

This determination includes an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 571
3152125

BETWEEN JPK
 Applicant

AND IDX
 Respondent

Member of Authority: Peter van Keulen

Representatives: Louise Laming, counsel for the Applicant
 Blair Edwards, counsel for the Respondent

Investigation Meeting: 27 June 2022 at Queenstown

Submissions Received: 27 June 2022 and up to 1 November 2022 from the Applicant
 27 June 2022 and up to 1 November 2022 from the Respondent

Date of Determination: 3 November 2022

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] This determination concerns claims arising out of a work-related accident. It contains details of the applicant's health and medical state as that relates to his recovery, rehabilitation and potential return to work. This information is private and confidential to the applicant but

it forms a necessary part of the evidence that I considered and for this reason I had to set some of it out in detail in this determination. In order to protect the applicant's privacy I have decided that non-publication orders should be made.

[2] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act), I make non-publication orders prohibiting the publication of name and identity of the applicant and the respondent so that the medical information set out in this determination cannot be directly linked to the applicant.

[3] For the purposes of this determination:

(a) The applicant will be referred to as JPK.

(b) The respondent will be referred to as IDX.

(c) Relevant employees of IDX will simply not be named or referred to by a three-letter identifier.

Employment relationship problem

[4] JPK was employed by IDX as a machine operator and a labourer. IDX operate an excavation and earthmoving business; JPK's role was to operate a digger, drive a heavy roller and a truck and carry out maintenance on machines.

[5] Unfortunately, on 8 July 2019, whilst working, JPK suffered a severe injury which left him with a neck sprain and concussion. After a medical assessment JPK was deemed fully unfit for work. JPK was eligible for ACC and from July 2019 was off work, receiving ACC earnings related payments and assistance from various specialists to aid his recovery so that he could recommence work with IDX.

[6] However, as time passed the question of how and when JPK would return to work for IDX was unable to be resolved. JPK, on advice from ACC, wanted to commence a gradual return to work and IDX, relying on the medical information about JPK's capacity to work, did

not want him to return until he was fully fit, as it believed he would be a risk to himself and others at work.

[7] This impasse came to a head in December 2019. Firstly, IDX were told by JPK's occupational therapist that he was going to resign. Then JPK rang IDX to discuss a possible return to work. This confusion for IDX led to it responding in a way that JPK took as a dismissal; IDX says it did not intend to dismiss JPK nor did it in fact dismiss him.

[8] Either way JPK did not return to work at IDX and he subsequently raised a personal grievance for unjustifiable dismissal.

The Authority's investigation

[9] The parties were unable to resolve JPK's personal grievance and he lodged a statement of problem in the Authority. JPK's claim for unjustifiable dismissal was premised on his employment being terminated by IDX in the telephone conversation in December 2019.

[10] IDX responded to the statement of problem, denying it had dismissed JPK and asserting he had resigned.

[11] I investigated JPK's claim by receiving written evidence and documents, holding an investigation meeting on 27 June 2022 and assessing the oral and written submissions of the parties' representatives.

[12] I received witness statements from JPK and his mother and then from two of the owner operators of IDX. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties. The representatives then provided oral and written submissions.

[13] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then

based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[14] JPK's personal grievance letter and statement of problem only refer to an unjustifiable dismissal. However, during the investigation meeting much of what JPK said had happened, related to communications and actions arising out of his attempts to return to work with IDX. The things he complained of were not the basis for his unjustifiable dismissal – that can only be the dismissal he says occurred in the telephone call – but they were complaints that he had been treated unfairly or unjustifiably by IDX in respect of his return to work.

[15] IDX were aware of JPK's complaints as set out in the statement of problem and his evidence and responded to the various allegations about its conduct in relation to JPK's return to work with it.

[16] Counsel for JPK's submissions at the end of the evidence addressed both an unjustifiable dismissal in connection with the December events and an unjustified action causing disadvantage personal grievance relating to IDX's conduct toward JPK in respect of him returning to work. This was despite the statement of problem not containing an unjustified disadvantage claim.

[17] So, I invited IDX to make submissions to me on both claims; I have the power to resolve an employment relationship problem on a basis other than as it is alleged or articulated, so it might be open to me to find an unjustifiable disadvantage claim despite it not being set out.¹

Unjustifiable action causing disadvantage

[18] The first issue that arises with the unjustified disadvantage grievance is whether JPK raised his grievance within 90 days of the events complained of occurring or coming to his

¹ Sections 122 and 160(3) of the Employment Relations Act 2000.

attention. Counsel for IDX says this is so because JPK did not set out an unjustifiable action causing disadvantage grievance in his letter raising a personal grievance. And counsel says notwithstanding the powers I have under ss 122 and 160(3) of the Act a personal grievance must be raised within the requisite 90-day period from the actions complained occurring or coming to JPK's attention.²

[19] If I am satisfied that JPK's personal grievance for unjustified disadvantage was raised within the 90-day period then the next questions, in respect of the unjustified disadvantage claim, are:

- (a) Did IDX act toward JPK as alleged?
- (b) If so, did these actions cause disadvantage to JPK's employment?
- (c) If so, were IDX's actions justifiable?

Unjustifiable dismissal

[20] The issues for the unjustifiable dismissal grievance are:

- (a) Was the employee dismissed; and
- (a) If so, were the actions of the employer in deciding to dismiss the employee, justifiable?

[21] In this case the question of whether JPK was dismissed is clearly in dispute. And the key enquiry is centred on the telephone conversation in December 2019, and the events surrounding that.

² Section 114(3) of the Employment Relations Act 2000.

Remedies

[22] If JPK is successful with either personal grievance, I will then need to consider remedies. If I award JPK any remedies, I will also need to consider if he contributed to his grievance in such a way that the remedies awarded should be reduced and if so by how much.

Unjustifiable action causing disadvantage

Was a personal grievance for unjustified action causing disadvantage raised in the requisite time frame?

[23] The first issue for me to resolve in respect of JPK's unjustified action causing disadvantage grievance is whether JPK raised his personal grievance within the requisite 90-day time period.

[24] This is because section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[25] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[26] In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* the Employment Court summarised the key principles for establishing if a grievance has been raised pursuant to s 114(2) of the Act.³ In particular Judge Holden said:

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also

³ *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.⁴

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.⁵

[27] So, at its simplest, the issue of whether a grievance was raised turns on whether sufficient information was provided to enable the employer to respond to the merits of the complaint in order to try and resolve it.

[28] Counsel for IDX says JPK's personal grievance was always expressed as being for unjustifiable dismissal and he never raised an unjustified action causing disadvantage grievance. Counsel says the first time IDX was aware JPK was claiming that IDX acted in an unjustified manner, other than the dismissal, was in the investigation meeting.

[29] Whilst this argument is credible based on how JPK's personal grievance has been labelled, the question of whether a grievance has been raised is not limited to the label put on it. What matters in this case is whether the complaint made included the matters JPK claims are unjustified actions such that IDX knew what it was that JPK was complaining about, notwithstanding that this was done under the label of unjustifiable dismissal.

[30] In the letter raising JPK's personal grievance the grounds for JPK's personal grievance included:

As per standard ACC protocol, JPK's caseworker and medical professionals endeavoured to implement a return to work programme for him. However, this was not able to be implemented, because you did not want to facilitate part time hours and advised ACC that you did not want JPK to return.

⁴ *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].

⁵ *Creedy v Commissioner of Police*, above n 5, at [36]-[37].

JPK endeavoured to contact you directly to discuss his return to work, but you did not respond in any way.

[31] In my view this is sufficient for IDX to know what it is that JPK is complaining about in terms of their actions, so that it could respond and it does not matter that these complaints were expressed as informing an unjustifiable dismissal personal grievance.

[32] I am satisfied that a personal grievance for unjustifiable action causing disadvantage was raised in the requisite time period.

[33] And I have the power to find that the employment relationship problem is this grievance notwithstanding that the grievance was expressed as an unjustifiable dismissal. For this reason, I will turn to consider if an unjustified action causing disadvantage grievance has been established.

What are the actions complained of and did they occur?

[34] The actions JPK complains about are that IDX refused to allow him to return to work on a phased or part time basis as suggested by ACC.

[35] These events did occur; IDX accepts it did this but says it did so because it did not have any light duties it could give JPK even on a part time basis and it did not believe JPK could return to work with heavy machinery and driving as he was not medically cleared for a return to work.

Did these actions cause disadvantage to JPK's employment?

[36] Not allowing JPK to return to work even on a phased return or a part time basis did cause a disadvantage to JPK's employment or the conditions of his employment.

Was IDX justified in acting as it did?

[37] The real issue for this personal grievance is whether IDX was justified in refusing to allow JPK to return to work on any basis as it believed he was not medically fit to be on site.

[38] JPK's return to work was to be implemented by a plan created by ACC (the Plan). The Plan was first established in September 2019. It appears that two assessors provided their respective assessments which they completed and signed off on in the Plan on 16 September 2019 and 20 September 2019.

[39] A review of the Plan indicates the following key assessments:

- (a) "When deemed fully fit for work [JPK] is recommended to return to work in a graded approach increasing the complexity of work tasks and hours to ensure a safe and sustainable return to work."
- (b) JPK's work has three main tasks, digger driving, roller/truck driving and general maintenance on machines – he was assessed as unable to do these tasks.
- (c) JPK had an initial prospective return to work date of 14 October 2019.
- (d) The Plan included a gradual return to full time work based on increasing number of days and hours per week over a six-week period starting with roller/truck driving and maintenance.
- (e) The Plan was subject to medical practitioner approval which was pending i.e., recorded as still awaiting clearance.

[40] The Plan is clear, any return to work was to be a graded return because of concern over regression. Significantly the Plan was also clear that JPK was unable to do any tasks at the time the Plan was created and there was a prospective commencement date which was subject to medical practitioner approval; any return to work could only commence once JPK was deemed fully fit for work by a medical practitioner.

[41] That medical practitioner approval was not forthcoming at any stage. The various medical certificates on the ACC file and those provided to IDX deemed JPK as fully unfit for

work, up until 12 January 2020. It is worth noting that JPK was not just deemed fully unfit which was one option on the medical certificate, he was never certified as being fit for work or fit for some work (with references to days and hours), which were the two other options available on the medical certificates.

[42] Then there was a further ACC report in December 2019. This report recommended a change to the Plan because JPK was not fully fit, and it recommended implementing training for independence. This report includes the following key points:

- (a) Recognising that JPK had a cognitively demanding role that involved sustained and prolonged periods of concentration and he continued to experience concussion symptoms that inhibited him from returning to work.
- (b) In particular, JPK's driving was limited to 30 minutes and his activity tolerance was limited to 1 - 2 hours, with fatigue, reduced concentration, headaches and dizziness setting in.
- (c) That JPK was deemed fully unfit for work until 12 January 2020 and this was likely to be extended.

[43] So, in December 2019, after approximately three months of working with JPK on the Plan, ACC's view was that the Plan required a change to focus on training to help JPK become fit to return to work; ACC had concluded that JPK could not return to work because he could not do his cognitively demanding role as he was unable to concentrate and was still experiencing concussion symptoms and JPK's likelihood of being fit to return to work (under the Plan on a phased return) by 12 January 2020 was unlikely.

[44] In conclusion then:

- (a) In September 2019, when the Plan was put in place it was on the basis that JPK would start a phased return to work once he was cleared as fully fit to work.

(b) JPK was not signed off as fully fit to work by a medical practitioner up to 12 January 2020.

(c) The Plan was changed in December 2019 on the basis that a different approach was required to facilitate JPK becoming fully fit for work – so that then a return to work could be implemented.

[45] In these circumstances IDX's actions in not facilitating a return to work for JPK were wholly justified – it is not clear to me why JPK believed he should be returning to work before January 2020 as the Plan did not provide for this and the medical clearance was not available.

[46] And, reflecting on these circumstances and the communication between IDX and ACC I am satisfied that IDX did enough to discuss the options available for JPK and explain its position such that there is no fault on IDX's part in connection with any communication over the proposed return to work for JPK.

Conclusion

[47] There is no basis for JPK's unjustified action causing disadvantage grievance and it is dismissed.

Unjustifiable dismissal

[48] As identified above the first issue for JPK's unjustifiable dismissal claim is whether he was dismissed by IDX.

Dismissal

[49] Dismissal is the termination of employment at the initiative of the employer.⁶ It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal.

⁶ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

In the case of an actual dismissal, the unequivocal act will be a statement amounting to a sending away or sending apart.⁷

[50] I need to decide if JPK was dismissed by IDX, which he says occurred in the telephone conversation in December 2019. I need to decide if the conversation and the circumstances leading up to it amount to an unequivocal act of sending JPK away. To do this I will establish what occurred and then decide if that amounts to a sending away.

What happened?

[51] During the time that JPK was off work there were various discussions about his return to work with ACC and JPK's occupational therapist (the OT). These discussions included contact with IDX, some of which has been referred to above. In these discussions IDX made it clear that it did not want JPK to return to work until he was medically fit to do so as it had concerns about his safety.

[52] In October 2019 IDX hired a new employee to cover the work that JPK would otherwise be doing as it did not know when he would return. IDX says this decision was separate from any thoughts or discussions it had about JPK not returning to work (either by resignation or dismissal) – which appears correct as the timing indicates these discussions occurred in November 2019.

[53] Against the backdrop of JPK wanting to return to work at IDX on a phased basis and IDX advising there was no work for him until he was fully fit, it appears that ACC and the OT discussed JPK's continued employment with him and the OT discussed this with one of the owner operators of IDX.

[54] These conversations took place in November 2019. The records of JPK's medical examinations with the OT indicate the following:

⁷ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 976.

- (a) On 4 November 2019 the OT spoke to IDX about JPK not returning to work until fully fit; with IDX expressing concern about JPK driving heavy vehicles.
- (b) On 12 November 2019 the OT's notes record "liaise with ACC re resigning from work, liaise with employer".
- (c) On 19 November 2019 the OT discussed resignation and the implications for ACC payments with JPK. The OT then spoke to IDX – the notes recording "discussed above", which was a reference to JPK possibly resigning and contemporaneous correspondence indicates that the OT expressed as JPK being likely to resign.
- (d) On 26 November 2019 the OT's notes record that JPK continued to present as unfit for his pre-injury role because of limited activity tolerances and post-concussion symptoms. The notes also record that IDX was unwilling to have JPK back until fully fit and it had indicated they would like to terminate his employment but cared about him.

[55] From these notes and the evidence from JPK and IDX it is clear that:

- (a) JPK contemplated resigning from IDX and he discussed this with ACC and the OT but did not tell either that he would resign; it does appear though that he authorised the OT to discuss at least his possible resignation with IDX.
- (b) IDX contemplated dismissing JPK as it was unsure when he would return and it had ongoing work it needed someone to do but it did not advise ACC or the OT that it would dismiss JPK or that it had dismissed JPK. In a conversation about JPK's ongoing employment IDX told the OT that they cared about him – it appears that they were saying they could dismiss him but they cared about him and would keep his job open. And in a conversation with the OT when

IDX were told JPK was going to resign, they told the OT that JPK's job would stay open for him to return to when he was fully fit for work.

[56] Then on 18 December 2019 JPK spoke to one of the owner operators of IDX (who I shall refer to as YHB). It is in this telephone conversation that JPK says he was dismissed.

[57] JPK says:

- (a) He told YHB that he was calling to update it on his ACC and rehabilitation progress.
- (b) YHB told him that he did not have a job as he had resigned.
- (c) He responded saying he did not want to resign.
- (d) YHB said, based on what the OT had said – that he was resigning – IDX had hired someone else.
- (e) He responded again saying IDX had not heard from him.
- (f) YHB told him to take that up with his OT.
- (g) He then asked about not having been paid his holiday pay to which YHB said that was “[IDX employee's] department”.
- (h) He then ended the call.

[58] YHB says:

- (a) JPK started the call by saying no doubt my ACC case manager has told you I am resigning, which it responded to with yes, he did. JPK then said I am not resigning.
- (b) He told JPK that it had hired another employee to cover the workload.

(c) JPK told him that it could not do that and YHB responded saying it needed to as it had a workload to cover.

(d) YHB ended the call by telling JPK to speak to his ACC case manager.

(e) YHB says he did not tell JPK that there was no job for him nor did it discuss holiday pay.

[59] I need to resolve the conflict in this evidence to determine what occurred and if this amounts to a dismissal.

Credibility

[60] As I have done in the past when considering conflicting evidence and making a decision on which evidence I prefer, or which is more credible, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court.⁸ This involves assessing what each witness said and reviewing how each witness expressed their evidence both orally and in writing, considering not just what was said and but also how it was said. In the course of doing this I must consider consistency of the witness' evidence, the witness' reliability and accuracy in terms of their recall of the events, whether any concessions were made, and how plausible the overall story is.

[61] I must also consider the likelihood that witnesses might be mistaken and their recollection subject to confirmation bias or whether witnesses might, in fact, be lying under oath or affirmation.

Assessment

[62] The following are the key points that have informed my assessment:

⁸ *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

- (a) There was no reason for JPK to call YHB to update it on his ACC and rehabilitation status. JPK had not done this before, and all communications about JPK and his return to work had been between ACC or the OT and IDX. It seems more likely that JPK called to discuss the OT advising IDX that he was likely to resign.
- (b) It seems unlikely that YHB would tell JPK they had hired someone else because he had resigned; the timing is not right for this to be the case as IDX had hired the new employee in October 2019, before conversation with the OT (which was in November 2019).
- (c) IDX did not assume JPK had resigned because of the conversations it had with the OT and IDX were not going to dismiss JPK – the contemporaneous notes support this. In fact, I am satisfied that IDX was prepared to keep JPK’s job open for him and it had told the OT this. This makes sense in the circumstances as IDX had a new employee to cover the work, it believed there would be further work available for JPK when he was able to return and it was not going to dismiss him in the interim because, amongst other things, it liked him.

[63] I have no doubt there is a degree of confirmation bias in both JPK and YHB’s evidence.

[64] I think JPK was concerned that IDX thought he had resigned and he believed he was going to be told there was no job for him to return to because of this; so, when he heard IDX refer to a new employee, he took that as a dismissal.

[65] In contrast, what YHB wanted to convey was the opposite, whilst JPK could not return to work until he was fully fit, there would be a job for him notwithstanding that it had hired a new employee.

[66] Reflecting on these observations and the other aspects of the credibility assessment, I conclude the following occurred:

- (a) IDX were told by the OT that JPK was thinking about resigning and was likely to resign. IDX told the OT it had a new employee to cover JPK's work but there was a role open for him to return to when he was fully fit for work.
- (b) JPK was concerned that the OT had told IDX that he had resigned so he called YHB on 16 December 2019; there was no answer so he left a message.
- (c) YHB returned JPK's call on 18 December 2019.
- (d) The call started with JPK telling YHB that he was not resigning. YHB then told JPK they had hired a new employee to cover the workload in his absence. JPK objected to that – telling YHB they could not do that. YHB told JPK they needed someone to cover his workload.
- (e) YHB concluded the call by telling JPK to speak to his ACC case worker about this.
- (f) IDX did not treat JPK as having resigned nor did it treat him as having been dismissed; it did not confirm the end of his employment in writing nor did it process his final pay. It did not contact JPK directly after 18 December 2019 as it was waiting for contact from ACC.

[67] This is a classic case of two people speaking passed each other and believing a message was conveyed:

- (a) JPK believed IDX thought he had resigned and he wanted to correct this. He did this and then when YHB responded by telling him it had a new employee, he thought it was telling him there was no longer a job for him so his resignation had to stand.

(b) YHB thought JPK would be upset at a new employee being hired and it needed to justify its position. YHB did not want to engage with JPK directly and wanted to deal with his ACC case worker; for this reason, it told him to speak to ACC, which it believed would tell him there was job open for him once he was fully fit to return to work.

[68] Based on this, my conclusion is, there was no equivocal statement of dismissal by IDX, that is, there was no sending away.

Conclusion

[69] IDX did not dismiss JPK and there is no basis for his unjustifiable dismissal grievance; the claim for unjustifiable dismissal is dismissed.

Summary

[70] JPK's personal grievances are not established and his claims are dismissed.

Costs

[71] 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, IDX 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 JPK will 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.

[72] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁹

Peter van Keulen
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.