IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 15
EMPC 125/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SPOTLESS FACILITY SERVICES NZ LIMITED Plaintiff
AND	ANNE MACKAY Defendant

Hearing:	(on submissions dated 5 and 14 December 2016, and 30 January 2017)
Appearances:	G Ballara, counsel for the plaintiff R Boulton, counsel for the defendant
Judgment:	22 February 2017

JUDGMENT (NO 2) OF JUDGE B A CORKILL

Introduction

[1] In a judgment of 21 November 2016, I considered an allegation brought by Ms Anne Mackay that she had been constructively dismissed by her employer.[1] She said she had resigned in frustration because she felt she was being bullied by her co-workers, and her employer was not taking this issue seriously.

[2] The Employment Relations Authority (the Authority) had upheld Ms Mackay's personal grievance with regard to one aspect of her claim: it said there had been a significant failing on the part of Spotless when it failed to tell Ms Mackay it would investigate her claim that a petition was circulating amongst staff. This

[1] *Spotless Facility Services NZ Ltd v Mackay* [2016] NZEmpC 153.

failure had caused Ms Mackay's resignation. The Authority accordingly determined that she had been constructively dismissed. Remedies were awarded.[2]

[3] Spotless Facility Services NZ Ltd (Spotless) brought a non de novo challenge to the Authority's determination. It alleged that the principles of constructive dismissal had been applied incorrectly; alternatively, Spotless asserted that if Ms Mackay's personal grievance was established, the Authority had erred when determining remedies.

[4] In dealing with the challenge, I concluded there was not a relevant breach of duty by Spotless of such seriousness as to make it reasonably foreseeable that Ms Mackay would not be prepared to continue to work for it. I found that Ms Mackay's claim she was constructively dismissed was not established. It followed that the remedies had to be set aside.

[5] However, I also concluded that was not the end of the matter. I noted that the manner in which Ms Mackay's concerns were dealt with had been the subject of significant criticisms by the Authority; and further criticisms emerged from the Court's consideration of the chronology.

[6] I therefore indicated that I wished to hear from counsel as to whether the Court should now consider the possibility that there is a disadvantage grievance on the basis of the findings which had been made about the inadequacies of the process adopted by Spotless, considered in the context of its Professional Behaviours Policy and Procedures.

[7] Such a possibility might be considered under s 122 of the Employment Relations Act 2000 (the Act), which provides that a finding may be made that a personal grievance is of a type other than that alleged.

[8] I invited counsel to file submissions with regard to this issue. This judgment deals with that issue in light of those submissions, and in light of the findings referred to in my first judgment.

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2 *MacKay v Spotless Facility Services (NZ) Ltd* [2016] NZERA Christchurch 52.

Key facts

[9] For ease of reference, I summarise the main events as referred to in my first judgment.

[10] Ms Mackay made two verbal complaints about unacceptable bullying to her immediate supervisor, Ms Gwenda Norton. Her complaint related to Ms X's behaviour towards Ms Mackay, including her looks, attitude, manner and overall demeanour. No steps were taken by Ms Norton. Then, after disagreements and even altercations over food presentation, Ms Mackay lodged a detailed complaint in a four-page letter of 18 June 2014.[3]

[11] On 24 June 2014, at a "safety toolbox meeting" Ms Norton reminded staff they should communicate with each other in a respectful way.[4]

[12] Also on 24 June 2014, Ms Mackay was invited to attend a meeting to discuss her complaint, to be held on 27 June 2014.[5] On that date, Mr Jason McLennan, the National Operations Manager Health for Spotless, and Ms Norton, met with Ms Mackay. On the same day they interviewed Ms X and Ms Y (who had been the author of a letter of complaint about Ms Mackay) and a relatively new staff member (who was the author of another letter of complaint about Ms Mackay), and three other staff.[6]

[13] In the course of these interviews, Mr McLennan coached Ms X on how to avoid inflammatory situations. He also recorded that Ms Y was willing to attend some form of mediation to restore a harmonious work environment.[7] Ms Mackay was not informed about these matters at the time. Nor had anyone spoken to her about obtaining support from an Employee Assistance Programme.[8]

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3 *Spotless Facility Services NZ Ltd v MacKay*, above n 1, at [7] – [8].
4 At [9].
5 At [10].
6 At [10] – [12].
7 At [13].
8 At [13] and [14].

[14] On 3 July 2014, Mr McLennan wrote to Ms Mackay. He summarised the complaints brought against her and invited a response, which was provided in a long email of 16 July 2014. In it she denied the allegations which had been made against her. Although the possibility of mediation was raised by Mr McLennan, Ms Mackay made no comment as to this possibility.[9]

[15] On 18 July 2014, Mr McLennan acknowledged Ms Mackay's email stating he would respond by the end of the following week, that is by 25 July 2014.[10]

[16] On 25 July 2014, having received no communication from Mr McLennan, Ms Mackay gave notice of her resignation with effect from 8 August 2014. This was because, the Authority found, Ms Mackay had received no response as to how her concerns could be addressed. She was due to return to work shortly, and she did not want to do so under the conditions which had prevailed previously.[11]

[17] However, on 30 July 2014, Ms Mackay wrote to Spotless asking that her resignation now be put on hold in the hope that the conflict could be resolved. She agreed to attend mediation. She asked for a response from Mr McLennan at his earliest convenience.[12]

[18] Subsequently, Mr McLennan discussed the information he had obtained with Human Resources (HR) advisors prior to a telephone conversation with Ms Mackay which occurred on 8 August 2014. By then, he had reached preliminary views as to the workplace conflict. These were not explained to Ms Mackay either before or on 8 August 2014.[13]

[19] Mr McLennan told the Court that he had made several unsuccessful attempts to contact Ms Mackay by telephone, between 4 and 7 August 2014.

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9 At [15] and [16].
10 At [17].
11 At [19] and [20].
12 At [22].
13 At [88].

[20] I found on the basis of the evidence provided to the Court that there was a broad consensus between Mr McLennan and Ms Mackay as to what occurred when they eventually spoke on 8 August 2014. This was as follows:[14]

a) The telephone call was brief;

b) Mr McLennan had explained to her that she could not put her resignation on hold, and that she either needed to retract it or keep it in place;

c) He said that he was still investigating the three complaints, although she had no memory of him saying that he wanted her to retract her resignation;

d) He said that the issue was that there were complaints in both directions, both from Ms Mackay and against her;

e) It was at this point that she raised for the first time the issue of the petition;

f) She had only heard about it that day. She agreed that Mr McLennan said he could not comment on it as he knew nothing about it;

g) At the Authority's investigation meeting she had not believed Mr McLennan when he said that he did not know about it; she now thought that whilst Ms Norton knew about it, Mr McLennan probably did not;

h) When she said that she supposed the matters referred to in the petition would be sent to HR and Mr McLennan said he was unaware of it, she decided she had had enough;

i) She wanted these issues resolved, because she would be returning to the workplace in two weeks' time following her recuperation from a carpel tunnel operation;

j) The straw that broke the camel's back was Mr McLennan's response when he said that he was unaware of the petition, and the fact that he did not say he would need to investigate its circumstances.

Submissions

[21] Counsel for Ms Mackay, Ms Boulton, submitted that on these facts there was a disadvantage grievance because:

a) Spotless had breached its own Professional Behaviours Policy and Procedures in failing to carry out a timely investigation and resolution of the complaints raised by Ms Mackay; and

b) It had also breached the duty of good faith, in particular the obligation to be active and constructive in establishing and maintaining a

[14] At [59].

productive employment relationship in which the parties were, among other things, responsive and communicative under s 4(1A)(b) of the Act.

[22] After referring to the chronology of events, Ms Boulton analysed the relevant Spotless policy, emphasising that:

a) Spotless was to encourage the reporting of unacceptable behaviour, and was to treat all complaints in a serious, sensitive, fair, timely and confidential manner.

b) The complaint investigation process required a focus on a prompt investigation, and the need to take all complaints seriously.

c) The policy provided further principles to be adhered to during a complaint investigation, amongst which was timeliness and the need to keep a complainant and respondent informed of progress.

[23] Ms Boulton went on to outline the various steps that were taken, submitting that they did not comply with the requirements of either the policy, or the obligations of s 4 of the Act.

[24] Then it was submitted that remedies should be awarded; Ms Boulton said that the impact of the events that had occurred prior to Ms Mackay's resignation were no less serious than the consequences which were considered for the purposes of her claim of constructive dismissal.

[25] Ms Mackay had described her resignation as being a relief; the implication of counsel's submission was that the long-term effects of the failure to investigate Ms Mackay's concerns in a timely way occurred prior to her resignation. After the resignation, she was no longer subject to bullying, and was no longer worried about the risks of returning to the workplace.

[26] At the hearing of the challenge, Ms Mackay had described long-term effects of confronting the bullying issues at a time when she was receiving hospital

treatment; those effects were related to her belief that Spotless was taking no steps to address the issues. She had said that some two years after the incident, she still described feeling ill at the thought of ever having to return to the hospital kitchen. Counsel submitted that in spite of her robust personality, Ms Mackay had been distressed by the circumstances which arose before she resigned.

[27] Ms Boulton submitted that the case fell in the "low to medium" range of awards where the impact of a personal grievance was ongoing, and submitted that an award of $15,000 was reasonable, and reflected a fair and just award.

[28] Summarising, Ms Boulton stated:

> [Ms Mackay] maintains that she had taken all reasonable steps to obtain information from Mr McLennan about the progress of the investigation and what steps he would take to resolve the matter. Mr McLennan accepted being in receipt of the written enquiries on this topic and claims he made several attempts to initiate the telephone conversation with [Ms Mackay] on 8 August 2014. This conversation was not a surprise to Mr McLennan, he was not caught off guard and he was fully apprised of the facts around the investigation and able to put [Ms Mackay's] mind at ease. His ongoing failure to provide an update continued to the end of the employment and impacted [Ms Mackay's] belief that there was no hope.
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> [Ms Mackay] was a long-term employee of [Spotless] with a good work history. She sought to resolve her issues in the workplace by using the policy and procedure put in place by [Spotless] with no relief. She was left feeling isolated throughout this process and believing it was [not] safe to return to her job until this was sorted. The absence of information directly contributed to her inability to resolve matters before her termination and the ongoing emotional turmoil that accompanies unresolved conflict. In these circumstances [Ms Mackay] submits there should be no reduction of award for contribution.

[29] Mr Ballara, counsel for Spotless, submitted that the Court does not have jurisdiction when considering a non de novo challenge to invoke the provisions of s 122 of the Act. The Court's jurisdiction was limited to entertaining the specific challenge that was before it: in essence, any relabeling of Ms Mackay's claim could

only relate to those parts of the determination which were challenged.[15] This was to be contrasted with a de novo challenge where s 122 obviously applied.[16]

[30] Mr Ballara emphasised that the direction given by the Court for the purposes of s 182(3) of the Act was that:

> The hearing of the challenge would relate to the import of the telephone discussion on 8 August 2014, together with, in the alternative, issues as to remedies.

[31] He said that applying s 122 now would effectively permit a new claim as to whether Spotless had followed its policy. Counsel submitted that such an issue would be outside the nature and extent of the hearing as ruled on by the Court at the outset of the proceeding.

[32] Mr Ballara emphasised that an issue as to timeliness would also be beyond what the amended statement of claim put in issue. Mr Ballara submitted that the Court could not consider a new claim based on what he described as the "background (i.e. … out of scope facts/issues)".

[33] Then Mr Ballara submitted that the personal grievance originally raised by Ms Mackay focused on an assertion that the investigation lacked independence; and that Ms Mackay was not informed of the outcome of the investigation. That is, an objection as to timeliness was not raised. Thus the Court would be considering a grievance which was different to the one which was raised originally. This would be beyond the scope of s 122 of the Act.

[34] Next, Mr Ballara submitted that a consideration of an issue of timeliness would not establish that there was a qualifying disadvantage. When assessing what occurred, the Court was required to avoid impermissible minute or pedantic scrutiny.

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[15] This submission was supported by reference to *Woud v Department of Corrections* [2007] ERNZ 284 (EmpC) at [28]; *Gurleyen v Riyad* EmpC Wellington WC14A/05, 10 November 2005 at [69] – [75]; *Workforce Development Ltd v Hill* [2014] NZEmpC [78] at [13] and *Sefo v Sealord Shellfish Ltd* EmpC Christchurch CC4/08, 14 April 2008 at [12] – [13].

[16] As in *Nathan v C3 Ltd* [2015] NZCA 350 [2015] ERNZ 61, and *Nisha v LSG Sky Chefs NZ Ltd* [2015] NZEmpC 171, (2015) 13 NZELR 185.

[35] Mr Ballara urged the Court not to take into account adverse comments which had been made by the Authority in its determination, which might be thought to touch on timeliness issues;[17] they would be outside the scope of the matters that were put in issue by the challenge.

[36] Mr Ballara submitted that if the Court were to get to the point of determining there was in fact a grievance, any compensation should be "very modest", and could only be about delay in communications between 30 July and 8 August 2014 which was the period during which there was a consensus as to mediation but that was not arranged; or between, say 4 and 8 August 2014 when advice was not given to Ms Mackay as to the preliminary views held by Spotless, noting that at the time of the telephone conversation the investigation was ongoing. Mr Ballara also said that the evidence of distress, such as it was, attached to loss of employment and the consequences of that.

[37] He also said the Court would need to consider whether there should be a reduction of remedies under s 124 of the Act, for example because:

a) When complaining to Ms Norton, Ms Mackay had, according to the Authority, "said it would be difficult to do anything about her concerns as they were difficult to pin down"; and had "not been able to give any specific examples".[18]

b) Ms Mackay was aware of an offer of mediation on 3 July 2014, but took no steps to agree to that possibility until 30 July 2014 and only then after her union had advised her to this effect.

c) Although she was asked to respond to information obtained by Mr McLennan by 10 July 2014, she did not do so until 16 July 2014.

d) Until the telephone discussion of 8 August 2014, she was prepared to wait for the Spotless investigation. Although she was told at that point that the investigation was ongoing, and although she had sought the investigation, she elected to resign.

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17 As referred to at paras [10], [14], [38] and [40] of the Court's first judgment.

18 *MacKay v Spotless Facility Services (NZ) Ltd*, above n 2, at [10] – [11].

e) She had acted in a blameworthy manner in the lead up to her complaint.

[38] Ms Boulton replied to Mr Ballara's submissions. In essence it was submitted that s 122 of the Act was applicable, having regard to the matters that were put in issue by the amended statement of claim.

[39] Furthermore, in light of the Court's determination that the Authority erred when it found Ms Mackay had been constructively dismissed, it was now open to the Court to reconsider the issues involved taking into account any evidence called at the hearing of the challenge.[19]

[40] The claim that a new inquiry would be undertaken if the circumstances were considered under s 122 was refuted. The issue was to be assessed by considering whether there was an alternative personal grievance in existence, having regard to the matters and evidence which were the subject of evidence and submissions at the hearing of the challenge.

[41] Further factual submissions were made, with particular emphasis on whether there was evidence of contributory fault. In particular, Ms Boulton emphasised:

a) The Authority had found that if Ms Norton had addressed the complaints that had been made to her, it was unlikely the matter would have come before the Authority. Counsel argued that it was unlikely the Authority would have come to this conclusion if Ms Mackay had failed to provide the necessary specifics.

b) The issue of mediation was well canvassed during the hearing. That Ms Mackay would not attend mediation when it was first raised had to be understood in the context of her not understanding the process, which was resolved only after she had the opportunity to speak to her union delegate.

c) That her response to Mr McLennan did not occur until 16 July 2014 was not relevant to the factors which gave rise to the unjustified

[19] Counsel relied on *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192, (2015) 10 NZELC 79-060 at [23](e).

disadvantage. Mr McLennan did not refer to this as being an explanation as to why he did not keep her appraised of the progress of the investigation.

d) At the time of the telephone call, Ms Mackay was willing to give her employer another opportunity to confirm that the investigation would come to a conclusion. Mr McLennan made no attempt to provide any assurance as to when that would occur, and Ms Mackay formed the view that the investigation was not being carried out in a timely way. It was not accepted Ms Mackay had acted in a blameworthy manner in the lead up to her complaint, particularly as the employer itself found that the issue was one of a clash of personalities.

Applicable principles

[42] There are three judgments which I consider are of assistance in considering the scope of s 122 of the Act. The first two relate to the equivalent provision of the Employment Contracts Act 1991, which was s 34; the third relates to s 122 itself.

[43] In *New Zealand Automobile Association Inc v McKay,* Judge Colgan, as he then was, was required to consider whether an adequate opportunity had been offered to an appellant to provide submissions on the possible application of s 34.[20] The Court explained the object of the provision in this way:[21]

> Although s 34 does not go so far as to provide a statutory exception to the obligations of the Tribunal to act fairly (s 88(3)) in accordance with the rules of natural justice, its objective is clearly to ensure that the rigidities of pleading do not prevent it from determining cases of personal grievance according to their merits rather than by reference to the way in which they have been expressed before or even during the hearing. The section contemplates its use by the Tribunal of its own motion after the conclusion of the hearing if it is fair and just to do so.

[44] The Court of Appeal considered this issue subsequently in *New Zealand Van Lines Ltd v Gray* when it had been argued by counsel that the Tribunal had erred in law in seeking submissions on the use of the power under s 34 and then using the

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[20] *New Zealand Automobile Association v McKay* [1996] 2 ERNZ 622 (EmpC).
[21] At 634.

power conferred in that section to uphold a finding of disadvantage which had not been pleaded or argued.[22] With regard to those circumstances, the Court observed:[23]

> This appears to us to be exactly the kind of situation for which s 34 was designed if a just result were to be reached, provided that the parties were given a fair opportunity to address the issues as the Tribunal identified them. We can see no error of law in the actions the Tribunal took. It was not a substitution of a new personal grievance for the grievance complained of. It relied on the same sequence of events and in respect of those events found a different type of grievance (disadvantage) from what had been asserted (dismissal). Further, it seems to us that the procedure was fair and just to the parties, appropriately informal (in not requiring for instance any amendments of the pleadings when the issues were clear) and speedy …

[45] These remarks suggest that a liberal or broad approach to the section is appropriate. This accords with the statutory objective that procedures for problem-solving need to be flexible and that the Authority and the Court must act as they think fit in equity and good conscience.[24]

[46] The third decision to which I refer is more recent, and pertains to the current provision. In *Sefo v Sealord Shellfish Ltd*, Chief Judge Colgan said:[25]

> The Authority and the Court are entitled to treat a particularly described personal grievance as a personal grievance for another category: s 122 Employment Relations Act 2000. The lawfulness of Ms Sefo's suspension was clearly at issue in the proceeding at all relevant times as part of the dismissal grievance and addressed by both evidence and submissions. It follows in these circumstances that it is open to the Court, as Ms Sefo now seeks, to address the lawfulness of the suspension as a distinct personal grievance for unjustified disadvantage in employment.

[47] These cases refer to particular issues which have arisen with regard to the use of the section or its predecessor. In none of them has the Court been required to consider whether, and if so to what extent, the power is more restricted in the case of a non de novo challenge. But that issue does not require resolution in this case, because as I shall explain below, the possibility of a disadvantage grievance arises from a consideration of the matters that were in fact put in issue by the non de novo challenge which Spotless brought.

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22 *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397 (CA).
23 At 407.
24 Employment Relations Act 2000, ss 143(d), 157(3), 189(1).
25 *Sefo v Sealord Shellfish Ltd*, above n 15 at [13].

[48] Some cases have referred to circumstances where natural justice obligations would be met by parties being invited to submit as to a possible application of s 34 of the Employment Contracts Act, now s 122 of the current Act.[26] That obligation was met in this case by the Court's request for submissions from the parties.

[49] Turning to the statutory definition of a disadvantage grievance, s 103(1)(b) of the Act allows an employee to bring a personal grievance if the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer. The issue of whether the action in question is unjustified requires a consideration of the test of justification as provided in s 103A of the Act.

[50] The meaning of "conditions" of employment is well established. It includes all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider than the terms of an employment agreement.[27]

[51] I also observe that the statutory context within which this assessment must arise includes the obligation in s 4(1A)(b) that the parties be active and constructive in establishing and maintaining a productive employment relationship, in which they are, amongst other things, responsive and communicative.

Jurisdiction issue

[52] The scope of the matters that were before the Court requires comment, for the purposes of the legal issue which was raised as to jurisdiction.

[53] The amended statement of claim filed for Spotless made it clear that its election relevantly related to:[28]

> Those parts of the determination finding the existence of an unjustifiable (constructive) dismissal as a consequence of the plaintiff's telephone discussion with the defendant on 8 August 2014: paras [74] to [85]:

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[26] For example, *Adams Sawmilling Co Ltd v Scott* EmpC Christchurch, CEC24/95, 7 June 1995 at 19 – 20.

[27] *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [26] and *ANZ National Bank v Doidge* [2005] ERNZ 518 (EmpC).

[28] Remedies were also put in issue by the pleading.

[54] That is the context within which the Court's subsequent direction as to the nature and extent of the hearing has to be understood.

[55] The challenged paragraphs of the determination related to what occurred in the key telephone conversation which occurred between Mr McLennan and Ms Mackay on 8 August 2014. But that conversation occurred in, and can only be understood by reference to, the context of the preceding events, as was made clear by the Authority. So in the contested passage of the determination, the Authority referred to:

a) The fact that Ms Mackay had complained about bullying.[29]

b) Mr McLennan's qualification as an investigator of the issues which Ms Mackay had (previously) raised.[30]

c) The fact that Ms Mackay had written a letter of resignation on 25 July 2014, but had then signalled afterwards she wished to reconsider it so as to give Spotless more time to resolve matters.[31]

[56] The telephone conversation of 8 August 2014 occurred against a background of other facts which were relevant to the asserted personal grievance:

a) Mr McLennan had been told by an HR colleague, from whom he took advice from time to time, that resolution of the problems which were occurring needed to be obtained as soon as possible. Mr Ballara argued this advice was based on a Spotless policy and that the policy guidance was subject to particular circumstances. However, the HR advisor considered the guidance to be applicable in the present circumstances.[32]

b) The actions and conclusions which Mr McLennan had reached about Ms X and Ms Y were not passed on to Ms Mackay.[33] On the evidence before the Authority, that information had been in Mr McLennan's

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29 *MacKay v Spotless Facility Services (NZ) Ltd*, above n 2, at [74].
30 At [75].
31 At [81].
32 *Spotless Facility Services NZ Ltd v Mackay*, above n 1, at [10].
33 At [14].

possession following the interviews he conducted with those persons on 27 June 2014. Mr Ballara argued that the finalising of Mr McLennan's views and steps he implemented as a result occurred after Ms Mackay resigned; however, the Authority's criticisms related to a failure to provide relevant information after the interview of 27 June 2014 which was well prior to her resignation.

c) The Authority found that Ms Norton should have investigated Ms Mackay's oral complaints, and that if these had been taken seriously she may not have encountered further bullying.[34] This finding was not challenged. I accept Ms Boulton's submission that this meant that there was enough in what Ms Mackay had told Ms Norton for her to take Ms Mackay's concerns seriously, and to investigate them.

d) The Authority determined that Ms Mackay was understandably seeking a resolution to work issues, and that she was impatient to hear the conclusions and approach Spotless would adopt.[35] Although the Authority also found that the resignation was too soon, and that Mr McLennan could be forgiven for not reverting to Ms Mackay after he had been advised of her resignation letter on 25 July 2014, the position changed when she wrote to Mr McLennan on 30 July 2014. As I shall elaborate shortly, her understandable anxiety as to the advancing of the investigation was well apparent from that time onwards and at the time of the telephone conversation on 8 August 2014.

[57] I conclude that the events discussed at paras [74] to [85] of the Authority's determination were not restricted to the telephone discussion itself. That conversation could only be understood with reference to the events which preceded it. It would be artificial to attempt to circumscribe the matter before the Court to the telephone conversation alone, as an isolated event. Viewed in context, that conversation was the culmination of increasing concerns held by Ms Mackay as to

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34 At [38].
35 At [40].

the timeliness of the investigation she had sought. Those were the concerns which were before the Authority, and addressed by the parties.

[58] I conclude that the adequacy of the investigation which Spotless undertook, including its timeliness, was clearly at issue in the challenge. Having regard to the discretion which the Court has under s 122 of the Act, I find that there is jurisdiction to consider whether those concerns should be addressed as a different type of personal grievance, one of disadvantage by unjustifiable actions.

Disadvantage analysis

[59] In my view, an important precursor to the telephone conversation was Ms Mackay's email of 30 July 2014. As already noted, on this date she wrote to Mr McLennan following a conversation with him which took place the previous day in which she had said she felt "unable to work in the stressful environment", and that she was finding it "intolerable". In her email, she said she needed urgent action and support from him to resolve the ongoing and worsening conflict, which went back to mid June. She also proposed mediation. She sought a reply at Mr McLennan's "earliest convenience". No reply email was sent to Ms Mackay.

[60] There was no further communication between Mr McLennan and Ms Mackay until the telephone conversation of 8 August 2014; as already noted, it followed attempts by Mr McLennan to contact Ms Mackay on previous days in that week.[36]

[61] By the time of the telephone conversation, there was a consensus as to mediation, and Mr McLennan had formed a preliminary view as to how the workplace conflicts should be resolved, though these had yet to be documented. Despite these developments, and notwithstanding Ms Mackay's plea for urgency, she had not been informed as to what was to occur. Her request for a prompt resolution of the concerns she had raised was understandable; moreover, timeliness was required by the terms of the Spotless policy. Although she was absent for medical reasons, the Authority found that her absence made it all the more important to get to the bottom of the issues. I agree.

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[36] *Spotless Facility Services NZ Ltd v Mackay*, above n 1, at [23].

[62] As I found in the first judgment, it is regrettable that when Mr McLennan ultimately spoke to Ms Mackay, he did not make it clear that he was continuing to investigate the workplace conflict, but that he was at a point where he had reached a preliminary opinion as to what should occur; and that there was a consensus between the parties for mediation so that there was a way forward and a means for achieving a constructive outcome. I found that in part, the brevity of the conversation was catalysed by the fact that Mr McLennan was speaking to Ms Mackay in less than ideal circumstances as he was waiting for a flight in an airport lounge.[37]

[63] The concerns which Ms Mackay held were significant, genuine and understandable. I do not consider the criticisms as to how they were dealt with could be regarded as subjecting the company's process to pedantic and minute scrutiny. I find that Spotless did not comply with the obligations to deal with complaint investigations in a timely way, as required by its policy. Spotless did not act according to what a fair and reasonable employer could have done in all the circumstances at the time. I also find that Ms Mackay's conditions of employment were thereby affected to her disadvantage.

[64] I conclude that it is fair and just to utilise s 122 of the Act to characterise the circumstances reviewed in the challenge as a disadvantage grievance.

Remedy

[65] It will be apparent from the foregoing discussion that the established grievance relates to circumstances that occurred during Ms Mackay's employment. The fact of the resignation must be put to one side. The focus must be on the evidence pertaining to Ms Mackay's humiliation, loss of dignity and injury to feelings, as it relates to the period from her email of 30 July 2014 to the telephone conversation of 8 August 2014.

[66] In light of that focus, I do not accept Ms Boulton's submission that the impact of events on Ms Mackay were no less than that which was presented in the case of her claim of constructive dismissal.

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[37] At [82].

[67] In her evidence, Ms Mackay described the fact that she continues to suffer from the after-effects of this episode of her work life; she said that the thought of ever going to the hospital again continues to trouble her. I find that an aspect of her reaction relates to the fact that she felt compelled to resign, for which compensation under this head cannot be awarded.

[68] Ms Boulton submitted that a fair and just award would be $15,000; Mr Ballara submitted that any award could only be "very modest". A review of median awards made by the Authority and Court for certain types of disadvantage grievances reveals outcomes which are lower than median awards for dismissal grievances.[38] While such a distinction may often be appropriate, there must also be a focus on the harm suffered by the employee. I approach the assessment on that basis.

[69] I accept that the consequences have been significant and ongoing for Ms Mackay. Putting the fact of resignation to one side, it is in my view appropriate for Spotless to pay Ms Mackay $2,000 under s 123(1)(c)(i).

[70] I outlined earlier the contentions which were advanced for Spotless in support of the submission that any award should be reduced under s 124 of the Act.

[71] In this regard, I accept Ms Boulton's submissions in reply. I am not satisfied, given the focus on the events from 30 July 2014 to and including the telephone conversation of 8 August 2014, that Ms Mackay contributed to the breach of Spotless' policy which constituted the disadvantage grievance. She made it very clear she wanted the conflict resolved promptly, but this did not occur. Accordingly, no reduction of remedies is required.

Conclusion

[72] I find that it is fair and just to conclude that the circumstances reviewed for the purposes of the present non de novo challenge constitute a disadvantage

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[38] Judge Christina Inglis and Liz Coats "Compensation for Non-Monetary Loss – Fickle or Flexible?" (paper presented to the New Zealand Law Society Employment Law Conference, Auckland, October 2016) 369 at 416.

grievance, and that the company should pay Ms Mackay the sum of $2,000 under s 123(1)(c)(i) of the Act.

[73] Costs are reserved. Those should be discussed in the first instance between the parties. If agreement cannot be reached, application may be made, supported by memorandum and evidence, if appropriate, within 21 days; any response should be filed and served 21 days thereafter.

B A Corkill
Judge

Judgment signed at 9.30 am on 22 February 2017