) fall outside the scope of the personal grievance; and
- the personal grievances based on suspension and disparity of wage rates were raised by way of letter dated 9 July 2020 and are out of time because they are discrete events which came to the attention of Mr Thomas on 9 March (the date the remuneration increase was announced) and 23 and 24 March (the respective dates the suspension was imposed and then revoked).

## **Background**

[17] On 3 October 2018 Mr Thomas wrote to VTNZL “raising a formal complaint due to the current treatment I am receiving...”. The letter identified employees responsible for the alleged treatment and said he felt:

“...[the identified employees] are using bullying tactics in order to make a point and create a stressful work environment for me. None of them know how to communicate, they do not support their employees and they use raised voices to try and make a point of the position they are in. In any given situation, they always presume the worst in the employee and instead of asking for the whole story, they start by telling you off...”.

[18] The letter goes on to give specific examples concerning circumstances around a meeting where regular time off was agreed to, application of the travel policy and a change in usual process for finishing which left Mr Thomas feeling humiliated, singled out and bullied. The letter finishes “I would be interested in meeting with HR to discuss these issues further.”

[19] On receiving Mr Thomas' complaint VTNZL appointed an investigator, Ms Rayner. Subsequent to sending the 3 October letter between 9 October and 17 January 2019 Mr Thomas actively engaged with VTNZL's investigation process:

- on 11 October Ms Rayner wrote to Mr Thomas outlining the investigation process;
- on 19 October Ms Rayner wrote to Mr Thomas asking for more information following an person meeting and posing specific questions including what his expectations of the outcome of the complaint were;
- on 25 October in answer to that question Mr Thomas replied:

Are you able to tell me what you would expect as an outcome of your complaint?

I would like for both [the identified employees] to understand that they cannot just do what they like and use policies to work in their favour and then not follow them ...

Thank you for sending me some bullet points to help me elaborate but I do not want to stray away from my main issue that I am being picked on by my management...this shows a clear pattern with my current management which is not acceptable.

I hope I haven't forgotten any of my points in this long response I look forward to hearing from you.

- as the investigation continued Mr Thomas wrote to Ms Rayner with his concerns about the process:

It feels as this investigation keeps going, valuable points keep being left out of each phase of this investigation and are being redirected towards things that aren't even a concern of mine. For example, on the phone you ask him about customer feedback cards, even though I have raised concerns about bullying, lying, money owing to me, individual treatment and management gang tactics...

I look forward to hearing from you.

- on 11 December Ms Rayner provided witness interview notes to Mr Thomas to comment on;
- on 15 January 2019 Mr Thomas wrote to Ms Rayner including:

While I have brought these individual treatment scenarios to your attention, nothing has been done to resolve any of them for me...Now VTNZL is going to put me back in a work environment with both of them while I still have an ongoing complaint that hasn't even been close to be (sic) dealt with. I find both of these managers intimidating with the things they do and how they talk to employees and going back into an environment like that is causing me stress.

- On 17 January Ms Rayner wrote by way of reply to Mr Thomas:

The investigation is ongoing. I have spoken to the manager and your complaint is being investigated.

[20] The email then goes on to address specific concerns about travel policy, being asked to work at different locations and recommends Mr Thomas ensure his hours worked in excess of eight are accurately recorded to ensure payment. The Authority understands VTNZL's view is this email communicates the resolution of a number of the specific concerns raised by Mr Thomas in the 3

October letter and that its position is that for Mr Thomas to now seek to raise these again in a bullying context is disingenuous because he has been, to date, satisfied with these discrete solutions.

[21] There was no further communication concerning Mr Thomas' 3 October letter or the investigation until 8 June 2020 when Mr Thomas wrote to Ms Rayner:

...

Second matter

As I am being accused of 'Misleading VTNZL' and breaking our good faith agreement for having Wednesdays off. I am enquiring about my bullying complaint.

I was forced to tell [one of the identified employees] about my open bullying complaint I had with him, this made me extremely uncomfortable. I had to explain that when you and me were discussing my bullying complaint, you asked me what resolution I was hoping for. I told you I wanted [the identified employees] to leave me alone and continue to keep my Wednesdays off. You acknowledged this and then I never heard from you again after 17<sup>th</sup> of January 2019 when you said the complaint was being investigated and ongoing. When I was given Wednesdays off initially [one of the identified employees] said he would come back in a matter of weeks to see how my situation was going. After the complaint, neither you or him ever came back to me so I presumed that permanent Wednesdays off was the solution you had taken.

