

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2026] NZERA 210
3333120

BETWEEN

AYLIAH MCCLEOD
Applicant

AND

SWAGGER INN PUB CO
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Ronald Jones, advocate for the Applicant
Carl Willetts, Respondent director

Investigation Meeting: On the papers

Determination: 8 April 2026

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ayliah McCleod was employed by Swagger Inn Pub Co Limited (Swagger Inn) in its kitchen from early February 2024 until 28 April 2024 when her employment ended by way of resignation. Ms McCleod says she resigned because she was promised the sous chef position when it became vacant and this did not happen. She says she has personal grievances for matters relating to the promised role and her resignation, the failure of Swagger Inn to provide her with a written employment agreement and issues regarding calculation of her holiday pay.

[2] Swagger Inn says it knew nothing of Ms McLeod's personal grievances until 7 November 2024 when it received service documents from the Authority consequent to Ms McLeod lodging a statement of problem. It says she has not raised her personal grievances within the statutory 90-day period, does not consent to the personal grievances being raised out of time and opposes leave to raise the grievances out of

time. It says the sous chef role was not promised to Ms McCleod and/or such a promise was not within the authority of the duty manager Ms McCleod says made the promise. It also says Ms McCleod has no outstanding holiday pay entitlement.

[3] This determination deals only with the preliminary jurisdictional issue of whether Ms McLeod has raised personal grievances within the statutory time frame and if not if leave should be granted to her to raise personal grievances out of time.

The Authority's investigation

[4] Almost 200 days after Ms McCleod's employment ended she lodged her statement of problem in the Authority which was served on Swagger Inn which then filed its statement in reply including a protest to jurisdiction. The parties had not been to mediation and were referred by the Authority. Mediation has not occurred, and the matter was allocated to me earlier this year.

[5] By consent the investigation of this preliminary matter is on the papers. The Authority has received information from the parties filed in accordance with timetabling directions.¹ This information includes an affidavit sworn by Ms McCleod 18 March 2026. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

Issues

[6] The issues requiring investigation and determination are:

- (i) Did Ms McCleod raise personal grievances with Swagger Inn within the statutory 90-day period?
- (ii) If not, did exceptional circumstances occasion Ms McCleod's failure to raise personal grievances within the statutory 90 days?

¹ Authority directions 16 February 2026.

- (iii) If so, is it just to do so?

Relevant law

[7] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe. A personal grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance the employee wants the employer to address.²

[8] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) considers it just to do so.

[9] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (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; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

² Section 114(2) of the Act.

Background

[10] Ms McLeod instructed an employment advocate, not Mr Jones, in early May 2024 to raise personal grievances on her behalf with her employer. The information before the Authority indicates the advocate emailed a letter dated 6 May that day outlining Ms McLeod's personal grievances. The letter was addressed to the trading name of the Swagger Inn business which employed Ms McCleod at its street address. There is no information indicating the letter was posted or couriered to that street address. At the same time the advocate filed a mediation request with MBIE mediation services. The request form shows the details provided to mediation services were those used in the 6 May letter and the covering email. The 6 May covering email shows the email address used was [duty manager's name]@gmail.com. The duty manager was the Swagger Inn employee to whom Ms McCleod averred she reported. Through June Ms McCleod and/or her advocate exchanged correspondence with the mediation service which advised on 9 July it had been unable to contact the employer to arrange mediation, and the mediation file would be closed.

[11] On 17 July Ms McLeod received an invoice from the advocate for work to date and a proposal to prepare and lodge an application in the Authority.

[12] Ms McLeod in time instructed Mr Jones who lodged her statement of problem in the Authority on 30 October 2024.

[13] Between 2 and 5 April 2024, before Ms McCleod's employment ended, she exchanged text messages with Mr Willetts about the sous chef role and received a written employment agreement. Mr Willett's is Swagger Inn's director and manages the day-to-day business operations,. The text messages provide:

[Ms McCleod 2 April]

I was offered full time hours/work at the time and when [name] leaves I will be taking his position (sous chef) – this was from [the duty manager] - I am just wondering what is happening with this as well as a contract that's all [2 x thumbs up emoji]

[Mr Willetts 5 April]

Morning

Apologies for delay in responding, caught me in middle of an audit, eftpos melt down and end of year financials. [Duty manager], I believe has responded to you (this is his dept), however the company requirements for a sous chef is

L5 or relevant experience in FCP, costings, kitchen management, financial proficiency etc – with our current status in the kitchen this is vital, Cheers [thank you, cool emojis]

[Ms McCleod 5 April]

Don't worry Carl – I have ben (sic) in hospo since 2002 – I have level ¾ cheffing cookery certificates started as a dishy then a cook to a sous chef and then to head chef...to be honest your kitchen does not need level 5 if that's the case then we are going into fine dining which the [Swagger Inn] is not.

Discussion

Did Ms McCleod raise personal grievances with her employer within the statutory 90 days?

[14] There is insufficient evidence the letter of 6 May was received by Swagger Inn. The advocate emailed the letter to the duty manager using what appears to be a personal gmail address. The email address does not reference the business. There is insufficient information to assume it was a work email or that that email address was used by Ms McCleod to communicate with the duty manager for work purposes. Further, there is insufficient information that the email was received by the addressee. In addition, there is no information before the Authority that the letter was otherwise delivered to the employer or contact made to raise Ms McCleod's personal grievances by any other means, eg text message, voice message or telephone call, with the duty manager or anyone else at Swagger Inn including Mr Willets.

[15] The mediation request form Ms McLeod's then advocate completed on her behalf in late May does not name the correct employer entity name, lists the duty manager as the contact person and their personal gmail account. There is also a mobile telephone number listed which is likely to be that of the duty manager. The documents show the mediation service was unable to contact the employer using the provided information. That mediation service was unable to contact the employer using the information provided on behalf of Ms McCleod further confirms the contact details were not effective for that purpose.

[16] For the above reasons Ms McCleod's personal grievances were not raised with Swagger Inn within the statutory 90 days.

Did exceptional circumstances occasion the delay in raising the personal grievances?

- (i) *Did Ms McCleod make reasonable arrangements to raise her personal grievances and this did not occur due to the unreasonable failure of her agent?*

[17] This does not appear to be the case. While it is accepted Ms McLeod instructed an advocate, the information before the Authority suggests they have acted to raise her personal grievances using information likely received from Ms McCleod which included a personal gmail address for the duty manager and the trading name of the business. Ms McCleod was directly advised by mediation service it had been unable to contact the employer. There is no information before the Authority that Ms McCleod provided Mr Willett's contact details to the advocate. The failure to raise was not due to the unreasonable failure of the advocate.

- (ii) *Does the relevant employment agreement contain a resolution explanation?*

[18] Every individual employment agreement must contain a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised.³ On the information before the Authority Swagger Inn did not provide Ms McCleod with a copy of an intended written employment agreement⁴ and did not provide her with a copy of her individual employment agreement or her individual terms and conditions of employment when, I find she requested a "contract" by text message to Mr Willetts on 2 April.⁵ An employment agreement must contain the names of the parties, this would include the correct legal name of the employing entity.

[19] An exceptional circumstance is established because Swagger Inn did not provide Ms McCleod with an intended written employment agreement. This failure has likely contributed to the difficulty Ms McCleod's advocate had in making contact with the employer and the subsequent delay in Ms McCleod progressing her employment relationship problem.

³ Section 65(2)(a)(vi) of the Act.

⁴ Employment Relations Act 2000, s 63A(2).

⁵ Employment Relations Act 2000, s 64(3).

(i) *Is it just to grant leave?*

[20] The evidence establishes Ms McCleod took steps to raise her personal grievances within time and this did not occur in part because information which would be expected to be included in a written employment agreement had not been made available to her by Swagger Inn. Though the subsequent delay in raising the personal grievances was substantial, a significant contributing factor was I find the fundamental failure of Swagger Inn to provide Ms McCleod with an intended written employment agreement, and this failure was compounded when it was not provided to her on request.

[21] In the circumstances it is just to grant Ms McCleod leave to raise her personal grievances out of time.

Outcome

[22] Ms McCleod has leave to raise her personal grievances as described in the letter 6 May 2024 out of time.

[23] The parties are directed to mediation.⁶ After mediation Ms McCleod should advise the Authority if she wishes the investigation to continue.

Costs

[24] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority

⁶ Employment Relations Act 2000, s 159(1).