IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE

[2025] NZERA 133
3305020

	BETWEEN	SUSAN BATES Applicant
	AND	BEAGLE CONSULTANCY LIMITED Respondent

Member of Authority:	Davinnia Tan
Representatives:	Costas Matsis, advocate for the Applicant Stephen Galbreath, counsel for the Respondent
Investigation Meeting:	11 December 2024 in Wellington
Submissions received:	At the investigation meeting 15 December 2024 from the Applicant (reply)
Determination:	5 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Bates' claim is that she was employed by Beagle Consultancy Limited (BCL) and was unjustifiably dismissed on 25 March 2024.

[2] BCL's response is that Ms Bates was not an employee and that the matter is a dispute over relationship property; alternatively, that the dismissal was justified.

Background

[3] BCL provides building consultancy services. Its sole director and shareholder is Dr Robin Wakeling.

[4] Ms Bates and Dr Wakeling were married from 1989 until their separation around January 2023.[1] Prior to their separation, Ms Bates was also a director and shareholder of BCL from 17 August 2005 until July 2024, during which time she provided office and accounting support. There were no other employees or shareholders.

[5] On 1 June 2023 Ms Bates and Dr Wakeling entered into a separation agreement. This separation agreement included a written employment agreement (IEA) setting out the following:

- BCL would employ Ms Bates on a two-year fixed term basis from 17 June 2023 until 17 June 2025 and on a part time basis, 10 hours per week, as an Accounts Manager;
- BCL would pay Ms Bates a salary of $130,000 gross per annum;
- Clause 4.3 provided that "The parties acknowledge and agree that the Employer has genuine reasons for employing the Employee for a fixed term. Such reasons are set out in Schedule 1."
- The reasons as set out in Schedule 1 noted that:
  - Ms Bates and Dr Wakeling were in a relationship,
  - That they both separated and entered into an agreement under s21A of the Property (Relationships) Act 1976 to settle the division of relationship property,
  - The Company was relationship property,
  - Ms Bates provided accounting and financial assistance to BCL;
  - As part of the agreement, they agreed for Dr Wakeling to solely own BCL and for Ms Bates to continue to provide financial and accounting assistance for a fixed term period to facilitate the transition of the company to Dr Wakeling.

- Schedule 2 set out Ms Bates' position description as an Accounts Manager which included:

> arranging and authorising tax payments, salary payments, credit card payments and other bill payments;
>
> …

[1] Ms Bates and Dr Wakeling were unable to agree on the exact date of their separation.

if requested to do so, and if reasonable information and cooperation is provided, helping Dr Wakeling anticipate and plan for future expenditure to try and ensure that funds are available to cover direct debits and other outgoings.

- Clause 9.1 provided that "Either party may terminate this Agreement by giving 3 months' notice in writing to the other…"

[6] During Ms Bates' employment, she received a fortnightly salary from BCL. Ms Bates would typically start her working day around 7:30AM or 8:00AM. If she wanted to take annual leave, she would inform Dr Wakeling. Clause 8.1.4 of her IEA states that other than as provided under the Holidays Act 2003, she had "total discretion to choose how and when she will take her annual leave entitlement. She shall give the Employer reasonable notice of the dates that she is to be on leave."

[7] Within a few months after entering into their agreement and the IEA, Ms Bates and Dr Wakeling found working with each other difficult and often exchanged emails to communicate their disagreements about work but also personal matters.

[8] On 29 August 2023, they had an email exchange in which Ms Bates said to Dr Wakeling that they did not have a "normal professional relationship" and that she was "not ready to talk" to him over 'zoom' calls after Dr Wakeling expressed a desire to have monthly virtual calls to go over "up coming monthly accounting issues".

[9] Ms Bates later explained that her characterisation of the relationship as "not a normal professional relationship" with Dr Wakeling was to acknowledge the fact she has a "long personal history with her employer" which she did not consider was usual in an employment relationship.

[10] Ms Bates stated she had always found communications with Dr Wakeling aggressive and he often questioned things which had already been agreed in their separation agreement; she recognised that communications with him could turn "ugly" having been on the "receiving end of angry and loud shouting" which she says was often not about work matters; and hence, for those reasons she referred to their relationship as "not a normal professional" one. Dr Wakeling disputed that he shouted at Ms Bates over the phone. Emails continued to be the primary form of communication between Dr Wakeling and Ms Bates following the email exchange of 29 August 2023.

Both Dr Wakeling and Ms Bates also continued to express frustration with each other about work matters.

[11] In early 2024, Dr Wakeling had asked Ms Bates for a "tax repayment plan" for the purposes of helping BCL pay its "2023 and 2024 tax and other outgoing payments".

[12] In the process of putting a tax plan in place for BCL, Ms Bates sought information from Dr Wakeling which included his monthly budget for his personal living expenses. Her request for this information became the catalyst for a dispute between them because they were unable to agree on what constituted reasonable information and cooperation. This disagreement ensued over a series of extensive email exchanges throughout February 2024 between them. On one hand, Ms Bates felt she needed to know what Dr Wakeling's expenses were to comply with her job description which included "helping Dr Wakeling anticipate and plan for future expenditure to try and ensure that funds are available to cover direct debits and other outgoings". On the other hand, Dr Wakeling did not consider his personal living expenses as the type of detail required for the task he had given Ms Bates. The disagreement resulted in further disagreement over several lengthy email exchanges in February 2024 as to form and detail of the tax plan, including how they were meant to be communicating with each other in a working relationship, with Ms Bates citing clauses from their IEA about communicating with each other in a respectful and reasonable manner; and Dr Wakeling citing good faith provisions of the Employment Relations Act 2000. To summarise, both Dr Wakeling and Ms Bates found greater difficulty working and communicating with each other.

[13] Eventually on 21 February 2024, Dr Wakeling sent Ms Bates a lengthy email prior to a scheduled virtual meeting. In this email, he made reference to termination of employment:

> […] I have asked you to provide a tax payment schedule and complementary information to reassure me that I will be able to pay my 2023 and 2024 tax and still pay you but you haven't provided this and you seem to be saying this cannot be done until I give you information on my expenses. This is incorrect as I have asked you to base calculations on my salary. This was what I wanted to talk about… You often ignore important suggestions and this is unacceptable. You have ignored so many of my reasonable suggestions about a resolution and suggested compromises and in the

> absence of any sign that this will change we should commence a termination of employment…
>
> I want to go over a robust projection of monthly tax payments for the whole period covering 2023 and 2024 tax during the period of our financial tie based on my salary and your "salary" and over outgoings that you are already familiar with and I need this before we start the meeting.

[14] On 21 February 2024, Ms Bates emailed Dr Wakeling advising that she would be taking some sick leave on 22 February 2024 as she had been "extremely distressed" by his "recent actions and behaviour", asked not to be contacted via text message and stated that she will not be checking emails from him "until Monday, possibly later". She also advised him that she would be taking annual leave from 4-6 March 2024 and 11 March 2024. In this email she included the following:

> The GST return is due next Wednesday. I cannot file it if you do not wish me to touch the bank accounts, and if you continue to take large amounts of money you will not be able to make the payment.

[15] Dr Wakeling replied that evening and advised Ms Bates that there was sufficient funds in the account in order to make the payments, then he stated that they had "an untenable arrangement", but noted "on the plus side for you is that you will have 3 months notice instead of the normal 2-4 weeks- another concession that I agreed to from which you will benefit."

[16] Ms Bates replied on 27 February 2024 and asked him to clarify if he was giving her notice of termination of their employment agreement. He did not respond.

[17] On 13 March 2024, Dr Wakeling emailed Ms Bates' advocate, Mr Matsis. Dr Wakeling advised that he had received Mr Matsis' email dated 22 February 2024 from his lawyer the day before. Mr Matsis' email had stated that he had been instructed by Ms Bates and that Dr Wakeling was in breach of the following obligations of the IEA:

a. to provide her with all information, documentation, and cooperation reasonably required to allow Ms Bates to undertake her employment duties;
b. accept and abide by the bill payment protocol;

c. communicate with her only about work-related issues and only in a respectful and reasonable manner;
d. treat Ms Bates at all times with respect and courtesy.

[18] In the email, Mr Matsis stated that Ms Bates was concerned that there would not be sufficient funds for BCL to pay her salary. Mr Matsis also stated his concern that if Dr Wakeling "forces" Ms Bates to resign, "he will have to pay her out the balance of her salary."

[19] In his email to Mr Matsis on 13 March 2024, Dr Wakeling included comments which refuted several claims made by Ms Bates. He also noted that Ms Bates had refused any face to face contact and was "reticent about organising the first work related zoom to discuss management of tax issues" and hence he was "struggling to see how [he could] continue to employ someone in such an important role when they continue to place such restrictions on normal levels of contact and communication." Dr Wakeling then stated that "this is in part why I have indicated that I am reviewing Susan's position and why, if nothing changes with respect to Susan's input I may have little choice other than to give Susan notice." The email ended with Dr Wakeling stating that "If I give Susan notice it will be for reasons beyond my control e.g., because Susan has failed to address the tax issues referred to and/or because the Beagle income does not allow payment of her salary, etc…".

[20] On 25 March 2024 at 2:13AM, Dr Wakeling sent an email to Ms Bates terminating her employment as follows:

> Dear Susan
> It is with considerable regret that I have to inform you that due to difficult circumstances your employment with Beagle will end after the notice period in your employment contract from today.
> […]

[21] On 3 April 2024, Dr Wakeling emailed Mr Matsis advising that he gave Ms Bates notice of her employment terminating which had not been acknowledged. Mr Matsis replied on 5 April 2024 raising a personal grievance of unjustified dismissal.

The Authority's investigation

[22] For the Authority's investigation written witness statements were provided by Ms Bates and Dr Wakeling. They answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions. At my request, Mr Matsis' reply submissions were provided following the investigation meeting.

[23] All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

The issues

[24] The issues requiring investigation and determination were:

(a) Whether there was a genuine employment relationship between Ms Bates and BCL;

(b) Whether Ms Bates was unjustifiably dismissed by BCL;

(c) If BCL's actions were not justified what remedies should be awarded, considering:

  (i) Lost wages;

  (ii) Compensation under s123(1)(c)(i) of the Act; and

  (iii) Any other monies owed (i.e. redundancy or other monies owed under the parties' employment agreement)

(d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Bates that contributed to the situation giving rise to the grievance?

(e) Should either party contribute to the costs of representation of the other party?

Submissions

[25] Ms Bates submitted that:

a. she was an employee as defined under the Act and she was unjustifiably dismissed;

b. She is claiming

  i. Three months' lost salary;

ii. Six months' salary by way of redundancy compensation under the IEA;
iii. Compensation under s 123(1)(c)(i) of the Act between $12,000.00 and $50,000.00;
iv. Special damages of $11,845.00; and
v. Costs.

[26] BCL submitted that:

a. There is no employment relationship problem because the real nature of the relationship was one of contractor/principal, not employment;
b. If the relationship was one of employment:
    i. The Authority does not have jurisdiction as this is essentially a dispute over a relationship property settlement to which other statutes apply;
    ii. Ms Bates was justifiably dismissed due to her failure to communicate to follow reasonable instructions, having been warned this could lead to her dismissal on several occasions;
    iii. Ms Bates has not lost any wages as a result of her dismissal because during the notice period BCL offered to continue her employment and she unreasonably refused the offer;
    iv. Ms Bates has not established that she has taken reasonable steps to mitigate her losses;
    v. Ms Bates was not dismissed due to redundancy;
    vi. An assessment of her lost wages should be based on the market rate. The best evidence of that is $16,083 per annum;
    vii. She did not suffer significant humiliation, loss of dignity or injury to her feelings; any hurt feelings she suffered existed prior to the commencement of her employment.

Was there a genuine employment relationship?

[27] In assessing whether a person is an employee, s 6(2) of the Act requires the Authority to determine the real nature of the relationship. Such assessment informs consideration of whether the relevant person is employed do work for hire or reward under a contract of service.[2] All relevant matters must be considered, including those

[2] Employment Relations Act 200, s6(1).

indicating the intention of the parties.[3] However, any statements describing the nature of their relationship are not determinative.[4]

[28] Section 6 of the Act requires that the Authority consider all relevant matters. In *Bryson v Three Foot Six Ltd* Blanchard J commented on what "all relevant matters" includes, and referred also to the relevant common law tests as to the assessment of whether a person is an employee:[5]

> "All relevant matters" certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his own account (the fundamental test), which were important determinants of the relationship at common law….

[29] In *Leota v Parcel Express Limited*[6], the Court stated:

> An employee works for the employer, and the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

Analysis

[30] I acknowledge that Ms Bates' relationship with BCL was atypical to a certain extent because she had previously been a director and shareholder of BCL, was married to BCL's sole director and shareholder, and her fixed term employment agreement was a product of her legal separation from Dr Wakeling.

[31] Notwithstanding these characteristics, having reviewed the evidence, I consider that Ms Bates was an employee of BCL. My reasons follow.

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[3] Employment Relations Act 200, s6(3)(a).
[4] Employment Relations Act 200, s6(3)(b).
[5] *Bryson v Three Foot Six Limited (No 2)* [2005] NZSC 34, at [32], Blanchard J on behalf of the Court.
[6] *Leota v Parcel Express Limited* [2020] NZEmpC 61.

[32] One of the significant factors of the working relationship, was that both Ms Bates and BCL had a shared intention of an employment relationship. This was demonstrated by the detail and considered clause-by-clause drafting of their employment agreement. Whilst it was argued on behalf of Dr Wakeling that the drafting changes sought by Ms Bates' counsel was atypical of an employment agreement (such as Ms Bates' ability to take annual leave and amend her location of work at her discretion), I note that it was open to the parties to have put in place a contracting arrangement but they chose not to do so.

[33] As BCL's sole employee who had also done the tasks of the role for many years previously as BCL's director, it was logical for Ms Bates to draft the initial position description because she was the one who knew what the role entailed better than Dr Wakeling. I also consider that the provision which allowed Ms Bates to choose the location of her work was inconsequential because BCL did not have any offices. Having legally separated, I did not find this unusual nor would expect Ms Bates to undertake work in their former residential home. Their shared intention of an employment relationship was also reflected by Dr Wakeling's own acknowledgement to Ms Bates that he had to comply with the notice period set out in the agreement and considered himself bound by the written agreement. Both Dr Wakeling and Ms Bates also referred to employment specific obligations throughout their working relationship. I am not persuaded that their intention could be anything other than an employment relationship notwithstanding their personal history.

[34] Ms Bates was central and integral to BCL's operations to comply with its tax and payment obligations. This was not disputed in either party's evidence given that paying tax and other outgoings is a core part of BCL's operations, which Ms Bates undertook as her primary function as BCL's accounts manager. In practice, Ms Bates and Dr Wakeling would exchange emails discussing BCL's operations, the requests for tasks to be done, for upcoming bills to be paid and for other administrative matters to be conducted, was also indicative that Ms Bates was integral to BCL's day-to-day operations.

[35] Ms Bates was economically dependent on BCL. She was not operating her own business or self-employed. Ms Bates' tax was automatically deducted from her salary by BCL and Ms Bates' work was subject to the direction of BCL.

[36] I acknowledge that Dr Wakeling's evidence would suggest he felt a lack of control over how Ms Bates' work was to be done, but BCL had the right to assert control over her work activities. Dr Wakeling tasked Ms Bates with producing a tax plan for BCL which she undertook (and was obliged to undertake), albeit to his dissatisfaction with how the task was to be performed.

[37] Having reviewed the evidence against the legal tests, I find there was an employment relationship between Ms Bates and BCL.

[38] For these reasons I also reject the submission that the dispute was about relationship property and that the Authority does not have jurisdiction to consider the dispute. Ms Bates' claims arise under an employment relationship and are therefore employment relationship problems which the Authority has jurisdiction over.

Whether Ms Bates was unjustifiably dismissed

[39] To determine the justification of a dismissal by the employer complained of under s 103(1)(a) of the Act the Authority applies the test in s 103A of the Act on an objective basis.

[40] When considering whether Ms Bates' dismissal was justified, I must apply the test of justification set out at s 103A of the Act. I must consider whether:

a. BCL sufficiently investigated allegations/matters giving rise to its concerns;
b. BCL raised the concerns that he had with Ms Bates before dismissing her;
c. BCL gave Ms Bates a reasonable opportunity to respond to those concerns before dismissing her; and
d. BCL genuinely considered Ms Bates' explanations before dismissing her.

[41] I may also take into account any other factors I think are relevant.

Submissions

[42] Counsel for Ms Bates submitted that the termination was by way of redundancy on the basis that:

a. Ms Bates was dismissed by email at 2:13AM on 25 March 2024 without reason other than a reference to "difficult circumstances": and

b. Dr Wakeling later claimed the termination was due to "financial pressures" in his email of 10 April 2024 to Ms Bates' lawyer.

[43] Mr Galbreath submitted that BCL was justified in giving Ms Bates notice of termination and that action was what a fair and reasonable employer could have done in all of the circumstances. This is because:

a. Ms Bates was unable to communicate other than by email with Dr Wakeling and did not make him aware of this prior to the working relationship commencing and therefore this amounts to a failure to disclose in breach of her IEA;
b. Ms Bates repeatedly failed to properly assist BCL with its reasonable request to manage payment of its tax liability and breached her duties; and caused Dr Wakeling significant stress;
c. Ms Bates failed to follow instructions to clear out a storage unit rented by BCL;
d. Ms Bates mismanaged BCL's accounts that she had access to as an employee;
e. Dr Wakeling had warned Ms Bates he may end her employment on several occasions.

Analysis

[44] I consider that while Dr Wakeling had given Ms Bates notice of termination under the terms of the IEA, he was unjustified in doing so. In reaching my view, it is helpful to step through the events that led to Dr Wakeling terminating Ms Bates' employment.

[45] The parties' inability to work harmoniously came to a head on 21 February 2024 when Dr Wakeling expressed to Ms Bates that he felt she had not undertaken a task he had requested her to do because she would only do it if he provided certain information to her which he felt was not necessary for the task. He expressed to Ms Bates that she ignored many of his suggestions on how to resolve the task and that unless this changed, "we should commence a termination of employment". There were also several other disputes as set out above, where Ms Bates and Dr Wakeling had a serious difference of opinion.

[46] In Ms Bates' response to Dr Wakeling on 21 February 2024, she advised Dr Wakeling she was taking sick leave due to feeling distressed by Dr Wakeling, and she also advised him she would take annual leave in March. The last day of annual leave was 11 March 2024. In that same email, she also advised Dr Wakeling that she would be unable to file a GST return if she was not given access to a bank account. Ms Bates did not respond to Dr Wakeling's suggestion that termination of employment should "commence".

[47] Dr Wakeling then replied, citing the three month notice period in the employment agreement. On 27 February 2024, Ms Bates asked Dr Wakeling if he was giving her notice. Then on 13 March 2024, she engaged counsel, Mr Matsis, who alleged that BCL did not comply with specific terms of the IEA to allow Ms Bates to undertake her work. Dr Wakeling then replied to Mr Matsis disagreeing and again stating that "if nothing changes I may have little choice other than to give [Ms Bates] notice." Dr Wakeling then stated that "this is in part why I have indicated that I am reviewing Susan's position and why, if nothing changes with respect to Susan's input I may have little choice other than to give Susan notice." The email ended with Dr Wakeling stating that "If I give Susan notice it will be for reasons beyond my control e.g., because Susan has failed to address the tax issues referred to and/or because the Beagle income does not allow payment of her salary, etc…"

[48] On 25 March 2024, Dr Wakeling gave Ms Bates notice of termination.

[49] Having reviewed the emails exchanged between the parties, I find that Dr Wakeling did not raise issues in a manner in which there was an invitation or opportunity to hear Ms Bates' side of the story other than a desire for things to "change", without providing specificity on what that meant. It was clear that both parties were wedded to their individual opinion on how the task (completing a "tax plan") should be completed and were not willing to move on that point. Although it is argued that Dr Wakeling warned Ms Bates of possible termination, this alone was inadequate.

[50] The only time Dr Wakeling indicated a willingness to meet was solely related to tasks and not to resolve employment relationship problems generally.

[51] During the investigation meeting, Dr Wakeling's rationale for terminating the IEA was based on the fact they were at odds on how the tax plan should have been done, and how they communicated. In his view, there was too much disagreement

between the two as to how work should be performed, and that Ms Bates would not meet to discuss these matters, which led to an unworkable employment relationship.

[52] Ms Bates did not dispute the difficulty in reconciling their differing views on how the tax plan needed to be completed and defended her refusal to meet with Dr Wakeling on certain occasions due to what she considered to be disrespectful communications, in breach of specific IEA obligations owed to her.

[53] I conclude that both parties found working with each other more challenging than they had envisaged when they entered into the IEA, and Dr Wakeling decided to give Ms Bates notice of termination as a way to end those challenges.

[54] Dr Wakeling has not acted as a fair and reasonable employer could. The obligation to ensure a termination is substantively and procedurally justified lies with the employer. Substantive and procedural fairness required more than simply referring to a notice period in an IEA after being unable to easily resolve a disagreement about a work matter. BCL was required to give Ms Bates a reasonable opportunity for her to respond to BCL's concerns and then genuinely consider them before terminating her employment.

[55] Dr Wakeling did not step through a fair dismissal in accordance with the Act. There had been a disagreement exchanged via a series of emails and against a background of a difficult relationship to begin with, which led to Dr Wakeling warning Ms Bates of the termination provisions of her IEA.

[56] Dr Wakeling did not provide Ms Bates a real opportunity to respond and then consider her response. The reference to termination in his emails to Ms Bates was an unreasonable reaction to a dispute he was unable to resolve with Ms Bates in the manner in which he had hoped to. Dr Wakeling's later attempt to rescind his notice of termination reinforces that it was a response to how he was feeling at that time. Accordingly, BCL's dismissal of Ms Bates was not what a fair and reasonable employer could have done in all the circumstances at that time.

[57] Mr Matsis has submitted that the dismissal was effectively a redundancy. I do not agree. Although Dr Wakeling had responded to Mr Matsis on 10 April 2024 stating that he had given Ms Bates 3 months' notice of her employment termination due to changes "in response to financial pressures" and that "one of the consequences of this

was termination" of Ms Bates' employment, Dr Wakeling also referred to the significant problems between them regarding their expectations of the role Ms Bates was employed to undertake, and failed communications. This email does not persuade me that the real reason for Ms Bates' dismissal was financial. Rather, I attribute it to the breakdown in their relationship, communication, and differences in opinion.

Remedies

Lost wages – s 123(1)(b)

[58] With respect to wages, s 128(2) of the Act requires the payment of the lesser of a sum equal to lost remuneration or three months' ordinary time remuneration. Ms Bates is seeking three months of lost remuneration which equates to $32,500.00.

[59] Although Ms Bates was paid her notice period of three months, her fixed term employment was not due to expire until 17 June 2025, almost 15 months away.

[60] As such I consider she is entitled to three months of lost remuneration, $32,500.00.

Compensation for humiliation, loss of dignity and injury to feelings

[61] As Ms Bates' unjustifiable dismissal claim is made out, she is entitled to compensation for humiliation and injury to feelings pursuant to s 123(1)(c)(i) of the Act. Ms Bates is seeking an award of $30,000.00- $40,000.00. It was submitted that Ms Bates suffered immense distress and anxiety, resulting in her mental state deteriorating significantly, including panic attacks, poor sleep, stress from ongoing financial uncertainty, and a sense that she was betrayed having trusted the protections of her IEA.

[62] Mr Galbreath submitted that Ms Bates has not suffered significant harm as a result of the dismissal because the dismissal did not come out of the blue. She worked remotely, and there were no other staff and hence any humiliation would have been minimal. Counsel also submitted that any significant emotional harm pre-dated the dismissal as Ms Bates had sought help to manage distress and anxiety as a result of Dr Wakeling's communications to her during employment. As such it was submitted that the dismissal did not cause any emotional harm.

[63] I have no doubt that Ms Bates felt humiliated and distressed as a consequence of the dismissal. I accept that Ms Bates experienced the stress of potentially not being

able to finance the new purchase of a house. I do not agree with BCL that she did not suffer significant harm from the dismissal and consider it artificial to separate the anxiety and distress experienced as a result of the employment relationship prior to and following the dismissal given that it arose from the dispute between the parties which eventually led to termination.

[64] I am also cognisant of the fact that under the IEA, Ms Bates had an expectation that she would have employment for at least two years which was till 17 June 2025. It was on this basis Ms Bates sought to secure a new property following her separation from Dr Wakeling. As the Employment Court stated in *Pyne v Invacare NZ Ltd* [7], in the context where harm arises from an employee's expectation of job security, "an employee is entitled to expect that their employment will not be terminated without proper justification – this is what the personal grievance framework is intended to preserve." [8]

[65] Having balanced the evidence against current trends in both the Court[9] and the Authority, I consider $15,000.00 appropriate in these circumstances.

Contributory conduct

[66] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[67] Mr Galbreath submitted that Ms Bates significantly contributed to the situation that gave rise to the dismissal such as refusing to communicate except by email and, in BCL's opinion, failing to comply with reasonable instructions and mismanaging BCL's accounts and refusing to clear out personal items from BCL's storage facility.

[68] Having reviewed the evidence, I consider that the manner in which Ms Bates chose to communicate with Dr Wakeling is relevant when considering contributory conduct.

[69] In these circumstances, Ms Bates' refusal to discuss the concerns that Dr Wakeling had raised (in order to resolve their difference in opinion on how the tax plan needed to be completed) left Dr Wakeling in a difficult situation as to how to move

[7] *Pyne v Invacare NZ Ltd [2023] NZEmpC 179.*
[8] *Pyne v Invacare NZ Ltd [2023] NZEmpC 179 [at 45].*
[9] *Pyne v Invacare NZ Ltd* [2023] NZEmpC 179; *GF v Customs* [2023] NZEmpC 101; *Pact Group v Robinson* [2023] NZEmpC 173.

forward. Although I accept that Ms Bates may have needed some time to process matters raised before having a discussion with Dr Wakeling, Ms Bates did not, in her evidence, show a genuine willingness to resolve their differences in a responsive and communicative way, which is a failure on her part to act in good faith as required under s4 of the Act. As such, I consider that Ms Bates' actions were a contributory factor which I must take into account.

[70] I find that the degree of Ms Bates' contribution to her dismissal was not insignificant and was not unintentional.

[71] For these reasons, I consider it appropriate and proportionate to make a deduction of 5% to the award of $15,000.00.

Special damages

[72] Ms Bates is seeking special damages of $11,845.00 due to legal fees incurred. It was submitted, citing *Stormont v Peddle Thorp Aitken*[10], that it is accepted that legal fees for expenses incurred prior to the issuing of proceedings can be claimed as special damages where the costs were reasonable and necessary.

[73] The invoices provided in support of these submissions were as follows:

a. $6,159.40 on 31 October 2023 for: "professional services rendered between 1 September 2023 and 31 October 2023 in respect of payment issues and disputes with Robin";
b. $2,724.35 on 31 March 2024 for: "various email exchanges …regarding various actions and breaches by Robin and Beagle Consulting Limited", "advising…on relevant matters, including in respect of…termination", "drafting email…on your behalf" and "reporting to you" and "all incidental attendances";
c. $2,961.25 on 31 May 2024 for "various email exchanges and telepgone discussions…", "advising on next steps", "drafting personal grievance … and advising"; "reporting to you", and "all incidental attendances".

[74] Mr Galbreath opposes the awarding of special damages on the basis that the invoices of:

[10] *Stormont v Peddle Thorp Aitken* [2017] NZEmpC71.

a. 31 October 2023 was unrelated to the dismissal of March 2024 and cannot be recovered;
b. 31 March 2024 related largely to matters prior to the dismissal;
c. 31 May 2024 related to the period following dismissal and pre-Authority proceedings but it is not clear whether this invoice also related to non-employment matters such as the Separation Agreement.

[75] I consider that the award of special damages in *Stormont v Peddle Thorp Aitken*[11] were based on unusual circumstances where a "bright line"[12] could be drawn between the costs associated with the flawed redundancy process in those circumstances and the legal costs incurred as part of proceedings. In these circumstances, I agree that the invoice of 31 October 2023 is unrelated to the dismissal; and the invoices of 31 March 2024 and 31 May 2024 lack sufficient detail to satisfy me that it related *solely* to the dismissal, even when viewed against all the correspondence between the parties.

[76] The circumstances surrounding the issues at hand were not, in my opinion, unusual, so as to warrant an award of special damages. Claims for special damages are therefore declined. I find that any legal costs associated with proceedings must properly be treated as 'costs' and I reserve determination on any costs issues, as set out below.

Orders

[77] For the reasons set out above, I consider that Ms Bates' claim of unjustifiable dismissal has been made out. Accordingly, I order Beagle Consulting Limited to pay Ms Susan Bates within 28 days of the date of this determination:

a. $32,500.00 (lost wages under s123(1)(b) and s128 of the Act); and

b. $14,250.00 compensation under s 123(1)(c)(1) of the Act (after a 5% reduction for contributory conduct).

Costs

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

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[11] *Stormont v Peddle Thorp Aitken* [2017] NZEmpC71.
[12] *Stormont v Peddle Thorp Aitken* [2017] NZEmpC71, at para [96].

[79] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Bates 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 BCL 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.

[80] 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.[13]

Davinnia Tan
Member of the Employment Relations Authority

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