

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 103  
5414398

BETWEEN

JOANNE DOUBLE  
Applicant

A N D

WELLINGTON SOCIETY  
FOR THE PREVENTION OF  
CRUELTY TO ANIMALS  
(SPCA) INCORPORATED  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Duncan Allan, Unite Union for Applicant  
Geoff Davenport, Counsel for Respondent

Investigation Meeting: 3 and 4 July 2013

Submissions Received: 4 July 2013 from Applicant  
4 July 2013 from Respondent

Date of Determination: 26 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Joanne Double was employed by the Wellington Society for the Prevention of Cruelty to Animals (SPCA) Incorporated in April 2004. Her position at that time was fulltime Animal Caregiver. When her employment terminated in September 2011, she was the Clinic Supervisor. That position was disestablished as part of a restructuring that took place in August and September 2011.

[2] Ms Double claims her dismissal for redundancy was unjustified, in that her employer failed to redeploy her to a position for which she was fully experienced and capable. She also says the SPCA followed a flawed procedure in implementing the restructure in that it failed to take staff feedback into account, or seek further information on issues raised in that feedback or to correct errors in the proposal

document. Underlying Ms Double's claims is the suggestion that her allegations of having been bullied by a manager over a period of years may have influenced decisions taken by the SPCA in the 2011 restructuring.

[3] Following her dismissal, Ms Double says she was demoralised and depressed, which made finding an alternative position more difficult. She found part-time work after 7 months. She seeks compensation for lost wages, and for hurt and humiliation.

[4] The Wellington Society for the Prevention of Cruelty to Animals Inc. (SPCA) is an incorporated society which has animal centres in Wellington and Waikanae. It relies on fundraising, bequests, grants and donations for its continued operation.

[5] The SPCA says Ms Double's employment was terminated justifiably following a genuine restructuring that was carried out in a procedurally fair manner. It says it could not redeploy her to a position that was vacant during the consultation process, because that position needed to be filled urgently for operational reasons.

[6] No decisions had been made at that time about the disestablishment of the Clinic Supervisor's position. It would therefore have been premature to offer redeployment to that position to Ms Double. In any event, that position was at a significantly lower remuneration than hers.

[7] The SPCA says all feedback that was submitted during the consultation over the restructuring was taken into account before final decisions were made. This included the response of the Unite Union (the union), despite the late submission of that response.

[8] It says Ms Double had not made formal complaints of bullying for several months. It believed earlier concerns expressed by her, and other SPCA employees, had been dealt with appropriately. The restructuring decision took no account of those issues which the CEO believed had been managed and resolved.

### **Issues**

[9] The main issue for the Authority to determine is whether Ms Double was justifiably dismissed. To determine that issue, it is necessary to consider whether:

- a. the position of Clinic Supervisor was genuinely redundant; and

- b. whether Ms Double should have been offered redeployment to a position that was vacant at the outset of the restructuring process.

### **The Law**

[10] Whether or not Ms Double's dismissal was justifiable must be determined by applying the test set out in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the SPCA's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[11] The application of the test requires the Authority to "*inquire into a decision to declare an employee's position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified.*"<sup>1</sup>

[12] The Authority's role is not to substitute its decision for that of the employer, but to assess whether the employer's decision, and how it reached that decision, were what a fair and reasonable employer could have done in all the relevant circumstances.

### **The evidence of the parties**

[13] Ms Double gave evidence on her own behalf and summoned 2 former Board members who gave oral evidence. A further 6 witnesses gave evidence for Ms Double, 4 of whom are current employees of the SPCA.

[14] Evidence for the SPCA was given by Mr Torrance, the Chief Executive Officer (CEO), Emanuel Kalafatelis, a current SPCA Board member who was also a Board member in 2011, and Nicholas Taylor, the Animal Care Manager.

[15] Four of Ms Double's witnesses were responding specifically to evidence given by Mr Taylor, relating to Ms Double's poor relationships with them during her employment with the SPCA.

[16] Each of those four witnesses denied Mr Taylor's evidence on that matter, and testified to the quality of their working relationships with Ms Double. Many witnesses spoke highly of Ms Double's competence and expertise as Clinic

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<sup>1</sup> *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEMPC 39, at [53]

Supervisor and Animal Caregiver. They referred to the high regard in which Ms Double was held by her colleagues throughout her employment.

[17] Ms Double gave evidence of the difficult relationship she had had with the Animal Care Manager. She had complained on a number of occasions about his behaviour towards her, which she considered to be bullying. Other employees had raised similar issues.

[18] In Ms Double's view those issues were not resolved during her employment with the SPCA. She referred to a discussion she and an Animal Caregiver, Julia Payne, had with the (then) newly-appointed CEO, Mr Torrance, in March 2011. The employees were concerned about Mr Taylor's behaviour. Ms Payne was unable to attend the investigation meeting. While her signed but unsworn witness statement has little evidential value, I note that it confirms a conversation with Mr Torrance about their concerns.

[19] Ms Double said the CEO was not willing to consider her concerns and, in fact, was dismissive of them, saying that he would be relying heavily on Mr Taylor. Ms Double believed Mr Torrance's view of her was coloured by the concerns she had raised and that he avoided her in the following months.

[20] Mr Torrance recalled that meeting and denied being dismissive of the concerns Ms Double and Ms Payne raised, or of avoiding Ms Double after the meeting. He was new to the organisation and was still assimilating information about it at the time. In the meeting he focussed on listening to the employees' concerns. Mr Torrance said bullying was not raised in the meeting, but Ms Double and Ms Payne had mentioned they did not like Mr Taylor's management style.

[21] Mr Torrance had been made aware by the previous Acting CEO, Craig Shepherd, of the staff complaints about Mr Taylor and of the steps taken by the previous Board to address the issue. Those steps included providing an external consultant to coach and mentor Mr Taylor. Mr Torrance had spoken with the consultant and been informed about the *excellent progress* made by Mr Taylor.

[22] Ms Double had made no formal complaints of bullying following Mr Torrance's appointment as CEO until the time of her departure from the organisation. If she had done so, Mr Torrance said he would have investigated her complaints.

[23] Mr Torrance said that, when he took over as CEO, the SPCA was dysfunctional and was losing money rapidly. In the previous financial year it had made a loss of more than \$800,000. Changes were needed urgently to address the financial crisis the organisation faced, particularly as similar losses were forecast for the current financial year. Mr Torrance's brief from the Board was to turn the financial situation around. He says he spent the first 4 months of his employment reviewing the current practices of the SPCA and considering how the organisation could be made more efficient and cost effective.

[24] During that period he was in constant communication with the Board which was meeting on a fortnightly basis. Mr Torrance says his proposals for restructuring, which were critical to both the financial improvement of the organisation and its improvement in terms of animal management and welfare, were formulated by July 2011 and firmed up during that month.

[25] Mr Kalafatelis confirmed that the Board had delegated to Mr Torrance the task of coming up with proposals for change, consulting on those proposals, and reaching decisions. The CEO had kept the Board informed as he developed his proposals for change, and the Board supported both his proposals and his approach. Mr Kalafatelis saw this process as appropriate for Mr Torrance to implement in his management and operational role. He said the Board thought it important for there to be a distinction between the CEO's role and its governance role.

[26] Mr Kalafatelis also noted that Mr Taylor was not present during any discussions between the Board and Mr Torrance and asserted that "*the proposals in the consultation document had nothing whatsoever to do with the interaction between Nick Taylor and Joanne Double.*" He confirmed that the focus of the proposal was "*on turning the financial performance of the business around and on making it as efficient as possible*".

[27] Mr Taylor gave evidence that he had no involvement in the formulation of the consultation document. He did have numerous discussions with the CEO over a range of issues between mid-March and 3 August 2011, but did not know how much Mr Torrance took from their conversations.

[28] Mr Torrance said he did not rely on Mr Taylor in matters relating to the restructuring. He had done an extensive review of current operational procedures,

including considering world-wide best practice. He acknowledged, however, that he had spent only about thirty minutes talking with Ms Double since becoming CEO and that much of his knowledge of her Clinic Supervisor's role came from Mr Taylor.

[29] In July 2011 one of the feline caregivers at the SPCA resigned and her position was advertised. Mr Taylor informed staff and volunteers of the vacancy by email dated 27 July 2011, and attached an application form for anyone interested in applying for the position. He also noted that the person who had resigned would be leaving "*in a few weeks*".

[30] In the investigation meeting Mr Taylor said the caregiver had resigned on 19 July 2011 and there was urgency in filling her role. Mr Taylor could not remember whether the employee had been permitted to leave during her notice period.

[31] When asked in the investigation meeting if he had told Mr Torrance about the urgency involving in filling the position, Mr Taylor replied that there was a staff freeze in place at the time and he was grateful Mr Torrance allowed him to replace the animal caregiver.

