# Employment Court of New Zealand



## Spotless Facility Services NZ Limited v MacKay [2016] NZEmpC 153 (21 November 2016)

Last Updated: 26 November 2016

**IN THE EMPLOYMENT COURT CHRISTCHURCH**

**[2016] NZEmpC 153**

**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: 27 October 2016

(heard at Christchurch)

Appearances: G Ballara, counsel for the plaintiff

R Boulton, counsel for the defendant

Judgment: 21 November 2016

**JUDGMENT OF JUDGE B A CORKILL**

### Introduction

[1] Ms Anne Mackay says she was constructively dismissed by her employer. She said she 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) upheld Ms Mackay's personal grievance with regard to one aspect of her claim, although it rejected a number of others. It found she had indeed been constructively dismissed. Remedies were awarded.[1]

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

SPOTLESS FACILITY SERVICES NZ LIMITED v ANNE MACKAY NZEmpC CHRISTCHURCH [2016] NZEmpC 153 [21 November 2016]

[3] The employer, Spotless Facility Services (NZ) Limited (Spotless), has brought a non de novo challenge to the Authority's determination. It says the Authority applied the principles as to constructive dismissals incorrectly when it considered a telephone conversation which occurred on 8 August 2014 which resulted in Ms Mackay resigning; and alternatively, if Ms Mackay's personal grievance was correctly upheld, the Authority erred when determining remedies. With regard to remedies, there were two concerns: did the Authority deal correctly with an issue as to mitigation of loss of wages, and did it correctly determine that Ms Mackay's conduct did not give rise to her personal grievance in any blameworthy respect?

**The Authority's determination**

[4] Apart from the conclusions reached with regard to the telephone conversation of 8 August 2014, the balance of the Authority's description of the chronology is unchallenged. Accordingly it is necessary to summarise the findings the Authority made as these provide the context for the telephone conversation which is the subject of this challenge.

[5] Ms Mackay was one of several staff who was employed by Spotless for

12 years in a variety of positions, and at several work sites. At the material time, she worked as a Kitchen Assistant in the kitchen of Timaru Hospital. Her direct Supervisor was Ms X; Ms Y, Ms X's daughter, was one of Ms Mackay's co- workers.2

[6] Initially Ms Mackay got on well with Ms X but she began to have problems with her, and with Ms Y, after Ms X became a Supervisor for the kitchen. She says she witnessed Ms X and Ms Y in essence bullying various members of staff over time, but she managed largely to avoid that treatment by keeping out of the way.

[7] Ms Mackay says she had complained on two occasions to Ms Gwenda

Norton, who had responsibility for the Timaru Hospital site including food services.

2 The names of co-workers were the subject of a non-publication order made by the Authority since these persons did not have an opportunity to explain their perspective of these events. The same order has been made by the Court, so as to preserve the integrity of the Authority's order.

Her complaint related to Ms X's behaviour towards Ms Mackay, including her looks, attitude, manner and overall demeanour. On the first occasion, Ms Norton said it would be difficult to do anything about her concerns as they were difficult to pin down. On the second occasion when a similar complaint was made, Ms Norton said she was not going to do anything and that Ms Mackay would just have to get over it.

[8] Ms Mackay's concerns came to a head on 9 June 2014, when there were several disagreements, and even altercations, as to the standard of food presentation or the way in which it was being undertaken. Ms Mackay recorded these events in a detailed four-page letter she wrote to Ms Norton on 18 June 2014.

[9] On 24 June 2014, at a "safety toolbox meeting", Ms Norton reminded staff that they needed to communicate with each other in a respectful way.

[10] The next day, Ms Norton wrote to Ms Mackay acknowledging her written complaint and inviting her to attend a meeting on 27 June 2014 to discuss it. She said she would be accompanied by Mr Jason McLennan, the National Manager, Health, for Spotless. She was told she could bring a support person with her. I interpolate that from the documents which the Authority had before it, Mr McLennan was a senior member of Spotless' management, having responsibility for issues of this kind in respect of those of its employees who worked in District Health Board facilities. It is also evident that Mr McLennan was told by a Human Resources (HR) colleague, from whom he took advice from time to time, that resolution to the problems which were occurring needed to be obtained as soon as possible.

[11] The meeting duly proceeded. Ms Mackay attended with a support person. The Authority found that Mr McLennan's notes were relatively lengthy, but that they included reference to the following matters:

a) Mr McLennan had told Ms Mackay that Spotless had received letters from other staff raising issues and allegations against her, similar to those she had raised; he said that these had been received before Ms Mackay had written her letter to Ms Norton.

b) Other staff had given permission for their letters to be provided to Ms Mackay. She agreed that a copy of her letter could be made available to the other staff involved.

c) Ms Mackay was given the opportunity to comment on each of the concerns she had raised; questions of clarification were asked.

d) Mr McLennan had stressed that the company took the allegations seriously and they wanted Ms Mackay to respond to the allegations contained in the letters about her.

e) Ms Mackay was asked how the situation at work could be resolved, but her support person interjected saying that they would need to review the other letters which had been referred to before commenting.

[12] The Authority recorded that on the same day Mr McLennan also met with Ms X, Ms Y (who was author of one of the letters of complaint about Ms Mackay), a relatively new staff member (who was the author of the other letter of complaint about Ms Mackay), and three other staff.

[13] The Authority noted that Mr McLennan had recorded in his notes that he coached Ms X on how to avoid inflammatory situations; and that the several staff members who were interviewed declined to agree that Ms Y was a bully, although most

of them believed she had a direct manner which involved her speaking what was on her mind. It was also recorded that Ms Y was willing to attend some form of mediation to restore a harmonious work environment.

[14] The Authority found that unfortunately the actions and conclusions reached by Mr McLennan about Ms X and Ms Y were not passed on to Ms Mackay. The Authority also accepted Ms Mackay's evidence that no one had ever talked to her about obtaining support from an Employee Assistance Programme, and as at the date of the investigation meeting she did not know what this entailed.

[15] On 3 July 2014, Mr McLennan wrote to Ms Mackay summarising the complaints brought against her, and inviting her to provide a response. She did so in a long email dated 16 July 2014, where she denied the allegations which had been made against her. These included assertions that she had used insulting language to describe Ms X and Ms Y to the new staff member, and that she had said to that staff member that Ms Norton would effectively side with Ms X in all matters.

[16] In his letter to Ms Mackay, Mr McLennan had raised the possibility of mediation. In her response, Ms Mackay made no comment as to this option. The Authority found that she was unaware as to what such a process would entail.

[17] On 18 July 2014, Mr McLennan acknowledged Ms Mackay's letter, stating

he would respond by the end of the following week, that is by 25 July 2014.

[18] The Authority found that during this period, Ms Mackay was largely absent from work, first with a sinus infection and then because she suffered a foot fracture. Between 5 July and 8 August 2014 she attended work on two days only. In addition, she had an operation for carpel tunnel syndrome on 5 August 2014 which prevented her from being able to return to work for two weeks thereafter.

[19] Having received no further communication from Mr McLennan, on

25 July 2014 Ms Mackay wrote a letter of resignation to Ms Norton in these terms:

To Gwenda Norton

Due to unresolved and ongoing issues within the kitchen of unacceptable behaviour, which makes it very difficult to work within, I am left with no choice but to give 2 wks notice of my resignation - Last day being Fri 8.8.14

[20] The Authority stated that Ms Mackay's reason for sending this letter was that she had received no response as to how her concerns could be addressed, that she was due to return to work soon, and she did not want to do so under the conditions which had prevailed previously. She had hoped that Mr McLennan would have obtained a resolution of the workplace conflict by 25 July 2014 which was the date by when Mr McLennan had indicated he would respond.

[21] The Authority then determined that it was not clear whether, and if so how, Spotless responded to Ms Mackay's notice of her resignation. I observe that there was no evidence in the Authority, and none before the Court, that any step was taken until the next communication from Ms Mackay which took place on 30 July 2014.

[22] On that day, she wrote to Mr McLennan asking if she could put her resignation on hold, in the hope that a resolution of the conflict could be obtained. She proposed mediation to assist in resolving the workplace issues. She concluded her email by stating:

... also due to the above i would appreciate how you propose to resolve this conflict so i feel safe. i await your reply at your earliest convenience. ...

[23] The Authority said that there were then a number of attempts to contact Ms Mackay by Mr McLennan, although she denied his assertion that he had tried to contact her on a daily basis prior to the occasion when they were able to speak.

[24] On 8 August 2014, Ms Mackay was able to reach Mr McLennan by phone. The Authority set out communications which followed the telephone conversation, before explaining what occurred during that call. The first of these was an email sent by Mr McLennan to Ms Norton and Mr Coll (HR Advisor) about 50 minutes after speaking with Ms Mackay, which referred to the conversation. It stated:

Gwenda / Josh,

I spoke with Anne at approx. 4.10pm this afternoon.

I explained to her that she could not put her resignation "on hold" as per her attached e-mail, and that she needed to either formally retract her resignation, or to keep it in place.

I then explained that we are still working through the complaint process, the issue being that we have complaints 'in both directions' – from Anne, and against Anne; and in both instances the parties are disputing the allegations against them.

Anne then commented that she had heard today that someone at the hospital was collecting letters / statements from the staff which were against her – I advised that I could not comment on this, as I knew nothing about it. So whilst the Union Delegate had told her to "put her resignation on hold", Anne has decided that given everything that she thinks is still happening (even in her absence) – she would like her resignation to 'still stand' with her official last day being today – Friday 8th August.

I have therefore accepted Anne's resignation and advised her that Gwenda will process her final pay which is to be paid to her in the normal payrun next week.

Josh – at the end of the call I asked Anne to drop me a quick e-mail to confirm her verbal advice. However after the call I decided that I would send the attached e-mail to say that her resignation was officially accepted given what she had told me verbally.

Gwenda – if you could please proceed to process Anne's final pay, and

please liaise with her to return any company issued property.

Thanks

Jason

[25] Mr McLennan also sent an email to Ms Mackay, in the following terms:

Hi Anne,

As per our telephone conversation this afternoon (at approx. 4.10pm) in which you advised me that you would like your resignation to 'still stand' with your official last day at Timaru Hospital being today, Friday 8th August

2014.

This e-mail is to confirm that your resignation is therefore accepted, and I will ask Gwenda to process your final pay which will be paid in the normal run next week.

I wish you all the best for your future endeavours. Kind regards

Jason

[26] Ms Mackay sent an email to Mr McLennan in response, on 11 August 2014, as follows:

khi Jason.this is to confirm our telephone conversation re- resignation Friday

8th august 2014. as i said, i was advised to put my resignation on hold until this work conflict was resolved,(that being my union rep) as i felt it was

extremely stressful and unsafe for me to work in.however in our

conversation you said human resources had said i could not do that, and it had to be either resign or not. as i mentioned i am left with no choice but to

stand on my resignation, with the last day being Friday 8th august. as you

said yourself with new complaints about myself still coming in, it appeared to be hindering a resolve, even though I've only worked 2 days out of 4 wks due to personal injury.whenever i try to touch on the workplace being unsafe for me to work in your response is as above, your still getting complaints about me, so in effect leaving me in a vulnerable position, hence being left with no choice but to stand on my resignation, that being the only safe thing to do for myself.. Anne Mackay

[27] Then the Authority explained that after Ms Mackay had written her original resignation letter on 25 July 2014, she had heard from two colleagues that a third was circulating a piece of paper asking people to write comments about her on it; she said this was a "petition" to which she had referred to in the conversation with Mr McLennan.

[28] The Authority also referred to the two references in Ms Mackay's email to Mr McLennan of 11 August 2014 in which she had suggested Mr McLennan had said new complaints about her were "still coming in". The Authority said that Mr McLennan's evidence was that he had not volunteered any information about what those further complaints were, but that she had assumed it was Ms Y raising further oral complaints about her following on from altercations they had when she returned for work for two days during her sick leave, referred to earlier.

[29] The Authority said that when asked why she had decided in the telephone conversation to tell Mr McLennan that she now wanted her resignation "to stand", she had said it was because of the petition that a colleague had told her had been circulating about her. When she informed Mr McLennan of this, he said he knew nothing about it. At that point, Ms Mackay said she had had enough. The Authority recorded her evidence that the petition was "the straw that broke the camel's back".

[30] The Authority summarised Ms Norton's evidence on this issue. She had said that she had been aware from Ms X that some staff were expressing concerns about Ms Mackay returning to the kitchen after her sick leave, and she had said that if staff had those concerns they should place them in writing. According to Ms Norton, these had become personal criticisms about Ms Mackay rather than work-related issues, so she instructed the staff member that this was not to continue. Ms Mackay had told the Authority that Ms Norton had not informed her of these events, and that she only learned about them at the Authority's investigation meeting.

[31] The Authority recorded that Mr McLennan issued a report on his investigation after Ms Mackay resigned, on 15 August 2014. Mr McLennan had found there had been no bullying, but there appeared to be a clash of personalities;

Ms X and Ms Y had been spoken to about expectations of behaviour in the workplace and what was needed to create a more harmonious environment.

*Description of issues*

[32] After discussing the presentation of each party's case and after summarising relevant legal propositions, the Authority dealt with the four issues which it said had arisen. These were:

a) Did Spotless take reasonable steps to investigate Ms Mackay's letter of

complaint of 18 July 2014?

b) Was Spotless unreasonable in refusing to allow Ms Mackay to put her resignation on hold?

c) Did Ms Mackay affirm any breach by asking to put her resignation on hold?

d) Was Spotless unreasonable in failing to tell Ms Mackay that it would investigate her claim that a petition was circulating amongst staff about her?

[33] Although it is only the last of these which is the subject of the challenge, the Authority nonetheless made factual findings with regard to the first three issues which are not challenged, but which are relevant to the context of the fourth issue.

*Professional Behaviours Policy and Procedures*

[34] Before discussing that issue, I refer to Spotless' "Professional Behaviours

Policy and Procedures". It includes this introductory statement:

Spotless promotes appropriate standards of behaviour at all times and will not tolerate unacceptable behaviour by individuals or groups towards others in any circumstances. Spotless will:

- treat complaints of unacceptable behaviour in a serious, sensitive, fair, timely and confidential manner;
- implement training and awareness-raising strategies to ensure all employees know their rights and responsibilities;
- provide an effective procedure for complaints of unacceptable behaviour to be addressed;

• encourage the reporting of behaviour which breaches this Policy;

- take all practicable steps to ensure protection from victimisation or reprisals.

[35] Unacceptable behaviour was "the collective term to describe activity such as discrimination, verbal, visual or physical harassment, sexual harassment and workplace bullying".

[36] Later, after amplifying the description of workplace bullying, responsibilities were described. Included in those pertaining to managers was this statement:

In the event that any allegation of unacceptable behaviour (formal or informal) is brought to their attention, managers shall investigate the matter promptly and take action in accordance with these Policy guidelines.

[37] Finally, principles to be adhered to during a complaint investigation, included:

**Timeliness**

Investigation of a complaint must commence as soon as reasonably practicable from receipt of the complaint. Similarly, outcomes from the investigation must be [effected] as quickly as possible

*Authority's findings on the issues*

[38] The first issue related to the steps taken to investigate Ms Mackay's original letter of complaint. The Authority first considered Ms Mackay's oral complaints. It found that Ms Norton should have taken steps to investigate these. The Authority held that if these had been taken seriously, she may not have encountered further bullying.

[39] The Authority also found that the notes of interview with Ms X, as recorded by Mr McLennan, appeared to suggest that there was not a particularly in-depth investigation of the allegations raised against Ms Mackay. But the Authority went on

to find that these could not have led to Ms Mackay's resignation as she was unaware

of them.

[40] Then the Authority concluded that the first resignation letter was submitted because Ms Mackay had not received any feedback from Mr McLennan to her long email of 16 July 2014. The Authority considered she was understandably seeking a resolution to the work issues, and that she was impatient to hear the conclusions and approach which Spotless would adopt. But at that stage it was arguable her resignation letter had been sent too soon. Consequently there was no relevant repudiatory breach.

[41] Turning to the second issue, which related to whether it was unreasonable to refuse to allow Ms Mackay to put her resignation on hold, the Authority found that this would effectively have meant that Ms Mackay was asking for indefinite notice. That would have created uncertainty for Spotless. The Authority agreed that either the notice had to be retracted, or it had to be maintained.

[42] The Authority went on to find, however, that what Ms Mackay was really asking for was whether there was a resolution in sight. The Authority considered that she was entitled to know that, and that Mr McLennan did not seem to have given her any comfort by addressing Ms Y's manner of speaking to people or advising Ms X that she could not threaten a written warning without due process having been followed. The Authority accepted, however, that these may have been Mr McLennan's intentions ultimately had Ms Mackay not resigned.

[43] When dealing with the third issue, as to whether Ms Mackay had affirmed any breach by asking to put her resignation on hold, the Authority found that by

30 July 2014 Spotless had taken no step that could be characterised as a breach which could give rise to an affirmation. Although Mr McLennan had not reverted by

25 July 2014, he could be forgiven for not having reverted to her after he had been advised of Ms Mackay's resignation letter.

[44] Alternatively, asking to put a resignation on hold could not amount to an affirmation, when what Ms Mackay was asking for was an urgent resolution to her

concerns, and for mediation to be conducted. All she was doing was seeking to give

Spotless another chance to sort out her concerns.

[45] It is the fourth allegation which is challenged. This required a consideration of the telephone conversation of 8 August 2014. The findings made by the Authority on this topic were:

a) There was a significant failing on the part of Spotless by failing to tell Ms Mackay that it would investigate her claim that a petition was circulating amongst staff. Mr McLennan knew that Ms Mackay was both complaining about bullying and was also the subject of complaints. There was clearly a dysfunctional situation within the kitchen that needed to be investigated and resolved.

b) Mr McLennan was a senior member of the HR team and he should have been alerted to the potential of serious bullying when he heard from Ms Mackay on 8 August 2014 that someone was collecting letters/statements (or as she put it, a petition) against her. It did not matter that she was on sick leave.

c) Mr McLennan merely saying that he did not know anything about the petition without going on to say he would investigate the matter was a serious failing. It was not for Ms Mackay to expressly ask for the matter to be investigated. Its seriousness spoke for itself. In other words, no fair and reasonable employer could have failed to investigate that information urgently in all the circumstances, and to have told Ms Mackay that this was his intention.

d) Then the Authority dealt with a disputed contention that Mr McLennan also stated during the conversation that there were further complaints coming in about Ms Mackay, but did not tell her what they were or who they were from. The Authority noted that Mr McLennan had made no mention of this fact in the email he sent soon after the telephone conversation, but this was not conclusive. What was stark was that

Ms Mackay had felt sufficiently strongly during the conversation with Mr McLennan to decide that she had to confirm her resignation; from this the Authority inferred it was more likely than not Mr McLennan did refer to more complaints coming in.

e) Whilst that fact could not of itself give rise to a right to resign and then claim there was a constructive dismissal, the Authority held that Mr McLennan did not tell Ms Mackay who had made these complaints and she assumed they had been made by Ms Y. Then the Authority said:3

... I do not believe there is sufficiently cogent evidence to suggest that Mr McLennan failed in any significant way as it is more likely than not he would have disclosed to Ms Mackay more details about the further complaints in due course, had she not resigned.

This statement was apparently made because Ms Mackay had asserted that Mr McLennan deliberately chose not to say that he would investigate these matters.

f) Dealing with the elements of constructive dismissal, the Authority found first that Spotless had failed in its duty of good faith when Mr McLennan did not take steps to investigate the petition and to advise her what he was going to do.

g) This failure was held to be a significant factor which caused Ms Mackay's resignation. When Ms Mackay heard that Mr McLennan intended to do nothing about the petition and that further complaints had been received which were hindering a resolution, she concluded that her fundamental concerns about the hostilities she had been facing in the workplace were not going to be resolved after all so that she faced an uncertain future in the workplace, or worse, further hostility

which Spotless was not acting to prevent.

3 *Mackay v Spotless Facility Services (NZ) Ltd*, above n 1, at [79].

h) By saying her resignation would "still stand" she was communicating

that she could not accept these circumstances, and had to leave after all.

i) In a context where Ms Mackay clearly harboured concerns about the way she was being treated by her Supervisor and Ms Y, it was foreseeable to any fair and reasonable employer that in those circumstances Ms Mackay would wish to resign when told that further bullying actions were occurring, but seeing that the employer was not prepared to do anything to investigate.

[46] Finally, the Authority dealt with remedies in respect of the established grievance. After considering a mitigation issue, the award was one for 10 weeks rather than the 14 weeks claimed. Spotless was directed to pay Ms Mackay

$8,001.70 gross.

[47] Ten thousand dollars was sought for humiliation, loss of dignity and injury to feelings. After analysing the evidence, the Authority concluded that an award of

$7,500 was appropriate.

[48] The Authority also considered factors with regard to s 124 of the Employment Relations Act 2000 (the Act), concluding that walking away from an employer in circumstances of constructive dismissal could not be taken to mean that the employee had contributed to the situation that gave rise to the personal grievance. Because on the Authority's findings Ms Mackay was entitled to resign, her resignation could not be seen as a blameworthy action warranting a reduction of remedies. Moreover, there had been a clash of personalities, with no disciplinary action being justified. Accordingly Ms Mackay had not contributed in any blameworthy way to the situation which gave rise to the personal grievance.

**The evidence as to the telephone conversation of 8 August 2014**

[49] Mr McLennan's evidence concerning the telephone conversation, as given to the Court, was that it was brief and undertaken when he was waiting for an outbound flight in an airport lounge.

[50] He said he told Ms Mackay she could not put her email resignation "on hold"

but needed either to retract it or keep it in place, which he said was entirely up to her.

[51] He also said he wanted her to retract her resignation because he was still working through the investigative process. He said the issue was that there were complaints in both directions, from her and against her, and that in both instances the complainants were disputing the allegations against them.

[52] Then she told him, for the first time, that she had heard that day there was someone at the hospital collecting letters/statements from the staff that were against her. She described this as a petition.

[53] Mr McLennan said he could not comment on this, as he knew nothing about it. He told the Court that this was an honest statement.

[54] Then, Ms Mackay confirmed she was resigning, stating that she wanted her resignation to “still stand”. He said the reference to the petition took him by surprise and that it was “all very quick”.

[55] Mr McLennan denied an assertion contained in Ms Mackay’s amended statement of defence that he said “there were further complaints coming in about her”; he also said that the did not use any words to this effect. He only referred to the three complaints which he was already investigating, which she already knew about. He said that had he been aware of any “further complaints” he would have told Ms Mackay about them giving her details of them as soon as he found out about them.

[56] Turning to Ms Mackay’s evidence, she said that during the telephone conversation she told Mr McLennan about the petition being circulated in the workplace, and that Mr McLennan responded by stating “I don’t know anything about it”.

[57] Ms Mackay said she then told Mr McLennan it was going to be sent to HR

and she did not know if it had got there yet. Then she stated:

Although I believed [Mr McLennan] when he said he did not know about it yet, I was very upset that he made no reference to looking into the petition or taking steps to address this. He took the same brush off approach that had been taken with my original complaint and focused on there being complaints about me.

[58] Ms Mackay said that when she told Mr McLennan she would like to put her resignation on hold to resolve things he said this was not possible, and that she either had to stay or resign. She felt overwhelmed and could see things would only get worse for her as nothing was being done, and she was not being supported in the workplace. Seeing no way out, she confirmed that she was resigning. She said that had Mr McLennan responded by stating that the additional matters sounded serious, and that he would need to look into it and get the matter resolved, or had referred to the possibility of mediation, she would have stayed.

[59] It emerged from Ms Mackay’s cross-examination that there was considerable common ground between her and Mr McLennan as to what occurred. Each element of Mr McLennan’s account was put to her and she agreed:

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.

[60] The Court will need to assess the findings of the Authority in light of this uncontradicted evidence.

**Submissions**

[61] Mr Ballara, counsel for the plaintiff, submitted that the best evidence as to the telephone conversation was to be obtained from Mr McLennan’s account of it as verified by the email he wrote soon after. It was contended that in the first part of the conversation, Mr McLennan discussed the status of Ms Mackay’s resignation, and the advice he had been given by HR colleagues that she needed either to retract it or keep it in place. Then Mr McLennan explained the process that was being

undertaken in respect of complaints from both Ms Mackay and two other staff, wherein in each instance parties were disputing allegations brought against them. These allegations were still being worked through.

[62] Counsel submitted that it was then that Ms Mackay referred to the fact that she had heard that day that someone was collecting letters or statements from staff

that were against her – that is the "petition". To this Mr McLennan responded that

he knew nothing about this; Ms Mackay responded by saying that she was resigning.

[63] It was submitted that the sequence of the evidence was important, because it indicated that Mr McLennan told Ms Mackay that the investigation was continuing. Indeed, he had told the Court that he had discussed the investigation with HR colleagues in the days which preceded the telephone conversation, and that he had had a reasonably clear view as to what the outcome of the investigation would be, as later confirmed in his report of 15 August 2014.

[64] Mr Ballara argued that analysed on that basis, the resignation by Ms Mackay was an overreaction. Mr McLennan was just being honest, in that he stated that he did not know anything about a petition having only just been told there was one. There could not in those circumstances be an actionable breach of duty.

[65] Ms Boulton, counsel for the defendant, submitted that having regard to all the circumstances which were to be assessed as from early June 2014, Mr McLennan must have known that Ms Mackay was anxious to know how the conflict would be resolved. She had already tendered her resignation citing ongoing issues and lack of resolution, and it was reasonably foreseeable she would tender her resignation stating on 30 July 2014 that she was finding the stress intolerable. Mr McLennan had made no reference to the steps he was taking to address the complaints raised by Ms Mackay; this was a serious breach of duty which satisfied the tests relating to a constructive dismissal.

**Legal principles**

[66] The relevant principles for constructive dismissal are well known. This type of dismissal is the equivalent for what would be described in general contract law as cancellation following a repudiatory breach of contract under s 7 of the Contractual Remedies Act 1979.

[67] It is necessary to focus on the way in which courts, and in particular the Court of Appeal, have characterised such a dismissal over the years. There are three potential categories which might give rise to such a dismissal. They were described

by Cooke J (as he then was) in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* who held that such a dismissal could arise where the preceding events suggest that:4

• the employee was given a choice of resignation or dismissal;

- the employer followed a course of conduct with the deliberate and dominate purpose of coercing an employee to resign; and

• a breach of duty by the employer led a worker to resign.

[68] Initially, for the purposes of this challenge, Ms Mackay claimed that the telephone discussion comprised a deliberate course of conduct. Analysis on this basis was discontinued at the hearing. The sole basis of the claim, therefore, was that there was a breach of duty which made resignation reasonably foreseeable.

[69] The correct approach where breach of duty is alleged is encapsulated in the following passage from *Auckland Electric Power Board v Auckland Provincial District Local Authority's Officers IUOW (Inc)*:5

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.6

[70] In this statement the Court emphasised that it is necessary to consider *all* the circumstances of the resignation.

[71] The evaluation of a breach of duty, and its seriousness, may well be an assessment of fact and degree. So, in *Wellington Clerical IUOW v Greenwich,* the

4 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 347 - 375.

5 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] NZCA 250; [1994] 2 NZLR 415 (CA) at 419.

6 The need to establish reasonable foreseeability has been regarded as novel in a contract setting, but it is clear that this is a required element: *Business Distributors Ltd v Patel* [2001] NZCA 301; [2001] ERNZ 124 (CA); *Transmissions and Diesels Ltd v Matheson* [2002] NZCA 63; [2002] 1 ERNZ 22 (CA). Chief Judge Goddard discussed this element in *Taranaki Healthcare Ltd v Lloyd* [2001] NZEmpC 154; [2001] ERNZ 546.

Court made it clear that it would need to be satisfied that the employer's conduct had "fairly and clearly be said to have crossed the border line which separates inconsiderate conduct ... from dismissive or repudiatory conduct ...".7

[72] Earlier, I set out Ms Mackay's evidence to the effect that what had occurred in the conversation of 8 August 2014 was the "final straw". There have been several cases which have referred to this characterisation of relevant conduct. Of assistance is the dicta of Judge Ford in *Pivott v Southern Adult Literacy Inc,* which I respectfully adopt:8

[61] The legal position regarding "final straw" cases, as they are often referred to, was considered by the English Employment Appeal Tribunal in *Triggs v GAB Robins (UK) Ltd.*9 There, the Tribunal provided a concise restatement of the principles first enunciated by the Court of Appeal of England and Wales in *Omilaju v Waltham Forest London Borough Council.*10

The Tribunal outlined these principles as follows:

[32] We derive the following principles from the *Omilaju* case.

(1) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

(4) And entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's acts as destructive of the necessary trust and confidence.

[62] Although overseas authorities need to be approached with a degree of caution, I do not see any reason why the statements of principle in *Triggs*

7 *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Casual 95 at 104.

8 *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236, [2013] ERNZ 377.

9 *Triggs v GAB Robins (UK) Ltd* [2007] EWHC 212; [2007] 3 All ER 590 (EAT). The directions of the Appeal Tribunal as to remedies were successfully appealed in *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, although its findings relating to constructive dismissal were unaffected.

10 *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493; [2005] 1 All ER 75 (CA) [19] – [22].

should not have equal application to constructive dismissal cases in this jurisdiction. ...

**Analysis of the Authority's findings as to telephone conversation**

[73] An evaluation as to whether the Authority erred with regard to its findings in respect of the telephone conversation is informed by the evidence placed before the Court. It is that evidence which both parties requested the Court to consider.

[74] First is the point that Mr McLennan did not hold HR qualifications and experience, contrary to the finding of the Authority. He was a Senior Manager, with access to HR advice, which he took; and although he had some experience with investigations of the type he conducted, it was not extensive.

[75] Second, the evidence before the Court was clear as to when Ms Mackay learned about the petition. Ms Mackay said she had learned about the co-workers' statements on the morning of the telephone conversation, from Ms Norton. It appears this

is not how the issue was put to the Authority.

[76] Third, I refer to the Authority's consideration of Ms Mackay's email sent several days after her resignation; in it she said that Mr McLennan had referred to the fact that there were "new complaints about myself still coming in". Ms Mackay did not give this evidence to the Court, and Mr McLennan denies that he said this in any event. Nor is there any independent evidence that there were yet further complaints, beyond such comments as had been made in the petition. I find that the reference in Ms Mackay's email of 11 August 2014 was to the issues which arose from her reference to the petition. It was these apparent complaints which Mr McLennan had learned about from Ms Mackay. However, the Authority proceeded on the basis that there were three complaints under investigation, there were the statements contained in the petition *and* there were further complaints coming in which Mr McLennan had not told her about. On the evidence before the Court this was not the case.

[77] Next, it is common ground from Ms Mackay and Mr McLennan that in the course of the conversation, Mr McLennan emphasised that he was continuing to

investigate the complaints (that is the complaint originally made by Ms Mackay, and the two others which Spotless had received from staff). This is an important fact, as it indicated that Spotless was continuing the process of investigation which it had commenced. This reference to the continuation of the investigation was made before the petition was referred to. The Authority does not appear to have been referred to in this aspect of the conversation.

[78] Ms Mackay appears to have told the Authority that she believed Mr McLennan's reaction to her information that there was a petition, and his failure to say that he would investigate it, was deliberate. She informed the Court that she had reflected further on this, and that she now "believed [Mr McLennan] when he said he did not know about it yet". This point was put differently to the Authority.

[79] Mr McLennan told the Court that he said to Ms Mackay that he did not want her to resign. Ms Mackay said she could not recall this statement being made. Nor is it referred to in either the email which Mr McLennan wrote soon after the telephone conversation to two of his colleagues, or in Ms Mackay's subsequent email. The Authority did not refer to it either. I find that it is probable that this statement was not made.

[80] Assessing all the evidence of the telephone conversation, particularly as presented to the Court, I agree there should be a focus on the sequence of the topics which were referred to. Once these are placed in their correct order, it is apparent that there was a miscommunication between the parties.

[81] The first part of the conversation related to the complaints which Mr McLennan had been investigating. He said he was continuing to investigate these.

[82] It is regrettable that he did not elaborate, and in particular that he did not say that he was at the point where he could issue a report; and that there was a consensus between the parties for mediation (which had been the case since 30 July 2014) so that there was a way forward and a means for achieving a constructive outcome. 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, whilst he was waiting for a flight in an airport lounge.

[83] However, even on the basis of what he did say, I find that it was evident he intended to deal with the outstanding issues.

[84] The second part of the conversation related to the new complaints, which Ms Mackay characterised as being incorporated in a petition. I find that Mr McLennan was honest when he stated that he did not know about these, and that Ms Mackay on being told this felt that this answer was not good enough and that she had to confirm her resignation. But I also conclude that this was an overreaction on her part. The line had not been crossed to dismissive or repudiatory conduct.

[85] I find that the circumstances fall within the fourth category of those which were referred to by the English Court of Appeal in *Omilaju*.11 That is, the employee genuinely, and subjectively but mistakenly, interpreted the employer's response as destructive of the necessary trust and confidence; but that was a response to an innocuous act: an honest statement was made which could have been better expressed; it did not justify an immediate decision to resign.

**Conclusion**

[86] Consequently, I cannot conclude that there was 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 do not think the statement was one where it could be said that a substantial risk of resignation was reasonably foreseeable having regard to all the circumstances. I conclude that the Authority did not reach a correct factual conclusion. This finding is necessary because of the further evidence given by the parties to the Court.

**Consequence of the Court's conclusion**

[87] Because the Authority erred in its finding of fact on the fourth issue which it considered, the decision of this Court must stand in its place on that point.

11 *Omilaju v Waltham Forest London Borough Council*, above n 12.

Ms Mackay's claim that she was constructively dismissed is not established. Furthermore, the remedies which were sought as a result of the Authority's determination that there was a constructive dismissal must also be set aside.

[88] However, that is not the end of the matter. The manner in which Ms Mackay's concerns, and then complaint, were dealt with were the subject of significant criticisms by the Authority.12 Further criticisms emerge from this Court's consideration of the chronology. In particular, I refer to the fact that there was a consensus that the parties could attend mediation by 30 July 2014; and that it was not explained to Ms Mackay either before or on 8 August 2014 that preliminary views

had been reached as to the workplace conflict and that there were constructive steps which could be taken in an attempt to reach a satisfactory conclusion for all parties.

[89] The Authority was not required to consider whether there was a personal grievance on the basis of unjustified action, a point which was made in the course of the determination.13

[90] Section 122 of the Act provides that a finding may be made that a personal grievance is of a type other than that alleged. An example of such an approach is found in *Nathan v C3 Ltd*.14

[91] I wish 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 have been made about the inadequacies of the process adopted by Spotless, considered in the context of its Professional Behaviours Policy and Procedures.

[92] Specifically, I require submissions as to:

a. The particular respects in which it can be said Spotless may have breached its obligations to Ms Mackay, including as to the steps it took,

12. For example, as referred to in paras [10]; [14]; [38] and [40] of this judgment; these findings arise in the context of the principles of the Policy described at [34] – [37].

13 *Mackay v Spotless Facility Services (NZ) Ltd*, above n 1, at [61].

14 *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61 at [35]; and see *Nisha v LSG Sky Chefs*

*New Zealand Ltd* [2015] NZEmpC 171 at [236].

the time it took to undertake them up to and including 8 August 2014, and the information it provided to Ms Mackay as to these.

b) Whether those steps constitute a personal grievance under s 103(1)(b)

of the Act.

c) If so, what remedies, if any, should be granted.

[93] I direct that submissions should be filed and served as follows:

a) On behalf of Ms Mackay, by 5 December 2016. b) On behalf of Spotless, by 19 December 2016.

[94] Upon receipt of counsel's submissions I will consider the matter further, including whether any further directions are necessary before reaching a decision on this topic.

B A Corkill

Judge

Judgment signed at 2.30 pm on 21 November 2016