

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 330  
5535746

BETWEEN KATE ELIZABETH HARRISON  
Applicant

A N D UNISON WORK SPACES  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Nevan Percy, Counsel for the Applicant  
Matthew Vyle, Director of the Respondent

Investigation Meeting: 19 October 2015 at Auckland

Date of Determination: 21 October 2015

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Unison Workspace Limited (Unison) sells office furniture and office products. Ms Kate Harrison started work at Unison as a Sales Support Manager on 23 September 2013. On 09 December 2014 Ms Harrison was given two weeks' notice of dismissal on the grounds of incapacity so her employment ended on 23 December 2014.

[2] On 05 July 2014 Ms Harrison sustained a back injury at home. Although she did not immediately require time off work her injury deteriorated over the next two weeks and on 24 July she was signed off work on ACC until 19 August 2014.

[3] Ms Harrison was medically cleared to return to work on a part time basis from 15 August 2014. Ms Harrison was to work a maximum of four hours a day five days a week on light duties provided that she avoided prolonged periods of standing or sitting. Ms Harrison returned to her normal full time duties on 20 October 2014.

[4] Ms Harrison claims that on 05 and 06 November she was required to lift boxes which she says aggravated her original injury. Unison strongly denies that Ms Harrison was ever required to lift boxes so it says her evidence about that is dishonest. Ms Harrison continued working until 10 November because she was worried about taking further time off work for her back injury.

[5] On 10 November Ms Harrison asked Mr Vyle, who is one of Unison's three directors, if she could leave early and he agreed. She appeared upset so Mr Vyle asked Ms Harrison what was upsetting her. She declined so he asked her if she was upset because of a personal issue and she told him it was. Ms Harrison says she told Mr Vyle that because she was scared about his reaction if he knew it was related to her back pain.

[6] Ms Harrison saw her doctor on 11 November and signed off work for 30 days. Ms Harrison reported this back pain as a work related injury which she claims occurred as a result of lifting boxes on 05 and 06 November. Ms Harrison received ACC for this injury and she sent her medical certificate to Unison that day.

[7] Mr Vyle says Ms Harrison phoned him on 11 November to say she had injured her back again so needed the rest of that week (four days) off work to recover. Mr Vyle says he therefore expected Ms Harrison back at work on 17 November. Ms Harrison says she never said she would be back then because she had sent Unison her medical certificate which recorded she needed 30 days off work.

[8] On 14 November Unison wrote to Ms Harrison requiring her to attend a disciplinary meeting regarding serious misconduct at 11am on Thursday 20 November. The letter identified the following three issues to be addressed:

- (a) Unison's ability to keep her job open;
- (b) Investigation of how her work related back injury occurred to ensure that she was not placed in an unsafe environment which was likely to cause further injury;
- (c) The amount of errors she continued to make and in particular the major error made with the Sky Chef's order which was stated to have the potential to significantly impact on Unison, both financially and by reputation.

[9] It was odd of Unison to start a disciplinary process on 14 November about the ordering error when Mr Vyle said these were going to be discussed with Ms Harrison at a meeting scheduled for 17 November.

[10] It was also strange that Unison commenced investigations into whether or not it could keep Ms Harrison's job open when she had only been off work for three days and Mr Vyle's evidence was he had expected her back on 17 November.

[11] Mr Vyle says as a result of Ms Harrison's phone call with him on 11 November he expected Ms Harrison to be back at work on 17 November so he emailed her on 18 November stating that he was expecting her to turn up for work on 17 November and asking for information about her whereabouts and an explanation for her not attending work. Ms Harrison replied that day saying that she was on ACC for thirty days and had sent an ACC certificate to Unison on 11 November.

[12] This was unusual action for Unison to take given it had by then already received the medical certificate, so knew Ms Harrison was not fit to attend work.

[13] A disciplinary meeting took place on 28 November. Ms Harrison was not provided with any documentation in advance of the meeting other than the disciplinary letter of 14 November. Mr Vyle was unclear when giving evidence about what matters were disciplinary and why a disciplinary process had been commenced.

[14] Ms Harrison attended the meeting with her father as her support person. Also present were Mr Vyle and a contracted HR adviser. This meeting did not go well – it only lasted about five minutes. Mr Vyle says he never got the information he was seeking.

[15] Ms Harrison says the HR Advisor was not interested in what she had to say but kept asking her questions about her ability to lift boxes which she (Ms Harrison) did not believe was part of her normal duties. She says the HR Advisor did not accept that and maintained she had to tell them when she would be fit to lift boxes again.

[16] The meeting became fraught when the HR Advisor continued to push Ms Harrison to say when she would be fit enough to move furniture and lift because Mr Vyle considered such activities were part of her role. Mr Harrison's response (in defence of his daughter) to this line of questioning was to swear at the HR Advisor and then the Harrisons left the meeting.

[17] Mr Vyle says that Ms Harrison told them she was still in significant pain and was unsure when she would be returning to work. Ms Harrison disputes that and says there was no attempt to discuss any of the issues set out in the letter of 14 November. She says the medical certificate clearly recorded she would be unfit for 30 days.

[18] Ms Harrison says there was no discussion about how her absence from work was impacting on the business, about whether there was a need for Unison to engage a temporary replacement for her or whether there were any difficulties associated in covering her position whilst she was on ACC. These matters never came up.

[19] On 28 November<sup>1</sup> Unison wrote to Ms Harrison asking her to respond to –

- (a) the current state of her back ailment;
- (b) her prognosis for future return to full medial fitness; and
- (c) whether or not there was a likelihood of a return to work.

[20] Ms Harrison instructed a lawyer on 02 December who wrote to Unison on her behalf advising:

- (a) They were taking instructions in order to respond to the questions raised in the letter of 27 November;
- (b) They were in the process of seeking medical information and information from ACC;
- (c) Unison had breached its obligations to Ms Harrison that the meeting appeared to be nothing more than a charade and that they were concerned that a decision had already been made by Unison to dismiss Ms Harrison.

[21] Ms Harrison saw her doctor again on 04 December and was signed off work for another 30 days – i.e. until 04 January 2015 when it was recorded by her doctor that she (Ms Harrison) was expected to be able to return to light duties. Ms Harrison emailed this medical certificate to Unison on 08 December and stated in her cover

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<sup>1</sup> This letter was incorrectly dated 27 November but it was actually sent on 28 November, after the disciplinary meeting

email that if her back improved sufficiently then she intended to return to work before 04 January 2015.

[22] On 09 December 2014 Unison wrote to Ms Harrison terminating her employment on the grounds that she had been absent from work for more than 20 days due to a back injury and they could not keep the job open for her because its work requirements meant her position had to be replaced with urgency. Unison gave Ms Harrison two weeks' notice so her employment ended on 23 December 2014.

[23] Union's dismissal letter claimed that Ms Harrison had not been forthcoming with information clarifying her prognosis for the future so in accordance with the incapacitation clause in her employment agreement she was dismissed because her injury prevented her from meeting her contractual obligations.

[24] Ms Harrison raised a personal grievance claim on 18 December claiming that her dismissal was substantively and procedurally unjustified.

[25] Unison claims it was contractually entitled to dismiss Ms Harrison for incapacitation because she had been off work for more than 20 days. Unison also says that it followed due process before dismissing Ms Harrison.

[26] Unison relies on the right to dismiss for incapacitation set out in clause 19(1)(a) of the employment agreement which states:

*19.1 The Employer may terminate the Employee's employment upon giving the notice required under clause 18.1 if:*

- (a) the Employee suffers an illness or injury that would incapacitate him or her from carrying out their duties under this agreement and this incapacity continues for a period of more than 20 working days; or*
- (b) the Employee is incapacitated at different times for more than 60 workings during any one 12 month period.*

## **Issues**

[27] The following issues are to be determined:

- a. Was Ms Harrison's dismissal justified?
- b. If not, what if any remedies should be awarded?

c. What if any costs should be awarded?

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

[28] Justification is assessed in accordance with the justification test set out in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Unison's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Harrison was dismissed.<sup>2</sup>

[29] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. These include the good faith obligations in s.4(1A) of the Act and each of the four procedural fairness tests set out in s.103A(3) of the Act. Failure to do is likely to fundamentally undermine an employer's ability to justify its actions and/or the outcome it imposed.

[30] The Authority may also consider other appropriate factors in accordance with s.103A(4) of the Act. The Authority is not permitted to find a dismissal is unjustified solely because of minor procedural defects that did not result in unfairness to the employee.<sup>3</sup>

#### *Good faith*

[31] An employer who is making a decision which may adversely impact on an employee's ongoing employment is required to provide the employee with access to relevant information and an opportunity to comment on it before a final decision is made.<sup>4</sup>

[32] Mr Vyle told the Authority that Unison "*did not have the luxury of excess staff or carrying long term illness.*" That may be so but s.4(1A) of the Act requires Unison to share the basis of its view about that with Ms Harrison and to give her an opportunity to respond to that information before she was dismissed.

[33] I find that it did not occur. The letter of 28 November says that because Ms Harrison had been off work for 18 days and her prognosis had not been clarified Unison was considering whether or not it could keep her job open.

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

<sup>3</sup> Section 103A(5) of the Act.

<sup>4</sup> Section 4(1A) of the Act

[34] Mr Vyle told the Authority that the three directors formed the view that Ms Harrison had:

- a. lied about being directed to lift boxes,
- b. been dishonest about how her supposed work related injury had occurred;
- c. made up a back injury to avoid meeting with the directors to discuss errors she had been making;
- d. breached her good faith obligations because she was not active and constructive in her dealings with Unison;
- e. not been forthcoming with information about her back injury and prognosis.

[35] I find that Ms Harrison was not given information relevant to these specific concerns or an opportunity to comment on such information before she was dismissed. I find that Ms Harrison was never specifically advised about the specific matters of concern that Mr Vyle told the Authority about or that such matters were likely to adversely impact on her ongoing employment.

[36] I find that Unison breached its s.4(1A) good faith obligations to Ms Harrison which undermines its ability to justify her dismissal.

*Section 103A(3) procedural fairness tests*

[37] Unison bears the onus of establishing on the balance of probabilities that it complied with the four procedural fairness tests in s.103A(3) of the Act.

[38] I find that Unison did not sufficiently investigate its concerns about Ms Harrison's alleged breaches of good faith and/or dishonestly because it did not pursue these matters as specific disciplinary concerns so never put these concerns to her to respond to in breach of minimum procedural fairness requirements.

[39] I also find that Unison failed to sufficiently investigate whether or not it could continue to hold Ms Harrison's job open for the ten working days from 09-22 December 2014.

[40] Unison did not look into resourcing or workflow issues nor did it identify whether there was any cost to the business of Ms Harrison's absence continuing for those additional ten days. Ms Harrison was on ACC so Unison saved paying her salary while she was in receipt of ACC.

[41] Unison did not keep track of the time that it says other employees had to spend covering Ms Harrison's responsibilities while she was away from work. There was no assessment as to what if any impact there was on the business and/or staff if the existing cover for her role continued for a further ten days. Nor was any assessment done on the impact if any, Ms Harrison's absence had on clients and/or workflow.

[42] I consider that a sufficient investigation could have included an assessment of:

- (a) Unison's current and future workload;
- (b) The impact and effects that Ms Harrison's absence was having on other employees;
- (c) Whether existing employee workloads could be adjusted to accommodate Ms Harrison's absence for another ten days;
- (d) Whether the temporary employee's hours could be extended further if Ms Harrison's responsibilities were not able to be satisfactorily covered by existing staff;
- (e) The economic cost to Unison of Ms Harrison's absence continuing for a further ten days.

[43] I also consider that a fair and reasonable employer could not have dismissed without obtaining medical evidence regarding Ms Harrison's diagnosis, prognosis and about what if any adjustments could be made to support her return to work and to avoid future injury occurring.

[44] There also needed to be some investigation into what light duties consisted of. On the face of it Ms Harrison's administration role appeared to consist solely of light duties, which her medical certificate dated 04 December said she would be able to do by 04 January 2015.

[45] A fair and reasonable employer could not dismiss an employee for incapacity without first seeking information about when (or if) the employee was likely to be fit to return to their normal full time duties.

[46] Given that Ms Harrison identified her absence as being due to a work related injury I consider Unison had an obligation to properly investigate whether it had caused or contributed to her injury because that was a relevant factor for it to consider when deciding whether to keep her job open for a further ten days.

[47] Clause 17 of Ms Harrison's employment agreement entitled Unison to obtain medical information directly from her medical advisors about the nature of the injury, the cause of the injury, whether or not the injury was work related, in order to assist it to determine what duties she could or could not perform or whether her situation caused any other health and safety issues.

[48] Although Unison (incorrectly) believed Ms Harrison had not been forthcoming with the information it required, Unison did not exercise its contractual right to obtain the medical information itself. I consider this fundamentally undermined the fairness and reasonableness of its process and decision to dismiss.

[49] Ms Harrison's lawyer had advised Unison that they would be providing updated medical and ACC information. I also consider that a fair and reasonable employer could not have dismissed for medical incapacity before giving Ms Harrison a reasonable opportunity to provide the further medical and ACC information which her lawyer had indicated would be forthcoming.

[50] However Unison did not wait to receive that information before dismissing Ms Harrison. Unison had not set a timeframe for receiving that information from Ms Harrison's lawyer nor did it advise Ms Harrison that she would be dismissed on 09 December if the information Unison wanted had not been received by then.

[51] Unison did not make it clear what additional information (over and above what had already been provided) was required.

[52] Because Ms Harrison was not put on notice that Unison would be making a decision on 09 December about whether or not to hold her position open she did not have an opportunity to address Unison's specific concerns about holding her job open for ten more days before she was dismissed.

[53] I find that Unison did not comply with its legal obligations under s.103A(3)(a) of the Act to sufficiently investigate its concerns before dismissing Ms Harrison.

[54] I further find that Unison dismissed Ms Harrison for reasons that had not been fairly or properly raised with her and to which she had not had an opportunity to respond. This includes the view formed by Mr Vyle at a very early stage (he told me on 11 November 2014) that Ms Harrison had made up that injury to get out of having a meeting to discuss ordering errors that she appeared to be responsible for.

[55] Nor did Unison share that the director who Ms Harrison alleged had told her to lift the boxes denied giving her such an instruction which led Unison to conclude that she had been lying about that and therefore other matters regarding her injury.

[56] Unison also did not believe that she had suffered a work related injury as a result of her lifting boxes on 05 or 06 November for the reasons Mr Vyle identified in his evidence to the Authority. However these matters were never raised with Ms Harrison so she could not respond to them.

[57] I find that Unison did not comply with either s.103A(3)(b) or (c) of the Act because it did not adequately raise its specific concerns with Ms Harrison or give her a reasonable opportunity to respond to such concerns before she was dismissed.

[58] It follows that because Ms Harrison was not aware of Unison's specific concerns and therefore did not provide an explanation that s.103A(3)(d) of the Act was also not complied with.

[59] I find that Unison is unable to establish that it complied with any of the four procedural fairness tests in s.103A(3) of the Act which fundamentally undermines its ability to justify Ms Harrison's dismissal.

*Other appropriate factors*

[60] In terms of other appropriate factors as per s.103A(4), there was clearly a dispute between the parties as to how Ms Harrison had sustained an injury. Mr Vyle believed that she made up her injury to get out of a meeting scheduled for Wednesday 12 November to discuss ordering errors she had made.

[61] This view appears to contradict the medical evidence and the ACC findings that Ms Harrison had suffered a back injury as a result of a work related injury which

had occurred on 05 and 06 November. Unison was therefore required to put its concerns about Ms Harrison's "*integrity and honesty*" (as per Mr Vyle's evidence) to her to respond to but that did not occur.

[62] I also find that there was no objective evidence to support Unison's statement in the dismissal letter that *the work requirements have determined that your position be replaced with urgency*.

[63] There was no evidence that her position needed to be replaced or indeed was actually replaced with urgency. Nor was there evidence to establish that Unison's workload was so heavy that her position could not be held open for the ten working days between 9-22 December 2014. There was also no evidence that holding Ms Harrison's position open for that period of time would adversely affect Unison's other employees, clients or workflow.

[64] Medical evidence available at the time that Unison decided to dismiss Ms Harrison indicated that she could return to light duties on 04 January 2015. Because Ms Harrison was employed as a sale support officer which was basically an administration role, on the face of this she could reasonably be expected to be sufficiently fit to perform most if not all of her duties by the time that Unison reopened on 12 January 2015.

[65] I consider a fair and reasonable employer would not have dismissed without reconvening a further investigation meeting at which the specific disciplinary allegations and matters of concern (i.e. inability to hold her position open) were put to her together with the evidence upon which those concerns had been based. It was premature for Unison to have dismissed Ms Harrison without that occurring.

[66] I find that there was no consultation with Ms Harrison about what Unison believed a reasonable period of time would be to allow her to fully recuperate and return to work. Nor did Unison advise Ms Harrison why it believed their view of what a reasonable time to recover was appropriate.

[67] Unison did not explain to Ms Harrison the reasons that it relied on to come to its belief that her job could not be held open nor did it provide her with an opportunity to comment on those reasons or on the information that had caused Unison to form adverse views about her honesty.

[68] Mr Vyle told the Authority Unison believed Ms Harrison had been evasive and had failed to engaged with Unison regarding the information it wanted about the cause of injury and prognosis to return to work to perform normal duties. I do not accept that. Ms Harrison had told Unison about when and how she had injured her back, about the nature of her injury and that her doctor expected her to be fit to return to light duties on 04 January. Ms Harrison had also indicated that she wanted to return sooner if her situation improved sufficiently before her medical certificate expired.

[69] Unison was not clear about what additional information it required or why. I consider that the real problem was not that Unison did not have information but rather that Unison did not believe the information Ms Harrison had provided. However instead of investigating that concern Unison elected to proceed on the basis that it could not continue to cover her absence from work.

[70] Clause 11.5 of the employment agreement allowed Unison to require Ms Harrison to undergo a medical examination or assessment (at its expense) where it was concerned about long term or frequent sickness absence.

[71] This meant that if Unison had genuine concerns about the inadequacy of medical information Ms Harrison had provided then it had a mechanism available to it to obtain the medical information it required to enable it to make an informed decision. Unison dismissed Ms Harrison without doing so.

#### *Section 103A(5)*

[72] I find that the process defects were serious and resulted in significant unfairness to Ms Harrison. Accordingly s.103A(5) of the Act does not preclude the Authority from finding that Ms Harrison's dismissal was unjustified.

#### *Substantive justification*

[73] Unison's failure to comply with its statutory good faith requirements and with any minimum procedural fairness obligations fundamentally undermines its ability to substantively justify Ms Harrison's dismissal.

[74] Unison simply did not have all the relevant information available to it at the time it dismissed Ms Harrison so it was not in a position to adequately assess whether dismissal was an appropriate outcome.

[75] The evidence presented to the Authority also failed to establish a genuine commercial justification for Ms Harrison's dismissal. I find this is not a situation in which Unison could fairly or reasonably have called halt to the employment relationship due to Ms Harrison's work related back injury.

[76] There was no objective evidence (such as financial information, workflow information, work allocation, client service delivery etc) to satisfactorily explain why Ms Harrison was dismissed on 23 December when her medical certificate indicated she would be fit to return to work on 04 January. Unison was closed from 23 December until 12 January 2015 so I consider a fair and reasonable employer could not have dismissed Ms Harrison on 23 December.

[77] Mr Vyle told the Authority that had it not been for the "*dishonesty*" concern then Ms Harrison probably would have remained employed because Unison would have worked with her regarding her medical issues. Mr Vyle says Unison did not consider that to be an option because it did not trust Ms Harrison because it believed she had lied about her injury.

[78] The problem is that Unison never put allegations of dishonesty to Ms Harrison. She was completely unaware that alleged dishonesty was a driving factor behind her dismissal so never had a chance to address Unison's concerns. Unison's dismissal letter did not refer to dishonesty, rather it relied on incapacitation.

[79] I therefore find that Ms Harrison's dismissal was improperly motivated. Unison was actually dismissing Ms Harrison for alleged dishonesty but instead of disclosing that to Ms Harrison she was told that she was dismissed for incapacity because her job could not be held open for her. That is not what a fair and reasonable employer could do when faced with this situation.

## **Outcome**

[80] I find that Unison's failure to comply with its good faith requirements and with any of the four procedural fairness tests in s.103A(3) of the Act fundamentally

undermines its ability to justify Ms Harrison's dismissal. I also find that Unison did not have a good reason for dismissing Ms Harrison.

[81] Unison has therefore been unable to discharge its onus of establishing on the balance of probabilities that Ms Harrison's dismissal was justified. Accordingly I find that Ms Harrison's dismissal is procedurally and substantively unjustified.

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

#### *Mitigation*

[82] Ms Harrison applied for a number of jobs and ultimately succeeded in obtaining a new position as a result of a job application she had made in December 2014. I am satisfied that Ms Harrison took appropriate steps to adequately mitigate her loss.

#### *Lost remuneration*

[83] Ms Harrison was out of work for 14 weeks. I consider it appropriate that she be reimbursed for her actual loss.

[84] Unison is ordered to pay Ms Harrison \$14,807.66 (\$1,057.69 per week for 14 weeks) under s.128(3) of the Act to compensate her for the remuneration she actually lost as a result of her unjustified dismissal.

#### *KiwiSaver*

[85] Ms Harrison was a KiwiSaver member so she is entitled to receive the compulsory employer KiwiSaver contributions which she would have received had she not been unjustifiably dismissed.

[86] Unison is ordered to pay Ms Harrison \$444.23 compulsory employer KiwiSaver contributions (being \$14,807.66 x the applicable compulsory employer contribution rate of 3%).

#### *Distress compensation*

[87] Ms Harrison explained to the Authority how incredibly hurt she was by Unison's actions. She enjoyed working for the company and had put a lot of effort into her job. Ms Harrison was particularly distressed because she believed she had a

long term future with Unison so put in extra work over and above what she was paid to do with the intention of progressing to a management role in due course.

[88] Ms Harrison also expressed anger and distress about the way she had been treated and in particular the failure to give her an opportunity to address Unison's specific concerns. Ms Harrison says that she was supporting her partner financially at the time she was dismissed and had little savings which put her under extreme financial pressure to pay rent and bills.

[89] Ms Harrison had to borrow money to cover her basic expenses. She became depressed and required medical attention and also saw a counsellor. Ms Harrison says her ability to receive counselling was curtailed as a result of her inability to afford the necessary fees.

[90] Ms Harrison told the Authority that her relationship broke down under the pressure and she was unable to afford her rent herself so had to move back in with her parents. She describes the 2014/2015 Christmas New Year period as one of the worst periods of her life. Ms Harrison described how every time she failed to get an interview for a job application or a job she had interviewed for, she felt she was worthless.

[91] Unison is order to pay Ms Harrison \$8,000 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.

#### **What costs should be awarded?**

[92] Ms Harrison as the successful party is entitled to a contribution towards her costs.

[93] The parties are encouraged to resolve costs by agreement. If that is not possible then Ms Harrison has seven days within which to file a costs memorandum with Unison having a further seven days within which to reply. This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[94] The Authority is likely to determine costs based on its normal notional daily tariff based approach (the tariff is currently \$3,500 per day). The parties are therefore

invited to identify any factors which they say warrant adjustments being made to the notional daily tariff.

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