

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 178  
5560209

BETWEEN                    TESSA-ANN ROBIN  
   Applicant  
  
A N D                            PARTNERS IN PORK LIMITED  
   Respondent

Member of Authority:     David Appleton  
  
Representatives:            Chrissy Gordon, Advocate for the Applicant  
   Tiffany McRae, Counsel for the Respondent  
  
Investigation Meeting:     17 November 2015 at Ashburton  
  
Submissions Received:     17 November 2015 on behalf of the Applicant and  
   the Respondent  
  
Date of Determination:     19 November 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A.     I grant leave for Ms Robin to raise her personal grievance outside of the statutory 90 day period.**
- B.     The parties are now directed to attend mediation in good faith.**
- C.     Costs are reserved.**

**Employment relationship problem**

[1]     Ms Robin claims unjustified dismissal from her employment as a part time butcher manager at the respondent's butchery business on 20 November 2014. The respondent denies it dismissed Ms Robin, or that she held the position of butcher manager.

[2]     Ms Robin concedes that the personal grievance was raised on her behalf outside of the statutory 90 day time limit prescribed by s.114(1) of the Employment

Relations Act 2000 (the Act). The respondent does not consent to the personal grievance being raised after the expiration of the 90 day period. Accordingly, Ms Robin has made an application to the Authority pursuant to s.114(3) of the Act for leave to raise her personal grievance outside of the 90 day period. She relies on s.115(b) of the Act to argue that an exceptional circumstance exists which occasioned the delay in raising her grievance and argues that it is just for the Authority to grant leave for her to raise her grievance outside of the 90 day time limit.

[3] The respondent does not contest that Ms Robin made reasonable arrangements to have her grievance raised on her behalf by her agent, Ms Gordon, or that Ms Gordon unreasonably failed to ensure that the grievance was raised within the required time. Therefore, it accepts that exceptional circumstances exist which occasioned the delay in Ms Robin raising her personal grievance within the statutory 90 day time limit.

[4] However, the respondent denies that it would be just to allow Ms Robin to raise her personal grievance outside of the statutory 90 day period. Accordingly, it is necessary to examine the circumstances leading to Ms Robin's employment coming to an end, as it is necessary to assess the evidence to ascertain whether it would be just to grant the application.

### **The law**

[5] Section 114(4) of the Act provides as follows:

...  
*114(4) 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.*

[6] Section 115(b) of the Act provides as follows:

*For the purposes of section 114(4)(a), exceptional circumstances include—*

...

*(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to*

*ensure that the grievance was raised within the required time.*

### **Brief account of the events leading to the termination of Ms Robin's employment**

[7] The respondent company operates a butchery business known as Evans Quality Meats. Ms Robin commenced employment with the respondent on 5 June 2014 and was employed in accordance with the terms of an individual employment agreement. She says that her position was as a part time butcher manager, although the individual employment agreement states that she was employed as a part time butcher. The respondent accepts that the employment agreement was never signed by Ms Robin or the respondent and that no job description was given to Ms Robin. Ms Robin says that she had asked for the job title to be changed but that this did not occur.

[8] Prior to, and during part of her employment with the respondent, Ms Robin also worked a full time afternoon shift as a supervisor at a local meat processing plant called AMP Abattoir.

[9] It is the evidence of Ms Robin that, when she met with the co-owner of Evans Quality Meats, Andrew Evans, she was told that he wanted to be able to open a shop for retail sales by Christmas of 2014 in order to sell hams. She says she was also told that the business could be as big as she could make it. Mr Evans' daughter, Catherine, was to be in charge of the shop project.

[10] When Ms Robin started work, there was one other employee and the business was already processing meat for a local bakery, which was the bulk of the respondent's business.

[11] Ms Robin says that she had believed that the shop needed a retail licence to be granted as well as certification for home kills, before it could open. She says that she was told every couple of weeks or so that the shop would open in the following two weeks or so, but that it was always put off. She understood that it was the obtaining of the licences that was holding up the opening of the shop.

[12] However, it is the evidence of the respondent that the shop already had a retail licence by August 2014, and that the home kill licence was irrelevant to the shop opening. What was delaying the shop opening was that it first had to be refurbished,

and second, they wanted to be certain that it would have enough business to sustain it once the busy Christmas period was over.

[13] As the anticipated opening date approached, Ms Robin's parents became employed at the business, in order to help prepare for the opening according to Ms Robin. Her mother did cleaning and packing and her father packing and processing. The respondent says that they had not been told that they would be helping Ms Robin, but just started, although Ms Robin denies this. In any event, the respondent did not object to them working alongside Ms Robin and paid them.

[14] It appears that Ms Robin had a disagreement at some point with Mrs Evans over whether the shop should open two full days a week or a couple of hours per day. Neither Ms Robin or Mrs Evans thought that that argument had been serious, although Ms Robin speculated in her evidence whether this had been the reason she had been dismissed. On the other hand, Mrs Evans says that Ms Robin had become confrontational on one occasion when she had asked Ms Robin to get her mother to come in and talk to her. Ms Robin denies she was confrontational.

[15] Ms Robin says that Mr Evans told her that the shop opening was being delayed until November 2014 and that she was quite disappointed as the shop was ready to open, apart from the retail licence. She said that she made inquiries of Mr Evans during November, but he did not respond.

[16] On 20 November 2014, Mrs Evans told Ms Robin that Mr Evans wished to talk to her. Ms Robin went to see Mr Evans after work on 20 November 2014, thinking he wished to talk to her about forecasting how many cattle beast needed to be killed to meet the bakery shop's requirements. Ms Robin says she then asked about the arrangements for opening the shop.

[17] It is Ms Robin's evidence that Mr Evans then told her that he was not opening the shop and that he did not need her anymore. She says that Mr Evans then asked her how much he should pay her out. She says that her mother also phoned Mrs Evans later that day and was told that the shop was not opening and she was no longer needed. Ms Robin's father then just stopped going into the shop.

[18] Ms Robin says that she was devastated by being dismissed and that she had previously resigned her position of supervisor at the abattoir in anticipation of working at the shop when it opened. She accepts that this was a risk she had taken

without having been given a firm opening date, but she knew the shop was ready to open and she wanted to be ready as soon as the retail licence came through. She says she was subsequently unable to get her job back at the abattoir and was only able to get a position as a basic labourer on a lower pay rate, working under people she had trained.

[19] Ms Robin sought immediate advice from an employment advocacy service called Equitable Employment Solutions. Ms Gordon works for Equitable Employment Solutions as an employment law advocate. Having taken instructions from Ms Robin, Ms Gordon sent a letter by email to Mr Evans seeking sums which she said Ms Gordon would accept in settlement. The Authority saw a copy of the communication from Ms Gordon, which stated, inter alia:

*Tessa has sought my advice in regard to your decision that her position with Evans Quality meats be terminated.*

*As you may be aware, this would be seen as an unjustifiable dismissal under the Employment Relations Act 2000 s.103A for which Tessa would be entitled to raise a personal grievance and seek compensation under ERA s123.*

*Rather than go through a personal grievance process, Tessa informs me that you have indicated that you would like to negotiate a settlement.*

[20] The letter then set out an offer of settlement, the details of which I omit from this determination. Ms Gordon says she received no reply to her letter, nor any reply to subsequent messages left.

[21] Ms Gordon eventually formally raised the personal grievance on behalf of Ms Robin nine days after the expiry of the period of 90 days starting with the termination.

[22] It was Mr Evans' evidence that Ms Robin had been employed as a butcher to assist one other staff member in processing mince, steak and sausages for the local bakery. This was a part time role in which Ms Robin would work around 25 hours a week. He said that they had discussed that he would like to open a retail shop at some point in the future, but that there was never any commitment to a firm date. He said it was to be a slow process while they built up the business and it had never been suggested to Ms Robin that she would be employed full time when the shop opened.

[23] Mr Evans says that Ms Robin had not been employed to set up the business as a retail shop although she did often ask about it and wanted to know when it was going to happen. He said that they consistently told Ms Robin that opening the business would be a slow process and they were not yet ready.

[24] Mr Evans said that he had asked his wife to tell Ms Robin to come and see him on 20 November because he had been told earlier that there had been a discussion between Ms Robin, Mrs Evans and Mr Hayes about Ms Robin giving up her job and her mother working for the company. He said that he wanted to talk to Ms Robin about this and to make sure that she understood the company did not have full time work for her.

[25] Mr Evans said that, when Ms Robin told him that she had given up her job, he explained to her again that they did not have enough work for her and that she should go back to the abattoir and ask for her job back. He says that he did not say that there was no more work for her at all or that he would pay her out. He said that, as far as he was concerned, nothing had changed and the company still wanted to employ her to do the part time work she had been doing.

[26] Mr Evans said that, on 21 November 2014, he received the letter from Equitable Employment Solutions and that he was shocked, as he had never said to Ms Robin that he did not wish to employ her anymore. He says that he took the letter to his lawyers and talked to them about how to respond.

[27] Mr Evans said in evidence that, after Ms Robin had ceased to be employed, he became aware that bones had been sold through the shop for which the money had not been accounted, and that Ms Robin had processed some sausages for AMP Abattoir which they had not known about at the time. He said that AMP Abattoir had provided them with a receipt for \$60 in cash which the company had paid, but the receipt stub was missing from the respondent's receipt book. He says that he had mentioned this to the police, but they did not pursue the matter because there was insufficient evidence.

[28] Ms Robin's evidence is that she did receive a visit from the police. She said that the only cash she handled whilst employed was \$20 in cash from a man who used to buy bones and once when AMP Abattoir paid \$60 cash for them to process the meat into sausages. She said that when AMP Abattoir gave her the cash, she sent a

text to Mrs Evans to advise her about it and the cash was given to her. She said that the \$20 she would get for the bones would be put in the first aid container and she was told to use it like petty cash by Catherine Evans. Accordingly, she says, she bought toilet paper, oil and other items and left receipts for all the purchases.

[29] This matter of the alleged missing money is relevant to consider in this determination as it could amount to an allegation of after-discovered misconduct, and so forms part of the Authority's investigation into the overall justice of allowing the grievance to be raised out of time.

### **The issues**

[30] In determining this matter, the Authority needs to establish the following:

- (a) Whether Ms Robin made reasonable arrangements to have her personal grievance raised on her behalf by Ms Gordon;
- (b) Whether Ms Gordon unreasonably failed to ensure that the grievance was raised within the required time; and
- (c) Whether it would be just to grant leave for Ms Robin to raise her personal grievance outside of the statutory time period.

[31] The respondent concedes, rightly in my view, that Ms Robin made reasonable arrangements to have her personal grievance raised on her behalf by Ms Gordon and that Ms Gordon unreasonably failed to ensure that the grievance was raised within the required time. Therefore, there is no question but that exceptional circumstances occasioned the delay in Ms Robin raising her personal grievance. The only other issue to consider, therefore, is whether it is just to grant leave for Ms Robin to raise her personal grievance out of time.

### **Is it just to grant leave for Ms Robin to raise her personal grievance outside of the 90 day statutory time period?**

[32] The question of whether it is just to allow Ms Robin to raise her personal grievance out of time requires the Authority to take into account the relative strengths of the respective parties' cases and any prejudice that might be caused to the respondent to allow the personal grievance to be raised out of time.

[33] I will address the second question first, in that it is relatively straightforward. Ms Gordon raised the personal grievance on behalf of Ms Robin only nine days late. Furthermore, she had made several attempts to contact Mr Evans before the expiry of the 90 day period, but had received no reply. Even though Mr Evans denies receiving some of those attempted communications, Mr Evans accepts he received the first letter dated 21 November 2014 from Ms Gordon, as he had shown it to the company's lawyers. The respondent was, therefore, fully aware that Ms Robin had concerns, and it had the opportunity to address those concerns well before the expiry of the 90 day period.

[34] This leads me to conclude that the respondent cannot be prejudiced by the Authority allowing the personal grievance to be raised late because it knew that Ms Robin believed she had been dismissed, and had concerns about that as early as the very day after the meeting of 20 November. Furthermore, the actual personal grievance was late by only nine days, which is not an excessive delay.

[35] However, it is also necessary to assess the relative strengths of the parties' positions.

[36] There is a straight conflict of evidence between Ms Robin and Mr Evans as to what was said on 20 November 2014. However, I find that Ms Robin's action of seeking the advice of Ms Gordon, and instructing her to write a letter to Mr Evans seeking a settlement, were consistent with her evidence that she was dismissed by Mr Evans in the meeting of 20 November 2014 and that he asked to know what he should pay her out.

[37] Conversely, I find that Mr Evans' failure to make any contact with Ms Gordon after he had received her letter dated 21 November to be quite inconsistent with his evidence that he was *shocked* to receive it as he had never said to Ms Robin that the company did not wish to employ her anymore. In his evidence, Mr Evans essentially blamed his lawyer (not Ms McRae) for not replying on his behalf.

[38] However, in a situation where an employee engages a representative to write a letter to her employer in which she says the employee has been dismissed, and that employee then fails to turn up for work, one would expect any reasonable employer who had not dismissed that employee to immediately deny the dismissal and take steps to reassure her that her job was still safe. Indeed, the duty of good faith at

s.4(1A)(b) requires the employer and employee to be active and constructive in establishing and maintaining a productive relationship in which they are, amongst other things, responsive and communicative. By not replying, or ensuring that his representative replied, the respondent failed to comply with this requirement.

[39] The incongruity of Mr Evans' lack of action is even more marked when one takes into account the fact that Ms Robin's mother and father also ceased working for the company after 20 November, even though Mrs Evans denies telling Ms Robin's mother on 20 November that there was no job for her anymore either. If that had not occurred, again one would have expected Mr or Mrs Evans to have contacted Ms Robin or Ms Gordon to say that they continued to have work for Ms Robin's mother and father.

[40] Mr Evans' evidence to the Authority was that the shop eventually opened on 9 December, which is 19 days after the meeting on 20 November. He says that they did not decide to open the shop until around the week before, although there was no cogent evidence in my view from either Mr or Mrs Evans as to what had occurred to change the position between 20 November, when there was no set date for the shop to open, and 9 December, when it did open.

[41] Mr Evans said in his evidence to the Authority that he had not regarded Ms Robin as capable of operating the shop. He also said that he recruited a full time butcher to run the shop, who he considered to have the experience and expertise to do so. This raises the question as to whether the respondent intended to dismiss Ms Robin once they had decided to open the shop on the basis that she had been pushing to manage it, and they had doubted her competence to do so.

## **Conclusion**

[42] When I consider the evidence I have summarised above, I believe that there is a reasonably strongly arguable case that Ms Robin's evidence is to be preferred, and that she was dismissed by Mr Evans on 20 November 2014. From that flows the strong probability that such a dismissal would be unjustified, given that no process that would be compliant with s. 4 and s103A of the Act appears to have been followed.

[43] Having reached those conclusions, I am drawn to the further conclusion that it must be just to allow Ms Robin to raise her personal grievance for unjustified

dismissal outside of the statutory 90 day period. This is because she would be unduly prejudiced by being potentially deprived of a declaration of unjustified dismissal and the award of lawful remedies through no fault of her own. This prejudice outweighs any prejudice the respondent would suffer by having to address such a personal grievance.

[44] Consequently, the Authority now has the jurisdiction to investigate Ms Robin's personal grievance, subject to my comments below.

### **Next steps**

[45] I am obliged, having granted leave pursuant to s114(4) of the Act, to direct the parties to mediation to seek to mutually resolve the grievance.<sup>1</sup>

[46] If the parties are unable to resolve the grievance having attended mediation in good faith, Ms Robin or her advocate is to advise the Authority of that outcome. In such a case the Authority would then convene a case management telephone conference at which would be discussed what further steps need to be taken to investigate the substance of Ms Robin's personal grievance, given that such an investigation had already been largely undertaken in investigating the current preliminary matter.

[47] I note that, if a further investigation were required, the Authority and the parties would have to address the fact that I have necessarily seen the contents of a without prejudice communication in investigating the preliminary matter.

### **Costs**

[48] Costs are reserved. They will either be settled at the forthcoming mediation, or will be addressed by the Authority at the end of any substantive investigation should mediation not resolve matters.

David Appleton  
Member of the Employment Relations Authority

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<sup>1</sup> Pursuant to s.114(5) of the Act.