[32] Mr Taylor said he had not made any connections between the vacancy and the restructuring proposals announced on 3 August 2011, at which time the vacancy remained open. He confirmed he had not considered any options other than the replacement of the employee who had tendered her resignation.

[33] Mr Torrance confirmed there had been a staff freeze in place for some time and that he had sought and obtained permission from the Board to fill the vacancy.

[34] Mr Torrance had not revealed his restructuring proposals to staff at the time of Mr Taylor's notification of the vacancy, and Ms Double did not know that her employer was proposing to disestablish her position. She says if she had known, she would have applied for the feline caregiver position.

[35] When asked why he had not alerted Ms Double to the possible disestablishment of her position, Mr Torrance responded that it did not occur to him to do so. He also said he did not know what the final decision on the proposal would be at that time, and he hoped no staff would be lost.

[36] Exactly one week after Mr Taylor's notification of the feline caregiver vacancy, Mr Torrance advised all employees of his restructure proposal, which included the disestablishment of Ms Double's position of Clinic Supervisor.

[37] Ms Double said she was shocked by the proposal as she believed the position to be a key one within the animal caregivers' team. In her view Mr Torrance could not be in a position to know much about the role as he had spent so little time in the clinic area since starting as CEO.

[38] She said the consultation document displayed a fundamental misunderstanding of her role. The proposal stated the intention for the clinic to come under the control of the Animal Caregiver team, with the clinic animals being cared for by the Animal Caregivers. As that was already the situation, Ms Double was "*sure that once feedback had been given and Iain Torrance had a greater understanding of the role, then the decision would be made to retain the position*".

[39] Mr Torrance received feedback from twenty two individual staff regarding the restructuring proposals. Additionally the union made a submission on behalf of its members. The union's submission, and some individual submissions, referred to the importance of retaining the Clinic Supervisor in any restructure. Some submissions, including the union's, also noted the factual error in the proposal document regarding the current placement of the clinic.

[40] Less than a week after the announcement of the restructuring proposal, and during the consultation period, Mr Taylor informed SPCA employees that a new staff member had been hired to fill the vacant feline caregiver position. This was the position Mr Taylor had notified on 27 July 2011.

[41] Ms Double said she found it humiliating that, while her employer was proposing to disestablish her role, it offered employment to someone with no animal welfare experience to fill a vacant role for which she, Ms Double, was well qualified. She thought this must be "*a direct attempt to get rid of me*".

[42] She claimed there was no urgency to fill the vacant position and she could easily have been redeployed to it. In Ms Double's view the SPCA should have redeployed her to that position rather than filling it with someone with lesser expertise who was not a current SPCA employee.

[43] Mr Torrance disputed that view. When asked whether any thought had been given to filling the role on a temporary basis pending the outcome of the restructuring, it was clear from Mr Torrance's responses that he had not considered any options other than advertising and filling the position.

[44] The decisions on the final restructuring were relayed to employees, including Ms Double, on 6 September 2011. It was confirmed that the position of Clinic Supervisor was to be disestablished.

[45] Ms Double subsequently attended a meeting with the CEO to discuss the disestablishment of her position. She says she asked Mr Torrance why the animal caregiver position had been filled during the consultation process, which denied her the opportunity to be considered for, or moved into, that vacancy.

[46] She says Mr Torrance took the view that this was a different issue, and noted that the *"timing looks bad"*. He denied saying that, claiming he said the timing *"could look bad, but we had to fill the role at the time, and at that stage I had not reached any decisions about any of the proposals for restructuring"*.

[47] Ms Double says that, in the meeting, Mr Torrance asked her if she wished to apply for two new vacant positions that had been created by the restructuring. He also noted there was a possibility in the future of a role in the Feline run but that would depend on another employee's plans. She would not be automatically moved into that position if it became available, and would need to apply for it. Ms Double says she told Mr Torrance she needed to think about everything that had happened.

[48] A few days later Ms Double asked to be paid out in lieu of her notice. She says she did this because she had found coming to work to be a humiliating experience since the announcement of the disestablishment of her position. She felt she was being pushed out and it was not possible for her to work out her full notice period in those circumstances.

[49] Ms Double left the SPCA on 22 September 2011 and raised a personal grievance in November 2011. She says the SPCA's denial of knowledge of any bullying by Mr Taylor, after she had raised her personal grievance, confirmed her view that she had been unjustifiably dismissed.

[50] Evidence from annual reports show that the SPCA turned around its \$800,000 loss in the 2011 financial year to a modest profit of \$44,000 in the 2012 financial year. The organisation increased its income substantially in 2012, while decreasing its expenditure. The CEO stated, in response to a question regarding expenditure on salaries and wages, that expenditure in that area had increased slightly in the 2012 year.

[51] Mr Torrance said the restructuring had led to better care for animals; more animals than ever before being helped; and the organisation becoming more sustainable. Both Mr Torrance and Mr Taylor provided oral and graphic (whiteboard) evidence of how the restructuring had changed the approach to SPCA's animal care lifecycle management. This had resulted in improved animal health, the elimination of some diseases, lower rates of euthanasia, and increased numbers of animal adoptions.

### **Discussion and findings**

[52] I have no doubt that the restructuring was a result of the genuine need for institutional change. The evidence is compelling that changes were required to ensure the financial viability of the SPCA. The loss of \$800,00 in the previous financial year, and indications that the organisation was heading down the same track in the current financial year, signalled an impending financial crisis.

[53] Mr Torrance was tasked with turning the organisation around and making it sustainable. That the changes he implemented improved the organisation's financial performance is indisputable. I accept the SPCA's evidence that they also resulted in improvements to operational efficiency.

[54] The decision to disestablish the Clinic Supervisor's position was clearly contentious, with some employees being vehement in their support for the retention of the position, and of its incumbent. However, that was a decision, among a number of other staffing decisions, that I find the SPCA was entitled to make.

[55] I accept Mr Torrance's evidence that the decision to disestablish the Clinic Supervisor position was his and that it was made for genuine reasons. I also accept that his decision had no connection with his knowledge of any formal complaints that Ms Double had made prior to Mr Torrance's appointment as CEO.

[56] Although the staff wages bill increased slightly over the following twelve months, that is only part of the picture. The effectiveness of the overall changes was demonstrated in the dramatic improvement to the organisation's financial position in the 2012 financial year. It is most likely that the staffing changes contributed to that improvement.

[57] However, I find the decision to fill the vacant animal caregiver position during the consultation period was not one that a fair and reasonable employer could have taken. The evidence concerning the urgency for filling the position was not persuasive.

[58] Neither the Animal Care Manager nor the CEO could recall whether the person who resigned from the position had been permitted to leave without completing her notice period. In any event, when Mr Taylor announced the new appointment to the position in an email on 8 August 2011, he said she would be "*officially starting after the 18<sup>th</sup>*", i.e. of August 2011.

[59] At the time that appointment was announced, the timetable for notifying the outcome of the restructuring was the end of August. This was less than 2 weeks after the new feline caregiver was due to commence her employment. The announcement of decisions regarding the restructuring was subsequently delayed by a week, but that would not have been known on 8 August 2011.

[60] A fair and reasonable employer would have found other means of covering the feline caregiver position until such time as decisions had been made over the restructuring, including the proposed disestablishment of the Clinic Supervisor position.

[61] Some means of covering the position temporarily were put to Mr Torrance in cross-examination. They included making a temporary appointment to the position, or negotiating increased hours with another staff member, or making greater use of volunteers in the interim period. Mr Torrance's answers to these suggestions made it clear he had not considered any such options. He had only considered advertising and filling the position.

[62] The Animal Care Manager acknowledged that, in terms of skill levels, Ms Double "*would have been great*" in the feline caregiver role. He said that she would

have been able to adapt to the differences in content and approach between her current position and the caregiver role.

[63] Mr Torrance expressed the view that Ms Double could have raised her interest in the role with him between 3 August 2011, when the restructuring proposal was announced, and 8 August 2011, when the appointment of a new employee to the position was notified. He also asserted that the role paid less than her Clinic Supervisor position, and that it entailed weekend work, which she did not do.

[64] I find that to be an unreasonable response. Ms Double was, at the time, convinced that, once the CEO realised the factual errors he had made in the proposal document regarding the Clinic Supervisor's position, he would not proceed with the proposal to disestablish it. He did not acknowledge those errors until he released the decision document on 6 September 2011, well after the appointment of the feline caregiver.

[65] Nor did Ms Double have any knowledge that the feline caregiver's position would be filled before decisions were due to be made on the restructuring. The issues of lesser pay and the assumption, which Ms Double rejected, that she would not be willing to undertake weekend work were matters that a fair and reasonable employer could, and should, have canvassed with her.

[66] I also find the CEO's indication to Ms Double that she would have to apply for any vacant new positions and for any possible future role in the Feline run to be unreasonable. The restructuring decision document referred to offers of redeployment being made to certain existing staff. The offers were to positions for which the CEO apparently deemed the employees suitable, or where the roles were not too far removed from their disestablished, or changed, roles.

[67] Had the feline caregiver's role been left open, instead of being filled during the consultation period, it would have been reasonable for Ms Double to have been offered that position, without having to apply for it. The situation is not dissimilar from that of Mr Davidson in the *Rittson-Thomas T/A Totara Hills Farm* case where Colgan CJ found that:

*In all the circumstances at the time, a fair and reasonable employer would have done more than offer Mr Davidson the opportunity to apply for another position as I am satisfied was put to him by Mr Rittson-Thomas on 9 November 2010. A fair and*

*reasonable employer would, at the least, have offered that alternative to Mr Davidson who was well regarded by Mr Rittson-Thomas and whose skills and experience would have been more than adequate for it. The plaintiff did not act as a fair and reasonable employer would have.*<sup>2</sup>

[68] While that case was decided under the former s103A test, i.e. what a fair and reasonable employer “*would*” not “*could*” do in all the circumstances, the outcome is the same in this instance.

[69] Evidence presented to the Authority by a former SPCA Veterinary Manager and Animal Care Manager was that Ms Double was “*widely respected by staff and managers within the shelter for her experience and expertise regarding feline care and care of small domestic animals*”. That evidence was not disputed, and similar evidence was put forward by other past and current SPCA employees. As previously noted, Mr Taylor acknowledged that Ms Double would have performed the role well.

[70] There was also a newly created full-time position of Foster and Volunteer Program Lead. Ms Double's duties as Clinic Supervisor included Volunteer/Fostering Co-ordination. At the very least, a fair and reasonable employer would have engaged in a discussion with Ms Double over possible redeployment to that role rather than informing her that she could apply for the position.

[71] In submissions, the SPCA argued that it had to be fair to other employees whose positions had been disestablished. I accept that. However, it is clear from the evidence that a number of the positions that were disestablished in the 2011 restructuring were already vacant, following the resignation of the former incumbent.

[72] One other position involving animal care was changed from part-time to full-time, with the incumbent being offered redeployment to the new position. It seems that Ms Double's position was the only full time position involving the care of animals to be disestablished. In my view it would not have been unfair to other employees for the SPCA to have offered her redeployment to the full time feline caregiver position.

[73] For these reasons I find it was not the action of a fair and reasonable employer to terminate Ms Double's employment when options for redeployment to alternative positions within the SPCA were, or should have been, available. Ms Double has a personal grievance for unjustifiable dismissal for which she is entitled to remedies.

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<sup>2</sup> Ibid at [59]

[74] I find it understandable that Ms Double chose not to apply for vacant roles, given her employer's insistence that she would be required to apply for positions for which she had the skills and experience. Her reluctance was also justified by a number of other factors.

[75] Firstly, the error over the Clinic Supervisor role in the restructuring proposal document, which was not acknowledged until the decision document was published. Secondly, the CEO's apparent lack of interest in Ms Double's position, as evidenced by the short amount of time he had engaged with her between March and August 2011.

[76] Thirdly, the filling of the vacant animal caregiver position during the consultation process. Lastly, the suspicion Ms Double had, that the CEO's view of her had been negatively influenced by her expression of concerns in March 2011 about Mr Taylor. While I have found that was not a factor in the decision to disestablish the Clinic Supervisor position, the brief time Mr Torrance spent in discussions with Ms Double did nothing to dispel her fears in that regard.

[77] Mr Torrance denied that his view of Ms Double had been influenced by the March meeting. However, he acknowledged in the investigation meeting that he had obtained much information about the Clinic Supervisor's role from Mr Taylor.

### **Remedies**

[78] Ms Double has sought the payment of 3 months' wages and she is entitled to that under the Act. The calculation of the 3 months' wages should be at the \$13.50 per hour rate cited by the SPCA as that applicable to the feline caregiver role, and not at Ms Double's former Clinic Supervisor rate, as that position was genuinely disestablished.

[79] There was no contribution by Ms Double to the situation that led to her personal grievance.

[80] I accept Ms Double's claim, which was corroborated by evidence from her former partner, that she was humiliated and demoralised by the loss of her employment with the SPCA. She is entitled to an award of compensation.

**Orders**

[81] The SPCA is to pay Ms Double:

- a. The sum of \$7,020, gross, being 3 months' wages. This award is made under s. 128 of the Act.
- b. The sum of \$5,000 compensation under s. 123 (1) (c) (i) of the Act.

**Costs**

[82] Costs are reserved

**Trish MacKinnon**  
**Member of the Employment Relations Authority**