

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 12/09
5122335

BETWEEN PAUL GREGORY COCHRANE
Applicant
AND KITCHEN HOUSE LIMITED
Respondent

Member of Authority: Leon Robinson
Representatives: Mark Nutsford for Applicant
Carrick Courtney for Respondent
Investigation Meeting: 23 September 2008
Further Information: 10 October 2008
Submissions Received: 3 October 2008
17 October 2008
Determination: 19 January 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Paul Cochrane ("Mr Cochrane") says he was made redundant with no consideration given to redeployment as an alternative to dismissal. Mr Cochrane cites a particular vacancy with reference to redeployment. Kitchen House Limited ("Kitchen House") says there was no vacancy to which Mr Cochrane could have been redeployed.

[2] The parties were unable to resolve the problem between them by the use of mediation.



The facts

[3] Mr Cochrane commenced employment with Kitchen House Henderson in November 2006 as Operations Manager but which was referred to by the parties as "Kitchen Wizard". The terms of the employment were recorded in a written individual employment agreement dated 24 October 2006 ("the IEA"). The IEA referred to the duties and responsibilities of the position being set out in a job profile "Regional Operations Manager Kitchen Wizard" and as amended from time to time. The job profile is not produced to the Authority.

[4] On 8 November 2007 a meeting was held of all staff at Henderson Kitchen House. The employees were informed that sales were not as anticipated, that expenses were higher than expected and that there were to be redundancies. This advice was confirmed in a business update document handed to staff at the same time. Management also advised that recently advertised vacancies would not be filled and the advertising for the same would cease.

[5] Mr Cochrane met with Kitchen House CEO and another manager on 21 November 2007. He was immediately advised his position was redundant. He was asked to think about other opportunities and was informed that Kitchen House would do the same. Mr Cochrane was asked to get back to management the next day to see if he could "come up with a position the company had not thought of".

[6] The following day on 22 November 2007 Mr Cochrane met again with Kitchen House CEO. Mr Cochrane was asked if he had thought of any other position. He responded that he could not think of any other position. He was then advised Kitchen House needed to make him redundant.

[7] Later that same day Mr Cochrane was handed a letter dated 21 November 2007 confirming the termination of his employment for redundancy.

[8] Kitchen House made fourteen employees redundant in November 2007 and a further six in December 2007.

[9] Mr Cochrane began searching for a new job in the third week after his employment with Kitchen House ended. In his search he came across an internet advertisement dated 23 November 2007 for a "Kitchen Wizard" at North Shore. Mr Cochrane telephoned the recruitment agency and it was confirmed to him the vacancy was for Kitchen House. Mr Cochrane says the agent diverted him away from the advertised vacancy and instead invited him to meet her after the Christmas vacation to find an alternative position. Kitchen House says this advertisement by the recruitment agency was a genuine mistake.

[10] Mr Cochrane saw the Kitchen Wizard North Shore vacancy advertised again on 28 December 2007. Kitchen House says this advertisement was also a mistake.

[11] Mr Cochrane saw a further internet advertisement on 17 January 2008 for an "Operations Manager". The recruitment agent Mr Patrick Petelo ("Mr Petelo") confirmed to Mr Cochrane the position was at Kitchen House. Both Kitchen House director Mr Dean Phillips ("Mr Phillips") and Mr Petelo say Mr Petelo was instructed to advertise a revised "Operations Manager" role which included a sales element. Both Mr Phillips and Mr Petelo concede the actual advertisement does not refer to any sales element.

The merits

[12] The issue in this investigation as specified in the statement of problem concerns redeployment and whether Mr Cochrane should have been offered a vacant position at another branch, as advertised, as an alternative to redundancy.

[13] There is a test for justification of an employer's actions prescribed by Parliament at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

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.

[14] Mr Cochrane concedes that Kitchen House was facing serious financial difficulties. He was aware that sales targets had not been achieved and that company-wide sales figures were down. Mr Cochrane candidly tells the Authority he could see Kitchen House needed to do something about the difficult financial situation it faced. I conclude on this basis and accepting Kitchen House's evidence, that the redundancy was genuinely for commercial reasons.

[15] Kitchen House confirmed there were sales positions available but Mr Cochrane was not considered for them because it resolved he did not have sufficient sales experience. Mr Cochrane says he does have previous sales experience. Whether that is so, Kitchen House did not enquire of him.

[16] Mr Petelo says he told Mr Cochrane of the revised sales focus. Mr Cochrane says he did not. Mr Petelo appreciated Mr Cochrane's previous sales experience and in fact referred Mr Cochrane to three vacancies having a sales role element. That being so, it is odd that Mr Petelo "advised [Mr Cochrane] of the new job responsibilities and that [he] deemed [Mr Cochrane] not right for the position".

[17] Similarly, I regard it suspicious that while both Mr Phillips and Mr Petelo give evidence Mr Petelo was briefed that the North Shore operations manager role would involve a sales and support element and be showroom based, the advertisement he actually placed does not communicate any such revised focus.

[18] I regard these matters as inconsistencies in Mr Petelo's evidence. For this reason I regard Mr Petelo as an unreliable witness.

[19] Unsatisfactory too is Mr Phillips' evidence that the advertisements placed on 23 November 2007 and 28 December 2007 were both mistakes. This situation I regard as most unlikely.

[20] Mr Cochrane notes that Kitchen House's web site details a position of operations manager at Henderson. He says his former position continues to operate and therefore his redundancy is false. Kitchen House says this also was a mistake.

[21] Weighing all these matters together, I conclude that there was an operations manager vacancy at North Shore at the time Mr Cochrane was made redundant. Mr Phillips made a remark at investigation meeting that Mr Cochrane lived too far away from the North Shore to be considered for the vacancy there. That was a telling statement. I regard it as an acknowledgement of an actual vacancy. I also accept that there were sales positions available that Mr Cochrane was not considered for and not informed of.

[22] Mr Cochrane was entitled to have information about these vacancies. He was entitled to be considered for them as an alternative to the termination of his employment.

[23] I accept that Kitchen House's initial correspondence with Mr Cochrane's advocate is not consistent with the position advanced in the investigation.

[24] Mr Cochrane is understandably suspicious as to why neither of the recruitment agents invited him to apply for the advertised vacancy - a position he had only recently been made redundant from.

[25] There are too many mistakes and inconsistencies involved here. The situation defies credibility in my view. I accordingly regard Kitchen House's defence of the application with much suspicion.

The determination

[26] I conclude Kitchen House failed to properly and fairly consult with Mr Cochrane as to alternatives to redundancy. It also failed to properly consider his redeployment. That was not fair to Mr Cochrane and was not the actions of a fair and reasonable employer. **Accordingly, I determine the dismissal was procedurally unfair and therefore unjustifiable. Mr Cochrane has a personal grievance for**

unjustifiable dismissal. He is entitled to resolution in settlement of that personal grievance.

The resolution

[27] 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 Cochrane'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. I find Mr Cochrane did not contribute to the situation that led to the personal grievance I have found.

Reimbursement

[28] As I have determined the redundancy was for genuine commercial reasons I am unable to find that Mr Cochrane has suffered a loss of income. I make no award of reimbursement. Although I regard Kitchen House's defence with much suspicion, I am not prepared to find there was a "sham" so as to entitle Mr Cochrane to reimbursement.

Compensation

[29] Mr Cochrane claims \$10,000.00 as compensation for hurt and humiliation and injury to his feelings. He was paid redundancy compensation of four weeks salary but that is contractual compensation for the loss of his employment. He asks for compensation for the personal grievance the Authority now finds.

[30] Mr Cochrane and his partner give evidence that after he was dismissed, he suffered major depression. They say Mr Cochrane found it extremely difficult to get motivated each day. Mr Cochrane came to have a very low opinion of himself and felt inadequate because he could not provide for his family.

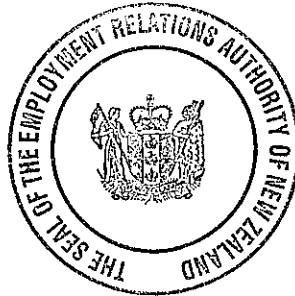
[31] I have no doubt it must have been distressing for Mr Cochrane to see what he believed was his position being advertised a number of times.

[32] I accept Mr Cochrane has suffered hurt and humiliation, loss of dignity and injury to his feelings. Having regard to his evidence, the length of his service and the nature of his personal grievance, I award him compensation of \$10,000.00. I order **Kitchen House Limited to pay to Paul Cochrane the sum of \$10,000.00 as compensation.**

Costs

[33] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nutsford is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Courtney is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

L. Robinson



Leon Robinson
Member of Employment Relations Authority

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