Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 177
3032276

BETWEEN	ELEANOR ANNE FRANCES DEANS Applicant
A N D	BOARD OF TRUSTEES OF GERALDINE HIGH SCHOOL Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Amy Keir, Counsel for respondent
Investigation Meeting:	20 November 2018 at Christchurch
Submissions Received:	20 November 2018 from Applicant 20 November 2018 from Respondent
Date of Determination:	4 December 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. Ms Deans' last day of employment was 14 March 2018, and she raised her personal grievance for unjustified dismissal within the statutory 90 day period.

B. Ms Deans was not represented, and so has incurred no costs at this preliminary stage.

Prohibition from Publication Order

[1] Medical information of a personal nature was put before the Authority by Ms Deans which she wishes to keep private. This information is of an inherently confidential nature and it is not necessary for the details to be publicised, although they are partially relevant to the issues to be determined. I issued a prohibition from publication order on 16 October 2018 in relation to this information and I repeat it here, for the avoidance of doubt.

[2] I prohibit from publication any information that discloses the nature of the injury suffered by Ms Deans on 31 March 2017, and its sequelae, save for information which it is necessary to describe in this determination to enable me to explain my conclusions in respect of whether Ms Deans was unable reasonably to raise a personal grievance within the statutory time limit.

Employment Relationship Problem

[3] Ms Deans alleges that she was unjustifiably dismissed from her employment following a restructuring process which resulted in the termination of her employment by reason of redundancy.

[4] The respondent argues that Ms Deans raised her personal grievance for unjustified dismissal outside of the 90 day statutory time limit, and it does not consent to the late notification of a personal grievance. The respondent therefore argues that the Authority does not have jurisdiction to consider Ms Deans' claim for unjustified dismissal.

[5] This determination is therefore limited to the questions of whether:

(a) Ms Deans raised her personal grievance within 90 days of the date of dismissal; or

(b) If she did not, whether there are exceptional circumstances which justify the Authority granting Ms Deans leave to raise her personal grievance outside of the statutory time limit.

Brief Account of the Events Leading to the Raising of the Personal Grievance

[6] As there is disagreement between the parties as to when the dismissal took effect, it is necessary to set out in some detail the events of the period October 2017 to March 2018.

[7] Ms Deans worked at Geraldine High School in the position of part-time school secretary. She commenced a period of parental leave on 16 March 2017 and sustained an injury on 31 March 2017. The injury had both significant physical and psychological consequences for Ms Deans.

[8] On 16 October 2017 the Principal of the school, Simon Coleman, wrote to Ms Deans advising her that the school secretary role had been redefined and that a finance and administration role had been created. The proposal would result in a major increase in the hours to be worked by the school secretary, from 13 hours to 35 hours a week including coverage outside of term time. This letter, like all the other letters sent to Ms Deans by Mr Coleman in respect of the restructure, had been drafted for Mr Coleman by the New Zealand School Trustees Association.

[9] Ms Deans corresponded with Rae Coburn, the business manager, about the restructure and took part in a meeting in October and also provided written feedback on the restructuring proposals.

[10] On 21 November 2017 Ms Deans underwent an operation in relation to her injury. On the same day, Mr Coleman wrote to Ms Deans to say that her role was going to be restructured and that the new position of finance and administration assistant was to be advertised, which Ms Deans would be eligible to apply for.

[11] Mr Coleman also referred to clauses 2.5 (variation of hours) and 10.2 (surplus staffing) of the Support Staff School's Collective Agreement 2017 – 2019 ("SSSCA"). The letter also stated:

> This letter serves as one month's notice in terms of both Clauses 2.5.1 and 10.2.2 of the SSSCA.

I shall examine those clauses below.

[12] The letter also stated that, if Ms Deans did not apply for or was not appointed to the position of finance and administration assistant, she would be given one month's written notice of termination of employment, and that the school would work with her to acquire reasonable alternative employment within the Education Sector or the State Sector.

[13] Mr Coleman also referred to a possible 12 hour a week position as a food technician in the technology department of the school being available and stated that "if reasonable alternative employment could not be found before the end of the notice of termination period, you will be entitled to redundancy pay". Mr Coleman asked for feedback from Ms Deans and invited her to a meeting on 30 November.

[14] Ms Deans was unable to attend the meeting on 30 November through ill-health but attended an alternative meeting on 7 December during which she requested information regarding a final redundancy payment.

[15] On 12 December 2017 Mr Coleman wrote to Ms Deans stating that the Board had decided to proceed with its proposal to change the school secretary role to an administration and finance assistant role, which would be advertised. With the letter he attached a position description for the food technology role. Mr Coleman's letter also stated the following:

> As per 10.2.3 of the Support Staff Collective Employment Agreement. The board is now giving you one months' [sic] notice of termination of your employment at Geraldine High School from the date of this letter, as your role has become surplus.

[16] Mr Coleman stated that he would inquire if there were vacancies within Geraldine Primary School or surrounding areas and stated that, if reasonable alternative employment could not be found before the end of the notice of termination period, Ms Deans would be entitled to redundancy pay.

[17] Mr Coleman also stated that, if reasonable alternative employment could not be found before her termination date then Ms Deans would go on to a 26 week period of preference under the Parental Leave and Employment Protection Act 1987 so that, at any time during the 26 weeks from when her parental leave ended, if a vacancy arose at the High School similar to her previous job, it would be offered to her first before it were advertised or offered to anybody else.

[18] The one month's notice given in that letter of 12 December 2017 expired on 12 January 2018. This is the date that the respondent primarily asserts was Ms Deans' last day of employment.

[19] On 19 December 2017 Ms Deans stated that she was interested in the food technology role, and other roles, and asked for details of the food technology and teacher assistant roles.

[20] On 9 January 2018 Ms Deans wrote chasing information about the food technology role. The one month's notice expired on 12 January 2018 and on 15 January 2018 Ms Deans wrote an email to Ms Coburn and Mr Coleman asking the following question:

> As I received my one months notice a month ago, what happens now? I am guessing nothing happens until we have decided on an outcome? Or should I wish to take redundancy am I to advise you today? (One month would have come to an end yesterday).

[21] It does not appear that that question was answered by either Ms Coburn or Mr Coleman.

[22] On 16 January 2018 Ms Deans asked for confirmation of the food technology role hours. The following day she emailed to say that she was hoping to return to the school, if she took the food technology role, at the end of her maternity leave. On the same day Ms Deans was emailed the job description for the food technology role and, later, information about the hours and shifts for that role.

[23] On 18 January Ms Deans responded to say that she needed more time to consider the food technology role as, contrary to her previous expectations, the role required working four days a week and not three.

[24] On 23 January 2018 Ms Deans asked how much redundancy pay she would receive if she were made redundant and she received an answer to that question on 25 January.

[25] On 27 January 2018 Ms Deans emailed to say that she could not do the food technology role four days a week and that she would take a redundancy payment. Ms Coburn replied two days later to say that she would work with Novopay to get the payment processed.

[26] On 29 January 2018 Mr Coleman wrote to Ms Deans to say that she was entitled to receive redundancy pay, that he would arrange for the calculation of payment of it through Novopay and reiterated Ms Deans' rights to a 26 week period of preference. A copy of a Novopay NOVO6 form seen by the Authority stated that 29 January 2018 was Ms Deans "last day of duty". Ms Deans said she did not see that form at the time. I accept that evidence.

[27] On 3 February 2018 Ms Deans wrote to Mr Coleman and Ms Coburn stating the following:

> Thank you for your letter dated 29th January 2018, which I received this morning. I would appreciate it if you would clarify what the effective date of my redundancy will be? I would be expecting it to be as of the date of my previous email which informed you of my decision? Please advise.

[28] It appears that Ms Coburn responded to this email but replied to say that she had "lodged it with novopay" but that she would follow up next week to see what their time frame was. She did not directly answer the question of what the effective date of Ms Deans' redundancy would be[1].

[29] Ms Coburn emailed Ms Deans on 12 and 27 February to say that she had been chasing Novopay about the redundancy payment and on 28 February Mr Coleman emailed Ms Deans to tell her about a vacancy at an auto repair company.

[30] Ms Deans states that she received a payslip which shows 14 March 2018 as her final day of employment. This appears to refer to the day when Ms Deans' holiday pay was calculated. The payslip in question also records 6.5 hours of parental leave without pay on 14 March 2018. This date was also the last day of Ms Deans' parental leave.

[31] On 20 March 2018 Ms Deans sent an email to Ms Coburn saying the following:

> Sorry for my lack of contact recently but to be honest this redundancy (that seems to be going on forever) is causing me distress and anxiety and I felt it was wise not to respond to previous emails. As you will be aware I am still yet to receive my redundancy and any final pay owed to me. We are now entering the eighth week of waiting since I advised you of my decision to be made redundant and, although you have been kind enough to email me twice in that time to explain that Novopay are to blame, I am getting the feeling that my situation is not featuring at all in your priorities. I am more than aware of Novopay's incompetence, however there is only so much we can blame them for.
>
> I am due to return to work this week with my maternity leave coming to an end. If my employment is not terminated with GHS (Geraldine High School) I stand to lose money in any new employment, as I may fall into a higher tax bracket.
>
> With respect, I am asking that you spend just a little bit of time on this and bring it to a close.

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[1] Ms Coburn's evidence was that she understood Ms Deans to be asking when the redundancy payment would be made, whereas Ms Deans' evidence was that she was asking when her employment would come to an end.

[32] Ms Coburn replied to this email saying that she had been chasing Novopay and that the School could pay her instead and recover the redundancy pay from Novopay later.

[33] Ms Deans responded to that email on 21 March in the following terms:

> Thanks. But I am not interested in receiving a sub from the school. Although the financial side is frustrating and unfair, I am more concerned about terminating my employment with you correctly and my finances for 2017/2018 being correct, which, if this continues to the end of the month, they will not be. Having declared this redundancy to the Inland Revenue as an unexpected income my Working Families Tax Credit (which we receive fortnightly) was reduced. If this money is not paid (through the correct channels) by the end of the month, you would have lost that money for nothing, as redundancy money will show in the next financial year. It may not have been much and we will receive it back in our rebate in June but when you are on one NZ wage, every penny counts and money in June doesn't pay the bills in February. Do you think this is fair and reasonable behaviour? I feel I have been treated terribly during this process, which has now lasted 5 months and counting… I wonder if you have spoken to Peter's superior or maybe contacted someone at the Ministry who could see what the issue is with the pay process? "Grumpy" emails don't seem to be doing enough.
>
> I hope to hear back from you with more positive news.

[34] Ms Coburn responded to say that she had "escalated it to the resourcing team who are the Ministry team in charge of resolving payroll issues".

[35] Ms Deans was finally paid her redundancy compensation on 27 March.

[36] Ms Deans raised a personal grievance in respect of her dismissal for redundancy on 10 June 2018 and on 13 June 2018 the Chair of the Board of Trustees wrote to refuse to consider the grievance, as being out of time.

The legal framework

[37] Pursuant to s.114(1) of the Employment Relations Act 2000 ("the Act") every employee who wishes to raise a personal grievance must raise it with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.

[38] Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period, the employee may apply to the Authority for leave to raise the grievance after the expiration of that period. Section 114(4) provides:

> On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
> (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
> (b) considers it just to do so.

[39] Section 115 of the Act sets out some examples of what would constitute exceptional circumstances under s.114(4) but makes clear, by use of the term "include", that the examples given are not exclusive. The exceptional circumstance relied upon by Ms Deans is set out at s.115(a), which provides exceptional circumstances include:

> Where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in s.114(1).

The Issues

[40] The issues to determine are:

(a) When did the dismissal about which Ms Deans wishes to raise her personal grievance take effect?

(b) Having determined the date of that dismissal, did Ms Deans raise her personal grievance within 90 days of it?

(c) If she did not, was her delay in raising the personal grievance occasioned by exceptional circumstances?

(d) If so, is it just to grant leave for Ms Deans to raise her personal grievance outside of the 90 day time period?

When did the termination of Ms Deans' employment take effect?

[41] The respondent asserts that it took effect on 12 January 2018, one month after the notice given by Mr Coleman in his letter of 12 December 2017. As an alternative, in submissions, Ms Keir suggested it was likely to be 29 January 2018, the date that Mr Coleman wrote to say that Ms Deans was entitled to a redundancy payment. A further alternative date suggested was 28 February 2018. On the other hand, Ms Deans asserts that her final day of employment with the respondent was 14 March 2018. If Ms Deans is correct, Ms Deans did raise her personal grievance within 90 days.

[42] The reason for Ms Deans' assertion that she was employed until 14 March is that her final payslip, for pay period 26 (14 March 2018 to 27 March 2018) stated "On 14/3/2018, 6.5 hours Parental LWOP[2]".

[43] In order to analyse the question thoroughly, it is necessary to take into account the requirements of notice under the terms of the SSSCA. Part 10 of the CEA deals with employment protection, surplus staffing and school merger provisions. Clause 10.2 deals with the surplus staffing provisions. Although the Authority has not made any determination with respect to whether Ms Deans' situation made her subject to the surplus staffing provisions, these were the provisions that were applied by the respondent. Clauses 10.2.3 to and 10.2.7 provide as follows:

> 10.2.3 The employer shall, at least one month prior to issuing notice of termination, advise any affected employee(s) of the possibility of a surplus staffing situation within an occupational category in the school.
>
> 10.2.4 The period of notice is to allow time for discussion between the employer and the employee(s) of the reasons for the possible surplus staffing situation and to determine whether this surplus can be absorbed by attrition. The employer shall consider whether or not it is able to offer an alternative position within the school with terms and conditions that are no less favourable, which may also entail on the job retraining.
>
> 10.2.5 If the required number of positions cannot be achieved through attrition (refer clause 10.2.4) and a surplus staffing situation still exists, all available positions in the occupational category will be internally advertised and appointments made from existing employees in that category. Where there is only one position in the identified occupational category in which the surplus exists identification of the position shall be automatic.
>
> 10.2.6 Employees who are not appointed or who are identified as surplus in terms of clause 10.2.5 above shall be given a minimum of one month's written notice of termination of employment provided for in clause 9.1. Except in exceptional circumstances (e.g. long-term sick leave), or as agreed with the employee, this notice shall be given at such time as to ensure it covers a period of a full month during which the employee is paid and at work.
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> 10.2.7 During the notice of termination period both the employer and the employee shall make reasonable efforts to locate alternative employment for the employee. The employer will provide reasonable paid time to attend interviews, where prior approval will not be unreasonably withheld.

[44] Clause 9.1, referred to in clause 10.2.6, is headed up "Termination of employment". Clause 9.1.1 provides as follows:

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[2] Leave Without Pay

> Unless otherwise agreed between the employer and the employee and except as provided in clause 9.1.2, termination of employment shall be by one month's notice by either the employee or the employer, to the other party; except in cases of serious misconduct which may warrant instant dismissal.

[45] Clause 9.1.2 dealt with fixed term employment which is not relevant in Ms Deans' case.

[46] It is clear from clause 10 that the giving of two separate notices is contemplated in a surplus staffing situation. The first, pursuant to clause 10.2.3, requires at least one month's prior notice to be given of a possible surplus staffing situation. During that one month's notice, pursuant to clause 10.2.4, discussion is to take place between the employer and the employee of the reasons for the possible surplus staffing situation.

[47] If, having discussed that possible surplus staffing situation, the employee is identified as surplus, then the employee must be given a minimum of one month's written notice of termination of employment pursuant to clause 10.2.6 and clause 9.1. During that further period of notice the employer and the employee must make reasonable efforts to locate alternative employment for the employee.

[48] I should also mention that clause 2.5.1 of the collective agreement also required the giving of one month's notice of any variation in hours of work, prior to the variation coming into effect. The letter of 21 November 2017 from Mr Coleman gave that notice.

[49] Ms Keir submits that the first staff surplus notice required under clause 10.2.3 was given in Mr Coleman's letter dated 21 November 2017, and that, although clause 10.2.2 was referred to, it actually should have referred to clause 10.2.3. I accept that the reference to clause 10.2.2 is likely to been intended to have been a reference to clause 10.2.3, and that the 21 November 2017 letter was giving notice of a possibility of a surplus staffing situation.

[50] Ms Keir submits that the second notice, of Ms Deans' termination of employment, was given by Mr Coleman in his letter of 12 December 2017. Again, that letter referred to the incorrect clause, she says, and should have referred to clause 10.2.6, and not clause 10.2.3. I agree, again, that it is likely that this is what the drafter of the letter meant to say.

[51] However, this second notice was given too soon, as the first notice, given on 21 November 2017 under clause 10.2.3, had not yet expired. The second notice under clause 10.2.6 was therefore invalid under the terms of the collective agreement.

[52] Furthermore, this purported second period of notice had expired prior to Ms Deans being given all the information she needed before she could decide about the suitability of the food technology role. Mr Coleman was only able to conclude that Ms Deans was entitled to a redundancy payment once Ms Deans had considered whether she could carry out the food technology role, and that did not happen until after 12 January.

[53] However, because of the confusion created by the second notice having purportedly been given, Mr Coleman failed to give proper notice to Ms Deans pursuant to clause 10.2.6 and 9.1 of the collective agreement when it had become clear that she was not going to be able to take up the food technology role.

[54] For the avoidance of doubt, I do not accept that 12 January 2018 was Ms Deans' last day of employment, not just because proper notice had not been given, but also because the respondent was taking active steps after that date to try to place her in an alternative role within the school, and within other schools. That was not done because of the preference period, which had not commenced yet, nor, as submitted by Ms Keir in reliance on evidence given by Ms Coburn, because the school was acting out of kindness. I believe that it was done because the school still regarded itself as under a duty as her employer to search for alternative roles for Ms Deans.

[55] Ms Keir submitted that employers breach the terms of employment agreements all the time by improperly dismissing employees, but that does not prevent the dismissal taking effect in law, even if it may be an unjustified dismissal. She is, of course, correct. However, in those cases it is usually clear when the dismissal takes effect because the employer usually takes active steps to send the employee away. This is not the case here, as it is not clear when Ms Deans' employment did come to an end due to the failure to give proper notice, and there was no other act of 'sending away'.

[56] Normally, the fact that an employer ceases to pay an employee provides an indication of the likely date of termination. However, of course, Ms Deans was on parental leave and so

was not entitled to be paid in any event. Indeed, there are a number of different dates that could be taken to be the end of the employment.

[57] One date is 29 January 2018, as submitted by Ms Keir, which is the date of the letter from Mr Coleman advising Ms Deans that she was entitled to a redundancy payment. This is the date noted on the Novopay NOVO6 form as "the last day of duty", although Ms Coburn said she had entered that date on the form simply because that was the day she had filled it in. She said that she had believed that 12 January 2018 had been Ms Deans' last day of employment.

[58] I accept that, by 29 January 2018, a settled decision had been made by both parties that Ms Deans was no longer going to return to work after the end of her parental leave. However, I do not accept that the letter of 29 January 2018 is unequivocal evidence that Ms Deans' employment had come to an end on that day. It does not expressly state that her employment ended on 29 January and, whilst it refers to the one month's notice having been given on 12 December 2017, the respondent continued to treat Ms Deans as its employee after the expiry of that notice.

[59] Furthermore, the letter of 29 January 2018 did not give notice of termination of employment as required under clauses 10.2.6 and 9.1, and, in the absence of notice having expressly been given as required, one month's notice of termination cannot be implied to have been given, which is what would be required if 28 February was the date of termination.

[60] Finally, I do not accept that a dismissal can take effect without it being communicated to the employee in some unequivocal way, whether by words or deeds. The only such unequivocal communication that had taken place was the notice that was purportedly given on 12 December 2017, and that notice was both given in breach of the collective agreement and was effectively overridden by the respondent continuing to treat Ms Deans as its employee after 12 January.

[61] For these reasons, I am not convinced, on a balance of probabilities, that Ms Deans' employment came to an end on 12 January, 29 January or 28 February 2018.

[62] An alternative day for the last day of Ms Deans' employment could be taken to be 14 March 2018. This is the day that Ms Deans asserts is the last day of employment and was

the day when her parental leave came to an end. It is to be noted that, as at that day, Ms Deans had still not received her redundancy payment.

Can 14 March 2018 be taken as Ms Deans' last day of employment?

[63] It is arguable that it can be in the absence of formal notice of termination having been given to her. This is because, at the end of her parental leave period on 14 March 2018, she was entitled to return to work and her employment had not been terminated prior to that date. However, she was unable to return to work because there was no longer a position open for her, and there was no suitable alternative position available for her. Therefore, it is arguable that this was her last day of employment.

[64] A final possible date would be the date when Ms Deans received her redundancy compensation payment on 27 March 2018. However, I do not believe that that is a reliable indication of Ms Deans' last day of employment as that was simply the day when Novopay finally processed the application for payment of her redundancy payment.

Conclusion

[65] Given that the respondent failed to give proper notice of termination under the terms of clauses 10.2.6 and clause 9.1 of the collective agreement, and given that no unequivocal sending away by the respondent occurred, I conclude that, on the balance of probabilities, Ms Deans' employment came to an end on 14 March 2018, for the reason expressed at paragraph [63] above. As a consequence, Ms Deans did raise her personal grievance within the statutory 90 day time limit.

An alternative view

[66] However, if I am incorrect in that, I believe that there are exceptional circumstances which occasioned the delay in Ms Deans raising her personal grievance within the statutory time limit. It is not the exceptional circumstance identified by Ms Deans in relation to her medical condition, because it is clear that Ms Deans was not so traumatised by her dismissal that she was unable to raise a personal grievance at any point during the 90 days after her employment came to an end (whether it were 12 January, 29 January or 28 February 2018).

[67] Whilst Ms Deans did suffer a serious debilitating injury which may well have prevented her from raising a personal grievance for a period immediately afterwards, the

Authority has seen a letter dated 7 February 2018 from a medical specialist which suggests that the injury was substantially healed by that date, to the extent that no firm arrangements were made to see Ms Deans again, leaving it to her to make an appointment if need be.

[68] The date 7 February 2018 was within the period of 90 days commencing from the date when the respondent says employment ended, 12 January 2018. It was therefore substantially before the possible later dates when employment ended, including when Mr Coleman indicated that Ms Deans was entitled to a redundancy payment. Therefore, I cannot conclude that Ms Deans' injury, or its sequelae, prevented her from raising a personal grievance in time.

[69] However, I believe there are other exceptional circumstances which did occasion her delay in raising a personal grievance, if indeed there was such a delay. Those circumstances are the complete lack of clarity about when Ms Deans' employment ended, or was to come to an end, and the complete failure of the respondent to answer her questions in that regard, which she asked on at least four occasions.

[70] Given that the respondent did not give proper notice under clause 10.2.6 and 9.1, it is not at all surprising that Ms Deans was confused as to when her employment would end. Does that constitute an exceptional circumstance? In my mind it does, as Ms Deans was entitled to expect the respondent to have complied with the terms of the collective agreement. If it had, in terms of giving correct notice, there would have been no doubt in Ms Deans' mind as to when her employment was to come to an end. Failure to do so is an exceptional circumstance in my opinion.

[71] Even if Ms Deans did not have the notice provisions of clause 10.2 of the collective agreement in mind, she was still expecting a clear communication about when her dismissal was to take effect. This was more than a matter of mere paperwork, or administration, as suggested by Ms Keir. Ms Deans was expecting a clear communication about when her employment was to end. The respondent cannot reasonably suggest that she had already been told it had ended on 12 January when the respondent continued to treat her as an employee beyond that date. Ms Deans concluded, in the absence of a clear communication, that her employment had ended on 14 March 2018, and worked on her personal grievance, which is lengthy and detailed, with that date in her mind.

[72] Ms Keir submitted that the examples of exceptional circumstances given in s.115 of the Act show that the threshold is high. I agree that the threshold is high, and I note that the examples given in s.115 (c) and s.115 (d) both refer to situations where the employer has failed to provide key information to the employee. In my view, failing to clearly communicate the date of termination is also a key failing, which is akin in terms of seriousness to the two examples in the section.

[73] In her oral evidence Ms Deans said that she was aware of the requirement to raise her personal grievance within 90 days of her dismissal and that she regarded herself to have been dismissed on 14 March 2018. No alternative and realistic date had been clearly communicated to her by the respondent. Therefore, if there was a delay in raising her grievance, I am satisfied that it was occasioned by the exceptional circumstance of Ms Deans not having been told the date of the termination of her employment, and having to draw her own conclusion as to when it was, which was not an unreasonable one.

[74] Having come to the conclusion that there was an exceptional circumstance which occasioned the delay in Ms Deans raising a personal grievance (if, indeed there was a delay) I finally have to consider whether it would be just to allow Ms Deans to raise a personal grievance out of time. I am clear in my view that it would be just to do so. She raised her personal grievance within 90 days of the date when she reasonably believed her employment had come to an end. Furthermore, the respondent did nothing to reasonably advise Ms Deans otherwise; that is to say, it did not give proper notice which would have told her when her employment was coming to an end.

[75] Furthermore, it would not be just to prevent Ms Deans from raising her grievance out of time in circumstances when the respondent did not give correct notice of termination under the terms of the collective agreement.

[76] In addition, whilst I have not made any assessment of the strength or weakness of Ms Deans' case for substantive unjustified dismissal, equally, it is not evidently so weak that it would not be just to allow it to proceed.

Conclusion

[77] It is my conclusion that Ms Deans' employment came to an end on 14 March 2018 for the reasons given above. Therefore, Ms Deans raised her personal grievance within the 90 day statutory time limit.

[78] However, in the alternative, if that is incorrect, I find that there were exceptional circumstances which occasioned the delay in Ms Deans raising her personal grievance within the statutory 90 day time limit, and that it is just to allow her to raise a grievance outside of that time limit.

Direction to mediation

[79] Section 114(5) of the Act states that, in any case where the Authority grants leave under sub-section (4), it must direct the employer and the employee to use mediation to seek to mutually resolve the grievance. The parties have not attempted to resolve their differences through mediation due to the jurisdictional objection raised by the respondent. However, the Authority having resolved that jurisdictional issue, and given leave to Ms Deans to raise her personal grievance out of time, I now direct the parties to mediation to attempt to resolve this employment relationship problem between themselves in good faith.

Costs

[80] Ms Deans has been successful in her application. She was not represented and did not incur any legal costs, and so costs are not an issue at this stage.

David Appleton
Member of the Employment Relations Authority