

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 202  
3008075

BETWEEN                      PUKI FAKATAGI UTATAO  
Applicant

A N D                              MAXCARE MEDICAL CENTRE  
LIMITED  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Jock Lawrie, Counsel for Applicant  
No appearance by or for Respondent

Investigation Meeting:        12 July 2017 at Auckland

Written Record of Oral  
Determination:                13 July 2017

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**WRITTEN RECORD OF ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Ms Fakatagi Utatao (who is known as Puki) was employed by MaxCare Medical Centre Limited (MaxCare) as a full time medical receptionist from 04 July 2016 until she was summarily dismissed on 20 October 2016.

[2] Ms Utatao's dismissal letter states that her performance "*borders serious misconduct and cost our company lost revenue and numerous complaints from patients and staff.*"

[3] Ms Utatao's terms and conditions of employment were recorded in an individual employment agreement which contained a 90 day trial period provision which expired on 03 October 2016. Ms Utatao's work duties were set out in her position description.

[4] Ms Utatao says that she was asked by Dr Tapu Rairi, the director of MaxCare, to see him in his office on the afternoon of 20 October 2016. Ms Utatao says that Dr Rairi told her that she did not fit in at the clinic and that there had been complaints about her.

[5] When Ms Utatao asked Dr Rairi what the problem was he told her it was “*everything*”. When pressed to explain in further detail, Dr Rairi allegedly told Ms Utatao that she “*just didn’t fit in*” and that she “*didn’t have ‘the flow’*”.

[6] Ms Utatao says that Dr Rairi told her that he wanted her to finish in November and that he would give her two weeks’ notice if she finished in the first week of November. He also said she would be better off going back to her previous employer.

[7] On 21 October Ms Utatao says she was posting outpatient reminders when Dr Rairi approached her and told her to stop doing it because patients were complaining about the letters.

[8] Ms Utatao says she apologised to Dr Rairi about the patient reminders. She also says that she asked if she could continue to work until the end of December or if not then at least until the end of November. Ms Utatao says that Dr Rairi refused to allow that and instead said she had to leave her job by the end of the first week in November.

[9] On 25 October 2016 Ms Utatao asked Dr Rairi if she was going to get written notice of her employment ending. She says that Dr Rairi then told her that she had a six month probation period after the 90 day trial period had expired and she was being dismissed under the probation clause.

[10] Ms Utatao asked for a copy of the original signed employment agreement he was referring to as she did not recall having seen a probationary period clause in it. Dr Rairi said he would give it to her the next day but did not do so. Ms Utatao is correct - there is no probation clause in the individual employment agreement I reviewed.

[11] On 26 October 2016, Ms Utatao says Dr Rairi called her into his office and handed over the dismissal letter while telling her that she “*wouldn’t like it but that the six month probation is law*”.

[12] Ms Utatao says that she told Dr Rairi that her employment agreement required her to be given four weeks' notice of termination or pay in lieu and that she was also entitled to holiday pay. Ms Utatao says she told Dr Rairi she wanted to work out her four week notice period but Dr Rairi said that she could not.

[13] Ms Utatao says that she queried Dr Rairi about his offer of working for two weeks which she believed he had made on 20 October. Ms Utatao says Dr Rairi told her that in their conversation on 20 October he had been trying to get her to hand in her resignation and find a job over the following two weeks.

[14] Ms Utatao claims her dismissal was procedurally and substantively unjustified. She seeks lost remuneration and distress compensation.

### **No appearance by respondent**

[15] MaxCare did not file a Statement in Reply in the form required by the regulations. MaxCare was granted an extension of time to file a Statement in Reply so it could take legal advice. Notwithstanding that MaxCare failed to file a Statement in Reply.

[16] MaxCare was reminded by the Authority on 16 May 2016 of the need to file a Statement in Reply but failed to do so. The Authority emailed MaxCare on 17 May 2016 asking for an explanation as to why it had failed to comply with the extension to file its Statement in Reply and advising that it now required leave of the Authority to defend Ms Utatao's claim.

[17] MaxCare was given until 22 May 2016 to file a leave application but did not do so. It was also warned that its refusal to attend mediation put it at risk of a penalty being imposed on it for delaying an investigation. No leave application was received. No explanation was given for failing to comply with the extended timetable.

[18] The Notice of Investigation Meeting was served on MaxCare by track and trace courier on 03 July 2017 and was signed for by Dr Rairi.

[19] MaxCare has not filed any evidence or documentation to assist the Authority with its investigation. Nor did it attend the Authority's investigation meeting.

## **The issues**

[20] The following issues are to be determined:

- (a) Was Ms Utatao's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

### **Was Ms Utatao's dismissal justified?**

[21] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively determine whether MaxCare's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Utatao was dismissed.<sup>1</sup>

[22] When assessing justification the Authority must consider MaxCare's compliance with its statutory obligations.

[23] These include the good faith obligations in s.4(1A) of the Act to provide Ms Utatao with access to relevant information and an opportunity to comment on it before a final decision was made about her ongoing employment. It also includes each of the four procedural fairness tests set out in s.103A(3) of the Act.

[24] A fair and reasonable employer is expected to comply with its statutory obligations. Failure to do so is likely to fundamentally undermine an employer's ability to justify its actions and/or its dismissal of an employee.

[25] I find that MaxCare did not comply with any of its statutory obligations. MaxCare breached its good faith obligations under s.4(1A) of the Act. It also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[26] There was no evidence that MaxCare sufficiently investigated its concerns about Ms Utatao. I consider that the manner in which Dr Rairi raised his concerns with Ms Utatao on 20 October 2016 by telling she did not fit in did not sufficiently raise the material concerns with her.

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<sup>1</sup> Section 103A(2) of the Act.

[27] It therefore follows that Ms Utatao was not given a reasonable opportunity to respond to MaxCare's specific concerns before she was dismissed. Because she had no opportunity to respond, MaxCare did not take into account any explanations she could have provided in relation to the concerns that MaxCare had about her ongoing employment.

[28] I find that these breaches are serious fundamental breaches that resulted in significant unfairness to Ms Utatao. Section 103A(5) therefore does not prevent the Authority from finding that Ms Utatao was unjustifiably dismissed.

[29] I find that MaxCare's dismissal of Ms Utatao was substantially and procedurally unjustified.

### **What if any remedies should be awarded?**

#### *Mitigation*

[30] I am satisfied that Ms Utatao took adequate steps to mitigate her loss. She obtained a fixed term engagement on 02 February 2017 which expires on 04 August 2017.

#### *Lost remuneration*

[31] Ms Utatao was paid \$47,840 gross salary per annum in accordance with her employment agreement. She received \$920 gross per week plus 3% (\$27.60 per week) on top of that as the employer's compulsory KiwiSaver contribution.

[32] Because Ms Utatao was a KiwiSaver Member Maxcare was also required to pay a compulsory KiwiSaver employer contribution of 3% to Inland Revenue Department (IRD) for the benefit of Ms Utatao's KiwiSaver account and to deduct and remit to IRD 3% from her wages as her compulsory KiwiSaver employee contribution.

[33] Ms Utatao is seeking reimbursement of the remuneration she has actually lost from the date of her dismissal until the investigation meeting today.

[34] There have been 37 weeks that have elapsed since Ms Utatao's dismissal. That means that had she not been dismissed then up until today (the day of the

investigation meeting) she would have earned \$34,040 (37 weeks x \$920 per week) plus \$1,021.20 as the employer's compulsory 3% KiwiSaver contribution.

[35] She would have earned \$34,000 over that period if she had not been unjustifiably dismissed.

[36] Since her dismissal Ms Utatao has received a Work and Income New Zealand (WINZ) benefit of \$1,516.10 plus total gross earnings from her new temporary job of \$20,240 (being 23 weeks x \$880 per week).

[37] Ms Utatao's actual lost remuneration is \$12,283.90 (being \$34,040 what she would have earned less \$21,756.10 being what she did in fact earn) plus \$368.52 as the compulsory employer's KiwiSaver contribution. Ms Utatao is entitled to be compensated for her actual lost remuneration.

[38] Within 28 days of the date of this determination MaxCare is ordered to pay Ms Utatao \$12,652.42 (being \$12,283.90 lost remuneration plus \$368.52 employer KiwiSaver contribution) under s.128(3) of the Act.

#### *Distress compensation*

[39] Ms Utatao was 63 years old at the time of her dismissal. She says that losing her job at her age has caused her a lot of stress and worry.

[40] Ms Utatao had to apply for a WINZ benefit. She also had to make a \$16,649.08 hardship withdrawal from her KiwiSaver account to cover her living expenses, bills and mortgage payments.

[41] This financial hardship caused her great anxiety and worry. She was also very concerned about not being able to provide for her family without an income. Ms Utatao told the Authority that she had worked all her life and had not have any problems or disciplinary or performance issues previously.

[42] Ms Utatao had never been dismissed before. Ms Utatao says that her dismissal now makes her feel anxious and worried about making mistakes in her new job. She described feeling frightened at work now just in case she accidentally does something wrong without knowing it.

[43] Ms Utatao gave evidence about the shock, hurt, distress and injury to feelings she suffered as a result of her unexpected and unjustified dismissal. She told the Authority that she has not been herself since this happened and still doesn't feel like she is back to normal yet.

[44] Ms Utatao says she was very shocked to be dismissed because no formal performance concerns or warnings had ever been given to her about her work or attitude or performance or conduct at work. She had no idea her ongoing employment was at risk. She had successfully completed her 90 day trial period so expected her employment to be ongoing.

[45] Ms Utatao says she found it very shameful to be dismissed when she was not even sure what she had done wrong. Ms Utatao says that she was never given an opportunity to explain her side of the story and was not given any information about MaxCare's specific concerns.

[46] Ms Utatao says she does not know what Dr Rairi was referring to in the dismissal letter when he talked about "*lost revenue and numerous complaints*". She still does not understand that.

[47] Ms Utatao says that to be sent away without any notice and without any discussion made her feel like "*a very bad person*". She often still feels like crying when she thinks about it and became emotional at the investigation meeting today.

[48] Ms Utatao was also confused about the real reason for her dismissal because she says when Dr Rairi spoke to her about her employment ending he said he found no fault in her work it was just that staff, patients and himself did not like her.

[49] Ms Utatao says she had had many sleepless nights and still has sleep problems. She has cried many tears about the way she had been treated. She found it hard to focus on everyday things and had to see her doctor for medical assistance as a result of the adverse consequences she suffered from her unjustified dismissal.

[50] Ms Utatao's doctor told her that it will help her health improve when she is able to finally put the legal process behind her as it is still very stressful for her to think and talk about them.

[51] MaxCare is ordered to pay Ms Utatao \$13,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

### *Contribution*

[52] Having determined that Ms Utatao has a dismissal grievance, s.124 of the Act requires me to consider the extent to which she contributed to the situation that gave rise to her grievance and to reduce remedies accordingly.

[53] Contribution denotes blameworthy conduct which has been proved on the balance of probabilities.

[54] Because MaxCare did not participate in the Authority's investigation and did not provide any of the information that the Authority had identified was relevant to its investigation, there was no objective evidence from which to conclude that Ms Utatao's actions had contributed to the situation that gave rise to her dismissal grievance.

[55] Accordingly Ms Utatao's remedies should not be reduced on the ground of contribution.

### **Costs**

[56] Ms Utatao as the successful party is entitled to a contribution towards her actual legal costs.

[57] I adopt the Authority's usual notional daily tariff-based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting. Because this matter involved one hour of investigation meeting time, the notional starting point for assessing costs on a pro rata basis is \$750.

[58] The Authority was not made aware of any factors that should result in the notional starting tariff being adjusted.

[59] MaxCare is ordered within 28 days of the date of this determination to pay Ms Utatao \$750 towards her actual legal costs and to reimburse her \$71.56 for her filing fee.

## **Orders**

[60] MaxCare's dismissal of Ms Utatao was procedurally and substantively unjustified. Her personal grievance claim for unjustified dismissal therefore succeeds.

[61] Within 28 days of the date of this determination MaxCare is ordered to pay Ms Utatao:

- a. \$12,283.90 actual lost remuneration;
- b. \$368.52 compulsory KiwiSaver employer contribution on lost remuneration;
- c. \$13,000 distress compensation;
- d. \$750 costs;
- e. \$71.56 filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**