

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 47/09  
5128855

BETWEEN                      VAEA HUTCHEN  
   Applicant  
  
AND                              DEPARTMENT                      OF  
   CORRECTIONS  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:              Karina Coulston, Counsel for Applicant  
   David Traylor, Counsel for Respondent  
  
Investigation Meeting:      18 February 2009 at Christchurch  
  
Determination:                15 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Hutchen) alleges that she was either unjustifiably constructively dismissed or suffered an unjustified disadvantage as a consequence of the same factual matrix on or about 15 October 2007. That application is resisted by her employer (the Department).

[2]     Ms Hutchen was employed by The Department as a full time Corrections Officer on 22 May 2006. The terms and conditions of her employment recorded a requirement to *work shift work in accordance with the published shift roster*.

[3]     Ms Hutchen continued to work shifts in accordance with that published shift roster for the duration of her employment. However, on 28 August 2007 she emailed The Department inquiring about the possibility of a job share arrangement. This was because Ms Hutchen wished to undertake the care of a young relative. In consequence she sought to work part-time rather than full-time.

[4] The advice from The Department to her 28 August 2007 inquiry was that it was generally difficult to job share in a *Unit based setting* (where Ms Hutchen worked) but that she should talk in the first instance to her Unit Manager.

[5] Shortly thereafter, Ms Hutchen filed a job share proposal with her Unit Manager.

[6] The Unit Manager then forthwith discussed Ms Hutchen's proposal with her and undertook to discuss the matter further with senior Prison managers, but did indicate that the corrections officer Ms Hutchen sought to job share with was considered *unsuitable*.

[7] On 20 September 2007 the Unit Manager emailed Ms Hutchen to indicate that her application would not be supported.

[8] On 15 October 2007 Ms Hutchen tendered her resignation.

[9] On the day before her resignation finally took effect, The Department's Regional Manager, Paul Monk, sent an email to several parties in which he opined that *there is no problem with job sharing positions* and further on *if job sharing is suitable would these individuals reconsider leaving the Department?*

[10] That email and the genesis of it was not disclosed to Ms Hutchen during her employment, nor was she made aware of it after she left the Department.

[11] Subsequently, Ms Hutchen raised a personal grievance.

## **Issues**

[12] The essence of Ms Hutchen's claim is that she resigned her employment as a Corrections Officer because The Department failed to properly deal with her application for job sharing.

[13] In particular, Ms Hutchen relies on the email traffic involving Regional Manager, Paul Monk (which I have just alluded to) as evidence for the view that in essence there was more that the Department could have done in respect to her job share application than in fact it did do, and that there were senior managers (in particular Paul Monk) who held a more encouraging view about job share than it appeared her Unit Manager did.

[14] It will be useful for the Authority to focus on the following issues:

- (a) Discussions between Ms Hutchen and her Unit Manger.
- (b) Did the Department properly consider Ms Hutchen's job share application?
- (c) The email exchange involving Paul Monk.

***Ms Hutchen's engagement with the Unit Manager***

[15] Ms Hutchen was advised by the Department to discuss a job share proposal with her Unit Manager, and at the same time told that job share was problematic in a normal shift roster. She filed a job share application with her immediate Unit Manager, John Cooper. She says that she told Mr Cooper that if the job share proposal was not agreed to, she would have to resign because of her upcoming family responsibilities.

[16] Mr Cooper gave evidence before the Authority and struck me as a straightforward and honourable witness whose evidence could be relied upon. Amongst other things, Mr Cooper said that ... *he knew she (Ms Hutchen) was going to resign if she couldn't get a job share proposal agreed.* This of course is consistent with Ms Hutchen's own evidence that she had told Mr Cooper that if the job share proposal was rejected she would have no option but to resign.

[17] So it is clear that a failure of the job share proposal would lead to Ms Hutchen's resignation and it is equally clear that the Department knew that was the position at the point at which they made the decision about the job share proposal.

***Did the Department consider the job share proposal appropriately?***

[18] The Department's position was clear. There was, in principle, no objection to job sharing arrangements. There was, however, a realisation that the practicalities of job sharing made it difficult to contemplate within a normal shift roster arrangement. Indeed, the only job share arrangement which Ms Hutchen could point to was in a Unit where the two job sharing corrections officers were not working a normal shift rotation.

[19] When Ms Hutchen first approached the Department to ask about job sharing, she was clearly told that the Department did not view job sharing arrangements within the Unit based setting as being viable. However, she was encouraged to take the matter up with her Unit Manager, John Cooper. She did that on 8 September 2008.

[20] Mr Cooper undertook to progress the application, but it seems that he told Ms Hutchen in doing so that he was doubtful about the person that Ms Hutchen wished to job share with.

[21] In essence, the Department's evidence was that there was never an issue about Ms Hutchen; she was regarded as a capable and effective member of the Department's staff and the Department was anxious to retain her services. However, Ms Tunbridge, the person that Ms Hutchen wished to job share with, appeared to be in a different category.

[22] Mr Cooper's evidence was that although Ms Tunbridge had not been warned about alleged inadequacies or performance deficits, he had had *a very clear discussion* with her about her inadequacies.

[23] It is particularly interesting that both Ms Tunbridge and Ms Hutchen got the impression from talking separately to Mr Cooper that job sharing arrangements might be possible. Yet, so far as Ms Hutchen was concerned, when she filed an actual proposal involving Ms Tunbridge, Mr Cooper clearly told her that Ms Tunbridge was not an ideal candidate for job sharing arrangements.

[24] The difficulty with that tacit encouragement is that it may well have lulled both women (and for our purposes, particularly Ms Hutchen) into a false sense of security about the job share proposal.

[25] The job share arrangement proposed by Ms Hutchen was rejected on 20 September 2007, and Mr Cooper's evidence was that in fact he could have reverted to Ms Hutchen earlier than that but he was away on secondment at another prison in the North Island. That suggests that he acted promptly to consider the job share application, sought advice from colleagues quickly and might well have been in a position to respond to Ms Hutchen more quickly than he actually did.

[26] Ms Hutchen says that the Department was never serious about her application and gave her proposal no more than a cursory examination before rejecting it.

However, Mr Cooper's evidence is that he did in fact discuss the matter with, in particular, the Prison Manager and with other senior colleagues with a view to seeing if the request could be accommodated. But it was clear to me from Mr Cooper's evidence that the real difficulty with Ms Hutchen's application was not in fact the practical difficulties of job share within a shift roster environment (although that was a problem) but with Ms Hutchen's chosen partner, Ms Tunbridge who the Department clearly regarded as unsuitable.

[27] I make this finding because Mr Cooper told me in evidence at the investigation meeting that he had undertaken inquiries himself (and it seems without telling Ms Hutchen) to see if there was somebody else in the Department who Ms Hutchen could job share with who would, in the Department's view, be suitable.

[28] I think the significant question is: what ought to have happened when the job share proposal was rejected? I asked Mr Cooper that question at the investigation meeting. He said that Ms Hutchen should have reverted to him to discuss the matter further and between them they might have been able to come up with a workable solution. He was very clear the Department regarded Ms Hutchen highly and did not want to lose the benefit of her services.

[29] However, because Mr Cooper was at that particular time working away from his normal South Island base in a North Island Prison, the possibility of that contact between the parties (while not impossible by electronic means) was perhaps less direct than would have been the case if Mr Cooper and Ms Hutchen were working together on the same site.

[30] On the balance of probabilities, I am satisfied that the Department gave proper consideration to Ms Hutchen's request and even told her in advance of that consideration of the significant impediment to approving the request that the involvement of Ms Tunbridge would be. Ms Hutchen complains that she did not know why Ms Tunbridge was considered unsuitable; the Department quite properly says that its employment relationship with Ms Tunbridge is private and is not something that can be shared with others.

[31] On the evidence, the Department did in fact consider Ms Hutchen's application and even sought to find another alternative which might have been

acceptable to her, although it is acknowledged that the Department did not tell her that it was undertaking that particular inquiry.

[32] In the result, the Department reached a conclusion that it was not able to accede to Ms Hutchen's request and I am satisfied after reflecting on the nature of the documentation which underpins the employment relationship between the parties that the Department does have a discretion to consider matters such as job share but it is entitled to exercise that discretion in accordance with its own requirements. This is so provided that it does not breach its obligations to employees in so doing and I am satisfied that it behaved properly in the consideration of Ms Hutchen's request.

***Does the email traffic involving Regional Manager Paul Monk change anything?***

[33] In essence, Ms Hutchen says that the email traffic in which Paul Monk became involved suggested that Mr Monk had a more flexible view about job sharing than his more junior staff and that had her situation been specifically considered in the light of Mr Monk's apparent enthusiasm for job sharing, she might well have been in a different position.

[34] However, it seems to me that this thesis relies on a contention that the problem with Ms Hutchen's job share application was the difficulty of arranging job share in a shift based environment. I do not think that was the principal difficulty at all, as I made clear in the last section of this determination. I think Mr Cooper's evidence makes it plain that the real problem was Ms Hutchen's selection of Ms Tunbridge as a job share partner. Indeed, Mr Cooper made it clear when he spoke with Ms Hutchen on 11 September 2007 that the issue was her proposed job share partner. In his evidence before the Authority, Mr Cooper said, about this discussion:

*I recall advising her (Ms Hutchen) that while I understood her situation, I did not believe that Royanne (Ms Tunbridge) was a suitable person for Vaea (Ms Hutchen) to job share with and for that reason I could not support her proposal.*

[35] It follows that right from the outset, it was as clear as could be that Ms Hutchen's proposal was going to struggle, not because of inherent difficulty with job share in principle, but because of the person that Ms Hutchen wished to job share with. Mr Cooper could not have been clearer that there was a difficulty with Ms Tunbridge so far as the Department was concerned, and that he, in consequence, was unable to support the job share proposal.

[36] It seems to me to follow that right from the outset then, the proposal was always going to struggle and, more importantly, right from the outset Ms Hutchen knew that she did not even have the support of her immediate manager, not because of any deficiency in her application per se or certainly because of any deficiency in her own work practice or behaviour, but because she had chosen as a job share partner somebody the Department had no confidence in.

[37] In that context then, I find it difficult to be persuaded that Mr Monk's request for staff to perhaps consider job share proposals positively as a way of retaining capable staff had any real effect on Ms Hutchen's situation. As I say, her application was rejected because of the person that she had mounted it with, and from the outset she knew that her application was not going to be supported by Mr Cooper.

[38] As Mr Cooper made clear, it is conceivable that had he and Ms Hutchen had further discussions, there may have been some basis on which the parties could come to terms which would have enabled the Department to retain Ms Hutchen's services, something which plainly they sought to do. This was not a situation where the Department was pleased to see the back of Ms Hutchen; quite the reverse was in fact the case with the Department seeking to retain her services as far as that was possible.

### **Determination**

[39] I am not persuaded, for the foregoing reasons, that Ms Hutchen has a viable claim against the Department. I do not find any evidence of a constructive dismissal or of a disadvantage occasioned by an unjustified action of the employer. As I have made clear, I do not think that the Department breached its obligations to Ms Hutchen and in the absence of a breach of the Department's duty to her, she cannot ground a constructive dismissal claim. There is certainly no evidence whatever that the Department sought to end the employment relationship; as I have made clear, quite the reverse was the case.

[40] In the absence of any breach of duty, the constructive dismissal claim must fail. In my opinion, the Department properly considered Ms Hutchen's application but warned her at the very outset that the application would not be supported because of the person that Ms Hutchen chose to associate with. Had she sought to put a different proposal to the Department or enter into further discussion with them, the

outcome may have been different, but that did not happen and no criticism can be levelled at the Department for that failure.

[41] In relation to the claim for a disadvantage as a consequence of unjustified actions of the employer, again I am unable to find any unjustified actions performed by the Department which have resulted in disadvantage to Ms Hutchen. Certainly, it could be said that the Department's failure to grant her application caused her a disadvantage, but in my opinion, on the evidence heard, the Department's failure to grant that was a proper exercise of its discretion and there is no evidence before me that it prejudged the issue or acted in any other way in an unfair or capricious fashion.

[42] For similar reasons, the alleged breach of the good faith obligation in s.4 of the statute is also not made out.

### **Costs**

[43] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority