

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 218/09
5136023

BETWEEN CHRISTINE FLORENCE BENNET
Applicant

AND RONALD EDWARD BISHOP and
MARGARET ELLEN BISHOP t/a
DEBTOR COMMUNICATIONS
Respondents

Member of Authority: Helen Doyle

Representatives: Anne-Marie McRae, Counsel for Applicant
Ronald and Margaret Bishop in Person

Investigation Meeting: 28 August 2009 at Timaru

Submissions received: 28 August 2000 from Applicant
September 2009 correspondence from Respondents

Determination: 21 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christine Bennet says that she was unjustifiably dismissed on 8 August 2008 from her employment as an office administrator with Ronald and Margaret Bishop trading as Debtor Communications. In final submissions from Ms McRae on behalf of Ms Bennet there was reference to a personal grievance of unjustified action causing disadvantage. The alleged actions concerned a final warning and advice of a unilateral change of hours. Both actions occurred the week of dismissal. I do not intend to deal separately with the unjustified action grievance in terms of remedies or otherwise as I find it subsumed within the dismissal grievance.

[2] Ms Bennet seeks recovery of lost wages in the sum of \$3,600 gross for an eight week period from 8 August 2008 until 6 October 2008 when she was able to obtain other employment.

[3] Ms Bennet seeks compensation in the sum of \$15,000 together with unpaid wages for the days prior to termination in the sum of \$405, unpaid statutory holidays for 2006 and 2007 in the sum of \$370 and unpaid holiday pay in the sum of \$265.32, less an amount paid of \$368.18. The claim for a penalty for the failure to provide an employment agreement is no longer pursued nor the claim for reimbursement in terms of toll calls.

[4] Ronald Bishop says in his statement in reply that Ms Bennet was not unjustifiably dismissed and is not entitled to remedies. He also says that there is a disagreement about the sum claimed by Ms Bennet for wages, unpaid statutory holidays and holiday pay. In the statement of reply Mr Bishop has referred to Mrs Bishop as a silent partner in the business who chooses not to get involved with the day to day running of the business. I still therefore refer mainly to Mr Bishop and his actions in this determination

[5] Mr and Mrs Bishop counterclaim against Ms Bennet in the sum of \$42,653.99 as set out below:

• Unauthorised deposits made into Debtor Communications' bank account	\$ 5,273.88
• Rental of office premises for personal business	2,000.00
• Use of power, telephone, rates	1,001.94
• Refund of wages for time spent on personal business	3,765.61
• Refund of holiday pay time spent on personal business	315.83
• Refund of holiday pay paid but not due	342.65
• Refund of after hours wages	356.25
• Unpaid GST to Inland Revenue Department incurring penalties	4,020.20

• Compass account for incorrect documentation	4,797.89
• Known missing stationery items	93.61
• Stationery items purchased by a non-employee, the applicant's son	320.75
• Cost of audit fees	352.28
• Cost of photocopying wage book sheets as promised	13.20
• Our costs incidental to the administration of these actions	5,000.00
• Compensation for causing worry and stress within the family	15,000.00
	\$ 42,653.99
	\$ 42,653.99

The issues

[6] The issues for the Authority to determine are as follows:

- Was Ms Bennet an employee of Mr and Mrs Bishop;
- What was the reason or reasons Ms Bennet was dismissed from her employment on 8 August 2009 and was there a full and fair investigation into the actions of Ms Bennet relied on by Mr and Mrs Bishop as justification for the dismissal and do those actions amount to serious misconduct?;
- Was the decision by Mr and Mrs Bishop to terminate Ms Bennet's employment justifiable;
- If the dismissal was unjustifiable, then what remedies is Ms Bennet entitled and are there issues of contribution or mitigation or should the remedies otherwise be reduced;
- Is Ms Bennet liable as alleged in the counterclaim and should there be orders made accordingly?

Section 103A of the Employment Relations Act 2000

[7] Section 103A of the Employment Relations Act 2000 requires the Authority in reaching a determination as to whether a dismissal was justifiable to consider, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances the dismissal occurred.

Was Ms Bennet an employee of Debtor Communications?

[8] Mr Bishop said that Ms Bennet was not an employee during the time that she worked at Debtor Communications but an independent contractor because her earnings were taxed not at PAYE rates but at scheduler, formally withholding, tax rates.

[9] I wrote to an investigator from the Inland Revenue Department following the investigation meeting and asked her to advise whether payments made to Ms Bennet during her time at Debtor Communications were taxed at other than PAYE rates. The investigator who had had previous dealings with Mr Bishop said that Mr Bishop had assumed the scheduler rate had been applied as it was similar to the PAYE rate. The investigator said that she had looked at the relationship given the issue and had found no evidence of an independent contractor relationship and said that she would not have expected to have done so in the office structure. The investigator confirmed, importantly for my purposes, that the employer's monthly schedules (IR348) filed were as PAYE for Ms Bennet's tenure. Mr Bishop raised another issue as to whether Ms Bennet had correctly accounted otherwise for tax in terms of matters outside of her employment. That is between Ms Bennet and the Inland Revenue Department and does not form part of my investigation.

[10] I am not satisfied that Ms Bennet was other than an employee employed in office administration for the entirety of her tenure with Mr and Mrs Bishop. I shall deal shortly with some work that Ms Bennet undertook with Fidelity Life but my view is not changed as a result of that work. Ms Bennet's claim will therefore not be dismissed as suggested by Mr Bishop for the reason that she was never an employee.

The background to the dismissal against which the issues in terms of the dismissal are required to be determined

[11] Ms Bennet was employed by Mr and Mrs Bishop from November 2006. She did not have a written employment agreement but was paid at an hourly rate of \$15 and worked Monday to Friday between the hours of 9am and 4pm which included a one hour unpaid lunch break.

[12] Ms Bennet gave evidence that she had been requested by Mr Bishop at her initial interview to carry out some after hours telephoning from her home in the evenings as this was often the best time to reach customers' debtors. Ms Bennet said that she recorded approximately half an hour a week for those calls on her time sheet. I accept Ms Bennet's evidence about that.

[13] Ms Bennet took seven days' annual leave commencing 23 July 2008. She was due back to work on Friday, 1 August 2008, but the cruise ship which she had been aboard with her partner, Harry Travaille, was affected by very bad weather. As a result Ms Bennet said that havoc was caused on board and the situation widely reported in the media. As a result of all of this, Ms Bennet and Mr Travaille did not return to Timaru until 2 August 2008.

4 August 2008

[14] On Monday, 4 August 2008, Ms Bennet went into work and found no work or stationery items on her desk. She went into Mr Bishop's office and found the stationery items that had been on her desk were on his desk. She recalls the items as being rubber bands, pens, pads and a box of tissues.

[15] I find from the evidence that Mr Bishop raised four main issues with Ms Bennet at that time and they were as follows:

- That she had purchased unnecessary stationery items for the office;
- That there had only been limited client work since she had taken her holiday;
- That there had been a significant tax loss;

- That Mr Bishop had paid for Ms Bennet to go on holiday and he had some issues with that.

[16] Ms Bennet said that the whole exchange reminded her of a previous time that she had returned from holiday in July 2007 to face similar allegations. She said that she was not feeling well as a result of the difficult experiences on board the cruise ship and lost her cool and swiped the stationery off the desk and onto the floor. Ms Bennet could not recall if she swore at that time but accepted that she may well have.

[17] Ms Bennet then walked out to her car. A person from a nearby business saw her and suggested, given her upset emotional state, that she telephone her partner. Mr Travaille was then contacted and he took the opportunity to go and see Mr Bishop. I find that Mr Bishop raised with Mr Travaille similar issues and/or concerns to those raised with Ms Bennet. Ms Bennet also telephoned Mrs Bishop about the exchange that had taken place and Mrs Bishop said that she would talk to Mr Bishop.

[18] Ms Bennet returned to work after lunch and started to undertake her work. During the course of the afternoon, Mr Bishop sent a letter to Ms Bennet which set out, amongst other matters, the following:

You must learn to understand that with a \$27,000 tax loss over 2 years the only option left is to close the business down which is something we should have done 3 years ago. We have kept it going because we care about you and we would have of liked to keep you in a job.

I regret to advise you that Debtor Communications is not generating enough business to be able to pay you for 6 hours work a day the best we can offer you is part-time hours on call when there is enough work. ---

As from today your hours will be reduced in keeping with the amount of business that we receive on a daily basis. You will come to work at an agreed time and leave when the work is done. You will also get my permission before spending any money on the business.

[19] There was reference in the letter about Ms Bennet losing her temper and throwing things around the room and reference to the cost of a few bits of stationery no longer being cause for concern.

[20] Ms Bennet duly responded to that letter in writing to Mr and Mrs Bishop on 4 August 2008 and made it clear that she was concerned about issues being raised with

her again. She also said in her note that she showed Mr Bishop the stationery invoices every month with the accounts for the business and that issues of concern should have been raised then not after her holiday

[21] On Tuesday, 5 August 2008, Ms Bennet attended at work as usual and advised Mr Bishop that she was looking for another job because she did not consider she could work for him any longer. I accept her evidence that she had not started looking for a new position because she had only just arrived back from holiday.

[22] Later that day, Mr Bishop provided Ms Bennet without any earlier discussion a letter expressed to be a final warning regarding her attitude and behaviour. The final warning aspect of the letter is set out below:

On Monday 4 August you dismissed yourself from a staff meeting in my office and in doing so you used abusive language towards me. You used physical violence by throwing things off my desk onto the floor. You left the office in an emotionally upset state and returned to work in the afternoon.

On Tuesday 5 August 2008 you told me you intended to leave your employment with Debtor Communications as soon as you found another job. While discussing the situation you again used abusive language towards me.

This behaviour is not to be tolerated and if I receive one more piece of physical or verbal abuse again you will be instantly dismissed.

[23] On Wednesday, 6 August 2008, Ms Bennet attended work as usual and received an email from Mr Bishop headed *Honesty*. The email referred to the following matters:

All was fine until she [Christine] went away on holiday and it was then I discovered some things that showed signs of dishonesty. Once again I gave her another chance and let go the reins until the next holiday and I found more things that showed signs of dishonesty only this time they were wrapped in abusive and violent behaviour.

I knew Christine had been using our office and our time to run her other business interests but I turned a blind eye to it as long as she was growing the Debtor Com business. When my accountant told me the bad news that we had made another loss I looked at the expenses and found that there were some things that should not of been purchased because they had nothing to do with the business. The biggest shock came when I discovered that Christine's last pay included holiday pay at the rate of six hours per day. The Holidays Act states that holiday pay is to be paid at the average weekly wage for the year.....

[24] On Thursday, 7 August 2008 Ms Bennet said she received an email with the subject *Timaru Debt Collection Agency to close* described as a press release and appearing to have been sent to various people at the Timaru Herald. Mr Bishop said that he never sent the email to Ms Bennet but I am satisfied that she received it and read it that day.

[25] On Friday, 8 August 2008, Mr Bishop called Ms Bennet into his office and I find apologised for upsetting her earlier in the week and said that everyone made mistakes including him. Mr Bishop then advised that he wanted to take a previous employee, Fiona, back on in Ms Bennet's administration role and he wanted to give Ms Bennet a marketing role. Ms Bennet was not happy with taking on that role and some discussion did take place about the reason why.

[26] Ms Bennet said that Mr Bishop then became upset and demanded her wage book and stationery invoices. There is no dispute that Ms Bennet returned with those items after lunch and gave Mr Bishop a cheque for \$70.65. Ms Bennet set out in handwriting the basis of the cheque which was to cover an overpayment of wages made to her in the sum of \$22.80 that Mr Bishop alleged she had received, reimbursement for two books that she had charged to the warehouse stationary account but said she inadvertently forgot about and reimbursement to Mr Bishop for the stationery items that he felt were purchased unnecessarily which included rubber bands and pens less a contribution towards dishwashing liquid and liquid soap that Ms Bennet had provided herself. Ms Bennet also added on \$2 because she had used a few plain envelopes. Ms Bennet also gave Mr Bishop a letter requesting a refund of money paid on behalf of the family business, a wine bar, to Mr Bishop to advertise in his business directory.

[27] Shortly after this Mr Bishop provided Ms Bennet with a letter of dismissal and requested that she leave the office immediately. Ms Bennet said that she recalled Mr Bishop saying that he could have coped with the cheque but not the refund request.

[28] The letter of termination provided:

8 August 2008

Dear Christine

Thank you for your services over the last couple of years. However we regret to inform you that you have left us with no alternative but to dismiss you immediately from our employment.

We are dismissing you on the grounds that we have several reasons to believe that you have been dishonest in some of your dealings with us.

You have also displayed verbal and physical abuse whenever I have questioned you about these matters.

I gave you a written warning but your attitude towards me has not changed.

You have been reluctant to talk to me about any of these matters or discuss your future role with Debtor Communications.

Under the circumstances I feel I can no longer work with you or trust you so it is best for all parties concerned if you left our employment today.

We wish you God's blessing for the future.

Ron and Margaret Bishop

What was the reason or reasons Ms Bennet was dismissed from her employment on 8 August 2009 and was there a full and fair investigation into the actions of Ms Bennet relied on by Mr and Mrs Bishop as justification for the dismissal and do those actions amount to serious misconduct?

[29] The reasons given in the letter of dismissal were that there was a belief that Ms Bennet had been dishonest in some of her dealings with Ron and Margaret Bishop and that she had displayed verbal and physical abuse.

[30] Mr Bishop elaborated on these matters in his evidence and referred to Ms Bennet's dishonesty spanning some 20 months since she had first opened a bank account for Debtor Communications. He referred to her taking items out of the office and making demands for petty things like a calendar, soap and a heater. He said that there were two instances of bad language and that Ms Bennet swiped things off his desk. Mr Bishop said he went to the Police after Ms Bennet's dismissal and laid a complaint which included that Ms Bennet's son had purchased items using the Debtor Communications Warehouse Stationery account.

[31] I have considered the reasons for the dismissal against the rather confusing events during the week ending 8 August 2008 and the requirement in terms of the test in s.103A of the Employment Relations Act 2000 that the justification must be determined at the time the dismissal occurred.

[32] When Ms Bennet was on holiday in or about July 2007, Mr Bishop formed a view that she had been acting dishonestly. He approached her family and former employer, whilst she was away and talked to them about Ms Bennet and his concern that she had been dishonest. He also went to the Police, making a formal complaint on 24 July 2007 about Ms Bennet. When Ms Bennet returned from holiday, Mr Bishop wrote to her with his view that she was dishonest. The employment relationship carried on from that point although considering it in light of the events a year later it seemed that what happened in July 2007 had left a mark on the relationship.

[33] There were several issues raised with Ms Bennet in July/August 2007 and I need to consider if any of them could be relied on in August 2008 in reaching the decision to dismiss. One of the issues concerned a third bank account, an interest bearing account for the Debtor Communications business that Ms Bennet arranged with the National Bank to open shortly after her employment commenced. Ms Bennet said that she asked permission to open the account so that interest could be earned on money for clients held on trust. I am satisfied that she talked to Mr Bishop before doing this –letter from Mr Bishop to Detective Bynes 24 July 2007. Some of the other issues discussed in 2007 with Ms Bennet included holiday pay and withdrawals by Ms Bennet from Debtor Communications' accounts with respect to commission paid by Fidelity Life.

[34] I will have to return to these issues as they form part of the counterclaim. In relation to a reason for dismissal I do not find that it is appropriate for these earlier matters that had been dealt with, presumably to both parties' satisfaction, in July 2007 to be taken into account in terms of Mr and Mrs Bishop's decision to dismiss Ms Bennet on 8 August 2008 without being put in any way to Ms Bennet that the concerns still existed.

[35] I turn now to the stationary issues and the cheques. Debtor Communications operated a Warehouse Stationery account and from time to time Ms Bennet would purchase office supplies using the account. Ms Bennet would then go to Mr Bishop with the Warehouse invoice for payment on the 20th of the following month and he would approve payment. Mr Bishop did not deny that he did this, but said he did not carefully check all the items at the time and simply trusted that Ms Bennet had done the right thing.

[36] From time to time Ms Bennet would charge an item for her own use to the account and then put a cheque in to pay for the items, together with the cheque from Mr Bishop on behalf of Debtor Communications when the invoice was paid on the 20th of the month. I was provided with one of Ms Bennet's cheques that was presented in April 2008 and written for the credit of Warehouse Stationery, which Ms Bennet said was for payment of some of the items referred to in the counterclaim which Mr Bishop said could not be found on the premises. I am satisfied that that cheque and the time of presentation seemed to answer in full the issue about those items. The stationary purchases during the entire period of Ms Bennet's employment did not, from a consideration of what I was provided with, run to pages of items. There was no evidence that Mr Bishop had ever raised with Ms Bennet as a disciplinary issue her purchasing items for herself on the stationary account and then paying for them.

[37] When Ms Bennet was on holiday, Mr Bishop said that he went over the stationery account because he felt that the spending was high and he noticed the business was paying for tissues and other things such as rubber bands and pens in quantities that were not required. These issues were raised with Ms Bennet on 4 August 2008. The amount of toilet paper purchased was also queried and a toilet seat purchase for \$17 which Ms Bennet said she purchased from her own money and then asked for reimbursement. With regard to the toilet seat, I am not satisfied from the evidence that it was not purchased for the toilet at the business premises but rather the concern was that permission had not been given for such purchase.

[38] During the week of Ms Bennet's dismissal, she gave Mr Bishop two cheques. The first cheque was given to Mr Bishop prior to the email about honesty sent to Ms Bennet from Mr Bishop on 6 August 2008 and was for \$50.00. In the 6 August email Mr Bishop said that he would not cash that cheque because there was no detailed account of what it was for. On the day Ms Bennet was dismissed she gave Mr Bishop a cheque for \$70.65 with some handwritten detail attached as to the basis for that amount.

[39] Mr Bishop was entitled to raise with Ms Bennet the expenses he was concerned about with respect to the stationary purchases. He was entitled to raise with her any items that he felt were not for the business and even her practice of putting the odd personal item on the account and later making payment. I do not find,

however, that Mr Bishop could place reliance on the cheques in the absence of even putting an allegation to Ms Bennet to conclude that there was dishonest conduct on her part simply because she gave him the cheques.

[40] The importance of obtaining an explanation so as to properly consider the actions of an employee against what is alleged before concluding whether there is misconduct is highlighted when the relevant part of a letter written to Mrs Bishop by Ms Bennet some six days after dismissal is considered. Ms Bennet wrote to Mrs Bishop on 14 August 2008 and said amongst other matters:

I have at no time been intentionally dishonest regarding my dealings with you and the business. This constant slight of my integrity and honesty is slander.

I paid Ron a Cheque which covered half the toilet paper I had used in the office (bit much having to pay for your own toilet paper) and the items that he did not seem to want including the bag of rubber bands that he initially was using and had used a box so next time I bought the bag full as it was cheaper than paying \$5 for a small box. This included an overpayment to me of \$22 on my wages to make him happy because he thought yet again he was being ripped off. The time I took without pay when I was sick should not have been included but I did anyway. In future I was going to just pay out 8% each payday for my holiday pay and then take pay without leave as he was resentful every time he had to pay me when I was away.

The only things that I had unfortunately omitted to pay for were 2 books I had bought for my personal use and had meant to put a cheque in as I had the previous month for items I had bought. I forgot about them and Ron was given the invoices that month. (I had not hidden them and had just forgot) and he had not picked them up but had initialled the statement to say he had checked them and to pay – so we both missed it.

The other items were pens that I had bought but had not used yet and the ink pens are for me to use when my arthritis hurts my fingers as they are easier to use with less pressure being used. They would have lasted me 12 months probably – and were on special when I bought them as well). Ron was always walking off with my pens so I bought him a box of Bic pens as I know that most would have ended up elsewhere. I checked my pen holder at home to make sure I had none from work and I didn't.

[41] I am not satisfied that Mr Bishop, in circumstances where he had raised concerns about unnecessary stationery and then was presented with two cheques from Ms Bennet, would conclude without giving Ms Bennet an opportunity for explanation, that the payment of cheques to him was an admission, or as he stated to the chief of Police in Timaru after the dismissal, *an attempt to cover up her crime and/or that she*

had stolen the goods. The circumstances was that this was a two person office in a small community and the first cheque was provided by Ms Bennet after the discussion with Ms Bennet on 4 August 2008 about unnecessary stationery but not allegations of theft.

[42] I am not satisfied that Ms Bennet was aware there was an issue about her son purchasing items on the Debtor Communications stationary account until after her dismissal when she was contacted by the Police. I am not satisfied that it was a reason therefore in the mind of Mr Bishop at the time he dismissed Ms Bennet so as to later be taken into account in assessing justification. Ms Bennet said in her evidence that on 15 March 2008 her son came to see her at work. He advised her that he was going to Warehouse Stationery to purchase some EftPos tape for his business. Ms Bennet asked if he could pick up some postage stamps and envelopes to bring back to the office. Ms Bennet also asked her son to purchase her a bottle of Coke for which she gave him some cash. There is no evidence that Ms Bennet's son charged the EftPos tape to the Debtor Communications account but only the office supplies being the postage stamps and envelopes. Ms Bennet said that the postage stamps and envelopes were delivered back to and used in the Debtor Communications office. Ms Bennet said that she had given Mr Bishop the receipt at the time which indicated her son had made the purchases and Mr Bishop raised no issue about it.

[43] There was reference to the methodology that Ms Bennet used for calculating holiday pay being of concern but I am not satisfied, without putting this allegation clearly and obtaining explanation, a conclusion would be reached by a fair and reasonable employer that the calculation of holiday pay was misconduct on the basis of any dishonesty on the part of Ms Bennet so as to form a reason for dismissal.

[44] The alleged verbal and physical abuse had already been the subject of disciplinary action on Tuesday, 5 August 2008 when Ms Bennet was issued with a final written warning which, although procedurally unfair, can be relied on at least to the extent that Mr Bishop viewed Ms Bennet's actions on the Monday and presumably on another day when he alleges she used bad language, as actions which did not justify dismissal. Those actions, which were the subject of a disciplinary sanction on 5 August 2008, cannot then be revisited to justify dismissal three days later. If there was a subsequent allegation of bad language as the letter of dismissal

seems to suggest between 5 and 8 August, it was not, in my view, properly put and could not fairly be relied on as a reason for dismissal.

Was the decision by Mr and Mrs Bishop to terminate Ms Bennet's employment justifiable?

[45] In conclusion therefore I have excluded some of the reasons given for the dismissal as not being conduct that could fairly and properly be regarded as misconduct and would justify summary dismissal. There is no doubt that dishonesty on the part of an employee can amount to serious misconduct but an employer is required to undertake a full and fair investigation into an employee's conduct before a decision to dismiss is taken. A full and fair investigation is one that involves a proper investigation into the allegation or allegations, notice of the specific allegations which an employee is required to answer and the likely consequences if the allegations are established. An employee is entitled to an opportunity to refute the allegations or to explain or mitigate his or her conduct and an unbiased consideration of the employee's explanation should take place before a decision to dismiss.

[46] I am not satisfied that any of the issues were properly investigated so as to conclude that there was misconduct which would justify Ms Bennet's dismissal. I find no fair and reasonable employer would conclude that Ms Bennet was dishonest as at 8 August 2008 and in the absence of a full and fair investigation the decision to dismiss Ms Bennet, objectively assessed, was not one that a fair and reasonable employer would have taken.

[47] I find that Ms Bennet was unjustifiably dismissed from her employment on 8 August 2008. She has a personal grievance in that regard and is entitled to remedies.

Remedies

Lost wages

[48] Ms Bennet seeks lost wages for the period from 8 August 2008 until she secured a new position on 6 October 2008. Ms Bennet said that she applied, after her dismissal, for approximately 15-20 roles and I was supplied with some of the rejection letters.

[49] I am satisfied that Ms Bennet has adequately attempted to mitigate her loss and I consider that her claim for lost wages is made out on the evidence and that the appropriate award is \$3,600 gross.

Compensation

[50] Ms Bennet gave evidence that distress was caused to her because of the dismissal and because of subsequent actions of Mr Bishop. On 27 August 2008 Ms Bennet was advised by the Timaru Police that a complaint had been received against her and her son regarding the stationery. Ms Bennet became aware that Mr Bishop had made further statements to the Police and had also written to the Inland Revenue Department by letter dated 17 December 2008 in which he stated that Ms Bennet was dishonest in her dealings with that department.

[51] In March 2009, Ms Bennet was contacted by a debt collection agency in Auckland and advised that she had been sent to debt collection in relation to a business debt of Debtor Communications the sum of \$4,038.12. This came about because Mr Bishop had written to the company after Ms Bennet's dismissal and had advised that Ms Bennet was the person who had completed the forms and set up the account with Compass Communications and he had given Compass Communications Ms Bennet's name and residential address. Mr Bishop went on to say in his letter that Ms Bennet no longer worked for Debtor Communications and that the overdue account was an exhibit in an employment case. Ms Bennet gave evidence that being sent to debt collection over this matter was extremely distressing for her because she had to spend time addressing the issue so it would not affect her credit rating.

[52] Ms Bennet said that she has found it hard to cope with the dismissal and Mr Bishop's subsequent actions and it has caused her to question her integrity and her self-esteem has been battered.

[53] I accept that there has been a considerable impact on Ms Bennet resulting from her dismissal and subsequent actions that have taken place in that regard.

[54] Sadly, this is a matter which could have been resolved at an early stage because Ms Bennet was prepared, having set out her version of events as at the 14 August 2008, to simply leave matters as they were if her holiday pay and wages were paid. Ms Bennet then became aware of the actions of Mr Bishop and matters escalated from there.

[55] I have considered the post-dismissal conduct and there are some aspects which I intend to take into account. I have had to consider whether the complaint to the Police was made as a result of Mr Bishop's sincere belief that there had been some criminal conduct or whether it was simply a reaction to Ms Bennet pursuing a personal grievance and/or asking for holiday pay and wages. I have carefully reflected on this. This was not the first complaint Mr Bishop had made to the Police about Ms Bennet.

[56] I am prepared to give Mr Bishop the benefit of the doubt that he complained to the Police because he wanted them to look into the matter. As I understand the Police complaint, it went no further than a telephone call to Ms Bennet and, whilst distressing, it would appear that the Police concluded there was no evidence or basis to proceed further in terms of this matter.

[57] I do not take that complaint into account in assessing post-dismissal conduct and the obvious effect that it had in causing Ms Bennet's distress. I do, however, take into account the allegations made in the letter to the Inland Revenue Department about Ms Bennet. They were unnecessary and without foundation. They were matters that Ms Bennet had not been questioned about before her dismissal. I also take into account the improper provision by Mr Bishop of Ms Bennet's name and address in terms of what was clearly a business debt. There could be no good reason for that and both those matters caused increased distress to Ms Bennet and led her to wonder what would happen next with respect to her reputation and standing within the small community of Timaru.

[58] In all the circumstances, I have had to carefully consider what a fair award would be. An award has to reflect the dismissal and the post dismissal conduct. I have taken into account that this employment relationship was unlikely from Ms Bennet's perspective to have been a long term one. I am of the view that an appropriate award for compensation for hurt and humiliation would be the sum of \$10,000.

Contribution

[59] I am required to have regard to s.124 of the Employment Relations Act 2000 as to whether the actions of Ms Bennet contributed towards the situation which gave rise to her personal grievance. If I conclude that her actions did, then I must reduce the remedies that I would otherwise have awarded.

[60] Mr Bishop made many allegations about Ms Bennet. I have not, until this point, been required to reach any conclusion on the balance of probability about whether Ms Bennet's actions could be said to be dishonest. I have to reach a view when making a determination about contribution.

[61] I am not satisfied, on the balance of probability, that Ms Bennet was dishonest. Her attempts to deal with Mr Bishop's concerns about the purchase of unnecessary stationery by simply paying him for the items was unwise. It was, however, I conclude only unwise because of the way that Mr Bishop has now attempted to portray the two cheques that she gave him.

[62] I do not find contribution in respect of the cheques. I am not satisfied that Ms Bennet deliberately decided not to pay for two items which she purchased on the account and I do not find contribution in that regard.

[63] There is no evidence to satisfy me on the balance of probabilities that those items purchased by Ms Bennet's son on the business account were not delivered to and used within the office. They are not listed as missing on the stationery items list. Again, with the benefit of hindsight, having another person put items on the account held by the business at the Warehouse Stationery was unwise, but I am not satisfied it was dishonest and I do not find contributory conduct in that regard.

[64] Ms Bennet did swipe stationery items onto the floor and used unbecoming language. Mr Bishop was entitled to raise concerns that he had about stationery. I accept that he could have done that in a better way and not immediately after Ms Bennet had returned from a traumatic holiday. There were issues at that time that both parties could have dealt with better. I do find however some limited contribution in that regard. It would have been better for Ms Bennet to simply have walked away setting another date to discuss the matter

[65] For completeness, I do not find that the remedies I otherwise go on to award should be further reduced by any of the matters in the counterclaim. The remedies that I have previously set out are to be reduced by a contribution that I have assessed at 10%.

[66] I order Ronald and Margaret Bishop to pay to Christine Bennet the sum of \$3,240 gross being lost wages under s. 123 (1) (b) of the Employment Relations Act 2000.

[67] I order Ronald and Margaret Bishop to pay to Christine Bennet the sum of \$9,000 without deduction being payment for compensation for hurt and humiliation under s 123 (1) (c) (i) of the Employment Relations Act 2000.

Claim for unpaid wages, statutory days and holiday pay

[68] Ms Bennet claims unpaid wages for her last week at work in the sum of \$405 gross being 27 hours. I am satisfied that she is entitled to payment of that amount and I order Ronald and Margaret Bishop to pay to Christine Bennet the sum of \$405 gross being unpaid wages for the week ending 8 August 2008.

[69] I find that Ms Bennet is entitled to payment of the following statutory days that she would have worked but for the fact that they were public holidays in the sum of \$375 gross:

Christmas Day 2006	5 hours
Boxing Day 2006	5 hours
New Year's Day 2007	5 hours
2 January 2007	5 hours
Waitangi Day 2007	5 hours

[70] I order Ronald and Margaret Bishop to pay to Christine Bennet the sum of \$375 gross being payment for statutory holidays.

[71] Ms Bennet also claims that she is entitled to holiday pay having regard to a schedule prepared by Mr Bishop. There was no disagreement, it appeared, from the schedule produced by Mr Bishop to the amount paid to Ms Bennet by way of holiday pay. I accept Mr Bishop's view that the way Ms Bennet chose to pay her annual leave entitlement on 17 June 2007 was somewhat unusual. Ms Bennet calculated an annual leave entitlement for the period from her anniversary date of 30 November 2006 to 31 March 2007 in the sum of \$342.65. This was 6% of her gross earnings for that period and she chose to calculate her holiday pay in this way because the annual holiday pay rate increased to 8% as at 1 April 2007.

[72] Ms Bennet said that Mr Bishop agreed to pay her this amount and whilst Mr Bishop does not accept that now, I am not prepared to revisit that matter. I should add for completeness that I have looked at the part sick day issue. I am not of the view

that calculating sick leave on this basis is unlawful if agreed. Given it was paid on a part day basis I am not prepared to revisit this matter and make changes to the earlier method of calculation because Mr Bishop now says that it was incorrect. What Ms Bennet has then calculated her holiday pay owing on is her gross income between 1 April 2007 and her termination on 8 August 2008. That is the sum of \$29,191.50 and her annual leave entitlement for this period at 8% was \$2,335.32. Ms Bennet's total annual leave entitlement was \$2,677.97, that being from 30 November 2006 to 8 August 2008.

[73] On that basis, and given that there was agreement as to the holiday pay paid, Ms Bennet has simply deducted the holiday pay paid which sum includes the \$342.65 from \$2,677.97 to arrive at an amount she says she is owed of \$265.32. I am satisfied that this is a reasonable basis for calculating holiday pay, given the rather unusual calculation earlier on in the employment.

[74] I am satisfied that it is appropriate to make an order in this regard that holiday pay be paid to Ms Bennet in the sum of \$265.32 gross.

[75] From those combined amounts that add up to the sum of \$1045.32 the sum of \$361.18 is to be deducted leaving a balance of \$684.14 gross and I order Ronald and Margaret Bishop to pay the sum of \$684.14 gross to Christine Bennet.

Counterclaim

Unauthorised deposits made into Debtor Communications' bank account

[76] Mr Bishop alleges that Ms Bennet, without his permission, opened a third bank account, called the 08 account, in 2007. He has made a complaint to the bank as to how that occurred. Ms Bennet said in her evidence that she did have permission to open the bank account and obtained that from Mr Bishop. I have found that to be so and in any event, I am not satisfied that any claim can be made because there is no evidence of loss that resulted because of this. I accept Ms Bennet's view that if Mr Bishop was unhappy with the bank account, he could simply have closed it in 2007.

Mr Bishop claims the sum of \$5,273.88 which he says were amounts that Ms Bennet withdrew from the Debtor Communications bank accounts

[77] The amount that was paid into the accounts was from Fidelity Life for insurance brokerage work. I am satisfied, although will address this separately, that Mr Bishop authorised Ms Bennet to become an independent insurance broker and trade from his office and there was discussion that the brokerage be called Timaru Brokers Limited.

[78] The deposits that were made into the Debtor Communications account were in relation to those insurance policies and what Mr Bishop is claiming is that the deposits made by Fidelity Life for this work be paid to him.

[79] Following the investigation meeting, I was provided with details of the amounts that were deposited into the account and I am going to set these out in some detail because the suggestion is now being made by Mr Bishop that Ms Bennet *laundered money* through his bank account.

[80] I accept that there were three deposits made by Fidelity Life into the accounts of Debtor Communications. There was a deposit of \$1,225.54 on 9 July 2007, \$3,097.47 on 11 July 2007 and \$950.87 on 12 July 2007. There were no other deposits made.

[81] Ms Bennet said that the agreement was that Mr Bishop would retain 10% commission and indeed the amounts withdrawn from the bank account and the balances left therein in terms of these initial deposits would reflect that that was indeed what occurred. There is no dispute that Mr Bishop signed the cheques made out to Ms Bennet on 12 July for the sums of \$2,000 and \$1,500 –see letter from Mr Bishop dated 1 August 2007 where he states *Even though I signed those cheques there was no documentation with them explaining what they were for*. I am not satisfied that any claim can be made by Mr Bishop in terms of these sums.

[82] Another area in which Mr Bishop said there was dishonesty was a situation where Ms Bennet had used one of the cheques paid to her by Mr Bishop to purchase Australian dollars. A letter has been provided from the National Bank that the National Bank in error debited Debtor Communications' 00 account in the sum of \$2,022.25. This matter, however, was corrected the same day and cannot be the responsibility of Ms Bennet.

[83] I am not satisfied that there can be any claim against Ms Bennet in terms of these matters.

Fidelity Life and reimbursement of rental, refund of holiday pay and wages

[84] The evidence is clear that Mr Bishop knew and authorised Ms Bennet to become an independent insurance broker and trade from his office. There was agreement between Ms Bennet and Mr Bishop that the brokerage would be called Timaru Brokers Limited.

[85] I accept the evidence that no policies were written in terms of the brokerage after August 2007 because Mr Bishop had raised the matters of concern with Ms Bennet about the brokerage at this time.

[86] I was concerned that in the statement in reply it was claimed Ms Bennet held herself out as an investment and insurance broker using office facilities behind Mr and Mrs Bishop's back and this was not discovered until she went on holiday. That very serious allegation is completely unsustainable on the evidence.

[87] Mr Bishop in a letter dated 1 August 2007 to Ms Bennet in terms of Timaru Brokers Limited clearly states that he *offered to help* [Christine Bennet] *by suggesting you use our offices to service your past insurance and investment clients and that we trade together under my trading name Timaru Finance Brokers and I designed and printed the disclosure document using my endorsement to obtain an agency.* There was no evidence to support that Ms Bennet otherwise used the facilities of Debtor Communications to run any other business. She accepted that she may have taken a few telephone calls unrelated to her employment or received facsimiles, but I am not satisfied that this was excessive or that there is evidence her work output as an administration officer suffered as a consequence.

[88] The claim that Ms Bennet should pay rental for the business premises, contribute towards power, telephone and rates, and refund wages, holiday pay is not made out.

Refund of holiday pay paid but not due

[89] I do not find that Mr Bishop is entitled to claim back the holiday pay for Ms Bennet that she calculated as at 31 March 2007. I have accepted that, on the

calculations provided, which I find form a reasonable basis on which to assess holiday pay, Ms Bennet is in fact owed some holiday pay. I also find that when Ms Bennet was paid this holiday pay in June 2007, Mr Bishop agreed to this and it would be unfair for him how to simply to ask for that sum back.

Refund of after hours wages

[90] I am not satisfied there should be any refund in terms of the payments that were made to Ms Bennet for after hours calls. If Mr Bishop had a different view on how these were recorded, then he should have raised that with Ms Bennet during her employment. I do not find that a claim at this stage for reimbursement of that amount of money can be made out.

Unpaid GST

[91] I am not satisfied that Mr Bishop has established to the required standard that Ms Bennet breached her contractual obligations in preparing GST returns so that she should be liable in terms of any GST owing to the Inland Revenue Department and/or penalty. Ms Bennet said that she calculated the GST on the basis of the schedule that Mr Bishop provided which had wages and PAYE on it. Ms Bennet said that if she had incorrectly calculated GST, then she would have thought that would have been picked up by the accountant.

Compass account

[92] This was a business account and no claim can be made against Ms Bennet in this regard.

Missing stationery items

[93] I am satisfied that Ms Bennet paid for the briefcase and two other items in April 2008 which are referred to in the counterclaim. The other items referred to in the counterclaim are the two items purchased on the account by Ms Bennet's son. I am not satisfied that these items were not purchased for and used within the business and therefore I make no award in terms of this claim.

Cost of audit fees

[94] I am not satisfied that Ms Bennet can be liable for the cost of an accountant and other staff costs involved for an audit that Mr Bishop had carried out by Inland Revenue of the wage book. That claim does not succeed.

Administration costs

[95] Mr Bishop claims for hours spent preparing for the Authority investigation meeting and to investigate what he says are the discrepancies caused by Ms Bennet.

[96] It seems to me that this claim really relates to a claim for costs and expenses and falls to be considered only in the event that Mr Bishop was successful. I do not find that Mr Bishop is entitled to any money in terms of counterclaim from Ms Bennet for these costs. I also note there is a claim for the cost of photocopying the wage book, however, this is a matter too that would fall to be considered when the Authority reaches the point of looking at costs and expenses.

Stress and worry within the family

[97] Mr Bishop has claimed the sum of \$15,000 for the stress and worry that the claim has caused him and, as I understand it, for the actions of Ms Bennet. I am not satisfied that there can be a valid claim against Ms Bennet for this amount.

[98] The counterclaim fails in its entirety.

Costs

[99] I reserve the issue of costs. Ms McRae has until 29 January 2010 to lodge and serve submissions as to costs and Mr Bishop has until 12 February 2010.

Summary of findings and orders made

- a. I have found that Ms Bennet was unjustifiably dismissed from her employment.
- b. I have assessed contribution at 10%.
- c. Taking contribution into account I have awarded Ms Bennet the sum of \$3240 gross for lost wages.

- d. Taking contribution into account I have awarded Ms Bennet the sun of \$9000 for compensation.
- e. I have awarded Ms Bennet the following amount for unpaid wages, unpaid statutory days that would otherwise have been working days and holiday pay in the sum of \$684.14 gross.
- f. I have dismissed the counterclaim in its entirety.
- g. I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority