IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 10
5639761

	BETWEEN	JUSTIS KINGI Applicant
	AND	SUPA SHAVINGS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Angela Rangitaawa, Advocate for the Applicant Russell Drake, Advocate for the Respondent
Investigation Meeting:	30 November 2016 in Otorohanga
Determination:	17 January 2017

DETERMINATION OF THE AUTHORITY

A. The employment of Justis Kingi by Supa Shavings Limited (SSL) ended by resignation at his initiative, not an unjustified dismissal by SSL.

B. Costs are reserved.

Employment Relationship Problem

[1] Justis Kingi worked for Supa Shavings Limited (SSL) from 8 June 2015 to 5 July 2016. SSL's business, based in Otorohanga, bales wood shavings that are then sold as bedding for calves and other animals. Mr Kingi was initially engaged as a contractor, providing invoices for his work, but from 2 October 2015 had worked under the terms of a written and signed employment agreement. He was employed as a baler and general hand.

[2] On Tuesday, 5 July 2016 Mr Kingi asked SSL's owner and manager Eric Tait for a pay rise. He said he got a negative response from Mr Tait, which included Mr

Tait swearing at him. Mr Kingi said he reacted by swearing at Mr Tait and leaving the premises. There was differing evidence about the words used in that exchange.

[3] Mr Kingi did not go to work on Wednesday, 6 July. On Thursday, 7 July he went to the SSL premises and spoke with his supervisor Mike Telfer about whether or not he still had a job at SSL. In the course of that conversation he gave Mr Telfer his keys for the premises. The following day, Friday 9 July, Mr Kingi telephoned SSL's office administrator Helen Thomas and asked for a copy of his employment agreement. After Ms Thomas telephoned him back to tell him a copy was ready to collect, Mr Kingi called in to pick it up.

[4] On Tuesday, 12 July Mr Kingi telephoned Mr Telfer and asked if he had received a letter from him. Neither Mr Telfer nor Mr Tait had seen any letter from Mr Kingi. After checking SSL's post box Mr Tait rang Mr Kingi, told him no letter from him had been received and asked him to drop off a copy of the letter at the office. Mr Kingi brought the letter in soon after. Mr Kingi's letter, which his mother Angela Rangitaawa had written, asked for written confirmation of his employment status, a detailed explanation of reasons if his employment had been terminated or "a mediation appointment where we can solve these matters and move forward".

[5] Later that day Mr Tait telephoned Mr Kingi and asked him to come to a meeting at SSL's office the next morning. Mr Tait said Mr Kingi could bring a support person.

[6] Mr Tait understood Mr Kingi had agreed to attend but Mr Kingi did not arrive at the nominated time of 8.30am on Wednesday, 13 July. When Mr Tait then telephoned him to ask why, Mr Kingi said he would not come to the meeting and wanted to attend mediation instead. Soon after he sent Mr Tait this text message:

> Hi Eric, just to clarify. I did not walk out on my job, I walked out on you because of the way you spoke to me. It was unnecessary and degrading. I apologise if I have offended you but I feel as though I have been dismissed unfairly. I have made application for Mediation through the Labour Department. I fear matters will not be resolved any other way. I have tried to communicate with you regarding this unfortunate predicament but to no avail. I will not subject myself to any more of your slander. I am recording all communication between us for future reference. Regards Justis.

[7] The parties eventually attended mediation, in Hamilton, on 24 August 2016 without resolving the matter. Mr Kingi then lodged a statement of problem in the Authority seeking reinstatement, lost wages and payment of some holiday pay that was withheld from him.

[8] In a letter dated 30 August SSL told Mr Kingi it had accepted his "verbal resignation". It said Mr Kingi had told Mr Tait to "stick his job" before leaving the premises and had confirmed, in a telephone conversation with Mr Tait on 12 July that he "had resigned".

[9] SSL's statement in reply to Mr Kingi's application to the Authority repeated its view that he had resigned by telling Mr Tait to "to stick his job" and said Mr Kingi had confirmed this on two subsequent occasions. It said those actions and Mr Kingi's failure to attend "an informal employment meeting" on 13 July demonstrated he had "abandoned his employment".

The issues

[10] The primary issue for determination was how Mr Kingi's employment with SSL came to an end – whether that was by him resigning on 5 July and his actions over the subsequent days, or by him abandoning his employment (either after 5 July or after not attending the 13 July meeting) or by SSL unfairly considering he had either resigned or abandoned his job. If SSL was found to have dealt with Mr Kingi unfairly, he would have been eligible for a consideration of remedies for SSL's unjustified treatment of him. Because of the conclusions reached and explained in this determination, it was not necessary to consider remedies.

[11] Two further issues, regarding payment of holiday pay and whether Mr Kingi owed SSL some money in repayment of a loan, could not be determined on the available evidence, for reasons explained later in the determination.

The Authority's investigation

[12] For the Authority's investigation witness statements were lodged from Mr Kingi, Mr Tait, Mr Telfer, Mr Thomas and two current SSL employees, handyman Andrew (Mac) McArthur and general hand Lance Uerata. Mr Uerata is the partner of Mr Kingi's sister and worked with Mr Kingi at SSL. Each witness attended the

investigation meeting and, under oath or affirmation, answered questions from me. The parties' representatives also had the opportunity to ask questions of the witnesses and provide closing submissions on the issues for determination.

[13] As permitted by 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Legal principles and obligations

[14] Through many cases about similar situations over the years the courts have developed principles on how to consider whether an employer may fairly take words said by a worker in the 'heat of the moment' as truly being a resignation. Words of resignation spoken in anger or as an emotional reaction or outburst of frustration must be treated with caution.[1] Generally what is required, if an employer is to be found to have acted fairly in accepting what appears to be words and actions by a worker ending the employment relationship, is a 'cooling off period'. Depending on the circumstances, that period might reasonably be some hours or some days. An employer, acting fairly and reasonably, will then check the situation with the worker and confirm his or her intentions before taking the employment relationship to be at an end.

[15] This obligation is consistent with the duty of good faith binding both employers and workers under s 4 of the Act. Each employer and each worker must be "responsive and communicative" as part of being "active and constructive in establishing and maintaining a productive employment relationship". This duty must, sensibly, apply in circumstances where there is doubt about whether that relationship is at end or where it is about to end as the result of action or inaction by one or other party. In the example of a 'cooling off' period following an apparent 'heat of the moment' resignation or a possible abandonment of employment, the duty requires a fair and reasonable employer to take some positive action to check the status of the relationship. It also requires the worker to participate in communication about the situation.[2]

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[1] *Boobyer v Good Health Wanganui Limited* EC Wellington, WEC 3/94, 24 February 1994 at 3.
[2] *Taylor v Milburn Lime Limited* [2011] NZEmpC 164 at [29], [32] and [34].

[16] For SSL and Mr Kingi their actions were also governed by terms of their written employment agreement. A "general termination" clause required three weeks' notice from SSL and three weeks' notice of resignation from Mr Kingi.

[17] Mr Kingi did not give three weeks' notice of the type required by his employment agreement, so his actions did not come within the scope of the general termination clause. Rather, what he said on 5 July and his actions by not working on the following days, might be described in legal terms as a 'repudiation' or unilateral termination by him of his obligations under the employment agreement. Colloquially, the question was did he resign by his own choice, or not?

[18] Because SSL suggested Mr Kingi had abandoned his employment, the following term from their employment agreement was also relevant:

> 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.

The 5 July meeting – a heat of the moment resignation?

[19] The evidence of Mr Kingi and Mr Tait differed on exactly what they each said on 5 July but their accounts revealed both had some misconceptions about certain facts that then affected what they said that day.

[20] When Mr Kingi came to see Mr Tait, Mr Tait believed Mr Kingi had been away from work the previous day without letting anyone know that he would not be coming in or why. Mr Kingi was not at work the previous day. After previous absences for sickness he had been reminded to telephone Mr Telfer by telephone if he would not be at work that day. On 4 July Mr Kingi had not telephoned Mr Telfer because he had no credit on his mobile phone. Instead he sent Mr Uerata a Facebook message asking him to tell Mr Telfer that he was sick and could not come to work. Mr Uerata passed the message on to Mr Telfer but Mr Telfer had not told Mr Tait that Mr Kingi had sent a message.

[21] On the evening of 4 July Mr Telfer sent Mr Kingi a text message asking him to come to work at 9am on 5 July and to work through until 6pm. It was likely Mr

Telfer had understood Mr Kingi was off work sick that day because Mr Telfer's text began with the words "hey, hope you feeling better".

[22] Mr Kingi, in turn, went to see Mr Tait on 5 July with the belief that his hours of work were being cut, which he saw as being a punishment for having been away from work the day before. Mr Kingi typically started work between 5am and 7am, with only occasional later starts for reasons either related to particular work needs or to attend to personal family matters. On the basis of Mr Telfer's evidence, the reason for a 9am start on 5 July was one of those occasional variations rather than a permanent change. Mr Kingi however had not seen the change that way. Earlier in the day, during a smoko break, Mr Uerata and Mr McArthur had heard Mr Kingi say he intended to speak to Mr Tait that day about getting a pay rise. Mr Uerata, from his family connection with him, knew Mr Kingi was "struggling with bills and life" on the wages he was getting. He could see Mr Kingi was agitated and urged him to "stay professional" when he talked to Mr Tait and "not let his anger take over if he does not get the pay rise or an explanation as to why his hours changed suddenly". Mr McArthur suggested that particular day might not be the best for Mr Kingi to speak to Mr Tait as he has been a "no show" the day before.

[23] Mr Tait was not expecting to meet with Mr Kingi when he arrived at his office door around 3pm on 5 July but agreed to talk with him. Mr Kingi said Mr Tait's response to his request for a pay rise was along the lines of "why the fuck should I help you?" and Mr Tait then also mentioned Mr Kingi was off work the previous day. Mr Tait denied he swore at Mr Kingi but agreed he did ask Mr Kingi to explain why he qualified for a pay rise when he had "again failed to come to work" on the previous day and had not contacted Mr Telfer about the reason.

[24] Their ensuing discussion also touched on what Mr Kingi was doing to repay a loan of $763.96 that Mr Tait had arranged for him from SSL funds in order to cover a power bill.

[25] Mr Kingi said he ended the conversation by standing up and saying: "I've worked with old cunts like you before, don't think I don't know what I'm doing, I will take you to the Labour Department". He said Mr Tait responded by saying: "If you walk out, that's it". Mr Kingi said he had then walked out "swearing and cursing".

[26] Ms Thomas, who was sitting about five metres away at her desk in an adjoining office area, said she had heard Mr Kingi call Mr Tait an "arsehole" as he walked out but had not heard what was said earlier in the discussion.

[27] Mr Tait denied Mr Kingi had used what he called "the c word" in what he said to Mr Tait but "might have thrown an 'f' in". Mr Tait also denied he said Mr Kingi would lose his job if he walked out. Mr Tait said he told Mr Kingi to "be careful" and to talk to "the Labour Department" before he did anything further. He said it was at that point Mr Kingi had said he was going to do that. Mr Tait said that before leaving his office Mr Kingi said "stick your job".

[28] Mr Uerata and Mr McArthur confirmed Mr Kingi had returned to the smoko room soon after in an agitated state. Mr Kingi's evidence was that he told Mr Uerata "That's it, fuck that old bastard" before leaving the premises. Mr Uerata's evidence was that Mr Kingi told him Mr Tait had asked "why the fuck should I help you" and he had "told Eric to shove his job up his ass". Mr McArthur's evidence was that he heard Mr Kingi say he had "told that asshole to stick his job up his ass". Mr McArthur also said he told Mr Kingi not to "do anything silly" and to calm down and "take a walk around the yard" rather than leave work. Mr McArthur said he told Mr Kingi that leaving working then would be abandoning his job. He said Mr Kingi had responded "who cares" and left.

The parties' conduct in the following days

[29] The conversation between Mr Tait and Mr Kingi on 5 July clearly ended with what amounted to a 'heat of the moment' resignation by Mr Kingi. The question then became whether SSL responded to that situation in a manner consistent with its obligations as a fair and reasonable employer, including allowing a cooling off period and actively communicating with Mr Kingi to clarify that situation, including the status of the employment relationship.

[30] While Mr Kingi did not attend work the next day, neither did Mr Tait or Mr Telfer make any attempt to contact him, either directly on his mobile number (which Mr Telfer at least had) or indirectly, such as by sending a message through Mr Uerata.

[31] Mr Kingi called into the workplace on the following day, Thursday 7 July, at his own initiative. Mr Tait was not there and Mr Kingi spoke to Mr Telfer. Their

accounts of what they recall about that interaction differ. Mr Telfer said Mr Kingi asked about coming back to work and said he would "if you want me and also give me a pay increase". Mr Telfer asked if Mr Kingi had told Mr Tait to "stick" his job and Mr Kingi confirmed he had. Mr Kingi said he asked Mr Telfer directly "do I still have a job" and Mr Telfer had gone into the next room and telephoned Mr Tait. On his return Mr Telfer told Mr Kingi that he needed to contact Mr Tait about whether he still had a job. Mr Telfer had no authority to hire or fire staff. Mr Kingi then went and got his keys for the premises and gave them to Mr Telfer. Mr Telfer said he had not asked for the keys. Mr Kingi's evidence was that he gave the keys back because he "got the impression" he no longer had a job. However Mr Kingi also confirmed Mr Telfer had told him to contact Mr Tait about "if I still have a job".

[32] After collecting a copy of his employment agreement from the SSL office on Friday 8 July, Ms Rangitaawa and Mr Kingi completed and post the letter seeking confirmation of his employment status or a "mediation appointment" under clause 33.1 of the employment agreement. That clause began with the following two sentences:

> If any employment issues arise, those should be raised with the Employer as soon as possible so that they can be resolved. If the matter is not resolved either party can seek assistance from the Department of Labour's mediation service.

[33] The letter asked for a reply by Tuesday 12 July. It had not arrived at SSL's post box by the time that Mr Kingi rang to ask about it that day. At the Authority investigation meeting Mr Tait said the original letter did not arrive by post until 18 July.

[34] In his oral evidence Mr Kingi said he asked Mr Tait on 12 July, while dropping off a copy of the letter at the SSL office, "if I could come back and he said no, you walked off the job". Mr Tait, however, could not recall having even seen Mr Kingi when he delivered a copy of the letter to the SSL office that day and denied he said Mr Kingi could not come back to work.

[35] In his written evidence Mr Kingi said it was when he had spoken to Mr Tait by telephone later that day that he asked Mr Tait if he could come back to work and Mr Tait's reply was: "No, I walked out and no one calls him an old cunt". However Mr Tait also denied that description of their conversation was accurate. He said Mr Kingi

had never used that particular swearword on 5 July so he would not have referred to it on 12 July. He also denied he said "no" as Mr Kingi claimed.

[36] On the balance of probabilities it was unlikely Mr Tait made any definitive statement to Mr Kingi on 12 July about whether he could continue to work or return to work for SSL. If Mr Tait had done so, there would have been no apparent purpose for seeking a meeting with Mr Kingi on the following day.

[37] Mr Tait gave what appeared to be a frank answer when asked at the Authority investigation meeting about what might have happened if Mr Kingi had attended the meeting planned for the morning of 13 July. Mr Tait said was "not sure now" and would have had to have seen what approach Mr Kingi took at the meeting at the time. He considered there was "a 50 per cent chance he could have been re-employed, probably with a couple of conditions put with that".

Did Mr Kingi and SSL comply with their obligations in the circumstances?

[38] By seeking to meet with Mr Kingi on the morning of 13 July, SSL complied with its obligation to check with an employee following an apparent 'heat of the moment' resignation. If Mr Kingi still considered the employment was 'on foot', that is that he had not meant to end the employment relationship permanently, he was obliged by clause 33.1 of his employment agreement to attempt to resolve the issue with his employer "as soon as possible". It was only where a matter was not resolved, that the clause contemplated mediation assistance. The meeting SSL offered, but Mr Kingi did not attend, provided an opportunity to resolve the matter and to confirm his employment status, as he had requested in his letter. If Mr Kingi considered he was, properly, still an employee of SSL he was then obliged, under s 4 of the Act, to be responsive and communicative by attending the meeting.

[39] Mr Kingi's text of 13 July was incorrect to state he had been "dismissed unfairly" on 5 July. Mr Tait did not send him away that day. Mr Kingi walked out. Even if Mr Tait swore in responding to the pay rise request, that was at worst a breach of the general duty of an employer to treat a worker fairly rather than an act of dismissal.

[40] Neither could the situation be properly described as an abandonment of employment, at least on the terms set by the relevant clause in the employment

agreement. What Mr Kingi and SSL did in the period from 6 July to 12 July did not meet the requirements of that clause.

[41] Mr Kingi did not go to work on 6 July or 11 July but he was not absent for three consecutive work days without notifying the employer as had he talked to Mr Telfer on 7 July and telephoned on 12 July to check if there was any response to his letter, and then dropped off the letter.

[42] Neither SSL had made "reasonable efforts" during that time to contact Mr Kingi that were sufficient for it to rely on the clause's automatic termination of its employment agreement with him. Mr Tait said Mr Kingi knew "the ball was in his court" after speaking to Mr Telfer on 7 July and being told to contact Mr Tait to discuss his job. SSL could take the view that Mr Kingi had to initiate any change to the situation by contacting it but could not then establish it took the "reasonable efforts to contact the employee" as required by the abandonment clause. SSL had the means by which it could reasonably have contacted him to clarify the situation in that period. It had a working mobile number on which to contact him (as Ms Thomas did on 8 July about the employment agreement and Mr Tait also did on 12 July about coming to a meeting).

[43] However, while SSL could be said to have let the matter 'drift' for several days, this was not so serious as to amount to having acted unfairly, because (when asked to confirm his employment status) it sought to meet and clarify the situation on 13 July. If it had refused to respond or had been asked to meet but declined to do so, it would not have been acting consistently with its obligation to consider whether a 'heat of the moment' resignation should stand. Rather, by his refusal to meet on 13 July, it was Mr Kingi who had not made the necessary effort. He was incorrect in his 13 July text to state that he had "tried to communicate with [Mr Tait] regarding this unfortunate predicament but to no avail". On getting his letter SSL promptly sought to meet with him. It was Mr Kingi who did not 'avail' himself of the opportunity. He was not asked to come alone on 13 July or, if he wanted more time to get advice or support for the meeting, had not asked and been refused the chance to do so.

[44] If he had not already done so by his conduct in the days between 5 July and 13 July, Mr Kingi effectively confirmed his resignation by not attending the meeting on the morning of 13 July. Enough time had passed to provide a 'cooling off' period.

While Mr Kingi had indicated he wanted to continue working for SSL, if he could do so on terms acceptable to him, he had then not taken the opportunity offered to discuss whether, when or how that could happen. The effect was that his act of resignation, by telling Mr Tait to "stick" his job and walking out of work, stood as the defining event.

[45] The result was Mr Kingi had not established he had a personal grievance for unjustified dismissal or for an unjustified disadvantage arising from actions of SSL that then caused his resignation for reasons that really amounted to a dismissal.

[46] While Mr Kingi, like any worker, had the right to ask his employer to consider a pay rise, he was not unreasonably asked to discuss the reasons for doing so. His employment agreement did provide for a 12 month pay review, but that point had not yet been reached by 5 July as, while he had worked as a contractor for some months, he had not worked a full year as an employee.

[47] Ultimately his angry response to the conversation was his responsibility, not that of his employer.

Holiday pay and the loan

[48] There were two further, interrelated issues that could not be resolved on the evidence available from both parties.

[49] SSL withheld five days' pay from the final pay made to Mr Kingi. It had done so because it believed it was entitled to do so under a clause of the employment agreement that enabled deduction of up to two weeks' wages if an employee gave less than three weeks' notice. In his evidence at the investigation meeting Mr Tait thought that SSL had since changed its position on that point, following mediation, and had paid in full all 14.36 days of holiday pay that was due to Mr Kingi. Mr Tait accepted, if it were not, that SSL would pay it.

[50] However it was also unclear the extent to which Mr Kingi may have repaid some or all of the outstanding amount of the loan for $763.96 advanced to him in January 2016 in order to pay a power bill. Mr Kingi had also borrowed $200 in cash from Mr Tait but this was accepted to have been paid back by work he did cutting firewood at the business. Mr Kingi suggested, however, that he also no longer owed

the money loaned for the power bill because he had "worked it off" by doing more work cutting firewood than SSL had accounted for.

[51] The result was that the Authority did not have sufficient reliable information to make a determination on whether Mr Kingi remained due any holiday pay or SSL remained due any of the loan. There were insufficient documents and evidence to confirm either point, either way.

Costs

[52] Costs are reserved. If there is any issue regarding costs, the parties are encouraged to resolve that between themselves. In the event that they are not able to do so and an Authority determination is required, SSL may lodge and serve a memorandum in the Authority within 28 days of the date of this determination. Mr Kingi would then have 14 days to lodge a response. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] Generally, if asked to determine costs, the Authority's assessment begins from its usual notional daily rate and then considers whether any particular circumstances or factors require an upward or downward adjustment of that tariff.[3] As a preliminary indication, this particular matter may be one where costs could reasonably lie where they fall or, if not, the limited financial circumstances of Mr Kingi would warrant only a modest award paid in instalments over a short period.

Robin Arthur
Member of the Employment Relations Authority

[3] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].