

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 308/08  
5084861**

BETWEEN      NICHOLAS TENNEIL COC-KROFT  
Applicant

AND            ZION WILDLIFE GARDENS LIMITED  
Respondent

Member of Authority:      Leon Robinson

Representatives:          Caroline Conroy, Advocate for Applicant  
Mark Kamphorst, Advocate for Respondent

Investigation Meeting:    19 March 2008  
20 March 2008  
29 May 2008

Submissions Received:    10 June 2008  
16 June 2008  
17 June 2008

Determination:            28 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Mr Nicholas Tennille Coc-Kroft claims in his statement of problem that he was unjustifiably constructively dismissed from his employment with the respondent Zion Wildlife Gardens Limited ("Zion"). Zion operates a wildlife animal park in Northland. In reply, Zion says Mr Coc-Kroft did not raise a personal grievance for unjustifiable constructive dismissal within the time permitted for him to do so but he did raise a grievance for unjustifiable disadvantage within time. The parties were unable to resolve the differences between them by mediation.

## The facts

[2] Mr Coc-Kroft initially arrived at Zion in February 2005 to support his friend Mr Craig Busch ("Mr Busch") the operators of Zion at the time. Mr Coc-Kroft's assistance evolved into an employment where he performed duties as Park Manager. Mr Coc-Kroft was paid \$914.00 each week from March 2005. His duties included taking visitor tours around the park, supervising volunteers and other tour guides, assisting Mr Busch with big cat encounters, hand raising new cubs, negotiating sponsorship deals, and liaising with the local council, MAF and other agencies. Mr Coc-Kroft also assisted with the slaughter of cows and horses and the shooting of them. The terms of Mr Coc-Kroft's employment were not recorded in a written individual employment agreement. Zion says Mr Coc-Kroft as Park Manager did not complete the task of having employment agreements prepared.

[3] I find that in March 2006 Mr Coc-Kroft relinquished his role as Park Manager. He says he did so because he did not actually have any real say in the management of the park and because he felt safety concerns he had raised were being ignored. Mr Coc-Kroft resolved that it would be better to focus on his duties as an animal handler and leave the management to someone else. He referred to himself thereafter as "Senior Big Cat Handler".

[4] In June 2006 Mr Busch's mother Mrs Patricia Busch ("Mrs Busch") assumed ownership and control of Zion as its Managing Director from Mr Busch. Mr Coc-Kroft reported to Mrs Busch. Mrs Busch introduced changes in the park's management and operation.

[5] The relationship between Mr Coc-Kroft and Mrs Busch deteriorated. They disagree as to which of them was responsible for the deterioration. Mrs Busch says that she believes Mr Coc-Kroft resented her efforts implementing changes at the park.

[6] By letter dated 27 November 2006 Mrs Busch wrote to Mr Coc-Kroft. She advised that it was her "preliminary view" that Mr Coc-Kroft "had been observed acting in contravention of these rules" and thereafter enumerated five particulars. These were firstly bullying, aggression, argumentativeness and intimidation.

Secondly, failing to commence tours on time. Thirdly, constant use of radio to extend argumentative discussions. Fourthly, careless use of park plant and equipment and in particular that he had “wheelied” the quad bike in a dangerous manner. Finally, that Mr Coc-Kroft had failed to give water to the animals on at least one occasion the previous week. Mrs Busch wrote that such matters had been previously discussed with Mr Coc-Kroft and that his unwillingness to accept the rules would amount to direct disobedience. Mrs Busch concluded:-

*If you wish to discuss any of these complaints or dispute them you are entitled to do so by reply and I will give your response fair and proper consideration before considering any further action. In order that you understand the need to respond adequately such further action includes disciplinary action.*

[7] Mr Coc-Kroft acknowledged Mrs Busch’s letter by his own to her dated 28 November 2006. Mr Coc-Kroft gave notice of his own work concerns and sought details of the allegations that had been made against him before he would reply to Mrs Busch in writing. He wrote:-

*As soon as I have detail of these things then I will reply to you in writing. I feel it is in the best interest of all that we are able to resolve any issues before we come into the busy holiday season. I hope that as a result we can all air our concerns, discuss the future direction of the gardens and get back to being a team who work and live in an enjoyable environment. It may be a good idea for a meeting with yourself, Craig and I to be overseen by someone independent with an outside perspective. Caroline Conroy has had vast experience in dealing with this type of situation, she is a current representative for her work union and I feel would help keep everything in perspective. Also you may want to have Michael sit in on the meeting.*

[8] Mr Coc-Kroft wrote to Mrs Busch by letter dated 30 November 2006 about work conflict he said he was having with the recently employed shop attendant Renee Woodleigh ("Renee"). He wrote that he was experiencing excess unnecessary stress affecting his ability to work. He sought resolution of the matter.

[9] There was no response from Mrs Busch in reply to Mr Coc-Kroft’s letters. They did however discuss in person the various safety concerns Mr Coc-Kroft had raised but not to Mr Coc-Kroft's satisfaction.

[10] In late 2006 Mr Coc-Kroft says he began to notice that he was being excluded from doing tiger walks, cub encounters and big cat tours.

[11] On 18 February 2006 Mrs Busch wrote to Mr Coc-Kroft requesting he pay for personal friends who had visited him at the park. Mr Coc-Kroft took exception to that request and regarded it as petty.

[12] On 26 February 2007 Mrs Busch approached Mr Coc-Kroft and handed him a letter of the same date. Mr Coc-Kroft was about to go off on leave. The letter stated:-

*Dear Nick*

*This letter is to advise you that your accommodation building is to be moved off site by the 12th March 2007. It is necessary to reduce the pressure on the resources available here at Zion Wildlife Gardens. We are also working towards ensuring that all buildings comply with the council requirements.*

*Yours faithfully*

*Patricia Busch*

*Managing Director*

[13] While he was on leave, Mr Coc-Kroft was paid a reduced amount of pay. Mrs Busch informed Mr Coc-Kroft he had no leave entitlements left. When he queried the pay records, Mr Coc-Kroft says learned he had not been paid for statutory holidays.

[14] Mr Coc-Kroft took legal advice and his lawyer wrote to Mrs Busch suggesting mediation.

[15] Mrs Busch wrote to Mr Coc-Kroft by letter dated 12 March 2007 advising that certain of his behaviours were unacceptable. These were undermining staff morale, unauthorised complimentary tours, abandonment of employment and entering an enclosure alone.

[16] Zion's counsel responded to Mr Coc-Kroft's lawyer by letter dated 19 March 2007. There was no response to the suggestion of mediation. Rather, a meeting was sought with Mr Coc-Kroft and his representative to discuss safety issues said to be disciplinary.

[17] Mr Coc-Kroft wrote directly to Zion's lawyer in a letter dated 25 March 2007. Mr Coc-Kroft addressed the safety issues raised in the lawyer's advice. The letter had this conclusion:-

*As I have verbally stated and in writing to Patricia previously all I have wanted is to resolve issues. I have suggested staff meetings as well as mediation with unbiased representatives in attendance. Patricia has ignored these requests and I feel she is now ostracizing me and making my working environment almost unbearable. I dearly love the big cats that I have raised and formed special bonds with, this is what has kept me going through these difficult months. A few months ago I told Patricia that I would like to see a return to the early days when we worked together as a family team. Whilst I don't believe those days can now return I would hope that Patricia takes advantage of the mediation opportunities now available to improve this current stressful situation.*

[18] Mr Coc-Kroft's lawyer wrote by letter dated 26 March 2007 again suggesting mediation.

[19] Mr Coc-Kroft took leave in late March because of what he says was workplace stress. On 13 April 2007 Mr Coc-Kroft emailed Mrs Busch advising her he was fit to return to work on 16 April 2007 although it had been advised his situation would be reviewed on 26 April 2007. Mrs Busch advised a return before then could not be condoned.

[20] When he returned to work on 16 April 2007 Mr Coc-Kroft did not disclose the reason for his unfitness for work to Mrs Busch when she asked him. Mrs Busch also asked if he was a danger to cats or people and Mr Coc-Kroft informed her he was not. Mrs Busch directed Mr Coc-Kroft to perform light duties until Mr Busch returned and was able to give clearance for Mr Coc-Kroft to work with the cats. Mr Coc-Kroft was not thereafter assigned to conduct tours, club encounters or big cat interactions. He was not involved with the public. Mr Coc-Kroft was directed to mow lawns, weed, clean toilets and perform grounds work.

[21] Mr Coc-Kroft found that the locks to the gates had been changed. He was not given keys for the new locks thereafter.

[22] Mr Coc-Kroft emailed Mrs Busch that same day as follows:-

*Hello Patricia*

*Following your discussion with me today can you please confirm that you want me to be on light duties at present and can you please advise what these duties are? You mentioned that Craig would need to give me clearance to get in with the cats again. Are you able to give me a date as to when this clearance will take place. Can you let me know what duties I can perform with the cats, as I am one of only two senior cat handlers employed at the park. Today you mentioned that my hours of work have changed can you confirm what hours you now want me to work. I understand that my start time has changed from 8am to 8.30 am and my lunch break is reduced from one hour to ½ an hour. As locks within the park have been changed whilst I was away, can you also clarify the arrangement with key access to and from the park and access to any animal enclosures.*

*Nick*

[23] Mr Coc-Kroft says that while Mrs Busch had agreed to let him attend a funeral on Friday 20 April and work on Saturday 21 April instead, he says it was insensitive that Renee phoned him while he was at the funeral to tell him he was not required to work on Saturday.

[24] The parties attended mediation on 8 May 2007.

[25] When he returned to work after mediation, Mrs Busch directed Mr Coc-Kroft to cut gorse on the park. Mr Coc-Kroft did so using secateurs as there was apparently no other tools available.

[26] By letter dated 10 May 2007 Mr Coc-Kroft wrote to Mrs Busch advising that he considered that despite the mediation there were unresolved issues that he wished to pursue as a personal grievance for “unjustifiable action resulting in disadvantage”. Mr Coc-Kroft enumerated nine issues being the removal of his cabin, access to and within the park, restricted work duties, cat handling duties, meal breaks, facilities, communication, inconsistent policies and procedures, and leave processes. He sought a meeting to discuss the issues and asked to be treated with respect as a committed team member.

[27] There was no immediate response to that letter. Mr Coc-Kroft wrote again to Mrs Busch by letter dated 28 May 2007:-

*I am writing this letter to you in regard to your current treatment of me as a big cat handler and your persistent and on going unwillingness to let me do the job I am employed to do.*

*Since April this year you have changed my duties from interacting with the big cats to one of lawn mowing and weed eating the park. Since my attendance at a labour Department mediation with you and your lawyer on the 8th of May you have denigrated my position even further by daily having me hand cut gorse only using a small pair of garden snippers and instructing me to remove gorse from the 126 acre property wether(sic) it being(sic) rain or shine.*

*I felt I have been insulted and humiliated by your attitude towards me and am disappointed that the confidentiality of the mediation was not honored(sic) by you. I have had staff at the park discussing matters of the mediation of which you would be the only other person privy to.*

*My working environment has now become intolerable to the point of affecting my health and creating large amounts of undue stress. Your treatment of me and other long serving staff at the park has effectively ostracized me from other staff and created an atmosphere of paranoia, anxiety and mistrust among the staff.*

*You have failed to respond to any of the issues I have raised in personal correspondence and verbal communication to you from 2006 or from my solicitor or my personal grievance letter dated 10th May or the legal employment obligations raised at mediation.*

*You have shown me a complete unwillingness to discuss or attempt to resolve any of the issues raised and in fact have taken the opposite tactic by further increasing punitive actions towards me as I have tried to resolve these issues.*

*This has left me with not alternative but to resign my employment with Zion Wildlife Gardens as of today.*

*Given the current situation I would presume you would not want me to work my one week notice period. If this is not the case please advise me forthwith.*

*I have been given no alternative but to seek redress for these issues through the employment relations authority.*

*Yours faithfully*

*Nicholas Coc-Kroft*

[28] That same afternoon Zion's lawyer responded to Mr Coc-Kroft with advice inviting Mr Coc-Kroft to retract his resignation and also included a letter dated 25 May 2007.

[29] Mr Coc-Kroft did not retract his resignation and his employment with Zion ended.

## The merits

[30] It is submitted for Zion that Mr Coc-Kroft did not raise a personal grievance for unjustifiable constructive dismissal until his advocate's letter to Mrs Busch of 31 August 2007. It is noted in the submissions that Mr Coc-Kroft sought compensation in respect of that grievance. Mr Kamphorst makes very helpful submissions to the Authority. The submissions are emphatic that Mr Coc-Kroft did not raise his

grievance within 90 days of the action arising. The Authority is invited to dismiss the contended grievance on that basis.

[31] I note that Mr Coc-Kroft resigned by his letter of 28 May 2007. He gave one weeks notice of resignation which meant the employment actually ended on 4 June 2007. That termination date was not varied. I say the ninety days must run from that date. I calculate ninety days thereafter as 2 September 2007. The personal grievance for unjustifiable constructive dismissal is conceded by submissions to have been raised in the letter of 31 August 2007. That disposes of the matter and I find that the grievance was therefore raised, with two days to spare, within time.

[32] There is no issue however in relation to the raising of the grievance for unjustifiable disadvantage. In any event, the Authority is authorised to find a grievance other than that which is alleged and additionally, may concentrate on resolving the problem howsoever it is described by the parties.

[33] I now assess whether Mr Coc-Kroft was unjustifiably constructively dismissed. The established test ask these questions:-

- (i) Did Mr Coc-Kroft resign?
- (ii) Was Mr Coc-Kroft resignation caused by a breach of duty on the part of Zion?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach

*Did Mr Coc-Kroft resign?*

[34] It is not disputed that Mr Coc-Kroft did in fact resign. That is clear by his letter of 28 May 2007.

*Was Mr Coc-Kroft's resignation caused by a breach of duty on the part of Zion?*

[35] Mrs Busch's letter of 27 November 2006 advised of her preliminary view of alleged contravention of rules by Mr Coc-Kroft. Mr Coc-Kroft was invited to dispute the preliminary views for consideration by Mrs Busch before she took further action including disciplinary action. Mr Coc-Kroft's response of 28 November 2006 was

conciliatory and he quite rightly in my view asked for details before he responded in writing. He also sought a meeting and suggested an independent facilitator. But there was never any response to either his request for details or to his request for a meeting. Mrs Busch says there was no point responding. That was not fair to Mr Coc-Kroft because it meant the preliminary conclusions remained unchallenged and unresolved. A fair and reasonable employer would not have permitted such matters to remain unresolved. Mr Coc-Kroft's conditions of employment were therefore affected by the outstanding inconclusive allegations against him.

[36] Mr Coc-Kroft wrote again by letter of 30 November 2006 raising issues with the shop worker Renee. He sought to resolve the issue immediately. But again, there was no response from Zion. Mrs Busch says it was pointless responding. I do not agree. A fair and reasonable employer would have provided some response.

[37] On 26 February 2007, as he was going away on leave, Mr Coc-Kroft was presented with a letter of the same date directing him to remove his cabin off site within two weeks. This was unreasonable in my view in the particular circumstances, whether or not Mr Coc-Kroft was actually spending less time at the cabin. There was no discussion or consultation whatsoever with Mr Coc-Kroft in advance. The direction was therefore unfair and not the actions of a fair and reasonable employer. I am not persuaded that the cabin formed part of Mr Coc-Kroft's remuneration.

[38] I accept that Mr Coc-Kroft was employed as a big cat handler. When he returned from sick leave in late April 2007, he was informed he would not be permitted to work with the cats. I accept that Zion had concerns about Mr Coc-Kroft's management of animals. But I do not agree that it acted fairly and reasonably towards Mr Coc-Kroft in dealing with the matter. Zion failed to put to Mr Coc-Kroft its particular concerns for him to respond to. It also did not consult with him prior to relieving him of such duties and it did not propose or advise of any process to resolve the matter. Mr Coc-Kroft had asked about clearance in this respect in his email of 16 April 2007. But there was no response, no dialogue, no consultation with him. Zion's failure to implement a process directed at resolving the situation was not the actions of a fair and reasonable employer. That situation affected Mr Coc-Kroft's conditions of employment.

[39] It is also relevant that Mr Coc-Kroft was not provided with keys after locks were changed. I am not persuaded there was a reasonable justification for depriving Mr Coc-Kroft of the access he previously enjoyed. Certainly, there was no discussion with him about the matter.

[40] I accept Mr Coc-Kroft's evidence that he found it very humiliating and degrading being required to perform grounds maintenance duties and gorse cutting. The change from big cat handler to maintenance person caused him much anxiety and distress.

[41] Mr Coc-Kroft complained about inconsistent meal break time allocation, inadequate staff facilities, management communication, inconsistent application of policies and procedures and his leave. Zion submits these matters are mere "gripes". I mean no disrespect to Mr Coc-Kroft nor do I seek to minimise the effect of the issues for him when I say my view of these matters is that they are peripheral issues to those which I have outlined above as most significant.

[42] It is said that Mr Coc-Kroft was very aggressive, bullying, intimidating, violent and a very unpleasant individual to work with. There were many witnesses who gave evidence in this regard to the Authority. There is evidence that employees resigned directly as a result of Mr Coc-Kroft. Mr Coc-Kroft denies such distasteful behaviour and the various allegations against him. Whether or not it was so, Mr Coc-Kroft was never formally disciplined for such conduct. If the evidence is correct, it does not appear to have been managed effectively. Mr Coc-Kroft ought to have been formally disciplined by way of a resolute and concluded fair process.

[43] The allegations against Mr Coc-Kroft are to be contrasted with the clear evidence that he frequently sought resolution and dialogue with his employer with a view towards resolution. His correspondence in this regard is not aggressive or difficult. It is invariably conciliatory and desirous of resolution. I refer to his letters of 28 November 2006, 30 November 2006, 25 March 2007, 10 May 2007 in this regard. Regrettably, I do not see any reciprocity on Zion's part.

[44] Rather, when Mr Coc-Kroft tendered his resignation Zion's response through its lawyer was to invite Mr Coc-Kroft to retract his resignation but contemporaneously a response to matters discussed at mediation three weeks previous. The timing is unfortunate. I rather consider it was a delayed response to the mediation rather than a direct response to his raising of a personal grievance. More than that however, the advice was accusatory of Mr Coc-Kroft, levelled more allegations against him premised upon conclusions not formally put to him, and issued warnings against him without due process. Advice in such a fashion was unlikely to retrieve the situation.

[45] For the reasons I have outlined, I consider that Zion breached its duty of good faith and fair and reasonable treatment owed to Mr Coc-Kroft. It made preliminary findings of contravention of rules by Mr Coc-Kroft but never concluded the process. Its request that he remove his cabin in the prevailing circumstances was unreasonable and unfair. It failed to address his issues with the employee Renee when he raised the matter. It assigned him to grounds maintenance work indefinitely and removed him from cat handling duties without any consultation with him and failed to initiate any process to review the situation. It denied him independent access to the park that he previously enjoyed without justification. All these matters lead me to find that Zion breached its duty of good faith and fair and reasonable treatment owed to Mr Coc-Kroft.

*A reasonably foreseeable substantial risk of resignation?*

[46] The breach of duties I have found were sufficiently serious that it was reasonably foreseeable that there was a substantial risk of resignation. I find that in combination, the particular matters constituting breaches of duty to Mr Coc-Kroft were on an objective view, reasonably foreseeable as to result in Mr Coc-Kroft's resignation. The breach of duties by Zion were directly causative of Mr Coc-Kroft's resignation, they were repudiatory in nature such that Mr Coc-Kroft was entitled to take the view he could not have trust and confidence in Zion of a continuing good faith employment.

**The determination**

[47] The test justification is to be assessed in terms of what is prescribed at section

103A of the *Employment Relations Act 2000* ("the Act").

*103A. Test of justification*

*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.*

[48] I find that the breaches of duty I have found were not the actions of a fair and reasonable employer in all the prevailing circumstances. **I find that Mr Coc-Kroft has a personal grievance for unjustifiable constructive dismissal and he is entitled to formal orders in settlement of that personal grievance.**

[49] As a result of my findings, it is not necessary for me to consider whether Mr Coc-Kroft has an alternative personal grievance for disadvantage. I now settle the personal grievance by the following resolution.

## The resolution

### *Contribution*

[50] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Coc-Kroft's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[51] I refer again to what I have earlier said about the allegations that Mr Coc-Kroft was a bully, the he was aggressive, intimidating, and even violent. There is no shortage of evidence that others found him unpleasant to work with and I find certain of the witnesses on this point very credible. I prefer the evidence of the various witnesses in this regard to Mr Coc-Kroft's denials. That is a finding I make as distinct from the view I have taken in relation to his written correspondence. I regard Mr Coc-Kroft's aggressive behaviour as blameworthy conduct which I am satisfied in part contributed to the situation that led to the personal grievance I have found. In such a situation, Mr Coc-Kroft should not be permitted to benefit for his own wrongdoing. I assess his contribution, for convenience, as 20%. I reduce the

remedies to be awarded to him in that proportion to take into account his own wrongdoing that I consider established.

***Reimbursement***

[52] I accept that Mr Coc-Kroft has lost income as a result of the personal grievance I have found. I accept his evidence that he eventually secured alternative employment at Rock Gas in Auckland. I also accept Mr Coc-Kroft took steps to mitigate his losses. I award him twelve weeks nett salary of \$700.00 per week and not the sixteen weeks he claimed because I am not persuaded of it. **I order Zion Wildlife Gardens Limited to pay to Nicholas Tennille Coc-Kroft the sum of \$6,720.00 nett being \$8,400.00 but reduced by 20%, as reimbursement.**

***Compensation***

[53] I accept that Mr Coc-Kroft has suffered hurt and humiliation, loss of dignity and injury to his feelings. Having regard to his evidence, his length of service and the nature of the personal grievance I award him \$6,400.00 as compensation being \$8,000.00 but reduced by 20%. **I order Zion Wildlife Gardens Limited to pay to Nicholas Tennille Coc-Kroft the sum of \$6,400.00 as compensation.**

**Costs**

[54] As Mr Coc-Kroft was not represented by professional advocate, there will be no order for costs.

Leon Robinson

**Member of Employment Relations Authority**