

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 242  
5160416 & 5370154**

BETWEEN JANE COX  
Applicant

AND SILVER FERN FARMS LTD  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Maevis Watson, Advocate for Applicant  
Tim Cleary, Counsel for Respondent  
Investigation Meeting: 29 May 2012 at Whangarei  
Submissions received: 29 May, 6 June & 19 June 2012 from Applicant  
29 May, 5 & 14 June 2012 from Respondent  
Determination: 17 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Jane Cox, had been employed as a Meat Processor by the Respondent, Silver Fern Farms Ltd (SFF), when she first injured her back in 2004 whilst working in the boning department. In March 2008 Ms Cox's back condition began to deteriorate and she was diagnosed as having a work related injury and placed on alternative duties (light duties).

[2] SFF arranged for Ms Cox to attend medical examinations during the latter part of 2008 and a report prepared by Mr L J Phillips, an Orthopaedic Surgeon, having confirmed that she had been diagnosed as having a pre-existing degenerative back condition, SFF had notified Ms Cox that her rehabilitation for the work related injury had been exhausted on 18 December 2008

[3] Following a number of meetings with Ms Cox and the obtaining of an Occupational Therapist report, SFF wrote to Ms Cox on 2 March 2009 advising her that her employment was being terminated with effect from 7 March 2009.

[4] Ms Cox claims that she has been unjustifiably dismissed by SFF as a result of SFF having accepted her injury as being non-work related and having dismissed her prior to all avenues of resolution in relation to her injury having been exhausted.

[5] Ms Cox further claims that she has been discriminated against in her employment in contravention of the Human Rights Act 1993.

[6] SFF denies unjustifiably dismissing Ms Cox, and claims that her dismissal was justifiable. SFF also denies that Ms Cox had been discriminated against in her employment.

### **Issues**

[7] The issues for determination are whether:

- Ms Cox was unjustifiably dismissed by SFF.
- Ms Cox was discriminated against in her employment by SFF

### **Background Facts**

[8] SFF is a co-operative society involved in the procuring, processing and marketing of sheep, lamb, beef and venison. There are processing plants at various locations throughout New Zealand. Ms Cox had been employed as a Meat Processor for approximately 10 years at the processing plant based in Dargaville (the Plant) at the time of her dismissal.

[9] Ms Cox's duties as a Meat Processor involved her processing meat on the trimming table, which could involve large cuts of meat weighing up to 15 kg (boning department work); and packing meat in 27 kg cartons and pushing them along conveyor belts (packing department work).

### *Management of ACC Claims*

[10] Mr Dean McNaught, Plant Manager, explained that SFF is in the Partnership Programme with ACC under the Accident Compensation Act 2001, in accordance with which all work related injuries are to be dealt with by SFF acting as an agent for ACC.

[11] This involves deciding whether or not a work related injury or a gradual process injury has occurred, what entitlements are applicable, and on rehabilitation options. SFF has

specialist employees who are based in Christchurch and responsible for the case- management of all claims made by employees of SFF under the Accident Compensation Act 2001.

[12] Mr McNaught explained that SFF employees are entitled to the same rights and are under the same obligations as any other claimant under the Accident Compensation Act 2001.

*Light duties*

[13] Ms Cox was employed subject to an individual employment agreement which was based on the terms and conditions as set out in the prevailing collective agreement between SFF and the New Zealand Meat Workers and Related Trades Union Incorporated ("NZMWU").

[14] Clause 21 of the collective agreement in force from 1 March 2008 until 31 October 2009 (the Collective Agreement) set out the provisions relating to Sickness, Domestic and Injury. The provisions relating to light duties were set out at clause 21(i) and include:

(i) *Employees unable to perform work due to injury may be employed on alternative or selected work provided:*

...

(iii) *The company, in accordance with the Injury Prevention Rehabilitation and Compensation Act 2002, may cease to offer alternative work at which time the employee shall return to accident compensation (where appropriate) until they are cleared for full duties.*

*Injury and medical interventions*

[15] Ms Cox said she had first injured her back in 2004 when she had been working in the boning room, packing and lifting boxes weighing up to 27 kgs. After a period of physiotherapy Ms Cox said she had been able to resume full duties.

[16] In March 2008 Ms Cox explained that her back condition had deteriorated and she had been placed on light duties. On 14 May 2008 Ms Cox had lodged a work injury claim. On or about this time Ms Cox had attended SFF's preferred medical centre, the White Cross clinic in Whangarei, where she had seen Dr Michael Klaper.

[17] Ms Cox said Dr Klaper had issued a medical certificate stating that she had a thoracic sprain and compression swelling, and he had advised that she remained on light duties. Whilst on light duties Ms Cox said her duties comprised office work, reception, filing, quality control on prime cuts of packed meat, and the printing of labels.

[18] Mr Dean McNaught, Plant Manager, said that because the normal recovery time for her type of injury had been exceeded, in May 2008 SFF had referred Ms Cox to Dr Bruce Gallop, an Occupational Medicine Specialist, for a specialist medical opinion. In his report dated 2 May 2008 Dr Gallop confirmed that he had diagnosed Ms Cox as suffering from degenerative changes in her spine, and stated that: “*she can be regarded as permanently unfit to carry out heavy manual work or for those occupations where she has to carry out forceful rotation of her thoracic spine.*”

[19] In August 2008 SFF sought another medical opinion and Ms Cox was assessed by Dr John Mayhew, a qualified medical specialist at the Millennium Institute of Sport and Health. Dr Mayhew diagnosed Ms Cox as suffering from: “... *acute on-chronic back pain probably on the basis of a degenerative disc disease*”. Dr Mayhew observed that Ms Cox had degenerative changes in her spine which had probably been aggravated by her work. Dr Mayhew also recommended that Ms Cox avoid repetitive heavy lifting and rotation movements of her spine.

[20] In late 2008 Ms Cox said that she had been advised that she was to attend an appointment with Mr Phillips, an Orthopaedic Surgeon who was based in Hastings. Ms Cox said she had been surprised that a nearer specialist based closer to Dargaville could not have been located; however she had been informed by SFF that Mr Phillips was their preferred specialist doctor.

[21] Ms Cox had been examined by Mr Phillips on 12 December 2008. In his report dated that same day Mr Phillips confirmed that he had diagnosed Ms Cox as having a degenerative disc disease which was due to a pre-existing condition and not to degeneration caused by a work gradual process claim. In the report, Mr Philips stated: “*I have indicated that her on-going symptoms are due to a pre-existing condition.*”.

[22] Mr Philips also commented that Ms Cox’s condition was: “*aggravated by the work undertaken in the packing department – ie, she was no longer constitutionally fit for the level of work demanded of her*”.

[23] On 6 January 2009 Mr Shane Palmer, the SFF Case Manager assigned to Ms Cox’s case, had written to her advising:

*As the effects of your strain are now wholly or substantially due to your pre-existing condition we must advise that ongoing entitlement to compensation and other entitlements are declined. We accept that this decision will cause you some inconvenience and as such*

*compensation entitlements will continue until the 23<sup>rd</sup> January 2009 to allow you time to make other arrangements.*

[24] Mr McNaught said that he had met with Ms Cox on 6 January 2009 and had given her a copy of Mr Phillip's report and a letter asking her to meet with him the following day to discuss her future placement within the Plant in light of the diagnosis that her injury may not have been work-related.

[25] Ms Cox said she had asked Mr McNaught what would happen if she had full clearance and Mr McNaught had responded that he would have to see what limitations might be placed upon a clearance, and what jobs would be available in the light of these limitations.

[26] Ms Cox explained that she had gone to see Dr Klaper following the meeting with Mr McNaught and had obtained a restricted duties medical certificate from Dr Klaper which had been provided to SFF.

*Meeting on 7 January 2009*

[27] The meeting on 7 January 2009 was attended, as were all the subsequent meetings, by Ms Cox, Mr Warren Clarke, a NZMWU delegate attending in a personal capacity to support Ms Cox who was not a union member, Mr McNaught and Mr Laurie Davies, Assistant Plant Manager. Mr Clarke made full notes at this, and subsequent meetings.

[28] Ms Cox said she had stated in the meeting on 7 January 2009 that she had been concerned that Mr Phillips had made what she considered to be a cursory examination and had decided on the basis of that examination that her symptoms were due to a pre-existing condition. Ms Cox said that it had been pointed out to Mr McNaught that Mr Philips had taken only one x-ray of her back and there had been no MRI scan.

[29] Mr McNaught said he had responded by saying that he could only act upon information with which he had been provided, and in this case it was that Ms Cox's injury was not degenerative but that she was affected by a pre-existing condition.

[30] During the meeting Ms Cox said she had asked what would happen next and Mr McNaught had explained that light duty work would no longer be made available to her, and that her entitlement to compensation would cease. Mr McNaught stated that he had advised Ms Cox that Mr Palmer would be writing to her to advise when the abatements would stop, that she could appeal that decision, and he had given her the forms from the SFF intranet and explained how an appeal claim could be made.

[31] Mr McNaught said that following this meeting Ms Cox had given him a copy of the medical certificate she had received from Dr Klaper; however this had been for restricted duties.

*Meeting on 16 January 2009*

[32] The next meeting took place on 16 January 2009 and Mr McNaught said he had explained that he had major concerns about Ms Cox's present and future well-being.

[33] At this meeting Ms Cox had provided a full medical clearance certificate issued by Dr Liz Humm; however she said that Mr McNaught had not accepted it on the basis that he did not believe Dr Humm had been given all relevant information.

[34] Mr McNaught said that he had not accepted the medical certificate on the basis that Dr Humm who was Ms Cox's own GP, had not been involved in the diagnosis or treatment of the injury to Ms Cox's back, and he had some doubt that she had been provided with full information by Ms Cox.

[35] Accordingly Mr Palmer had written to Dr Humm on 21 January 2009 asking for clarification of the situation. Dr Humm's response had not been received until 23 February 2009, however this confirmed that Mr McNaught's concern that Dr Humm had not been in possession of the full medical details was correct.

[36] Mr McNaught said that the meeting had concluded with an agreement to make further investigation.

[37] Mr McNaught said that on 20 January 2009 a full clearance for work certificate in respect of Ms Cox had been received by fax from Dr Klaper. Mr McNaught said that he had had some concern about how this had been obtained and he had asked the Plant Health and Safety Manager to follow it up. Mr McNaught said that the enquiries had revealed that the White Cross clinic in Whangarei had not been sent all the relevant information.

*Meeting on 23 January 2009*

[38] Mr McNaught said that at the meeting on 23 January 2011 he had read out the relevant sections from the medical reports from Dr Gallop and Mr Philips in which degeneration of the spine had been mentioned and that it was aggravated by tasks of heavy lifting and twisting.

[39] Mr McNaught said he had explained to Ms Cox that SFF could not allow an employee to return to work if there was a risk that they might re-injure themselves.

[40] Mr McNaught said Ms Cox had agreed that she knew her limitations, and the original injury having occurred by her lifting heavy cuts of meat while trimming, she would not be returning to that type of work.

[41] Mr McNaught had proposed that an Occupational Therapist assessment be completed given his concern about the risk of Ms Cox re-injuring herself. Ms Cox said she had agreed to this proposal and also agreed the Occupational Therapist could have access to the reports on her personal file.

#### *Occupational Therapist Assessment*

[42] Mr Clarke's notes stated that there had been a meeting with the Occupational Therapist, Mr Bohdan Pasternak, on 3 February 2009. Mr Clarke reported that Mr Pasternak had been shown around the boning room and the positions Ms Cox had assumed when she had been injured.

[43] In his report Mr Pasternak stated that:

*...medical reports from specialists.. have indicated that she has a degenerative back condition that may be agitated through her full work rotation role as a packer due to the need to twist repetitively and handle cuts of meat that can be heavy at times.*

*As such, a return to her full work role (grade C) may be symptom free for the short term but ultimately would not be appropriate as her ability to sustain this role may be compromised in the long-term as she would be susceptible to re-aggravation of her condition, and the rate of degeneration that may occur is unpredictable.*

[44] Ms Cox said at the Investigation Meeting that she had seen the assessment as positive, in that it had identified 19 tasks positions she could undertake without injuring her back, however she had accepted that she would not be able to undertake her previous position.

#### *Meeting on 23 February 2009*

[45] Mr McNaught said that at the meeting on 23 February 2009 the report from Mr Pasternak, which had been read by Ms Cox, Mr Clarke and Mr Bennett, who attended the meeting in his capacity as a representative to Ms Cox, was discussed.

[46] In his notes Mr Clarke recorded that Ms Cox and her representatives had been very concerned at the report statement that Ms Cox's return to work might be symptom-free in the

short term, but it was doubted that she could be able to maintain the role of full C Grade rotation. Mr McNaught's notes of the meeting state that Mr Clarke and Mr Bennet had suggested alternative duties for Ms Cox.

[47] Mr McNaught said that, in light of the specialist medical reports, there would always be a risk of re-injury. However he agreed to consider all the recommendations which had been made, and stated that he would consider the appropriate outcome.

*Meeting on 27 February 2009*

[48] Mr McNaught said at the meeting on 27 February 2009 there had been discussion about Ms Cox returning to work on the basis that she continued to undertake light duties on a permanent basis, this would involve Ms Cox undertaking all but one of the 19 task positions she could undertake without injuring her back as identified by Mr Pasternak.

[49] Mr McNaught said he had stated that health and safety was important in the Plant and the rotation of tasks programme was an important part of this. Mr McNaught said he had also remarked that he was nervous about placing an employee who had limitations due to a non-work injury into restrictive positions.

[50] Mr McNaught said he had further explained that the tasks which had been identified were used as part of a rotational programme for all the employees on a health and safety basis, and to provide light duties for rehabilitation purposes for employees who had work-related injuries. Ms Cox undertaking these tasks on a permanent basis would mean they would not be available for rotational and light duties for work-injured employees.

[51] Mr McNaught said he had explained that SFF could not ignore the reports and assessments which had been provided and which all had reached the same conclusion, this being that Ms Cox was restricted to tasks involving small weights, and that she could not carry out her full role without running the risk of further injury. Mr McNaught said that he and Mr Davies had then adjourned the meeting to discuss the situation.

[52] When the meeting resumed, Mr McNaught said he had concluded by advising Ms Cox that as a result of her degenerative spinal problem, which was a non-work related injury, she was not able to perform the duties for which she had been employed, and accordingly her employment would be terminated.

[53] On 2 March 2009 Mr McNaught had written to Ms Cox attaching the work assessment report by Mr Pasternak, summarising the information in the medical reports from Drs Gallop and Mayhew and Mr Philips, and stating:

*Therefore as a follow-up from the meeting we had on the 27/02/09 I would like to re-iterate that we cannot ignore these recommendations and feel it would be unwise to allow yourself to continue working here at the plant, as we cannot guarantee that there would be no risk of injury and due to your medical condition and the repetitive heavy work we offer, injury to you is high, and as a responsible employer we cannot allow this to happen. Also the lighter jobs that you have mentioned are part of a rotation and are used as a recovery task for the staff, therefore to move one of these tasks from the rotation could have an adverse affect [sic] on the other staff.*

*I therefore recommend that you find alternative employment that would be better suited to your condition.*

## **Determination**

### **Was Ms Cox was unjustifiably dismissed by SFF?**

#### **The Law**

[54] The law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed. In *Hoskin v Coastal Fish Supplies Ltd*<sup>1</sup> Judge Horn made a statement which has been regularly cited since that time that: “*There can come a point at which an employer ... can fairly cry halt*”.. Similarly in *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd*<sup>2</sup> Judge Castle stated:<sup>3</sup>

*... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period ...*

However such a decision must be justifiable

[55] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

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<sup>1</sup> [1985] ACJ 124

<sup>2</sup> [1983] ACJ 875

<sup>3</sup> Ibid at 877

*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 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"*

[56] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[57] The test of justification also makes it clear that the actions of the employer are to be determined based upon all the circumstances prevailing and known at the relevant time. This proposition is supported by the decision of the Court of Appeal in *Lang v Eagle Airways Ltd*<sup>4</sup> which clarified that the test for justification in cases of dismissal for sickness is whether the decision was one the fair and reasonable employer would make in the particular circumstances at the time the decision became effective.

[58] In the Employment Court case *Barnett v Northern Region Trust Board of the Order of St John*<sup>5</sup> Judge Travis highlighted that such a decision will be made after a fair investigation:

*The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to do the work required and is not in a position to be able to do so within a reasonable time in all the circumstances.*

[59] Ms Cox, subsequent to her dismissal, had applied for ACC's decision to suspend her weekly compensation payments on the basis that she did not have a work related gradual process injury to be reviewed in accordance with her rights under the Accident Compensation Act 2001. Whilst the first review dated 22 May 2009 was unsuccessful, the second review dated 21 September 2011, some two and a half years later, was successful.

[60] There was also a report dated 18 February 2009 obtained from a Dr Daube, a Consultant Rheumatologist, at the request of Ms Maevis Watson, representative of Ms Cox. This report took issue with Mr Phillips opinion that Ms Cox's condition was non-work related. However at the Investigation Meeting Mr McNaught confirmed that he had not seen this report and there is no evidence that this report had been read by Mr Palmer or any of the specialist employees who case-manage all ACC claims

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<sup>4</sup> [1996] 1 ERNZ 574 (CA36/95)

<sup>5</sup> Unreported, AC 49/03

[61] Moreover Mr McNaught said his decision to dismiss Ms Cox would have been the same irrespective of whether the injury was work-related or non-work-related in origin.

[62] I find that that the actions of SFF in dismissing Ms Cox fall to be judged on the basis of the circumstances at the relevant time, as such the subsequent decision by a reviewer some considerable time later, or the report of Dr Daube which had not been seen by SFF, cannot be taken into consideration. Mr McNaught's actions must be considered in light of the information to which he had access at the time the decision to dismiss Ms Cox was taken.

[63] On the date the decision had been taken to terminate Ms Cox's employment, she had been on light duties since her back injury in March 2008. The Collective Agreement at clause 21(i) referred to: *alternative or selective work*, and I accept the light duties referred to by SFF as being the *alternative or selective work* on the basis that clause 21(i)(iii) differentiates these duties from: *full normal duties*.

*The information available to Mr McNaught*

[64] At the time Mr McNaught made the decision to dismiss Ms Cox, the information he had consisted of the two specialist medical reports from Drs Gollop and Mayhew dated 2 May 2008 and 18 August 2008 respectively. Both of these reports provided the information that it would be unwise for Ms Cox to carry out her normal work duties, specifically heavy lifting or rotational movements:

- Dr Gallop stated:

*It would be most unwise to go back to her original job where she was either lifting products in heavy cartons of around 18-29 kg or carrying out heavy listing.*

- Dr Mayhew stated:

*She needs to avoid heavy repetitive lifting and rotary movements of her thoracic spine.*

[65] Mr McNaught also had a medical report from the Orthopaedic Surgeon Mr Philips dated 12 December 2008 which contained the information that Mr Philips considered Ms Cox to be: “ *no longer constitutionally fit for the level of work undertaken in the packing department*”.

[66] The final medical report obtained by Mr McNaught was a report from the Occupational Therapist Mr Pasternak, dated 9 February 2009, who summarised his report:

*As such, a return to her full work role (grade C) may be symptom free for the short term but ultimately would not be appropriate as her ability to sustain this role may be compromised in the long-term as she would be susceptible to re-aggravation of her condition, and the rate of degeneration that may occur is unpredictable.*

[67] I consider that Mr McNaught acted reasonably in relying upon this information obtained from three medical specialists and the Occupational Therapist, all of which, whatever the underlying cause of the injury, concluded that Ms Cox was unfit to carry out the work requirements of the position she had been employed to do. Moreover there was no positive indication contained in the reports that this situation would alter in the future.

[68] I do not consider that it was for Mr McNaught who is not a medically qualified person, to disregard this information, nor was it incumbent on him to undertake further investigation from this point. The Employment Court held in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited*<sup>6</sup> that an employer is not expected to continue investigations indefinitely:<sup>7</sup>

*However the employer is not required to continue investigations indefinitely, only to carry out enquiries to a reasonable extent in all the circumstances of the case. Accordingly once the Court held, as it did, that the employer had made a complete and fair enquiry prior to the dismissals, further evidence which was not available to the employer, despite its full investigation was not relevant to the issue before the Court.*

[69] In this case I find that Mr McNaught and SFF had carried out enquiries to a reasonable extent in all the circumstances.

[70] Having obtained the three specialist medical reports Mr McNaught held several meetings with Ms Cox and her representative(s) following the initial meeting to discuss Mr Philip's report held on 6 January 2009. During this process, further medical information was provided by Ms Cox to Mr McNaught in the form of medical clearances certificates received from Dr Klaper and Dr Humm.

[71] The medical certificates which providing a full clearance from Dr Klaper dated 20 January 2009 and from Dr Humm dated 21 January 2009 were regarded by McNaught with some concern on the basis that he was not sure that Dr Humm had been given all the relevant information, or that Dr Klaper had understood the implications of what he had been requested

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<sup>6</sup> [1990] 3 NZLR 549

<sup>7</sup> Ibid at p 554

to provide. Mr McNaught had requested that further enquiries be made of both doctors, which I find to be reasonable given that Mr McNaught had the detailed reports from three specialists in the field of spinal injuries area which conflicted with the full clearance provided by the general practitioners.

[72] I also note that the results of the enquires made at Mr McNaught's request subsequently supported his concerns that the medical certificates had been issued without Drs Klaper and Humm having been provided with all the relevant information.

[73] Following the provision of the full clearance medical certificates which were at variance with the specialised medical report conclusions, Mr McNaught had agreed at the conclusion of the meeting on 23 January 2009 to obtain an independent Occupational Therapist assessment and to maintain the payment of abatements to Ms Cox whilst this step was undertaken.

[74] The assessment compiled by Mr Pasternak advised that it would not be appropriate for Ms Cox to return to her position as a full-time packer due to the risk of further injury, confirming the advice obtained from the medical specialists. Mr Pasternak in line with the advice from the three medical specialists, was unable to indicate that Ms Cox would be rehabilitated within a reasonable period of time, on the contrary he had indicated that re-aggravation of her condition might occur.

[75] I find that Mr McNaught had made a thorough and fair investigation of Ms Cox's fitness to undertake the job she had originally been employed to do, and he had concluded fairly and reasonably on the medical evidence obtained, and irrespective of whether the injury was work-related or not, that there was a risk of further injury to her if she continued in the role of Meat Processor.

[76] Mr McNaught considered the proposition that Ms Cox could carry out duties in a significant number of alternative positions in SFF. In reaching the conclusion that this would prevent these positions being available to other employees on a rotational basis, Mr McNaught was balancing the needs of the other SFF employees against those of Ms Cox. This was a decision I find he was entitled to do.

[77] Moreover in terms of the Collective Agreement, the alternative work duties were available at the discretion of SFF, there was no contractual entitlement to continue to provide them.

[78] The decision to dismiss must be not only substantively justifiable, but procedurally justifiably. In cases of this nature the Employment Court in *Angus and McLean v Ports of Auckland Ltd*<sup>8</sup> commented that:

*[In] a case of medical incapacity, it is well established that an employer must investigate, as well as it is reasonably able to do so, the circumstances of an employee absent from work long-term and without apparent certainty of return. Included in this investigation must be the employer's concerns about that situation. Next, such concerns, and the issues generally, must be raised with the employee before any decision is taken to dismiss or disadvantage the employee. Then, it is well-established that in such circumstances the employer must give the employee a reasonable opportunity to respond to these matters. Finally, the employer's consideration of them before dismissing or disadvantaging an employee must be undertaken genuinely.*

[79] Following receipt of Mr Philip's report on 6 January 2009, there had been four meetings prior to the final meeting on 27 February 2009 to discuss the situation in which Ms Cox and her representatives were given an opportunity to respond. Ms Cox had been provided with details of all the relevant medical specialist reports and prognoses on risk of further injury, and given the opportunity to comment on these.

[80] During the meeting on 23 January 2009, it had been Mr McNaught who had proposed the obtaining of the Occupational Therapist report and agreed to maintain the *status quo* in the interim.

[81] The Occupational Therapist report had been fully considered and discussed with Ms Cox and her representatives at the meeting on 23 February and alternative roles for Ms Cox had also been discussed.

[82] The decision to dismiss Ms Cox had only been made after the conclusion of all these stages, and after consideration had been given to the proposals for alternative work duties. I find that Mr McNaught carried out a fair and reasonable procedure.

[83] I determine that the decision to dismiss Ms Cox was a decision a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

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<sup>8</sup> [2011] NZEmpC 160

## **Was Ms Cox discriminated against in her employment by SFF?**

[84] Ms Cox claims that she has been discriminated against in terms of the Human Rights Act 1993. Section 22 of the Human Rights Act 1993 makes it unlawful to discriminate against an employee who has a disability unless, pursuant to section 29 (b), it is justifiable for reasons of safety:

*S 29 (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, ... and it is not reasonable to take that risk.*

[85] An employer may also justifiably discriminate against a person who has a disability for reasons of practicability pursuant to s 35 of the Human Rights Act 1993:

*S 35 No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer) some other employee could carry out those particular duties.*

[86] I find that if SFF did discriminate against Ms Cox on the basis of her disability, and no evidence has been offered to suggest that it did, it did so justifiably on the basis that Mr McNaught foresaw a risk of further harm to her or to others should there be diminished availability of rotational duties.

[87] I am unable to assist Ms Cox further.

### **Costs**

[88] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

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

