

NOTE: This determination contains an order prohibiting publication of certain information at [1] and [98] – [103].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 621
3317640

BETWEEN NJS
Applicant
AND MPV
Respondent

Member of Authority: Sarah Kennedy-Martin
Representatives: Claudia Serra, advocate for the Applicant
YVU for the Respondent
Investigation Meeting: 6 May 2025 in Tauranga
Information received up to: 25 August 2025 from the Applicant
8 September 2025 from the Respondent
Determination: 3 October 2025

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] There are non-publication orders prohibiting the publication of the names and identifying details of the applicant (NJS), the employer (MPV) and its managing director (YVU).

Employment Relationship Problem

[2] NJS was employed to work at MPV as an Administration Support Person from 26 October 2022 until their dismissal on 30 January 2024. The dismissal related to NJS coming into work late at night and taking alcohol out of the fridge. This was considered to be serious misconduct by MPV and summary dismissal to be the appropriate

outcome. NJS says their conduct did not reach the level of seriousness required for summary dismissal, the process was flawed and also likely motivated by other factors to do with them seeking extended leave around that time. NJS seeks compensation, lost wages, wage and holiday arrears, including family violence leave that was denied, and penalties.

[3] YVU is the sole director and shareholder of MPV. YVU says while there had previously been a good employment relationship between the parties, NJS' conduct was very serious as it involved an unlawful entry by NJS and theft. A tenant lived above the work premises meaning out of hours access was prohibited and all staff were aware of this. MPV says NJS' behaviour was so serious it was inconsistent with the integrity expected from its employees and damaged the trust YVU says he could have in NJS. MPV carried out a fair investigation and summary dismissal was said to be justified because it was appropriate in the circumstances.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from NJS and YVU. They answered questions under oath or affirmation. Written submissions were provided by both parties. YVU also provided further documents the Authority requested after the investigation meeting. This included the policy MPV says was in place that clearly stated there was to be no entry to the premises after hours.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the 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.

[6] The issues identified for investigation and determination were:

- (a) Was NJS unjustifiably dismissed?
- (b) Was NJS disadvantaged by being suspended?
- (c) Should any remedies be awarded?
- (d) Is NJS owed six days annual holiday arrears?
- (e) Should a penalty be applied to MPV for failing to provide wage and time records under s 130 of the Act and/or for an unlawful deduction of annual holiday leave under s 13 of the Wages Protection Act 1983?

- (f) If any remedies are awarded, should they be reduced for blameworthy conduct by NJS that contributed to the situation giving rise to the grievance?

The employment relationship

[7] NJS said they got to know YVU while they worked elsewhere and that they were friends first. NJS was employed to work in YVU's company MPV as an administration support person. Among other things this involved making and coordinating arrangements for the sale and installation of products MPV sold to customers. There were generally two other employees plus YVU.

[8] The parties signed an individual employment agreement dated 10 October 2022. Attached was a procedure for resolving employment relationship problems and personal grievances. A document entitled "Code of Conduct and Company Policies" was provided after the investigation meeting. Relevantly cl 15 of that document sets out there is to be no afterhours access to company premises because a resident lives on site. Any afterhours access must be pre-approved and logged.

[9] NJS' evidence was that they had not seen the Code of Conduct document during employment and questioned whether the policy existed at the time of their employment. YVU could not be sure it was provided to NJS but asserted that everyone knew about it. Regardless of the conflict in the evidence about that, the key point is that it was not referred to at all during MPV's employment investigation that led to NJS' dismissal.

Background to employment relationship

[10] Both parties agreed the employment relationship had some ups and downs but on the whole it appears to have remained steady until January 2024. What is notable is that YVU provided support to NJS in the workplace allowing NJS to balance their family responsibilities and some personal issues. NJS was a loyal employee who worked through some workplace issues as they arose. For example, NJS accommodated some erratic wage payments and on one occasion, in discussion with YVU, dipped into their savings to support the business at a time when MPV was having difficulty paying wages on time. YVU agreed that had happened and confirmed a small increase was paid with the wage payment to cover the interest NJS missed out on by accessing savings. This was to ensure NJS was not disadvantaged by having to dip into their savings to cover wages for MPV.

[11] On the other hand, YVU arranged and loaned money to NJS for car parts and repairs at a time of need. They both accepted those things happened. There had been support that flowed both ways in the employment relationship.

[12] However, both parties made additional allegations that were not accepted by the other. These were of a more serious nature. They are not directly relevant to the claims the Authority must resolve and have not been recorded in full but have been considered as part of the context to the grievance claims.

NJS removed alcohol from the work fridge and requests additional leave

[13] In January 2024 several things happened and as a result MPV commenced an employment investigation into NJS' conduct. NJS entered the work premises in the early hours of 10 January 2024 and removed alcohol from the fridge for their personal use. Just prior to and overlapping with the alcohol incident NJS requested additional leave which was declined by YVU.

[14] NJS had been on leave over the holiday period from 23 December 2023 to 7 January 2024. YVU had already agreed to NJS taking a longer period than usual to be with family. On 7 January 2024, the day before NJS was due back at work, NJS requested an extra weeks' leave from 8 to 12 January 2024.

[15] YVU declined NJS's request for that leave:

Hey [YVU], hope your weekends going good, did you end up thinking about whether I could have next week off or not, I'm sure you said you would get back to me cause you would have [name of other person]. Let me know algood if not.

YVU replied:

Hey Ye [sic] got today off. Sorting vehicles for next week. I'd rather we all start tomorrow as there is so much to do and need to order a lot of stuff. See you in the morning.

[16] NJS attended work on 9 January. After work NJS says they received distressing news about their nephew. He was in hospital after an accident that NJS says they later disclosed was a self-harm attempt. NJS sent YVU a text straight away to let YVU know they would not be at work the next day:

Hey [YVU] I'm kinda distorted I'm sorry not to call but I'm freaking out my nephews just had an accident over in Hamilton so I won't be able to make it in tomorrow, I'm going over to my family now. Sorry for the inconvenience I'll keep in touch when I know more.

[17] In the early hours of 10 January, NJS went to work and collected alcohol NJS says they believed had been gifted by a customer. NJS said they were with family who wanted a drink given what had happened and alcohol stores were closed.

[18] On the evening of 10 January, NJS sent a text message to YVU saying they would be back at work the next day:

Hey [YVU], not looking good but I'll be back tomorrow. Apologies for not being in today nice being support for my sister.

[19] On 11 January, NJS went to work, put replacement alcohol in the fridge before YVU arrived at work and sent the following text to YVU:

[YVU] will you be at the shop this morning? I really need to talk with you?

[20] When YVU arrived, NJS explained they had taken alcohol but replaced it. NJS says YVU acted like he got a fright when he looked in the fridge and it was obvious the alcohol had been replaced. NJS says YVU then said "you could have just had them" and said he had asked the other employees about missing alcohol in a joking manner. YVU did not indicate he was unhappy about anything to do with the alcohol. According to NJS the conversation was friendly. NJS says they also spoke about NJS's personal situation including to do with their nephew and needing to take time off. NJS recalls this conversation being supportive with YVU telling them to take a couple of days off to get themselves sorted.

YVU told NJS to take the rest of the day off

[21] YVU accepted the conversation happened and that the alcohol was replaced but had a different recollection about what was discussed. He said he sent NJS home and told them to take the rest of the day off because they looked to be in a poor state and smelled of alcohol. YVU denied information about NJS' personal life was conveyed in the conversation.

[22] On 12 January, the text messages show there was a misunderstanding between them about NJS taking further time off. NJS did not go to work that day and had a general practitioner (GP) appointment arranged for that afternoon. YVU sent a text asking why NJS was not at work. YVU made it clear he had not agreed to further time off and said the absences were affecting business. Later that day NJS sent through a

medical certificate that stated NJS was not well enough to attend work until 22 January 2024 and had been medically unfit for work from 10 January 2024.

NJS is on sick leave and requests family violence leave

[23] On 16 January, while on sick leave, NJS sent another text saying the doctor had advised the medical certificate would cover domestic violence leave. By text YVU requested proof and communicated that a letter from a support agency or someone he could speak to would be accepted. On 18 January, NJS intended to provide proof but their last text did not send and NJS dismissal superseded the family violence leave request.

[24] The text messages about NJS' leave are as follows:

YVU Hi there Hope you well You didn't turn up for work today? I've asked you to let me know.

NJS Hi [YVU] sorry I thought you said take a couple of days to sort myself out, I've got a doctors video appointment today, at 3. Doctors are all booked out for walk in app. Went to go ... works to start counselling they have said the wait list is quite long.

YVU I said go see a doctor And pls let me know I didn't say take a few days off. We are struggling at work and you have had excessive amount of time of work Its affect running the business And go on like this I have always supported you and been very lenient I've accommodated and worked around you This can no longer continue.

NJS Well maybe there was some miscommunication there YVU cause when we spoke yesterday you said to go see the doctors which I've got an appointment booked and to take the next couple of days to get myself sorted knowing that doctors are always quite booked out. This is added stress to my situation that is very unnecessary. I understand this puts pressure on the company, but there should also be procedures in place for these sorts of things. I will have a doctor cert for you by Monday. This is not okay.

YVU Thanks for taking up my suggestion for getting medical help. To clarify my comment of "this can no longer continue" I meant with communication between us to come up with a plan to cover or assist with your operational duties. Looking forward to hearing from you.

NJS Hey YVU, I just spoke with my doctor, and he has advised that with my circumstances my medical cert covers for domestic violence leave for the 10 days he has given as proof of. Sorry if this has caused any inconvenience to you, with every day that comes my mind gets better. Thank you also for your support with my situation.

YVU Hi NJS hope you doing ok Thank you for the txt If you want to use domestic violence leave I would have to see proof. Looking forward to hearing from you.

NJS Thanks YVU I have a counselling session tomorrow so should have all relevant paperwork then.

NJS Morning YVU so my counselling session has been postponed, however what proof are you wanting for me to be approved for family violence leave as I've just spoken to employment nz and they've said that a medical certification is evidential enough.

YVU Hi there It's important we keep the communication open so I can support you through this. If you could give me a call so we can discuss this matter. You can get a letter from support agency or anyone I can talk to explain your situation and how it affects you. Thank you

NJS Morning YVU so with the doctor I originally saw on Friday past, he's on leave so the nurse there said to book in with my doctor as they have all my med history, app as per the screenshot which thankful enough they have booked me an emergency app on Friday. They have also asked if you can let me know what information you need in the report and just wanted to confirm wages have gone through? Thank you they have also booked me in with their mental health practitioner too.

[25] On 19 January, NJS' last text message about family violence leave and provision of supporting information was drafted but NJS' phone records showed it did not send. NJS was on sick leave in accordance with the medical certificate but with proof of the need for family violence leave outstanding, YVU did not action NJS' request and on termination, annual leave was recorded as being used to cover some of NJS' sick leave.

NJS is suspended from work and an investigation is commenced

[26] On 22 January, NJS returned to work from sick leave but shortly after arriving YVU advised them they were suspended from work. An investigation was to be carried out into concerns about NJS' unlawful entry to the workplace and taking alcohol from the fridge. NJS was handed a letter that stated they were suspended while the matter was investigated.

[27] This was followed up with a letter inviting NJS to a disciplinary meeting about potential serious misconduct. It was recorded MPV was very concerned about the seriousness of the matter and that entering the premises was considered to be either misconduct or serious misconduct and this may lead to dismissal. NJS was invited to a meeting to respond and provide any relevant information. MPV would then consider NJS' response and undertake any further investigation required before a final decision was made.

[28] On 30 January, the employment investigation meeting took place. NJS said they apologised and agreed at the meeting that in retrospect they should not have come to the workplace late at night, admitted they were not in a good head space but said they

did not think they had stolen anything. They were not a criminal and were very upset about being labelled as one.

[29] NJS reiterated the information they had provided in the text messages and on the morning of 11 January, about their personal circumstances and what had been going on for them. NJS conveyed they did not understand why it was considered NJS had entered unlawfully when they had previously entered the business premises outside of work hours with no problem. NJS said they asked YVU why they had changed their mind after telling NJS on 11 January they could have had the alcohol anyway.

[30] YVU did not accept at the investigation meeting that NJS had conveyed all information about the personal circumstances and denies they said NJS could have the alcohol. YVU was very concerned about NJS breaching their trust and considered the conduct to be dishonest.

[31] NJS told the Authority an additional issue about timesheets was also raised during the meeting and YVU agreed that had happened. NJS says from their perspective that issue had already been discussed and resolved. This is of note because this issue was not recorded as a concern in the letter inviting NJS to the meeting.

NJS' employment is terminated for serious misconduct

[32] Later that day YVU emailed NJS a termination letter. The letter recorded the reason for the dismissal as follows:

The final decision reached was that your actions during the event were inconsistent with the integrity expected from our team members. Your actions have now damaged my trust in you, making it untenable for your continued employment.

[33] NJS' employment was terminated effective immediately and their final pay was paid out on 7 February. NJS requested a breakdown of their final pay because of concerns they had not been paid correctly, in particular, annual leave was used instead of the family violence leave as requested.

[34] On 23 February 2024, a personal grievance claim was raised with MPV on NJS' behalf and on 15 August 2024, NJS lodged a statement of problem in the Authority.

Unjustified dismissal

[35] Assessment of the employment relationship problems raised by NJS in the Authority require consideration of whether NJS' dismissal and suspension from work were justified by MPV. In assessing whether MPV's actions were justified, the test for justification set out in s 103A involves determining whether MPV's actions were what a fair and reasonable employer could have done in all the circumstances at the time.

[36] In considering MPV's actions against the fair and reasonable employer test the Authority must consider:

- (a) Whether, having regard to the resources available to MPV, did it sufficiently investigate the allegations before taking action against NJS;
- (b) Whether MPV raised the concerns with NJS before dismissing or taking action against them;
- (c) Whether MPV gave NJS a reasonable opportunity to respond to MPV's concerns before dismissing NJS;
- (d) Whether MPV genuinely considered the employee's explanation in relation to the allegations against NJS before taking action against NJS.

[37] The test for justification is an objective test and the Authority may not substitute the employer's decision with its own but is required to review the facts on which the decision was made to determine whether an employer acted justifiably. The Authority may also consider any other factors it thinks appropriate (s103A(4)).

[38] Minor defects in the process followed by the employer cannot in and of themselves, render an action unjustifiable if these did not result in the employee being treated unfairly (s103A(5)).

[39] NJS says MPV's decisions to suspend them from work and to dismiss NJS are both unjustified. In relation to the dismissal NJS has four main concerns. Firstly, no investigation was carried out and their response to the allegation at the meeting was not taken into account. Secondly, the conduct was not capable of amounting to serious misconduct and thirdly a new matter was raised at the disciplinary meeting. Lastly, there was an ulterior motive because YVU was unhappy about the amount of leave taken, so the conclusion NJS' conduct was serious misconduct and the decision to

dismiss NJS were predetermined because the summary dismissal was based on other factors.

[40] Regarding the suspension NJS says they were not given an opportunity to respond to the proposal to suspend and it was unreasonable to suspend NJS for the purposes of an investigation. NJS had admitted the conduct that MPV had concerns about and there was nothing further to investigate.

YVU says there were inconsistencies in NJS' evidence

[41] YVU highlighted inconsistencies between NJS' first and second statement regarding the alcohol. The reference to the first statement must be reference to the statement of problem because NJS only provided one written statement of evidence and gave oral evidence at the investigation meeting. YVU was able to question NJS about their evidence and any inconsistencies under oath at the investigation meeting.

[42] There was disagreement over whose alcohol it was and whether NJS knew it was YVU's personal alcohol. NJS said they believed it was gifted by a customer and YVU said it was his. The differences highlighted between the statement of problem and NJS' evidence have been noted but the true owner of the alcohol is not material to the issues to be resolved which are whether that conduct was serious enough to warrant summary dismissal. It is also not necessary to resolve that conflict in the evidence because NJS acknowledged they took alcohol that did not belong to them.

[43] YVU also gave different evidence to NJS about the gifting of alcohol. He agreed alcohol was gifted from time to time but said it was not typical that NJS received it. YVU also said to be seen to be fair to all staff, any gifts were kept on site and shared amongst the staff. On this occasion YVU had personally purchased the alcohol for his own use and said this was why he noticed the alcohol was missing on 10 January and talked to other staff about where it was.

NJS' suspension was not justified

[44] NJS left work and was suspended on pay for six days. Initially the disciplinary meeting was scheduled for two days after the suspension but the meeting was not able to be held until the following week due to NJS' support person not being available.

[45] NJS says they were blindsided by the letter suspending them from work. It was their first day back at work after sick leave. They were confused when presented with the letter and did not understand what was going on. NJS asked YVU what it meant and says YVU said because of the investigation they were to go home and wait for him to get in contact.

[46] NJS says the decision to suspend them was compounded by the fact YVU knew NJS was in a fragile state due to matters in their personal life. NJS had informed them about these issues including their nephew's accident and some detail about the request for family violence leave but not all of the circumstances. NJS says this was conveyed in the conversation with YVU on 11 January and in the text messages.

[47] YVU did not make submissions directly about the suspension but gave oral submissions about the seriousness of the incident that were two-fold. The matter was very serious because of the nature of a theft which is ultimately criminal and entry to the business premises at nighttime was unauthorised and unlawful because a tenant lived in an apartment accessed through the work premises meaning entry out of hours was not permitted unless YVU gave permission. This further elevated the seriousness of the conduct. A policy document provided after the investigation meeting made it clear entry after hours by MPV's employees was prohibited without permission. The conduct was described in evidence and in the letters to NJS as an unlawful entry and a theft.

[48] The individual employment agreement between the parties did not specifically refer to suspension but depending on the circumstances suspension can be a reasonable step for employers to take when conducting enquiries into workplace conduct. Whether a suspension is reasonable is assessed according to the facts of each case. The length of any suspension, as well as the reasons for it are also important considerations. It is well-established an employer is generally required to give notice of a proposal to suspend and seek the employee's views before making a final decision about suspension.¹

[49] YVU faces some difficulties with the characterisation the conduct was serious and that suspension was necessary because an investigation was required. NJS had been on leave from 11 January in accordance with the medical certificate and 22

¹ See for example: *E tu v Singh* [2024] NZEmpC 84 at [54].

January was their first day back at work. NJS' evidence was of being at work for approximately an hour before YVU handed them the suspension letter. The suspension letter starts with the sentence "This letter confirms that you are suspended from work from today until further notice while an investigation is done into unlawful entry of the business premises and theft".

[50] Investigation was already complete because NJS had been on leave for two weeks since the incident. The CCTV footage had been viewed, other employees spoken to on or around the time NJS replaced the alcohol and NJS had admitted the conduct. All that was required at that stage was NJS' response to the allegations.

[51] YVU did not describe the consultation he alleged he entered into with NJS on the morning NJS returned to work. NJS' evidence was that the letter was simply handed to them with an explanation they were under investigation. What discussion they did have was about the investigation because NJS was confused and did not understand why they were under investigation when they had replaced the alcohol and already spoken with YVU about it.

[52] NJS said they asked what it all meant, they were told to go home and wait for further information. NJS' views were not sought before the decision was made to suspend them and they had no opportunity to comment. In those circumstances it is clear YVU on behalf of MPV made a unilateral decision to suspend NJS without consultation.

[53] YVU submitted there was no disadvantage to NJS because they were paid for the duration of the suspension. While payment during suspension is relevant payment is only part of the obligation on an employer. Being prevented from working when an employee is willing and able to work is an action that affects terms and conditions of work. Employees are often understandably distressed at being removed from the workplace and it is not always a reasonable step to take.

[54] NJS was kept away from work by virtue of the suspension. Significantly the letter recorded the suspension decision was already made. This disadvantaged NJS because there was no consultation and they were prevented from working when they had just returned from sick leave. These are actions that affected NJS' terms and conditions of employment and MPV has not been able to justify its actions in relation to suspending NJS from work.

[55] NJS' claim their suspension was both procedurally and substantively unjustified is successful.

NJS' dismissal was not justified

[56] NJS was summarily dismissed because allegations of a theft and unlawful entry to the work premises were made out and it was considered to be serious misconduct. As noted above, there are issues with that conclusion because although the allegations sound serious and the process had the appearance of being fair, the conduct when considered in the context of the employment relationship is less serious.

NJS' conduct was not capable of reaching the threshold for serious misconduct

[57] YVU submitted the level of seriousness involved was at the high end of the scale because both allegations, the entry to work after hours and removing the alcohol from the fridge, were criminal acts. YVU was very clear about this and referred to NJS making admissions "of guilt" about entering the work premises. YVU said entry to someone's place of residence was "without authority" and therefore "a criminal act".

[58] The allegations were also drafted using language associated with criminal offending to describe the conduct of concern:

I would like to meet with you to discuss an employment matter that I have become aware of. In particular I have concerns about unlawful entry to the premises and theft of items on Tuesday the 9th of January 2024.

[59] The letter from MPV dismissing NJS also recorded the final decision that was made based on references to an unlawful act and a theft:

"Our meeting on 30th Jan2024 at 9am, where you and [name of support person] were present, addressed the regrettable incident of unlawful entry and theft on January 9th. The final decision reached was that your actions during this event were inconsistent with the integrity expected from our team members. Your actions have now damaged my trust in you, making it untenable for your continued employment.

[60] While the use of the terms "unlawful entry" and "theft" can in some circumstances be accurate descriptors of misconduct in an employment relationship, in this case they were not. The definition of theft is set out in the Crimes Act 1961.² In

² Crimes Act 1961, s 219.

order for NJS to be accused of committing a theft, the facts would need to show the taking of the alcohol with an intent to permanently deprive the owner of that property.

NJS did not commit a theft

[61] It is relevant that NJS both replaced the alcohol and did not attempt to hide the fact they had taken it. In those circumstances it cannot be said there was an intention to permanently deprive the owner of the alcohol and describing the concern as a theft is incorrect. Taking something from work and then replacing it and apologising can still be conduct an employer is concerned about and may be considered to be misconduct but it does not automatically reach the level of seriousness associated with a theft. Something more would likely be required.

The unlawful entry was also not serious

[62] The allegation of an unlawful entry faces similar issues. At best entry outside of hours could be described as a breach of policy but YVU faces the problem that he made no reference to the policy until the investigation meeting in the Authority. Additionally, while the policy was referred to in the Authority it was also not provided until after the investigation meeting.

[63] Putting aside the policy to start with because the conduct was not referenced as being a breach of the policy, is not clear that entry outside of work hours is unlawful per se because by virtue of the employment agreement NJS had permission to access and enter the work premises at least during normal work hours. There may be questions as to why employees might enter outside of work hours but without a business rule or policy regarding after hours entry, it is unlikely NJS's entry at night can be said to have been "unlawful".

NJS had entered previously outside of business hours

[64] NJS did not give specific examples at the meeting with YVU but at the investigation meeting said they had previously entered after hours. NJS provided three occasions they had entered after work hours: at 8.00pm on 7 May 2023, they entered to borrow a drill to build their daughter's drawers; at 6.45pm on 24 September 2023 NJS retrieved their oysters out of the fridge; and at 9.30pm on 29 September they collected their glasses and picked up a box of Jim Beam from the fridge. I considered NJS to be a careful witness about the facts and their admission they previously entered out of hours tends to support NJS evidence they were unaware of a business rule preventing

those entries. My assessment of NJS was they would deliberately breach a rule they knew about.

The policy was not provided to NJS

[65] YVU says they were unaware of those entries but nonetheless they would all have been unauthorised under the policy. When asked in cross examination for the name of the policy YVU said he did not know. He also did not know when NJS received the policy but said probably when they started. He did say it was regularly spoken about but that was not NJS' evidence. When asked if NJS ever stayed later than 5.00pm he said probably because NJS locked up at night.

[66] In any event, if the concerns had been drafted by reference to the applicable policy, the policy states entry to the work premises out of hours was not allowed without permission. The conduct NJS engaged in was entering without permission. That is significantly different to characterising NJS actions as an unlawful entry.

[67] YVU says the conduct was very serious and at the level where he lost all trust and confidence in NJS. I do not accept that is a reasonable conclusion. It follows that because of the difficulties with characterising conduct engaged in by NJS as theft and an unlawful entry the conduct was not capable of reaching the threshold for serious misconduct.

[68] NJS is successful with their claim the dismissal was unjustified.

Family violence leave

[69] NJS requested family violence leave. They communicated this by text while NJS was on sick leave. NJS said the GP had advised that with NJS's circumstances the medical certificate "covers for domestic violence leave".

[70] Employees are entitled to request family violence leave if they are affected by family violence regardless of how long ago the violence occurred. The Act sets out the framework of rules in relation to family violence leave. Employees who are people affected by family violence have a statutory right to request a short-term (2 month or shorter) variation of their working arrangements for the purpose of assisting them to deal with the effects of family violence on them.

[71] Employers are required to deal with a request as soon as possible but not later than 10 working days after receiving it and an employer may refuse a request only if proof of family violence is required and not produced, or the request cannot be accommodated reasonably on certain grounds.

[72] Employers may request proof the employee is affected by family violence but they do not have to. If proof is requested, an employer must tell the employee as early as possible that proof will be required and within three working days of receiving the request. YVU complied with that requirement because his text message requesting proof was the same day NJS had asked for the leave.

[73] YVU said he would need to see proof and looked forward to hearing from NJS. It transpired NJS's counselling session was postponed and NJS enquired about what proof he required. NJS had spoken to Employment NZ who said a medical certificate was enough. YVU then asked NJS to call him to discuss and noted he wanted a letter from a support agency or anyone he could talk to who could explain NJS's situation and how it affected them.

[74] YVU's evidence was that they did not believe NJS had needed the sick leave or the family violence leave:

NJS was given time off from the 23rd of December 2023 until the 7th of January 2024. MPV have also supplied text evidence from NJS on Sunday 7th of January 2024 asking YVU to continue their time off, of the dates 8th – 12th of January 2024. As the texts will show, YVU responded to the text indicating that we needed NJS at work for the week. It appears contradictory that someone would apply for both a holiday with their partner, and domestic violence leave for the same period. It should be keenly noted that NJS has consistently referred to the leave as "domestic" violence, and not "family" violence.

[75] The reality of this situation was that NJS was already on sick leave and the request was to convert the sick leave to family violence leave on the advice of NJS's GP. YVU said they had checked the Employment NZ website to get information on its obligations when it came to family violence leave. He noted the website suggests both parties act in good faith, being open and honest and quick to respond and that the law does not state what type of proof is required, however, it also suggests a doctor's report and not a medical certificate. He notes all the suggestions reference telling the employer what is actually happening.

[76] The Employment New Zealand website records examples of proof as follows:³

a letter or email about what's going on and how it affects the employee from either:

- a support organisation – for example, a family violence support service or Oranga Tamariki
- a support person
- a report from a doctor or nurse
- a report from a school
- a declaration – a letter of evidence witnessed by an authorised person like a justice of the peace
- any court or police documents

[77] YVU was already on notice that NJS was struggling with health issues because this was confirmed by the medical certificate and the information NJS had shared. The new piece of information was that NJS was a person who had been affected by family violence and YVU simply did not believe that to be the case.

[78] YVU noted NJS came to work in the middle of the period they were covered by the medical certificate and he told them to go home because they were not medically fit to be at work. I do not consider that to mean NJS was not unwell. There was considerable pressure being placed on NJS about the impact their leave was having on the business at that time. YVU also notes the 9 January payslip recorded two days sick leave remaining and NJS had exhausted their sick leave by 11 January 2024 which supports his view the request for family violence leave was not genuine and by implication NJS's family violence leave request was to ensure NJS was paid for the sick leave.

[79] The problem with that position is firstly full wage and time records were never provided by MPV. YVU provided some payslips and what is immediately obvious is the payslips in November and December did not record a sick leave balance. There was a general heading "leave balances" that set out a balance but it was not possible to determine what was annual leave and what was sick leave. The next pay slip dated 9 January 2024 recorded two days sick leave.

[80] Sick leave renews annually and the allocation is 10 days so it is difficult to understand the appearance of two days sick leave in the 9 January payslip when the

³ www.employment.govt.nz/leave-and-holidays/family-violence-leave/managing-family-violence-leave#scroll-to-3

previous payslips do not record any sick leave. In short there were issues with MPV's wage records and without providing accurate records YVU's submission regarding NJS having an ulterior motive for requesting family violence leave lacks credibility.

[81] MPV was in breach of ss 81 and 82 of the Holidays Act 2003 for not accurately recording NJS' current entitlement to sick leave and providing a copy of the holiday and leave record when NJS' advocate requested it. MPV is also in breach of s 130 of the Act for not providing wage and time records when requested and this is referred to below.

[82] While an employer is entitled to request proof as YVU did, that NJS was a person affected by family violence the statute does not set out what level of proof is required. It is suggested the bar is low and that Parliament rejected a prescriptive list of acceptable documents and considered "any proof" that an employee was affected by family violence would be sufficient.⁴

[83] YVU could have taken NJS's text message referring to their GP's advice to be proof there were grounds for family violence leave. YVU had two key pieces of information. YVU knew NJS was so unwell they were not medically fit to be at work at that point and that NJS' GP had advised NJS family violence leave would be appropriate.

[84] YVU also submitted to the Authority MPV remained committed to paying family violence leave if proof is provided. The opportunity for proof appears to have passed but given NJS' annual leave balance reduced before termination without consultation and without accurate records, NJS' claim for holiday arrears converted to cover sick leave that also corresponded with the period requested for family violence leave, I consider it appropriate to make such an order.

Remedies

[85] NJS seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings caused by the unjustified disadvantage and dismissal. NJS says their dismissal had a profound and devastating impact on their mental health. Being falsely accused of theft and suspended from work was deeply humiliating and to be treated as being untrustworthy increased NJS' distress. NJS was blindsided by the fact an

⁴ John Hughes and others *Mazengarb's Employment Law* (online ed, LexisNexis) at [3272G.1] and *Employment Law* (online ed, Thompson Reuters) at [HA72G.01].

investigation was being commenced. This was especially so in the context of NJS and YVU previously having enjoyed a good employment relationship and friendship before that.

[86] There were also stresses associated with the summary dismissal including financial stresses that also impacted on NJS and their family. With reference to other similar cases, I consider appropriate awards under s 123(1)(c)(i) of the Act to be \$20,000.00 for the dismissal and \$3,000.00 for the suspension in relation to the harm suffered by NJS as a result of MPV's actions.

[87] NJS also seeks compensation for lost wages. NJS provided evidence of jobs they applied for between February and June 2024. They were unable to find employment given they had to explain they had been dismissed from their previous employment. NJS gave evidence they made the decision to study once it became clear how difficult it was to find new work. They seek 13 weeks lost wages based on their hourly rate of \$30.00 per hour at 37 hours per week which amounts to \$14,430.00.

[88] The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration.

[89] I consider an award equivalent to three months lost wages is appropriate.

Annual holiday arrears

[90] NJS seeks arrears equivalent to six days annual holiday pay in the amount of \$1,332.00. With no wage and time records provided by the employer they believe annual leave was deducted without their consent for the six days sick leave the medical certificate covered. This also coincided with the family violence leave request that was never responded to on the basis proof was requested. NJS says they did not consent to annual leave being used and without being provided with their wage and time records they have had difficulty quantifying the claim for unpaid wages.

[91] Given MPV failed to keep accurate wage and time and holiday and leave records or to produce them, under s 132 of the Act the Authority may accept as proved the claims made by an applicant. I consider it appropriate that MPV pay NJS the equivalent of six days leave. I note some records were produced at the investigation meeting but

the inconsistencies regarding the sick leave balance means they cannot be relied on to be accurate.

Penalty

[92] It was submitted a penalty for failure to provide wage and time records in breach of s 130 of the Act and for making an unlawful deduction from NJS final pay would be appropriate.

[93] There is a straight forward obligation on employers in s 130 of the Act to provide wage and time records at any time they are requested. MPV failed to comply with the request from NJS's advocate on 23 February 2024. A penalty of \$20,000.00 may be awarded against MPV for a single breach.

[94] In considering the relevant factors in s 133A of the Act, I note firstly that MPV has not previously been involved in similar conduct. I also note there was an attempt to provide documents to assist the Authority at the investigation meeting. In light of that I consider the breach of the Act for failing to provide wage and time record was not intentional and at best negligent. I am satisfied YVU now has an understanding of the obligation on the company to keep and provide accurate wage and time and holiday and leave records and I decline to award a penalty on this occasion.

[95] I also decline to award a penalty under s 4 of the Wages Protection Act 1983 for unlawful deductions. Amounts were deducted from NJS's final pay that correlate to three invoices relating to private arrangements between YVU and NJS made at a time when there was a good relationship between the parties. I cannot be certain of the terms agreed between them at the time those arrangements were entered into and therefore am not satisfied the deductions were unlawful.

Contribution

[96] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. I have found above the investigation was substantively flawed. While NJS accepted to a degree they could have done things differently they are not responsible way in which MPV approached the conduct of concern and then the employment investigation.

[97] NJS has not contributed to their personal grievance.

Non-publication

[98] NJS and YVU made separate applications for non-publication of their names and identifying details that were not opposed. An order of permanent non-publication is a departure from the fundamental principle of open justice. The standard for departure is a high one but the risk of harm to an individual has been accepted as a sound reason to displace the presumption of open justice.

[99] The Court recently considered the test for granting non-publication orders in *MW v Spiga Limited*⁵ confirming the fundamental importance of the established general rule of open justice unless there are sound reasons for departing from that rule. There must first be a reason to believe specific adverse consequences could “reasonably be expected to occur” and secondly the Authority must undertake a weighing exercise and consider whether those adverse consequences justify a departure from open justice in the circumstances of the case.

[100] NJS’s application relied on the grounds the evidence included reference to family violence and other family members mental health. Public disclosure of NJS’s name could lead to identity of family members who are not involved in the employment relationship dispute and was likely to cause harm to NJS if their name was able to be associated with the evidence about family violence leave. Any potential harm to NJS was said to be disproportionate to any legitimate public interest in the knowing the parties’ identities.

[101] YVU submitted MPV was a small business and given how disgruntled the parties had become with each other, and the unproven assertions NJS made about YVU and vice versa without non-publication, the business could be impacted.

[102] I am satisfied in the particular circumstances of this case that the presumption of open justice is displaced in relation to naming the parties. There is no public interest identifying third parties and by naming NJS, family members could be identified. I accept there would be an adverse consequence to NJS if they are linked to an application for family violence leave.

[103] It has also been accepted that non-publication may be appropriate if the publication of that information would undermine the original orders by providing other

⁵ *MW v Spiga Limited* [2024] NZEmpC 147.

ways of identifying an individual. This is such a case. Should MPV and YVU be named it is more likely NJS will be able to be identified. Taking into account also the unresolved additional allegations made about each other I accept NJS and YVU's evidence of the specific adverse consequences if their names were published and that these could reasonably be expected to occur. I consider this outweighs the presumption of open justice in relation to publication of their names.

[104] Under clause 10 of schedule 2 of the Act non-publication orders are made in relation to the applicant (NJS), the respondent company (MPV) and the managing director (YVU).

Orders

[105] MPV is to pay NJS within 28 days of this determination:

- (a) Compensation under s 123(1)(c)(i) of the Act in the amount of \$23,000.00 for unjustified dismissal and disadvantage.
- (b) Lost wages under s 124(1)(b) and 128 of the Act in an amount of \$14,430.00.
- (c) Six days annual holiday leave arrears in the amount of \$1,332.00.

Costs

[106] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[107] If the parties are unable to resolve costs, and an Authority determination on costs is needed, NJS may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MPV will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[108] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies