

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 99
5556817

BETWEEN DENISE JARDEN
Applicant

A N D THE GOLD AND BLACK
GROUP LIMITED t/a TAXIS
GOLD AND BLACK (PN)
Respondent

Member of Authority: M B Loftus

Representatives: Jenny Murphy, Advocate for Applicant
Kelly Colley, Advocate for Respondent

Submissions Received: 21 September and 6 October 2015 from Applicant
5 October 2015 from Respondent

Date of Determination: 15 October 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] On 16 September 2015 I issued a determination¹ concluding Ms Jarden had a personal grievance in that she was unjustifiably dismissed by the respondent, The Gold and Black Group Limited (Gold and Black).

[2] Costs were reserved and Ms Jarden, as the successful party, now seeks a contribution toward her costs which totalled \$3,464.06 (including the filing fee of \$71.56).

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

¹ [2015] NZERA Wellington 93

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

[4] The investigation took approximately a third of a day and that included the delivery of an oral decision. Applying the daily tariff would see the award of a contribution in the order of \$1,200. Ms Jarden, however, seeks more and asks for full reimbursement. In the event this is declined she asserts an increase in the daily tariff is warranted.

[5] Ms Murphy submits the claim for full indemnity costs is justified by reason of *the respondents conduct (which increased costs unnecessarily), and the rejection of a timely Calderbank offer.*

[6] In respect to conduct Ms Murphy submits the respondent admitted its position was hopeless yet forced Ms Jarden to proceed to a hearing. She says it then chose to call unnecessary witnesses whose evidence had to be addressed thus increasing costs.

[7] Gold and Black says it would be inappropriate to consider an uplifted tariff let alone indemnity costs. Indeed, it submits it should receive a contribution toward its costs given its acceptance of liability which should have shortened the time and effort required by Ms Jarden's representative and its efforts to resolve the matter. In the alternate, it is submitted costs should lie where they fall.

[8] Before continuing I outline the offers the parties exchanged given both refer to these in support of their submission. Ms Jarden's Calderbank was forwarded soon after filing and sought \$12,000 with just over half being payable by instalment. The response was a counter offer of \$6,000 which was rejected. That was followed by a second offer from Gold and Black eight days before the investigation and by which time Ms Jarden had filed an amended statement of claim in which the amount sought as compensation had trebled. Gold and Black offered \$13,500 (\$10,000 plus \$3,500 costs). Three days later that was rejected as *too little, too late*. An increased offer followed later that day and was also rejected.

[9] There is a technical argument Ms Jarden's offer does not constitute a valid Calderbank as it did not comply with the requirements there-of.³ It is, however, evidence of an attempt to resolve the matter and should be viewed accordingly. Having considered the offer I conclude it cannot be relied upon to support a claim for an increased tariff (let alone indemnity costs) as it sought more than was subsequently awarded.

³ *Pauanui Publishing Ltd v Loh* EmpC Wellington WC43B/01, 20 December 2001

[10] Ms Murphy submits the offer was close to the amount awarded as it ignored costs which, once paid, would have reduced Ms Jarden's net benefit to something close to that awarded. The argument fails to convince as it seems to compare apples with oranges. While not clear, given a reference to lost wages, the offer appears to be couched as a compensatory payment with the total amount going to Ms Jarden. As such it is close to the total sought in the then applicable statement of problem yet fails to recognise Ms Jarden would lose a portion as PAYE on the wage component should such a result be attained through the Authority. The PAYE amount would be similar to her then costs meaning she was effectively asking for an outcome comparable to that claimed. That appears to be short of a genuine attempt to settle and is, in any event, greater than the amount ultimately awarded (either net or gross). It is also more than the amount Gold and Black will be ordered to pay after this costs determination.

[11] Turning to conduct. Ms Murphy claims Gold and Black's conduct increased costs. In this respect she claims it forced Ms Jarden to proceed to hearing when it had admitted its position was untenable and called unnecessary witnesses.

[12] If something is untenable it is the accusation Gold and Black forced Ms Jarden to hearing. Gold and Black admitted from the outset it could not defend its decision to dismiss and it did not try. It says it was forced to hearing by an inability to settle given Ms Jarden's inflated claims.⁴ Given the evidence, reflected in my comments in [10] above, I conclude this claim has validity. I also note Gold and Black made two offers, albeit not long before the investigation, which exceeded Ms Jarden's subsequent award by some margin. Given the evidence I conclude that if the hearing was forced, it was due to Ms Jarden's failure to accept reasonable offers.

[13] Ms Murphy also claims Gold and Black called unnecessary witnesses. While it added subsequent witnesses, I am not surprised. Their evidence was a response to Ms Jarden's. Ms Jarden should have anticipated a reaction given the evidence to which the additional witnesses were responding was inflammatory and, given Gold and Black's concession regarding the substantive claim, unnecessary.

[14] By way of conclusion, and for the above reasons, I find the submission I increase the daily tariff unconvincing.

⁴ *Jarden v Gold and Black Group Limited*, above n 1 at paragraph [8]

[15] Turning to Gold and Blacks claim I award costs in its favour. It is based on a submission Ms Jarden rejected reasonable offers of settlement and therefore put the parties to unnecessary expense. The very purpose of a Calderbank offer is to recoup costs where a losing party is put to expense by the other party's rejection of a reasonable offer which may have avoided that expense. That said the offer should be made in advance so as to avoid the incurring of cost. Here, and while exceeding the amount subsequently awarded, the offers were proffered after the bulk of the preparation had occurred and the costs incurred. That detracts from their validity and removes the possibility I might award costs in Gold and Black's favour.

[16] That said I again refer to the fact Gold and Black's late offers exceed the awards subsequently made. They can only be seen as reasonable and acceptance would have reduced Ms Jarden's costs by negating the need for a hearing. To that I add the fact Ms Jarden had already established a prima facie case – Gold and Black admitted its position was indefensible. Despite that Ms Jarden included evidence which was unnecessary and which could only sting the respondent leading to the additional evidence it called. Further cost resulted from Ms Murphy's decision to pursue these issues by both offering additional evidence in chief and questioning the respondents witnesses about these issues and the reason for dismissal. I repeat Gold and Black was not trying to defend the dismissal and this was therefore unnecessary.

[17] There is then the fact that while she offered evidence which unnecessarily addressed the substantive merits of her claim Ms Jarden failed to adequately address that which would have assisted her. In this respect I note the lack of evidence about remedies, hence the failure to attain the rewards she thought she were due.⁵

[18] This is an investigation meeting which should never have occurred. For reasons enunciated above I conclude the prime reason was Ms Jarden's failure to accept Gold and Blacks admissions and its subsequent and reasonable efforts to settle.

[19] It was, primarily, Ms Jarden's decisions that put the parties to avoidable cost. For that reason I accept Gold and Blacks submission costs should lie where they fall.

M B Loftus
Member of the Employment Relations Authority

⁵ *Jarden v Gold and Black Group Limited*, above n 1 at paragraph [16]