

[3] In any event, Mr Bate claims the restructure significantly altered his position: key functions were redistributed and his role was surplus to requirements. Mr Bate says IBM has been unwilling to acknowledge that outcome so as to avoid paying redundancy compensation.

[4] Monetary remedies corresponding to IBM's performance process and the dismissal are sought. Mr Bate also seeks a determination that his position is redundant, and asks the Authority to order IBM to pay his contractual entitlement. He further claims he was unjustifiably disadvantaged by restraint provisions after his employment ended and seeks a declaration that the non-competition provision is unenforceable.

[5] IBM rejects Mr Bate's claims in their entirety. It acknowledges there was a reorganisation of its software services but says Mr Bate's position was not disestablished. IBM says Mr Bate was justifiably dismissed for failing to follow an instruction to perform his role.

Issues

[6] The Authority is required to determine the following matters:

- (a) whether Mr Bate was unjustifiably disadvantaged by IBM's performance process;
- (b) whether Mr Bate was unjustifiably dismissed;
- (c) whether Mr Bate's role was redundant;
- (d) whether terms of the Noncompetition Agreement are enforceable
- (e) whether there are additional claims the Authority is able to determine.

The Authority's investigation

[7] Mr Bate gave written and oral evidence to the Authority. His wife also provided testimony. On behalf of IBM, Ms Katrina Troughton, also attended the meeting, as did New Zealand based IBM HR Manager, Ms Dorothy Lewsley.

[8] This determination has made finding of fact and law necessary to dispose of Mr Bate's claims have been made. As is permitted by s 174 of the Employment Relations Act 2000 ("the Act") I have not referred to each item of evidence or every

aspect of submissions furnished to the Authority over the course of the investigation, but all information received has been carefully considered.

Background information

[9] Mr Bate was employed by IBM for almost 22 years. Between 2007 and 2017 Mr Bate undertook a number of international assignments. In his most recent position as ‘Vice President, Hybrid Cloud Software’, he was accountable for the performance of IBM’s Hybrid Cloud software business in the Asia Pacific (AP) region.

[10] Mr Bate began the role in January 2016 during a period of international assignment based in Singapore. Terms and conditions of employment, including redundancy provisions, are recorded in a “Schedule of Special Terms” signed in 2005. There is also there a non-competition agreement signed by the parties in 2012.

[11] In early 2017 IBM foreshadowed to staff the likelihood of a merger of its “Hybrid Cloud Software” and “Analytics Software” business teams in each of its global locations. Exactly when the restructure would occur was uncertain, but IBM anticipated the changes would happen in the second half of 2017 or early 2018.

[12] In April 2017 Mr Bate began reporting to Ms Troughton. Her role was based in Australia. The pair interacted mostly by telephone and through email.

[13] On 8 May 2017 Mr Bate was required to provide Ms Troughton with his primary objectives for the (then) financial quarter: Q2. Ms Troughton says her predecessor had discussed with Mr Bate his performance and that of his business unit. Mr Bate denies his performance had ever been at issue. On receipt of the requested information, she noted they were aligned to performance expectations, but advised: *“if you are unable to meet these I will be required to remove you from the role and we will shift our discussion to and next steps and options available”*. Ms Troughton accepts the correspondence was blunt. She says she wanted to ensure there was no room for ambiguity on the matter.

[14] It is not disputed that Mr Bate had several informal conversations on 5 June 2017 with senior executives about the impending restructure. One executive commented that it was *“very likely”* he would not be in his role on 1 July 2017. Another is said to have told him that the single leadership role would be performed by either Mr Bate or his counterpart in the Analytics unit, Martin Chee. Ms Troughton

informed him it was “*likely*” there would be a single leader following the merger of the two software groups and that they needed to discuss options. They revisited the topic of the restructure several days later in a telephone call on 7 June 2017.

[15] Over the following 4 weeks (or thereabouts) Mr Bate and Ms Troughton debated what exactly had been communicated between them in early June. Mr Bate was of the view that Ms Troughton had advised: his role would combine with those from the other business units into a single leadership role; his position would no longer exist after June 2017, and; he was not being considered for the AP leadership position.¹ Via several emails, Ms Troughton denied she had told him he would not be considered for the position as no decision on the appointment had been made. She said if IBM did move to a single role in July 2017 Mr Bate would be considered but that his current performance would be taken into account.² Mr Bate considered Ms Troughton had altered her position since their earlier discussions and advised her of the same.³

[16] On Monday 3 July 2017 Ms Troughton wrote to Mr Bate. She indicated she wanted to progress a review of Mr Bate’s business unit’s performance for Q2. She informed him that IBM would shortly be announcing a new AP software leader. She advised “*Your current role remains*”. Later in the email she stated “*You will continue in your current role and responsibilities reporting to the new leader.*”

[17] Mr Bate responded the following day. His email mainly focused on the issue of performance. As to the announcement, he said he was “*not aware this change [meaning an additional layer of management] was being contemplated.*”

[18] On 4 July 2017 Ms Troughton notified members of the wider software teams that Analytics and Cloud Sales business units in Asia Pacific had been brought together. In a blog attached to her email, she set out the composition of the AP executive management for the new structure, including that Mr Chee had been appointed to the leadership role of the new team.

[19] Mr Bate emailed Ms Troughton on 5 July 2017, as follows:

¹ Emails dated 8 and 29 June 2017

² Emails dated 14 June 2017 and 2 July 2017.

³ Email dated 29 June 2017

The appointment of Martin Chee as VP Hybrid Cloud and Analytics for Software has come as a surprise to me as that is my position. I do not believe that I have a role in IBM of VP Hybrid Cloud Software Asia Pacific any longer. Simply put Martin Chee has got my job now. I cannot 'continue in (my) current role and responsibilities reporting to the new leader' as you said in your email to me on Monday evening because the role and responsibilities I had had been taken over by MC.

...:

If this is to be a "parting of the ways" with IBM I would like it to be on the basis of mutual respect and good faith. ...

Therefore, I think the sooner (me and IBM) discuss this to try and reach an acceptable outcome for both the better.

[20] Mr Bate was away from the workplace for several days. Ms Troughton sent him an email on 10 July 2017. She repeated her earlier advice: a performance assessment needed to be completed, his role and responsibilities remained but he reports to Mr Chee.

[21] On 14 July 2017, through his solicitor, Mr Fintan Devine, a letter was sent to IBM. Amongst other things, Mr Devine alleged Mr Bate's role had been made redundant on Mr Chee's appointment to the leadership position. Mr Bate had also not been identified in the new structure. The letter listed several executive meetings for which Mr Bate had not been invited since the merger, noting Mr Chee had accepted an invitation to a meeting Mr Bate would have usually attended. He requested the parties attend urgent mediation on the issues referred to in the correspondence. Payment of redundancy compensation was sought.

[22] Between 17 July 2017 and 18 August 2017 (inclusive) the parties exchanged several items of correspondence. I have not set out the content of every document. Broadly summarised, the focus of IBM's communications was on scheduling a meeting to discuss with Mr Bate his performance going forward. Mr Bate was unwilling to attend a performance meeting without his solicitor present. IBM was unwilling to attend mediation.⁴ Present throughout their exchange, Mr Bate asserted his role had gone whereas IBM said it had not.

[23] Mr Bate's international assignment came to an end on 31 July 2017 and he returned to New Zealand. I shall return to this issue.

[24] On 25 August 2017 Ms Troughton wrote again to Mr Bate as follows:

⁴ IBM had initially agreed to mediation but later declined.

Unexplained absence for work

The purpose of this letter is to raise IBM's concern with your prolonged and unexplained absence from work. Since returning to New Zealand on 31 July 2017 you have not:

- Attended for work;
- Been in touch with your manager, Martin Chee, or attended any of the scheduled team calls;
- Been in touch with your team to provide direction and support as is expected in your role; or
- Performed any of the other functions of your position as vice-president, Hybrid Cloud Sales, Asia Pacific.

[25] She noted that the nature of the role would normally permit him to work remotely, but his failure to perform to the position required him to attend either the Wellington or Petone offices for work going forward. A call was scheduled to discuss the issues. Mr Troughton notified Mr Bate that if he did not have a good reason for his absence, and did not comply with IBM's direction, IBM may commence a disciplinary process for serious misconduct. Mr Bate responded in writing.⁵ He said he was fully equipped to work remotely but that he had been removed from his role. His email went on to state:

I have therefore been unable to perform the tasks described in your letter. No one from IBM (including yourself and Martin Chee) have made any attempt to engage with me as to how it was proposed that I would be employed in the business.

Since returning to New Zealand on 31 July 2017 I have continuously monitored my IBM email and appropriately actioned those tasks asked of me. My New Zealand cell phone number is in blue pages and I have been accessible and fully available.

Given the breakdown in my employment relationship with IBM and the complete loss of trust, I have no confidence that a call between us will be productive. Upon my lawyer's advice, I respectfully decline your invitation, for a telephone call between us on Monday morning.

...

[26] Ms Troughton rejected almost every aspect of Mr Bate's response.⁶ A disciplinary process was commenced.

