

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 93  
5556817

BETWEEN

DENISE JARDEN  
Applicant

A N D

THE GOLD AND BLACK  
GROUP LIMITED t/a TAXIS  
GOLD AND BLACK (PN)  
LTD  
Respondent

Member of Authority: M B Loftus

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

Investigation Meeting: 16 September 2015 at Palmerston North

Submissions Received: At the investigation

Date of Determination: 16 September 2015

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**ORAL DETERMINATION OF THE AUTHORITY**

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[1] The applicant, Denise Jarden, claims she was unjustifiably dismissed by the respondent, The Gold and Black Group Limited (Gold and Black), on 6 March 2015.

[2] Gold and Black does not dispute the claim.

[3] Originally there was also a claim for unpaid notice and two statutory holidays. These have now been resolved and the claims withdrawn.

[4] Gold and Black employed Ms Jarden as a dispatch operator and she commenced on 12 January 2015. There was a written employment agreement and while there is debate over when it was signed the parties agree it was after Ms Jarden commenced employment. The evidence suggests a date no earlier than 31 January 2015 which is some three weeks after Ms Jarden started.

[5] The agreement purports to contain a clause permitting dismissal without reason or challenge within the first 90 days as envisaged by section 67A of the Employment Relations Act 2000 (the Act). Gold and Black relied on this when it advised Ms Jarden of her immediate dismissal on 6 March 2015.

[6] While Gold and Black claims Ms Jarden was well aware of the 90 day trial and had agreed, at least orally, prior to commencement it concedes it cannot rely on this as a defence.<sup>1</sup>

[7] The absence of a valid 90 day trial clause means Gold and Black is required to comply with the requirements of section 103A of the Act. Gold and Black accepts its mistaken believe the clause was valid means it did not do so. Indeed, and using its own words, it did not even try to cobble together a defence. Its concerns, which related to the signing of the employment agreement along with a view Ms Jarden's performance required improvement, were not put. Ms Jarden did not, therefore, have an opportunity to explain and therefore there was not an response for Gold and Black to consider.

[8] Gold and Black concedes it cannot justify Ms Jarden's dismissal and this is reinforced by the decision not to try to do so in its witness briefs. It says the reason it must still answer this claim is it is incapable of resolving the dispute as its parlous financial state means it cannot consider what it portrays as Ms Jarden's inflated and unrealistic claims for compensation. Gold and Black supports its claims regarding its financial state with a copy if its financial statement for the year ended 31 March 2014.

[9] In the circumstances, and given Gold and Black's concessions, the dismissal must be found to be unjustified. That raises the question of remedies.

[10] Ms Jarden seeks three months wages (\$6,656.00) plus holiday pay on that amount (\$532.48) along with \$15,000 compensation pursuant to section 123(1)(c)(i) of the Act. The compensatory claim was increased from an original \$5,000 via an amended statement of claim with references to recent judicial comments about current awards being inadequate cited as justification.<sup>2</sup>

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [47]

<sup>2</sup> *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [87] endorsed in *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 at [345]

[11] Section 128(2) of the Act provides that where an employee has a personal grievance and has lost remuneration as a result the Authority must order that the employer pay the employee the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis but Ms Jarden does not ask that I exercise that discretion.

[12] The argument Gold and Black might be impecunious does not entice me to consider reducing the amount. Aside from the fact it is a statutory entitlement inability to pay might be a pertinent when ordering compliance or considering a time payment regime but I am unaware of anything which suggests it is a consideration when initially setting compensatory amounts. Those depend on the actual loss.

[13] There is then an argument Ms Jarden's performance was such that she may well not have lasted the three months. Due to the decision not *to cobble together a defence* or otherwise try and justify the decision I find myself with insufficient evidence to take this further. Finally there is an argument Ms Jarden's attempts to mitigate her loss were inadequate but this is undermined by evidence of job applications.

[14] In three months Ms Jarden would have earned \$6,656.00 had she remained employed by Gold and Black. That is the amount claimed and it is payable given the provisions of s.128(2).

[15] Ms Jarden also seeks an additional \$532.48 being holiday pay on the amount awarded in [14] above. For two reasons this claim will not succeed. First holiday pay accrues with time in employment. Ms Jarden was not employed in the three months to which this payment applies. Second, and more importantly, the payment would effectively add, for no obvious reason, to the amount already awarded and the recompense would then exceed that specified as the maximum payable under s.128(2).

[16] Turning to the compensation claim. The decisions referred to as supporting the increased claim do not exonerate an applicant from the requirement they proffer evidence in support of their claim hurt has been incurred. While I accept some hurt must emanate from an unheralded and unexplained dismissal Ms Jarden proffered little evidence in support of her claim. It amounts to approximately half a page and emphasises the immediate effect of dismissal with little about on-going hurt.

[17] There is then reference to a medical condition which her doctor says might *possibly*, but not necessarily, be linked to stress and I must note the medical condition indicates Ms Jarden was suffering other stressors which were not of Gold and Black's making and which may have contributed to her feelings at the time. The evidence is not compelling and does not warrant a large compensatory payment.

[18] Ms Jarden also added some oral evidence but pertaining to hurt said to result from an earlier event. It shall not be considered as it does not emanate from the grievance Ms Jarden raised and she conceded she was *just venting*.

[19] Having considered the evidence, the submissions and a couple of concessions in this respect by Gold and Black, I consider \$2,500 appropriate.

[20] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Jarden contributed to the situation in which she found herself. Gold and Black's decision not to evidence Ms Jarden's alleged deficiencies means there is no evidence upon which a finding of contribution can be safely based.

### **Conclusion and orders**

[21] For the above reasons I conclude Ms Jarden has a personal grievance as she was unjustifiably dismissed. As a result the respondent, The Gold and Black Group Limited, is to pay the applicant, Denise Jarden, the following:

- i. \$6,656.00 (six thousand, six hundred and fifty six dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$2,500.00 (two thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[22] Costs are reserved.