

**Attention is drawn to  
the order prohibiting  
publication of certain  
information in this  
matter**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 80  
3134200  
3135481

BETWEEN	HAMISH WYLIE Applicant (3134200) Respondent (3135481)
AND	MDL CIVIL & ENGINEERING LTD Respondent (31234200) Applicant (3135481)

Member of Authority:	Eleanor Robinson
Representatives:	Deirdre Watson, counsel for the Applicant Matthew McGoldrick, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence	22 January 2022 from the Applicant 2 February 2022 from the Respondent
Determination:	09 March 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Hamish Wylie, claims that he was unjustifiably dismissed as General Manager on 22 December 2020 by the Respondent, MDL Civil & Engineering Ltd (MDL).

[2] Mr Wylie also claims that he was unjustifiably disadvantaged by MDL.

[3] Mr Wylie further claims that he is entitled to a profit share payment by MDL.

[4] MDL denies that Mr Wylie was dismissed on 22 December 2022 and claims that he was offered and accepted ongoing employment with MDL in a different role from 5 January 2021.

[5] In relation to the unjustifiable disadvantage grievance, MDL claims that it was raised outside of the 90 day statutory time limit set out in s 114(1) of the Employment Relations Act 2000 (the Act), and it does not consent to it being raised out of time.

[6] MDL further claims that Mr Wylie has breached provisions of his employment agreement.

[7] This determination addresses two issues which have arisen as preliminary matters: one concerns a request by Mr Wylie for information to be provided by MDL; the second concerns whether or not the claim of a disadvantage grievance was raised out of time by Mr Wylie, and if so, in the absence of consent by MDL, leave should be granted to raise it out of time.

#### **Non-publication orders**

[8] **Pursuant to clause 10 (1) of Schedule 2 of the Act, I order that the content of the draft financial statements to be provided by MDL for the period ending 31 March 2021 is subject to a non-publication order.**

[9] **Pursuant to clause 10 (1) of Schedule 2 of the Act, I order that the reference to the amount of MDL's net operating profit for the period ended 31 March 2020 is subject to a non-publication order.**

#### **Note**

[10] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions and affidavits from the parties.

#### **Issues**

[11] The issues to be determined by the Authority are whether or not:

- The Authority should call for information and issue witness statements as requested by Mr Wylie to be supplied by MDL?

- Mr Wylie raised his personal grievance within the 90 day statutory time limit, and if he failed to do so, should permission be granted for him to raise a claim outside of the statutory time frame?

### **Brief Background**

[12] Mr Wylie commenced employment with MDL on 18 November 2019 as General Manager. He was employed pursuant to an individual employment agreement dated 23 August 2019 (the Employment Agreement).

[13] Mr Wylie's remuneration package comprised an annual salary of \$275,000.00 and a 10% profit share, calculated on the annual net operating profit of MDL.

[14] The section of Schedule A of the Employment Agreement entitled "Remuneration" related to the profit share scheme. It set out the basis of the performance bonus in clause 2:

1. ...
2. A performance bonus calculated as 10% of the net operating profit the employer applying the calculation of net operating profit but accepting that work carried out by the company for clients associated with the employer including Murphys Development Ltd, Homestead Bay Trustees Limited and Mangawhai Central Ltd and any others in which any of those shareholdings have a further shareholding are to be costed such that the client will receive the benefit of not less than 15% discount at normal commercial rates.

#### *April 2020 Restructuring*

[15] MDL underwent a restructuring exercise on or about April 2020 which resulted in a change to the MDL senior leadership team. As a result of that process a General Manager – Finance and Compliance was identified.

[16] Mr Wylie relocated to Mangawhai, where he owned and lived in a property, on or about June 2020, and undertook the role of General Manager at the site being developed by MDL for Mangawhai Central Limited (the Mangawhai Development).

#### *December 2020 Restructuring*

[17] On 9 December 2020 MDL commenced an organisation-wide restructuring process. As part of that process MDL proposed changes to the senior management team, these included renaming the role of General Manager – Finance and Compliance to Chief Operating Officer (COO).

[18] It was also proposed that in addition to all Head Office roles, all Senior Site Supervisors and all Site Technical management roles for each of the companies: Murphys Development Limited (Murphys), Homestead Bay Trustees Limited (Homestead) and the Mangawhai Development report to the COO.

[19] In regard to the Mangawhai Development, MDL proposed:

- a) Disestablishing the role of General Manager;
- b) creating the role of Senior Site Supervisor; and
- c) creating an additional role of Site Supervisor (x 3)

[20] During a meeting held on 16 December 2020 which Mr Wylie attended with Ms Watson, a letter was provided to MDL setting out Mr Wylie's feedback to the proposal and making requests for information.

[21] On 17 December 2020 MDL responded to the feedback and to the requests for information, including information relating to the issue of redeployment. MDL set out that:

- i. The proposed role of COO was substantially similar to the role of General Manager – Finance and Compliance;
- ii. If the proposal proceeded, Mr Wylie would likely be offered the proposed Senior Site Supervisor role at Mangawhai, and
- iii. The outline of the possible terms of such offer.

[22] On 21 December 2020 Ms Watson provided Mr Wylie's additional feedback to MDL.

[23] On 22 December 2020 MDL confirmed its decision in relation to the proposed feedback. In particular it confirmed that it would be disestablishing the role of General Manager, creating the role of Senior Site Supervisor, and offering that role to Mr Wylie.

[24] MDL provided a proposed offer of employment to Mr Wylie.

[25] On 29 December 2020 Ms Watson wrote to MDL seeking documentation in relation to the calculation of the contractual entitlement to a profit share in the Employment Agreement.

[26] MDL responded on 31 December 2020 confirming that the calculations had not been undertaken and could therefore not be provided but would be provided when available. MDL also confirmed that it was unable consequently to confirm when any contractual entitlement would be paid.

*Events during January and Disciplinary Process February 2021*

[27] Mr Wylie signed and returned the proposed individual employment agreement accepting the role of Senior Site Supervisor on 5 January 2021. He commenced in the role that same date.

[28] Also on 5 January 2021 Ms Watson wrote to MDL on behalf of Mr Wylie advising that a detailed personal grievance letter would be provided.

[29] On 7 January 2021 Mr Wylie wrote to the Chairman of MDL about concerns he had regarding conduct within MDL and alluding to the possible making of a complaint to the Serious Fraud Office.

[30] On 11 January 2021 SBM Legal wrote to Ms Watson seeking details in relation to the nature of the personal grievances to be raised by Mr Wylie in order that it could respond. MDL also sought undertakings in relation to the provision of estimated calculations of the profit share entitlement and confirmed that Mr Wylie should liaise with the Chairman in relation to the assertions made by Mr Wylie in the 7 January 2021 correspondence.

[31] On 12 January 2021 Ms Watson wrote to MDL raising certain of the personal grievances subsequently set out in the Statement of Problem filed on 26 March 2021.

[32] On 16 February 2021 MDL wrote to Mr Wylie requiring him to attend a disciplinary meeting on 22 February 2021 and respond to allegations of serious misconduct.

[33] MDL proposed suspending Mr Wylie during the disciplinary process and sought his responses to that proposal.

[34] SBM Legal responded on behalf of MDL to the personal grievances raised by Mr Wylie on 17 February 2021, confirming that Mr Wylie was out of time to raise personal grievances in relation to events in April 2020, and that it did not consent to any of the personal grievances being raised out of time.

[35] On 17 February 2021 Ms Watson:

- a) provided Mr Wylie's response to the suspension proposal;
- b) requested that the disciplinary meeting be rescheduled; and
- c) responded in relation to the provision of estimated calculations of the contractual entitlement to a profit share and the inability of undertakings to be provided by Mr Wylie and/or Ms Watson in relation to these.

[36] On 23 February 2021 in a letter to Ms Watson, MDL stated that it had considered Mr Wylie's responses about the proposed suspension and confirmed he would be suspended for the duration of the disciplinary process. It was confirmed that the disciplinary meeting would occur on 3 March 2021.

[37] On 24 February 2021 Mr Wylie wrote to MDL confirming his resignation.

[38] MDL confirmed that same day that it accepted the resignation and did not require Mr Wylie to provide a period of notice.

**Request for information and witness summons**

[39] Mr Wylie applies for the Authority to exercise its power to call for the following information:

- a) Financial statements for MDL for the year ended 31 March 2020, together with GST returns for that period;
- b) If final financial statements for MDL are not yet prepared for the year ended 31 March 2021, then management or draft financial statements for MDL for the year ended 31 March 2021, together with GST returns for that period; and
- c) Copies of all file notes, messages, texts, emails and documents, board papers, board minutes and other information (whether electronically stored or otherwise), in the possession, power and control of MDL and dated between August 2019 and February 2021 (being the duration of Mr Wylie's employment) relating to:
  - i. the alleged restructuring of MDL in December 2020;
  - ii. Mr Wylie and his employment with MDL and/or his profit share entitlement;
  - iii. The alleged demotion of Mr Wylie and restructuring of MDL that MDL claims took place on or about 24 April 2020 whereby Mr Wylie was demoted to "General Manager Mangawhai Heads" and was removed from the senior leadership team; and
  - iv. The motivation for the investigation commenced by MDL against Mr Wylie on 16 February 2021 including specifically any documents (emails, texts and messages between the Managing Director and the Chairman of MDL) relating to an investigation of Mr Wylie's complaint against the Managing Director.

[40] Mr Wylie applies for the Authority to issue a witness summons in respect of Hongbiao Chen and Dan Xiao to attend before the Authority and bring the documents referred to in the preceding paragraph that are within their possession, power and control, specifically all Board papers and minutes relating to the matters identified in the preceding paragraph.

[41] MDL opposes the Application on the basis that it is effectively seeking discovery, which the Authority has no power to order. MSL's position is that whilst the Authority has powers to call for evidence and information from parties, such is constrained by certain principles, including that such information must be relevant, and helpful to the Authority in the conduct of its investigation.

[42] MDL opposes the Application on the basis that certain of the information sought is irrelevant. Moreover that the application for witness summonses is an attempt to circumvent the Authority's processes by requiring discovery from persons not parties to the underlying matter before the Authority.

[43] MDL also notes that certain commercially sensitive and confidential matters relating to the profitability of MDL arise in relation to the Application. Accordingly MDL submits that, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) , non-publication orders should be made in relation to the contents and details of its financial statements.

[44] The Authority has power to call for evidence and information from the parties pursuant to s 1260 (1)9a) of the Act which states:

**160 Powers of Authority**

(1) The Authority may, in investigating any matter,—

- (a) call for evidence and information from the parties or from any other person:
- (b) require the parties or any other person to attend an investigation meeting to give evidence:
- (c) interview any of the parties or any person at any time before, during, or after an investigation meeting:
- (d) in the course of an investigation meeting, fully examine any witness:
- (e) decide that an investigation meeting should not be in public or should not be open to certain persons:
- (f) follow whatever procedure the Authority considers appropriate.

(2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not

[45] In accordance with case law, certain principles have been developed in relation to how the Authority exercises its powers in this area. These include:

- i. Whilst having no power to order discovery, the Authority can, and frequently does, seek information from parties to assist it with its investigation. In the

exercise of that power the Authority is guided (though not bound by) the rules in the Evidence Act 2006, particularly in respect of relevance.<sup>1</sup>

- ii. An applicant to the Authority cannot circumvent the Authority's processes by seeking discovery by a witness summons. If a witness summons effectively requires discovery, that is irregular and an abuse of process.<sup>2</sup>
- iii. In exercising its power to call for information, the Authority has no power to override legal professional privilege.<sup>3</sup>

**Should the Authority require MDL to provide financial statements for the year ended 31 March 2020, together with GST returns for that period?**

*Applicant's submissions*

[46] The Applicant submits that documents have been repeatedly requested from MDL relating to the profit share calculation.

[47] It is submitted that Mr Wylie had expected the net profit position for the year ended 31 March 2020 to be significantly higher than circa \$600,000.00. Prior to accepting employment it is submitted that it was represented to Mr Wylie that the net operating profit of MDL would range from \$600,00.00 to \$1,500,000.00 per annum, he therefore expected to receive an annual profit share payment within that range, depending on the performance of MDL.

[48] It is submitted that he is entitled to ask for the actual financial statements or other financial documents that will verify the net profit calculations including what items were expensed that financial year.

[49] It is submitted that Mr Wylie is also entitled to the same type of documents for the year ended 31 March 2021. Mr Wylie deposes in his affidavit that he is aware that billings at the date of the alleged unjustified dismissal were in excess of \$22 million, likely to \$30 million for the year ended 31 March 2021.

[50] Counsel submits that Mr Wylie has offered to provide an undertaking that he will not use such documents for any purposes but for these proceedings. However he would need to disclose them to counsel and to an accountant, the latter is required because Mr Wylie is entitled

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<sup>1</sup> cf: *Morgan v Wanganui College Board of Trustees* [2014] NZCA 340 and *UXK v Talent Propeller Limited* [2021] NZEmpC 167

<sup>2</sup> Cf: *new Zealand Railways Corporation v Goston* [1994] 1 ERNZ 237 at 239; *Auckland Council v George* [2013] NZEMPC 79 at [18]

to challenge any items which have been expensed into an account relying on expert accounting advice.

[51] It is submitted that it is not accepted that the information requested relating to the year ended 31 March 2021 cannot be provided until after July 2022.

*Respondent's submissions*

[52] It is submitted by MDL that in relation to the financial year ended 31 March 2020, Mr Wylie has been paid the contractual entitlement in the Employment Agreement.

[53] Further that MDL expressly accepted in paragraph 1.4 of the Statement in Reply to the Amended Statement of Problem dated 4 May 2021 that Mr Wylie had such a contractual entitlement which it would meet.

[54] Mr Duncan Napier, Managing Director of MDL deposes in his affidavit that on 30 July 2021, SBM Legal wrote to Ms Watson advising:

- a) MDL's net operating profit for the financial year ending 31 March 2020 was \$604,124.00.
- b) Pursuant to Mr Wylie's contractual entitlement in the Employment Agreement, for the period of his employment to which the period related, he was entitled to \$47,902.70 (gross), and MDL therefore sought details in order to make payment.

[55] On 30 July 2021, Ms Watson confirmed Mr Wylie's bank account details.

[56] On 5 August 2021, SBM Legal wrote to Ms Watson to confirm that MDL had made the applicable payment.

[57] Accordingly, payment of the contractual entitlement for the financial year ending 31 March 2020 has been made and received.

[58] On that basis it is submitted that there is no need for provision of any further information to assist the Authority in its investigation.

[59] It is submitted that there is no suggestion in the material filed by Mr Wylie that any issue in fact arises in respect of this particular payment. The assertion is made in the submissions for Mr Wylie that there were representations made to Mr Wylie that the net operating profit of MDL would range from \$600,000.00 to \$1.5 million per annum: "depending

on the performance of MDL". The net operating profit for the period in issue (\$604,000.00) was plainly in the range of what Mr Wylie asserts he expected.

[60] It is submitted that it is unclear why MDL's GST returns are relevant to this issue since they do not deal with the concept of net operating profit, which is referred to in the contractual entitlement. In no way would GST returns capture all matters relating to net operating profit, unlike employee wages and salaries which are not dealt with in GST returns but are plainly related to MDL's operating profit.

[61] It is submitted that GST returns are irrelevant to the Authority's investigation since they do not address the issue and should be declined.

[62] In respect of the request for financial documents for the year ended 31 March 2021 or management or draft financial statements for the year ended 31 March 2021 it is submitted that provision of management accounts, or draft financial statement, do not address the issue of the monies to which Mr Wylie is contractually entitled for the period ended 31 March 2021. It is only the final financial statements (when complete) that could be relevant to the Authority's investigation.

[63] It is submitted that MDL opposes providing management or draft financial statements but accepts that final statements for the period ended 31 March 2021 are relevant to the Authority's investigation.

[64] On the basis that the financial statements when complete will contain commercially sensitive and confidential information and if required to provide them by the Authority, MDL submits that, pursuant to clause 10 of Schedule 2 of the Act, non-publication orders should be made in relation to the contents of those financial statements.

[65] MDL also seeks that any non-publication order covers reference to the amount of the net operating profit for the period ended 31 March 2020.

[66] I find that on the basis that: (i) payment has been made by MDL in accordance with the contractual entitlement in the Employment Agreement for the financial year ending 31 March 2020, (ii) was received into Mr Wylie's bank accounts on 5 August 2021; and (iii) the amount paid as calculated accords with the range of profit within the expectations of Mr Wylie, I am not persuaded that any further information in respect of that period would assist the Authority.

[67] Accordingly I make no order for that information to be provided by MDL.

[68] The situation is different as regards the financial year ending 31 March 2021, for which the profit share entitlement for the relevant part of that period remains to be made to Mr Wylie.

[69] I accept that final statements for the year ended 31 March 2021 are not, and will not be completed as yet, and that, as submitted by counsel on behalf of MDL, only these are truly relevant to the quantum of monies to which Mr Wylie may be contractually entitled.

[70] However I also accept that Mr Wylie may consider that he requires some advance information in advance of the investigation meeting set down at the end of July 2022 to verify the net profit calculations.

**[71] I order pursuant to clause 10 (1) of Schedule 2 of the Act that MDL provide to Mr Wylie draft financial statements for the period ended 31 March 2021 subject to the following:**

1. The order does not cover provision of GST returns.
2. A non-publication order covering the content of the draft financial statements of MSL provided for the period ending 31 March 2021.
3. A non-publication order covering reference to the amount of the net operating profit of MSL for the period ended 31 March 2020 of \$604,124.00.

**Should the Authority grant the request for all documents in the power, possession and control of MDL during the duration of Mr Wylie's employment to be provided?**

[72] The amount of information requested by the Applicant is considerable and comprehensive, encompassing copies of all file notes, messages, texts, emails and documents, board papers, board minutes and other information (whether electronically stored or otherwise).

[73] In respect of the April 2020 demotion and restructuring, it is submitted on behalf of Mr Wylie that the information requested is required to establish that he never agreed to the restructure as had been asserted by Mr Napier.

[74] Mr Wylie submits that this is important in relation to the December 2020 restructuring because had he been part of the senior leadership team then this would have improved his chances of retaining his employment. It would have made him the natural choice to move into the COO role.

[75] The Applicant submits that if there had been a formal restructuring in April 2020 to which Mr Wylie had agreed, there would have been documentation in respect of this, but none has been provided despite being repeatedly sought by Mr Wylie.

[76] The Respondent submits that, as deposed by Mr Napier in his affidavit, that he has made a search in MDL's electronic files but has found no documentation pertaining to the relocation of Mr Wylie to Maunganui.

[77] Mr Napier further deposes that in relation to the December 2020 restructure, legal counsel was engaged.

[78] It is a principle that the Authority has no power to override legal professional privilege and I am not prepared to override this principle in the present case unless persuaded that legal professional privilege does not attach to an identified document.

[79] I observe that Mr Napier will be present at the substantive investigation meeting and therefore available to be questioned by the Authority and cross-examined by counsel for the Applicant. This will assist issues of credibility concerning the search for documentation and the point at which legal professional privilege ensued.

[80] I note that there is a divergence of views between Mr Wylie and Mr Napier as to whether Mr Wylie agreed to the move to Mangawhai and the implications of it, and to Mr Napier's search for documentation. These involve an assessment of credibility.

[81] Assessments of credibility are not unique in Authority investigations and the Authority is experienced in this area.

[82] Moreover in this case there is a detailed restructuring proposal which has been provided as part of the evidence already filed and will be highly relevant to the genuineness of the restructuring in December 2020.

[83] Mr Wylie seeks evidence relating to the investigation commenced on 16 February 2021 including documents relating to any complaint about Mr Napier.

[84] Mr Wylie submits that the investigation was motivated by his personal grievance and specifically the complaint made about Mr Napier in January 2021.

[85] As observed by the Respondent in its submissions, motivation is a state of mind and as such difficult to ascertain.

[86] Whether or not MDL had sufficient grounds for its decision to commence disciplinary proceedings against Mr Wylie for serious misconduct will be ascertainable from the material relating to that process which will be before the Authority in relation to the investigation into justification in relation to the allegations.

[87] I find that what the Applicant is effectively seeking is discovery, and I am not persuaded that all of the information sought is necessary for the purposes of the Authority's investigation.

[88] Accordingly, I make no order for provision of the documentation sought by the Applicant.

**Should witness summons be issued for Hongbiao Chen and Dan Xiao to attend before the Authority and bring the documents sought by the Applicant?**

[89] I have made orders regarding the documentation sought by the Applicant.

[90] To issue summons to require the attendance of Mr Chen and Mr Xiao, neither of whom were parties to the underlying issues between Mr Wylie and MDL, and require them to bring the requested documentation, appears to be an attempt to obtain documentation by another means when I have already made decisions on the requests for documentation in the preceding paragraphs.

[91] It is a principle that the Authority's processes cannot be circumvented by a witness summons.

[92] To clarify, the request for witness summons for Mr Chen and Mr Xiao to provide evidence is denied.

**Did Mr Wylie raise his unjustifiable personal disadvantage grievances within the statutory limitation period pursuant to s 114(1) of the Act?**

[93] Mr Wylie claims that he suffered a disadvantage in employment in relation to his alleged demotion in April 2020 when he was removed from the senior leadership team and lost some of his General Manager duties.

[94] Mr Wylie did not raise a personal grievance in relation to his alleged demotion on or about 24 April 2020 inside the statutory 90 day time period i.e. by 23 July 2020. The personal grievance was raised in the personal grievance letter sent by Ms Watson on 12 January 2021.

[95] MDL denies that Mr Wylie raised a personal grievance of unjustifiable disadvantage within the 90 day period required by s 114(1) of the Act. To the extent that Mr Wylie was dissatisfied with the alleged action, it claims it both occurred and came to his notice on or about 24 April 2020.

[96] Pursuant to s 114(1) of the Act an employee must raise a personal grievance within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[97] In the Employment Court case *Drayton v Foodstuffs (South Island) Ltd* Judge Travis accepted a submission that: “The words “came to the notice of the employee” are synonymous with knowledge of the action on the part of the employee”.<sup>4</sup>

[98] Mr Wylie claims that knowledge of the April 2020 restructuring only came to his attention during the 16 December 2020 consultation meeting.

*When did Mr Wylie have the requisite knowledge of the alleged demotion?*

[99] MDL claims that in April 2020 there had been a reorganisation affecting the senior management team which followed Mr Wylie moving to Mangawhai to manage the site being developed there. Mr Wylie owned a property in Mangawhai and he lived at the property and managed the Mangawhai Development as General Manager.

[100] In his affidavit Mr Napier deposes that he had been advised that there had been discussion with Mr Wylie about the restructure in April 2020. Mr Wylie denies this discussion occurred.

[101] In the Amended Statement of Problem (ASOP) received by the Authority on 23 April 2021 it is stated that on 5 June 2020 Mr Napier told Mr Wylie that he would assume focus on setting up the Mangawhai Heads development site. It is further stated that Mr Wylie: “ was busy with the Mangawhai Heads development, which was in essence the role of a Senior Site Manager”.<sup>5</sup>

[102] On that basis from June 2020 Mr Wylie had knowledge that his role had become akin to that of a senior site supervisor, but there is no evidence that he raised this as an issue with MDL. In fact Mr Napier deposes in his affidavit his understanding that Mr Wylie was happy with the situation.

[103] I accept that the knowledge that he was no longer part of the senior management team may not have been obvious to Mr Wylie if he was continuing to operate and perform the duties associated with the General Manager role as part of the senior management team, despite the role he perceived himself as fulfilling following the move to Mangawhai.

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<sup>4</sup> *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 at [529]

<sup>5</sup> ASOP paragraph 2.12

[104] However that situation appears to have changed by September 2020. The ASOP asserts that Mr Wylie became aware that the number of emails he was receiving had dwindled and a number of General Manager duties had been removed from him and states in paragraph [2.11]: “Between mid to late September 2020, Mr Wylie became gradually aware he was no longer being included as part of the senior leadership team”, with examples being provided.<sup>6</sup>

[105] On that basis I consider that by late September 2020 Mr Wylie had sufficient information and knowledge to have a reasonable belief that MDL had acted unjustifiably towards him and to raise a personal grievance.

[106] Mr Wylie did not raise the unjustifiable disadvantage personal grievance until the letter from Ms Watson dated 12 January 2021.

[107] I determine that Mr Wylie did not raise his unjustifiable disadvantage personal grievance within the statutory 90 day time period.

*Should Mr Wylie be granted leave pursuant to s.114(4) and s 115 of the Act to raise a personal grievance outside the statutory 90 day time period?*

[108] I have determined that the personal grievance for unjustifiable disadvantage was raised on 12 January 2021 and is outside the 90 days statutory time limit set out in s 114(1) of the Act. MDL does not consent to the personal grievance being raised outside of the statutory time frame.

[109] In those circumstances Mr Wylie seeks leave to raise a personal grievance outside of the statutory time frame Section s 114 (4) of the Act provides that the Authority may grant leave if it::

- 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

[110] Mr Wylie seeks leave on the basis of exceptional circumstances as set out in the ASOP, namely that :

- i. He was unaware of the legal ramifications of failing to raise the personal grievance within 90 days ;

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<sup>6</sup> ASOP paragraph 2.11

- ii. He was unaware of the consequences for his employment status and any subsequent restructuring as a consequence of earlier restructuring;

[111] Exceptional circumstances are set out in s 115 of the Act but the reasons cited in the ASOP are not covered in that section of the Act . I set out s 115 in full below:

**Section 115 Further provision regarding exceptional circumstances under section 114**

For the purposes of section 114(4)(a), exceptional circumstances include-

- 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)
- 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;
- 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 obligations under section 120(1) to provide a reason for the dismissal.

[112] The meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune* as being those which are "unusual, outside the common run, perhaps something more than special and less than extraordinary"<sup>7</sup>.

[113] The Employment Agreement contains in Schedule B an explanation of the steps to be taken in resolving an employment relationship problem. Mr Wylie has initialled the page. It is set out clearly that a grievance must be raised by the employee within 90 days.

[114] Mr Wylie submits that he was 'unaware of the legal ramifications' of not raising the personal grievance within 90 days. Whether or not Mr Wylie was aware of the legal ramifications is not the issue, the issue is whether Mr Wylie raised his personal grievance within 90 days of becoming aware of it.

[115] I have found that Mr Wylie failed to do so, and therefore find no ground for granting leave to file the personal grievance out of time on exceptional basis in relation to the first ground.

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<sup>7</sup> *Wilkins v Field & Fortune* [1998] 2 ERNZ 70 at pg 77

[116] In relation to the second ground I do not find, given my conclusions on when the circumstances giving rise to the personal grievance arose, that this second reason is 'exceptional'.

[117] I determine that there are no grounds for granting leave for Mr Wylie to raise his unjustifiable disadvantage personal grievance out of time.

**Is it just to grant Mr Wylie leave pursuant to section 114(4)(b)?**

[118] On the basis that I have not found the delay in Mr Wylie in making an unjustifiable disadvantage personal grievance claim to have been caused by exceptional circumstances pursuant to s 114 (4) and s 115(a) of the Act, I do not have to determine whether it would have been just to grant him leave to proceed with unjustifiable disadvantage personal grievance.

**Costs**

[119] Costs are to be determined following the final outcome.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**