[27] The parties met on 1 September 2017. Mr Devine spoke on Mr Bate's behalf. The Authority was provided with notes from the meeting. Ms Troughton questioned what Mr Bate had been doing since his return to New Zealand and why he had not

⁵ Email dated 28 August 2017

⁶ Letter dated 29 August 2017.

attended standard meetings. For Mr Bate, it was said; there was no role for him to perform and he was unaware of any meeting requests. These were asked to be produced. The meeting notes record Mr Bate had not carried his Singapore meeting scheduler over to his New Zealand scheduler. Further correspondence between the parties was exchanged.

[28] Ms Troughton wrote again to Mr Bate on 8 September 2017. She did not accept the suggestion that he had continued to perform tasks he considered remained from his former role. She concluded he had failed to follow a lawful and reasonable instruction to perform his role.

[29] Mr Bate's employment was terminated with immediate effect.

The legal framework concerning Mr Bates claims of an unjustified disadvantage and an unjustified dismissal

[30] Section 103(1)(a) provides a personal grievance may arise where the employee has been unjustifiably dismissed by his or her former employer.

[31] Section 103(1)(b) sets out the circumstances in which an unjustified disadvantage personal grievance may occur. There must be both an unjustifiable action by the employer, and the action must affect the employment of the recipient employee to his or her disadvantage.⁷

[32] Section 103A(2) requires the Authority to objectively assess whether the dismissal or the actions said to be unjustifiable are actions that a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.⁸ In undertaking such an assessment, factors set out as s 103A(3) concerning procedural fairness, as well as the resources of the employer, and any relevant factors, must be considered.

[33] The assessment must also be informed by considerations of good faith. Section 4(1A) requires parties be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things, responsive and communicative.

⁷ Employment Relations Act 2000, s.103(1)(b) paraphrased

⁸ Section 103A Employment Relations Act 2000

Whether Mr Bate was unjustifiably disadvantaged by IBM's attempts to implement a performance process

[34] Mr Bate draws a distinction between his performance personally, and the performance of his business unit. He accepts the unit had not met revenue targets over the 18 months prior to Ms Troughton's email on May 2017. He says this is due to an ongoing reduction in headcount. But Mr Bate says there were no substantive grounds to give IBM justifiable cause to assess his performance. He provided several emails sent by colleagues over the course of the first half of 2017 to support his proposition, each of which praised him for his work on aspects of IBM's business.

[35] I have preferred Ms Troughton's evidence on this point. I accept Mr Bate's performance was indivisible from that of the business unit for which he was accountable. The email messages Mr Bate received are not, in and of themselves, sufficient to conclude it was unreasonable of IBM to want to discuss with him both his performance and that of the unit.

[36] An employer is entitled to discuss legitimate performance issues with an employee. Given Mr Bate's concession about the unit's productivity I find Ms Troughton's request to discuss his performance as the director of the unit was an action open to a fair and reasonable employer, and not unjustified.

[37] Mr Bate points to the objectives in Ms Troughton's email of 8 May 2017 and says Ms Troughton was (or should have been) aware these were unachievable. As I understand, the objectives in the email were drafted by Mr Bate. He cannot claim these were unfair if devised by him. If it was Ms Troughton who drafted the objectives, there is no evidence Mr Bate advised her that the targets were unachievable.

[38] Mr Bate refers also to the words "*will be removed*", in Ms Troughton's email. He alleges this statement establishes the proposed performance assessment had already been decided. I do not agree. It is clear from the context in which the words are stated that the potential for removal was prefaced on Mr Bate's failure to meet future objectives. Objectively viewed the email does not demonstrate predetermination. I agree that the consequences of a failure to meet the objectives may have been expressed bluntly, but a fair and reasonable employer must, as a matter of good faith, advise an employee of the possible outcome if a reasonable

instruction is not met. I have no doubt the email gave Mr Bate cause for concern but I am not satisfied the email gives rise to a successful claim of an unjustified disadvantage.

[39] Had a performance meeting occurred Mr Bate's explanation regarding "headcount" may have been accepted by IBM. But a meeting to assess Mr Bate's performance did not transpire. Nor was the performance improvement plan ever implemented. It follows that Mr Bate cannot have been disadvantaged where neither action said to be unjustifiable was progressed. Mr Bate's claims of unjustified disadvantage regarding IBM's attempts to assess and/or improve his performance are dismissed.

Was the dismissal justifiable?

[40] Mr Bate was dismissed by IBM for failing to follow a lawful and reasonable instruction to perform his role. At issue is whether or not the IBM's instruction was reasonable.⁹ The reasonableness of its instruction must be assessed against the background context in which it occurred.

