

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 121

3177054

BETWEEN JESSE JOSIAH HYLANDS
Applicant

AND DRIP IV NEW ZEALAND
LIMITED
Respondent

Member of Authority: Lucia Vincent

Representatives: Gary Pollak, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 19 December 2022 at Christchurch

Submissions received: 19 December 2022 from Applicant
No submissions received from Respondent

Determination: 9 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Jesse Hylands (Jesse) worked for the respondent, Drip IV New Zealand Limited (Drip IV) as a registered nurse. Jesse says Drip IV unjustifiably dismissed him in April 2022 after he raised reasonable concerns about how it operated. Drip IV has not participated in proceedings to date.

The Authority's investigation

[2] Jesse provided the Authority with a written witness statement, answers to questions asked and further information as requested. Jesse's legal representative gave oral closing submissions at the investigation meeting. I arranged for further information

to be sent to Drip IV so it had an opportunity to respond following our investigation meeting. Drip IV did not do so.

[3] As permitted by s174E of the Employment Relations Act 2000 (Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination were:

- (a) Did Drip IV unjustifiably dismiss Jesse?¹
- (b) If the answer to (a) is yes, what remedies should I award, including any:
 - Reimbursement of wages or other money lost because of any unjustified dismissal (subject to evidence of reasonable endeavours to mitigate his loss)?²
 - Compensation for any humiliation, loss of dignity, and injury to Jesse's feelings?³
 - Reduction for any conduct by Jesse that contributed to the situation giving rise to his personal grievance?⁴
- (c) Should either party contribute to the costs of representation of the other party?

Did Drip IV unjustifiably dismiss Jesse?

Background

[5] Jesse described Drip IV operating in a similar way to an Australian counterpart that describes itself as the "... leading mobile healthcare company specialising in assisting with nutritional deficiencies."⁵ Drip IV uses a model that relies on a remote medical team to prescribe and tailor individual treatment plans and customised infusions to a client's nutritional needs. Registered nurses administer those infusions to

¹ Sections 103(1)(a) and 103A.

² Section 123(1)(b).

³ Section 123(1)(c)(i).

⁴ Section 124.

⁵ See <https://www.dripiv.com.au/>

clients wherever they are, described as providing a mobile IV (Intravenous Vitamin) service to “... deliver vitamins, minerals and amino acids directly to the body via the bloodstream to allow for optimal bioavailability.”

[6] Jesse initially worked casually for Drip IV in September 2021 whilst working full time in a hospital Emergency Department (ED). He signed a casual employment agreement recording his position as a mobile infusion district nurse on 21 September 2021 (Agreement).

[7] At the time of his dismissal, Jesse held the role of New Zealand Training Manager for Drip IV. He had accepted a promotion to work on a permanent, full-time basis as the main point of contact for all their New Zealand based nurses. He had responsibility for training, managing stock and overseeing rosters. Drip IV’s Director confirmed Jesse’s promotion with more responsibility, hours, and money (\$74,000 per annum) in a letter Jesse signed the same day on 6 December 2021.

[8] Jesse relied on prescriptions obtained through an online application - Instant Scripts (App). Initially he felt confident the App’s doctors were New Zealand based and authorised to prescribe for New Zealand clients, based on assurances he had received during his training by Drip IV. The App ensured he complied with his professional and legal obligations under the Medicines Act 1981 - obligations he understood to require him to only administer medicines prescribed by an authorised prescriber i.e. a doctor based in New Zealand. Towards the end of his employment, Jesse learned Drip IV did not appear to use a New Zealand registered doctor for prescribing for clients in New Zealand. This gave rise to serious concerns covered in more detail below.

[9] Jesse also had access to Acuity, an account he used in his work for communications and scheduling. Acuity and the App gave him the information he needed to know, whom and where he would administer infusions prescribed by an appropriate medical professional. However, following Jesse’s promotion to Training Manager, he had access to more information about the prescribing process. This information along with an incident that occurred in early April raised red flags.

Concerns

[10] Jesse first felt concerned about how Drip IV operated when he received a shipment of product (vitamins for infusions) at his home early April 2022. He noticed

a batch with names that did not match the names of clients he would be administering the infusions to. Jesse spoke to an Australian manager who told him not to worry as Drip IV filled a prescription for ten vials but only administered one, reallocating the remaining nine. Jesse had received the reallocated vials. In addition, Jesse had noticed the same doctor seemed to be signing off both Australian and New Zealand prescriptions. These discoveries rang alarm bells and caused him to start asking questions. He did not want to risk acting outside his scope of practice as a registered nurse.

[11] Hoping it was a quick solve, Jesse promptly expressed his concerns to Drip IV in an email on 11 April 2022 at 2:05pm. He said he had checked all the doctors listed on the App and none seemed to be registered in New Zealand. He noted Instant Scripts did not know about New Zealand based clients so asked who was signing off prescriptions?

[12] The Director emailed Jesse at 2:08pm saying he would be introduced to Drip IV's New Zealand doctors that day or the next, logins were being set up with a doctor, scripts were independently signed by a nurse prescriber, the App was used for form stack and record holding and to contact them if he was unsure of anything before reaching out to anyone else.

[13] Remaining concerned, by email at 2:14pm, Jesse asked again who the nurse prescriber was. To Jesse's knowledge, nurse prescribers could only sign off a small list of medications under certain conditions.

[14] At 4:31pm, having not heard further, Jesse followed up again by email asking for proof of who was prescribing for New Zealand clients. He said if all prescriptions were signed by the doctor named (not a New Zealand doctor), they were illegal for use in New Zealand. Until he had proof, Jesse could not legally see clients.

[15] The next day, 12 April 2022, Jesse noticed he had lost access to Acuity. He received a message saying his work email address did not exist. Jesse emailed the Director from his personal email address at 6:28pm asking why he had lost access and who the legal prescribing doctor was in New Zealand. He reiterated he could not legally see clients until then because it risked breaching his scope of practice and patient/client safety.

[16] Around this time Jesse also messaged an Australian based manager for Drip IV in WhatsApp. He expressed his concerns and sent a screenshot of the error message he received regarding his email address. None of these issues were resolved.

Dismissal

[17] Drip IV's Director did not attempt to address Jesse's serious concerns, despite them asking him to contact them if he remained unsure of anything. Instead, at 10:57am on 13 April 2022, the Director emailed Jesse at his personal email address saying:

Due to the way in which you have conducted yourself over the last few days, I have to have an urgent internal meeting about your behaviour.

I am instructing you to stand down from all duties of your role until given further notice.

I will be in touch later today.

[18] Jesse emailed the Director at 11:16am asking them to explain what behaviour they questioned, what the meeting would entail, why they had stood him down and why he had not been paid for his last two weeks of work. He asked for his pay to be remedied urgently - he had a mortgage to pay and family to provide for.

[19] The next day, at 1:15pm on 14 April 2022, the Director emailed a letter to Jesse terminating his employment immediately. It said:

As per my email on Wednesday the 13th of April, a meeting was held to discuss your behaviour on Monday the 11th of April.

Drip IV has made the decision to terminate your employment effective immediately. Due to the nature of your role, a lot of trust had been held for you and your position. You have shown that you are not capable to fulfil the role you were employed to do.

I am extremely disappointed that it has come to this and I hope you can take this as a learning curve for your next position.

I wish you all the best for your future endeavours.

I have attached a document for you to sign to have your 2 weeks wages and annual leave paid out upon signing.

[20] The document attached to the email resembled a record of settlement attempting to bind Jesse to non-disparagement and restraint of trade clauses. It also promised payment of Jesse's gross earnings of \$5,176.53 for the period 11 to 24 April 2022 and all outstanding annual leave balances. Jesse did not sign the document.

Personal Grievance

[21] Jesse contacted the New Zealand Nurses Union (NZNO) who wrote to Drip IV. An NZNO Organiser emailed the Director at 1:16 pm on 14 April 2022 confirming they represented Jesse and that they understood after querying some legalities around prescribing in New Zealand, Drip IV had dismissed Jesse with neither notice nor process, in breach of obligations under the Act.

[22] The NZNO emailed the Director again on 26 April 2022 raising a personal grievance on behalf of Jesse for unjustified dismissal, seeking remedies and agreement to attend mediation. Drip IV did not respond to any of the emails including a further follow up from NZNO by email on 29 April 2022.

Unjustified?

[23] An employer must justify a decision to dismiss an employee. I must determine on an objective basis if Drip IV acted how a fair and reasonable employer could in all the circumstances at the time it dismissed Jesse. In doing so I must consider whether Drip IV has met minimum procedural requirements. These include whether:

- a. Having regard to resources, Drip IV sufficiently investigated the allegations against Jesse before dismissing him;
- b. Drip IV raised its concerns with Jesse before dismissing him;
- c. Drip IV gave Jesse a reasonable opportunity to respond to its concerns before dismissing him; and
- d. Drip IV genuinely considered Jesse's explanations (if any) to the allegations before deciding to dismiss him.

[24] Drip IV did not meet any of the above minimum procedural requirements. Nor did it have a good reason exist to dismiss Jesse. Drip IV also failed to comply with clauses in the agreement that required fair process, good reason and notice.⁶

[25] Prior to his dismissal, Drip IV's Director referred Jesse to "the way in which you have conducted yourself," "your behaviour" and "you are not capable to fulfil the

⁶ See for example, the clause called "Ending employment" which stated "The employer might end the employee's job if there's a good reason (also called reasonable cause), and they follow a fair process in deciding to end employment."

role you were employed to do.” But the Director did not tell Jesse exactly what conduct, behaviour or incapability they alleged Jesse had engaged in that they believed could justify termination. Even when Jesse asked for more information, the Director simply responded with a dismissal letter. Having not set out sufficiently what the allegations were, Drip IV did not give Jesse any opportunity to respond to the concerns (whatever these were). Any meeting that occurred had not involved him. Drip IV did not genuinely consider Jesse’s explanations because he had no opportunity to provide any, even if he had understood what the allegations were.

[26] Jesse described how he believed he had been dismissed by Drip IV in retaliation for raising his professional concerns. If he was, that would not be a good reason to justify dismissing him. Jesse responsibly raised what were serious concerns he had about what appeared to be a non-compliant prescribing process. When he could not satisfy himself that Drip IV complied, Jesse rightly refused to continue administering infusions he reasonably believed would put him at risk of breaching his professional and legal obligations as a registered nurse. After an initial assurance that prescribing processes were compliant (which Jesse later questioned for good reason), Drip IV did not respond. Jesse continued to raise his concerns because he had an obligation to ensure he adhered to his professional obligations. Rather than continuing to engage in good faith with Jesse about his concerns, Drip IV shut Jesse out of Acuity (two days prior to his dismissal), then dismissed him.

[27] Drip IV has not justified its decision to dismiss Jesse. It followed an unfair process that failed to meet minimum procedural and good faith requirements.⁷ None of these failures were minor.⁸ No good reason existed for Drip IV to dismiss Jesse. Drip IV unjustifiably dismissed him.

Remedies

[28] During the investigation meeting Jesse spoke about the impact of his dismissal. He felt shocked and under pressure due to the house purchase process he and his partner were going through. He had a young child to provide for. Jesse suffered sleepless nights and stress. His dismissal impacted on his family. Fortunately, Jesse secured

⁷ Sections 103A(3) and 4(1A)(c).

⁸ Section 103A(5).

employment with his former employer within a matter of weeks. Despite that, he felt embarrassed returning a matter of months after having resigned from his role in ED.

[29] Jesse calculated financial losses by being suddenly without work as follows:

- a. Three weeks remuneration totalling \$4,831.72;⁹ and
- b. Unpaid annual holiday pay of \$3,575.47.¹⁰

[30] I accept Jesse incurred these losses due to Drip IV's unjustified dismissal of him. At the investigation meeting Jesse confirmed he had belatedly received an additional payment from Drip IV of \$3,947.87. He did not receive a payslip meaning he could not be certain what it was made up of. He acknowledged that sum should be deducted from any remedies.

[31] Jesse also claimed KiwiSaver contributions he estimated to total \$1,542.76. These contributions were deducted from Jesse's pay but not passed on. I accept these should have been paid.¹¹

[32] For completeness I note that given Drip IV's failure to provide full records (Jesse had only two payslips), to the extent that Jesse has estimated his losses, I accept the amounts claimed in accordance with s 132 of the Act.

[33] That leaves consideration of compensation for emotional harm caused by the personal grievance. Jesse has claimed \$40,000. I have identified the extent of the harm Jesse has suffered, where that harm sits when compared with other cases, then stepped back and assessed what would be a fair and just amount in the circumstances.¹²

[34] I recognise the shock, sleeplessness and stress suffered by Jesse due to being suddenly and unjustifiably dismissed, including potentially jeopardising a house purchase. The harm suffered however did not appear to have had serious ongoing consequences for him beyond the comparatively brief three-week period within which he secured alternative employment and his initial embarrassment to return to ED so

⁹ All amounts are gross and set out at paragraphs 22 and 24 of Jesse's statement of evidence.

¹⁰ Calculation based on 2.03 weeks holiday pay, accrued as per payslip provided for pay period ending 10 April 2022 and payable under s 23 of the Holidays Act 2003.

¹¹ The Agreement contained a clause called "KiwSaver" which provided for deductions. Payslips recorded some of the deductions made. Also see *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55 at [69] – [82] where the Court awarded Kiwisaver contributions.

¹² Relevant factors considered in *Mikes Transport Warehouse & Anor v Vermuelen* [2021] NZEmpC 197 at [72].

soon after resigning. I cannot consider the impact on Jesse's family except to the extent that he felt stressed seeing his family distressed. I am not satisfied an award at the level of \$40,000 is justified in the circumstances when compared to the level of harm suffered and awards made in other cases.¹³ I consider an award of \$15,000 fair in all the circumstances.

[35] Nothing Jesse did contributed to the situation giving rise to his personal grievance that would warrant a reduction to remedies. By contrast, Jesse mitigated his losses significantly by securing employment almost immediately.

[36] I order Drip IV pay Jesse within 28 days of this determination:

- a. \$883.85 being an amount of three weeks remuneration \$4,831.72, with \$3,947.87 deducted;
- b. Holiday pay of \$3,575.47;
- c. Kiwisaver contributions of \$1,542.76;
- d. Interest on the above amounts;¹⁴
- e. Compensation of \$15,000; and
- f. Costs of \$2,000 and the filing fee as a disbursement of \$71.56 as outlined below.

¹³ See for example, average awards in the Authority rarely being above \$25,000 <https://www.employment.govt.nz/about/employment-law/compensation-and-cost-award-tables/compensation-for-personal-grievance-claims-jan-jun-2022/> and *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40, where the Court awarded \$15,000 for a moderate level of harm under s 123(1)(c)(i) recognising Ms Popkin felt stressed, uncertain, cut out of the process, excluded from decision-making, powerless to influence what was happening and without an opportunity to engage, at [21] – [22]. Compare this case with the severe and serious harm suffered on an ongoing basis in *Richora v Cheng* where the Court considered a higher award appropriate but confined to the \$20,000 sought.

¹⁴ Clause 11, Schedule 2, Act, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Costs

[37] Having been wholly successful in his claims in an investigation meeting that took less than half a day, I award a proportionate amount of the daily tariff for costs of \$2,000 plus the filing fee of \$71.56 as a disbursement.¹⁵

Lucia Vincent
Member of the Employment Relations Authority

¹⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.