

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 65
3136864

BETWEEN USHA BHANA
 Applicant

AND JARDEN PARTNERS LIMITED
 Respondent

Member of Authority: Sarah Kennedy

Representatives: Barbara Buckett and Moira Gray, counsel for the
 Applicant
 Simon Lapthorne and Meilun Chen, counsel for the
 Respondent

Investigation Meeting: 24 and 25 May 2022 and 12 September 2022

Submissions Received: 29 September and 7 October 2022 from the Applicant
 29 September 2002 from the Respondent

Date of Determination: 13 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Usha Bhana was employed by Jarden Partners Limited (Jarden) on 8 April 2020 as a Scrip Settlements Officer until she was dismissed for incompatibility on 28 January 2022. Ms Bhana says a number of things contributed to the relationship breakdown including her concerns about her manager not being investigated, Jarden’s unilateral decision to move her permanently to a different team and proposals to implement performance improvement plans.

[2] Ms Bhana seeks a determination from the Authority that she was unjustifiably dismissed and/or disadvantaged and that Jarden breached its duty of good faith. She seeks lost wages, compensation, special damages and costs. In addition, she seeks to recuperate the cost

of her engagement with Keith McGregor, Psychologist, as a lost benefit under s 123(1)(c)(ii) of the Employment Relations Act 2000 (the Act). She no longer seeks reinstatement.

[3] Jarden says it was entitled to take legitimate steps to address performance concerns, complied with its obligation of good faith, consulted with Ms Bhana and says there could be no unjustified disadvantage in relation to the performance improvement process because one never commenced. Jarden denies Ms Bhana was unjustifiably dismissed. It says there was an irreconcilable breakdown in the employment relationship attributable wholly or substantially to Ms Bhana, in particular, when she refused to meet in December 2021 to discuss concerns and it followed a fair and reasonable process when it raised this with her.

[4] Jarden accepts Ms Bhana was transferred into a new role but denies this was a unilateral decision. To the extent there was a breach of contract due to the transfer, Jarden says Ms Bhana affirmed the breach by failing to raise any concerns until 11 weeks later when performance concerns were raised with her. Jarden also says it never received a complaint from Ms Bhana about her manager.

[5] A counterclaim was also lodged seeking a declaration that Ms Bhana breached her duty of good faith to her employer when she refused to meet with Jarden to discuss the concerns. Penalties are sought for that breach.

The Authority's investigation

[6] For the Authority's investigation written witness statements were received from Usha Bhana, Rachael Badham, Ota Aben, Keith McGregor and Karen Knight. For Jarden witness statements were received from Jessica Vaughan, Malcolm Jackson, Sarah Bone, Stephanie Wylie, Divyang Patel, Biddy Wilson and Rachel Martin.

[7] The investigation meeting was adjourned part heard because the evidence was not completed in two days. Arrangements were made for Jarden's last two witnesses to give evidence in person. Mr Patel and Mr Jackson gave evidence on 12 September 2022. All witnesses who gave in-person evidence answered questions under oath or affirmation from me and the parties' representatives. Written affidavit evidence was received from the remaining witnesses. The representatives also gave written and oral closing submissions by audio visual link on 29 September 2022.

[8] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[9] As permitted by 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Background

[10] Jarden is an investment advisory group providing investment products and services, such as investment banking and capital solutions to clients. As part of its services, Jarden holds client funds in trust bank accounts and acts on instructions from clients, for example, to buy and sell shares and administer money belonging to clients in a fiduciary capacity.

[11] These services are regulated and the work that is undertaken in processing share settlements is time sensitive as settlement closes at certain times of the day. If trades are not processed by the cut off times, settlement cannot occur. Accuracy is very important, given the potential consequences if an error is made. Training and induction at Jarden were on the job and it was accepted there was a general tolerance for some minor errors each week, so long as the employee learned from mistakes and the same errors did not repeat.¹

[12] Jarden said the roles within the team were divided up by market and covered retail and institutional equity and fixed interest settlements. Each market has slight variations and different processes and procedures using various systems. It was common for a Scrip Settlement team member to be a subject matter expert in more than one market or to learn roles in other teams and to have the skills to be able to cover the various markets.

[13] The job description for the Scrip Settlements officer role provides:

The role will involve liaising with Advisers, Cash Team, institutional and retail desks along with a range of external financial institutions. Facilitating settlement across NZX and foreign markets. The Scrip team is split into four distinct roles International, NZX Equity, Fixed Interest and ASX (Wholesale and retail), this role will give the candidate an opportunity to start with ASX settlement. Dealing with Credit Suisse and UBS our external counter parties. Full training will be provided with current staff on the various platform[s] we use.

¹ Ms Wilson's brief of evidence, at [55].

[14] Ms Bhana started at Jarden on 8 April 2020 during the Covid-19 lockdown. As the role was considered to be an essential service, she joined a small team who were working at the office through lockdown. Ms Bhana received initial on the job training from another team member. Ms Bhana says it became obvious to her, from mid-May onwards, she was not being accepted as a member of the team. She and one other team member were excluded from the daily morning tea ritual in the office, and she found interactions with her manager to be unfriendly and dismissive of her. As a result she increasingly had trouble settling into the role and felt unsupported. She later raised this with Ms Martin, People and Culture business partner and Mr Patel, Director, Head of Operations. Ms Bhana's manager reported to Mr Patel.

[15] Ms Bhana also said she had issues with her initial training in the Australian Retail work. The person training her was hard to follow and very fast. Other people confirmed that he was quick. She was told Jarden's documented processes for her role were out of date so she should take her own notes. She set about updating the procedures while at the same time receiving on the job training. The lack of any accurate written training material was not denied by Jarden. The role, it said, was not difficult to pick up and did not require detailed training material.

[16] When another team member went on leave Ms Bhana was temporarily given Fixed Interest work in addition to the Australian Retail work she had been undertaking. She found it difficult to incorporate what she viewed as the new work into what she thought were her permanent duties (Australian Retail). Jarden says Fixed Interest was always part of her role as a Scrip Settlements Officer because it was part of the progression of having her learn all aspects of the role as set out in her employment agreement. It was accepted Ms Bhana was initially covering Fixed Interest temporarily but at some point, that changed to her taking it over permanently.

[17] Ms Bhana raised her concerns about taking on the Fixed Interest work with both her manager and Mr Patel, on more than one occasion. A meeting with her manager and Mr Patel took place on 23 June via Zoom, but from Jarden's perspective that was a discussion about Ms Bhana learning to prioritise tasks and manage her workload better.

[18] Ms Bhana's evidence was she was never told Fixed Interest was part of her duties and said she did not retain a copy of her employment agreement so was unaware Fixed Interest was part of her Scrip Settlement Officer role. Ms Bhana was mistaken about her expectations regarding the Fixed Interest work because it was clearly set out in the role description attached

to her employment agreement, but no evidence was given to indicate the misunderstanding about her role was identified or addressed with her.

Ms Bhana's concerns about her manager

[19] On 31 July, Ms Bhana contacted Mr Patel raising concerns about working with her manager and her workload. Ms Bhana, as well as experiencing difficulty in carrying out the two roles, also felt alienated from the team in a way she said left her without support or resources to know how to do things the way her employer wanted them done.

[20] Mr Patel met with her a couple of times. Jarden's position at this stage was that Ms Bhana's performance was impacting on the team who were becoming frustrated when asked the same questions repeatedly.

[21] From Ms Bhana's perspective nothing came of those meetings, despite Ms Bhana asking to meet off site as she wanted to discuss concerns about her manager. Mr Patel could not remember the specifics of the meetings other than addressing how she could juggle her duties. He did recall discussing with her how best to communicate with her manager but could not recall discussion about Ms Bhana returning to just the Australian Retail work or that she said she felt bullied or harassed by her manager. He says he would have flagged the matter as important and investigated further if Ms Bhana raised bullying with him. Mr Patel did not raise the fact the team were frustrated with her repeated questions or that she was considered to be underperforming.

[22] At that stage, Ms Bhana had not used the term bullying to describe the behaviour she had experienced. Ms Bhana's manager did not give evidence.

People and Culture team involvement

[23] On 18 August 2020, in a lengthy telephone call with Rachel Martin, People and Culture Business Partner, Ms Bhana again raised concerns about her manager's behaviour, and the impact it was having on her wellbeing and health. Ms Martin requested examples and Ms Bhana provided those in an email. Ms Martin replied saying she had spoken to Mr Patel, and they would raise things with Ms Bhana's manager and come back to her.

[24] Unbeknownst to Ms Bhana, at an earlier date on 2 June 2020, Ms Bhana's manager contacted his manager, Mr Patel, to express concerns about her performance and the impact on

the team. Mr Patel explained he was told of a few instances where Ms Bhana had made errors and if they had not been picked up, they would have created a significant risk to business. He also said he understood Ms Bhana was making frequent, repeated errors, despite having been trained.

[25] On 13 August Ms Bhana's manager emailed Mr Patel saying that things with Ms Bhana were "beyond a joke" and requested human resources help. Ms Bhana had asked to finish early to attend a medical appointment and the email clearly indicates he thought this was unreasonable because of the workload. He also said he was worried she would "bombard" the other team members and asked to hold off letting Ms Bhana know about his concerns because the workload would "only likely provide more ammunition or examples of negligence...". The plan was that he would talk to her the following week.

[26] Ms Bhana was not aware there was an issue with her request to leave work early or that there were concerns from the team as early as 2 June or of a plan to gather mistakes as "examples of negligence". She became aware of these emails much later.

[27] Her manager and Mr Patel followed through and contacted Ms Martin on 13 August for assistance. Mr Patel advised Ms Bhana of this in an email to her on 14 August 2020 saying he had set aside some time to talk through the issues they had previously discussed. No examples of the issues for discussion were provided. On 18 August 2020, Ms Bhana rang Mr Patel again to discuss her issues with her manager. Mr Patel did not address that issue directly and instead advised Ms Bhana to speak to Ms Martin on the basis that he considered the People and Capability team could assist with the interpersonal issues. Ms Martin gave evidence that she had suggested Ms Bhana was put in touch with her so she could offer support.

[28] Despite the email from Ms Martin, Ms Bhana heard nothing more about her concerns with her manager and neither Ms Martin or Mr Patel communicated what they had decided to do. It was clear from the evidence it was considered to be an interpersonal issue and an informal approach was to be taken. At some later point Jarden considered the matter to be resolved once Ms Bhana and her manager were no longer in the same team.

[29] Several more incidents occurred, Ms Bhana formed the view her colleagues were sniggering at her behind her back and she did not feel she could continue in that environment. Ms Bhana emailed Ms Martin saying she was unsure how much more she could take and advised she was going to see her doctor. Ms Bhana had a short period of leave and said when

she returned the behaviour had not changed and in fact no one would talk to her including her manager.

[30] Jarden gave evidence that some action was taken in relation to her manager but in order to protect his privacy, no information could be provided to her at the time or to the Authority.

Performance issues

[31] Mr Patel put aside the issue with Ms Bhana's manager and started to address her performance. He said it was Jarden's expectation Ms Bhana be up to speed within four to six weeks of starting the role. Because she continued to struggle, he discussed with her manager a plan to assist her. They appointed a different person, Jess Vaughan, as Ms Bhana's main point of contact to take the pressure of two other team members who worked in the same team and who were reporting frustration with Ms Bhana's questions.

[32] They asked Ms Bhana to put together a training plan so Ms Vaughan could address her training needs and in the following weeks Ms Vaughan provided extensive training. Mr Patel says Ms Bhana continued to make errors and further friction between the team members was reported to him. On 16 October, Ms Vaughan circulated an email summarising the topics covered off in their training. All topics Ms Bhana highlighted as areas she wanted more training on, were completed.

[33] In early November it was reported to Mr Patel that Ms Bhana had asked questions of a team member about a standard matter, she had taken extra time at a lunch time appointment causing this team member to need step in, and a serious mistake was made with the additional concern being that Ms Bhana did not know what had gone wrong.

[34] Ms Bhana's manager told Mr Patel this was what the wider team had been saying for a month and nothing was changing. Ms Bhana went on sick leave from 23 November to 5 December 2019. Again, it was unclear when or if Mr Patel or Ms Bhana's manager communicated with Ms Bhana directly about the new concerns that had been reported to Mr Patel.

Transfer to new team

[35] On 8 December 2020, Ms Bhana was transferred to an alternative team, the Cash Settlements team. Mr Patel gave evidence of several conversations with People and Culture

and his line manager about Ms Bhana's lack of progress. As a result of those discussions it was decided a good solution was to have Ms Bhana undertake a Cash Settlements role rather than her Scrip role.

[36] Ms Martin's evidence was there was increasing frustration with Ms Bhana's performance causing interpersonal issues. She said the performance issues with Ms Bhana were not addressed at that point because it would have been unfair while the interpersonal issues with Ms Bhana's colleagues and manager were live. Ms Martin's position was that once Ms Bhana moved into a new team, the interpersonal matter was resolved from Jarden's perspective and the performance issues could then be addressed. However, none of this was communicated to Ms Bhana. Ms Bhana instead considered this to be an interim measure while they investigated her concerns about her manager.

[37] The transfer to Cash Settlements Officer meant a change in role and different tasks from the Scrip Settlement Officer role. Ms Bhana did both roles for several weeks. Her new manager, Bidy Wilson, was based in Auckland and managed Wellington operations remotely.

[38] Ms Bhana says there was no consultation about the move and she would not have moved if she had known it was permanent. Mr Patel said he called Ms Bhana to discuss the move to the Cash Settlements team, and Ms Wilson having oversight. He suggested it would be a good fresh start for her. He said Ms Bhana seemed happy about the move and because she did not express any hesitation or reservation, Jarden says she accepted it was a permanent transfer.

[39] From Ms Bhana's perspective this meant starting from scratch in another role that she maintains was different to the one she was employed to do. Jarden says it was similar enough and Ms Bhana should have been able to pick it up. She asked for process information and there was no dispute it did not exist or if it did, it was outdated. Ms Bhana was told she could draw up her own. Specifically, Ms Bhana said the "Asset Watch" system and ANZ banking platforms were new to her.

[40] Mr Patel said in his first statement that the roles were the same but in an updated brief of evidence he stated they were different. Having reviewed Ms Bhana's job description I am satisfied the Cash Settlement role was a different role to the Scrip Settlement Officer position that Ms Bhana was appointed to. Any movement to a new role should have been approached with formality such as providing Ms Bhana with the all the information about why the move

was suggested, an opportunity to comment and genuine consideration of her responses before making a decision. If there was agreement, an agreed variation to the existing contract in writing, as required by the employment agreement, or a new contract would have been required.

[41] In December Mr Patel called Ms Bhana and told her she would be receiving a discretionary bonus and said he would speak to her when he was in Wellington. She took this to mean that she was doing okay and was shocked when shortly after, on 19 January 2021, she received a formal proposal to place her on a performance improvement plan (PIP).

[42] In February 2021, Mr Patel confirmed the discretionary bonus of \$2000.00 “as a reflection of [her] hard work and commitment to the firm.”

Performance improvement plan

[43] Jarden was facing mounting frustrations from other team members and had reached a point where there was a high level of concern about the fact Ms Bhana was not operating at the expected level. It was decided to propose a performance improvement plan (PIP). With the Christmas break and leave intervening, and Ms Bhana, having only worked 12 days in the new role, she received a letter from her new manager, Bidy Wilson informing her of the proposal to place her on a PIP.

[44] In the letter Jarden explained the informal approach had not improved Ms Bhana’s performance to a satisfactory level so a PIP was proposed. The issues of concern in the new role were listed as:

Your understanding of your role and basic processes;

Not comprehending / following instructions

Making repeated errors

General time management

[45] Ultimately the PIP was never implemented after Ms Bhana’s representatives intervened. Four repeated errors were listed, as well as not listening or following instructions resulting in repeated questions to multiple team members, issues with time management, and additional distractions recorded as personal phone calls and appointments.

[46] Jarden confirmed that PIP was in relation to Ms Bhana's new role in the Cash Settlements team but having only been in that role for such a short period of time it was unlikely the imposition of a PIP at that time could have been reasonable.

[47] Of surprise to Ms Bhana, it was recorded she was only doing 60% of her role because of how long it was taking her to complete her work. She accepted she was slow in that she was struggling to pick things up, but the evidence was she had only just started in the new role in a different team and performed both roles for a period of time until late December. Ms Bhana said moving between teams was disruptive to her. She also gave feedback that she learned better with face to face training and that had not always been possible.

[48] Ms Bhana's evidence was that none of these competency concerns had been put squarely to her. After hearing the evidence, I accept that was the case. On 18 January 2021 Ms Wilson provided a list of specific points Ms Bhana needed improvement on to People and Culture Group so they could draft the PIP. There was no evidence the list was shown or discussed with Ms Bhana. I accept they may have been raised over time by Ms Wilson but Ms Wilson's style was supportive and gentle. I think it is likely that Ms Bhana was not aware from those discussions of serious performance concerns.

[49] Ms Bhana's evidence of a 1:1 catch up with Ms Wilson on 6 July is typical of the difference between the parties in relation to what was being communicated:

I recall it being a positive meeting in terms of the purported performance issues. I told Bidy I was still anxious about sending emails to the Scrip team when I can hear them taking [sic] negatively about me and that I didn't know how to overcome this or put it right. Bidy said she would have a chat with Aaron and the team. She agreed that it would be frustrating feeling deliberately singled out. She told me not to worry and keep copying her into all communications with the team and wait to hear back from her. I never did hear back from her, and nothing changed.

[50] Ultimately there were several issues with the PIP. Most importantly the fact Jarden had not communicated it had reached a point it had serious performance concerns prior to proposing the PIP. Ms Bhana had also provided responses to some of the matters listed but it was not clear whether these were taken into account and in some cases insufficient evidence was provided to Ms Bhana, for example, there was reference to Ms Wilson raising personal phone calls with Ms Bhana. Ms Wilson accepted in her evidence that was based on a short conversation with Ms Bhana's previous manager and she did not have any evidence to support that. Ms Bhana also said at the time she did not know what phone calls Ms Wilson was talking

about but neither Ms Wilson or Ms Martin inquired about the detail before including that as a specified concern in the PIP.

[51] Ms Bhana raised a personal grievance in a letter from her representatives on 1 March 2021 saying she had been disadvantaged by the PIP, requested information and asked to be returned to her contracted role. She advised Jarden of the adverse effects on her health due to the unresolved issues.

Serious misconduct allegation

[52] Jarden raised an allegation of serious misconduct against Ms Bhana, in that she had altered an email trail and provided false information. Jarden set out in writing that it wanted to meet with her to discuss both the potential serious misconduct allegation and the performance concerns.

[53] They met on 8 April to discuss the altered email. Ms Bhana thought the meeting was about the PIP but on review of the transcript it appears all the issues between the parties were discussed.

[54] At the meeting Ms Bhana learned someone else was in her Scrip role and she says at least four reasons were provided for moving Ms Bhana into the new team, the last one was probably the most correct one from Jarden's perspective, to resolve a personality clash. That had been Ms Martin's assessment of the situation from early on. Ms Bhana says she felt misled because she had thought the transfer was for her benefit.

[55] On 9 April, Ms Bhana was provided with a document called "Tracker" that recorded errors she made from 2 February 2021 to 8 April 2021 in the new Cash Settlement Officer role. Ms Bhana says none of those errors were raised with her as significant errors at the time they occurred, and she was unaware at the time the document existed or that her errors were being documented.

[56] On 14 April, after receiving Ms Bhana's response, Jarden said it was not pursuing the serious misconduct allegation.

A second proposed PIP and mediation

[57] Ms Bhana lodged a statement of problem in the Employment Relations Authority on 23 April 2021. The parties attended mediation although on Jarden's behalf only People and Culture employees attended, and mediation was unsuccessful. Ms Bhana went back to her doctor was advised to take time off for work related stress. By this stage she was not sleeping and felt like her every move was being scrutinised at work.

[58] On 21 June, Jarden wrote to Ms Bhana proposing another PIP due to start on 2 August. Ms Bhana took the position that the issues she had raised, being her relationship with her original manager and her substantive role had still not been addressed meaning she was unwilling to agree to a performance management plan until those underlying issues were resolved.

[59] Jarden requested further information over and above the medical certificate information from Ms Bhana's general practitioner and received confirmation she was suffering severe anxiety and depression related to her work conditions. It was recommended she did not attend any meetings without her lawyer present, some general support for stress management and flexibility around start and finish times was recommended as was working from home to assist with her health situation.

[60] In late June or early July, Ms Bhana had a mid-year performance review with Bidy Wilson. The two objectives were "Confidentiality processing DA instructions" and "Increase speed/ accuracy". I assume the first objective should have read "confidence" because no evidence was given about concerns regarding confidentiality and Ms Bhana received feedback that she was to increase speed in relation to the first objective and was told that she had increased speed with the second objective, but she needed to keep making incremental improvements so that by the next review she would be even faster again. Ms Bhana again gave feedback that she found it easier to receive feedback and to ask questions face to face. Ms Wilson said she would talk to Mr Patel to see if more in person visits could be arranged. Apart from initially most contact with Ms Wilson was remote.

Reports from Keith McGregor and Geoff Summers

[61] Ms Bhana sought a report independently from Keith McGregor, Director of Personnel Psychology NZ Ltd and received some coaching. She provided this report with recommendations to Jarden. Nothing further eventuated from that report.

[62] On 30 August 2021, the parties were directed to mediation by the Authority in an effort to have the parties reach resolve between themselves how best to address the performance concerns because by this time New Zealand was in a second Covid-19 lockdown.

[63] The parties agreed to have Geoff Summers, Business Consultant, work with the parties to create a report to assist them with the disputed issues. A terms of reference was drawn up and it included the following:

The parties agree to engage the services of Geoff Summers to produce a report for the parties that will clarify the current duties and responsibilities being performed by Usha and future duties and responsibilities and the specific KPIs the role is and will be measured against.

Specifically the report will identify:

- Management expectations and how they will be monitored and assessed,
- Current performance gaps if any,
- Performance accountabilities
- Resources and supports available (including development training)
- Any other matters Mr Summers thinks is relevant.

...

This report will provide recommendations for an agreed expectations plan.

[64] Mr Summers was unable to complete his report. He said the performance plan was not sufficiently detailed in that it did not cascade down into key result areas to allow for him to complete the agreed outcomes set out in the terms of reference. He noted there was no documentation for Ms Bhana's new role (Cash Settlements) because a "Role Purpose" document was the closest information he had been given to a job description, but it was only half a page long with 15 bullet points.

[65] Mr Summers did record that with limited documented role clarity available it would be difficult for a Team Leader to objectively assess an employee's performance rather than relying on their own knowledge of how to do the role and secondly, due to the lack of documentation, he was not able to break the job down into assessable bites that would have a level of objectivity to them.

[66] He also noted two sticking points being Ms Bhana's understanding her new role was temporary and there was a difference in opinion about the adequacy of Ms Bhana's training to date.

[67] Seven current duties and responsibilities were set out in the role description document. Jarden had recorded in the first PIP that Ms Bhana was only doing 60 per-cent of her role. However, Mr Summers recorded agreement between Jarden and Ms Bhana that she was doing most of the seven duties listed. It was agreed there were two lines highlighted in yellow in the task and timing document that Ms Bhana still needed training but once she had picked those up she would be doing 100 percent of the Cash Settlement role. Under cross examination Ms Wilson accepted they made up less than 40 percent, which conflicted with what had been recorded in the PIP about Ms Bhana only doing 60 per-cent of her role.

[68] There were communications between the representatives about the Mr Summers' report, but no further action was taken. Ms Wilson continued to work with Ms Bhana until Jarden made the decision to move her back to the Scrip team in November 2021.

[69] Ms Bhana said she had concerns about moving back to the Scrip role and noted her end of year review had been positive and she now felt comfortable working with Ms Wilson. Ms Bhana set out those concerns in writing. While she wanted to return to the Scrip team, given what had happened and those things were just starting to come right in the new team, she wanted reassurance that a return to Scrip would be smooth and she would be supported. From her perspective some of her concerns had been addressed but she was struggling personally with stress and her health. Mr Patel agreed to meet with her regularly and she returned to Scrip on 1 December 2021.

Legal representation

[70] Issues arose in navigating between legal representatives. After the Summers Report, Ms Bhana told Ms Wilson she could not meet with her to discuss the report because she could not agree to any duties until a discussion about the report had taken place with lawyers present. At several points in time, the evidence shows Jarden wanting to meet with Ms Bhana but she was reluctant to meet without her lawyer present. There was agreement that Jarden could talk to Ms Bhana without her lawyer present about operational matters. Then a dispute arose about whether discussion of the Summers Report was operational or not.

[71] In December as things were coming to a head there were many disagreements about when meetings could or should be held to discuss Jarden's concerns, including about incompatibility.

[72] Section 236 of the Act deals with representation, but it does not cover legal representation in disciplinary procedures. However, it is generally considered to be consistent with good faith obligations to allow employees representation if they request it.² Employment agreements sometimes contain express provisions entitling employees to be assisted by a representative during a disciplinary investigation by their employer. Ms Bhana's employment agreement did not have such a clause, but it did state that should the employee have any issues in respect of their employment, if the matter was not resolved on an informal basis, either party can seek assistance from a lawyer or advocate.

[73] The employment agreement sets out an expectation that specialist employment assistance and advice could be sought. Ms Bhana had unresolved concerns about her first manager and that the proposed first PIP was unfair. She had commenced proceedings in the Authority so it would appear reasonable to consider she reached a point, at least by late 2021, that she was in circumstances where she could rely on having her legal advisors present.

Dismissal for incompatibility

[74] On 13 December 2021, Ms Martin contacted Malcom Jackson, Group Chief Financial Officer seeking to have him determine whether there had been a fundamental breakdown in the employment relationship between Ms Bhana and Jarden. This was because Ms Martin and Ms Wilson had tried to meet with Ms Bhana since 26 November 2021 to discuss concerns about the working relationship but had been unable to do so. On four occasions Ms Bhana's representatives had said they were unavailable. It was decided that if Ms Bhana continued to refuse to meet with Jarden, then a decision about incompatibility would need to be made based on the information available.

[75] By the time Mr Jackson became involved, from Jarden's perspective it had been trying to address concerns about underperformance with Ms Bhana for 12 months and now she was reluctant to return to her Scrip duties. Reluctance to meet with Jarden was considered to be the final straw and Mr Jackson said it was not sustainable for the company to wait a further month, as it had been requested to by Ms Bhana's representatives.

[76] In reaching a preliminary view Mr Jackson considered Ms Bhana's repeated unwillingness to meet with Jarden to discuss performance concerns, her insistence at having

² *Employment Law* (online looseleaf ed, Thomson Reuters) at [ER236.01(03)] *Disciplinary process meetings*.

her lawyers attend routine meetings with her manager, her repeated demands to have time off (paid) to take legal advice, and more recently her unwillingness to meet and discuss the concern about the relationship breakdown between Ms Bhana, her managers and colleagues.

[77] He also noted the steps already taken, including two mediations and engagement with an independent workplace facilitator. He discounted alternatives because his view was that Ms Bhana was not willing to take responsibility for her underperformance, meet with her managers or to address the relationship concerns Jarden had.

[78] Ms Vaughan and Ms Wilson provided statements saying by this stage Ms Bhana was unwilling to take responsibility for her work or accept any constructive feedback. They said at times she would respond in a dismissive and confrontational manner. They were feeling stressed and anxious and no longer wanted to work with Ms Bhana which was causing an unsustainable and toxic working environment.

[79] Ms Bhana had an opportunity to provide feedback about Jarden's finding that there had been a fundamental breakdown in the employment relationship and the proposal to terminate her employment. Ms Bhana suggested facilitated conversations with team members and noted she was currently working in the Scrip team without issue. Mr Jackson discussed this with Mr Patel, Ms Wilson and Ms Vaughan but that suggestion was met with strongly negative responses. Mr Jackson also gave evidence he talked to others but wanted to protect their privacy and not breach confidences so that information was not recorded formally but he took it into account.

[80] Although Mr Jackson would normally have considered repeated errors to be a lack of training issue, he was satisfied that Jarden had provided more training to Ms Bhana than any other employee. The regulatory risk was also noted because if an employee makes repeated significant errors this creates a very real and serious risk for Jarden in terms of its regulatory obligations and potential liability for financial losses and penalties.

[81] Mr Jackson also noted while the company had previously engaged and paid for a facilitator, Geoff Summers, ultimately there had been no successful outcome. Ms Bhana had declined, and he says, in fact refused to discuss the report without her lawyers present and then raised concerns about the report with the Authority before later advising the Authority that things were going well.

[82] It is accepted by both parties that Ms Bhana was dismissed from her employment by Jarden in its letter of 28 January 2022. The decision was made by Mr Jackson on behalf of Jarden and the justification for the dismissal was incompatibility.

Legal test - incompatibility

[83] As noted by the Employment Court in *Alistair Ross Gordon Humphrey v Canterbury District Health Board Te Paori Hauora o Waitaha*³ the Court of Appeal have made it clear in *Reid v New Zealand Fire Service Commission*⁴ it is open for an employer to dismiss an employee on the basis of incompatibility, however a dismissal for incompatibility will only rarely be available. The Employment Court had noted in *Reid* that the employment relationship between the parties had broken down and become dysfunctional, and that this could be attributed to the appellant.

[84] The test the Authority must consider in determining whether a dismissal for incompatibility can be justified, requires the employer to establish three grounds:⁵

- (a) The existence of an irreconcilable incompatibility.
- (b) The incompatibility must be wholly or substantially attributable to the employee.
- (c) The employer must carry out the dismissal in a fair manner.

Was there an irreconcilable incompatibility?

[85] While Jarden was of the view that the situation could not continue, in comparison with other cases involving dismissals for incompatibility, the amount of time Jarden spent addressing the incompatibility and the nature of the break down in the relationship, is distinguishable from other cases.⁶ All the concerns about Ms Bhana were initially about other team members frustrations with her asking questions. Then concerns changed to performance

³ *Alistair Ross Gordon Humphrey v Canterbury District Health Board Te Paori Hauora o Waitaha* [2021] NZEmpC 59.

⁴ *Reid v New Zealand Fire Service Commission* [1998] 2 ERNZ 250 at [280]

⁵ *Walker v Procare Health Ltd* [2021] NZEmpC 90 at [77] and *Mabry v West Auckland Living Skills Homes Trust Board* (2002) 6 NZELC 96, 573.

⁶ *Reid v New Zealand Fire Service Commission* [1998] 2 ERNZ 250; *Neil v New Zealand Nurses Organisation* [2020] NZERA 219; *Davis v Commissioner of Police* [2016] NZERA Christchurch 34; *Walker v ProCare Health Ltd* [2021] NZEmpC 90.

concerns and finally became an incompatibility issue sometime in 2021, when frustrations on both sides were running high.

[86] On 13 December 2021, when Ms Bhana was reluctant to return to her original team, Mr Jackson was approached to consider incompatibility. Facilitated sessions with frustrated staff were discounted as an option which would have been an obvious next step given there was acceptance of interpersonal issues including with Ms Bhana's manager in the very early stages of her employment. Her original manager's ongoing influence was discounted despite the fact he still sat in the same general vicinity as the Scrip team.

[87] The facts in this case do not support the existence of an irreconcilable relationship breakdown. All other options had not yet been explored or indeed exhausted and many aspects of the alleged incompatibility had their genesis in the way in which the performance concerns were addressed by Jarden.

Was any incompatibility attributable to the employee?

[88] It cannot be said in this case that the incompatibility was wholly or substantially attributable to the employee because several steps taken by the employer contributed to the breakdown in the relationship well before there was reluctance to meet with Jarden in November and December 2021. The decision to permanently move Ms Bhana to a different team without providing her with sufficient information so she could understand it was a permanent move, and then to move her back abruptly at a time when the employer appeared to be close to calling time on the relationship, caused further difficulties in the relationship. General failure to communicate clearly the position Jarden reached in relation to its concerns about the amount of time it was taking Ms Bhana to reach a satisfactory level of competence was also attributable to the employer.

[89] Regardless of the difficulties about meeting to discuss the Summers report, there was no attempt by Jarden to amend the performance indicators to provide better clarity about what was required. For example, to provide objective measures rather than measuring performance against the subjective view of a mentor or manager who knew how to do the job through personal experience. The importance of objective measures was explained quite clearly by Mr Summers. I have already found above it was not reasonable to implement a PIP after only 12 days in a new role.

Was the dismissal carried out in a fair manner?

[90] Section 103A of the Act requires that dismissal must be an option that a fair and reasonable employer could take for it to be justified. Any finding by an employer must be thoroughly based on the facts. That is not the case here. Mr Jackson gathered a considerable amount of oral evidence by speaking to various employees between the preliminary decision and reaching his final decision. None of that information was made available to Ms Bhana so she was prevented from suggesting ways in which any concerns about her could be addressed. This was at a time when she had indicated a willingness to attend facilitated meetings to rebuild relationships.

[91] Not only did she have no opportunity to respond and have her response taken into account, Mr Jackson made no attempts to satisfy himself the views and opinions of the employees he had spoken to were accurate and able to be verified.

[92] A fair and reasonable employer would have pursued those further steps before making a final decision and provided Ms Bhana with the information gathered about her for her response (particularly because the information was clearly not favourable to Ms Bhana), before taking that information into account when reaching a final decision to dismiss.

[93] Mr Jackson was only involved at the very end of the process and did not enquire into whether Jarden's actions may have contributed to the relationship breakdown. Implementing a performance improvement plan as she moved into a new role, moving Ms Bhana without consultation or being clear it was a permanent move, a general lack of clarity in communications with Ms Bhana about the concerns and the proposed next steps to address those including why she was moved to a new team and a failure to communicate with her about her complaint about her manager also undoubtedly contributed to her reluctance to meet and the relationship breakdown.

Was Ms Bhana disadvantaged in her employment?

[94] As well as her claim for an unjustified dismissal, the Authority was asked to consider whether Ms Bhana was affected to her disadvantage by any actions taken by Jarden that were not able to be justified. Ms Bhana said there were several ways in which she was disadvantaged. Firstly, her concerns about her manager were not addressed and this caused her difficulties in settling in, learning the role and this persisted throughout her employment. The proposed PIPs were unfair because of both the timing of the proposals and the content of

the documents. In addition, she says it was never made clear to her that the transfer into the Cash Settlement team was a permanent move and it was a different role to the one she had been appointed to.

[95] Jarden on the other hand said its actions were justified because it was entitled to address legitimate performance concerns with Ms Bhana and the situation Jarden found itself in was different from how other employee's had progressed in the role. It said there was no complaint of bullying or harassment and therefore nothing to investigate, and Ms Bhana did not raise any concerns about moving into the Cash Settlement team, and in fact, accepted the move into the new role.

Concerns about her manager

[96] Ms Bhana's concerns about being ostracised from others by her manager and unsupported were raised from a very early stage. With Ms Bhana's manager and the other person allegedly ostracised not giving evidence, I cannot conclude whether Ms Bhana's concerns about the reasons why she was treated differently were accurate, but the failure to address her concerns is where the disadvantage to Ms Bhana occurred.

[97] I am satisfied Ms Bhana raised concerns that a reasonable employer could have been expected to address or at the very least communicate with Ms Bhana about decisions it reached, particularly if an informal approach was to be taken, or as happened here, no further action was to be taken. I find there was a relationship breakdown between Ms Bhana and her first manager based on the evidence from Mr Patel and Ms Bhana, People and Culture and the emails set out above. The email from her manager suggesting Ms Bhana was not to be informed of his concerns until later allowing examples of "negligence" to be gathered, essentially to use against her, is enough, together with Ms Martin's assessment, that there were interpersonal issues, for me to be satisfied there were issues. I do not accept that Ms Bhana needed to use the words bullying or harassment in order for her employer to address her concerns.

Performance improvement plans

[98] It was clear that significant efforts were made by Jarden to assist Ms Bhana and I accept there was a level of frustration from other team members. Jarden argued that the two roles Ms Bhana held were simple ones and did not require a high level of training and that it had in fact provided a lot of support including the proposals to implement performance improvement

plans. Ms Bhana herself accepted she had been slow picking things up but there are several problems with Jarden's argument.

[99] Firstly, the impact of the relationship breakdown with her manager was never quantified or given consideration and secondly the options identified in Mr Summers' report were not implemented. Mr Summers observations regarding objective measures against which performance could be measured, rather than a subjective measure of a person who had previously carried out the role appeared to have some merit. This is particularly so when Ms Bhana said on more than one occasion she struggled with getting different advice from different people on how to do various tasks and articulated her preference for face to face training when much of the training and feedback, even if the training was in person, was by email or using audio visual conferencing.

[100] In addition, having just moved Ms Bhana into a new role, implementation of a PIP that covered her previous role was problematic. By this stage, Jarden was aware Ms Bhana had been suffering from work related stress, which does not appear to have been taken into account. Jarden sought advice from her general practitioner but there was no evidence any of the recommendations were implemented.

[101] Another issue for Jarden as an employer is the communication style it adopted with Ms Bhana. Ms Wilson gave evidence that every time Ms Bhana made a mistake in the Cash Settlement team she informed her and would explain what she had done so she knew where she had gone wrong and could learn from her mistakes. She provided an email to evidence this showing a friendly informal approach with Ms Bhana suggesting someone would run through an error with her the next day.

[102] While Jarden considered it had an employee who was not meeting performance expectations, overall, there was a lack of clear and direct communication about the concerns, both as they arose and then cumulatively once it was considered formal support was necessary. There was no evidence of any written communication recording a high level of concern about her performance, with examples, until the first proposed PIP. Feedback was always discussed in collegial settings with lots of positive reinforcement which was out of step with the position that Jarden had reached as far back as August 2020. The performance reviews and the bonus also potentially muddied the water in terms of what Jarden was communicating to Ms Bhana.

Cash Settlement team

[103] I have set out above that Mr Patel's evidence satisfied me there was a difference between the roles and the employment agreement confirms that. Ms Bhana was not given sufficient information to understand the move was permanent or the actual reasons for the move. This was unfair and in breach of her contract. I find that Ms Bhana was disadvantaged by Jarden's decision to move her to the Cash Settlement Officer role.

Additional claims

Breach of contract and good faith

[104] Breach of contract and a breach of good faith were also claimed, however, I have found those to be so closely aligned with the unjustified dismissal and disadvantages for which remedies will be provided that I have decided not to make any further finding or apply separate remedies.

Conclusion

[105] In these circumstances, I find Ms Bhana's dismissal for incompatibility was unjustified and she was disadvantaged by Jarden's unjustified actions in three ways, moving her into the new team, failing to address with her concerns about her manager, and the proposed PIPs. The disadvantages are separate from the dismissal for incompatibility because they formed part of Jarden's efforts to deal with performance at an earlier time. Having been successful in bringing her claim she is entitled to an assessment of remedies.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[106] Ms Bhana's evidence established she suffered injury to her feelings from her dismissal for incompatibility, from the unilateral move into a new team, and the way it dealt with her complaint and addressed its performance concerns. In addition, she felt distressed, unwell and anxious about her employment over a sustained period of time due to the approach Jarden took. I accept the evidence of Ms Bhana's friends who were consistent in their accounts of the impact on her. Her general practitioner issued more than one medical certificate for work related stress.

[107] Considering the distress experienced and the impact on her health and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the

Act is \$25,000.00 for the dismissal and \$10,000.00 for each of the three disadvantage grievances for humiliation, loss of dignity and injury to Ms Bhana's feelings.

Lost wages

[108] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance.

[109] Reimbursement of lost wages are sought, and I accept that reimbursement is appropriate in circumstances where there has been an unjustified dismissal. Ms Bhana's last day of employment was 28 February 2022. Her evidence was that she was unwell to the extent she was unable to look for new work immediately which I find to be reasonable in the circumstances. However, she did secure new employment starting on 2 May 2022

[110] Ms Bhana's salary at Jarden was \$74,000.00 per annum (gross) plus a 3 per-cent KiwiSaver contribution. In the two month period between 28 February and 2 May 2022, lost wages equates to \$12,333.33 (gross) wages and \$370.00 (gross) in KiwiSaver contributions.

[111] Reimbursement of the difference between her new salary (\$72,000.00 per annum) and her salary at Jarden is also sought. The difference amounts to \$166.67 (gross) per month in wages and \$5.00 per month in lost KiwiSaver contributions. Projecting that loss out over 10 months from the date of Ms Bhana's new employment amounts to \$1,660.70 in lost wages and at \$5.00 per month, \$50.00 in KiwiSaver contribution.

[112] Taking into account the relatively small additional sum this loss represents, the amount of time Ms Bhana was employed, the relative ease in which she found new work, and the fact that Jarden likely reached a position where it was reasonable to consider addressing performance with Ms Bhana, I have decided not to exercise the discretion to order a greater sum than that already ordered under s 123(1)(b) of the Act.

[113] I therefore consider reimbursement of lost wages in the amount of \$12,333.33 in wages and \$370.00 in KiwiSaver contributions would be appropriate.⁷

⁷ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Contributory conduct

[114] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[115] In this case, in the context of a dismissal for incompatibility where the irreconcilable breakdown in the relationship cannot be solely attributed to Ms Bhana and the circumstances of the three ways in which Ms Bhana was disadvantaged, I do not find that Ms Bhana's conduct contributed to the situation or was sufficiently blameworthy to warrant a reduction.

Special damages

[116] Special damages or loss of monetary benefit under s 123(1)(c)(ii) of the Act are also sought for the legal fees Ms Bhana incurred in having to engage in what was submitted to be an unnecessary employment process.

[117] The purpose of special damages is not punitive but to compensate a party for the loss, damage or harm it has suffered. The Court of Appeal in *Binnie v Pacific Health Limited* held that legal expenses prior to the issue of proceedings, such as for investigation into the conduct of employees, could be treated as special damages rather than as party and party costs, provided a proper line could be drawn between the two.⁸

[118] I have considered the application but find in this case it is difficult to draw a proper line between damages and costs. Ms Bhana made concessions late in the piece that she had been slow to pick things up. While I have found there was a disadvantage connected with the proposed implementation of performance improvement plans, ultimately Jarden reached a point where it would have been reasonable to take steps to address performance although Ms Bhana was disadvantaged by how Jarden went about that. That means pre-litigation costs would more than likely have been incurred regardless meaning this is not a matter where special damages are warranted.

The McGregor report

⁸ *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438 (CA).

[119] I decline to order reimbursement of the cost of obtaining the Mr McGregor's report because there as no evidence this was agreed to by Jarden and was an independent step taken by Ms Bhana.

Counterclaim

[120] In relation to Jarden's counterclaim, because the dismissal was unjustified and Ms Bhana was disadvantaged in several ways by Jarden's actions and decisions, I am not persuaded in all the circumstances that Jarden has made out the claim that Ms Bhana breached her duty of good faith.

Orders

[121] Jarden Partners Limited is ordered to make the following payments to Usha Bhana:

- (a) Compensation in the sum of \$25,000.00 under s 123(1)(c)(i) of the Act for the hurt and humiliation suffered by Ms Bhana because of her unjustified dismissal.
- (b) Compensation in the sum of \$10,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Bhana because of an unjustified disadvantage caused by Jarden failing to address Ms Bhana's concerns about her manager with her.
- (c) Compensation in the sum of \$10,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Bhana because of an unjustified disadvantage caused by the timing and content of the proposed performance improvement plans.
- (d) Compensation in the sum of \$10,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Bhana because of an unjustified disadvantage caused by Jarden's decision to move her to the Cash Settlements Officer role.
- (e) Lost wages in the sum of \$13,993.33 in wages and \$420.00 in KiwiSaver contributions under s 123(1)(b) of the Act.

Costs

[122] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed,

Ms Bhana may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the Respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[123] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Sarah Kennedy
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1