

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 375
3010232

BETWEEN DOUGLAS MUIRHEAD
 Applicant

AND DEBEC MANAGEMENT
 LIMITED
 Frist Respondent

AND DEBEC BUILDING
 SOLUTIONS LIMITED
 Second Respondent

Member of Authority: Vicki Campbell

Representatives: Kate Ashcroft for Applicant
 Mark Beech for Respondent

Investigation Meeting: 1 September 2017

Submissions Received: 8 and 20 September 2017 from Applicant
 15 September 2017 from Respondent

Determination: 6 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Muirhead was an employee of both Debec Building Solutions Limited and Debec Management Limited.**
- B. Debec Building Solutions Limited and Debec Management Limited are jointly ordered to pay to Mr Muirhead arrears of wages including holiday pay of \$4,878.77 under section 131 of the Employment Relations Act within 28 days of the date of this determination. Interest will accrue at the rate of 5% per annum from 19 May 2017 until paid in full.**

- C. Mr Muirhead was unjustifiably dismissed.**
- D. Debec Management Limited and Debec Building Solutions Limited are jointly ordered to pay to Mr Muirhead the following sums within 28 days of the date of this determination:**
- 1. Lost wages of \$7,830 under s 123(1)(b) of the Employment Relations Act;**
 - 2. Compensation of \$5,000 under s 123(1)(c)(i) of the Employment Relations Act;**
 - 3. Compensation of \$1,153.84 under s 123(1)(c)(ii) of the Employment Relations Act**
- E. The application for a penalty for breaches of good faith is declined.**

Employment relationship problem

[1] In August 2016 Mr Douglas Muirhead entered into two separate agreements with two different but closely related companies. An individual employment agreement dated 5 August 2016 was signed by Mr Muirhead and a representative of Debec Management Limited. A second agreement titled “Contracting Agreement for Services” dated 7 August 2016 was signed by Mr Muirhead and a representative of Debec Building Solutions Limited.

[2] Debec Building Solutions trades as Landmark Homes in Tauranga and was the vehicle used by its directors and shareholders, Mr Haggie and Ms Zandstra, to enter into contracts with clients to build houses.

[3] Debec Management was the vehicle used by its directors and shareholders, Mr Haggie and Ms Zandstra, to enter into employment agreements for all those working on the building projects. Debec Management had responsibility for the payment of salaries and other benefits.

[4] Both the employment agreement and the contracting agreement had ended by 19 May 2017.

[5] Mr Muirhead says he did not receive the remuneration promised under the contracting agreement and claims payment by way of arrears of wages. To succeed in this claim Mr Muirhead must establish that he was an employee of Debec Building Solutions and not an independent contractor.

[6] Mr Muirhead also says that one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of Debec Management and/or Debec Building Solutions and that he was unjustifiably dismissed. Further, Mr Muirhead claims Debec Management and/or Debec Building Solutions breached its obligations of good faith and asks the Authority to impose penalties.

Issues

[7] The issues for determination are:

- a) What was the real nature of the relationship between Mr Muirhead and Debec Building Solutions?
- b) Is Mr Muirhead owed any wage arrears?
- c) Was Mr Muirhead unjustifiably dismissed and if so what, if any, remedies should be awarded?
- d) Were one or more conditions of Mr Muirhead's employment affected to his disadvantage by unjustifiable actions of Debec Management and/or Debec Building Solutions and if so what, if any, remedies should be awarded?
- e) Did Debec Management and/or Debec Building Solutions breach the statutory duty of good faith and if so what if any penalty should be imposed?

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Muirhead, Debec Management and Debec Building Solutions but has stated findings

of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What was the real nature of the relationship?

[9] During the construction of Mr Muirhead's own home by Debec Building Solutions he started having discussions about the prospect of employment. Mr Muirhead was working remotely for his then employer and he was looking to move permanently to Tauranga. Debec was looking for a Project Manager.

[10] The parties agreed to split the relationship between the two companies. Debec Management would enter into an employment agreement and pay an agreed salary plus other benefits including the provision of a company vehicle. Debec Building Solutions would enter into a separate relationship and pay a "fee for service" in the following terms:

- Each contract that is signed within Debec Building Solutions Ltd \$1,613.35 + GST will be applicable and payable at floor down stage.
- Drafting/prelim deposits received by the consultants \$322.67 + GST (payable on cleared funds from the client will be payable).

