

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 58/09
5127711

BETWEEN	EVA MCCARTNEY Applicant	REBECCA
AND	ROBBIES BAR & BISTRO LIMITED Respondent	

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, Advocate for the Applicant
Alan Roberts, Advocate for the Respondent

Investigation Meeting: 23 April 2009 at Nelson

Determination: 4 May 2009

DETERMINATION OF THE AUTHORITY

[1] Eva McCartney worked for a brief period at the Railway Hotel in Richmond. She was dismissed by the hotel manager and within a day or two was offered but declined reinstatement. More than 90 days after the date of the dismissal, the principal of the business received a letter from Ms McCartney's representative raising a personal grievance, although the representative had made an earlier attempt to raise a grievance.

[2] The first issue for determination is whether a grievance was raised within time or whether there are exceptional circumstances meriting leave to raise the grievance out of time. If there is a positive answer to either question then I must consider whether a personal grievance has been established and what remedies are appropriate in light of the reinstatement offer.

[3] The proceedings were initiated against *Robbies Bar and Bistro* which is a trading name rather than a legal entity. By agreement, I amended the name of the

respondent to *Robbies Bar & Bistro Limited*. Alan Roberts is a principal of that company and is based in Christchurch. The company operates a number of hospitality businesses in various locations, including the Railway Hotel in Richmond. The company's registered office and address for service is at the offices of its accountants *Ainger Tomlin Limited, Level 1 – 116 Riccarton Road, Riccarton, Christchurch*.

Was a grievance raised in time?

[4] There was some confusion about dates. It is now common ground that Ms McCartney commenced work on 5 November 2007. She received one pay before she was dismissed then received her final pay on 15 November 2007. Mr Roberts arranged for the final pay to be paid into her bank account after several phone discussions between them. The phone discussions followed an incident between Ms McCartney and the Railway Hotel manager (Gary Brown). Mr Roberts says that he first learnt of the incident on 13 November 2007 when Ms McCartney phoned and spoke to him. This is consistent with the evidence about the final pay. Ms McCartney says that she rang and spoke to Mr Roberts on the day of the dismissal. There is no reason to doubt either piece of evidence. It follows that the latest day on which the grievance could have arisen was Tuesday 13 November 2007.

[5] Ms McCartney told me that she did not raise a grievance with Mr Roberts during her phone discussions. It was not until some time later and at the behest of friends and family that she decided to raise a grievance. She then contacted an advocate (Brent Climo), went to see him and asked him to raise her grievance. Ms McCartney could not tell me when this happened except to say that it was before Christmas 2007. Mr Climo is deceased. Ms Sharma took over a number of Mr Climo's files including this one. Unfortunately Mr Climo's file for Ms McCartney does not give the date of her instruction to raise her grievance but a note does record her telling him that she *started work again 15/12/07*. That suggests that Ms McCartney saw Mr Climo some time after that date. There is a signed letter from Mr Climo's file dated 1 February 2008 addressed to *Robbie's Bar and Bistro Limited (Nelson), Aiger Tomlin Ltd, Level 1 116 Riccarton Rd, CHRISTCHURCH*. I infer that Mr Climo must have been instructed no later than 1 February 2008 to raise Ms McCartney's grievance.

[6] Mr Climo's file included a postmarked envelope addressed to *Human Resources Manager, Aiger Tomlin Ltd* at the above Christchurch street address.

There is no return address on the envelope. The postmark is 7 February 2008 so I infer that Mr Climo posted the 1 February 2008 letter on 7 February 2008. The address on the envelope has a line through it and 8237 written on it. That is Ainger Tomlin Limited's post office box number. There is also a date stamp of *12 FEB 2008* on the envelope. From this I infer that the posted item was redirected by NZ Post, delivered to Ainger Tomlin Limited's PO Box number, date stamped at the offices of Ainger Tomlin Limited on 12 February 2008, opened and then returned to the sender.

[7] Having received the letter back, Mr Climo then resent it to *Robbie Bar & Bistro, c/- Railway Hotel, 321 Queen Street, Richmond*. That envelope is postmarked 18 February 2008 so could not have been received at the Railway Hotel any earlier than 19 February 2008. Mr Roberts told me that he was contacted by Mr Brown when it was received, that he (Mr Roberts) rang and spoke to Mr Climo, asked him to fax him a copy of the letter and that Mr Climo did so. The fax bears a fax header of *19/02/2008 08:09* but also has a date stamp of *20 FEB 2008*. The date stamp is in the same form as the date stamp mentioned above. The fax is addressed to *Robbies Bar and Bistro (Nelson), Aiger Tomlin Ltd* at the Christchurch street address but is otherwise the same as the returned letter.

[8] The position for the company is that no grievance was raised with it until 19 February 2008 which is 99 days after the day on which the grievance arose. At best for Ms McCartney the grievance was raised with the employer 7 days earlier on 12 February 2008 when the envelope containing the 1 February 2008 letter was received at the offices of Ainger Tomlin Limited. Either way, the grievance can only proceed now with leave.

Exceptional circumstances

[9] Mr Climo's notes of his instructions from Ms McCartney record her telling him that she finished work on 19 November 2007. He then used that date to calculate the 90 day period. When Mr Climo posted his 1 February 2008 letter on 7 February 2008 he thought he had sent the letter well within 90 days commencing on 19 November 2007 and ending on 16 February 2008. If the 1 February 2008 letter received at the respondent's registered office on 12 February 2008 raised a grievance then it could not be said that its receipt out of time was occasioned by any unreasonable failure on Mr Climo's part to ensure that the grievance was raised in

time. Rather, it was received out of time because of Ms McCartney's mistaken instruction as to when she was dismissed.

[10] I find that the receipt of the letter at the registered office on 12 February 2008 did raise a grievance. The envelope was delivered to the company's registered office and it was opened there before being returned to Mr Climo. The address line on the letter as opposed to the envelope was sufficiently clear that the correspondence related to the company *Robbies Bar and & Bistro Limited* and the letter clearly raises Ms McCartney's grievance.

[11] As it turns out, 12 February 2008 is outside the 90 period that actually commenced on 13 November 2008 rather than 19 November 2008. The delay was occasioned by Ms McCartney's inaccurate instructions rather than any of the exceptional circumstances described in s115(b) of the Employment Relations Act 2000. There is therefore no basis for granting leave to raise the grievance out of time.

[12] In case I am wrong about this conclusion, and on the assumption that leave could be granted, I will go on to deal with another ground on which this grievance application fails.

Personal grievance

[13] It is not necessary to dwell too much on the details of the grievance. In short, Mr Brown came to think that Ms McCartney had taken money from the till, he confronted her about it when she happened to be at the premises on her day off, he told her that a policeman friend of his had described it as theft, he lost his temper with her when she denied the allegation, he swore at her and dismissed her. Ms McCartney asked for the head office phone number so she could contact them but Mr Brown refused to give her the number saying that he would *nail your fucking arse to the wall* (or something similar) if she involved head office. All this falls well below the standard of fairness and reasonableness required of an employer so Ms McCartney was unjustifiably dismissed.

[14] As mentioned, a little after these events, Ms McCartney got a phone number and was able to speak to Mr Roberts. This was the first he knew about these events so he said he would ring back after he had investigated. Mr Roberts then spoke to Mr Brown and quickly formed the view that there was insufficient evidence to suggest that Ms McCartney had taken any money. He then spoke again with Ms McCartney.

There are some minor disputes about precisely what was said during this conversation but I prefer the evidence of Mr Roberts where that contradicts Ms McCartney's evidence. He told Ms McCartney that Mr Brown had acted wrongly, he apologised and said that she could keep her job. Ms McCartney was concerned about how that would work but Mr Roberts told her that she would be fairly treated and that he would instruct Mr Brown to that effect. Ms McCartney asked for some time to think about this and Mr Roberts agreed. Ms McCartney phoned back, probably the next day, but did not want to keep her job. Ms McCartney's evidence is that Mr Roberts told her to contact Mr Brown if she wanted to stay on but I do not accept that evidence.

[15] Perhaps a week or so later, the Railway Hotel advertised Ms McCartney's position. Ms McCartney responded to the ad by ringing Mr Brown. He told her that she was welcome to apply and to come and see him. By that stage he had already interviewed several other applicants. Ms McCartney did not take the matter any further. Her evidence is that she was put off by Mr Brown's demeanour over the phone. However, I prefer Mr Brown's evidence that he was cordial during their phone discussion. These events must have predated Ms McCartney's first contact with Mr Climo since that was probably some time after 15 December 2008.

[16] I find that it was unreasonable for Ms McCartney to reject the prompt and genuine offer of reinstatement made by Mr Roberts as soon as he had familiarised himself with what had happened. Mr Robert's admitted the manager's fault, he apologised and he made it clear that there would be no negative repercussions if Ms McCartney accepted reinstatement. The argument now for Ms McCartney is that the manager's actions in dismissing her were so egregious that her loss of trust and confidence could not be remedied. However, I do not accept that Ms McCartney was so affected by the dismissal despite its obvious unfairness. Ms McCartney rang and spoke to Mr Roberts initially not to raise a grievance but because she was concerned for the business that there might be a thief working there. Although she initially declined reinstatement, it was only a few days later that she approached Mr Brown to inquire about the advertised position. That evidence establishes that Ms McCartney did not at the time consider that the employment relationship had been irreparably damaged. If Ms McCartney had simply contacted Mr Roberts again instead of phoning Mr Brown she probably would have recommenced her employment straight away. In these circumstances, Ms McCartney failed to mitigate her losses and is not

now entitled to compensation against her former employer despite the grievance: see *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971.

Conclusion

[17] Ms McCartney did not raise her grievance within 90 days. The delay in raising the grievance was not occasioned by exceptional circumstances. Even if there had been exceptional circumstances, Ms McCartney unreasonably refused the employer's genuine offer of reinstatement and would not be entitled to any remedies.

[18] Costs are reserved. The company was represented by its principal so there probably is no claim for legal costs but if there is some basis for a claim, it should be made in writing within 14 days and Ms McCartney may then have a further 14 days to respond.

Philip Cheyne
Member of the Employment Relations Authority