

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 31
5583565

BETWEEN JUANITA VASZILYKO
 Applicant

A N D SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Philippa Tucker, Counsel for Applicant
 Christine Pidduck, Counsel for Respondent

Investigation Meeting: 20 and 21 January 2016 at Christchurch

Submissions Received: 11 February & 10 March 2016 for Applicant
 4 March 2016 for Respondent

Date of Determination: 15 March 2016

DETERMINATION OF THE AUTHORITY

- A. Ms Vaszilyko was unjustifiably constructively dismissed and is awarded the remedies set out in this determination.**
- B. Ms Vaszilyko is owed arrears of overtime and attendance allowance in respect of the period when she was beef slaughter supervisor.**
- C. Costs are reserved.**

Prohibition from publication order

[1] Briefs of evidence, contemporaneous documents and oral evidence put to the Authority referred to three employees of the respondent whose performance was

criticised in various ways. They did not take part in the Authority's investigation process in any way and so did not have the opportunity to put their side of events. It is accordingly not appropriate for the identities of these three individuals to be disclosed, and I therefore prohibit publication of their names.

[2] They shall be referred to in this determination as FPW (female production worker), MPW (male production worker) and LH (leading hand). These initials bear no relationship to their real names.

Employment relationship problem

[3] Ms Vaszilyko claims that she was unjustifiably constructively dismissed from her employment. She also claims arrears of wages in relation to overtime payments and attendance payments not paid while she held the position of beef slaughter room supervisor.

[4] The respondent denies that Ms Vaszilyko was dismissed by the respondent and further asserts that she was not entitled to receive overtime or attendance allowance payments once she had been promoted to the position of beef slaughter room supervisor.

Brief account of the events leading to Ms Vaszilyko's resignation

[5] Ms Vaszilyko commenced employment with South Pacific Meats Limited (SPM) on or around 6 September 2013, initially as a trimmer. She moved from that position to working in compliance, and then worked as an offal supervisor between December 2013 and September 2014. As offal supervisor, she was paid \$24 an hour, and was entitled to overtime payments and an attendance allowance of \$2 an hour.

[6] With effect from 22 September 2014, she worked as the beef slaughter room supervisor receiving \$27.50 per hour, plus \$2 per hour performance allowance which she says was based on effective yields and meeting quality targets¹. It is common ground that Ms Vaszilyko received no written variation to her employment agreement, nor any letter confirming the terms of her appointment to beef slaughter supervisor.

¹ Ms Vaszilyko has no concerns about the level of performance bonus payments she received.

[7] During the first part of her employment as beef slaughter room supervisor, Ms Vaszilyko also retained the position of offal supervisor. It is her evidence that the role of offal supervisor entailed supervising between 18 and 20 staff and that the beef slaughter room role entailed supervising a further 35 staff. She ceased to be offal supervisor from around 3 November 2014.

[8] Ms Vaszilyko says that, throughout her employment with the respondent, she had only ever been issued with one employment agreement which she had been given at the commencement of her employment. This is not contested. The Authority saw a copy of this agreement which stated, inter alia, that it came into effect from 9 October 2013 and remained in force until terminated under the provisions set out in the agreement, or 47 weeks, whichever was the earlier. It then stated expressly that employment was for a maximum fixed term of 47 weeks. It is to be assumed that its terms were extended by way of performance to become a permanent employment agreement, as no further written agreement was issued to her.

[9] Clause 1.2 of the agreement provided:

The terms and conditions of this agreement may be varied by mutual agreement between the parties at any time, with such agreement written and signed by the parties and attached as an addendum to this agreement.

[10] Clause 6.2 of the agreement provided as follows:

All employees may be transferred within and/or across departments and to any tasks within their ability at the discretion of the company and dependent on the company's operational requirements.

[11] The agreement also provided that overtime would be paid at the rate of time and a quarter for hours worked in excess of 40 hours per week.

[12] It is the respondent's case that Ms Vaszilyko was appointed to the position of beef slaughter room supervisor on the basis of a three month trial period, whereas Ms Vaszilyko says that she had never been told this expressly, believing the trial to have been for one month. The respondent also says that this trial period was extended by a further three months at a meeting on 16 December 2014. Ms Vaszilyko says, however, that such an extension was never stated expressly and that she was completely unaware of it until after she had left the employment of the respondent. No written record of a trial period, and its terms, was given to Ms Vaszilyko.

[13] I find that the initial trial period was intended by the respondent to be for three months, but that this was not clearly communicated to Ms Vaszilyko.

[14] The high level view of the respective positions of the parties in this personal grievance can be summarised as follows. Ms Vaszilyko states that she was put into an extremely busy and complicated role with demands arising out of the company's expectations to achieve a consistently high throughput and yield, combined with complex regulatory requirements (overseen by both internal and external compliance auditors) and staffing issues. Ms Vaszilyko says that, despite all these difficulties, she received a lack of proper training, a lack of support from the plant manager, Mr Dean Burgess, and had to contend with near continual plant and equipment breakdowns which she struggled to have fixed in a timely way. She says she asked for a job description for the beef slaughter role several times, but never received one.

[15] On the other hand, the respondent characterises the relationship between it and Ms Vaszilyko by acknowledging that the role was challenging but saying that she was given adequate training, that she was given daily or near daily support by Mr Burgess, that steps were taken to relieve the pressures on her (such as removing duties) and that plant and equipment breakdowns were addressed effectively, but that Ms Vaszilyko's performance was not up to scratch and that she refused to accept criticisms of her performance shortcomings, instead blaming others.

Ms Vaszilyko's specific complaints

[16] It is necessary to give more detail of the events that occurred between September 2014 and March 2015 in order to understand better what led to Ms Vaszilyko's resignation.

[17] Ms Vaszilyko asserts that when she first took up the role of beef slaughter room supervisor there were multiple staffing problems that were adversely affecting production. These included absenteeism, stops in production and people walking off the floor. It is her view that she turned these issues around, which was evidenced by increased production, increased manning and that the production chain would rarely cease. She says she focused on making staff responsible for multiple tasks and ensuring that, if one person stepped out for whatever reason, then the chain could continue.

Lack of support regarding MPW

[18] Ms Vaszilyko alleges, however, that she did not receive the support that she needed in respect of addressing certain staff issues. She refers to an example of the male production worker MPW. Ms Vaszilyko alleges that Mr Burgess had undermined her authority by effectively allowing MPW to walk off the job. Whilst there are a number of email exchanges between Ms Vaszilyko and Mr Burgess which it is not necessary to replicate in this determination, I shall do so in respect of the email chain between the two that took place on 27 November 2014 as it is illustrative of the breakdown between Ms Vaszilyko and Mr Burgess that appears to have occurred. On 27 November 2014, Ms Vaszilyko emailed Mr Burgess about MPW as follows:

Why is he back on the floor without me knowing?

[19] Mr Burgess replied in the following terms:

He is not leaving and I am not transferring him for the reasons he covered. Don't make this another [FPW²] please. Will discuss. I need to discuss again with you the process for employment regulations.

