

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 352/08  
5101001

BETWEEN                      ROWAN (PETER)  
   McCUTCHEON  
   Applicant

AND                                CHARLES (PAUL)  
   GALLAGHER practicing as  
   PAUL GALLAGHER LEGAL  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:            Chris Patterson, counsel for Applicant  
   Stephen Barter, counsel for Respondent

Investigation Meeting:      4 September 2008

Submissions Received:      17 September 2008 from Applicant  
   2 October 2008 from Respondent

Determination:                10 October 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Mr Peter McCutcheon was employed as a barrister and solicitor by law firm Paul Gallagher Legal from August 2003. Just over a year later he was told that his employment was being terminated, during a meeting with principal of the firm Mr Paul Gallagher.

[2]     Mr McCutcheon received a letter confirming he had been given notice of one month, as required by the terms of the employment agreement between the parties. He continued working for Mr Gallagher until the notice period ended on 1 October 2004.

[3] There was no further communication about the termination of employment for nearly 80 days, until 17 December 2004. Then, Mr Gallagher received an email from counsel Mr Patterson but containing only the following advice:

*I act for Peter McCutcheon.*

*He has instructed me to raise, on his behalf, a personal grievance for unjustified dismissal.*

*Regards*

*Chris Patterson  
Barrister*

[4] Nearly three years then went by until Mr Gallagher was served with a Statement of Problem, after it had been lodged in the Authority at the end of September 2007. Mr Gallagher duly responded to it with a Statement in Reply.

[5] As the parties had not been to mediation to resolve the employment relationship problem, the Authority formally directed them to undertake that process before the end of January 2008. It was unsuccessful and the Authority has been required to investigate the problem and resolve it by determination.

[6] It has been of no help to anyone concerned in it that this claim was delayed in being brought to the Authority for nearly three years after the termination of Mr McCutcheon's employment. Even then it had not been to mediation and the parties had to be ordered to undertake that process. Because of delay and the potentially unsatisfactory resolution of the claim on a jurisdictional point, and one that was not taken up by the employer, the Authority has not called for submissions from the parties as to whether a personal grievance was ever raised in accordance with the requirements of s 114 of the Employment Relations Act 2000.

[7] No determination is therefore given by the Authority on the point, but set out at the end of this determination are the reasons why the Authority has doubts about that issue.

### **Termination of the employment**

[8] Mr Gallagher has lately accepted that the termination of Mr McCutcheon's employment was by dismissal. Mr Gallagher has also accepted that he did not dismiss Mr McCutcheon because of any misconduct or non-performance on his part,

and there has been no suggestion that redundancy was the reason for dismissal. The termination followed from Mr McCutcheon expressing to Mr Gallagher his frustration at what he regarded as delay in having his annual review of performance and salary completed.

[9] In an email dated 31 August 2004 sent just after the first anniversary of his employment, Mr McCutcheon advised Mr Gallagher that he thought the review was taking too long. He asked to know where he stood, and said:

*I asked you for a salary review two weeks ago, and nothing substantive has come back to me.*

*I really expected more leadership from you on this issue, and I don't think that I am being treated especially well on it, I am afraid. I have had to initiate everything, and I feel as though you pump me for information in our meeting, but there wasn't much coming back.*

*Look, I don't feel as though things are working out for me here – I don't want to chase you round endlessly asking to be considered properly, and it all seems to be keeping too hard, I am afraid.*

*There's a job in town going with a friend from law school – \$80-\$90k salary: car park allowance: gym membership; health insurance subsidy; reasonable expectations in terms of hours: automatic salary reviews every six months – I am thinking about applying for it – I have got a limited time on this planet like everyone else.*

*I hope you understand.*

*Let me know if you would like me to resign now.*

*Peter*

[10] Mr Gallagher replied quickly to the email, saying that he did not understand why Mr McCutcheon was complaining of delay in view of steps he had been taking in the process. He described himself as being “*aghast*” at receiving the email and said he thought Mr McCutcheon was trying to provoke him in some way to justify leaving his employment. He concluded his reply by asking:

*Can we therefore discuss this sensibly tomorrow evening or have you already in fact made up your mind?*

[11] The two met on the morning of 2 September for about 20-30 minutes. I accept the evidence of Mr Gallagher as to what was said by Mr McCutcheon during that meeting.

[12] Mr McCutcheon, I find, said he had lost faith in Mr Gallagher. When asked to clarify what he meant McCutcheon told Mr Gallagher he had lost faith completely in him. Mr McCutcheon also said he thought Mr Gallagher had been evasive or was avoiding the issue of the salary review. Mr Gallagher again asked Mr McCutcheon to say clearly what he meant and was told by Mr McCutcheon that he did not feel he and Mr Gallagher could work together.

[13] Mr McCutcheon also told Mr Gallagher, I accept, that he did not need time to think further about the way he felt, but said he did not intend giving notice. At this point Mr Gallagher advised Mr McCutcheon that in view of what had just been said he had no choice but to give him notice.

[14] Mr McCutcheon's evidence was that during the meeting Mr Gallagher had produced a written notice of termination in the form of a three page letter. I accept Mr Gallagher's evidence that he did not write that letter until later on during the course of the day and that when he finished it he gave the letter to Mr McCutcheon. Mr McCutcheon's initial evidence was that he had been handed the letter during the meeting and he concluded it must therefore have been written prior to the meeting, showing that Mr Gallagher had pre-determined the dismissal.

[15] In view of how long it took after that meeting until there was any attempt to record the events of it, let alone give evidence about it, the Authority is not surprised that Mr McCutcheon's recollection may have become dimmed with time. He fairly acknowledged this, especially when asked to look at some of the comments in the letter referring to things supposedly said during the meeting, and which therefore suggest the letter was written after it. I accept that was the case. The significance of the letter is no more than a notice of termination of employment given in accordance with the terms of the employment agreement after that advice had earlier been given orally.

[16] I find from the circumstances that Mr McCutcheon's employment was terminated by the act of dismissal carried out by Mr Gallagher. It is clear that Mr McCutcheon did not resign his employment, although he had invited that possibility earlier, depending on whether Mr Gallagher confirmed he wanted him to resign, and during the 2 September meeting he rejected resignation, upon being asked by Mr Gallagher if that was what he was going to do.

[17] In his statement in reply Mr Gallagher described the termination as “*a mutual decision although one brought about at the initial instigation of Mr McCutcheon on the basis that he had other employment to go to.*” Although Mr Gallagher conceded to the Authority that “*technically*” he had dismissed Mr McCutcheon, he viewed this as a formality or an act signifying the end of the relationship, following Mr McCutcheon’s declaration of complete loss of faith in him as his employer.

[18] It seems likely to the Authority that Mr McCutcheon’s disenchantment with his employer and his employment went deeper than an irksome delay of a week or two in having his review carried out by Mr Gallagher. Whatever unrest he might have felt in the job, Mr McCutcheon did not talk to Mr Gallagher about that before sending his agitating email of 31 August.

### **Whether dismissal justifiable**

[19] Having determined that Mr McCutcheon was dismissed, the Authority must decide whether that action of the employer was justified in the circumstances.

[20] The test of justification is given at s 103A of the Employment Relations Act 2000; whether a dismissal is justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[21] As noted earlier, the more usual grounds for justification such as misconduct, non-performance or genuine redundancy, are completely absent from this case.

[22] During the investigation meeting the Authority asked whether a situation of incompatibility might have developed between Mr Gallagher and Mr McCutcheon. Mr Gallagher said in a sense that became the situation after the meeting of 2 September. He told the Tribunal that he had found the behaviour of Mr McCutcheon at that meeting incomprehensible, because after he had raised an issue about the salary review as he was entitled to do, Mr McCutcheon was told there would be a procedure followed but then when there was a delay of about two weeks this was viewed by Mr McCutcheon as a “*hanging offence.*”

[23] The Authority is satisfied that the statutory test of justification has been met in this case. I find that Mr McCutcheon unequivocally renounced his employment, a

relationship which is required to be built on trust and confidence, when he declared his total loss of faith in Mr Gallagher and confirmed that he could no longer work with his employer. With that the heart and soul of the employment relationship departed, leaving it only for Mr Gallagher to formally declare the termination by giving notice under the terms of the employment agreement.

[24] I accept as reasonable Mr Gallagher's assessment made at the time that he had no realistic alternative and that if Mr McCutcheon was not going to resign then he was justified in recognising the ending of the relationship by giving Mr McCutcheon notice. Having to just put up with a terminally broken relationship was not a real or reasonable alternative, more so in the relatively intimate working environment of Mr Gallagher's firm.

[25] I am satisfied that during the course of the meeting Mr McCutcheon was quite considered, rational and deliberate in the way he addressed his remarks to his employer Mr Gallagher and had not lost control of himself. Mr McCutcheon has acknowledged that was robust and provocative in addressing his employer Mr Gallagher. As this had not started out as a disciplinary meeting in any sense, it was not a situation requiring representatives to be available during the meeting.

[26] I am satisfied that in so far as one was required, there was an adequate cooling off period after Mr Gallagher had issued notice to Mr McCutcheon. It occurred during the one month period of notice that was worked out by Mr McCutcheon.

[27] Mr Gallagher has commended Mr McCutcheon for his exemplary behaviour during that time, so it is clear that cordial relations were able to be maintained between the two. There was seemingly nothing to prevent either of the two lawyers from approaching the other to sit down and review what had taken place on 2 September, to see whether the termination would proceed or whether the employment could be resumed. It is understandable why Mr Gallagher may have been disinclined to do this, as Mr McCutcheon had given him reason to believe that he was leaving for other employment, a possibility he had referred to in his email of 31 August 2004.

[28] Viewing justification on an objective basis as required by s 103A of the Act, the Authority should not disregard the particular profession practiced by both Mr Gallagher and Mr McCutcheon. They are articulate and intelligent people practicing a profession which places a high value on honesty, integrity and sincerity.

Mr McCutcheon was not a young person relatively inexperienced in employment matters but was someone trained to have an understanding of legal relationships and the importance of expressions of intention by the parties to those. Mr Gallagher was entitled to take Mr McCutcheon at his word. In the context of their professional background and association, to have applied Mr Patterson's elaborate 'do's and don't's list' of procedural fairness would have been unnecessarily pedantic and therefore beyond the requirements of employment law.

### **Determination**

[29] Accordingly, the determination of the Authority is that the dismissal of Mr McCutcheon by Mr Gallagher was justified. Mr McCutcheon is not entitled to any remedies as claimed by him under the Employment Relations Act.

### **Was a personal grievance raised by Mr McCutcheon?**

[30] Although Mr Gallagher has not taken issue with the raising of a grievance by Mr McCutcheon, I consider that question to be strongly arguable for the following reasons. The communication by which the grievance was purportedly raised with Mr Gallagher was Mr Patterson's email sent on 17 December 2004. In its brevity the email does not expressly state how Mr McCutcheon wanted Mr Gallagher to resolve the grievance declared curtly by that communication to have been raised.

[31] Although in submissions Mr Barter acknowledged that the email was "*technical notice*" of a claim, giving notice is not the same thing as "*raising*" a grievance.

[32] In *The Board of Trustees of Te Kura Kaupapa Motuhakeo Tawhiuau v. Edmonds* unreported, 16 May 2008, AC 14/08, the Employment Court reviewed current case law about the requirements for raising a grievance. The Court referred to its earlier judgment in *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517, where a communication from a lawyer was held in the circumstances not to constitute the raising of a grievance, for reasons which included the following:

*... so it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment .... What is important is that the employer is made aware sufficiently of the*

*grievance to be able to respond as the legislative scheme mandates. ... An employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

(my underlining)

[33] As well as the general law, the parties' written employment agreement at Schedule B required Mr McCutcheon to take reasonable steps to make Mr Gallagher aware that he was alleging there was a personal grievance;

*..... that the employee wants the employer to address.*

[34] A bare declaration that a personal grievance exists does not expressly make the employer aware that the employee wants the grievance to be addressed, let alone how he wants it to be addressed. This is the point decided in the *Creedy* case as referred to in the *Edmonds* case (both above).

[35] This was a point taken up by Mr Gallagher in his statement in reply when he said the following about the termination of Mr McCutcheon's employment:

*The applicant made no complaint or comment at all. It was only the most brief of notes sent on almost the last working day of the year (and beyond which the statutory time for indicating an employment dispute would expire), that there was any intimation whatsoever of the disagreement by the applicant of the termination of his employment in any way.*

[36] As the cases show, intimating disagreement is not by itself sufficient to raise a grievance. Mr Gallagher also referred to the failure by Mr McCutcheon as a qualified solicitor to prosecute a claim of this sort in a timely way, saying that it showed a lack of good faith as required under the Act. He stated:

*This deprives the employer of the ability to deal with the matter as it arose and calls into question the bona fides of the applicant in general.*

[37] After Mr Patterson had written his brief email starkly asserting a grievance, there was then total silence and inactivity as between Mr Gallagher and Mr McCutcheon in relation to the termination of the latter's employment. The only communication between them was about the application Mr McCutcheon had made to the Law Society to be able to practice on his own account. The grievance was not apparently addressed further.

[38] The next action with regard to the termination did not occur until September 2007, when the statement of problem was lodged in the Authority. Just as the bare assertion of a grievance was contemptuous of the grievance procedure and its purpose, lodging a claim in the Authority two and half years later without any attempt having been made to resolve the matter by mediation was also dismissive of the requirements of the Employment Relations Act. The parties had to be directed to mediation eventually.

[39] I have considered whether Mr Gallagher could be regarded as having given consent to the late raising of a grievance, either by conduct or in any other way. His conduct for nearly three years amounted only to silence and inactivity, and arguably was no form of consent. As well, of course, the stark assertion of a grievance gave him no idea as to what Mr McCutcheon wanted done to resolve that problem, whether that was reinstatement, reimbursement of wages, payment of compensation, an apology, or any of the many other ways that are the subject of such a request.

[40] When Mr Gallagher was served with the statement of problem he responded to the claim by lodging a statement in reply, and he engaged further when he attended mediation. Neither of those steps taken by him could be regarded as consent, as they were both mandatory by law. The statement in reply was a matter of regulatory requirement and the attendance at mediation was directed by the Authority.

[41] Although it seems Mr Gallagher regarded himself as having been given notice of a grievance by the December email, this may have been a mistake of law as much as fact, and he therefore may not have been prevented from raising a jurisdictional point in this case if he had wished to.

[42] As no issue has been taken during the investigation with the raising of the grievance, the Authority makes no final determination about that matter.

### **Non-publication order**

[43] The Phobic Trust letter produced to the Authority from G Philip dated 15 February 2008, is permanently suppressed from publication pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000.

**Costs**

[44] Costs are reserved. If there is any question, the Authority expects the parties to try and resolve it themselves. If application must be made for costs, memoranda may be filed in the Authority in the usual way.

A Dumbleton

**Member of the Employment Relations Authority**