IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 444
3309460

	BETWEEN	DEIVID MARIOTTI DA SILVA Applicant
	AND	DSJ JOINERY LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Dave Cain, advocate for the Applicant Megan Leaf, counsel for the Respondent
Investigation Meeting:	23 April 2025 in Tauranga
Submissions and further information received:	29 April 2025 from Applicant 1 May and 5 May 2025 from Respondent
Date of determination:	23 July 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Deivid Da Silva was employed by DSJ Joinery Limited (DSJ) as a joiner in mid-April 2023. The employment started well, but Mr Da Silva says by late September or early October, DSJ's director Daniel Milne started treating him poorly and ignoring him. This treatment, Mr Da Silva says, unjustifiably disadvantaged him in his employment. On 16 October 2023 Mr Milne called Mr Da Silva into a meeting and Mr Da Silva walked out believing he had been fired. Mr Da Silva says he was unjustifiably dismissed in the 16 October meeting because DSJ did not have a good reason for firing him and it did not follow any process.

[2] DSJ says Mr Da Silva resigned and it did not terminate Mr Da Silva's employment. After Mr Da Silva left the 16 October meeting Mr Milne thought Mr Da

Silva was just taking some time off until he received a text later that day from Mr Da Silva asking when his final pay was going to be.

[3] This determination resolves the issue of how Mr Da Silva's employment ended, and whether he has a personal grievance for unjustified dismissal and / or unjustified disadvantage. It also resolves whether DSJ breached s 130 of the Employment Relations Act 2000 (the Act) by failing to provide Mr Da Silva's wage and time records when he requested them, and if so, whether a penalty should be imposed.

The Authority's Investigation

[4] The Authority received written witness statements from Deivid Da Silva and his wife Juliana Da Silva, in support. The witnesses for DSJ were Daniel Milne and Toni Erni, a contractor-joiner. All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation.

[5] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

Issues

[6] The issues for the Authority to resolve are:

a. Whether Mr Da Silva was unjustifiably dismissed from his employment in that his dismissal was not substantively justifiable or procedurally fair, or whether he resigned from his employment.
b. Whether Mr Da Silva was unjustifiably disadvantaged in his employment relating to Mr Milne's alleged treatment of him.
c. If Mr Da Silva is found to have valid personal grievance(s) whether he should be awarded compensation under s 123(1)(c) of the Act (subject to contribution).
d. If Mr Da Silva is found to have a valid personal grievance for dismissal, whether he should be awarded reimbursement of one week's lost wages under s 123(1)(b) of the Act (subject to mitigation and contribution).
e. Whether DSJ has breached s 130 of the Act and if so, whether a penalty should be awarded.
f. Costs and disbursements.

[7] DSJ withdrew its alternative claim that Mr Da Silva abandoned his employment, and says Mr Da Silva resigned.

Relevant background

[8] DSJ is a small company that mostly carries out low to mid-range joinery work but also does some high-end bespoke joinery on occasion. Mr Milne is the sole director of DSJ. He also does most of the joinery work himself with assistance from another joiner who is a contractor rather than an employee.

[9] In February 2023, Mr Da Silva heard through his networks that DSJ was looking to employ a full-time joiner. Mr Milne was due to have shoulder surgery in August and needed a full-time joiner to take over operations while he was unable to work. Mr Da Silva was working for a large company at that time, and was looking for different experience which he expected to be able to get from a smaller company. Mr Da Silva walked into DSJ's factory with his CV and met with Mr Milne. Mr Milne looked over Mr Da Silva's CV which stated Mr Da Silva had 18 years' experience in joinery but no formal qualifications. Mr Milne asked Mr Da Silva to carry out a few tasks so he could assess Mr Da Silva's ability to use a manual saw-bench. Mr Milne was satisfied with Mr Da Silva's work and offered him employment with DSJ.

[10] The parties signed an employment agreement on 13 April 2023. Mr Da Silva was to work a minimum of 40 hours and up to 44 hours per week. His starting hourly wage was $32 which increased to $33 after around four weeks.

[11] The first months of Mr Da Silva's employment with DSJ went well. Mr Da Silva says Mr Milne was a generous and understanding boss and the workers were treated like part of the DSJ family. Mr Milnes says Mr Da Silva's workmanship was "above average" and above his expectations. When any minor issues were raised about Mr Da Silva's joinery practices, these were usually dealt with between Mr Da Silva and the administrative staff and did not result in any disciplinary action.

[12] On 19 July 2023 a representative from the training organisation BCITO visited the factory to talk to both Mr Milne and Mr Da Silva about Mr Da Silva becoming formally qualified as a joiner. Mr Milne signed a BCITO training agreement for Mr Da Silva to continue to undertake his training while at DSJ. Mr Milne initially said he felt pressured into signing the agreement and the visit raised some concerns for him around

Mr Da Silva's skill level, but he did not raise these with Mr Da Silva at the time. There was no impact on DSJ's operations from Mr Da Silva signing up to BCITO – he continued to work relatively independently and Mr Milne continued to be satisfied with his work.

[13] The relationship changed after Mr Milne had his shoulder surgery on 15 August 2023. Mr Milne was away from the factory recuperating for some time but he was also in and around the factory more than he had previously been when he was "on the tools" meaning he had more opportunity to observe Mr Da Silva's work. This period also coincided with DSJ getting a contract to work on a high-end bespoke kitchen that required a different standard of craftsmanship from the low to mid-range joinery that was standard for the company. While both Mr Milne and Mr Da Silva emphasised that high-end bespoke work was not outside DSJ's capability, the project was complex and demanding and made more stressful because Mr Milne was unable to carry out any joinery work himself.

The incident

[14] On Friday 13 October 2023 Mr Da Silva was working in the factory cutting MDF planks and Mr Milne was doing paperwork in the office. Sometime in the middle of the afternoon Mr Milne says he heard the high-pitched sound of a sawblade hitting a screw. He continued with his paperwork and did not go out to the factory floor. After Mr Da Silva had left work for the day around 4:00 or 4:30 pm, Mr Milne looked around the sawbench where Mr Da Silva had been working. At the bottom of the offcuts bin Mr Milne found a piece of MDF plank with a vertical cut in it, stopping at a round screw hole. Mr Milne could not find the screw that had been in the hole. Mr Milne inspected the sawblade and observed it had teeth and tips missing, suggesting the sawblade had gone through the head of a screw. He took a photo of the MDF plank with his phone and sent it to Mr Da Silva that night at 8:13 pm as a text without any words. Mr Milne says he did not get a response to his text. Mr Da Silva says he did respond, but he was unable to produce any response texts for the Authority because his phone was subsequently lost or damaged.

The meeting

[15] On the morning of Monday 16 October, Mr Milne asked Mr Da Silva to come into his office. Mr Milne had Mr Da Silva's CV on his desk and the MDF plank in his hand. From this point, their stories diverge.

[16] Mr Milne says the purpose of the meeting was to have a health and safety discussion with Mr Da Silva about what had happened on Friday 13 October. On seeing Mr Milne, Mr Da Silva almost immediately started saying it was not him. Mr Milne asked Mr Da Silva why he had not told him about the screw and said the sawblade was damaged. He had the piece of wood in his hand and asked Mr Da Silva "what's the go?". There was some back and forth where Mr Da Silva repeated that it wasn't him, and Mr Milne said "it had to be you". He told Mr Da Silva to stop lying and said that Mr Da Silva was "doing his head in". Mr Da Silva left, saying he was going home and "taking the day off".

[17] Mr Da Silva says in the meeting Mr Milne called him a liar and a "shit joiner" and that he told Mr Da Silva that he felt like killing himself due to Mr Da Silva being around. Mr Da Silva says Mr Milne told him "you're fired and I don't want you here anymore" and "I'm giving you two weeks' notice".

[18] Mr Milne and Mr Da Silva agree the meeting was over in a matter of minutes. Mr Da Silva went home and looked on the internet for information about being fired and approached an employment advocate for advice. There was no contact between them for the rest of the day until 4:31 pm when Mr Da Silva sent the following text to Mr Milne:

> Hi, I am in shocked [sic] with your decision, I have a family to feed, and bills to pay, when is gonna be my final payment? Thanks.

[19] Mr Milne responded:

> Sorting out now with admin. your welcome to pick up your tools up at 10am tomorrow. U will be paid for a full week.

[20] Mr Milne says he took Mr Da Silva's text as being his resignation and that Mr Da Silva had no intention of returning.

[21] On 17 October the following texts were then exchanged:

Mr Da Silva:	Ok I will get my tools but am i ready fired?
Mr Milne:	Can I please have your registration in text .thank you
Mr Da Silva:	I asked you a question?
Mr Da Silva:	I did NOT resign you fired me!?

Mr Da Silva:	Why have you sent me a payslip with final pay? I did not resign? Also the annual leave is not correct
Mr Da Silva:	I haven't resigned? You fired me!? What is going on? What about my holidays?

[22] On 18 October, there was an exchange of emails. Mr Milne wrote to Mr Da Silva explaining days taken off as holidays were paid in advance on his payslip. Mr Da Silva disputed this and said this was incorrect. He then sent a further (and final) email:

> Why are you saying I resigned when you fired me!? I never resigned I need my job

[23] Mr Milne did not respond to this email. DSJ processed Mr Da Silva's final pay.

[24] Mr Da Silva agrees he had no intention of returning to work at DSJ, but says this was because Mr Milne called him a liar and fired him.

[25] Mr Da Silva raised a personal grievance via his representative in a letter dated 1 November 2023.

Was Mr Da Silva unjustifiably dismissed?

What is the law?

[26] The long-established definition of dismissal is that it is termination of employment at the initiative of the employer.[1] It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal. In the case of an actual dismissal, the unequivocal act will be a statement amounting to a sending away.

[27] It is clear the employment relationship between Mr Da Silva and DSJ ended after the meeting on 16 October and the communications that followed. The issue is whether Mr Da Silva resigned or was dismissed, and where responsibility for his termination properly lies.[2]

[28] The parties had wholly different recollections of what happened in the meeting. Given this conflict in evidence, I must decide which evidence I prefer based on an assessment of credibility. I rely on the guidance provided by the District Court in *R v Biddle*[3] that was cited with approval on appeal to the High Court.[4] The key aspects of

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[1] *EN Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 at [20].
[2] *New Zealand Cards Limited v Ramsay* [2012] NZEmpC 51.
[3] [2015] NZDC 8992.
[4] *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

this guidance applicable to the present matter are consistency of witness evidence, as well as how reasonable, plausible and probable the evidence is.

[29] If I find that Mr Da Silva was dismissed then I need to determine whether his dismissal was unjustifiable by applying the test of justification in s 103A of the Act. I am required to consider on an objective basis whether DSJ's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[30] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act and determine whether DSJ:

a. fully and fairly investigated the allegations against Mr Da Silva before taking action against him;

b. raised the concerns it had with Mr Da Silva (including giving him relevant information) before taking action;

c. gave Mr Da Silva a reasonable opportunity to respond to its concerns before taking action;

d. genuinely considered Mr Da Silva's explanations before taking action (the decision was made without predetermination).

[31] I may take into account other factors as appropriate. The Authority must not find a dismissal to be unjustifiable solely because of minor defects that did not result in the employee being treated unfairly.[5]

How did the employment relationship end?

[32] Based on the evidence before the Authority, I am satisfied that going into the 16 October meeting Mr Milne had no intention of disciplining or dismissing Mr Da Silva and ending the employment relationship and he did not do so in the meeting. I prefer Mr Milne's account of the meeting overall because I consider his evidence was more consistent and his account more plausible than Mr Da Silva's. This is because the evidence supports that DSJ was generally a lenient employer. Mr Milne allowed Mr Da Silva to work flexibly around his family commitments, and on occasion even permitted him to leave work early to go surfing on full pay. Mr Milne's undisputed evidence was that he had never raised any disciplinary issues with Mr Da Silva and

[5] Section 103A(5) of the Act.

even when health and safety incidents arose, Mr Milne would ask his administrator to deal with Mr Da Silva directly over any necessary paperwork. Mr Milne had never issued a formal warning or taken any form of adverse employment action against any of his employees including Mr Da Silva. Against this accepted background, I find it implausible and improbable that Mr Milne would escalate a health and safety meeting - which was not even a disciplinary meeting - to a dismissal in the course of minutes. I therefore conclude that Mr Milne did not dismiss Mr Da Silva in the meeting.

[33] Through questioning and submissions, DSJ alleged that Mr Da Silva did not truly believe he had been dismissed, and after taking advice from his advocate he constructed a false narrative to support raising a personal grievance. The text message Mr Da Silva sent on the afternoon of 16 October, DSJ says, was part of establishing this false narrative. I am not persuaded the evidence supports this.

[34] Rather, the facts support that Mr Da Silva's workmanship and honesty was called into question during the meeting in a way that caused him to believe he was not able to return to work at DSJ. This was not necessarily based directly on what Mr Milne said during the meeting, which is in any event disputed. But just as I accept Mr Milne's evidence that he believed the employment relationship remained intact following Mr Da Silva's exit from the factory, I also accept Mr Da Silva's evidence that he believed he had been dismissed at the meeting.

[35] It was the exchange of text messages later in the day on 16 October and on 17 October and the emails on 18 October that cumulatively ended Mr Da Silva's employment. When he received the text from Mr Da Silva at 4:31 pm Mr Milne says he believed Mr Da Silva had resigned from his employment because he asked: "when's my final pay gonna be?" However, it was not reasonable for Mr Milne to have read these words in isolation from the previous part of the text, and in particular, the allegation that Mr Da Silva was in shock about "your decision". Mr Milne had the opportunity to correct Mr Da Silva's statement that DSJ had decided to end his employment. Mr Milne did not take this opportunity.

[36] For the sake of completeness, I acknowledge that Mr Milne did not totally ignore Mr Da Silva's texts and emails, but he did not respond directly to Mr Da Silva's question about whether he had been fired, or Mr Da Silva's repeated assertions that he had not resigned. Several texts on 17 October from Mr Da Silva saying that he had not resigned went unanswered. DSJ largely ignored the communications and proceeded to

process Mr Da Silva's final pay. DSJ also ignored the direct question Mr Da Silva asked over email about why Mr Milne was saying Mr Da Silva had resigned, when he had been fired.

[37] In these circumstances, the duty of good faith and in particular the obligations to be communicative and to be active and constructive in maintaining the employment relationship required DSJ to do more than just accept the end of the employment relationship and ignore Mr Da Silva's communications. DSJ's failure to discharge that duty was a serious breach of good faith.

Conclusion

[38] Although there was not an actual dismissal and the circumstances of this case do not fit into any of the conventional categories of constructive dismissal,[6] I conclude the employment relationship ended as a result of DSJ's conduct. Trust and confidence was eroded as a result of Mr Milne's actions on behalf of DSJ in the 16 October meeting and although I have found the employment relationship was intact at the end of the meeting, matters severely deteriorated from 16 to 18 October due to DSJ's failure to act in good faith and correct Mr Da Silva's perception of what had happened in the meeting. Consequently, DSJ must "suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place".[7] I conclude DSJ dismissed Mr Da Silva from his employment.

Was the dismissal unjustified?

[39] Irrespective of whether the meeting on 16 October was intended to be a health and safety incident meeting or a disciplinary meeting, DSJ did not follow a fair process to raise and address the sawblade issue with Mr Da Silva, and viewed objectively its actions were not the actions of a fair and reasonable employer.

[40] This is because of the way that Mr Milne first raised the MDF plank issue with Mr Da Silva by sending him a photo over text after work had finished for the week, with no explanation of why the photo was being sent. DSJ invited Mr Da Silva to an impromptu meeting shortly after he arrived at work the following Monday. DSJ did not tell Mr Da Silva what the meeting was going to be about in advance and did not give Mr Da Silva the opportunity to prepare or have support in the meeting. DSJ did

[6] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).
[7] *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51 at [51].

not take steps to follow up with Mr Da Silva after the meeting despite Mr Da Silva leaving the meeting clearly upset about what had transpired. These were not the actions of a fair and reasonable employer.

[41] DSJ's communications following the meeting were also not consistent with the actions of a fair and reasonable employer. DSJ did not respond directly to the allegations Mr Da Silva had raised, or correct Mr Da Silva's understanding of what had happened in the meeting. DSJ ignored the questions and statements relating to whether Mr Da Silva had resigned or been dismissed.

Conclusion

[42] Stepping back to look objectively at DSJ's actions and how it has acted over the course of events from the 13 October incident, through to the meeting on 16 October and in its subsequent communications with Mr Da Silva from 16 to 18 October, I conclude DSJ has not acted as a fair and reasonable employer could. Mr Da Silva was unjustifiably dismissed.

Was Mr Da Silva unjustifiably disadvantaged?

What is the law?

[43] For his disadvantage claim to succeed, Mr Da Silva must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by DSJ.[8] This means I need to determine whether Mr Da Silva suffered a disadvantage in his employment, and – if so – whether this was caused by an action by DSJ and whether that action was unjustified.

[44] DSJ's actions are assessed in light of the test under s 103A of the Act set out above and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[45] Mr Da Silva alleges that he was unjustifiably disadvantaged by Mr Milne's behaviour and actions towards him in the two to three weeks prior to his employment ending. Mr Da Silva says Mr Milne was angry towards him, and was "rude" when he used to be nice. At some point, Mr Milne then ceased communicating with him at all.

[8] *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

[46] DSJ says the complaints about disadvantage are vague and unspecified and Mr Da Silva has failed to provide particulars in respect of specific events over a broad timeframe which means that DSJ cannot respond in any meaningful way. Mr Milne does not accept that his attitude or behaviour changed and says he was only ever courteous and understanding towards Mr Da Silva. Mr Milne acknowledges he was keeping a closer eye on Mr Da Silva's ability to safely perform required work given the involvement of BCITO but not in a way that impacted the conditions of Mr Da Silva's employment.

[47] Based on the evidence before the Authority, I accept Mr Milne's behaviour towards Mr Da Silva did change following his shoulder surgery. This was driven by the two factors noted above – Mr Milne was around the factory more to observe Mr Da Silva's work and the contract for the bespoke high-end kitchen added pressure to the business. However, I do not accept Mr Milne was completely failing to communicate with Mr Da Silva – there were text messages between the two parties in the last weeks of September and first weeks of October and Mr Da Silva accepted the messages up to 9 October 2023 were not negative or rude. Mr Da Silva also acknowledged Mr Milne did speak to him at the factory because naturally as the "boss", Mr Milne had to issue Mr Da Silva with work orders.

[48] Mr Da Silva also says he did respond to the picture of the MDF plank that Mr Milne texted to him. While I am not persuaded by Mr Da Silva's explanation that he lost or damaged his phone and was unable to produce the text messages, that would suggest there may have been other communications between Mr Milne and Mr Da Silva in the period of time Mr Da Silva says Mr Milne was ignoring him.

Conclusion

[49] Looked at objectively, the evidence before the Authority does not substantiate the claim that Mr Da Silva was subjected to negative behaviour and actions by Mr Milne that disadvantaged him over the period leading up to 16 October. Even if Mr Milne's behaviour and attitude had changed, there is no specific evidence of how this disadvantaged Mr Da Silva. His personal grievance for unjustified disadvantage does not succeed.

Remedies

[50] I have found Mr Da Silva was unjustifiably dismissed from his employment and he is therefore entitled to an assessment of remedies.

[51] Mr Da Silva seeks:

(a) Compensation under s 123(1)(c) of the Act for humiliation, loss of confidence, loss of dignity and injury to his feelings.

(b) Reimbursement of one week's lost wages under s 123 (1)(b) and s 128 in the amount of $1,452.00 (gross).

[52] Mr Da Silva asks the Authority to make a global award of compensation to take into account the hurt, upset and injury to feelings over the last weeks of his employment with DSJ. Mr Da Silva says he found the events of 13 October and 16 October stressful. He was anxious, upset and angry about the situation. The way his employment with DSJ ended impacted his self-confidence and he says DSJ's actions were entirely unreasonable. Mr Da Silva and his wife gave evidence that he developed an itchy and swollen rash which was an extreme stress reaction and he required medication for sleep difficulties.

[53] DSJ says moderation should be applied in assessing the impact on Mr Da Silva because of his relatively brief employment history with DSJ. It says no medical evidence has been provided in respect of his physical symptoms. DSJ also says Mr Da Silva did not demonstrate a lack of confidence in securing new employment within days of leaving DSJ, or while giving evidence at the Authority. Overall, DSJ says there was a low level of harm for an extremely short timeframe.

[54] I have considered the general range of compensation awards in other cases. Based on the evidence of impact on Mr Da Silva as expressed in his statement and the statement of his wife, and standing back to objectively assess the impact as best I can, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is $15,000.00, subject to contribution.

Lost wages

[55] Under s 123(1)(b) of the Act, the Authority is able to order that the employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 of the Act provides that the Authority must order the employer to pay lost remuneration or three months' ordinary time

remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance, although there is a discretionary power in s 128(3) of the Act to award a greater sum.

[56] When assessing the appropriate award for lost remuneration, the applicable principles are that full financial losses set the upper limit on an award of compensation, and there is no automatic entitlement to full compensation. Moderation is required. Precision is difficult and awards of compensation "will inevitably involve a broad brush approach".[9]

[57] Mr Da Silva claims $1,452.00 (gross) in lost wages, being 44 hours at $33.00 per hour for the week he was out of work after leaving DSJ. He says he was very proactive in his efforts to secure employment and took all reasonable steps to mitigate his loss. He also says his employment agreement provides for two weeks' notice.

[58] DSJ says in the week following the end of Mr Da Silva's employment until 18 October, he was paid for 36 of 44 hours leaving a shortfall of eight hours (or $264.00 at $33.00 per hour). There were two days in the following week's pay run where Mr Da Silva was out of work before he obtained a new permanent role (average of 8.8 hours per day, based on an average of 44 hours over five days x 2 days totalling $580.80). However, DSJ says this total amount is off-set by a cash "handyman" job Mr Da Silva carried out for $800.00. This leaves an actual shortfall of $44.80 (gross) which DSJ says is rendered nugatory because the new role Mr Da Silva obtained had a higher hourly rate.

[59] Mr Da Silva accepts he was paid for 36 hours in the first payslip after his employment ended. I am satisfied that Mr Da Silva's actual loss was therefore closer to three days, rather than the full week he claims. Prior to obtaining new permanent employment, Mr Da Silva had a loss of 25.6 hours or $844.80. The question is whether this amount should be offset by the cash amount he earned.

[60] I take into account that Mr Da Silva had his own side business, being a 'handyman service' which he advertised around August 2023, well before the end of his employment with DSJ. Mr Da Silva could not claim any loss of any income from that additional job as being a loss arising from his personal grievance, and as a corollary of that, it would not be appropriate to take this entirely separate job into account to

[9] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36].

offset losses resulting from the grievance. I therefore decline to offset Mr Da Silva's claim for lost wages, which in any case I consider extremely modest.

[61] Mr Da Silva should be paid for 25.6 hours of work totalling $844.80 without offset, subject to contribution.

Contribution
Con

[62] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Da Silva may have acted in a way that contributed to the situation that gave rise to his grievance.[10]

[63] DSJ says Mr Da Silva contributed significantly to his own personal grievance by lying to Mr Milne about hitting the screw with the sawblade, which was a health and safety issue. The lies, DSJ says, undermined the relationship of trust and confidence. DSJ also says Mr Da Silva's conduct during the 16 October meeting and subsequently made it clear he was not going to return to work and the text message Mr Da Silva sent to Mr Milne that tried to establish a termination by DSJ was deceitful. It says Mr Da Silva's contribution to the situation warrants a 50 percent reduction of remedies as being appropriate in the circumstances.

[64] The Employment Court has succinctly summarised the key principles relating to contribution as follows:[11]

> a. First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
>
> b. Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[65] The Court also stated:[12]

> The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

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[10] Section 124 of the Act.
[11] *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].
[12] Above n11 at [17].

[66] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[67] Based on the evidence before the Authority, I conclude that Mr Da Silva's actions in the 16 October meeting and subsequent to the meeting contributed to the dismissal. The situation during the meeting was heightened and Mr Da Silva's text message sent later that day asking about his final pay effectively led to an argument between the parties about whether Mr Da Silva had been fired or had resigned. While I have found Mr Da Silva was dismissed, his own conduct was not constructive or conducive to trying to resolve the employment relationship problem. He did not act in a way that supported his reciprocal duty to act in good faith towards DSJ. I assess Mr Da Silva's contribution at 10 percent. Personal grievance remedies are to be reduced accordingly.

Breach of s 130 and penalty

[68] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties.[13] Mr Da Silva asks the Authority to order a penalty for DSJ's failure to provide wage and time records.[14]

[69] Mr Da Silva says the breach was clear and unambiguous because he requested wage and time records on 1 November 2023, DSJ provided payslips on 13 November 2023 which did not meet the statutory requirement and compliant records were not provided until after the Authority's case management conference on 22 November 2024.

[70] DSJ says if there was a breach, it was a technical breach only. DSJ is a "one-man band" and Mr Da Silva was its only employee. DSJ provided Mr Da Silva with an employment agreement and payslips, and Mr Da Silva filled in his own time records. DSJ says its breach has not impacted Mr Da Silva's ability to calculate lost wages or holiday pay.

[71] The information on the payslips was not sufficient to meet the statutory requirement to provide wage and time records on request and DSJ is liable to a penalty

[13] Section 133 of the Act.
[14] Section 130 of the Act.

for the breach. This breach attracts a maximum penalty of $20,000.00 against a company.

[72] Even if a penalty is technically available, the imposition of any penalty must meet the purposes and principles of penalties. In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.[15] These principles have been elaborated on and followed since.

[73] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour. DSJ's actions were inconsistent with the Act's objects, including acknowledging and addressing the inherent inequality of power in employment relationships, and promoting the effective enforcement of employment standards. It is appropriate for a penalty to be imposed.

[74] The law in respect of quantification is well established given s 133A of the Act and requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

[75] Penalties should be set at a level which both punishes for breaches and deters from future non-compliance. Specific and general deterrence are relevant considerations. A message should be sent to DSJ and to any like-minded employers who might be tempted to treat legislative requirements as optional. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.[16]

Analysis

[15] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.
[16] Above n15 at [147].

[76] In determining the penalty claim I follow the approach set out by the Employment Court in *Borsboom v Preet*.[17]

[77] There is one breach alleged, the maximum penalty for which is $20,000.00. I consider the breach was inadvertent or negligent rather than intentional, driven primarily out of Mr Milne's misunderstanding that providing payslips was sufficient to discharge DSJ's obligation to provide wage and time records.

[78] The severity of the breach is at the very lowest end of the scale because the impact of the breach was that it was more difficult for Mr Da Silva to determine whether he had been paid properly, and whether he had an entitlement to annual leave arrears – a claim that was ultimately withdrawn.

[79] There is no evidence before the Authority of previous conduct by DSJ. DSJ remains registered as a company on the Companies' Office website although its current financial position is unknown. Consequently there are no circumstances that would justify either increasing or reducing an otherwise appropriate penalty.

[80] Stepping back to look at the matter objectively and considering parity with other cases, I consider an appropriate and proportionate penalty to be $500.00 for this breach.

[81] Mr Da Silva has been directly affected by DSJ's failure. Where a breach has resulted in a non-compensable loss to the employee (where the breach is in the nature of 'performing a public duty') it may be more appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee.[18] On that basis, I order the penalty to be paid to Mr Da Silva.

Orders

[82] I have found that Mr Da Silva was unjustifiably dismissed by DSJ. Mr Da Silva was not unjustifiably disadvantaged by DSJ.

[83] I order that within 28 days of the date of this determination DSJ Joinery Limited is to pay Deivid Mariotti Da Silva:

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[17] Above n15 at [137] – [151].
[18] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

a. Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of $13,500 ($15,000 minus 10 % contribution).

b. Reimbursement of lost wages under s 123(1)(b) and s 128 of the Act in the amount of $760.32 (gross) ($844.80 minus 10 % contribution).

c. A penalty of $500.00.

Costs

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

[85] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Da Silva 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 DSJ 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.

[86] 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.[19]

Natasha Szeto
Member of the Employment Relations Authority

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