[20] In reply to Mr Burgess' email, Ms Vaszilyko wrote the following:

So everytime I put him onto a job he doesn't like he's allowed to walk off the job? Is that a regulation? So when he walks off the job or doesn't show up for work the departments livelihoods are jeopardised.

Is this about keeping him purely because he's skilled and we're desperate to keep him so make the supervisor deal with him. You do realise anything I say to him, he will consider as bullying, show others that it's ok that they don't have to listen to me, that management will override my management of them.

Thanks

[21] In reply, Mr Burgess wrote the following:

*For s***'s sake Juanita. Come see me and Wayne. Stop fricken questioning every thing I do. When you understand then question it. See me soon please!!!!!!*

[22] The reference to Wayne in the above quotation relates to Wayne Lindsay, the HR and Health and Safety Manager.

² The name of the female production worker about whom Ms Vaszilyko had issues and concerns.

[23] Mr Burgess' evidence about MPW was that Ms Vaszilyko experienced difficulties in managing him and demanded that he not work in her department and that he be fired. Mr Burgess says that he did not accept that removing him from the department was the best way to manage MPW. He says that there were serious issues with the process that Ms Vaszilyko had adopted with MPW and it was Mr Burgess' view that the risk was too great in terms of a sound process.

[24] Mr Burgess says that his reply was not about undermining Ms Vaszilyko but about protecting the respondent and ensuring sound employment processes. He says that the reference to FPW was another example of Ms Vaszilyko not following proper process and taking the approach that she did not want FPW in her department. Like MPW, FPW had attendance, attitude and reliability issues but Mr Burgess did not accept that transferring FPW was the appropriate way to manage her.

[25] My finding in respect of this matter is that Mr Burgess had sound reasons for putting both FPW and MPW back into the beef slaughter teams, and that he was entitled to have the final say on who worked where, in exercise of his managerial prerogative, as Ms Pidduck submitted. However, Mr Burgess signally failed to consult with Ms Vaszilyko in respect of either of these decisions prior to implementing them. I find that no fair and reasonable employer could have failed to have informed and consulted with a supervisor in charge of a department such as the beef slaughter room prior to putting back into the department two staff members which it knew the supervisor had serious concerns about. Such failures were undermining of Ms Vaszilyko and were not justified in all the circumstances.

Repairs and maintenance issues

[26] With respect to equipment failings, Ms Vaszilyko said that there would be difficulties every day such as leaking pipes, sterilisers not working, flooding, and other basic problems. The Authority saw examples of emails that Ms Vaszilyko had sent to Mr Burgess, as well as to the plant engineer, Scott Goodsir, and Mr Lindsay. It is clear from these emails that Ms Vaszilyko was concerned about breakdowns and equipment difficulties having an impact on staff health and safety, and on production. The Authority saw a schedule of repairs and maintenance which listed a large number of issues that had been reported in the beef slaughter room during Ms Vaszilyko's spell as beef slaughter supervisor. It is clear from this schedule that there were a great

many different sorts of problems, some of which recurred and some of which were systemic rather than one offs. Some took much longer than others to address.

[27] Mr Burgess' evidence is that he acknowledges that there were breakdowns in the chain but says that this is a normal part of such a production process and that is why the company employs engineers so that such breakdowns can be dealt with. It was clear that a substantial sum was spent on servicing the beef slaughter room.

[28] It is beyond the scope or expertise of the Authority to be in a position to judge whether any of these many mechanical and other problems listed on the schedule should have been addressed more quickly than they were, or in a different way, or even exactly how they each impacted upon production and compliance. What is clear is that the plant was relatively new, and that there were bound to be teething problems, which Ms Vaszilyko acknowledged.

[29] I do not find that any of the problems were deliberately left unaddressed. What is important is whether Ms Vaszilyko was blamed unjustly for compliance or production problems that were beyond her control, because they were caused by repair and maintenance issues.

[30] On balance, I heard no cogent evidence that satisfies me that there were clear unfair actions by the respondent in which Ms Vaszilyko was blamed for issues that were no fault of her own. At times, Ms Vaszilyko appeared to take offence at concerns that Mr Burgess raised which were not directed at her, or not solely at her. This was not helped, perhaps, by the somewhat abrupt tone that Mr Burgess adopted in some of his emails. However, whilst Mr Burgess could certainly have been more consultative with Ms Vaszilyko about day to day production issues, I have not seen any specific examples where his actions in respect of day to day production matters were so unreasonable as to amount to an unjustified disadvantage action.

Meeting of 16 December 2014

[31] On 16 December 2014, a meeting took place between Ms Vaszilyko, Mr Burgess and Mr Lindsay. Ms Vaszilyko says that, whilst it was supposed to be a catch up meeting, it was actually a disciplinary meeting in which she was told that her performance was *useless* and *substandard*. She says that she was told that she was unable to manage the change process (which I understand to refer to the process of

improving the performance of the staff in the beef slaughter room) and that she was taking too long to achieve a turnaround on the team.

[32] Mr Burgess says that this meeting was not a disciplinary meeting and that she was not told that her performance was useless. However, performance matters were discussed with Ms Vaszilyko in order to assist her to improve in the role. He says that the trial period was extended by a further three months to enable Ms Vaszilyko time to improve and address the issues. As noted above, Ms Vaszilyko says that there was no mention at this meeting of a trial period being extended by a further three months.

[33] The notes of the meeting that were disclosed to the Authority, made by Mr Burgess, do not make any reference to the three month trial being extended. It is also the case that no written communication of any kind was made to Ms Vaszilyko in relation to the extension of the trial period, the reasons for the extension, what improvements the respondent needed to see to make her permanent in the role and the consequences of any failure to improve in that way. I therefore find that Mr Burgess did not mention an extension of the trial period to Ms Vaszilyko. He clearly did criticise aspects of her performance however.

[34] This finding therefore has an impact upon the right of the respondent to have removed Ms Vaszilyko from her post as beef slaughter supervisor. I address the consequences of this below.

[35] There was a straight conflict of evidence about whether Mr Burgess had described Ms Vaszilyko as useless. On balance, I find it less likely than probable that Mr Burgess said to Ms Vaszilyko that she was useless. I base this finding on an email from Ms Vaszilyko to Mr Burgess dated 7 March 2015 in which she stated, amongst other things:

*You always put my work down without actually saying "your sh*t".*

[36] Similarly, Ms Vaszilyko had sent an email to Mr Burgess dated 16 January 2015 in which she complained about a number of issues, but which does not mention being called useless. I believe that Ms Vaszilyko would have referred to being called useless in one or more of her emails to Mr Burgess had he done so, and the occasions cited above would have been appropriate opportunities to do so.

Removal of responsibility for the beef chillers

[37] Ms Vaszilyko also says that she had an aspect of her role removed before the meeting of 16 December 2014 (namely, the beef chillers) but found out from the worker who had been appointed to take on responsibility for them and not from Mr Burgess. I accept this evidence as, again, the respondent did not write to confirm that her role was changing in that way. The respondent says this occurred in order to assist her.

[38] Again, I find that Mr Burgess did not consult with Ms Vaszilyko about his decision to remove the chiller duties from her. Whilst I do not find that the removal of these duties caused any tangible disadvantage to her (indeed, it probably eased her work load, and was not an evident erosion of her status) the lack of prior consultation was a disadvantage, which was not justified as, in all the circumstances, no fair and reasonable employer could have removed from an employee aspects of her duties without first talking to them about that proposal.

Telling staff Ms Vaszilyko had been sent home for swearing at an engineer

[39] Ms Vaszilyko says that, around New Year's Eve 2014, she went to see Mr Burgess because she had heard that he had undermined her publicly with her staff, telling them that she had been sent home because she had sworn at an engineer. She admits she did swear at an engineer but says that the real reason she had left work was to enable her to get home after a car accident had left her without a vehicle. She says that Mr Burgess denied having spoken to her staff but that she believed what her staff had told her. She says that she felt at that point that the relationship with Mr Burgess was deteriorating as he was lying to her. Mr Burgess in his evidence to the Authority denied talking about Ms Vaszilyko to her staff as alleged.

[40] Ms Vaszilyko became upset during the Authority's investigation meeting when recounting this incident and I do accept that she had been told by two staff members that Mr Burgess had said she had been sent home. However, she did not name the two staff members who she says had told her this, and did not ask either of them to support her evidence.

[41] My finding is that Ms Vaszilyko was indeed told by staff that Mr Burgess had told them that she had been sent home for swearing at an engineer, but that the staff members had got hold of the wrong end of the stick or been misinformed by someone

else. This is because of the plausibility of Mr Burgess' denial, as it is unlikely he would have told production staff about disciplinary matters involving a supervisor, because Ms Vaszilyko had not been sent home for that reason, and because staff had witnessed Ms Vaszilyko having an altercation with the engineer. I believe that it is most likely that matters had become confused in the minds of the staff members.

Shutting Ms Vaszilyko down in production meetings

[42] Ms Vaszilyko says that, at production meetings, supervisors would have the opportunity to talk and that she would refer to difficulties she was having with the plant, with compliance and so forth, but that Mr Burgess would shut her down and not let her finish and then would move onto the next person. She said that he did not treat any other supervisor in this way and did not do anything to resolve her issues. Mr Burgess says that he only treated Ms Vaszilyko differently to other supervisors to the extent that she received more support and training than them. He denies that he shut her down at production meetings and did not let her speak.

[43] This is a generalised complaint from Ms Vaszilyko without any specifics as to which meetings, when they occurred, exactly what was said and who witnessed the alleged behaviour. I decline to find that this allegation is made out therefore.

Leading hand LH

[44] Ms Vaszilyko states that she was further undermined by Mr Burgess in respect to the leading hand LH. LH had failed to ensure that carcasses were correctly identified and separated, which had led to the respondent losing market access. When the Ministry for Primary Industries reissued the respondent's licence, LH caused a further breach to occur. Ms Vaszilyko says that Mr Burgess told her to give LH a warning.

[45] Ms Vaszilyko says that she therefore organised a meeting and asked Mr Lindsay to be present. She heard from LH and explained the respondent's version of events. LH said that, if he received a written warning, he would stand down. He then stood himself down she says. She then says that both Mr Burgess and Mr Lindsay said that they would not give LH a warning, which caused her to feel very undermined and humiliated. She also says that, after she had resigned, LH was approached by the respondent and re-employed to take over her role.

[46] Mr Burgess says that he remembered discussing with Ms Vaszilyko the issue of LH failing to properly separate carcasses and saying that the matter would need to be investigated, that it was serious and could result in a warning. He said that he would not have told Ms Vaszilyko to issue a warning without investigating the matter first. He says that LH resigned, and did not stand himself down. He confirmed that LH was approached after Ms Vaszilyko had left the respondent's employment as the respondent was effectively desperate to have an experienced person to take over the beef slaughter supervisor role.

[47] My finding on this issue is that, on balance, Ms Vaszilyko misunderstood what Mr Burgess wanted. I do not necessarily blame Ms Vaszilyko for this, as she and Mr Burgess appear to have had a number of communication breakdowns. However, it is unlikely that Mr Burgess would have told Ms Vaszilyko to issue a warning without having carried out an investigation first.

Training

[48] Ms Vaszilyko says that she requested further training on running the slaughter room but did not receive it. Mr Burgess says that further training was arranged for Ms Vaszilyko from 23 to 27 February 2015. This is supported by documentary evidence. In the Authority's investigation meeting Ms Vaszilyko said that it was no good being trained on something she already knew about.

[49] I do not find that there was a significant failing by the respondent to train Ms Vaszilyko.

Pregnancy and suspected miscarriage

[50] Ms Vaszilyko gave evidence that, around the end of January 2015, she found out that she had health issues and was pregnant. The Authority saw a copy of an email from Ms Vaszilyko to Mr Burgess dated 30 January 2015 in which she advised Mr Burgess that she was pregnant and that there were some medical complications with the pregnancy which she needed to address which might mean some further time off.

[51] Ms Vaszilyko says that on 5 March 2015 she emailed Mr Burgess to tell him she believed she was miscarrying and that she had started to bleed. Mr Burgess denies that he ever saw such an email. The Authority did see a copy of an email from

Ms Vaszilyko to Mr Burgess dated 5 March 2015 sent at 08.03 in which she stated *I continue to bleed so going to doctor*. Mr Burgess responded within five minutes by email saying *what's wrong and come see me*. Ms Vaszilyko answered around an hour later saying *will come see you later*.

[52] Ms Vaszilyko said in her brief of evidence that Mr Burgess required her to *come down* and explain in person the details of her condition and whether miscarriage was likely. She says it was a very personal and stressful situation. This explanation was, however, different when she gave her oral evidence. In her oral evidence she says that she popped her head around the door of a meeting room in which Mr Burgess was conducting a meeting with supervisors and announced to him that she was leaving. He then followed her into the corridor.

[53] Ms Vaszilyko says in her brief of evidence that she had to give her explanation in the corridor adjacent to a management meeting which she had interrupted for the purpose. She says it involved her standing in the corridor explaining the details of her situation in front of the beef and lamb supervisor and another supervisor while the lady from payroll and other staff were walking back and forth along the corridor on the tea break. She says the two supervisors were standing behind Mr Burgess and that the payroll lady saw her upset and wanted to talk to her. She said that it was humiliating.

[54] Again, her oral evidence was different in that she said that she did not believe that the two supervisors could hear what she was saying.

[55] Mr Burgess' evidence is that he received the email of 30 January 2015 and on Monday, 2 February 2015 had a conversation with Ms Vaszilyko in which she indicated that she would not be continuing with the pregnancy. He says that he did not pry and accepted this was a sensitive and private issue. He says that when he received Ms Vaszilyko's email on 5 March 2015 saying that she *continued to bleed*, he was concerned and asked her to come and see him but had no idea that she was referring to pregnancy complications. He says that he was very concerned.

