

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 76  
5575919

BETWEEN	SUSAN MARY TAYLOR Applicant
A N D	NICKI HALE t/a MOVE IT FITNESS First Respondent
A N D	JUB JUB LIMITED Second Respondent

Member of Authority: T G Tetitaha

Representatives: K Usmar, Advocate for Applicant  
B Hale, Advocate for Respondent

Investigation Meeting: 24 February 2016 at Tauranga

Submissions Received: 24 February and 2 March 2016 from both parties

Date of Determination: 10 March 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Susan Mary Taylor was employed by Jub Jub Limited.**
- B. Susan Mary Taylor was unjustifiably dismissed by Jub Jub Limited.**
- C. There is an order that Jub Jub Limited pays Susan Mary Taylor the sum of \$1,750 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. The application for payment of wage arrears in the form of holiday pay is dismissed.**

**E. Jub Jub Limited is ordered to pay \$1,750 costs to the Susan Mary Taylor.**

**Employment relationship problem**

[1] Susan Mary Taylor was employed as a cleaner and childcare worker by one of the respondents. She walked out of the workplace after an altercation with Nikki Hale about smoking on 24 April 2015. She alleges she was subsequently dismissed by Ms Hale by email.

**Issues**

[2] The issues for hearing were:

- (a) Who was Ms Taylor's employer?
- (b) Was she unjustifiably dismissed?
- (c) Are there any wage arrears pertaining to holiday pay under s.28 of the Holidays Act 2003?

**Who was Ms Taylor's employer?**

[3] **Definition of an employer/employee:** The Employment Relations Act 2000 (the Act) defines an "employer" as a "person employing any employee or employees"<sup>1</sup>. An "employee" is "any person of any age employed by an employer to do any work for hire or reward under a contract of service"<sup>2</sup>. To determine whether a person is employed by another person under a contract of service, the Authority is required to determine "the real nature of the relationship between them"<sup>3</sup>.

[4] To determine the real nature of the relationship, I must consider "all relevant matters, including any matters that indicate the intention of the persons" and any statement by the parties describing the nature of their relationship is not determinative<sup>4</sup>.

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<sup>1</sup> Section 5 of the Act.

<sup>2</sup> Section 6(1)(a) of the Act

<sup>3</sup> Section 6(2) of the Act

<sup>4</sup> Section 6(3) of the Act

[5] **Evidence of identity of employer:** A useful starting point in identifying an employer is any documentary evidence between the parties<sup>5</sup>. It is common ground there is no employment agreement. There are payslips, bank statements, an IRD employer monthly schedule and evidence from the respondents' accountant, Sarah O'Loan of Giles & Liew Chartered Accounting Limited. All of this evidence indicates that the employer was Jub Jub Limited.

[6] Ms O'Loan confirmed under oath she was Ms Hale's accountant. To her knowledge Ms Hale did not have any business activity under her own name during 2014 to the current financial year. She further confirmed the connection of the proposed respondent, Jub Jub Limited, with the business known as Move It Fitness.

[7] IRD has Jub Jub Limited registered as Ms Taylor's employer. Jub Jub Limited's bank accounts records the payment of Ms Taylor's wages.

[8] Another employee, Andrea Brian, confirmed she understood her employer was Jub Jub Limited.

[9] Ms Hale produced payslips noting Jub Jub Limited on them for the period 19 January to 26 April 2015. Two payslips produced by Ms Taylor had Move It Fitness not Jub Jub Limited on them. Jub Jub Limited's previous company name was Move It Fitness Limited. It is possible the payslips were changed in later times to reflect Jub Jub Limited as the employer. However, there is nothing in those payslips to indicate Ms Hale was the employer.

[10] Ms Taylor produced a page from the respondent's website which represented Ms Hale as the owner of Move-it-fitness. Ms Hale stated she had been trying to correct this with the website designer but had been unsuccessful. Ms Hale is a shareholder. She is an owner of shares in the company Jub Jub Limited but not the only shareholder. This evidence is equivocal at best.

[11] **Finding:** On balance the evidence supports a finding Susan Mary Taylor was employed by Jub Jub Limited.

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<sup>5</sup> *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132 at [41]

## **Was Ms Taylor unjustifiably dismissed?**

[12] **Legal requirements for an unjustified dismissal:** The central issue is whether Ms Taylor was in fact dismissed by the respondent. Once a dismissal has been established, the onus falls upon Jub Jub Limited to justify whether its actions “*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*” (s103A(2)). In applying this test, I must consider the matters set out in s.103A(3). These matters include having regard to the resources available, did an employer sufficiently investigate the allegations, raised their concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[13] If it is established Jub Jub Limited dismissed Ms Taylor, there is no evidence it followed the s103A process prior to dismissal. The dismissal shall in those circumstances be unjustified.

[14] **Facts leading to alleged dismissal:** Move it fitness is a gymnasium in Tauranga. It offers childcare services to members for 1 ½ hours Monday to Friday. Ms Taylor was responsible for caring for the children while their parents attended fitness classes.

[15] On 24 April 2015, Ms Taylor was at work when she was confronted by Ms Hale about smelling of cigarette smoke. Smoking was forbidden at work. Ms Taylor was about to start her childcare duties. She admitted smoking prior to coming to work but did not think she smelt of smoke. Both ladies went into Ms Hale’s offices to talk. Ms Taylor became agitated and left the building.

[16] At 9.59am that same day, Ms Hale sent an email to Ms Taylor. The email said, amongst other things, that smoking was not tolerated and there were concerns about Ms Taylor’s relationship with one of the clients becoming “*a little intense*”. However, the email then went on to state:

*I have been really impressed with the way you have managed to keep the job with us but I have felt all along that we were on “borrowed time” and if there was an issue you would not hesitate in walking out.*

*I think we have reached the end of the line as far as working together. I want to thank you for the work you have done for us. Your cleaning skills are brilliant and we will miss you.*

*I wish you all the very best Sue I really do and I hope fostering will be for you. I will of course pay you what you are owed up to and including yesterday the 23rd April.*

*Best wishes  
Kindest regards  
Nicki*

[17] Ms Taylor alleged that that was a letter of dismissal. She raised a personal grievance on 18 June 2015 regarding unjustified dismissal.

[18] **Finding:** I do not accept the respondent's proposition Ms Taylor had terminated her contract by walking out of the building on 24 April 2015. Ms Hale was aware that Ms Taylor had personal issues which included a tendency to leave stressful situations by walking out. Ms Hale had been supporting her to reduce this behaviour. Ms Hale was aware this was a reaction to stress not an act of termination. There is also evidence that Ms Taylor had been told not to come to work smelling of smoked and had left the premises previously and then returned to work. She had not been disciplined for this behaviour.

[19] I do not accept Ms Hale's explanation her email dated 24 April 2015 was supposed to open communication. It purported to end the working relationship and pay Ms Taylor all money owed. Ms Hale was Jub Jub Limited's manager. She had apparent authority to act on its behalf. The only reasonable interpretation of that email was termination of Ms Taylor's employment.

[20] Given my finding Ms Taylor was dismissed and the lack of evidence to show any fair process prior to dismissal, I find Susan Mary Taylor was unjustifiably dismissed by Jub Jub Limited.

### **Remedies for unjustified dismissal**

[21] **Lost remuneration:** Having found a personal grievance, Ms Taylor is entitled to seek lost remuneration of up to three months wages pursuant to s.128 of the Act.

[22] Ms Taylor has an obligation to mitigate her losses by seeking alternative paid employment<sup>6</sup> meaning she must show efforts to obtain alternative employment to mitigate any lost income. Failure to mitigate losses means she cannot have lost

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<sup>6</sup> *Carter Holt Harvey v Yukich (CA74/75/75)*

remuneration as a result of the grievance and there is no statutory requirement to order reimbursement<sup>7</sup>. In practice this requires evidence of detailed efforts made to obtain employment including dates, places, names, copies of correspondence<sup>8</sup> evidencing applications for jobs.

[23] There is no evidence of mitigation. Accordingly Ms Taylor could not have lost remuneration and I decline to make any order for lost remuneration.

[24] **Compensation:** Ms Taylor seeks compensation of \$3,500 for hurt and humiliation. Compensation is not to be used as a penalty to indicate disapproval of an employer's conduct. Rather it is to compensate the employee for the effect of the grievance<sup>9</sup>.

[25] Ms Taylor gave evidence of how she felt leading up to and following the dismissal. The amount sought would be an appropriate award subject to any reduction for contributory conduct.

[26] **Contribution:** An employee's conduct may be relevant to remedies. I must "*consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance*" in deciding the nature and extent of remedies to be provided in respect of a personal grievance.<sup>10</sup> If the actions of the employee are both causative of the outcome and blameworthy reduction in remedies is appropriate.<sup>11</sup>

[27] There is contributory conduct here. Ms Taylor walked out of the premises. I accept the evidence from Ms Hale and another employer, Andrea Brian, that Ms Taylor was heard swearing at Ms Hale prior to leaving. Ms Taylor's behaviour did prompt the respondent's subsequent action. Ms Taylor's behaviour justifies a reduction of 50% in the remedies.

[28] Accordingly there is an order that Jub Jub Limited pays Susan Mary Taylor the sum of \$1,750 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

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<sup>7</sup> *FINAU v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

<sup>8</sup> *Allen v TransPacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 at [78]

<sup>9</sup> *Paykel Ltd v Ahfeld* [1993] 1 ERNZ 334 (EmpC)

<sup>10</sup> Section 124 of the Act.

<sup>11</sup> *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].

## **Holiday Pay claim**

[29] **Inclusion of annual holiday pay with pay:** It is accepted Ms Taylor was paid her annual leave entitlement as part of her pay each week. It is also accepted there was no written employment agreement. The Holidays Act 2003 allows an employer to include annual holiday pay with the employee's pay if, amongst other things, the employee agrees in his or her employment agreement<sup>12</sup>. Given there is no written employment agreement, the employer was not entitled to pay Ms Taylor's holiday pay in this way.

[30] However even if an employer has incorrectly paid annual holiday pay with an employee's pay, it is not required to pay those amounts again unless "*the employee's employment has continued for 12 months or more*".<sup>13</sup>

[31] **Finding:** Ms Taylor's employment ended just over 3 months after she started. She was only employed from 12 January to 24 April 2015. She was paid her holiday entitlements with her pay. She is not entitled to any further payment. The application for payment of wage arrears in the form of holiday pay is dismissed.

## **Costs**

[32] Ms Taylor incurred actual costs of \$6,489.29. She was only partially successful. Any costs award should reflect this success. This was a one day hearing. The starting point for any award of costs is the Authority's daily notional tariff of \$3,500. I intend starting from a reduced daily tariff of \$1,750 to reflect her partial success.

[33] Mr Usmar produced two settlement offers dated 25 September 2015 and 21 January 2016. The settlement offers sought more than the remedies awarded here. They have no effect upon costs as a consequence.

[34] The respondent alleges it is insolvent. It has produced some financial information. Financial insolvency does not prevent any award of remedies or costs. The company remains registered at the Companies Offices. It will need to make payment arrangements with Ms Taylor.

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<sup>12</sup> Section 28(1)(a) and (b) of the Holidays Act 2003

<sup>13</sup> Section 28(4) of the Holidays Act 2003

[35] There are no factors justifying an increase or decrease in costs. Jub Jub Limited is ordered to pay \$1,750 costs to the Susan Mary Taylor.

**T G Tetitaha**  
**Member of the Employment Relations Authority**