

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 223  
3255639

BETWEEN	KAYLA FABER Applicant
AND	CHS INVESTMENTS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Heather Stephens, advocate for the Applicant Eddie Taia, counsel for the Respondent
Investigation Meeting:	On the papers
Information and submissions received:	25 January, 15 February and 26 March 2024, from the Applicant 2 February 2024 and 26 March 2024, from the Respondent
Determination:	18 April 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Kayla Faber has been employed by CHS Investments Limited (CHS) from 19 June 2019 as a part time retail assistant in its Whangarei store. She brings a number of matters before the Authority for resolution including four personal grievances for unjustified disadvantage. The grievances concern not having a signed and agreed employment agreement, CHS failing to communicate regarding changes to rostered shifts, an unwarranted and unfair disciplinary process and failing to reasonably investigate concerns of unfair treatment.<sup>1</sup>

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<sup>1</sup> Refer personal grievance raising letter 25 September 2023.

[2] CHS does not accept Ms Faber's personal grievances, other than that concerning her employment agreement, were raised within the statutory 90-day time frame. It does not consent to the personal grievances being raised out of time. CHS says the issues concerning the roster, the disciplinary investigation and its outcome and the bullying and harassment complaint and its outcome were matters which came to Ms Faber's attention in at least 2021 and for which personal grievances were not raised until 25 September 2023. CHS opposes leave to raise the grievances out of time, though it notes Ms Faber has applied to do so.

[3] This determination deals only with the preliminary jurisdictional issue of whether Ms Faber has raised personal grievances for the three identified matters 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 information including submissions and supporting affidavit evidence from the parties which they filed in accordance with timetabling directions. Affidavits have been received from Chris Sorrell and Kelly Hughes, sworn 2 February 2024 and Ms Faber, sworn 17 January 2024 and 13 February 2024, Adam Faber, sworn 16 January 2024 and Bruce Erceg sworn on 17 January 2024 and 13 February 2024. The parties subsequently exchanged memoranda on matters raised by the Authority during the course of this investigation.

[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 information provided by the parties and their submissions.

### **Issues**

[6] The issue requiring investigation and determination is whether Ms Faber raised personal grievances for unjustified actions causing disadvantage within the statutory timeframe. She has not applied for leave to raise any grievance out of time.

## 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] In personal grievances where the conduct leading to the grievance has continued over a period (as Ms Faber alleges for part of her 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>

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

[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.

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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.

[11] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:<sup>4</sup>

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.”

[12] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:<sup>5</sup>

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.

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.

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

[13] 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:

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<sup>4</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>5</sup> [2019] NZEmpC 132, at [36]–[38].

- (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.

[14] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (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
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

## **Background**

[15] The following background outlines the key events relevant to the determination of this preliminary issue in chronological order.

### *24 July 2020 - first reported incident of bullying and harassment*

[16] Ms Faber says on 24 July 2020 a serious bullying and harassment incident occurred at work between her and a co-worker. She says she told Mr Sorrell including that the incident had upset her so much that she wanted to resign. In response Mr Sorrell said they would speak to the coworker about the incident and asked Ms Faber to take a week to reconsider her resignation because they did not want her to leave. Ms Faber took the week off as offered and when she returned to work was told in a telephone conversation that because it was a "he said/she said" situation CHS could not determine exactly what happened. Ms Faber did not take the matter further.

*March 2021 – disciplinary investigation*

[17] On 9 March 2021 CIL wrote to Ms Faber inviting her to attend a disciplinary meeting on 11 March to discuss an allegation she failed to follow a reasonable request to return to work after a civil defence tsunami warning had been lifted. Prior to the meeting Ms Faber provided a written response to the allegation. The meeting was held by audio-visual link. Ms Faber attended with a support person and they spoke to the written response. At the end of the meeting Mr Sorrell advised Ms Faber CHS would take no further action and she should return to work as normal. CHS says the outcome of the meeting was then confirmed to Ms Faber by email dated 18 March 2019. Ms Faber says she did not receive the email at that time. She does not accept the outcome letter was emailed to her on 18 March. She says the first time she saw the letter was in late 2023 when it was provided in response to an information privacy request.

*25 May 2021 – formal complaint of workplace bullying and harassment*

[18] On 25 May 2021 Ms Faber emailed CHS's HR advisor Ms Hughes with a formal workplace bullying and harassment complaint. The email followed an audio-visual call Ms Faber attended with Ms Hughes and a coworker to discuss rosters and housekeeping matters in the workplace. The email includes:

Now that I've had a few minutes to calm down after the obvious workplace bullying and harassment that you have just witnessed on our zoom call, I would like to make a formal complaint.

During the 10 months that [co-worker's name] and I have been working at Spurs together I have been subjected to this bullying and harassment in a multitude of times as Chris has been made aware of.

This has to stop and is totally unacceptable in any terms especially in a workplace.

[19] Ms Hughes replied by email they should speak the following day. She described the conversations that followed as allowing Ms Faber to vent her frustration about the situation with the coworker, that she outlined the options available to Ms Faber in terms of an investigation of the complaint and Ms Faber elected not to proceed. There is no written record of the discussions between Ms Faber and Ms Hughes, CHS did not write to Ms Faber recording an outcome and there is no contemporaneous record of any such discussion before the Authority. CHS does not appear to have considered Ms Faber was raising a personal grievance that she was being bullied by her coworker.

[20] Ms Faber denies making any such election. She says she had no prior experience with such employment relationship issues and relied on CHS to guide her through the process. This reliance seems reasonable given Ms Hughes had made herself available to Ms Faber as CHS's HR advisor and at this stage, Ms Faber had not been provided with a written employment agreement, which was required to contain a plain language explanation of services available to resolve employment relationship problems and include a reference to personal grievances and the relevant timeframes.<sup>6</sup>

*2 June 2021 – CHS provides Ms Faber with a written employment agreement*

[21] On 2 June 2021 a written employment agreement was provided to Ms Faber to sign. This was the first written employment agreement CHS had provided Ms Faber and includes provision that the roster may be subject to change and a clause explaining resolution of employment relationship problems and other required matters.<sup>7</sup> Ms Faber did not sign this agreement or one subsequently offered by CHS. The parties' dispute as to the terms of the employment agreement and matters arising from the written employment agreement not being provided at the outset of Ms Faber's employment are substantive matters before the Authority to be determined later.

*September 2021 – roster agreement*

[22] In September 2021, following discussion the parties appear to have reached agreement as to a roster for Ms Faber – Tuesday, Wednesday and every third Saturday.

*27 September 2022 – complaint about inappropriate diary note*

[23] Ms Faber emailed Mr Sorrell on 27 September about raising a complaint that her coworker had written an inappropriate and rude note in the work diary "yet again", described the impact on her and put the impact in the context of the earlier concerns raised. Mr Sorrell and Ms Hughes proposed a process in writing to Ms Faber over a series of emails to investigate the complaint.

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<sup>6</sup> Employment Relations Act 2000, s 65(2)(vi).

<sup>7</sup> Employment agreement, clause 18.

*4 October 2022 – Ms Faber request CHS ‘hold fire’ on the complaint*

[24] On 4 October Ms Faber wrote to Ms Hughes asking her “to hold fire” on the complaint because she understood the coworker had told Mr Sorrell they would be leaving at the end of the year. Ms Faber appears to accept this has resolved the 2 June complaint but says it did not resolve the 25 May complaint.

*23 September 2023 – Ms Faber raises personal grievances*

[25] After a period of leave in 2023 Ms Faber contacted Mr Sorrell about returning to work. She was dissatisfied with the proposed roster and following an exchange of correspondence, the personal grievance letter dated 23 September was sent on her behalf. Ms Faber remains employed by CHS but, the Authority understands has not returned to work.

**Discussion**

*Has Ms Faber raised personal grievances for unjustified actions causing disadvantage?*

(i) *Unfair roster changes?*

[26] The 23 September letter includes a personal grievance:

Changing my roster with no warning and no discussions was done as a unilateral change by you.

All changes to my rostered hours must be made in good faith and a fair process. Neither of these guiding principles was adhered to in any way and I believe that the employment relationship requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[27] The letter identifies the roster change the subject of the personal grievance as that advised to Ms Faber in September 2023 when she sought to return to work after a period of leave. The letter also seeks to place Ms Faber’s concerns about rosters in the context of the whole employment relationship.

[28] Ms Faber has raised a personal grievance for unjustified disadvantage in relation to claims she makes about changes to her roster in September 2023. Roster arrangements made by the parties during the course of the employment relationship is context for any substantive consideration of the personal grievance as is the terms of the parties' employment agreement.

(ii) *Bullying and harassment complaint?*

[29] The 23 September letter purports to raise a personal grievance in relation to workplace bullying and harassment. The personal grievance is described as follows:

During my time in your employment, I advised both you and the HR Consultant of a serious bullying incident between myself and another staff member, however, you did not investigate this matter and let the incidents occur without taking any action at all leaving me in a very vulnerable and precarious situation at work.

[30] It is not clear on the face of the 23 September letter when Ms Faber says she raised these issues with CHS and Ms Hughes. The statement of problem provides more information. It refers to the 25 May 2021 formal complaint Ms Hughes emailed CHS saying she was suffering workplace bullying and harassment, the timeframe over which she says it continued and identifies the alleged perpetrator. 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 Ms Faber wanted addressed. I am satisfied this is what occurred.

[31] The 25 March 2021 email Ms Faber seeks to rely on constitutes a raising of a raise personal grievance for unjustified action causing disadvantage in respect of her claim of bullying and harassment for the period 90 days prior to that date. That personal grievance remains unresolved. It is not accepted Ms Faber has forgone her 25 March personal grievance (either in part or whole) due to either failure to prosecute or satisfaction with CHS's handling of the situation. There is no evidence to support such a finding – other than Ms Hughes acknowledgment of the email and request to speak with Ms Faber there is no contemporaneous record of how CHS responded to the personal grievance. The argument that it was Ms Faber's decision not to proceed with the investigation of the complaint is not established and conflates the nature of the matters raised – an investigation into a bullying and harassment investigation is not the

same as responding to a personal grievance, which having raised on 25 March 2021 Ms Faber had 3 years had to commence proceedings.<sup>8</sup>

[32] The events complained of that fall before the 90-day period ending on 25 March 2021 may be considered as relevant to the issues within the 90-day period.<sup>9</sup>

[33] The events following the 25 March personal grievance are not relevant to the investigation of that personal grievance because Ms Faber did not raise a personal grievance in respect of CHS's alleged failure to investigate her 25 March claim until over two years later when the 23 September letter was sent to CHS. She is in time to pursue her claim of workplace bullying and harassment as raised on 25 March. She is not in time to raise a personal grievance that CHS failed to investigate that claim.

(iii) *Formal disciplinary process?*

[34] Ms Faber says the cause of action that the outcome of the disciplinary meeting was unsatisfactorily dealt is ongoing because she did not receive a written outcome of the meeting. There is no dispute Ms Faber was told at the conclusion of the meeting that the disciplinary matter would be taken no further. The meeting and its outcome were not raised again between the parties until 23 September 2023 when Ms Faber raised a personal grievance. The initiator for this grievance being raised at that time appears to be Ms Faber first seeing the outcome letter which she did not receive though, for completeness, this delay has not been raised as a personal grievance.

[35] Ms Faber had 90 days to raise a grievance as to her dissatisfaction with the disciplinary process and the outcome, or lack thereof. She has not raised a grievance concerning the disciplinary process, by which I mean CHS's decision to conduct a disciplinary investigation into the relevant matter, within the statutory timeframe because that cause of action arose on 11 March 2021. In respect of the outcome of the disciplinary action and her expectation of what that might involve, again, the grievance has been raised well out of time, because the cause of action also on 11 March 2021 was known to her when Mr Sorrell told her no further action would be taken. Ms Faber knew at that date how CHS had communicated the outcome. The claimed deficiency

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<sup>8</sup> Employment Relations Act 2000, s 114(6).

<sup>9</sup> Refer *Premier* above.

was known to her then, or ought reasonably to have been known and the 90-day period started at that date.

### **Outcome**

[36] Ms Faber has raised within the 90-day statutory timeframe personal grievances for unjustified disadvantage in respect of the 25 May 2021 bullying and harassment complaint about a coworker, roster changes in September 2023 and matters concerning her employment agreement.

[37] A case management conference is to be scheduled to progress the investigation of this employment relationship problem.

### **Costs**

[38] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority