

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 107  
3001315

BETWEEN                      DAVID BANGS  
   Applicant  
  
A N D                              SUE JOHNSTONE t/a GRANT  
   JOHNSTONE NISSAN SUZUKI  
   Respondent

Member of Authority:        Rachel Larmer  
  
Representatives:              Rebekah Brown, Counsel for Applicant  
   Nicholas Koreneff, Advocate for Respondent  
  
Investigation Meeting:        22 February 2017 at Rotorua  
  
Submissions Received:        27 February 2017 from Applicant  
   01 March 2017 from Respondent  
   03 March 2017 from Applicant  
  
Date of Determination:        10 April 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Non-publication order**

[1] This case has involved disclosure by Mr Bangs of personal and sensitive medical information about not only him but also his wife, children and parents. By consent an oral non-publication order was issued during the investigation meeting regarding the medical information that was presented to the Authority as part of its investigation into Mr Bangs' claims. A final non-publication order regarding the Bangs' family's medical evidence was issued on 15 March 2017.<sup>1</sup>

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<sup>1</sup> [2017] NZERA Auckland 70.

[2] This determination has not detailed the medical information which was heard by the Authority in the course of its investigation in order to preserve the privacy of Mr Bangs and his family. The parties and the witnesses who attended the investigation meeting are all aware of the content of the medical information presented to the Authority so this determination has been prepared on that basis.

[3] Mrs Johnstone acknowledged to the Authority at the investigation meeting that the genuineness of the sick and/or domestic leave absences taken by Mr Bangs either when he was either personally unwell, or to care for his wife or children when they were unwell, was not in dispute.

### **Identity of employer**

[4] Mr Bangs was employed by Sue Johnstone to work at the family business she is running which is trading as Grant Johnstone Nissan Suzuki, a Nissan dealership based in Rotorua.

[5] Although Mrs Johnstone initially took issue with her being named personally as the employer, at the investigation meeting Mr Koreneff properly conceded that Mrs Johnstone accepted personal liability as Mr Bangs' employer in accordance with the doctrine of the undisclosed principal because there was no evidence that Mr Bangs had ever been notified that his employer was a limited liability entity rather than Mrs Johnstone.

### **Employment relationship problem**

[6] Mr Bangs was employed by Mrs Johnstone as a Service Technician and he started work on 30 September 2015. Mr Bangs resigned from his employment on 02 August 2016 on three weeks' contractual notice. He was required to work out his notice period so his last day of work was 23 August 2016.

[7] Mr Bangs claims that his resignation was a constructive dismissal. Mr Bangs alleges that Mrs Johnstone told him he had to resign or agree that he would not take any more time off work.<sup>2</sup> Mr Bangs alleges that Mrs Johnstone said she would end his employment by giving him a third and final warning if he didn't resign. He also

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<sup>2</sup> Mr Bangs says he could not agree to never take any more time off work because he had to care for his sick wife or sick children if no one else was able to do it.

claims that Mrs Johnstone pointed out that if he was dismissed he would not get a reference and his reputation would be tarnished.<sup>3</sup>

[8] Mr Bangs claims he was pressured into resigning when he did not wish to do so. Mr Bangs' resignation letter records that his resignation was "*as per your* [Mrs Johnstone's] *request.*"

[9] Mrs Johnstone had previously unilaterally imposed two prior written warnings<sup>4</sup> on Mr Bangs for taking sick leave when he was genuinely ill, or on domestic leave to care for his wife or children when they were unwell and no other carers were available. I consider that both warnings were substantively and procedurally unjustified. I also find that these warnings caused Mr Bangs to be very concerned about his job security.

[10] The parties agree that their communications over the resignation issue resulted in a heated and unpleasant exchange between Mr Bangs and Mrs Johnstone late on the afternoon of 01 August 2016. There is a dispute about who said what to whom, but each party claims that the other was angry and abusive towards them.

[11] However there is no dispute that during this exchange on 01 August, after Mr Bangs told Mrs Johnstone that he did not want to resign, Mrs Johnstone told him he had to leave his personal mobile phone on her desk during work hours because his colleagues were concerned about how much time he spent making personal calls during work hours. This was the first time this had been raised with Mr Bangs and no evidence or information was provided to support Mrs Johnstone's concern about his mobile phone use.

[12] Mr Bangs denied using his phone during work hours other than for emergencies (such as having to collect a sick child from daycare). He refused to leave his personal phone with Mrs Johnstone so she told him to leave it with her assistant instead, which he also refused to do, then exited their meeting angrily.

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<sup>3</sup> Mr Bangs had been living and working in Australia prior to returning to New Zealand to take up Mrs Johnston's offer of employment so he did not have work ties to the local community, unlike Mrs Johnstone.

<sup>4</sup> The first warning is dated 29 February 2016 and was issued because Mr Bangs had taken 12 out of 103 days as sick or domestic leave. The second warning is dated 18 April 2016 and was issued because Mr Bangs had taken 5 days' sick or domestic leave in the week commencing 11 April 2016.

[13] Mr Bangs says this was the last straw. He says that he believed Mrs Johnstone was using the instructions about his phone to coerce his resignation. Mrs Johnstone denies that.

[14] I find that Mrs Johnstone was unable to provide a satisfactory explanation as to why she raised the phone issue in this way as soon as Mr Bangs had made it clear that his final decision was that he would not be resigning. I therefore consider that it is more likely than not that Mrs Johnstone raised the phone issue to put additional pressure on Mr Bangs to rethink his decision not to resign.

[15] Mr Bangs says he only handed in his written resignation the following day (02 August 2016) because he felt he had no other option. He gave three weeks' contractual notice which he was required to work out, so his employment ended on 23 August 2016.

[16] Mr Bangs raised a dismissal grievance via his lawyer on 05 August 2016<sup>5</sup> advising that his resignation was a constructive dismissal and setting out why he held that view. Mrs Johnstone did not reply to that so Mr Bangs' lawyer sent another letter on 17 August 2016<sup>6</sup> asking for a response and raising other concerns about Mrs Johnstone's inappropriate actions towards Mr Bangs. Both of these communications were sent while Mr Bangs was still at work, working out his notice period.

[17] A substantive response was not provided to Mr Bangs' lawyer's letters until 25 August 2016 when Mr Koreneff responded on Mrs Johnstone's behalf. By then, Mr Bangs' employment had ended.

[18] Mr Koreneff's response to the dismissal grievance letter alleged that Mr Bangs had resigned because he needed to devote his work hours to his firewood business and because his wife had become employed. It also alleged that several of the sick leave days Mr Bangs had taken were used to deliver firewood.

[19] I note that Mrs Johnstone changed her view about that at the investigation meeting and accepted that the sick leave that had been taken was genuine and that she did not dispute the genuineness of Mr Bangs' sick leave absences.

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<sup>5</sup> During his notice period so he was still employed.

<sup>6</sup> Ibid.

[20] Mr Koreneff's letter further stated that Mr Bangs' had taken 30 days sick or domestic leave out of a total 230 work days. Mr Koreneff recorded that Mrs Johnstone said that she had not asked Mr Bangs to resign but had asked "*whether he could commit to full time employment as contracted*". Mr Koreneff's response letter claimed that Mr Bangs' response was to say he would resign so he was told by Mrs Johnstone "*he should put his resignation in writing*".

[21] Mrs Johnstone told the Authority at the investigation meeting that she did not believe Mr Bangs was able to meet the requirements of the role because of his family's illness-related circumstances. Mrs Johnstone advised that, other than his sickness absence, Mr Bangs was a good employee and performed his job to the required standard.

[22] Mrs Johnstone strongly refutes Mr Bangs' version of events regarding his resignation. Mrs Johnstone told the Authority that she never intended for the prior warnings to be viewed as actual disciplinary warnings, rather she claims they were used as "*a wakeup call with no teeth*". Mrs Johnstone was adamant that Mr Bangs could not reasonably have viewed either of these warnings as a threat to his ongoing employment.

[23] Mrs Johnstone's firm view was that Mr Bangs should have seen the two warnings as an attempt to "*help*" him by encouraging him to "*consider his situation and consider getting help*". By getting "*help*" Mrs Johnstone meant engaging someone other than him to cover any future family illnesses, if his wife was unable to do it.

[24] Mrs Johnstone claims that the warnings were merely an attempt to get Mr Bangs to "*engage in discussion about what was obviously a problem for him*". I find that evidence hard to accept because I do not consider there was any actual discussion about the underlying problems because the warnings were presented as a *fait accompli* – they were simply handed to Mr Bangs without any discussion.

[25] I did not find Mrs Johnstone's evidence about the previous warnings credible for a number of reasons:

- (a) These warnings were imposed unilaterally. Mrs Johnstone did not give Mr Bangs an opportunity to engage with her about her concerns or

about his family situation which he had fully disclosed to her before she offered him employment;

- (b) I am not satisfied that Mrs Johnstone put forward suggestions of assistance or help other than suggesting Mr Bangs ask WINZ to provide him with home help so he didn't need to leave work if his immediate family were sick;
- (c) The warning letter expressly states "*This is your first official warning for consistent absenteeism without just cause.*" The use of the word "*official*" suggests it was meant to be taken seriously rather than as a casual or informal communication;
- (d) The genuineness of Mr Bangs' absence was apparently not in issue, and he did have good cause to be absent, so the words "*without good cause*" were untrue. I find that Mr Bangs was either genuinely unwell himself or caring for sick family members when there was no one else available or well enough to do it. I further find that Mrs Johnstone also knew that at the time the warning was issued;
- (e) The second warning also says "*This is your second official warning for consistent absenteeism without just cause*". The same comments I have made about the first warning also apply to the second warning.

[26] Although I did not have unjustified disadvantage claims before me (because Mr Bangs did not raise such claims within the 90 day timeframe)<sup>7</sup> I nevertheless refer to the warnings because they provide a critical context in terms of Mr Bangs' decision to resign.

[27] Mrs Johnstone claims that she was supportive of Mr Bangs and wanted to help him with his family illness issues but that he was uncommunicative. She denies she asked him to resign or threatened him with a third and final warning which would end his employment. Mrs Johnstone considers that Mr Bangs resigned because he

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<sup>7</sup> Mr Bangs said he was concerned about his employment and did not want to cause any conflict by challenging Mrs Johnstone over the warnings because he felt the situation was delicate enough already.

probably wanted to pursue a firewood business she believed he had been running on the side.<sup>8</sup>

[28] Mrs Johnstone told the Authority that the level of Mr Bangs' sickness absence was unacceptable because in her view it was putting the business and other employees under unacceptable pressure.<sup>9</sup>

[29] Mrs Johnstone said she believed that Mr Bangs was not prioritising his work by failing to put arrangements in place to have someone other than him take care of his wife and/or children when they were unwell.

[30] Mrs Johnstone acknowledged that Mr Bangs had disclosed his wife's ongoing medical issues to her (Mrs Johnstone) before he was employed and that he had explained that the family was moving back to Rotorua to be closer to family support to help them better deal with the challenges Mrs Bangs' medical issues presented.

[31] Mrs Johnstone acknowledged that Mr Bangs had been open about the fact that the need to care for his family in light of his wife's medical issue had interfered with his work in Australia, where he had no family support available.

[32] Mrs Johnstone says Mr Bangs lead her to believe that his family situation would not interfere with his work for her because he had family available in Rotorua to help out when additional support was needed. Mrs Johnstone says she made it clear to Mr Bangs that his employment required dependable attendance by him.

[33] Mrs Johnstone told the Authority that Mr Bangs had let her down because his family situation had changed and he had not discussed that with her. Subsequent to Mr Bangs starting work for Mrs Johnstone, Mrs Bangs had entered the workforce and Mr Bangs' mother, who was intended to be available to care for the children when needed, had suffered her own serious health issues which meant she was unable to be an alternative caregiver when required.

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<sup>8</sup> Mr Bangs' wife and one of his wife's friends owned the firewood business which made minimal income. Mr Bangs did firewood deliveries in the weekend. He denies he ever used work time to do firewood deliveries. Mrs Johnstone did not pursue the matter after Mr Bangs' denial.

<sup>9</sup> Mr Bangs disputes that was the case because his colleagues were not busy so could easily cover his absences. I find that these concerns were never fully or fairly put to him.

[34] This development placed an extra unexpected burden on Mr Bangs to support his wife and/or children when they were sick if his wife either could not take time off her work or was physically incapacitated herself, so unable to care for their children.

[35] Mrs Johnstone told the Authority that she believed she had been misled by Mr Bangs because the family support that he had said was available before he was offered employment was not in fact available due to changes to his family situation that occurred after he had been employed.

[36] It was clear to me that Mrs Johnstone felt very aggrieved at Mr Bangs' absences and she believed that changes to Mr Bangs' family situation meant he could not fulfil the requirements of his role. However I find that Mrs Johnstone did not fully or fairly put her concerns about that to Mr Bangs to respond to.

### **Issues**

[37] The following issues are to be determined:

- (a) Was Mr Bangs dismissed?
- (b) If so, was his dismissal justified?
- (c) If not, what, if any remedies should be awarded?
- (d) What, if any, costs should be awarded?

### **Was Mr Bangs dismissed?**

[38] Mr Bangs bears the onus of establishing on the balance of probabilities that his employment ended because he was dismissed. Dismissal is a sending away that occurs at an employer's initiative, regardless of whether or not the employer ever used the word "*dismissal*".

[39] Mr Bangs therefore needs to establish that his resignation was not a free, voluntary or genuine resignation but was in effect action that was initiated by, or occurred, at the initiative of Mrs Johnstone. The circumstances that led to Mr Bangs' resignation must be carefully examined.

[40] On 27 July 2016 Mr Bangs was called by his son's day care to collect his son who was unwell. Mr Bangs' wife was unable to leave work because of pre-existing

work commitments that could not be changed which is why Mr Bangs had to collect his son. Mr Bangs also took the next day (28 July 2016) off work to care for his son because his wife had to attend a course which her employer had paid for and which could not be cancelled without the employer losing its investment.

[41] When Mr Bangs returned to work on 29 July 2016 he was called to a meeting with Mrs Johnstone. Mr Bangs was not given any advance notice of what was going to be discussed, nor was he provided with any information or documentation, either prior to the meeting or during it, about Mrs Johnstone's specific concerns. Mr Bangs was not advised of the right to have a representative present or of his right to take legal advice or to respond to Mrs Johnstone's concerns.

[42] Mrs Johnstone admits that during this meeting she asked Mr Bangs "*whether he could commit to the full-time employment as contracted*". Mrs Johnstone says she raised that question with him because in her view Mr Bangs was not fully or adequately committing to his job because his family situation had resulted in him taking too much time off work due to illness related issues.

[43] Mrs Johnstone considered that Mr Bangs' time off work was excessive and unsustainable by the business. However, she acknowledged to the Authority that she never started a formal disciplinary process to address that, but instead dealt with her concerns by unilaterally issuing two written warnings.

[44] Mrs Johnstone admits that she asked Mr Bangs "*whether he was able to do his job in light of the changes in his circumstances<sup>10</sup> or did he want to resign*". Mrs Johnstone admits that she was the one who suggested resignation as an option. Mrs Johnstone also accepts that on more than one occasion Mr Bangs told her that he did not want to resign.

[45] Mrs Johnstone says that she accepted Mr Bangs' decision that he did not want to resign. Mr Bangs disputes that.

[46] Mr Bangs has a completely different view of what was said and done during the two meetings on 29 July 2016. Mr Bangs claims that Mrs Johnstone told him that he needed to find alternative employment and resign. Mr Bangs also claimed that

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<sup>10</sup> The changed circumstances Mrs Johnstone was referring to were the unexpected incapacity of Mr Bangs' mother meaning she could no longer care for the children when cover was needed

Mrs Johnstone said she wanted his resignation by the end of the day or she would not give him a reference and his reputation would be tarnished. Mrs Johnstone denies that.

[47] Mr Bangs further says that after telling Mrs Johnstone he did not want to resign, she then immediately accused him of driving through town to complete firewood deliveries for a firewood business she believed he was operating in his spare time. Mr Bangs denied that allegation and asked where she had got that information from.

[48] Mrs Johnstone agrees that she told Mr Bangs he had been seen driving through town in his work uniform with a load of firewood while on sick or domestic leave. Mrs Johnson says she told Mr Bangs that she got that information from a member of the public but she told the Authority that answer was not true because one of her employees (and Mr Bangs' co-worker) had given her the information but she did not want to tell Mr Bangs that.

[49] Mrs Johnstone says she accepted Mr Bangs' denial and did not take the matter further. I query whether Mrs Johnstone did in fact accept that denial because she raised it again as a concern in her response to Mr Bangs' dismissal grievance letter and suggested she was going to conduct an investigation into that issue.

[50] In terms of the conflict in the evidence about what was said and done during this meeting, I find on the balance of probabilities that on 29 July Mrs Johnstone was more likely than not to have indicated to Mr Bangs that if he had any more time off work she would be forced to give a third and final warning thus ending his employment without a reference, which she told him would adversely affect his ability to find alternative work in Rotorua.

[51] I am also satisfied that when the two meetings on 29 July 2016 occurred they were both initiated by Mrs Johnstone who was frustrated at the level of Mr Bangs' sick leave absence. Mrs Johnstone embarked on these two meetings by believing that Mr Bangs' absences were adversely impacting her business, that his absences meant that he had not been meeting the requirements of the role,<sup>11</sup> he could not meet the

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and his wife's entry to the workforce meaning on occasions she could not leave work to care for a sick child.

<sup>11</sup> She acknowledged his performance in all other aspects was good and that the only concern she had about him was his time off work for illness-related issues.

requirements of the role going forward unless he agreed to get someone (other than him) to cover his family's illness related issues, she believed he was not being communicative with her, and she had been told by another employee that Mr Bangs appeared to be running a side business while on sick leave.

[52] I therefore consider Mrs Johnstone had a lot of reasons to have acted in the way Mr Bangs alleges she did. Mrs Johnstone also admits that she was the person who raised resignation which I consider supports Mr Bangs' evidence that his resignation was something Mrs Johnstone was pushing and that it did not come from him.

[53] Mrs Johnstone also had no satisfactory explanation for alleging to Mr Bangs that he had been running a side business while on sick leave (without providing any evidence to back the allegation up) immediately after suggesting he may want to resign.

[54] That can be contrasted with Mr Bangs who was the sole income earner, who was helping others out with a firewood business that was a short term seasonal enterprise at best which was not making money, he was financially responsible for his family who needed his income to live on, he had no alternative income stream in place, he had devoted his career to working in the industry he was employed in and had been passionate about the industry since he was a teenager.

[55] I accept Mr Bangs' evidence that he had no good reason for wanting to resign or to discuss resignation with his wife unless he had been improperly pressured by Mrs Johnstone to do so. The resignation put his family under considerable additional stress and pressure during what was already a challenging time for them. It also had an adverse effect on the family's overall wellbeing.

[56] I appreciate these are serious allegations by Mr Bangs which Mrs Johnstone strongly refuted so I must note that these are credibility findings that I have not made lightly. However after very carefully reviewing all of the evidence, assessing the witnesses and examining the actions taken by all involved to ascertain whether they tend to make one account more likely than the other, I am satisfied that Mr Bangs' account makes more logical sense in terms of the contemporaneous documentation, how the parties acted, and their evidence at the investigation meeting.

[57] I find that Mr Bangs was left with the impression from the 29 July meeting that he had to commit to taking no more sickness absences or face a third and final warning that would effectively end his employment. I also consider it more likely than not that Mrs Johnstone asked Mr Bangs to resign as he claimed.

[58] I do not accept Mrs Johnstone's evidence that she wanted to continue to employ Mr Bangs and was prepared to consider possible options to support him because I find she failed to put forward any options to Mr Bangs either before, during or after the meeting that would have supported him. I consider that the lack of evidence of support being offered undermines Mrs Johnstone's evidence about that.

[59] Mr Bangs and Mrs Johnstone met again at approximately 4.30pm on 29 July. There is a conflict in the evidence as to who initiated it and why the meeting occurred. Mrs Johnstone says that Mr Bangs just popped into her office to tell her that he would discuss resignation with his wife over the weekend and would give her a decision on Monday.

[60] I consider that Mr Bangs' actions in that regard do not make sense if Mrs Johnstone's evidence that Mr Bangs had already rejected her suggestion he consider resignation at the first meeting that morning is correct. However that action makes more sense in light of Mr Bangs' evidence that he was told by Mrs Johnstone that she wanted his resignation by the end of the day.

[61] Whatever the circumstances of this meeting, the parties agree that Mr Bangs told Mrs Johnstone he would discuss the situation with his wife over the weekend. Mr Bangs claims that Mrs Johnstone told him she wanted his resignation on her desk first thing Monday morning. Mrs Johnstone denied that.

[62] However Mrs Johnstone admits that she did meet with Mr Bangs on Monday afternoon on 01 August to ask if he and his wife had made a decision about his employment. She says he told her he would not be resigning. Mrs Johnstone told that Authority that she "*fully accepted his decision*".

[63] Mr Bangs says that when he was approached by Mrs Johnstone on Monday afternoon asking where his resignation was he told her he would be taking legal advice because of the way he was being treated. Mr Bangs alleges that Mrs Johnstone said he was putting pressure on the business and asked when he would have an answer

about his resignation for her. Mr Bangs says he told her by the end of the week after he had seen his lawyer.

[64] Mr Bangs also claims that Mrs Johnstone's response to his failure to resign was to tell him he had to leave his personal mobile phone on her desk during work hours because his colleagues were apparently annoyed about how much he was using it during work hours. Mr Bangs refused to do that so declined. Mrs Johnstone then suggested he leave his phone with her assistant instead. He also refused to do that.

[65] I accept Mrs Johnstone's evidence that Mr Bangs became very angry and stormed off saying he was going to see his lawyer.

[66] On 02 August 2016 Mr Bangs handed his written resignation to Mrs Johnstone. Although the resignation was stated to be as per her request, I consider it significant that Mrs Johnstone did not take issue with that.

[67] I also consider it significant that Mrs Johnstone failed to respond to Mr Bangs' personal grievance letter dated 05 August 2016 which says he had been constructively dismissed. This is also significant because the grievance letter alleged that Mrs Johnstone had told Mr Bangs he would get a third warning if he took any more time off and that she had asked him to resign by the end of the day on 01 August 2016 or his reputation would be tarnished so he would not be able to get alternative employment.

[68] These are all very serious allegations and the parties were still in an employment relationship at the time they were made. I would have expected Mrs Johnstone to have disputed such claims immediately, and if there had been a miscommunication or misunderstanding, to have immediately attempted to have cleared that up.

[69] I consider Mrs Johnstone's failure to respond to the grievance letter or to refute from the outset that Mr Bangs's resignation was tendered as per her request fundamentally undermines her evidence that Mr Bangs freely and voluntarily resigned.

[70] I consider that Mr Bangs made it clear to Mrs Johnstone that he believed she had required his resignation which was the only reason he had provided it.

Mrs Johnstone's failure to address that belief supports Mr Bangs' account of what occurred.

[71] I find that Mr Bangs has discharged the onus of establishing on the balance of probabilities that his employment ended because he was dismissed. I am not satisfied that his resignation was a genuine or voluntary resignation.

[72] There is no dispute that Mrs Johnstone was the person who initiated resignation discussions, she followed up with Mr Bangs on a number of separate occasions asking about his resignation, she was on notice he believed he had been required by her to resign and she did not correct his view about that.

[73] I consider it more likely than not that Mrs Johnstone dismissed Mr Bangs because:

- (a) On 05 February 2016 she called his father, who was in the ICU at the time, asking where Mr Bangs was and saying that he (Mr Bangs her employee) was being unprofessional and was letting the business down because he was not at work. Mr Bangs (her employee) had called his manager that morning to say he was sick so was not at work but the manager did not pass the message to Mrs Johnston. At the time Mrs Johnstone was telling Mr Bangs' father how unprofessional his son was, his son was actually at the emergency room himself;
- (b) Despite Mr Bangs calling in sick on 18 April 2016, his manager phoned him at home and told Mr Bangs that Mrs Johnstone wanted him at work, so Mr Bangs went to work on 18 April 2016 even though he was unwell. When he got to work he was called in to a meeting and handed a second written warning for his sickness absence;
- (c) Prior to giving his resignation, Mr Bangs had been given two substantively and procedurally unjustified unilateral warnings for his genuine sickness absence;
- (d) Mrs Johnstone told Mr Bangs he would get a third and final warning if he had any more absences;

- (e) Mr Bangs was told a third warning would end his employment without a reference so he would struggle to get new employment;
- (f) Mr Bangs was told his absences were putting the business under pressure and his colleagues were complaining about him, although no evidence of that was provided to him;
- (g) On two separate occasions Mrs Johnstone raised two different potential disciplinary concerns raised with him for the first time, with no forewarning and without any relevant information being provided, on both occasions immediately after Mr Bangs told her he did not want to resign.<sup>12</sup> Neither of these concerns were pursued subsequently by Mrs Johnstone;
- (h) Mr Bangs clearly stated in his resignation letter that it was being provided at Mrs Johnstone's request and she never corrected or addressed that statement;
- (i) Mr Bangs clearly stated in his personal grievance letter, provided prior to his employment ending, that Mrs Johnstone had told him to resign or be dismissed because any further absences by him were unacceptable.

[74] I find that Mr Bangs has discharged the onus of establishing to the required standard that his resignation was not voluntary and that his employment ended because he was dismissed by Mrs Johnstone.

### **Was Mr Bangs' dismissal justified?**

[75] Justification is to be assessed in accordance with the justification test in s.103A(3) of the Employment Relations Act 2000 (the Act).

[76] Mr Koreneff accepted on Mrs Johnstone's behalf that there was no issue about justification because she had not proceeded on the basis that she had dismissed Mr Bangs. Accordingly Mrs Johnstone accepted that she had not complied with any of the procedural fairness requirements in s.103A(3) of the Act or with the good faith requirements in s.4(1A) of the Act.

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<sup>12</sup> The firewood issue and the phone issue.

[77] Mr Koreneff acknowledged that if the Authority found there had been a dismissal, it followed that any such dismissal would be unjustified because Mrs Johnstone could not meet the requirements of the s.103A justification test in the Act.

[78] I consider that was an appropriate concession to make in light of the evidence. I therefore find that Mrs Johnstone's dismissal of Mr Bangs was substantively and procedurally unjustified.

**What, if any, remedies should be awarded?**

*Mitigation*

[79] I am satisfied that as a result of the evidence Mr Bangs gave in his witness statement and during the Authority's investigation meeting that he took appropriate steps to mitigate his loss by actively seeking alternative employment opportunities. Mr Bangs commenced work as an independent contractor painter and decorator for his father's painting business on 04 January 2017. Mr Bangs also took over his wife and her friend's firewood business in an attempt to generate income.

*Lost remuneration*

[80] Mr Bangs claims lost remuneration for 19 weeks to cover the period from his last day of work until 04 January 2017 when he commenced work as an independent contractor. He acknowledges that from this amount needs to be deducted earnings he received from the firewood business he took over from his wife of \$2,853.90.

[81] I do not have the information to be able to fix the amount of Mr Bang's actual lost remuneration because net figures not gross figures have been provided to the Authority when any award must be for the gross amount. It is also not clear how much he earned over the period for which he is seeking lost remuneration.

[82] I therefore encourage the parties to attempt to agree on that amount themselves. The parties have seven days from the date of this determination within which to attempt to agree on the amount of lost remuneration Mr Bangs has been awarded.

[83] If agreement is not reached, then either party have a further seven days (being 14 days from the date of this determination) to file an application with the Authority

to fix the amount of lost remuneration to be paid to Mr Bangs under s.128(3) of the Act.

*Distress compensation*

[84] Mr Bangs is a man of few words and was clearly uncomfortable discussing his feelings about his unjustified dismissal. He did set out in his witness statement the impact that his unjustified dismissal had on him, and in particular the humiliation and distress he suffered as a result of that.

[85] Mr Bangs' evidence was corroborated by his wife and by his father, both of whom were very concerned about the adverse effects his unjustified dismissal had had on him. Mr Bangs was the predominant income earner. He had three children under seven years of age and although his wife worked, she had serious ongoing health issues.

[86] Mr Bangs stated that his dismissal caused him to lose his passion for being a mechanic which is something he had been passionate about since he was a teenager. He had worked his entire career in that industry, but told the Authority he could no longer face it as a result of what had occurred with Mrs Johnstone. Mr Bangs discussed his concern about what Mrs Johnstone would say about him to prospective employers. Mr Bangs say he felt his situation with Mrs Johnstone was damaging to his reputation in a community as small as Rotorua.

[87] I accept Mr Bangs' evidence that his distress was significantly increased by Mrs Johnstone turning up unannounced at his home on 12 August 2016 (during his notice period) when he was responsible for caring for his sick child. I accept Mr Bangs' evidence that Mrs Johnstone's visit appeared to be an attempt to catch him out because Mrs Johnstone asked where his wife was, why his wife was not looking after their child and also had wanted to see his sick child herself.

[88] Although Mrs Johnstone denied wanting to "*catch Mr Bangs*" out I find that her evidence about this inappropriate visit was very unsatisfactory. She knew that he was legally represented so should not have been communicating with him directly. He was also due back at work the following day so she could have seen him then. I consider it significant that Mrs Johnstone did not attempt to meet with Mr Bangs when he returned to work the following day, lending weight to Mr Bangs' view that she had been trying to catch him out.

[89] I do not accept Mrs Johnstone's evidence that she went to Mr Bangs house because she was very concerned about his situation and wanted to see if she could offer help and if he would withdraw his resignation. I find that Mrs Johnstone did not offer him any help and she did not ask him to withdraw his resignation. I further find that Mrs Johnstone never asked Mr Bangs to withdraw his resignation although I consider she had ample opportunity to do so.

[90] If Mrs Johnstone's evidence about her motivations was correct then there was no need for her to turn up at Mr Bangs' home unannounced asking to see his sick child. He had his hands full caring for his sick child and he had a legal representative on record as acting for him. Mrs Johnstone had not even responded to the grievance letter at the time of her home visit and had not communicated with Mr Bangs' lawyer at all.

[91] An unannounced home visit on 12 August was also not the right time for Mrs Johnstone to expect Mr Bangs to have any discussions about his situation because he was focused on caring for his sick child. Mrs Johnstone could and should have spoken to Mr Bangs when he was at work because his employment did not end until 23 August 2017. I note that she did not do so.

[92] Another aggravating factor which increased Mr Bangs' distress occurred on 16 August 2017. This incident involved Mr Bangs' manager calling someone who worked with Mr Bangs' wife to find out if his wife was at work after Mr Bangs had told his manager he (Mr Bangs) had to leave work early to collect a sick child because his wife could not leave her work to do it.

[93] After ascertaining from one of Mrs Bangs colleagues that she was at work that day, the manager asked Mrs Bangs' work colleague to put Mrs Bangs on the phone. When Mrs Bangs took the phone she was very surprised to find Mrs Johnstone on the phone. Mrs Bangs says that Mrs Johnstone started quizzing her (Mrs Bangs) about her health, her children's health, and why she could not have left work instead of her husband to care for their sick child that day.

[94] Although Mrs Bangs answered all of Mrs Johnstone's questions, Mrs Bangs told the Authority she felt it was an invasion of privacy, particularly because Mr Bangs had already resigned and had raised a grievance claim against her. I consider

that there was no good reason for Mrs Johnstone to have acted in this way especially when Mr Bangs' employment was ending merely days later.

[95] I find that Mrs Johnstone's inappropriate actions increased Mr Bangs' distress humiliation and embarrassment about his unjustified dismissal.

[96] I order the respondent to pay \$15,000 to Mr Bangs under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

### *Contribution*

[97] Having established that Mr Bangs has a valid personal grievance claim, s.124 of the Act requires me to assess the extent to which his actions contributed to the situation which gave rise to his grievance and to adjust remedies accordingly. Contribution denotes blameworthy conduct which is proven on the balance of probabilities.

[98] I am not satisfied that Mr Bangs engaged in any blameworthy conduct. He took sick leave from his work to look after his sick family in circumstances where there was no-one else available to care for them.

[99] I find that Mr Bangs informed his employer on each occasion of the need to take sick leave and he was also open about the reasons why the leave was required by sharing medical information and details of the reasons for the sickness absence which he was not legally required to share, but which he did provide to ensure that Mrs Johnstone was fully informed of what was going on.

[100] I find that Mr Bangs did not contribute to the situation which gave rise to his dismissal grievance, so remedies are not to be reduced on the ground of contribution.

### **What, if any, costs should be awarded?**

[101] Mr Bangs as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs by agreement. If that does not occur then Mr Bangs has 14 days within which to file a costs application, Mrs Johnstone has 7 days within which to respond, with Mr Bangs having a further 3 working days to file any reply costs memorandum.

[102] The Authority is likely to adopt its notional daily tariff based approach to costs, which is currently \$4,500 for the first day and \$3,500 for the following day. This investigation meeting, although it took place on one day, it was an extremely long day, and costs should be assessed on the basis that the matter involved a day and a half of the Authority's investigation time. The first day is to be assessed at \$4,500 with the second day to be on a pro rata basis on a notional daily tariff rate of \$3,500.

[103] The parties are invited to identify to the Authority any factors which they say would warrant a departure from the notional daily tariff. This may include *Calderbank* offers, if there have been any.

### **Outcome**

[104] Mr Bangs' employment ended because Mrs Johnstone dismissed him. Mr Bangs' dismissal was procedurally and substantively unjustified.

[105] Within 28 days of the date of this determination Mrs Johnstone is ordered to pay Mr Bangs \$15,000 without deduction under s.123(1)(c)(i) of the Act.

[106] The parties have 14 days within which to attempt to agree the amount of lost remuneration Mr Bangs has been awarded. If agreement is not reached a timetable has been set to enable the Authority to fix that amount.

**Rachel Larmer**  
**Member of the Employment Relations Authority**