

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 96  
5322154

BETWEEN

GEORGE HILARY  
GALLAGHER  
Applicant

A N D

MARAC FINANCE LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: George Gallagher, In Person  
Glenn Jones, Counsel for Respondent

Investigation Meeting: 22 June 2011 in Dunedin

Date of Determination: 4 July 2011

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**DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1] This determination deals with a preliminary issue about whether the Authority should grant leave under s.114 (4) by virtue of s.115 (b) of the Employment Relations Act 2000 to raise a personal grievance of unjustified dismissal out of the timeframe for doing so.

**Raising of the personal grievance**

[2] Mr Gallagher's employment was terminated for reason of redundancy with four weeks notice provided in a letter to him dated 25 November 2009. He worked out his notice period with his employment ending just before Christmas 2009.

[3] Mr Gallagher's personal grievance was raised on 25 June 2010, over three months after the expiration of the 90 day timeframe for raising a grievance under

s.114 (1) of the Act, in writing by the firm of solicitors who were at that time dealing with his personal grievance.

[4] Mr Jones on behalf of MARAC responded to the raising of the grievance by letter dated 7 July 2009 and advised that MARAC did not consent to the late raising of the grievance and that the dismissal was justifiable by reason of genuine redundancy and that there was procedural fairness. He also noted that Mr Gallagher intended to seek leave to raise the grievance out of time on the grounds of an unreasonable failure by a solicitor of the firm to ensure it was raised within the required time. Mr Jones stated in his letter that rule 13.5 of the Lawyers Conduct and Client Care Rules provided it was not appropriate for the firm to act in the matter.

[5] On that basis Mr Gallagher approached the firm of Downie Stewart in Dunedin to assist him with making an application for leave and his personal grievance claim. On 8 October 2010 a statement of problem was lodged with the Authority and a sworn affidavit from the solicitor at the firm who was instructed to raise the personal grievance was amongst other documents attached to the problem deposing to the reasons for the delay and that Mr Gallagher had done everything that he could have done to ensure the grievance was lodged on time.

[6] In the statement in reply MARAC accepted that the delay in raising the personal grievance was occasioned by exceptional circumstances within the meaning of s.114(4) and 115 (b) of the Act but maintained that it would not be just to grant leave under s.114 because:

- (a) the contended grievance lacks merit and is unlikely to succeed;
- (b) although the failure to raise the grievance within 90 days was occasioned by failure on the part of the former solicitor, the applicant has also been guilty of inordinate delay in pursuing matters even after he became aware of the solicitors failure between 7 July and 8 October 2009.

[7] The parties have not been to mediation.

## **The Investigation Process**

[8] The Authority decided that the most efficient way to deal with its investigation of this problem was to hear the evidence about both the preliminary and substantive issues. The Authority advised the parties that it would issue a determination on the preliminary issue as soon as possible. If leave to raise the personal grievance was granted then the Authority must under s.114 (5) of the Act direct the parties to mediation but would then be in a position after that if the matter was not resolved to determine the substantive issue without the need for a further investigation meeting. It was agreed that written submissions about the substantive issues would not be provided until after the preliminary matter had been determined.

[9] The Authority heard evidence from Mr Gallagher and from David Battersby who was at the material time the Chief Operating Officer for MARAC and Michael Fickling, the Manager of Commercial Lending at the material time.

## **The Issues**

[10] Section 114 (4) of the Act provides:

*On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority-*

*(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*  
*(b) considers it just to do so.*

[11] MARAC accept that the delay in raising the personal grievance was occasioned by exceptional circumstances because Mr Gallagher made reasonable arrangements to have the grievance raised on his behalf by his solicitor and the solicitor unreasonably failed to ensure the grievance was raised within the required time under s.115 (b) of the Act.

[12] The focus therefore for the Authority is on whether it would be just to grant leave. It will be necessary to consider both whether there were unreasonable delays in making the application for leave between 7 July and 8 October 2010 and whether in terms of the merits of the case it would be just to grant leave.

**Inordinate delay 7 July to 8 October 2009**

[13] Mr Gallagher set out in detail in his evidence the steps taken by him and Downie Stewart, between 7 July 2010 and the lodging of the statement of problem on 8 October. Ms Shona Cummings an associate at Downie Stewart I am satisfied took reasonable steps to uplift Mr Gallagher's file from his previous solicitor in a timely manner – such file being available for uplifting on 19 August 2009. After perusal of the file she wrote on 9 September 2009 to Mr Jones about whether agreement was possible regarding the extension of time and mediation. There was a brief delay in Mr Jones responding because of the September earthquake until 20 September 2009 when he advised that MARAC would oppose the application for leave. The evidence and emails sent from that time support any delay concerned the supply of a sworn affidavit from the solicitor who had failed to raise the personal grievance within time. Ms Cummings took reasonable steps to encourage the supply of such an affidavit so that it could be attached to the statement of problem and any delay was that of the previous firm of solicitors.

[14] Mr Jones in closing oral submissions stated fairly that after hearing the evidence the delays in making the application for leave were not of Mr Gallagher's making. I agree with that and do not find it made out that it would not have been just to have granted leave on the basis of any delay in lodging the application for leave in the circumstances.

**Substantive Merits**

[15] An assessment of the merits of a case when determining whether it is just to grant leave under s.114 (4) of the Employment Relations Act 2000 was considered by the Employment Court in *Paul McMillan v Waikanae Holdings (Gisborne) Limited* (2005) NZELR 402 and *Lynette Melville v Air New Zealand Ltd* [2010] NZEmpc 87. An application for leave to appeal *Melville* was dismissed by the Court of Appeal [2010] NZCA 563.

[16] Judge Travis stated amongst other matters in *McMillan* at para.27:

*Even if I had held that what was done, and not done, had constituted exceptional circumstances, I would not have considered it just to have granted leave on hearing the evidence of Mr McMillan in support of his grievance. I reached the conclusion that his claim was unlikely to be upheld either in relation to the circumstances in January or his resignation in February.*

[17] In *Melville* Judge Travis stated amongst other matters in paragraphs.39 and 41:

*I observed that in many cases it would be difficult, if not impossible, to determine whether it is just to do so, once exceptional circumstances are established, without delving to some degree into the merits of the case.*

*I still adhere to the view that the merits do need to be addressed to determine whether it is just to allow the grievance to be pursued out of time.*

[18] The Authority was in a good position in this case to assess the merits because I heard the evidence about the substantive claim that Mr Gallagher was unjustifiably dismissed. In hearing and carefully assessing the merits I have concluded that the personal grievance of unjustified dismissal is unlikely to succeed.

[19] In terms of whether the redundancy was genuine there was no evidence of ulterior motive but rather a business decision. MARAC decided to restructure the Dunedin office in late 2009 where there were two sales staff, one a contracted agent and the other Mr Gallagher. A decision was made to only have one salesperson and it was decided that it would be the contracted agent who was paid on a retainer and commission. Mr Gallagher was not replaced.

[20] The restructure took place against a background of the collapse of finance companies in mid to late 2008 and a decision by MARAC as a result to move to other than property related lending to reduce risk. Mr Gallagher was employed to start up the MARAC Ascend Finance division as Financial Services Manager and thought about 50 – 60% of the loans in his portfolio were property based. Ascend was viewed as operating at the higher risk end of the market and by August 2009 MARAC had ceased lending under Ascend and new loans were to be made under the MARAC brand. The letter of 1 April 2009, whilst advising Mr Gallagher his role continues unchanged, still alerts him to the need for a discussion in the short term about a

transition to operating under the MARAC brand and does not go as far as to assure him his position would not be affected by any proposed restructure. This is particularly so viewed in the context of the subject of the letter being the bonus scheme.

[21] Mr Gallagher raised several issues about the process but having heard the evidence I find it unlikely that the process would be found to be unfair on the grounds advanced. Mr Gallagher was advised there was to be a restructuring and there was a possibility that his position in the sales operation at Dunedin could be redundant – meeting Mr Fickling and letter 3 November 2009. I have carefully considered the issue of the information Mr Gallagher requested from Mr Fickling after this meeting. All information was not provided. It is likely that this was either because the company did not have it in the form requested or did not consider it relevant. I conclude that Mr Gallagher would probably have the information in his possession and that in the circumstances of this case where the company was focussed on new business growth it would not have changed the outcome.

[22] There was then a further meeting with Mr Battersby on 17 November 2009 at which the letter given to him earlier made it clear he could bring a representative. Following the meeting Mr Battersby sent a letter setting out three possible outcomes including redundancy and that he wanted to review those in more detail and would defer any final decision on the restructure until 23 November 2009.

[23] Whilst Mr Gallagher said he had no idea when, or indeed if, Mr Battersby would attend at the office on 17 November 2009 emails suggest that this date was known and if in doubt of the time of arrival on that day Mr Gallagher could have checked particularly where the evidence supports that shortly before this meeting Mr Gallagher discussed his situation with his solicitor. No adjournment of the meeting was requested.

[24] There was no evidence supporting a breach of the process in the individual employment agreement. Notice and payment of redundancy compensation were in accordance with the agreement.

[25] Mr Gallagher said that there was predetermination of the decision to make him redundant. He said after his redundancy he was advised by another MARAC employee [an Ascend finance manager] that the decision to make him redundant had been made earlier. The Authority did not hear from that person. Mr Battersby said that it was common knowledge at that time that MARAC was in a state of change and that it was operating in the worst financial situation. There was a general understanding that there may be a need to restructure. He said he may well have spoken about Mr Gallagher's redundancy being a possibility to the person but denied there was ever a decision to make Mr Gallagher's position redundant until 25 November 2009. A possibility of something is not a decision made so as to find pre-determination.

[26] Mr Gallagher further said that he took notes of the telephone call made by Mr Battersby on 25 November 2009 advising him of his redundancy. These included the statement from Mr Battersby – *decision already made but not finalised prior to discussion starting*. Mr Battersby denied saying that because he says it was clear that no decision was made earlier as he was thinking about different options – see letter 18 November 2009. I find such a statement by Mr Battersby is not supported by what actually occurred after the meeting on 17 November 2009 which included talking to the contractor about the possibilities Mr Gallagher had discussed with Mr Battersby.

[27] Issues about lending discretion and reducing the lending book were historical and not relevant to the analysis of the substance and fairness of the redundancy but more related to the situation MARAC was in at the time with its business. A personal grievance was not raised about the way the lending discretion was removed within 90 days.

### **Determination**

[28] I find therefore in conclusion that it would not be just to grant Mr Gallagher leave to pursue a claim against MARAC that is unlikely to succeed and the application for leave to raise a personal grievance is declined.

**Costs**

[29] I reserve the issues of costs.

Helen Doyle  
Member of the Employment Relations Authority