[56] Mr Burgess says that he was in a production meeting when Ms Vaszilyko did come and see him; she popped her head into the meeting and advised him that she was leaving the site. He excused himself from the meeting and Ms Vaszilyko and he walked down the corridor through two sets of doors to have a discussion. He denies

that there were people walking past and says that he wanted to find out what was wrong and to ensure that there was cover if she was leaving.

[57] Ms Vaszilyko denies that Mr Burgess was not aware that there were pregnancy issues because of her previous email in which she told him that she thought she was miscarrying. It is Ms Vaszilyko's position that Mr Burgess said to her that she had not given him enough notice.

[58] Given that the email of 5 March 2015 in which Ms Vaszilyko states *I continue to bleed* uses the word *continue*, I am satisfied that this was a follow up email to a previous one in which Ms Vaszilyko would have referred to her bleeding. I am therefore prepared to accept her evidence that she had sent an email or some other communication that she believed she was miscarrying. However, I also note that Mr Burgess asked in his reply, *what's wrong?* I do not believe that he would have asked that if he had received Ms Vaszilyko's previous email. In addition, the Authority saw a screen shot of all the emails he had received that day, and there was nothing referring to her miscarrying. I therefore accept Mr Burgess' evidence that he did not know what Ms Vaszilyko was referring to when she wrote *I continue to bleed*.

[59] My finding is that Mr Burgess did not deliberately force Ms Vaszilyko to explain herself in a corridor knowing already that she was possibly miscarrying her child. I believe that, when she announced to him during his meeting that she was leaving, he was entitled to ask her what was wrong, what cover she had arranged and that he needed to talk to her immediately.

Communications from 7 March 2015

[60] On Saturday, 7 March 2015, Ms Vaszilyko wrote an email to Mr Burgess stating that she would be returning to work but needed further time off due to work-related stress. She then referred in her email to Mr Burgess saying that she had not given him enough notice when she asked for leave due to bleeding on 5 March 2015. She also then referred to a lack of support from him which impacted on her ability to do her job efficiently, causing her to lose her confidence; him undermining her in front of her team; and her everyday running of the department which consisted of recurring engineering issues that were an everyday battle. She said that she was never given any KPIs indicating exactly what she was responsible for. Her email ended with the following paragraph:

This is few of many things but at the end of the day I no longer have faith in my plant manager purely because your treatment towards me is unfair and unjust. You are demeaning and controlling that external people see that treatment immediately it's humiliating for me and the company. I've exhausted any patience that our working relationship would improve and I feel I have worked extremely hard trying to get things right.

[61] Mr Burgess replied the same day thanking her for the update and asking her to continue to update him and then saying that the issue was best discussed in person.

[62] On 12 March 2015, Ms Vaszilyko's GP issued a medical certificate stating that she had examined Ms Vaszilyko and that, in her opinion, Ms Vaszilyko was medically unfit from 9 March 2015 and should be fit to resume work on 23 March 2015.

[63] Ms Vaszilyko sent an email to Mr Burgess on 12 March 2015 advising him that she had been signed off sick until 23 March 2015 and saying that, as she had mentioned to him in their meeting on 11 March 2015, she would like to have a beef slaughter supervisor's contract/job description which outlined her role and expectations when she returned. In the response to Ms Vaszilyko from Mr Burgess that the Authority saw, he made no reference to this request. Neither Ms Vaszilyko nor Mr Burgess recalled the details of any meeting between them after 5 March, so the reference to the 11 March meeting remains unexplained.

[64] Between 12 March and 23 March, Ms Vaszilyko and Mr Burgess had a number of email exchanges, mainly trying to agree a date and time when Ms Vaszilyko could come to work to attend a meeting. Although Ms Vaszilyko had been signed off as unfit to work until 23 March, she did not come to work on 24 or 25 March, and Mr Burgess sent her an email asking where she was.

[65] It appears that Ms Vaszilyko then obtained another medical certificate which she dropped off with the respondent on 25 March. It is not known until what date that certificate extended her sick leave, although Mr Burgess and Ms Vaszilyko finally agreed that she would attend a meeting on the afternoon of 26 March.

[66] There then followed a series of events which need to be carefully recounted and analysed as they impact on Ms Vaszilyko's constructive dismissal claim. At first sight, it appears that Ms Vaszilyko resigned before the meeting of 26 March in which she says she was unjustly demoted.

Ms Tucker's letter of 26 March 2015

[67] On 26 March 2015, prior to the meeting between Mr Burgess and Ms Vaszilyko, Ms Tucker wrote to Mr Burgess on behalf of Ms Vaszilyko raising a personal grievance and stating:

Our client resigns on the basis of constructive dismissal.

[68] At the end of the three page letter Ms Tucker states that Ms Vaszilyko would be seeking *compensation for lost wages, compensation for humiliation and injury to feelings and costs.*

[69] Ms Tucker also stated that the implied duty of trust and confidence in Ms Vaszilyko's employment relationship had been breached to such a degree that her employment was untenable. In that letter, Ms Tucker described a number of alleged actions by the respondent, as follows;

- a. The situation concerning leading hand LH in which Ms Vaszilyko says she was told to issue a warning, which Mr Burgess then told her not to do;
- b. The situation concerning a poor performing staff member in which Ms Vaszilyko was told to take the staff member back into her department³;
- c. The performance review in which she was allegedly told she was *useless*;
- d. The situation in which Mr Burgess had allegedly told staff that Ms Vaszilyko had been sent home for swearing at an engineer; and
- e. Not receiving support from management.

[70] In her letter Ms Tucker said that the *final straw* was Ms Vaszilyko seeking to leave work urgently and quietly with dignity while she was bleeding and having a potential miscarriage but, instead, being publicly asked to explain her condition before permission to leave was granted by Mr Burgess.

³ It is not clear from the letter whether this is a reference to FPW or MPW.

[71] It emerged during oral evidence that this letter had been drafted by Ms Tucker on 25 March 2015 and, after Ms Vaszilyko had approved it, it had been sent to Mr Burgess prior to the meeting between him and Ms Vaszilyko on 26 March, although Mr Burgess did not receive it until around 30 March, as it had been incorrectly addressed.

[72] If I can be satisfied that Ms Vaszilyko understood the meaning of the words of the letter in which Ms Tucker communicated to her employer that she was resigning then, unless she subsequently withdrew the resignation, I would have to determine that Ms Vaszilyko had decided to resign before the respondent had told her that she was no longer to be the beef slaughter room supervisor, which means that that issue cannot have been the rationale for the resignation and cannot form part of the factors that I have to consider in relation to determining the constructive dismissal personal grievance.

[73] There were a number of other subsequent events and pieces of evidence adduced which, however, complicate the picture. The most striking is that Ms Vaszilyko sent an email to Mr Burgess on 8 April 2015 in which she purported to resign. In this she referred to what she perceived as the demotion from her post that she had been told of on 26 March. In her oral evidence to the Authority, Ms Vaszilyko said that she had sent the email on 8 April to Mr Burgess because she had believed that an employee had to resign in person for it to be effective.

[74] However, in her oral evidence to the Authority, during re-examination, she said that she regarded her last day of employment at the respondent as having been 26 March 2015.

[75] I asked Ms Vaszilyko a number of questions during the Authority's investigation meeting about the apparently contradictory actions of resigning twice, and I am not convinced that Ms Vaszilyko truly understood the significance of Ms Tucker's letter of 26 March. In particular, I am not convinced that Ms Vaszilyko fully understood the concept of resigning at that time. This is not only because of her erroneous belief that she had to resign in person for it to be effective, but also because she had earlier said that she had believed that LH had *stood down* and not resigned, even though he had left the company.

[76] Whilst Ms Vaszilyko said under re-examination that she believed that her employment had come to an end on 26 March, I regard this as a statement informed by considerable hindsight. This is because of the inherent incompatibility of that position with having sent an email resigning on 8 April. A further piece of evidence to take into account comes from Mr Burgess, who said that he had not regarded Ms Tucker's letter of 26 March as having been a definitive statement of Ms Vaszilyko's resignation. Furthermore, from an administrative point of view, the respondent had treated Ms Vaszilyko's last day of employment as 14 April, the day she had stated would be her last day of employment in her email of 8 April.

[77] All in all, I therefore conclude that, despite Ms Tucker's letter of 26 March, this is not sufficient proof of Ms Vaszilyko's intention to treat her employment as having been repudiated at the point when she instructed Ms Tucker to send the letter as I am not satisfied, on a balance of probabilities, that Ms Vaszilyko understood the significance of the words in Ms Tucker's letter which purported to signal her resignation.

[78] Another approach to the matter is was submitted by Ms Tucker. That is, once Ms Vaszilyko found out that she was going to a meeting to discuss her role (in her mind, to get a job description) she withdrew the resignation by her attendance at the meeting. Such a withdrawal would have worked as Mr Burgess was not aware of the resignation until 30 March, after the meeting. This analysis, however, is not right, as Ms Vaszilyko knew about the meeting before Ms Tucker sent her letter of 26 March, as she and Mr Burgess were arranging the date of the meeting for several days beforehand. I therefore prefer my analysis based on Ms Vaszilyko's lack of understanding of the import of what Ms Tucker had said in her letter.

[79] It remains to examine the events that occurred after Ms Tucker sent her letter in order to determine whether Ms Vaszilyko's email of 8 April amounts to a valid constructive dismissal.

Meeting of 26 March 2015

[80] Ms Vaszilyko says that she attended a meeting with Mr Burgess on 26 March 2015 and it was at that meeting that she was effectively demoted, being told that she could no longer be beef slaughter supervisor and that her role would thenceforth be

assistant boning supervisor. The Authority saw a copy of the note prepared by Mr Burgess of the meeting in question. The note contained the following paragraphs:

DB confirmed that an offer would be made although no contract or job description has been drafted this was why best to discuss in person. The offer is assistant boning supervisor and will retain current remuneration so JV is not financially disadvantaged. DB knew this was important to JV as she recently purchased a house and has been loyal employee. DB made it clear that the beef slaughter position would not be offered. JV initially though [sic] this was good offer and retaining the same rate was important to her and looked to consider it.

JV asked why and DB responded due to performance of the room and risk the company was at with PBV⁴ and upcoming USA audit. The audit focus areas are areas where JV has struggled and MPF⁵ have also supported the concern with JV running the floor. A number of points were covered including that JV was not at a competency level to sign off people or even critical checks which are crucial to running the slaughter effectively, these are areas that JV has had significant training from in-house staff and the external resources including specific compliance training.

JV responded her performance has been due to poor maintenance, resources, and [LH] the leading hand working against her. JV became rattled and questioned why [LH] was running the floor and how he is so good now when he wasn't while helping her. DB replied that it was not about [LH].

DB did explain to JV the decision was in the best interests of the company and not personal, decision was made taking all factors into account including upcoming audits. It was mentioned that JV was put on 3 months trial and had review 16/12/14 and then a further 3 months after that.

WL at this point asked JV what she would do in this position, WL said the room seems to be going well and JV return would be a backward step.

JV said that she wants to see the offer in writing but really wants the beef slaughter floor, she felt like she was leaving a job undone.

JV then got upset and started on the [LH] comparisons.

By the end of this JV was rattled and commented "she would not accept anything other than beef slaughter or she will resign".

DB advised her not to decide now while upset and best her go away and think about it over the weekend.

JV feels like we are forcing her out, DB confirmed to JV definitely NOT the case and is a sidestep. James M is a good example of

⁴ Performance Based Verification

⁵ Ministry for Primary Industries

someone who has moved around jobs to best suit the needs of the company, this has actually worked out better for James.

JV left and said she would see the offer but also asked who she sends her resignation to.

DB said we will be in touch to confirm time to cover contract.

[81] Ms Vaszilyko responded by email to Mr Burgess later that day. As this illustrates Ms Vaszilyko's thought processes at this time, it is appropriate to replicate the text of this email in full. It read as follows⁶:

In response to our discussion today. I feel I'm being penalised for leaving my place of work due to a potential miscarriage at the time and have since been absent from work due to work stresses, I know could have been prevented with your support.

The leading hand was promoted to run my department in my absence after he stood himself down when you gave me instructions to discipline him with a written warning.

I am not prepared to take on another role despite it being potentially beneficial. My concern is it's a strategy to push me out by placing me in a position my heart isn't in.

You asked that I go away and think it through and like I said (twice) during our conversation I've had two weeks to think over what I wanted and asked you in our last meeting that I have a job description for the role as beef slaughter supervisor, not to be placed in another role.

You may comment that I was doing this to get my way and holding the company to ransom. This isn't the case at all. I simply asked for a contract which seemed basic but proven difficult. You said I wasn't being penalised after you mentioned this new role was a step backwards.

You said I was valuable to the company yet placing me in a made up role as assistant supervisor not taking into consideration for any credibility I had is being stripped from me.

You have a production manager, supervisors for each department and leading hands to support the supervisors in these roles anyway so don't see a foreseeable future in this position. It's really another attempt to undermine my authority so I cannot question supervisors or management's decision.

What does it show production staff that a leading hand is promoted for walking off the job and me the supervisor is stood down to become an assistant supervisor?

[82] Ms Vaszilyko's evidence is that the role that she had been told to fill did not exist and that it was a made up role because the boning department had two leading

⁶ Paragraph breaks have been added for ease of comprehension

hands and a supervisor already. She said that Mr Burgess made it very clear that she would not be able to return to beef slaughter and that there was no mention in the meeting of the issue of the trial period coming to an end. She says that, when she refused to take the position and said she wanted to return to beef slaughter, Mr Burgess said *I am the plant manager and I can do it*. Mr Burgess denied that it was a made up role and said that the role still exists.

[83] On 1 April 2015 Mr Burgess wrote an email to Ms Vaszilyko in the following terms⁷:

I wish to take this opportunity to let you know that offering you the alternative supervising role in the boning room, while maintaining your current paid rates, was for the purpose of putting you in a less stressful environment and is what any reasonable employer would do when an employee has been diagnosed as unfit to work due to stress by their doctor.

Your mention in your email that your “concern is it’s a strategy to push me out by placing me in a position my heart isn’t in” is simply not the case. This offer was put to you for your consideration and with the intention of alleviating your stress.

The company has reached no final conclusion as to your future position at this point, and was not going to do so until you had considered the option put to you and come back to us. After being presented the offer for consideration, at the conclusion of the meeting you stated that it was the beef slaughter supervisors role or you’ll resign, having given the role no real consideration, and followed it up with the mail below, without having any opportunity to reconsider your situation as to stress.

We have now received a letter from your legal representative dated 26th March with whom I have Cc’d into this response to your email. I wish you to know that this is not the outcome the Company foresaw and expected dialogue on how to help relieve your stress, but were given no opportunity.

[84] It would appear that there was no further communication between Mr Burgess and Ms Vaszilyko until she sent her email of 8 April. Mr Burgess was unable to say when he had decided that Ms Vaszilyko’s resignation was intended.

[85] Ms Vaszilyko’s email of 8 April stated as follows:

*Dean/Wayne
Consider this my one weeks notice to end my employment with South Pacific Meats, Malvern as of 08/03/15 [sic] and will conclude 14/04/15.*

⁷ Paragraph breaks have been added for ease of comprehension

I have medical certificates from my medical practitioner to cover my absence from the 05/03/15 until 07/04/15 if necessary.

Unfortunately, I have felt the need to resign due to unresolved issues that were not addressed and it appeared that the only solution to rectifying anything was to demote me from a supervisory role into an assistant supervisory position.

I have never been so emotionally exposed (by the plant manager) where my privacy was compromised in front of production staff, other supervisors and management and it feels my vulnerability and ‘work stress’ was taken for granted and used against me making it impossible to return to my work place.

Having returned to work as an assistant supervisor only would have created further humiliation for me by being put into a role I did not wish to do and any credibility gained, lost. I was simply demoted because of my health issues and although noted as work stress could have been prevented with Deans assistance.

Dean was not supportive in my role to the point he undermined me and my work, gave me in adequate resources to work with which felt like I was being set up to fail. Dean said he wasn’t given the opportunity to rectify the problems yet I initially approached him on the 31/12/14 to clarify whether his issues with me we’re [sic] personal, he denied and our work relationship continued to deteriorate and nothing resolved.

Any further correspondence needs to go directly to my lawyer Philippa Tucker.

The issues

[86] The Authority must determine the following issues:

- a. Whether Ms Vaszilyko was unjustifiably constructively dismissed by way of the acts and omissions of the respondent; and
- b. Whether Ms Vaszilyko is due overtime and attendance payments.

Was Ms Vaszilyko unjustifiably constructively dismissed?

[87] First, it is useful to briefly summarise the legal principles that have been applied by the Courts relating to constructive dismissal. These were succinctly summarised by the Employment Court in paragraphs [87]-[90] in the case of *David*

*Rodkiss v. Carter Holt Harvey Ltd*⁸ and I respectfully replicate them below (omitting case citations):

[87] *The legal principles relating to constructive dismissal are well established and have been applied by this Court in a number of previous decisions. In Auckland Shop Employees Union v Woolworths (NZ) Ltd, the Court of Appeal enunciated three non-exhaustive categories of constructive dismissal:*

- *Where the employee is given a choice of resignation or dismissal;*
- *Where the employer has followed a course of conduct with the deliberate and common purpose of coercing an employee to resign; and*
- *Where a breach of duty by the employer leads a worker to resign.*

[88] *.... In Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc, the basis of the employee's claim throughout was that his resignation had been caused by a breach of duty on the part of the employer and therefore the case fell within the third of the three non-exhaustive categories of constructive dismissal referred to in the Auckland Shop Employees Union case. Elaborating on that category, the Court of Appeal in the Auckland Electric Power Board case stated:*

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 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.

[89] *... The Court of Appeal noted that there were a number of duties of an employer which were potentially relevant in this field and, after referring to relevant reported United Kingdom cases, specifically affirmed the application in New Zealand employment law of the implied term that "employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

[90] *... As Judge Perkins noted in Hamon v Coromandel Independent Living Trust, the duty of trust and confidence is*

⁸ [2015] NZEmpC 34

now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith. Section 4(1A)(a) specifically provides that such a duty "is wider in scope than the implied mutual obligations of trust and confidence". Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[88] In addition to the s.4 duty of good faith, the Authority must apply the principles of s.103A of the Act; which provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[89] In order to determine whether Ms Vaszilyko was unjustifiably constructively dismissed, it is necessary to examine a number of sub-issues, as follows;

- a. Which of the respondent's alleged actions can Ms Vaszilyko rely upon?
- b. Were the actions causative of Ms Vaszilyko's resignation?

- c. Was a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach(es)?
- d. Had Ms Vaszilyko affirmed any of the respondent's breaches by her own actions?

What actions can Ms Vaszilyko rely upon?

[90] I have already found that I do not regard the following issues as being unjustified actions by Mr Burgess:

- a. Allegedly telling Ms Vaszilyko to issue a warning against LH, and then telling her not to;
- b. Allegedly telling staff that Ms Vaszilyko had been sent home for swearing at an engineer;
- c. Deciding that FPW and MPW should work in the beef slaughter department after Ms Vaszilyko had decided she did not want them to;
- d. Blaming Ms Vaszilyko for issues that were due to mechanical breakdowns or other equipment challenges;
- e. Allegedly telling Ms Vaszilyko she was useless; and
- f. Allegedly forcing Ms Vaszilyko to explain about her bleeding and potential miscarriage in a public place knowing already that she was potentially miscarrying.

[91] However, I have found that Mr Burgess unjustifiably:

- a. Failed to advise Ms Vaszilyko that her trial period as a beef supervisor was being extended;
- b. Failed to consult with Ms Vaszilyko about taking away her responsibility for the beef chillers; and
- c. Failed to consult with Ms Vaszilyko before deciding that FPW and MPW should work in the beef slaughter department after Ms Vaszilyko had decided she did not want them to.

Removal of the beef slaughter supervisor post

[92] I also find that the action of taking away from Ms Vaszilyko her position of beef slaughter supervisor on 26 March 2015 without first having consulted with her was an unjustified disadvantage. I make this finding because of the following;

- a. By his own evidence, Mr Burgess knew that holding the position of beef slaughter supervisor was very important to Ms Vaszilyko;
- b. Whilst Mr Burgess says he told Ms Vaszilyko in December 2014 that he was extending her trial period by another three months, I find that he did not make this clear to her. He neither spelled it out orally, nor confirmed it in writing;
- c. Mr Burgess did not formally spell out to Ms Vaszilyko, with a support person present, the performance shortfalls he was concerned about, what she needed to do to improve and the potential consequences of failing to do so;
- d. The employment agreement states, at clause 21.2, that a disciplinary matter includes poor performance, and sets out a process the respondent must normally follow to address such a matter, involving a first and second written warning. The respondent did not abide by this requirement; and
- e. Section 4(1A)(b) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. The respondent did not abide by this requirement.

[93] Mr Burgess made clear in his evidence to the Authority that he removed the position from Ms Vaszilyko because he was concerned about a forthcoming or anticipated USA market audit of the beef slaughter room which he was afraid would fail under Ms Vaszilyko's management. This is expressly stated in Mr Burgess' note of the meeting of 26 March.

[94] Mr Burgess' email of 1 April 2015 sought to justify the action by reference to the stress Ms Vaszilyko says she had been feeling in the role. However, I note that Mr Burgess' note of the meeting made no reference to her stress, and I believe that the email of 1 April was a post hoc attempt to justify the removal of the beef slaughter supervisor post, probably drafted by the respondent's legal advisers.

[95] The reference to an offer in Mr Burgess' note of the meeting appears to refer to the alternative role that was being offered; namely assistant boning supervisor. I do not find that Ms Vaszilyko was being offered the choice of keeping the beef slaughter supervisor role or doing the assistant boning supervisor role; she was being told that she was being stripped of the beef slaughter role and could do the assistant boning supervisor role instead. No alternative to that assistant role appears to have been offered.

[96] Was this alternative role a demotion, as Ms Vaszilyko has characterised it? Although on the same pay, it is clearly a demotion in the sense that Ms Vaszilyko would have been subordinate to the boning room supervisor, instead of being in sole charge of the department, as she was in the beef slaughter room.

[97] Finally, I note that the employment agreement under which Ms Vaszilyko was employed refers, at clause 6.2, to employees being transferred within or across departments at the discretion of the respondent company. I accept that the respondent was, therefore, able contractually to require Ms Vaszilyko to carry out other duties, including ones that were lower in status, such as the assistant boning supervisor. However, the unjustified action of the respondent arises from the failures enumerated at paragraph 92(b) to (e) above.

Were the actions causative of Ms Vaszilyko's resignation?

[98] I find that the action of taking away Ms Vaszilyko's role of beef slaughter supervisor without having first followed a fair performance improvement process, was a repudiatory breach of contract which was causative of the resignation that Ms Vaszilyko communicated to the respondent by way of her email dated 8 April 2015. Whilst Ms Vaszilyko was threatening resignation prior to that date for the reasons stated in Ms Tucker's letter dated 26 March, I cannot find that the three actions which I have found at [90] above were unjustified, were causative of the

resignation, because the first action was not known to Ms Vaszilyko at the time of her resignation and the second and third actions were not of sufficient seriousness.

Was a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach(es)?

[99] It is possible that Mr Burgess did not foresee that Ms Vaszilyko would resign when he took away her role of beef slaughter supervisor. However, I believe that such an action was reasonably foreseeable; in other words, a reasonable employer would have foreseen that taking away Ms Vaszilyko's post of beef slaughter supervisor without having first followed a fair performance improvement process would be likely to cause her to resign. This is especially given that she had threatened to resign in the past and that he knew how important the role was to Ms Vaszilyko. I question the submission of Ms Tucker, though, that her letter to Mr Burgess dated 26 March made it reasonably foreseeable that Ms Vaszilyko would resign, as he did not receive the letter until after he had told Ms Vaszilyko that she was to have her role of beef slaughter supervisor taken off her.

Had Ms Vaszilyko affirmed any breaches by the respondent by her own actions?

[100] An employee does not have to resign immediately in the face of a repudiatory breach by an employer. This is confirmed by the Employment Court in *Premier Events Group Limited and others v Malcolm James Beattie and others*⁹ which cited with approval a passage from the UK Employment Appeal Tribunal judgement in *WE Cox Turner (International) Ltd v Crook*¹⁰ (which was relied on by the UK Court of Appeal in *Cantor Fitzgerald International v Callaghan*¹¹).

[101] The passage in question is as follows:

Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract.

⁹ [2014] NZEmpC 231

¹⁰ [1981] ICR 823 (EAT)

¹¹ [1999] All ER 41, [1999] ICR 639

However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.

[102] The Employment Court in *Premier Events Group Limited* then stated, citing the Court of Appeal in *Cantor Fitzgerald*¹²:

..... "the ultimate question is one, not of law, but of fact" including in circumstances from which the Court is invited to draw inferences about whether the contracts of employment were affirmed.

[103] While Ms Vaszilyko was on sick leave, she was emailing Mr Burgess about returning to work, but only if she could get a *beef slaughter supervisor's contract/job description which outlines my role and expectations when I return*. I agree with Ms Pidduck's submission that Ms Vaszilyko's actions in providing medical certificates, and seeking a job description for the beef slaughter supervisor role, tend to show that Ms Vaszilyko affirmed any breaches that may have occurred prior to 26 March.

[104] However, as these actions were prior to the meeting on 26 March, in which Mr Burgess effectively refused to give her such a contract/job description, these requests cannot be seen to affirm the breach caused by the respondent in removing Ms Vaszilyko from the beef slaughter supervisor role without having undertaken a performance improvement programme.

[105] There appears to have been no communication between the parties between 1 April, when Mr Burgess sent his email, and 8 April when Ms Vaszilyko sent her email of resignation. As noted above, mere delay does not affirm a breach. Ms Vaszilyko took no steps to affirm the breach that occurred on 26 March 2015 in my view.

Conclusion

[106] I find that Ms Vaszilyko was entitled to treat her contract of employment as having been repudiated by the respondent removing her from the beef slaughter supervisor role without first having undertaken a fair performance improvement process¹³. This failing by the respondent was an unjustified action, as no fair and reasonable employer could have failed to have followed a fair process in all the

¹² At [653]

¹³ I agree with Ms Tucker's characterisation in her submissions of the meeting of 26 March as an ambush.

circumstances, including that the employment agreement required first and final written warnings to be normally given for poor performance. This failing therefore amounts to a breach of both its contractual and statutory duties by the respondent.

[107] I do not go so far as Ms Tucker when she says that the respondent also gave Ms Vaszilyko the choice of resigning or being dismissed, as there was no cogent evidence to suggest that Ms Vaszilyko was told that she would be dismissed if she failed to accept the assistant boning room supervisor role.

[108] Having found that Ms Vaszilyko's employment ended by way of a constructive dismissal, in view of my finding that it was caused by an unjustified action by the employer I am bound to find that the constructive dismissal was itself unjustified. This entitles Ms Vaszilyko to be considered for an award of remedies.

Remedies

[109] Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[110] Section 128 of the Act provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[111] During the latter part of her employment, during her sick leave, Ms Vaszilyko was not receiving pay as she had exhausted both her sick pay and holiday pay entitlement. This sick leave was because of the stress she said she was suffering from at work, as referred to in the letter from her GP. If the respondent had been following a fair process, it would have advised Ms Vaszilyko that it had concerns about her performance, and given her time to improve, with regular feedback, as early as December 2014 when it extended her three month trial. If that had occurred, there may have been one of at least three possible outcomes:

- a. Ms Vaszilyko's performance would have been deemed to have improved sufficiently by March 2015, vitiating the need for her removal from the beef slaughter supervisor role and her resignation; or
- b. Her performance would not have been deemed to have improved sufficiently, despite regular feedback, but she would have accepted the respondent's judgement; or
- c. Notwithstanding being subject to a fair process, she would still have felt stressed, been signed off sick and resigned.

[112] One should have faith in a fair process producing a fair and acceptable result, and I prefer to find that, had a fair process been followed, the stress that Ms Vaszilyko suffered would not have been so great, and would not have necessitated her absence from work, or her resignation.

[113] That, in turn, would have meant that she would have been able to have continued to receive her pay. As the respondent promised her that she would not receive a pay cut if she had accepted the assistant boning supervisor role, it is

appropriate to calculate her loss of income at the rate of \$27.50 per hour, whether or not she would have remained in her beef slaughter supervisor role.

[114] I decline to exercise the discretion at s.128(3) because my speculation as to the probable outcome of a fair process must have some limits, and also because, whilst Ms Vaszilyko had still not found employment at the time of the Authority's investigation hearing, she had clearly given up looking at some point as she was intending to start her own business. I also agree with Ms Pidduck that no cogent evidence was produced to support Ms Vaszilyko's allegation that the respondent has adversely influenced prospective employers.

[115] I therefore limit her lost remuneration to 13 weeks' pay, which amounts to \$14,300 gross (calculated at \$27.50 an hour, for 40 hours per week).

[116] Turning to compensation for humiliation, loss of dignity and injury to her feelings, I find that Ms Vaszilyko was genuinely stressed by what she felt were unreasonable actions by Mr Burgess. I have found that some of them were justified actions, whereas others were not justified. I certainly find that the act of removing the post of beef slaughter supervisor from her without first following a proper and fair performance improvement process caused Ms Vaszilyko humiliation, loss of dignity and injury to her feelings.

[117] It is not easy to separate out the effects on Ms Vaszilyko of actions which were justified from actions which were not. Indeed, Ms Vaszilyko most probably suffered a continuing series of effects. However, standing back, I believe that it would be fair and reasonable to award Ms Vaszilyko the sum of \$12,000 under s.123(1)(c)(i) of the Act. I do not accept that \$33,000 is warranted, as was submitted by Ms Vaszilyko, as there was no evidence to show that a very high level of humiliation, loss of dignity and injury to her feelings were suffered.

[118] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[119] Whilst Mr Burgess was critical of Ms Vaszilyko's conduct, saying that she was too much into *the blame game*, for example, I find that most of this conduct was a product of the poor communication between the two, responsibility for much of which must be borne by Mr Burgess as the most senior of the two. In all the circumstances, I do not find that the actions of Ms Vaszilyko contributed towards the situation that gave rise to her personal grievance in any blameworthy way and so I decline to reduce the remedies that would otherwise have been awarded.

Is Ms Vaszilyko owed arrears of wages and other payments?

[120] During the Authority's investigation, the respondent reassessed the wages it had paid to Ms Vaszilyko against her entitlement and concluded that it had underpaid her by the gross sum of \$1,292.50. The respondent undertook to pay this to Ms Vaszilyko as soon as she provided the respondent with her new bank account number and her tax code.

[121] There remained to be determined, however, the issue of whether Ms Vaszilyko was owed overtime payments and attendance payments for the period when she had taken over the role of beef slaughter supervisor.

[122] I accept that the role does not ordinarily attract such payments. However, clause 1.2 of the employment agreement states clearly that any variation would be written and signed by the parties and attached as an addendum to the agreement. This was not done.

[123] I cannot, therefore, accept that there was a binding oral variation between the parties in respect to these matters as contended for by the respondent, and Ms Pidduck appears to accept this in her submissions. This is especially as Ms Vaszilyko gave evidence, which I accept, that when Mr Burgess told her she would be paid a flat rate of \$27.50, she believed that that term *flat rate* referred to her no longer being paid a lower rate during smoko breaks. Mr Burgess essentially conceded that this was a plausible explanation and that he could not confirm that he had ever referred expressly to no overtime or attendance allowance being payable when discussing Ms Vaszilyko's promotion.

[124] The respondent however, argues that Ms Vaszilyko waived her contractual entitlement to overtime and attendance allowance in exchange for the opportunity for

the beef slaughter supervisor role. A key component of an effective waiver is that it requires a clear and unequivocal representation, whether by words or conduct.¹⁴

[125] I am not satisfied that Ms Vaszilyko waived her contractual right to receive overtime and attendance payments because I am not convinced that she made a clear, unequivocal representation by words or conduct that she waived her right to these payments. Merely turning up to work does not constitute an unequivocal representation of waiver.

[126] I also do not accept that Ms Vaszilyko's claim is defeated by the doctrine of estoppel as I accept her evidence that she did not understand the term *flat rate* to mean that she would no longer receive overtime and attendance bonus payments. She cannot be estopped from claiming what she considered to be her contractual right based upon a misunderstanding.

[127] In conclusion, Ms Vaszilyko is entitled to overtime and attendance payments in relation to her holding the beef slaughter position.

Recommendation

[128] I refer to s.123(1)(ca) of the Act. I find the following omissions by the respondent contributed significantly to the personal grievances and claims which the Authority has had to determine:

- a. A failure to issue an updated employment agreement when a significant promotion had been awarded which set out clearly the expectations of the role in question in the form of a job description. I refer to the requirement at s.65(2)(a)(ii) of the Act.
- b. A failure to set out the remuneration for the position in question, including all allowances and other entitlements attendant on the role;
- c. A failure to address Ms Vaszilyko's perceived poor performance in a structured and fair way, so that she knew exactly what the concerns were, the standards that were expected, the support she may reasonably have expected, the timeframe within which she was expected to rectify the shortcomings and the consequences of failing to do so.

¹⁴ Law of Contract in New Zealand, Burrows, Finn and Todd, 4th edition, Chapter 8.3.

[129] My recommendation is that the respondent takes urgent steps to design and implement processes which will rectify these failings.

Orders

[130] I order the respondent to pay to Ms Vaszilyko the following sums:

- a. Lost wages in the gross sum of \$14,300;
- b. Compensation under s.123(1)(c)(i) of the Act in the sum of \$12,000;
- c. Insofar as such sum has not already been paid, the gross sum of \$1,292.50 (less appropriate PAYE deductions) within five days of Ms Vaszilyko or Ms Tucker advising Ms Pidduck in writing of Ms Vaszilyko's bank account number and tax code; and
- d. Such sums as will satisfy the arrears owed to her in respect of overtime and attendance payments during the period when she held the position of beef slaughter room supervisor.

[131] With respect to the sum at (d) above, the parties are to seek to agree this sum. Once agreed, it is to be paid within five days of such agreement being reached. In the absence of agreement being reached within 28 days of the date of this determination, either party may apply to the Authority for it to determine the sums owed.

Costs

[132] The parties are to seek to agree how costs are to be dealt with between them. In the absence of such agreement within 28 days of the date of this determination, any party seeking costs may serve and lodge a memorandum of costs within a further 14 days and any response is to be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority