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Panapa v Spotless Facility Services (NZ) Ltd [2021] NZEmpC 88 (21 June 2021)

Last Updated: 25 June 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 88](#)

EMPC 481/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EVELYN PANAPA Plaintiff
AND	SPOTLESS FACILITY SERVICES (NZ) LTD Defendant

Hearing: 27 April 2021 (Heard at
Auckland)

Appearances: A Mapu, advocate for plaintiff R
Towner, counsel for defendant

Judgment: 21 June 2021

JUDGMENT OF JUDGE J C HOLDEN

[1] Ms Panapa claims that Spotless Facility Services (NZ) Ltd (Spotless) failed to properly act when she complained to it about alleged workplace bullying. Ms Panapa claims this is an unjustifiable disadvantage. Spotless emphatically denies these claims and says it takes the health and safety of its employees very seriously. In its view, it acted responsibly towards Ms Panapa at all times. It does not believe any bullying of Ms Panapa took place.

[2] In a preliminary determination, the Employment Relations Authority (the Authority) found that Ms Panapa's personal grievance was not raised within the 90-day timeframe specified in [s 114](#) of the [Employment Relations Act 2000](#) (the Act). As the Authority found that Spotless had not consented to Ms Panapa raising her

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grievance out of time, she could not pursue it.¹ The Authority, therefore, did not proceed to hear Ms Panapa's substantive claims.

[3] Ms Panapa challenges the Authority's preliminary determination and this judgment resolves that challenge. At issue, therefore, is whether Ms Panapa raised her unjustifiable disadvantage personal grievance within 90 days of it arising.

Ms Panapa complains about bullying

[4] Ms Panapa alleges that she has been subjected to bullying in her employment at Spotless, dating back to 2007.

[5] The incident that triggered her personal grievance claim occurred on or about 6 May 2018. Ms Panapa says her colleagues on the Spotless cleaning team at New Zealand Steel's Glenbrook site accused her of writing a threatening letter. Ms Panapa says she raised that matter with Mr Whitelaw, the Cleaning Manager at Spotless, the same day.

[6] On 9 May 2018, Ms Panapa saw her general practitioner complaining of stress caused by workplace bullying. She says she was advised to take stress leave, but she considered she needed to return to work, which she did. On 17 May 2018, Ms Panapa started counselling, as she considered she was not coping well due to stress at work.

[7] On 30 May 2018, Ms Panapa contacted Ms Ereckson, who was working as a Human Resource (HR) Advisor at Spotless Facility Services, providing HR Support for Spotless. Ms Ereckson confirms that she had a short discussion with Ms Panapa in which Ms Panapa advised her of the accusation against her from other employees and that she felt like she had been bullied by those employees. Ms Ereckson advised Ms Panapa that, if she wanted to make a complaint and have Spotless look into it, she would need to send in something specific in writing so that Spotless could begin an investigation. Ms Ereckson says she never received anything in writing from Ms Panapa or her union or heard from her again.

1 *Panapa v Spotless Facility Services (NZ) Ltd* [2019] NZERA 672 (Member Fitzgibbon).

[8] There was a conversation between Ms Panapa and Mr Whitelaw on 31 May 2018, although their recollections of that conversation differ. Ms Panapa says she raised her treatment with Mr Whitelaw. Mr Whitelaw says Ms Panapa accused another staff member of not doing her job properly, and did that in front of that staff member and other staff.

[9] On that day Ms Panapa also spoke to Mr Joslin, Spotless' Contract Manager at New Zealand Steel's Glenbrook site, who accepts that Ms Panapa advised him that everybody was talking about her, that she was sick and tired of the way other staff were treating her and that she had spoken to Spotless HR. Mr Joslin says he asked Ms Panapa to be more specific, for example, giving times and dates and any staff she could identify. He told Ms Panapa, in the absence of those particulars, her very generalised non-specific complaint would not progress and the matter would be forgotten.

[10] By letter dated 7 June 2018, Ms Panapa provided information to her E tū union delegate, Mr Palmer, setting out her concerns to enable him to assist her. Mr Palmer acknowledged receiving the letter but says that, at Ms Panapa's request, he did not give the letter to Spotless. Mr Palmer understood that Ms Panapa was concerned that she had referred to other people in her letter and did not want that information to be passed on to Spotless.

[11] Mr Palmer confirmed he met with Spotless several times, including on 14 June 2018 and assumes that he would have used the 7 June letter as the basis for his discussions. Mr Whitelaw and Ms Pereira, who was Ms Panapa's social worker, confirmed there was a meeting between Spotless and Ms Panapa, including with Mr Palmer and Ms Pereira. Mr Palmer said that Spotless understood what Ms Panapa's issue was. Mr Palmer's evidence was not challenged.

[12] During this period Ms Panapa applied for special leave saying:

I am writing to you an application for special leave due to work place stress and for grievances under the circumstances relating to work place issues.

I have been using my sick leave and annual leave and day in lieu pay because of ongoing issues of intimidation and work place bullying dating back September 2007.

I am also asking for [a] reimbursement for use of annual leave, sick leave and day in lieu.

I have not yet received anymore wages since last week for 2 days income. Could you please respond to this letter by email as soon as possible please.

[13] Ms Panapa's application for special leave was supported by Ms Pereira, who wrote:

This letter is in support of my client, Evelyn Panapa for her application of special leave.

This letter strongly strongly advocates for Evelyn Panapa as she is no longer receiving income or compensation/grievances from Spotless Cleaning.

I am aware that Evelyn sent you a letter requesting for special leave.

Evelyn is receiving counselling with our organisation. I have spoken to Evelyn's counsellor as she is adamant the stresses and grievances are due from the bullying and intimidation of workplace. From my collaborations with Mark Palmer, I understand that the code of conduct has been stipulated in union meetings as well as of Management duty under code of conduct.

Hoping that you would be a great source of support under these circumstances as Evelyn is struggling to manage financially, also, resilient enough to manage, trying to maintain a sense of balance in her life throughout these work-related incidents.

[14] In August, other letters were provided from Ms Panapa's therapist and her general practitioner referring to workplace stress. On 16 August 2018 the health and safety representative at Spotless wrote a letter to Spotless, which also refers to Ms Panapa's continuing struggle with work colleagues and Spotless management. The health and safety representative said in that letter that management had been approached by Ms Panapa numerous times to address these issues without avail.

[15] In September 2018, Mr Palmer emailed Spotless regarding Ms Panapa's time off work, said to be due to workplace-

related stress. Mr Palmer suggested Spotless use a consultation business that specialises in coaching and training leaders and employees in building trust, rapport and cohesion amongst work colleagues and minimising the possibility of workplace bullying, harassment and conflict. He proposed that Spotless make contact with this company with a view to conducting the training sessions/workshops that they provide with the aims of minimising the potential for further complaints of this nature and providing a safe return to work

programme for Ms Panapa (and for another employee). There was some email and other discussions between Mr Palmer and Mr Peters, the General Manager of Human Resources New Zealand at Spotless, but nothing was finalised.

[16] Ms Panapa then sought mediation assistance and ultimately she and Spotless attended mediation on 24 January 2019. Three weeks after mediation had taken place, but not resolved matters, Mr Mapu, who is Ms Panapa's representative, wrote to Spotless advising that a statement of problem had been filed with the Authority on behalf of Ms Panapa. He also sought Ms Panapa's return to work. Spotless did not respond to that letter at the time, only responding by email on 15 May 2019, saying that it had carefully investigated Ms Panapa's complaint and no bullying had been found. Spotless said it had taken all reasonable steps to ensure a safe workplace was maintained, including, but not limited to, facilitating regular, all staff toolbox meetings in which professional behaviours were promoted, constant coaching and support for management, regular communication with the site-based union representatives on staff matters, and the application of processes to address unacceptable behaviour. Spotless said it had provided Ms Panapa with a return to work plan, work buddy support, regular check-in meetings, continuation of the steps identified and further assistance from Spotless' employee assistance programme to assist Ms Panapa with the reintegration.

[17] Ms Panapa's statement of problem was filed with the Authority on 5 February 2019. In her statement of problem, Ms Panapa claimed to have been unjustifiably disadvantaged when Spotless failed to provide a safe working environment free from bullying. Ms Panapa also claimed that Spotless was trying to constructively dismiss her and that it had failed to investigate and take the appropriate steps to prevent further bullying and to enable Ms Panapa to return to work.

[18] Ms Panapa remains an employee of Spotless, but without pay.

Ms Panapa says filing the statement of problem raised the grievance

[19] Ms Panapa's primary argument is that, despite the many steps she took between May 2018 and January 2019, Spotless failed to properly investigate her allegations of bullying or to put measures in place to protect her while at work. She says that her grievance crystallised when mediation failed to resolve matters. She says it was at that time she realised that Spotless was not going to conduct a proper investigation or to put appropriate steps in place. She argues that given the statement of problem was filed in the Authority within 90 days of the crystallisation of her personal grievance, it was not out of time and she should be able to continue with it.

[20] Spotless acknowledges that the detail in the statement of problem was sufficient for it to constitute the raising of a grievance. However, it says that Ms Panapa's grievance arose many months earlier and therefore the personal grievance was not raised within time.

[21] As an alternative argument, Ms Panapa says that, if her grievance did arise at an earlier time, the communications made by her and/or on her behalf in the 90 days following that happening were sufficient to raise her grievance. Spotless does not agree.

Grievances are to be raised within 90 days

[22] An employee who wishes to raise a personal grievance generally must raise the grievance with their 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.² That time can be extended if the employer consents to the personal grievance being raised after the expiration of the 90-day period or by the Authority if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and the Authority considers it just to do so.³

² [Employment Relations Act 2000, s 114\(1\)](#).

³ [Employment Relations Act 2000, s 114\(1\)–\(4\)](#).

[23] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.⁴ The raising of a grievance is the first recognised step in the problem solving process.

[24] In order for a communication to constitute the raising of a personal grievance, it must make the employer sufficiently aware of the grievance to be able to respond to it.⁵

[25] 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 formula of words that must be used. Where there has 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.⁶

[26] It does not matter what an employee intended their complaint to be, or their 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.⁷

Spotless claims the amended statement of claim is ambiguous

[27] Spotless raises issues with the amended statement of claim. It says Ms Panapa has conflated three different issues:

(a) the dates of the alleged bullying;

⁴ [Employment Relations Act 2000, s 114\(2\)](#).

5. *Creedy v Commissioner of Police* [\[2006\] NZEmpC 43](#); [\[2006\] ERNZ 517 \(EmpC\)](#) at [\[36\]](#); *Disabilities Resources Centre Trust v Maxwell* [\[2021\] NZEmpC 14](#) at [\[17\]](#).

⁶ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [\[2019\] NZEmpC 132](#) at [\[36\]](#).

7. *Chief Executive of Manukau Institute of Technology v Zivaljevic*, above n 6, at [\[37\]](#); *Clarke v Nelson Marlborough Institute of Technology* [\[2008\] 5 NZELR 628 \(EmpC\)](#) at [\[37\]](#).

(b) the date the action alleged to amount to a personal grievance occurred; and

(c) the date on which Ms Panapa raised her personal grievance.

[28] It says there are other ambiguities in the amended statement of claim.

[29] In the amended statement of claim Ms Panapa first claims, in summary, that she has been unjustifiably disadvantaged when Spotless failed to provide a safe working place free from bullying, pointing to the alleged incident on 6 May 2018. She then says Spotless was trying to constructively dismiss her and that it has failed to investigate, be communicative and take the appropriate steps to prevent further bullying and enable Ms Panapa to return to work.

[30] The amended statement of claim sets out the facts as claimed by Ms Panapa in some detail. Towards the end of the amended statement of claim, Ms Panapa claims that she believed Spotless would resolve her problems and it was not until the mediation was unsuccessful that it came to her attention that she would need to progress through the employment relationship problem solving procedures to have her problems fixed. This is when Ms Panapa filed a statement of problem with the Authority, which sets out how she wanted her problems resolved.

[31] Ms Panapa then says, in addition, her grievance was raised within 90 days of “the incident (6 May 2018) which gave rise to the events which lead to the grievances being raised.” She points to correspondence sent in the 90-day period after 6 May 2018.

[32] Ms Panapa says that her grievances were sufficiently raised on 5 February 2019, within 90 days of the mediation being unsuccessful, which was when she realised Spotless was not going to fix her problems. She also says, however, that she was communicating her problems to Spotless and collectively those communications should be the raising of her grievance.

[33] Spotless' statement of defence to the amended statement of claim is very brief. Apart from saying it did not receive Ms Panapa's letter dated 7 June 2018, Spotless does not plead to the factual allegations. It simply denies that any personal grievance was raised with it within the requisite 90-day period “whether in relation to alleged bullying, threatening behaviour or otherwise”.

[34] As Ms Panapa is still employed by Spotless, she cannot be said to have been dismissed, constructively or otherwise. She did not pursue an argument in respect of a claim of unjustifiable dismissal at the hearing in the Court.

[35] What can be taken from the amended statement of claim, reinforced by Mr Mapu's submissions at the hearing, is that Ms Panapa's primary argument in respect of her unjustifiable disadvantage claim is that the failure of the mediation was the point at which she realised Spotless would not do as she sought and, thus, the grievance arose at that time. The filing of the statement of problem constituted the raising of the grievance, and was within time.

[36] She then raises an alternative claim that, if the grievance arose on 6 May 2018, being the first date it possibly could have arisen, her communications within 90 days of that date together constituted the raising of a grievance.

The grievance was an ongoing one

[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.⁸ 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

⁸ See *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257 at [20].

investigation she sought or take the steps she says were needed to make the workplace safe for her.

[39] Here, Ms Panapa says that realisation came in January 2019, when the mediation failed to resolve matters.

[40] Spotless points out, and I accept, that the content of the mediation is confidential and cannot be used as founding a personal grievance.⁹ However, Ms Panapa does not refer to anything said at mediation, but only to the result – that matters were not resolved between the parties. She does that to identify the time at which she realised that Spotless would not act on her issues.

[41] Given the nature of her grievance, it seems to me that the position she takes is one that is open to her. Ms Panapa cannot be criticised for trying, with the help of others, including her union, and then through mediation, to get Spotless to take the actions she sought that would allow her to return to work.

[42] That being the case, and given that it is common ground that the statement of problem provided sufficient detail to raise the personal grievance, Ms Panapa raised her personal grievance within 90 days of it crystallising.¹⁰

[43] In the alternative, what can be seen from the chronology is that Ms Panapa, her representatives and other people on her behalf, made Spotless aware throughout the period from May 2018 to January 2019 that she was looking to it to take steps in relation to the perceived bullying and to enable her to safely return to work. There were several communications in the 90-day period after 6 May 2018.

[44] On an objective basis, even if the grievance arose at the first point at which Spotless had the opportunity to take steps to investigate the complaint and put appropriate measures in place, being in early May 2018, the communications from and for Ms Panapa were such that she raised the grievance within 90 days.

⁹ [Employment Relations Act 2000, s 148](#). But see also *Downer New Zealand Ltd v Livingstone*

[2019] NZEmpC 109, [2019] ERNZ 316.

¹⁰ See *Beattie*, above n 8, at [5]-[12].

[45] Ms Ereckson confirmed that, in her telephone conversation with Ms Panapa on 30 May 2018, Ms Panapa identified that she felt she had been bullied by other employees, implicitly wanting Spotless to do something about that. Ms Ereckson said that she advised Ms Panapa to put her complaint in writing. There is no requirement that a personal grievance be in writing. Ms Ereckson also said that Ms Panapa did not say that she had a personal grievance or use those words, but, again, that is not a requirement to raise a personal grievance.

[46] In any event, there then was the conversation with Mr Joslin on 31 May 2018, in which Ms Panapa also made clear that she was unhappy with the situation, and the meeting with Spotless on 14 June 2018 where Ms Panapa's issue was discussed.

[47] The letter, in which Ms Panapa applied for special leave, uses the word "grievances"; it referred to workplace stress and workplace issues; the supporting letter from Ms Pereira referred to bullying and intimidation in the workplace. In her letter, Ms Panapa expressly seeks a particular outcome from Spotless, being the reinstatement of leave balances.

[48] When these communications are looked at in combination, objectively they raised a personal grievance regarding the lack of action by Spotless up until that time. There was enough information for Spotless to know the substance of Ms Panapa's complaint. Accordingly, if the grievance arose in May 2018, there were sufficient communications from Ms Panapa to constitute the raising of her grievance with Spotless within 90 days of that date.

Ms Panapa may proceed with her claim of unjustifiable disadvantage

[49] It follows that Ms Panapa is entitled to proceed with her claim in the Authority.

[50] I note, however, the evidence demonstrates that the relationship between Ms Panapa and Spotless has difficulties from

both parties' perspective. I also am conscious that Ms Panapa has been away from work, and unpaid, since sometime in mid-2018. It seems to me the problems between the parties likely would benefit from

further mediation. While I do not direct mediation, the parties should consider a return to mediation to try to resolve all matters between them.

Costs are reserved

[51] Costs are reserved. The parties should endeavour to agree costs between them. If that cannot be done, Ms Panapa may apply for an order for costs by way of memorandum filed in the Court and served on Spotless within 20 working days of this judgment. Spotless has 15 working days from service of the memorandum within which to file and serve a memorandum in response and any memorandum in reply from Ms Panapa must then be filed within a further five working days from receipt of the memorandum from Spotless. The application then will be dealt with on the papers.

J C Holden Judge

Judgment signed at 2 pm on 21 June 2021

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