[11] There is no dispute that Mr Muirhead was an employee of Debec Management and received payments of salary and other benefits. A dispute has arisen about the real nature of Mr Muirhead's relationship with Debec Building Solutions.

[12] The onus of establishing whether Mr Muirhead was an employee of Debec Building Solutions rests with him on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Act which states:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[13] Section 6(3) states:

For the purposes of subsection (2), the court of the Authority-

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[14] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd*.¹

[15] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:²

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[16] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice then to apply the three tests known as the control, integration and fundamental or economic reality test.

[17] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.³

[18] The Court in *Atkinson v Phoenix Commercial Cleaners Ltd* noted:⁴

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties’ common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine with Mrs Atkinson was Phoenix’s employee.

¹ [2005] ERNZ 372.

² [2010] NZEmpC 77 at [20].

³ Ibid at [21].

⁴ [2015] NZEmpC 19 at [58].

Intention of the parties

[19] Emails were exchanged between Mr Muirhead and Ms Zandstra between May and July 2016 setting out offers and counter offers under which the arrangement between Mr Muirhead, Debec Management and Debec Building Solutions would operate.

[20] The emails show all parties intended there to be a division to the way Mr Muirhead would be remunerated for his work. This included a salary component and payment of “contract rates” which Mr Haggie has referred to as “bonus” payments. The bonus payments applied to building contracts entered into by Debec Building Solutions and its clients and would attract payment at the floor down stage; and to deposits paid for drafting and preliminary jobs which would attract a payment on confirmation of cleared funds.

[21] The total salary/bonus payments were estimated based on contracts signed and drafting/preliminary work undertaken by Debec Building Solutions over the 12 months immediately prior to the negotiations. This was estimated as \$118,075 but was contingent on the same or approximately the same numbers being achieved during Mr Muirhead’s employment.

[22] On 28 July Ms Zandstra set out two options for Mr Muirhead to consider. Both options included the split between an employment agreement and a contract for services arrangement and stated that Mr Muirhead would be responsible for his own GST/ACC and Tax for the contracting component of the relationship.

[23] In an email from Mr Muirhead to Ms Zandstra and Mr Haggie on 27 July 2016 Mr Muirhead advised that he would need assistance to set up for GST and ACC payments in respect of the contracting agreement.

[24] While the values of the different components of the overall package applicable to both agreements altered during the negotiations the objective of achieving a total remuneration package equivalent to about \$118,000 did not.

[25] The two agreements signed by Mr Muirhead reflect the discussions held between him, Ms Zandstra and Mr Haggie. That is, that he would be paid a salary as an employee and would receive “fees for services” as an independent contractor.

[26] The parties intended that the tasks to be undertaken by Mr Muirhead under both agreements would be identical. The parties also intended that between the hours of 8.30 am and 5 pm Mr Muirhead would devote all of his time to undertake work for Debec Management.

[27] I find on balance that the intention of the parties was to separate the payment components of Mr Muirhead's remuneration package but that Mr Muirhead would devote all of his working hours to undertaking his tasks for Debec Management which in turn required him to project manage the construction of houses for clients of Debec Building Solutions.

The control test

[28] This test examines the extent to which the activities of Mr Muirhead were controlled by Debec Building Solutions. The following factors are strongly indicative of an employment relationship.

[29] The employment agreement sets Mr Muirhead's hours of work as being from 8.30 am to 5 pm with a 30 minute lunch break. There were no hours of work set out in the contracting agreement.

[30] Debec Building Solutions has argued that Mr Muirhead was free to undertake other work and had indicated that he intended to. When I asked Mr Haggie at the investigation meeting when he expected Mr Muirhead to undertake work under the contracting agreement he told me between 5 pm and 8.30 am. That answer is not credible.

[31] I am satisfied that at all times during his normal working hours, Mr Muirhead was project managing building projects on behalf of Debec Building Solutions. My finding is supported by the documents which set out an identical set of tasks in both the employment agreement and the contracting agreement. Both documents focus on the management of building projects.

[32] Debec Building Solutions submitted Mr Muirhead was responsible for finding his own work on a commission basis. That submission overlooks the fact that Mr Muirhead did not get paid a commission for finding work. He was to be paid a bonus based on all contracts signed between a client and Debec Building Solutions and a

bonus on drafting or preliminary work irrespective of who secured the contract or undertook the drafting/preliminary work.

[33] Mr Muirhead was answerable to Mr Haggie for his performance in respect of both the employment agreement and the contracting agreement.

Integration test

[34] This test examines the extent to which Mr Muirhead was integrated into Debec Building Solutions' business. That is whether the work undertaken by Mr Muirhead was integral to the business and whether he had become part and parcel of the business.

[35] Debec Building Solutions submitted that the role under the contracting agreement was not integral to the business but merely an incentive for Mr Muirhead to produce more work and clients for the business.

[36] The reality is that Mr Muirhead devoted his time to managing building projects for Debec Building Solutions. These building projects arose from contracts signed by clients and Debec Building Solutions or for whom drafting and other preliminary work was undertaken irrespective of whether Mr Muirhead was involved.

[37] The factors set out above are indicative of an employment relationship.

Fundamental test

[38] This test examines the extent to which Mr Muirhead took on financial risk in providing his services to Debec Building Solutions including whether he was in business for himself.

[39] Debec Building Solutions submitted Mr Muirhead had the ability and intention to contract with others. The evidence shows that Mr Muirhead did not contract with others and only undertook work under the employment agreement, which was in fact project management work for building contracts entered into by Debec Building Solutions.

[40] During the negotiations from May to July 2016 between Mr Muirhead, Mr Haggie and Ms Zandstra, there was discussion about the need for Mr Muirhead to

register for GST and take responsibility for ACC and tax for the payments made under the contracting agreement. Mr Muirhead did not take any steps to further these requirements and he did not receive any bonus payments under the contracting agreement.

[41] Mr Muirhead was not in business on his own account. He did not advertise his services, employ others, or hold business assets. He could not delegate his work to someone else and did not have scope for other business activities. Mr Muirhead was not exposed to any risk in terms of loss or profit.

[42] The fundamental test is strongly indicative of an employment relationship.

Industry practice

[43] There was little evidence as to the industry practice. Mr Haggie told me it was common practice across the Landmark franchises to enter into arrangements such as those entered into by Mr Muirhead. Mr Haggie has not provided any evidence to support his statement.

Overall impression

[44] The overall impression from all of the facts of the underlying and true nature of the relationship is that of employer and employee. Signing two different agreements has masked the true nature of the relationship.

[45] It is possible to have joint employers. A common feature of such relationships is common control by the joint employers.⁵ The reality is Debec Building Solutions benefited from the services provided by Mr Muirhead. When he reported to Mr Haggie on issues he could have been reporting to him as a working director of either entity. Both Debec Management and Debec Building Solutions acted in concert in their employment of Mr Muirhead. The management and control over Mr Muirhead's activities were merged.

[46] In her letter dated 21 April 2017 Ms Zandstra confirms the termination of the two agreements and refers to both agreements as being "employment contracts". I am

⁵ *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345 at [53] and [56] – [58].

satisfied this is how the relationship worked in practice and how the parties viewed their relationship despite the signing of the two agreements.

[47] I find Mr Muirhead was jointly employed by both Debec Management and Debec Building Solutions. Both respondents will be jointly liable for arrears of wages and other amounts ordered as a result of the personal grievances.

Arrears of wages

[48] Mr Muirhead claims he is owed the bonus payments promised under the Debec Building Solutions agreement plus holiday pay and interest.

Bonus payments

[49] Mr Muirhead says he earned bonus payments amounting to \$17,424.18 during the relationship with Debec Building Solutions.

[50] The contracting agreement provides for the following payments to be made to Mr Muirhead:

- a) \$1,613.35 plus GST for each contract that is signed with Debec Building Solutions, payable at floor down stage; and
- b) \$322.67 plus GST for each drafting/prelim deposit received by the consultant's payable on cleared funds from the client.

[51] Debec Building Solutions submits that the payments under the contracting agreement are bonuses and not wages. The Wages Protection Act defines wages as including bonuses or other special payments agreed to be paid to a worker.⁶ There is no dispute the parties had agreed to the bonus payments. They were set out in the contracting agreement. The bonuses are therefore wages.

[52] Mr Muirhead claims the sum of \$12,906.80 under clause 3 bullet point 1 of the Schedule to the contracting agreement. Mr Muirhead has provided the Authority with a list of the clients for whom he says he is entitled to receive payment for the floor

⁶ Wages Protection Act 1983 s 2.

down bonus. The clients named in Mr Muirhead's list signed their contracts with Debec Building Solutions before his employment started.

[53] During the negotiations over the remuneration package Mr Haggie and Ms Zandstra relied on the prior year contract numbers and drafting/prelim deposits received to assist in the negotiations over the total remuneration to be paid to Mr Muirhead. This was to provide an estimate of possible total income. There is no evidence that Debec Building Solutions intended for Mr Muirhead to be rewarded for contracts signed prior to his employment.

[54] Mr Muirhead says that even though the contracts against which he is claiming the bonus payments were signed prior to his employment, he managed the project to floor down stage and therefore should be entitled to payment of the bonus associated with that work. I disagree.

[55] Mr Muirhead was paid a salary to undertake the tasks set out in his employment agreement. Those tasks included managing each stage of the building projects including to floor down stage.

[56] Mr Muirhead's claim for bonus payments relating to contracts signed with Debec Building Solutions before he started his employment is declined.

[57] Mr Muirhead claims \$4,517.38 under clause 3 bullet point 2 of the Schedule to the contracting agreement. At the investigation meeting I asked Mr Haggie if he could tell me whether Debec Building Solutions had received cleared funds for each of the deposits associated with Mr Muirhead's claim. Mr Haggie could neither confirm nor deny cleared funds had been received.

[58] I am satisfied on the balance of probabilities that Mr Muirhead has established his claim that he is owed arrears of wages for bonus payments amounting to \$4,517.38 gross calculated at \$322.67 gross for 14 clients who paid deposits for drafting or preliminary work after he started working for Debec Management and Debec Building Solutions.

[59] Debec Building Solutions Limited and Debec Management Limited are jointly ordered to pay to Mr Muirhead the sum of \$4,517.38 gross under section 131 of the Act within 28 days of the date of this determination.

Holiday pay

[60] Mr Muirhead claims payment of holiday pay on the arrears of wages. Debec Building Solutions denies holiday pay is owed on the amount ordered because the payment was a bonus.

[61] An employer is required to calculate holiday pay at the rate of 8% of an employee's gross earnings where the employment ends within 12 months.⁷ Mr Muirhead started his employment on or around 29 August 2016. His employment ended on or before 19 May 2017. This is employment of less than 12 months.

[62] Gross earnings means all payments that an employer is required to pay to an employee under the employee's employment agreement. This includes productivity or incentive-based payments including commissions.⁸

[63] The bonus payments were contractual terms, which mean they were required to be paid. The bonus payments were an incentive payment and therefore are part of Mr Muirhead's gross earnings on which he is entitled to the calculation of holiday pay.

[64] Debec Building Solutions Limited and Debec Management Limited are jointly ordered to pay to Mr Muirhead the amount of \$361.39 being 8% holiday pay on the arrears of wages. Payment is to be made within 28 days of the date of this determination.

Interest

[65] Mr Muirhead seeks the payment of interest on the wage arrears.

[66] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.⁹

⁷ Holidays Act 2003, s 23.

⁸ Ibid at s 14.

⁹ Judicature (Prescribed Rate of Interest) Order 2011.

[67] I consider it reasonable and fair that Mr Muirhead is paid interest on the arrears of wages and holiday pay. Mr Muirhead has not had the use of the unpaid wages and holiday pay since at least 19 May 2017.

[68] Debec Building Solutions Limited and Debec Management Limited are ordered to pay interest on the arrears of wages including holiday pay of \$4,878.77. Interest is to be calculated from 19 May 2017 at 5% per annum until the date payment is made in full.

Dismissal

[69] In an email dated 21 April 2017 Ms Zandstra confirmed Mr Muirhead's employment would end on 19 May 2017. Mr Muirhead says the dismissal was unjustified. Mr Haggie told me the termination of the relationship was a mutual termination. The onus falls upon Debec Management and/or Debec Building Solutions to establish that its actions in dismissing Mr Muirhead were justified.

[70] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether the actions of Debec Management and Debec Building Solutions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[71] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Debec Management and Debec Building Solutions sufficiently investigated allegations, raised the concerns with Mr Muirhead, gave him a reasonable opportunity to respond and genuinely considered his explanations prior to dismissal.

[72] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Muirhead being treated unfairly.¹⁰ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

¹⁰ Employment Relations Act 2000 (the Act), s 103A(5).

Events leading to dismissal

[73] On 25 November and 14 December 2016 Mr Haggie, Ms Zandstra and Mr Muirhead met to discuss concerns about Mr Muirhead's performance. During the 14 December meeting Mr Muirhead was told that this was his last chance to show improvement in his performance.

[74] On 24 March 2017 Mr Muirhead met with Mr Haggie and Ms Zandstra and raised concerns about Debec Building Solutions' failure to make payments owed to him under the contract.

[75] Instead of discussing the contract payments Mr Haggie told Mr Muirhead he was not performing and the role was not working out. Mr Haggie advised Mr Muirhead that five clients had raised concerns about him. Mr Haggie acknowledged that four of the five clients existed prior to Mr Muirhead's employment.

[76] Mr Haggie told Mr Muirhead that he was considering employing his brother, Grant Haggie to undertake some of Mr Muirhead's duties and that Ms Zandstra would take over the balance including communications with clients.

[77] Mr Haggie invited Mr Muirhead to consider what he wanted in the way of compensation to leave his employment and to advise him of what he wanted. Mr Muirhead says he was shocked and told Mr Haggie he wished to seek legal advice. The meeting ended.

[78] Ms Zandstra emailed Mr Muirhead later that day confirming her and Mr Haggie's view expressed in the meeting that the relationship was not working out. Ms Zandstra reiterated Mr Haggie's invitation to consider what he felt was owed to him and to provide that in writing to her. Ms Zandstra said it was envisaged Mr Muirhead's employment would end on 7 April 2017.

[79] On 27 March 2017 Ms Zandstra requested a meeting on 3 April 2017. This meeting did not eventuate. On 3 April 2017 Ms Zandstra requested Mr Muirhead to update her on their discussion from the previous week and requested Mr Muirhead to put something in writing as soon as possible.

[80] On 11 April 2017 Mr Muirhead was invited to attend a meeting on 12 April 2017. At this meeting Mr Muirhead advised Mr Haggie and Ms Zandstra that he had engaged representation and that person would be in direct contact with them.

[81] Despite a message being left for Ms Zandstra to contact Mr Muirhead's representative, Ms Zandstra emailed Mr Muirhead later on 12 April 2017 and advised him that his employment would be terminated with effect from 21 April 2017. Mr Muirhead was directed not to generate more orders and to spend the next week tidying up his work.

[82] On 21 April 2017 Ms Zandstra wrote again to Mr Muirhead this time providing separate periods of notice. Ms Zandstra wrote [verbatim]:

1. **Independent Employment Contract:**

Termination: Under this employment contract the Contractor may give two weeks notice in writing. This employment Contract is now terminated as per letter dated 7th April 2017.

2. **Individual Employment Agreement Contract:**

Termination: Under this employment contract two months written notice. As per our letter dated 24th March giving you 2 weeks notice and extending this to the 7th April we deem this as a months notice. As per your employment contract you have one months notice of today the 21st April being your last and final day with our company on the 19th May 2017. This under our employment agreement is 2 months notice.

We do require you to work this.

[83] Mr Muirhead worked out the notice period until 19 May 2017 as requested.

Compliance with the employment agreement

[84] Schedule D of the employment agreement sets out the agreed process for dealing with performance concerns. This required Debec Management to meet and discuss the areas of dissatisfaction, provide directions on how to improve, outline the consequences of failing to improve and provide of an assessment period of two weeks to meet the performance criteria.

[85] Meetings took place on 25 November and 14 December where Mr Muirhead was put on notice that he was not performing. No notes were taken at either of those meetings. At the meeting on 25 November Mr Muirhead promised he would improve.

[86] Mr Haggie was not satisfied Mr Muirhead had demonstrated improvement and on 14 December he told Mr Muirhead that this was his last chance to improve.

[87] The employment agreement requires a written record of the last meeting be provided to Mr Muirhead. If the last meeting was on 14 December, this was not done. Instead, on 25 March 2017 Mr Haggie advised Mr Muirhead that his employment was to end and asked him to consider what it would take to have him leave.

The dismissal

[88] Debec Management and/or Debec Building Solutions decided to end the employment relationship on 25 March when Ms Zandstra advised Mr Muirhead it was envisaged his employment would end on 7 April. This was reiterated on 12 April when Ms Zandstra advised Mr Muirhead his employment would end on 21 April, and again on 21 April when Ms Zandstra advised Mr Muirhead that his employment would end on 19 May.

[89] The meeting on 25 March took place following an email from Mr Muirhead on 17 February where he advises Mr Haggie and Ms Zandstra that he did not believe the contracting agreement was working out as he believed they it should. Mr Muirhead did not believe he was receiving enough in bonus payments to achieve the estimated annual remuneration of \$118,000.

[90] I have concluded that at this point in time a misunderstanding has occurred between the parties that has informed all future dealings between them. Mr Muirhead was talking about the contracting agreement payments not providing him with the level of income he expected. Mr Haggie has taken Mr Muirhead's comment in his 17 February email as an endorsement of his [Mr Haggie's] own view that it was the relationship that was not working out.

Conclusion

[91] The process leading to Mr Muirhead's dismissal was defective. Debec Management has failed to follow its own procedures set down in the employment agreement. Mr Muirhead sought legal advice after the 24 March meeting. He advised Mr Haggie and Ms Zandstra on 12 April he had engaged representation, but neither of them spoke to his representative or held any further meetings to discuss the issues or the dismissal which was, by 12 April, well on track.

[92] The defects were not minor and have resulted in Mr Muirhead being treated unfairly.¹¹ The actions taken by Debec in terminating Mr Muirhead's employment was not what a fair and reasonable employer could have done in all the circumstances.

[93] Mr Muirhead's dismissal was unjustified and he is entitled to a consideration of remedies.

Unjustified disadvantage

[94] Mr Muirhead claims that from 12 April 2017 when he received the email from Ms Zandstra reiterating the decision to terminate his employment from Debec Management and Debec Building Solutions his duties were unilaterally and significantly changed.

[95] The change in Mr Muirhead's duties included him being denied access to "Buildmaster" which is the primary facility for pricing working drawings and ordering building materials. This action by Debec Management was consistent with the instruction given to Mr Muirhead on 12 April that he was not to generate any more orders.

[96] In his witness statement of evidence Mr Haggie told me access was removed to prevent potential loss of confidential information. In his oral evidence Mr Haggie told me Mr Muirhead was not competent and he did not want him making more mistakes and costing the company money. The issues Mr Haggie had discussed with Mr Muirhead since November 2016 included issues about Mr Muirhead's mistakes in ordering building materials for the projects he was managing.

[97] I find the actions of Debec Management in removing Mr Muirhead's access to Buildmaster during his notice period without any explanations affected his conditions of employment to his disadvantage. However, Mr Haggie held valid concerns about incorrect materials being ordered through Buildmaster. In particular Mr Muirhead had made three major errors resulting in incorrect plywood and skirting being delivered. One of the orders involving incorrect skirting materials resulted in a \$4,000 cost to Debec.

¹¹ The Act at s 103A(5).

[98] I find Mr Muirhead's removal of access from Buildmaster and the instruction that he not place any further orders was a reasonable action to take in all the circumstances of this case.

Remedies

[99] Mr Muirhead claims lost wages, compensation for humiliation, loss of dignity and injury to feelings and compensation for the loss of other benefits being a car allowance.

Lost wages

[100] Pursuant to s 123(1)(b) and s 128(1) of the Act, Mr Muirhead is entitled to reimbursement of the remuneration he would have earned for the period of three months following his dismissal. Under s 128(3) of the Act, I have discretion to award more if I am inclined to do so.

[101] Mr Muirhead has been unemployed from 19 May 2017. He has registered with several recruitment agencies in Tauranga and has applied for five positions for which he considers he is well qualified. His applications have been unsuccessful.

[102] Given the performance issues raised with Mr Muirhead it is more likely than not that his employment would have ended within a short period of time. For that reason I will not exercise my discretion to award more than three months loss.

[103] At the time of his dismissal Mr Muirhead was paid \$1,305 each week. Extrapolated out over 12 weeks this equates to a sum of \$15,660. This award will be subject to my findings on contribution.

Compensation

[104] Mr Muirhead gave evidence that following his dismissal he had trouble sleeping, his blood pressure became dangerously high and he required medication.

Mr Muirhead is 65 and I accept he will struggle to find alternative employment at the level he had with Debec.

[105] Mr Muirhead told me he has had to make financial cut backs including cancelling his medical and life insurance policies and has relied on his savings. The uncertainty over his financial future has added stress.

[106] The dismissal did not come out of the blue for Mr Muirhead. He was aware dismissal was a possibility and had indicated a willingness to negotiate an agreed exit.

[107] This is not a situation where continued ongoing employment over a lengthy period was being contemplated by either party. I am satisfied however, that Mr Muirhead should be compensated for the hurt and humiliation he suffered as a result of his dismissal. I consider an appropriate award for hurt and humiliation in the circumstances is \$10,000. This award will be subject to my findings on contribution.

Lost benefit

[108] Mr Muirhead had the benefit of a vehicle allowance valued at \$10,000 per annum. He seeks reimbursement of this allowance from the date of his dismissal until the date of the investigation meeting.

[109] Mr Muirhead is entitled to compensation for the lost benefit for a period of three months. Calculated on the basis of 12 weeks at \$192.30 and subject to my findings on contribution the total award under s 123(1)(c)(ii) of the Act would be \$2,307.69.

Contribution

[110] Where the Authority determines an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must reduce the remedies that would otherwise have been awarded.¹²

[111] Mr Muirhead was making mistakes including placing orders through Buildmaster that were putting the business at risk of incurring additional unnecessary costs. The parties had met on at least three separate occasions to discuss the performance concerns held by Mr Haggie.

¹² Employment Relations Act 2000, s 124).

[112] Mr Haggie told me that at the meeting on 25 November he had intended dismissing Mr Muirhead as it was still within his 90 day trial period. However, Mr Muirhead promised to improve his performance and outlined ways he would do that which satisfied Mr Haggie. Mr Muirhead was then told on 14 December that he had not improved and this "...was his last chance otherwise his employment and his Contractor Agreement would be at risk of termination."

[113] I have concluded Mr Muirhead contributed to the situation that gave rise to the personal grievance. Balancing the flaws in the actions of Debec Management and/or Debec Building Solutions which led to the unjustified dismissal balanced against Mr Muirhead's contribution to his personal grievance it is appropriate to reduce all remedies by 50%.

Summary of orders for remedies

[114] Taking into account my findings on contribution Debec Management Limited and Debec Building Solutions Limited are jointly ordered to pay to Mr Muirhead the following sums within 28 days of the date of this determination:

- a) lost wages \$7,830 under s 123(1)(b) of the Act;
- b) compensation of \$5,000 under s 123(1)(c)(i) of the Act;
- c) compensation for other benefits of \$1,153.84 under s 123(1)(c)(ii) of the Act.

Breaches of good faith and penalties

[115] Mr Muirhead claims the actions of Debec Management and Debec Building Solutions constitutes a breach of good faith and seeks the imposition of penalties.

[116] I accept that failure to pay the bonus payments under the contracting agreement was a breach of good faith and that this breach was sustained. I also accept that Debec Management's failure to follow its contractual processes when dealing with the performance issues with Mr Muirhead and the way it went about terminating his employment were also breaches of good faith and were serious breaches.

[117] However, I am not satisfied the breaches were intended to undermine the employment relationship. All parties had a genuine belief that the contracting agreement required Mr Muirhead to submit invoices before he could receive payment of the bonus. Mr Haggie and Ms Zandstra acted on the misapprehension that they and Mr Muirhead had agreed that the relationship was not working out and it should end.

[118] On balance I am not satisfied the imposition of a penalty is justified.

Costs

[119] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Muirhead shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Debec shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[120] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority