

**ATTENTION IS DRAWN TO THE  
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OF CERTAIN INFORMATION REFERRED  
TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 198  
5160390

BETWEEN                      LIZELOUISE LAMPRECHT  
Applicant

AND                              THE ULTIMATE CARE  
GROUP LIMITED  
Respondent

Member of Authority:      G J Wood

Representatives:            E Gartrell for the Applicant  
P Cullen and S Cates for the Respondent

Investigation Meeting:     1 September 2011 at Wellington

Submissions Received:     By 30 September 2011

Determination:              1 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

1. The applicant, Ms Lizelouise Lamprecht, claims that her dismissal, which was ostensibly for redundancy, was a sham. She also claims that she should not have been dismissed within the 18 months period that she claims to have had either a fixed term employment agreement, or a legitimate expectation thereof. The respondent (Ultimate Care/the Ultimate Group) denies all of Ms Lamprecht's claims.
2. For obvious reasons I have made an order, pursuant to clause 10 of Schedule 2 to the Act, prohibiting the publication of the names of any patients of the Ultimate Care Group, or any details that may lead to their identification.

3. On credibility, in general I have accepted the evidence of Ultimate Care's witnesses, Mr Ronald Spraggon (GM Operations) and Mr Roger Harrison, the former Human Resources Manager, over that of Ms Lamprecht and her former second in command, the clinical nurse leader (CLN).
4. Whilst there is no reason to doubt the genuineness of Ms Lamprecht or the CNL's evidence, equally there is no reason to doubt the evidence of Messrs Harrison and Spraggon. Indeed Mr Spraggon adequately explained why certain things had occurred, and was prepared to accept, with the benefit of hindsight, that on at least one occasion he had made a wrong decision. This was in not allowing Ms Lamprecht to attend the Ultimate Group conference in the CNL's place. I also note that Mr Harrison has since left the employment of the Ultimate Group.
5. Ms Lamprecht was relying on a course of events that did seem strange, given the short period she was in employment. There was, however, no admission that Ultimate Care did not consider her performance adequate and it could not do so (or at least not so quickly) on performance grounds, and thus the restructuring was designed to get rid of her. The only exception was Mr Harrison's oral reference once to *when your position is disestablished*, which I accept was merely a slip of the tongue.
6. Given that the focus in determining credibility is on the motives of Ultimate Care's managers, I have relied to a large degree on my conclusion that this is a case where the Ultimate Group was gearing up very quickly for growth. However, when its cornerstone shareholder refused to put in any more money and the global financial crisis hit a New Zealand economy already in recession, actions had to be taken to contain costs. In this regard I accept that Ultimate Care genuinely looked to cut costs and genuinely saw an opportunity to do so by merging the management functions of two facilities into one position. This scenario is far more likely than the alternative, that Ultimate Care had decided, at a very early stage, that it wanted rid of Ms Lamprecht due to perceived performance issues. The evidence in support of this was not great and was largely speculative. In particular, I accept that one meeting Mr Spraggon had with Ms Lamprecht following an audit was not a performance meeting and the focus on KPI's was appropriate. In light of the

audit the KPI's simply focussed the parties' discussions on what was going well and what was not at the facility. Employers are entitled to hold such discussions as regularly as they see fit. In this case a number of such discussions with a new manager could only be expected. Furthermore, it was clear that there were historical matters inherited from the previous owners that needed to be addressed at Mt Victoria.

### **Factual discussion**

7. My findings of fact follow from the above analysis. The Ultimate Group was formed as a company to purchase and operate residential facilities in the aged care sector. Between its inception in March 2007 and April 2008 it purchased 16 such facilities throughout New Zealand. In Wellington it bought two hospital/rest homes, Mt Victoria Life Care and Mapuia Life Care. Each facility was run at the time by a facility manager.
8. In May 2008, some several months after it was purchased by Ultimate Group, Ms Lamprecht, an experienced nurse manager, who had moved from Auckland to Wellington in order to be closer to family, was recommended for the position of facility manager through a recruitment firm. While Ms Lamprecht's interviews went well there were significant differences between the parties on salary expectations, especially given that Ms Lamprecht had never run a facility like a 50 bed hospital/rest home before. The Ultimate Group was also concerned that Ms Lamprecht, being new to Wellington, would simply use the position as a stepping stone to a new one. The Ultimate Group was thus looking for a commitment of at least 12 months, and the recruitment agency asked Ms Lamprecht if she would be willing to sign a guarantee for a 12 to 18 month contract. Ms Lamprecht responded that she would sign a contract whereby she stayed for 12-18 months (and stated that *the contract should be more specific* in this regard), if the Ultimate Group was prepared to meet her salary level.
9. The Ultimate Group agreed to Ms Lamprecht's salary and sent her a letter of offer, together with a draft employment agreement and position description. The letter of offer stated *that the terms and conditions would be those set out in this letter and in the attached individual employment agreement.*

10. The letter of offer also stated:

*The remuneration for this position will be \$X per annum, on the understanding that you will stay employed in the position for a minimum of 18 months.*

11. The individual employment agreement provided other relevant terms, including one on redundancy, which provided for one month's notice, plus one week's salary for each completed year of service. It also contained, at clause 27, an entire agreement clause. It states:

*27.1 Except as provided in "The Ultimate Care Group Ltd Policy" clause, this agreement is complete in itself and includes all terms, representations, undertakings and statements that relate to your employment with the employer.*

*27.2 This agreement replaces any previous agreement or understanding relating to your employment with the employer. No prior or concurrent term, representation, undertaking or statement by the employer or any of its subsidiaries, officers, employees or agents not expressly included in this document will be binding on the employer.*

*27.3 By signing, you accept and agree that this agreement is the sole agreement expressing the terms and conditions of your employment with the Ultimate Care Group Ltd.*

28 Ms Lamprecht signed the agreement and started work on 25 June 2008.

29 Ms Lamprecht referred to a number of incidents through the course of her employment over the next five or six months, which she says demonstrate that the Ultimate Group was dissatisfied with her employment and wanted to get rid of her.

30 Based on my findings on credibility I consider that all were merely examples of *bedding in* issues that could be expected with any new manager, particularly one that had not managed a rest home/hospital before. Given that the facility was undergoing a major upgrade involving significant disruption to staff and patients; it would also be surprising if Ms Lamprecht was being blamed for any problems that occurred during this period. Accordingly, I do not accept that she was. Furthermore, Ultimate Care was a new owner and had inherited a number of major issues, including some involving its staff.

- 31 In particular, I accept that the Ultimate Group was entitled to conduct spot audits and that the findings of such had no impact on the Ultimate Group's later restructuring decisions. Indeed the evidence showed that Mr Spraggon took steps as a result of one of the audits to assist Ms Lamprecht in her job. Overall, there is no evidence that the audits led to a change of Mr Spraggon's view about Ms Lamprecht's competence. The Ultimate Group was entitled to run audits that were not announced in advance if it so chose, and it was also entitled to speak to Ms Lamprecht about any issues identified in the previous audit during any intervening period.
- 32 I accept that it would have been of benefit to Ms Lamprecht to have been involved in *Preceptor* training. However, only five staff of the eleven who applied were given the training, and even then three of those were from the Wellington region. This selection process does not tend to show any animus towards Ms Lamprecht.
- 33 The Ultimate Group did, however, make some decisions that appeared, with hindsight, to be wrong, such as about providing Ms Lamprecht with sufficient training, but those are not sufficient evidence to show that the redundancy process that was later implemented was a sham.
- 34 Rather the driver for change appears to have been a fiscal one. The Ultimate Group had grown very quickly between March 2007 and mid 2008. As a result of the global financial crisis, however, the equity fund that was the principal shareholder in the Ultimate Group would no longer put in any more funds to grow the business, such as buying more rest home facilities. Furthermore, its bankers changed the funding arrangements for the Ultimate Group and this meant cost reductions in the business were required. I accept that one of the first changes looked at involved management of the two Wellington facilities, Mt Victoria and Mapuia. Given the small size of Mapuia and Mt Victoria compared to other company facilities, and their reasonably close physical location, I accept that the Ultimate Group genuinely believed that it could save money by disestablishing the two facility manager positions and implementing a new position of Joint Facilities Manager in Wellington.
- 35 Ultimate Care provided a proposal along these lines to Ms Lamprecht on 8 December 2008. The process adopted thereafter was a standard one in

employment law terms, and has not been challenged. As a result Ms Lamprecht's position and that of the Mapuia Facility Manager were disestablished. Mr Harrison's evidence that this was a genuine restructuring was supported by all the documentation and the financial imperatives, plus the fact that other restructuring initiatives took place soon thereafter.

- 36 Ms Lamprecht provided feedback to the proposal, stating that it would not be safe from a nursing perspective to have one manager for both facilities. This was rejected by Ultimate Care because of the close proximity and the relatively small size of both operations.
- 37 I accept that action had to be taken quickly as a result of the financial imperatives facing the Ultimate Group and that therefore *quick runs on the board*, such as the proposal affecting Ms Lamprecht, were those that were given priority, and pursued without the need for significant background work. I also note that the structure still applied at the date of the investigation meeting, and that it has led to direct savings of one management staff salary, together with other ancillary savings.
- 38 On 7 January 2009 Ms Lamprecht was informed in writing that as a result of the restructuring, if she was unsuccessful in obtaining the new facilities manager's position (which was available for either of the two current facility managers to apply for) then her position would be made redundant. I accept that Mr Harrison's comment to the contrary was merely a slip of the tongue, as it was inconsistent with the letter and would be a totally unprofessional comment to make deliberately.
- 39 Ms Lamprecht's decision not to apply for the new position was surprising, given that she did not have another job to go to, but was one for her to make, not the Ultimate Group. Given that decision and that there were no alternative positions available in the Ultimate Group at that time, because it was no longer growing, a meeting was set for Monday 12 January to agree on Ms Lamprecht's final date of employment. At that meeting Mr Gartrell made it clear that because of stress Ms Lamprecht would prefer to leave soon, rather than work out her notice period. As a result the Ultimate Group allowed Ms Lamprecht to leave immediately, although it did note that any stress on Ms Lamprecht was unknown to it.

- 40 At that point it was made clear that Ms Lamprecht was not convinced that this was a genuine redundancy and that she had expected 18 months' employment. No issue was taken with the process adopted by the Ultimate Group.
- 41 The parties have attended mediation as a result of Ms Lamprecht's grievance, but have been unable to resolve this employment relationship problem then or subsequently. It therefore falls to the Authority to make a determination.

### **The law**

- 42 In *Simpson Farms Ltd v. Aberhart* [2006] ERNZ 825 it was held, in regard to the test of justification for redundancy under s.103A, at para.67:

*I do not consider that the recent statutory changes were intended to revisit longstanding principles about substantive justification for redundancy exemplified by judgments such as Hale. The words and phrases of s.103A echo the statements of Cooke P and Richardson J in Hale as set out in paras 40 and 41. Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of justification for dismissal it appears to have been satisfied, by enacting s.103A, to return to the position of espoused by the Courts and cases such as in following Hale. So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A.*

- 43 Thus if for genuine commercial reasons an employer concludes that a worker is surplus to its needs it is not for the Authority to substitute its business judgment for that of the employer.
- 44 At least since *Williams v. Attorney-General in respect of Secretary for Justice* [1999] 2 ERNZ 457 it has been clear that fixed term employment agreements can not be terminated before the end of their expiry date unless the employment agreement expressly provides a means to do so. *Williams* found that it may be valid to provide a term in an employment agreement for a fixed term duration that provides that the agreement can be terminated before the expiry of its term upon the happening of some defined events (such as redundancy).

### **Determination**

- 45 While the employment agreement contained a clause stating the agreement was the complete agreement, I conclude that account can be taken of the accompanying letter of offer, as it states that its contents did form part of the terms and conditions agreed between the parties. What the relevant clause states

is that the remuneration offered was offered on the understanding that Ms Lamprecht would stay employed in the position for a minimum of 18 months. That is a term for the benefit of the Ultimate Group as much, if not more than Ms Lamprecht.

- 46 I do not accept that as a result Ms Lamprecht had any legitimate expectation or other grounds for concluding that she had the right to a minimum of 18 months' employment. I accept the genesis of the 18 month period came from Ultimate Care and the reason for that was to try and commit (as best it could) Ms Lamprecht to stay on for that period.
- 47 However, rather than being a set term of the agreement, it was an understanding between the parties only. For example, given that normally specific performance can not be applied to employment agreements, there is no way that this term could be enforced on Ms Lamprecht, otherwise people could agree to agreements akin to slavery. In addition, the wording used is of an *understanding*, which is far from being wording intended to be legally binding by and on the parties.
- 48 I therefore conclude that this was a non-binding understanding between the parties. It was not a binding term on them and could not give rise to a legitimate expectation that Ms Lamprecht could not be made redundant in advance of 18 months. Similarly, she could be dismissed for cause in advance of 18 months. Furthermore, I do not accept Ms Lamprecht's evidence that if she had not had the minimum term she would not have relocated from Auckland. The evidence was clear that she had in fact already left Auckland for Wellington to be closer to her family.
- 49 Finally, if I were wrong with the above analysis, I would have concluded that if there was a fixed term agreement or that Ms Lamprecht had an expectation of one through the letter of offer, then that did not override the agreed clause in the agreement for redundancy, see for example *Williams*. Furthermore, the existence of a *complete* written agreement here is quite different to the situation that existed in *Collins v. Guan Holdings Limited* unreported, Colgan J, AEC 105/95, 5 October 1995 and is therefore clearly distinguishable. The extreme uncertainty over the terms that applied in *Collins* was not so the case here, where the parties' agreement was clearly set out in writing after full negotiations.

- 50 Ms Lamprecht was new to the position of facility manager and thus it was to be expected that there would be a number of issues with her employment, particularly as this was a new site for the Ultimate Group. In this context it was entirely appropriate for Mr Spraggon and Ultimate Care's auditors to go over how the new employment was progressing. Equally, I accept that it was entirely appropriate to use, as a basis for discussion, Ms Lamprecht's job description and/or KPI's. That does not make such a discussion a performance review, or that there were any performance problems with Ms Lamprecht. Indeed, Mr Spraggon was able to demonstrate that he had taken action following one meeting to assist Ms Lamprecht in her job, which does not support the claim that the Ultimate Group wanted to get rid of her.
- 51 Similarly, I do not accept that there was any improper auditing of the Mt Victoria facility by the Ultimate Group. Clearly, it had a strong audit team and it focused on matters of interest to it. It was entirely appropriate to follow up matters on the basis of documents from an earlier audit (which Ms Lamprecht did not complain about), with her. While it is possible one auditor was less than sensitive in the way that she raised a number of issues, particularly some staff issues, that does not mean that those involved in the restructuring, and Messrs Spraggon and Harrison, in particular, had been instructed by anyone (including the auditor) that Ms Lamprecht's employment had to be terminated, or vice versa. Instead, I accept that this was a genuine redundancy situation, arising out of a need for savings in the Ultimate Group, which, as accepted, was fairly implemented.
- 52 In summary therefore, Ms Lamprecht had no entitlement to a minimum term of 18 months. While she may have been treated more sensitively and she did not have an easy time of it as a new facility manager, that does not mean that her dismissal on the grounds of redundancy was not genuine. Rather, I have concluded that the Ultimate Group, consistent with its managerial discretion, decided, at a time when it was required to consolidate and limit expenditure, to take the business decision to merge two managerial functions into one. That decision has proven effective as it still exists. Thus Ms Lamprecht's dismissal was justifiable.
- 53 I therefore dismiss all of Ms Lamprecht's claims.

**Costs**

54 Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**