



New Zealand Employment Relations Authority Decisions

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Jo v Cockcroft & Co Limited (Auckland) [2011] NZERA 536; [2011] NZERA Auckland 348 (5 August 2011)

Last Updated: 24 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 348 5341161

Member of Authority: Representatives:

Investigation Meeting: Submissions received: Determination:

BETWEEN SUNOK JO

Applicant

AND COCKCROFT & CO LIMITED

Respondent

Eleanor Robinson

Gregory Bennett, Advocate for Applicant Gregory Walker, Counsel for Respondent

12 July 2011 at Auckland

12 July 2011 from Applicant and Respondent

5 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mrs Sunok Jo, claims that she was unjustifiably disadvantaged in her employment by the Respondent, Cockcroft & Co Limited ("CCL"). Specifically Mrs Jo claims that she was made redundant without due process by CCL.

[2] CCL deny that Mrs Jo was unjustifiably disadvantaged and claim that there was due and proper process in the termination of Mrs Jo's employment.

Issues

[3] The issue for determination is whether a due and proper process was followed by CCL in terminating Mrs Jo's employment on the basis of redundancy.

Background Facts

[4] Mrs Jo was employed by CCL, an accountancy firm, as a junior accountant in September 2005. CCL was classified by the New Zealand Institute of Chartered Accountants ("NZICA") as an Approved Training Organisation, and Mrs Jo was therefore able to complete the practical requirements for entry to NZICA with training assistance, and the experience provided during her employment with CCL.

[5] Mrs Cockcroft explained that at the time Mrs Jo was made redundant she was working as a chartered accountant carrying out predominantly compliance work for small entities. Mrs Jo did not have any other areas of responsibility.

[6] CCL employed approximately 11 employees including Mr and Mrs Cockcroft, directors and shareholders of CCL, of whom 8 were chartered accountants and 3 were support staff.

[7] Mr Cockcroft explained that during 2009 CCL had suffered a substantial loss in gross fees. In July 2010 Mr Cockcroft said that CCL's largest client was sold to an international Canadian company and in October 2010 the account which CCL had managed for the client transferred to another accountancy firm.

[8] Mr Cockcroft said he had been concerned that there was not sufficient work to keep the CCL employees fully employed, and consequently in November 2010 when he became aware that a block of \$400,000 of fees in a Mt Eden Accountancy Practice was for sale, he entered into negotiations to purchase the block of fees in order to be able to avoid the potential need for redundancies.

[9] The negotiations were not successful and the block of fees was sold to another accountancy firm. This development resulted in Mr Cockcroft concluding that CCL was overstaffed by approximately two positions and that a redundancy exercise might need to be undertaken.

[10] Mr Cockcroft said he had taken advice from Mr Walker, a lawyer who worked in the same office building, and accessed the Department of Labour website, for guidance on how to conduct the redundancy process.

Meeting on 24 February 2011

[11] On 24 February 2011 Mr and Mrs Cockcroft met informally with Mrs Jo. Mr and Mrs Cockcroft advised Mrs Jo of the current position of CCL, being that the annual level of fees in the business had dropped substantially, explained about the loss of the large account in

October 2010, and about the unsuccessful attempt to purchase the block of fees in the Mt Eden accountancy practice.

[12] Mr Cockcroft stated that he had explained to Mrs Jo that CCL was going to have to reduce the staff numbers by potentially two employees, one of whom could possibly be a chartered accountant. Mrs Jo said she had asked "*Is it me?*" and that Mrs Cockcroft had responded: "*Tes it is you and we are sorry*".

[13] Mr and Mrs Cockcroft agreed that Mrs Jo had asked if it was her, but although they had been taken by surprise by the question, they denied that they had confirmed that it was her position which was affected, although they had confirmed that a possible outcome could be that her position was affected.

[14] Mrs Jo said that she had then asked the reason for another employee returning from maternity leave and Mr Cockcroft had responded that she (the employee) needed the money. Mr Cockcroft said he had been surprised at the question since he could not see that it was relevant, but he had explained to Mrs Jo that the employee in question was entitled to return to employment following her maternity leave, and that her return was originally to have taken place in October 2010. Mr Cockcroft further explained that although the return had been delayed until February 2011 due to CCL's financial situation, it had not been possible to delay her return any longer.

[15] Mrs Jo said Mrs Cockcroft had then explained to her that in the circumstances she could not have any large clients as she had previously requested. Mrs Jo said she had asked Mr Cockcroft how long she could stay, and that he had responded to the effect that she could stay as long as she wanted. Mr and Mrs Cockcroft both said that they could not recall this question having been asked, but said that had it been asked, their response would not have been that Mrs Jo could stay as long as she wished, this being clearly incompatible with the redundancy proposal.

[16] Mr and Mrs Cockcroft explained, and Mrs Jo agreed, that they had informed Mrs Jo that there would be a formal meeting the following week, and that Mrs Jo should consider the situation and come back to them with her views, since there was a situation in which there were potential redundancies.

[17] Mrs Cockcroft said she advised Mrs Jo that she should bring a support person with her to the meeting the following week, and suggested that this person might be her husband, a lawyer or an advisor. Mrs Cockcroft also offered for Mrs Jo to take the rest of that day, which was a Thursday, and the following day, Friday, as leave in order to prepare for the meeting the following week.

[18] No time or date was arranged for this meeting, although Mrs Jo said that Mr Cockcroft had said that the meeting would not be possible on Monday or Tuesday morning of the following week, although any time from Wednesday onwards would be suitable.

[19] Mrs Cockcroft explained that no time or date had been set for the second meeting as she had expected Mrs Jo to inform her when she would have a support person available, and that it had been explained to Mrs Jo when it would be possible to hold the meeting in order that she could arrange a support person accordingly. Mr Cockcroft further explained that due to the small nature of the workforce and he and Mrs Cockcroft having 'open-door' policies, meetings were quickly and easily arranged.

[20] Following the meeting on 24 February 2011, Mrs Jo found out that her husband had resigned from his job that same day. Mrs Jo said that, although she had not been aware that he planned to do so on 24 February 2011, she had previously advised her husband to resign due to the adverse effect his employment was having on his health, and consequently she had not been surprised at the news of his resignation.

[21] Ms Thomas, a senior chartered accountant and senior manager of CCL where she had been employed for more than 10 years, stated that Mrs Jo came to see her the next day, 25 February 2011. Ms Thomas said Mrs Jo had said to her: *"Looks like they don't want me anymore"* and had commented that this was acceptable to her as she had been expecting it to happen.

[22] Ms Thomas said that Mrs Jo had previously informed her that she was bored and looking for alternative employment, and had requested that Ms Thomas contact her friends to ascertain if they were aware of any suitable positions for her. Following the meeting on 24 February 2010, Ms Thomas said that Mrs Jo had repeated this request. Ms Thomas said that Mrs Jo had also told her on 25 February 2011 that her husband had resigned from his job the previous day.

[23] Mrs Jo said that, having waited for Mr and Mrs Cockcroft to confirm when the meeting would take place, she had spoken to Ms Thomas about the situation on Thursday 3 March 2011 and Ms Thomas had advised her to ask Mr and Mrs Cockcroft for the meeting. Mrs Jo said she asked Mr Cockcroft for a meeting at 9.00 a.m. on 3 March 2011 but he had told her he had been busy on a telephone conference call. Later that morning she had again requested that the meeting take place, and at this point Mr Cockcroft had notified Mrs Cockcroft and the meeting had proceeded.

[24] Mr Cockcroft stated that week commencing 28 February 2011 had been a stressful and eventful week for CCL in that it had been advised that another large client might be transferring their account from CCL, and he and Mrs Cockcroft had been in discussions with a view to preventing this possibility. This had been the reason that he and Mrs Cockcroft had not been available to hold a meeting with Mrs Jo at the beginning of the week. However as soon as Mrs Jo had informed him of her wish to proceed with the meeting on 3 March 2011, he had spoken to Mrs Cockcroft, and the meeting had taken place.

Meeting on 3 March 2011

[25] Mrs Jo explained that she had not taken a support person with her to the meeting on 3 March 2011 since her understanding was that she had already been made redundant at the meeting on 24 February 2011 and there was no purpose to be served by having a support person present.

[26] Mrs Jo said she had prepared for the meeting on 3 March 2010 by compiling a list of questions to ask Mr and Mrs Cockcroft. Mrs Jo explained that she had asked her questions in order to obtain a better understanding of why she had been made redundant at the previous meeting. Mrs Jo said she had asked her questions, Mr and Mrs Cockcroft had answered all of them and she had written the answers down. Mrs Jo stated that she had asked if there were to be meetings with other members of staff and Mr Cockcroft had answered: *"we are not going to have a meeting with other staff and we picked you"*.

[27] Mr and Mrs Cockcroft both said that Mrs Jo's manner at the second meeting was aggressive, Mrs Cockcroft stating that some of the series of questions Mrs Jo had asked appeared to be out of context and irrelevant, however she and Mr Cockcroft had answered all of the questions.

[28] Mr Cockcroft said he had been particularly offended by one of the questions which was to the effect that Mrs Jo had been chosen for redundancy because she was Korean. Mr Cockcroft explained that CCL was a multi-cultural employer and in addition that at this stage Mrs Jo had been employed by CCL for 5 years. Mr Cockcroft said that Mrs Jo had also asked if she had been selected based on imperfections in her English language skills.

[29] Mr Cockcroft said that although he answered these questions, he had been surprised that the discussion was not centred around CCL's position and the possibilities of redundancies in general.

[30] Having answered Mrs Jo's questions, Mr and Mrs Cockcroft said there followed a lengthy and detailed discussion about the other members of staff and their areas of responsibility. Mrs Cockcroft had explained that since all the other chartered accountants in CCL were senior to Mrs Jo, and additionally held either a managerial role or had an area of special expertise or responsibility, Mrs Jo did not have the skills to fill these. However the other position being considered for redundancy was that of the bookkeeper.

[31] Mrs Cockcroft had explained to Mrs Jo the nature of the bookkeeper's role which encompassed responsibilities with regard to the Inland Revenue Department and compliance work with the Companies Office. Mrs Jo was asked if she would be interested in taking over these functions, should the employment of the person currently undertaking those duties be made redundant.

[32] Mrs Jo said she did not believe the bookkeeper role was discussed with her, however Mr and Mrs Cockcroft both maintained that it had been discussed, and Mrs Cockcroft stated that Mrs Jo had informed them that she would not want the role as she regarded it as a backward step in her career on the basis that she had been wanting the opportunity to work on larger accounts. Mrs Cockcroft said that Mrs Jo had told them that it would be more beneficial for her career if she could

move to another firm where there were more opportunities.

[33] Mrs Cockcroft stated that Mrs Jo had informed her and Mr Cockcroft that her husband had resigned from his job, and that this had come as a surprise to her. However Mrs Jo had told them that she agreed with her husband's decision to resign due to the effect his employment was having on his health.

[34] Mr and Mrs Cockcroft adjourned the meeting to discuss the situation. Mrs Cockcroft said knowing that in the current financial situation CCL was overstaffed in the compliance area, and that Mrs Jo not wanting to assume the bookkeeper's administrative duties, it had been decided that Mrs Jo should be advised that her position was surplus to requirements. However since Mrs Cockcroft was particularly concerned that Mrs Jo and her husband might both be without a job, she had proposed, and Mr Cockcroft had agreed, that they would confirm to Mrs Jo that despite her contractual notice period being one month, her employment would not be terminated until the end of June 2011, a total of four months notice.

[35] When the meeting resumed Mr and Mrs Cockcroft advised Mrs Jo that her position was to be terminated on the basis that it was surplus to requirements, and that she was to be given an extended notice period until the end of June 2011 in consideration of her husband's resignation. Mr and Mrs Cockcroft also informed Mrs Jo that she could take as much time as she needed to seek alternative employment. Mr Cockcroft stated that he had also told Mrs Jo that CCL would actively continue to seek to purchase another block of fees which might avert the necessity for the redundancy to proceed.

[36] By letter dated 8 March 2011 Mr Cockcroft confirmed to Mrs Jo the fact that she was being made redundant. The letter concluded:

.... you asked if you could stay on until you found another job.

Sue and I asked for 5 minutes alone in order to discuss the matter and then you returned into the office and we informed you that, on compassionate grounds and notwithstanding we wanted your employment to cease earlier, you could remain until the end of June. During this 4 month period you will be allowed all reasonable time off in order to actively seek another job and we will assist with this in any way we can.

[37] Ms Thomas said she had become aware of the fact that Mrs Jo had been made redundant when Mrs Jo showed her the letter dated 8 March 2011. Ms Thomas said that the following day, 9 March 2011, Mrs Jo had told her that she had booked a ticket for her husband to go to Perth with a view to his obtaining employment there, and asked that Ms Thomas not tell anyone else in the office. Ms Thomas said she had urged Mrs Jo to tell Mr and Mrs Cockcroft that her husband was leaving the country as she knew that the four months notice had been provided because Mrs Jo's husband had resigned from his position.

[38] Ms Thomas stated that in early April she had made enquiry of Mrs Jo as to her future plans and when she intended to go to Australia as Ms Thomas was still looking for an alternative position on Mrs Jo's behalf. Ms Thomas said that Mrs Jo had told her that her husband really liked Perth, had told her that there were many jobs available, and that she herself would be joining him as soon as he obtained employment. On 8 April 2011 Ms Thomas said that Mrs Jo had informed her that her husband had received a job offer which he had not accepted as he was awaiting replies from two other prospective employers. Ms Thomas said she had urged Mrs Jo to tell Mr and Mrs Cockcroft about this situation, but that Mrs Jo refused to do so. Ms Thomas said that she herself had therefore informed Mr and Mrs Cockcroft of the fact that Mrs Jo's husband was in Australia seeking employment as she had felt Mrs Jo was not acting in a fair manner towards them.

[39] Mrs Jo's employment with CCL terminated at the end of June 2011. **Determination**

[40] Mrs Jo was advised of the decision to terminate her employment on 3 March 2011, this being confirmed in the letter dated 8 March 2011. Although Mrs Jo's employment did not actually terminate until the end of June 2011, I consider that the unjustifiable disadvantage claim arose as a result of actions taken prior to 1 April 2011 when the Test of Justification in [s 103A](#) of the [Employment Relations Act 2000](#) ("the [Act](#)") was amended.

[41] The [Interpretation Act 1999](#) states as a principle at s.7 that: "*An enactment does not have a retrospective effect*", and at s.4 makes it clear that the Interpretation Act 1991 provisions apply to an enactment that is part of the law of New Zealand. In these circumstances I consider that it is the Test of Justification as it existed at the time the action occurred, i.e. prior to the amendment, which is the correct test to apply in this case.

[42] The applicable Test of Justification states:

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.

[43] When considering whether CCL followed a due and proper process when terminating Mrs Jo's employment on the basis

of redundancy, other provisions of the Act are relevant. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

"(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made." s4 (1A)(i) and (ii).

[44] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*^[1] noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*"^[2]

[45] The nature of consultation was commented upon by the then Chief Judge Goddard in

Cammish v Parliamentary Service^[3] who stated:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the person consulted is not necessary in the action taken following proper consultation.

[46] Mrs Jo considered that she had been informed that she was redundant at the first meeting with Mr and Mrs Cockcroft on 24 February 2011. In considering the evidence, I find that at this first meeting Mrs Jo had reached the erroneous conclusion that she had been terminated on the basis of redundancy.

[47] I find from the evidence supplied by Ms Thomas that Mrs Jo had, prior to the meeting on 24 February 2011, contemplated and had in fact taken steps towards obtaining, alternative employment. I also consider it probable from the evidence provided that Mrs Jo and her husband were seriously contemplating obtaining employment in Australia. I consider that Mrs Jo had prematurely concluded from the initial comments by Mr and Mrs Cockcroft that the redundancy decision had already been made, as this aligned with her own tentative plans, and that consequently she did not give her full attention to what was subsequently discussed.

[48] I find further support for concluding that Mrs Jo had reached an erroneous conclusion in the fact that Mrs Cockcroft referred to a formal meeting the following week, albeit at a date and time which was not confirmed at that stage, and offered Mrs Jo time off to prepare for the meeting. The fact that Mrs Jo was advised to bring a support person to the meeting further points to the fact that this was to be a formal meeting for the purpose of consultation.

[49] Mrs Jo chose not to have a support person at the meeting on 3 March 2011, a decision I find to have stemmed from Mrs Jo's mistaken belief that the decision to make her redundant had already been made, although this belief had not been communicated to Mr and Mrs Cockcroft, who had proceeded without the knowledge that Mrs Jo thought the decision had already been made.

[50] During the meeting on 3 March 2011 Mrs Jo had asked a number of questions which she had prepared prior to the meeting. Although Mrs Cockcroft said that some of the questions Mrs Jo asked appeared to be out of context and irrelevant, I find that she and Mr Cockcroft acted in good faith by addressing all of them.

[51] Mr Cockcroft had then proceeded to discuss the redundancy situation and in particular provided Mrs Jo with relevant information on the existing more senior positions in CCL in order to explain CCL's view of why it was considered that these roles which required more skills and experience than Mrs Jo had, were not surplus to requirements. These discussions clarified that one of two positions were potentially redundant, that filled by Mrs Jo, and the bookkeeper position.

[52] Although Mrs Jo did not recall the bookkeeper position being discussed with her, I find Mr and Mrs Cockcroft's evidence that it was discussed the more credible.

[53] I find that Mr Cockcroft quite properly consulted with Mrs Jo prior to making a final decision on this matter, as the bookkeeper position was one which Mrs Jo had the capability to undertake. However the outcome of this discussion had resulted in Mrs Jo making it clear that she did not wish to undertake the administrative duties involved in the bookkeeper role, regarding this as a retrogressive step in her career. Following Mrs Jo's rejection of the bookkeeper position, there was no purpose to be served in further consultation, and I find that it was only at this point that the decision was made to confirm Mrs Jo's position as redundant.

[54] Mrs Jo had expressed concern that there was an issue of predetermination, in that the bookkeeper had not been advised of a potential redundancy situation prior to Mrs Jo being advised. However I find that at the outset of the process, being the

preliminary discussion with Mrs Jo on 24 February to advise her of CCL's financial position and of the need for a formal meeting, Mr and Mrs Cockcroft had not pre-determined the issue of Mrs Jo's subsequent redundancy termination.

[55] I am supported in this conclusion by the evidence of Mr and Mrs Cockcroft that at the later discussion at the formal meeting on 3 March 2011, the possibility of Mrs Jo's undertaking the bookkeeper role had been discussed. Had Mrs Jo shown an interest in undertaking this role, the outcome might have been different, especially given Mrs Cockcroft's concern that Mrs Jo had been placed in the position of sole breadwinner in her family.

[56] I find that there was genuine consultation in accordance with the principles as outlined in *Simpsons Farms Limited v Aberhart* [4]. I am satisfied that CCL properly considered the feedback from Mrs Jo, answering all her questions fully and in good faith, provided full information on the reasons for identifying the two possible positions that were surplus to requirements, and gave proper consideration to Mrs Jo's preferences in regard to her undertaking the bookkeeper role, before finalising the decision to confirm Mrs Jo as redundant.

[57] I note that the good faith requirements of s4 of the Act apply equally to the employer and the employee. Mrs Jo was under a duty to be "responsive and communicative"[5] throughout the consultation process. By not advising Mr and Mrs Cockcroft that she and her husband were contemplating moving to Perth for employment, I find that Mrs Jo failed in the duty of good faith which she owed to CCL. On the evidence provided by Mrs Cockcroft at the Investigation Meeting, it is clear that had Mrs Jo informed Mr and Mrs Cockcroft of her intentions, the necessity for the termination of her employment on the grounds of redundancy almost certainly would have been averted, and further that Mr and Mrs Cockcroft would have assisted Mrs Jo to obtain employment in Perth through contacts which they had in the accountancy profession in Australia.

[58] Whilst I consider that CCL ought to have been more active in setting up an actual time and date for a meeting, I do not consider this to be of such significance as to negate the finding that CCL carried out the redundancy process with due process, given that the meeting took place in a timely manner after Mrs Jo had made it clear that she was ready to proceed. Moreover I consider that any deficiency in the process has been more than compensated for by the additional three months of notice of termination of employment provided to Mrs Jo, this having a monetary value of approximately \$18,000.00.

[59] I determine that CCL followed due and proper process in making Mrs Jo redundant. **Costs**

[60] 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

[1] [2006] NZEmpC 92; [2006] ERNZ 825,842

[2] Ibid at para [40]

[3] [1996] 1 ERNZ 404, per Goddard CJ at p417

[4] at para [62]

[5] Section 4 (1A)(b) of the Act