Now [one of the identified employees] is saying he was not aware of this and as my contract was never amended to include Wednesdays off, it is still a good faith agreement despite him never following up on his end. This means that my complaint was never resolved and I would like to hear from you on what is happening. This being the case, having [one of the identified employees] investigate me while I have an ongoing bullying complaint makes me very distressed.

What is the current situation of my complaint?

Why have you never come back to me about the investigation?

...

[22] When Mr Thomas did not receive a reply he wrote again to Ms Rayner on 22 June:

As I haven't received a reply to my email that I sent you on the 8<sup>th</sup> of June addressing my bullying complaint, I am following up with you. I have been informed by [one of the identified employees] that my bullying complaint that I raised about both [the identified employees and his manager], has been closed due to lack of evidence. I am not sure why the person I am complaining about is informing me that the case is closed. This is the first I have heard about my complaint since your last email of January 17<sup>th</sup> 2019 stating the investigation was still ongoing.

...

[23] On 23 June 2020 Ms Rayner replied to Mr Thomas:

Good morning Cody

Your complaint was investigated. I could not find any evidence to support your complaint, your managers only asked you to do your job at the time. You stated DTO at Westgate and Northshore were able to leave early if they finished their test earlier than 4.30pm. This was not the case at North Shore and Westgate DTOs often assist the CSR's or their manager.

DTO's are required to work their hours of employment which is either 8 – 4.30pm or 9 to 5pm depending on the location. Across branches it is expected if DTO finish testing early on the day they are should either prepare work for the following day or check in with their manager as to providing assistance in the branch.

Being asked to travel to and from branches is within your employment agreement and is expected that you will assist when asked to travel. If you are unable to do so you need to raise this with your manager. The distance travelled according to policy is 15 km the distance between Saturn Place and North Shore is 6km one way. I understand an expense claim was paid to you for the petrol expenses incurred at the time you completed this travel.

Your health matter was raised with your managers, they decided that it was better for you to continue to work Mon – Tues – Thurs – Fri. Having Wednesdays off to rest and recover.

At the time of your complaint your branch did not have a manager...was acting as the Saturn Place manager, he was responsible for ensuring the team worked their hours according to their employment agreements. Your Area Manager is responsible for area, he is the decision maker regarding the employment needs in his area.

The alleged matter being investigated at the moments refers to the development of a website. The decision maker regarding this investigation is your Area Manager.

Regards

...

[24] This exchange was prompted by the disciplinary investigation VTNZL undertook in March 2020 into a website Mr Thomas started and the subsequent investigation meeting held on 5 June 2020 where Mr Thomas asked about the outcome of the October 2018 bullying complaint. On 28 July 2020 VTNZL through its lawyer wrote to Mr Thomas' representative:

As advised to you at the meeting held on 22 July, the complaint was properly investigated by my client (Robyn Raynor, VTNZL Business partner). It is regrettable that the outcome of that investigation was not notified to Mr Thomas until 23 June 2020. This 'time lag' was not deliberate but simply an omission by Ms Rayner to advise Mr Thomas of the outcome. It is making this point however it is noted that this omission does not appear to have concerned Mr Thomas as it was not until he met with [one of the identified employees

and a manager] on 5 June 2020 that he raised the matter again – see p. 6 of the Interview Notes.

[25] The interview notes referred to include:

CT:...And then, I don't, did Robyn come to you about my complaint?

PC: refresh my memory, what was the complaint about?

CT: A complaint against you and [the other identified employee] for bullying.

PC: That was in 2018?

CT: Yes. Yeah.

PC: I, off the top of my head Cody that's possible. There were a lot of things I've dealt with since 2018.

CT: Yeah, that's alright. I'm sure you get through a lot, so...yeah, so I brought that up, working through it with Robyn. She asked me what...

PC: Was that around that time when you were working out of here – came down here to work for a week?

CT: I kept getting sent to you, yes. Yeah, yeah. And there was a few things outside of it.

PC: Yeah, [indistinct 12.17] she did, then.

CT: Yeah. So that was there. I had meetings with her. She asked me what I wanted and in terms of, you know, a solution. And I said I wanted you and [one of the identified employees] to basically leave me alone and for me to keep my Wednesdays off, and she acknowledged that. And then I never heard from her or your guys again. I kept my Wednesdays off, so I assumed that was her way of getting rid of my complaint and resolving it.

## **Discussion**

*Has Mr Thomas raised personal grievances for unjustified actions causing disadvantage?*

*(i) 3 October bullying personal grievances?*

[26] All the evidence and information provided has been reviewed. I am satisfied the 3 October 2018 letter Mr Thomas seeks to rely on constitutes a raising of a raise personal grievance for unjustified action causing disadvantage in respect of his claim of bullying and disparate treatment for the period 90 days prior to 3 October 2018 (that is 3 July 2018) and that the personal grievance raised in the 3 October letter remains unresolved.

[27] Even if it could be said the 3 October letter fell short of raising a personal grievance the totality of communications between Mr Thomas and Ms Rayner up to January 2019 state his view VTNZL were requiring him to work with employees whose conduct, as described, he characterised as bullying, that this was causing him stress and he did not want VTNZL to put him in that situation. To raise a personal grievance there must be sufficient information communicated to the employer that a grievance is being raised in relation to the events which Mr Thomas wanted addressed. I am satisfied this is what occurred.

[28] The events complained of that fall before the 90 day period ending on 3 October 2018 may be considered as relevant to the issues within the 90 day period.<sup>5</sup>

[29] As stated above at [26] Mr Thomas' 3 October personal grievance remains unresolved. As to events subsequent to 3 October which may, following an assessment of fact and degree, be sufficiently close in time and quality to be relevant are issues to be considered in the substantive investigation of this employment relationship problem.

[30] For completeness I am not drawn to the argument that Mr Thomas has forgone his 3 October complaint (either in part or whole) due to either failure to prosecute or satisfaction with VTNZL's resolution. This is because there has been a clear failure on VTNZL's part to complete an investigation process over which it had total control. Mr Thomas was entitled to rely on Ms Rayner's January 2019 email that the investigation into his complaint was ongoing and his comments and correspondence in June 2020 is consistent with his good faith reliance on that communication. That the investigation outcome was not communicated to Mr Thomas until June 2020 is not a reasonable basis to limit his claim.

*(ii) Suspension and remuneration disparity March 2020 regarding remuneration?*

[31] These personal grievances are purported to have been raised by letter dated 9 July 2020.<sup>6</sup> The discrete events involved occurred on 9, 23 and 24 March 2020 – when the remuneration round was announced and the suspension imposed and revoked. On a

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<sup>5</sup> Refer *Premier* above.

<sup>6</sup> There is a suggestion in the submissions filed on behalf of Mr Thomas that he verbally raised this personal grievance. There is no evidence or insufficient evidence to support such a finding.

bare numerical count they are out of time unless the Authority accepts they are part of the course of conduct first complained of in the 3 October 2018 letter and/or they are themselves ongoing in nature.

[32] In respect of the former I am not satisfied on the evidence they are sufficiently connected to the events raised in the 3 October letter given both the time delay and their discrete nature. In respect of the later I am satisfied the basis of these personal grievances were discrete events and, on the evidence, crystallised on those dates which are the dates the 90 day time frame commenced.

[33] The delay is not occasioned by exceptional circumstances which would make it just to grant leave. While I accept Mr Thomas' attention may have been on the disciplinary investigation and following up the bullying complaint (at least from 5 June) the threshold necessary to grant leave is not met by such circumstances.

### **Outcome**

[34] By letter dated 3 October 2018 Mr Thomas has raised personal grievances for unjustified actions causing disadvantage for bullying and disparate treatment described therein.

[35] By letter dated 9 July 2020 Mr Thomas has raised personal grievances for unjustified action causing disadvantage in relation to VTNZL's investigation into his 3 October 2018 complaint.

[36] Mr Thomas has not raised personal grievances within time for March 2020 unlawful suspension and wage disparity and leave is not granted for him to do so.

[37] A case management conference is to be convened with the parties to discuss directions to progress the substantive application.

## **Costs**

[38] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority