

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 543
3147705

BETWEEN	THOMAS PONGA Applicant
AND	DOUBLE J SMALLWOODS LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Dave Cain, advocate for the Applicant Libby Brown, counsel for the Respondent
Investigation Meeting:	5 July 2022 at Gisborne
Submissions received:	12 July 2022 for the Applicant 19 July 2022 for the Respondent
Determination:	25 October 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant, Thomas Ponga, was employed full time by the respondent, Double J Smallwoods Limited (DJS). Mr Ponga says he was unjustifiably dismissed after leaving work early on 23 December 2020, which was DJS's last working day prior to closing down for the Christmas/New Year period. Mr Ponga claims compensation for hurt, humiliation and injury to feelings and reimbursement of lost wages.

[2] DJS says Mr Ponga was not dismissed. It says that it operated under the reasonable belief that Mr Ponga had resigned from his employment when he left work early on 23 December 2020. DJS says no awards should be made in Mr Ponga's favour.

What has the Authority's process been?

[3] Witness statements were filed for Mr Ponga, his partner Hiki Spring and Mr Joe Spring. For DJS, statements were filed for Mr Jon Gardner, Mrs Margaret Gardner, Mr Sukhmin Singh and Mr Tupai Mackey.

[4] At the investigation meeting each witness answered questions under affirmation from the Authority and the representatives. The parties' representatives filed helpful written submissions after the investigation meeting.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[6] This determination has not been issued within the three month period required by s174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

What are the issues?

[7] The following are the issues for investigation and determination:

- a. How did Mr Ponga's employment come to an end?
- b. If Mr Ponga was dismissed, were DJS's actions unjustified?
- c. Should remedies be awarded and are there issues of contribution?
- d. Should either party contribute to the costs of representation of the other party?

What happened?

Background

[8] DJS is a wood remanufacturing business which takes waste wood products from larger businesses and repurposes them into useable wood products for resale. Its mill is based in Gisborne. Mr and Mrs Gardner are DJS's directors and shareholders. Mrs Gardner does not take an active role in DJS. It employs around 20 people.

[9] Mr Spring was a very long serving employee of DJS and was its mill manager prior to his retirement on 23 December 2020. Mr Spring was in charge of operations at the mill, while Mr Gardner did the book work.

[10] Mr Ponga's partner is Ms Hiki Spring, Mr Spring's daughter. Mr Spring introduced Mr Ponga to Mr Gardner and brokered a job for him at DJS. Mr Ponga started working at DJS sometime in August 2010 as a casual employee, and was offered permanent full time employment in April 2011. Mr Ponga started as a labourer and over the years progressed to machine operator and later a leading hand.

[11] When Mr Spring started to consider retiring in 2018, Mr Gardner approached Mr Ponga and asked whether he would like to take over as mill manager. Mr Ponga says he declined as he did not feel well suited to the role. He did not know how to drive and was already very happy in the role he was in. He says he was flattered to have been asked and it was nice knowing DJS felt like he was capable enough to be mill manager. Mr Singh accepted the role and at the times relevant to this matter was the trainee mill manager.

[12] Traditionally DJS shuts down its operations on 23 December each year. It normally ceases operations at around 3.30pm or when orders are finished on that date. On one occasion during Mr Ponga's employment, he finished at midday on 23 December and that was with prior arrangement.

Written employment agreement

[13] Mr Ponga was provided with a written employment agreement. While the employment agreement is signed only on behalf of DJS on 1 April 2011, it is common ground the employment agreement applied to Mr Ponga's employment. No further written agreements were agreed between the parties at any point.

[14] The agreement provided Mr Ponga's hours of work were 40 hours Monday to Friday between the hours of 7.30am to 5pm. It provided Mr Ponga was paid weekly no later than Thursday.

[15] The agreement stated DJS may closedown all or part of its operation once a year and require Mr Ponga to take leave with at least 14 days' advance notice of the closedown.

[16] In relation to termination of employment, clause 13.1 of the agreement stated:

The Employer may terminate this agreement for cause, by providing **days**notice in writing to the employee. Likewise the Employee is required to give **days**notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

If the employee terminates employment without having given the required amount of notice the employer has the discretion to deduct wages from the employee's final pay in lieu of notice owed.

This clause is subject to the Wages Protection Act 1983. The employee's signature will satisfy the written consent requirement of section 5 of the Wages Protection Act 1983.

[17] When asked at the investigation meeting about the period of notice not being specified in the agreement, Mr Gardner stated it should have said 14 days' notice of termination was required by either party. Mr Ponga gave oral evidence that he did not know how much notice he was required to give on resignation.

[18] The employment agreement also contained a clause relating to abandonment of employment, which I will address later.

November 2020

[19] Mr Ponga says that sometime around November 2020 he talked to Mr Spring about finishing work early on the last day of the year. At the investigation meeting Mr Spring recalled having a conversation with Mr Ponga and saying to him he could leave on 23 December when the orders were finished, and that might be at 3pm or 3.30pm. It is clear Mr Ponga only mentioned leaving early to Mr Spring on this one occasion.

21 December 2020

[20] On 21 December 2020 Mr Ponga had a disagreement with Mr Singh about what tasks needed to be done prior to the Christmas closedown. Mr Ponga says had Mr Singh agreed to do the tasks the way Mr Ponga suggested, they would have been able to complete all orders by 22 December 2020. By doing it the way Mr Singh had wanted, Mr Ponga says they were left with a whole pile of orders which needed to be completed before the Christmas break. It is common ground that Mr Ponga spoke with Mr Gardner

in the last week about his idea, but Mr Gardner sided with Mr Singh and Mr Spring's view to get the order out by 3.30pm on 23 December 2020 and that no changes were to be made.

23 December 2020

[21] Mr Spring's final day of employment before retiring, after 28 years of service, was 23 December 2020. Mr Spring impressed as a forthright witness.

[22] Mr Ponga did not apply for leave for 23 December 2020 at any point. Mr Ponga says that on Wednesday 23 December 2020 he told a few of the guys he was planning on knocking off early and a few of them decided to join him. Mr Ponga left work at around 12pm. There was evidence three other employees also left work around this time.

[23] Mr Mackey says there was banter by staff leading up to Christmas about working a half day on 23 December 2020. Mr Mackey recalls in the week before the Christmas closedown Mr Ponga mentioned to him on a couple of occasions that he was "finishing up on Wednesday". Mr Ponga acknowledges he told Mr Mackey that he would be leaving early. He says at around midday Mr Ponga told him he was leaving. Mr Mackey told Mr Ponga that there were customer orders that needed to be finished before Mr Ponga could leave, but Mr Ponga repeated that he was "finishing up". Mr Mackey told Mr Ponga that Mr Gardner was a good boss and that he needed to speak to Mr Gardner before he left. It is common ground that Mr Ponga left at around midday without speaking to Mr Gardner, Mr Spring or Mr Singh. I accept that Mr Mackey then went to the yard office and told them that Mr Ponga had finished up at midday and left.

[24] Mr Spring says he and Mr Gardner were angry about Mr Ponga leaving early. Mr Spring says he was extremely disappointed because he expected Mr Ponga to stay and help finish DJS's orders and he was relying on him to get the orders out prior to Christmas.

[25] It is common ground Mr Ponga did not have his own mobile phone or landline phone throughout most of his employment. Although Mr Ponga says he had a mobile phone as at 23 December 2020, I accept Mr Gardner did not know this or his phone number. Mr Singh gave evidence that Mr Ponga had provided him with his phone number around two months prior the ending of Mr Ponga's employment.

[26] Mr Spring says that Mr Gardner told him he could sack Mr Ponga for abandoning his employment. Mr Gardner says Mr Spring told him that he was expecting Mr Ponga at his house that night so Mr Spring would follow up with him and clarify whether he had resigned. Mr Gardner did not ask for a contact number for Mr Ponga or Ms Spring and says he left it to Mr Spring to talk to Mr Ponga and find out what was going on. Mr Spring says Mr Gardner never asked him to follow up with Mr Ponga, and that his work finished at 5.30pm on 23 December 2020. Mr Spring says he intended to have a blow up at Mr Ponga about leaving early, but he did not intend to report back to Mr Gardner unless he came across him.

[27] Despite genuinely liking the work at DJS, Mr Ponga says he was fed up with the way he was treated. He says his ideas about how DJS could be run more efficiently were never genuinely considered and it did not seem to appreciate or recognise the hard work that he put in. He says in every other job, his employers always made an effort to thank him at the end of every year. He says he never thought the absence of a simple thank you would bother him so much, but after 10 years with DJS it did. At the investigation meeting, Mr Gardner stated he had some awareness that Mr Ponga was not entirely happy regarding some work matters.

[28] Mr Ponga says he did not abandon his employment. He says he left work early because he was fed up with Mr Gardner. He also acknowledged that part of the reason he left early was because he had already planned to leave early.

31 December 2020

[29] On 31 December 2020 Mr Spring visited the mill to drop off grass clippings pursuant to an agreement he could do so. Mr Gardner and Mr Spring came across each other and spoke. Mr Gardner says Mr Spring told him that Mr Ponga and his family had visited him on around 27 December 2020, however Mr Ponga did not get of his car and speak to Mr Spring about whether he had quit or not. Mr Gardner says Mr Spring relayed that he instead told Ms Spring that Mr Gardner was under the impression that he had quit his job, therefore he needed to urgently contact Mr Gardner to explain.

[30] I accept Mr Gardner contacted the Ministry of Business, Innovation and Employment's helpline (MBIE) for advice. He says the helpline advised that if Mr

Ponga had quit, DJS was obliged to pay his final pay which would be the pay period ending 31 December 2020. Mr Gardner says the helpline suggested he go around to Mr Ponga's home address and check with him what the story was. I accept that Mr Gardner then visited Mr Ponga's home twice on 31 December 2020 but Mr Ponga was not present.

[31] After not being able to speak with Mr Ponga, Mr Gardner processed DJS's payroll and paid Mr Ponga's final pay which included holiday pay entitlements on termination. Mr Ponga received \$3,270.76 on 31 December 2020 into his bank account.

[32] Mr Ponga became aware of this payment after Ms Spring brought the additional amount received to his attention. Mr Ponga says he thought the additional payment must have been a mistake.

1 January 2021

[33] On 1 January 2021 Ms Spring drove Mr Ponga to Mr and Mrs Gardner's house to query the payment. Mr Gardner was not home and Mr Ponga spoke to Mrs Gardner on the doorstep. Mr Ponga says he told Mrs Gardner he had been paid too much and she told him that the sum of money was no mistake - it was Mr Ponga's final pay. He says Mrs Gardner stated it was only half of Mr Ponga's final pay as DJS could not afford to pay the rest of his holiday pay. Mrs Gardner denies saying that. Mr Ponga's statement said Mrs Gardner went on to say that he had abandoned his employment. In his oral evidence, Mr Ponga referred to Mrs Gardner having said his job had been "terminated".

[34] Mrs Gardner says Mr Ponga advised her he had been paid too much, to which she said "No, you had walked off the job". Mrs Gardner says Mr Ponga did not ask why he was dismissed or anything along those lines. She says she told Mr Ponga that she was disappointed with how he had walked off the job when they had a contract to fill and that this was the first time they had not been able to complete an order before the holidays. She says she told Mr Ponga that he had been offered a leadership role and that was not what they expected of a leader.

[35] In his oral evidence, Mr Ponga recalled Mrs Gardner saying something like what he did was not good for a management role. He also says he asked Mrs Gardner if Mr Gardner was coming home.

[36] Mrs Gardner says while Mr Ponga was standing there, she telephoned Mr Gardner to find out how far away he was. Mr Gardner told her he would be home around 1pm and asked her to ask Mr Ponga if he could come back after 1pm. Mrs Gardner says she relayed Mr Gardner's message and before he left Mr Ponga said he would come back that afternoon. In oral evidence, Mr Ponga acknowledged Mrs Gardner told him Mr Gardner would be back at 1pm. Mr Ponga also accepted he told Mrs Gardner he would return that afternoon, but that he did not. Mr and Mrs Gardner say they then waited all afternoon for Mr Ponga to come back. I accept Mrs Gardner's recollection of her discussion with Mr Ponga, which for the most part is undisputed by him. I accept she did not state Mr Ponga's employment was "terminated" or "abandoned", but told him he had "walked off the job".

[37] Mr Spring says that Ms Spring came over to his home and told him that Mr Ponga had tried to see Mr Gardner because he been paid too much. Mr Spring says he told Ms Spring that Mr Ponga needed to speak to Mr Gardner and try sort things out.

[38] Mr Ponga and Ms Spring had planned to go to Hawkes Bay that evening but did not. His statement says he was far too worried about whether he had a job to return to, felt embarrassed and did not want his family asking about his work. They instead stayed locally and drank alcohol with family and/or friends.

2 to 5 January 2021

[39] On or around 2 January 2021, Mr Ponga and Ms Spring went to Matawai with their four children to visit family for a few nights. Matawai is around a one-hour drive from Gisborne. They returned to Gisborne on around 5 January 2021.

6 January 2021

[40] On Wednesday 6 January 2021, Ms Spring sent a text message to Mr Gardner on Mr Ponga's behalf with his consent. Mr Ponga says he had lost his phone by this time. The text exchange was as follows:

Mr Ponga: Hi Jon its Thomas here just messaging because Joe has informed me that I have been dismissed from work and want to know if it's true? I have tried to come and see you but you haven't been home. [7.40am]

Mr Gardner: Not dismissed, as you walked off the job.
No notice or explanation given.

I discussed we [sic] Joe and have accepted that you quit.
Your termination pay has been deposited into your bank account.
You visited Marg at home and I was away.
I waited around the rest of the day, as you said you were coming back.
All 3 that walked off are being treated the same.
We are in Mahia, so in and out of reception. [9.50am]

Mr Ponga: Ok well I am sorry I was not able to continue working that day I was in an angry state of mind and decided to just walk off before I did something I shouldn't.
I'm shocked from the fact that after working for you for 10 years you and Joe decide that I have quit and to pay me a termination pay all because I walked off early on the last day of work without informing anyone.
I would have liked to have been asked so that we could discuss the matter before your decision to Terminate me but if this what you feel needs to be done then so be it. Could you please write a letter of termination? As I need it for Winz.
Thanks [11.56am]

Mr Gardner: Just got home from Mahia, if you want to come around to discuss?
[7.11pm]

Mr Ponga: Can i meet with you tomorrow morning? [7.20pm]

[41] When asked about the reference to "All 3 that walked off are being treated the same", Mr Gardner said he meant all employees who had left early on 23 December 2020 had been asked for explanations. He says Mr Ponga was the only employee who had not provided an explanation.

[42] There is no evidence that Mr Gardner responded to Mr Ponga's final message sent at 7.20pm. Mr Ponga says he could not believe what was happening, and that he was extremely upset about the situation.

7 January 2021

[43] DJS's mill reopened after the closedown period on Thursday 7 January 2021.

[44] Mr Gardner's signed witness statement filed with the Authority said that on 7 January 2021 he waited for Mr Ponga to show up at his home but that Mr Ponga did not turn up. It further denied having any discussion with Mr Ponga on 7 January 2021, and said he thought if he and Mr Ponga could sit down and talk about what had happened and clear up any misunderstandings then Mr Ponga could get back to work. At the investigation meeting, Mr Gardner acknowledged that Mr Ponga in fact attended DJS's mill on the morning of 7 January 2021 and the pair spoke.

[45] On that date Ms Spring drove Mr Ponga to DJS's workplace in the morning. Mr Ponga says he brought his lunchbox with an intention to go back to work that day. Mr Ponga says he intended to speak with Mr Gardner and hoped that they could mend their relationship and move past this. It appears Ms Spring waited in their car in earshot while Mr Ponga and Mr Gardner spoke outside of it. Mr Ponga says the first thing he asked Mr Gardner was whether he still had a job and Mr Gardner told him "that depends". In his oral evidence, Mr Gardner confirmed Mr Ponga asked this and that his response was that it depended on the outcome of their meeting. Mr Ponga says Mr Gardner advised he was still waiting for an explanation. Mr Ponga says he explained to Mr Gardner that he left work early out of frustration on 23 December 2020 because he felt unappreciated. Mr Ponga says Mr Gardner's response was, "if that's the way you feel it's best that we part (ways) now".

[46] Mr Ponga also says Mr Gardner told him that he and Mr Spring had a meeting the previous Thursday (being 31 December 2020) and it was decided that Mr Ponga would not be returning to work. Mr Ponga says Mr Gardner advised that he and Mr Spring had tried to speak to Mr Ponga on numerous occasions about his employment and that Mr Ponga stormed off when he tried. Mr Ponga says this is not true. Mr Ponga also says Mr Gardner told him Mr Spring tried to discuss with Mr Ponga why he had left work early on 23 December 2020. Ms Spring heard this comment and said that it was her that Mr Spring had spoken to, not Mr Ponga.

[47] Ms Spring says when Mr Ponga asked if he could come back to work, Mr Gardner said no, and that he did not like Mr Ponga's lack of communication. She says Mr Ponga asked Mr Gardner again and he again said no. She recalled Mr Ponga said he would get a letter from Mr Gardner. Mr Ponga and Ms Spring say Mr Gardner then walked off and she and Mr Ponga left the site.

[48] Mr Gardner says the only explanation Mr Ponga gave was that he was mad but that did not correspond with evidence Mr Gardner had gathered from others. In his oral evidence, Mr Gardner says while Mr Ponga and Ms Spring were still onsite, he telephoned Mr Spring to "check the facts", and then MBIE for further advice. Mr Gardner says MBIE advised that as Ms Spring had a relationship with Mr Ponga the onus was on her to speak with Mr Ponga about the situation. Mr Gardner says when he finished his telephone discussions, he realised Mr Ponga and Ms Spring had left the site. He says he had expected them to wait for his discussions to finish.

[49] Mr Gardner was unable to give a satisfactory explanation as to why his signed statement omitted his interaction with Mr Ponga on 7 January 2021. He ultimately said he “can’t explain” it. Given this, I prefer Mr Ponga and Ms Spring’s recollection of their discussion and the way it ended.

[50] Following this interaction, on the same day at 10.18am Mr Ponga sent a text message (via Ms Spring) stating:

So can you let me know when you have written the letter of termination and ill come pick it up thanks

[51] Mr Gardner did not respond to that text message or otherwise attempt to clarify that a termination of employment had not occurred.

[52] It appears on the same date that Mr Ponga’s advocate emailed a letter to DJS’s accountant raising a personal grievance on Mr Ponga’s behalf. Mr Gardner says he received this letter on 7 or 8 January 2021.

14 January 2021

[53] The parties did not interact again until 14 January 2021. Mr Gardner says he waited until 14 January 2021 to make a decision in relation to Mr Ponga’s employment because he had to make a decision whether or not to pay him due to it being the end of another pay period. Mr Gardner argues that DJS paying out Mr Ponga’s final pay on 31 December 2020 could have been addressed by either Mr Ponga paying it back or DJS treating it as pay or leave in advance.

[54] On 14 January 2021 Mr Gardner sent Mr Ponga a text message simply stating “if in you want your job still. Best get Joe and come in for a chat”. Mr Ponga responded by saying:

No thanks Jon. I now have an Advocate Dave Cain from Sacked Kiwi helping me. I thinks [sic] its best that you respond to The Personal Grievance Letter that has been forwarded to you by your accountant and direct all future communications to Dave. [advocate details provided]

How did Mr Ponga's employment come to an end?

[55] How the employment relationship between Mr Ponga and DJS came to an end is firstly an evidential matter. I have determined what occurred as a matter of fact based on the evidence.

[56] The first step for any unjustified dismissal claim is to establish that the employee has been dismissed. A dismissal requires an action by the employer amounting to a sending away.¹

[57] Mr Ponga says he was dismissed from his employment as a punitive measure for leaving work early on 23 December 2020, and that the dismissal was substantively and procedurally unjustifiable in all the circumstances.

[58] DJS says there is no basis or credible evidence of any act of dismissal aside from Mr Gardener taking a reversible administrative action of paying Mr Ponga's final pay, which he thought he had to do if Mr Ponga had resigned on 23 December 2020.

Resignation

[59] In *Mikes Transport Warehouse Limited v Vermuelen*, the Employment Court summarised the law relating to resignations as follows:

[37] Resignation is a unilateral act. It does not involve the employer's agreement or disagreement. An employer cannot, for example, decline to accept a resignation and require the employee to continue to work for them. It follows that the key question is not whether advice of resignation was given by the employee in a moment of distress, anger or frustration. Nor is the key question what a fair and reasonable employer would do in response to a resignation given in the heat of the moment. Rather the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances.

[38] A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner or which are plainly not meant to be taken seriously...

[40] Second, while an employer's decision to dismiss must be justified and meet the standard of what a fair and reasonable employer could do in all the circumstances, an employee does not need to justify their decision to resign; nor does the decision need to be demonstrably sensible or well thought through. And where a resignation has, on an objective assessment, occurred it remains open for the employer to reengage an employee on the same terms if that is what the parties choose to do after a period of reflection.²

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC)

² *Mikes Transport Warehouse Limited v Vermuelen* [2021] NZEmpC 197.

[60] The relevant question has also previously been put as follows - whether, objectively, a fair and reasonable employer could have taken what the employee said and did at the time to amount to a resignation and could have relied on their resignation to end the employment.³

[61] Mr Ponga advised Mr Mackey on 23 December 2020 that he was “finishing up” or words to those effect, which Mr Mackey then relayed to Mr Gardner. Such words, if they were repeated to Mr Gardner, could clearly be construed as him saying he was finishing up for the day rather than altogether. In my view, the latter interpretation was not a reasonable one that could have been reached having regard to Mr Ponga’s long-standing employment of 10 years and his acknowledged record as a good hard-working employee. While Mr Ponga says he was frustrated on the day, there is no evidence that his words or demeanour showed that he was, which could have indicated he intended to resign. His words were not expressed in an unequivocal manner and were only directed at a colleague (Mr Mackey) and not to anyone in authority such as Mr Gardner, Mr Spring or Mr Singh. Further, Mr Gardner says he was unaware of Mr Ponga’s frustrations on 23 December 2020. Had Mr Gardner known about his frustrations that day, there may have been at least some basis for assuming Mr Ponga did not intend to return to work after the New Year period.

[62] Taking into account all of the circumstances, I find that a fair and reasonable employer could not have taken what Mr Ponga said and did on 23 December 2020 to amount to a resignation. If that is not correct the circumstances are such that there would have been a duty on DJS to confirm its belief that a resignation was intended.

Abandonment

[63] Whether Mr Ponga abandoned his employment must also be assessed.

[64] Abandonment is where an employer believes a worker has walked away from the job but where the worker has not clearly indicated an intention to finally end the employment, the employer should be cautious in that inference and make further inquiries of the worker.⁴ The statutory duty of good faith requires the employer to be

³ *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164, (2011) 9 NZELR 275 at [29].

⁴ *E M Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 (CA) at [26].

active in finding out the true situation and to take reasonable steps to communicate with the worker about it. The worker has a corresponding obligation to be active and communicative in responding to the employer's query.⁵

[65] The starting point for a consideration of abandonment is what the parties have agreed it means. Clause 13.3 of the employment agreement provided:

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[66] I am satisfied Mr Ponga's employment did not end by way of abandonment. Mr Ponga's absence from the workplace fell during DJS's closedown period in which there were no working days for the parties. Mr Ponga also had a good reason for his absence – he was on leave. For completeness, I also find DJS did not take sufficient reasonable steps in the circumstances to try to contact Mr Ponga to find out why he left work early and/or if he was returning to work - instead it simply paid him out.

[67] I consider the question whether DJS dismissed Mr Ponga turns on whether it did so when it paid out Mr Ponga's final pay, and/or as a result of its discussion with Mr Ponga on 7 January 2021. Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.

[68] I am satisfied DJS's action of paying out Mr Ponga's final pay on 31 December 2020 was an objectively unequivocal act amounting to a sending away. The Wages Protection Act 1983 requires an employer to pay an employee's entire wages when they become payable under an employment agreement.⁶ Further, holiday pay entitlements must be paid on termination in accordance with the provisions of the Holidays Act 2003. The timing and amount of payment of such monies are legal requirements which can be enforced when not complied with. Given this, I do not agree with DJS's submission that payment of Mr Ponga's final pay can be seen an administrative action without any legal consequences. Indeed, Mr Gardner was aware DJS had these legal obligations which is why he processed the payment when he did. This is an act that recognises cessation of employment.

⁵ Employment Relations Act 2000, s 4(1A).

⁶ Wages Protection Act 1983, s 4.

[69] If I am wrong and the payment of Mr Ponga's final pay was not an unequivocal act in and of itself, then it must be considered in light of Mr Gardner's actions on 7 January 2021. During their discussion on that date, Mr Gardner told Mr Ponga that he and Mr Spring had met and decided Mr Ponga would not be returning to work. Mr Ponga asked if he still had a job and was told it "depends". Mr Ponga explained to Mr Gardner that he left work early out of frustration on 23 December 2020, to which Mr Gardner responded in that case that it was best they part ways. While Mr Gardner says he then made enquiries and expected Mr Ponga to wait while he made them, I am not satisfied this expectation was made clear to Mr Ponga or Ms Spring. Further, Mr Gardner then took no steps to contact Mr Ponga to indicate he had changed his mind about them parting ways following Mr Ponga's text message on 7 January 2021.

[70] I am satisfied DJS's actions amounted to an unequivocal sending away of Mr Ponga. DJS dismissed Mr Ponga.

Was the dismissal unjustified?

[71] When the Authority considers justification for DJS's actions it does so by applying the test of justification in s 103A of the Act. In determining justification of a dismissal or other actions the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of DJS and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[72] The statutory duty of good faith also requires the employer to be active in finding out the true situation and to take reasonable steps to communicate with the worker about it.

[73] Many prudent employers ensure they have a contact number for employees and/or their next of kin, although this is not a legal requirement. I accept in the circumstances it was reasonable to ask Mr Spring to speak with Mr Ponga given their familial relationship and that they would be seeing each other over the Christmas/New Year period. However, I find a reasonable employer could not have relied solely on Mr Spring's feedback about whether Mr Ponga had resigned or abandoned his employment. Mr Spring had just retired and was no longer employed by DJS – he held no responsibilities as its employee and mill manager. In those circumstances it was not

reasonable for Mr Gardner to assume Mr Ponga had resigned or to pay his final pay without having direct contact with Mr Ponga. Mr Gardner could have made payment as usual and waited a short time until 7 January 2021 when DJS reopened after its closedown period.

[74] Mr Ponga learned on 1 January 2021 that Mr Gardner had apparently understood his leaving work early on 23 December 2020 was a resignation contrary to Mr Ponga's intention. He agreed to return to the Gardners' home but did not do so. He also made no attempts to correct Mr Gardner's impression of the situation until 7.40am on 6 January 2021 when he sent a text message to him via Ms Spring's phone asking if it was true that he had been dismissed. A worker has an obligation to be active and communicative and Mr Ponga was not in this situation. There is no doubt in my mind that Mr Ponga's reticence has contributed to the predicament he found himself in.

[75] However, his actions must be assessed in all of the circumstances, which importantly were that it was the Christmas/New Year period during which time DJS's business was closed down, he was on leave and was not expected to return to work until 7 January 2021. This period is a time when individuals and families spend time together at home, stay in their town or locality but leave home to visit friends and family members, or leave their town or locality as both Mr Ponga and Mr Gardner did here. It is also a time when people take the opportunity to drink more alcohol than usual as Mr Ponga appears to have done here. Had the relevant events occurred outside of the Christmas/New Year period, the surrounding circumstances would have been different and my assessment may also have been different.

[76] I find in all the relevant circumstances that DJS's actions in assuming Mr Ponga had resigned or abandoned his employment, failing to make adequate inquiries with him, paying his final pay on 31 December 2020 and advising they should part ways without following a sufficient process was not what a fair and reasonable employer could have done in the circumstances. Mr Ponga has established a personal grievance for unjustified dismissal.

Should remedies be awarded and are there issues of contribution?

[77] Mr Ponga has a personal grievance for unjustified dismissal and is entitled to a consideration of remedies.

Lost wages pursuant to section 123(1)(b) of the Act

[78] Mr Ponga seeks reimbursement of lost wages as a result of his dismissal, pursuant to s 123(1)(b) of the Act.

[79] I am satisfied Mr Ponga took reasonable steps to mitigate his losses and started new employment after a month of termination. Mr Ponga is entitled to reimbursement of lost wages for the month he was unemployed, which I accept totals \$4,235.00 (gross).

Compensation pursuant to section 123(1)(c)(i) of the Act

[80] Mr Ponga seeks compensation between \$20,000 and \$25,000 under s 123(1)(c)(i) of the Act taking into account the duration of his employment and the extent of the hurt and upset caused. His advocate says Mr Ponga suffered significant hurt, humiliation and loss of dignity, and the relevant time was an extremely stressful time for him both financially and emotionally. Mr Ponga says he turned to alcohol and that he was feeling depressed, and that his anger and frustration had a detrimental impact upon his relationship with family and friends. He says he felt betrayed by DJS after giving his all to it for such a long time.

[81] I am satisfied Mr Ponga has experienced some harm under each of the heads in section 123(1)(c)(i). I note that the harm experienced was not for a long period and did not prevent him finding a new job quickly. I quantify the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, I consider that an award of \$12,000 under section 123(1)(c)(i) is appropriate.

Contribution

[82] Section 124 of the Act states that I must consider the extent to what, if any, Mr Ponga's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. Having considered the evidence, I have no hesitation in finding Mr Ponga's actions in leaving work early on 23 December 2020 without authority to do so, and not returning to Mr Gardner's home to speak with him after saying he would do so on 1 January 2021 contributed to the situation giving rise to his grievance. It was sufficiently blameworthy conduct such that a reduction of the remedies awarded for his grievance is appropriate.

[83] I find Mr Ponga's remedies ought to be reduced by 10 per cent.

What are the Authority's orders?

[84] Double J Smallwoods Limited is ordered to pay to Thomas Ponga the following within 21 days of the date of this determination:

- a. \$10,800 under s 123(1)(c)(i) of the Act;
- b. \$3,811.50 (gross) under s 123(1)(b) of the Act.

Costs

[85] Costs are reserved.

[86] 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, Mr Ponga may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[87] 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.⁷

Sarah Blick
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.