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THE ADVOCATE

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Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Sequel to the Final Straw

In the December issue of The Advocate, we reported on the case ***Spotless Facility Services NZ Ltd v. Anne Mackay*** [2016] NZEmpC 153, in which Ms MacKay claimed that her employer's actions surrounding investigation of her complaints about other staff (and their complaints about her) left her with no choice but to resign. In subsequent discussions she claimed she knew of a '*petition*' about her (which her employer denied knowing about) and that this amounted to the "*final straw*" leading to her alleged constructive dismissal. The Court rejected her constructive dismissal claim, holding that the employer's actions did not amount to a final straw. However, the Court did raise the possibility that a disadvantage grievance may exist:

"[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."

In its subsequent decision, the Court examined the disadvantage claim in detail. Based on the facts set out in our December Advocate, the Court heard submissions from both parties. The case for Ms Mackay, was, in summary:

"[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.

[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."

Spotless argued, unsuccessfully, that the Court had no jurisdiction to consider the disadvantage claim. It then argued, among other things, that the issue of timeliness was not sufficient to establish a disadvantage grievance.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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The Court disagreed:

"[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.

[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.

[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."

The Court then considered what level of compensation should be awarded and said:

"[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. 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)."

There are a number of lessons for employers arising from this case. One is that success in defeating a dismissal personal grievance does not guarantee overall success, due to the Court's (and Employment Relations Authority) ability to consider whether some other form of grievance may exist beyond that originally claimed.

Another lesson is that if there are policies in place dealing with complaints or grievances, these must be followed to the letter, or there is a risk, as in this case, of adverse consequences. Finally, any investigation into complaints or grievances (even where no specific policy applies) need to be carried out in a timely manner with adequate communications with the parties involved, particularly a complainant. The good faith obligation to be "*responsive and communicative*" is a binding obligation in these circumstances.

Time to Ensure Existing Employment Agreements are Compliant?

The amendments to the Employment Relations Act, introduced by the Employment Standards legislation may require changes to a number of provisions in existing individual employment agreements, including:

- Hours of Work
- Overtime
- Salaried Payments
- Conflict of Interest; and
- Deductions from Remuneration provisions.

For existing employees **1 April 2017**, was the deadline for ensuring that your individual employment agreements comply with the new legislation. The team at MGZ are available to undertake a review of your employment agreements to ensure compliance.