[41] Setting aside whether Mr Bate's view that his role was in fact redundant, he says each of the events as set out below (which are not challenged by IBM) led him to believe his role had disappeared. On balance I am satisfied Mr Bate's belief concerning his position was genuinely held where:

- Several weeks prior to the restructure he was advised by Ms Troughton and two other senior executives that the merger of the business units would result in one leadership role and his position would likely not exist after the event.
- IBM says when the restructure crystalized an additional layer of management was inserted above Mr Bate's position. Mr Troughton accepts the structure of the newly formed software management team was not conveyed to Mr Bate until the day before it became operational.
- Ms Troughton also accepts that following the announcement (of 4 July 2017) that Martin Chee would perform the leadership position she had no communication with Mr Bate about the division of responsibilities between his role and that of Martin Chee.

⁹ See for example: *Kupa v Silver Fern Farms* [2016] NZEmpC 87 at [78].

- Between the restructure and his dismissal, Mr Bate informed IBM, in no less than 8 pieces of correspondence, and during the meeting of 1 September 2017, that he considered his job had gone. Ms Troughton accepts that neither she nor any member of IBM’s HR team discussed with Mr Bate the reasons for his view other than to assert his role remained.

[42] The circumstances of this case are similarly comparable to those set out in *Sky Network Television Ltd v Duncan*.¹⁰ In that case the Court of Appeal held that an employee’s failure to follow an instruction said by the employer to be lawful and reasonable would not necessarily justify a dismissal where there was a genuine dispute over the application or interpretation of a contractual provision.

[43] The letters sent to IBM on Mr Bate’s behalf did not overtly characterise Mr Bate’s claim as a contractual dispute. However, it should have been obvious to IBM from the content of Mr Bate’s correspondence, particularly the assertions that his position had gone, that a legal dispute concerning the very existence of his role had been raised.¹¹

[44] In *Toll New Zealand Consolidated Ltd v Rail & Maritime Transport Union Inc*:¹² the Employment Court referred to *Duncan* and summarised the position as follows:

Until a dispute is resolved, a party cannot act unilaterally as though it is correct in the view it has formed in a way that causes detriment to the other party.

[45] The Court Appeal noted (in *Duncan*) that the nature of the dispute:

“...cried out for an attempt at resolution Such an approach to the issue which had arisen between the parties may well have resolved it without matters reaching a point at which mutual confidence or trust of the parties ... had been destroyed.”¹³

[46] Whilst that there is nothing in Mr Bate’s terms of employment to indicate how the parties would resolve a dispute, it is clear Mr Devine sought IBM’s agreement on 14 June 2017 when the issue was first formally raised to attend urgent mediation. IBM initially agreed but later declined that invitation.

¹⁰ [1998] 3 ERNZ 917 (CA)

¹¹ Employment Relations Act 2000, the word dispute is defined at s 5 as “mean[ing] a dispute about the interpretation, application, or operation of an employment agreement”.

¹² [2004] 1 ERNZ 392

¹³ Above n9 at 924

[47] Against a backdrop of restructuring, and in the knowledge that Mr Bate considered his role had been disestablished, it cannot have been the action of a fair and reasonable employer for IBM to have instructed Mr Bate to perform to it, without taking some initiative to resolve the issue central to the dispute. Applying the reasoning set out in *Duncan* I find the instruction was unreasonable in the circumstances. It follows I must find his dismissal was unjustified.

[48] I am also not satisfied IBM met its duty to deal with Mr Bate in good faith on this matter. IBM's statutory duty to be active in maintaining a productive employment relationship by being responsive and communicative required it, at a minimum, to engage with Mr Bate on the matter. Simple (albeit repeated) assertions that the role remained, without some additional dialogue, was not a constructive response. IBM's omission to discuss and clarify with Mr Bate why he considered the role had gone was inconsistent with the actions of a fair and reasonable employee acting in good faith in the prevailing circumstances. Moreover, the failure to query Mr Bate on the matter precludes IBM from asserting it was able to, and did, genuinely consider his explanation as to why he not performing his role. It simply cannot have done so where no inquiry about the issue was made.

[49] I have not been persuaded that IBM's decision to dismiss Mr Bate was the action of a fair and reasonable employer in the circumstances. Mr Bate's dismissal was unjustified.

Is Mr Bate entitled to redundancy compensation?

[50] Mr Bate seeks the Authority "to determine Mr Bate has been made redundant and is therefore entitled to redundancy as set out in his signed employment agreement."¹⁴¹⁵ I accept IBM's submission that the onus lies with Mr Bate to establish his claim.

[51] The redundancy provisions contained within his individual employment agreement define a redundancy as:

¹⁴ Statement of Problem at 3.1

¹⁵ The letter of 14 July 2017 can be interpreted as raising a personal grievance concerning both the process undertaken in the restructuring and the alleged redundancy. But these matters were not pleaded as personal grievance claims in the statement of problem lodged with the Authority or in the amending document.

“... a situation where your employment is terminated because the duties and responsibilities of your position are significantly altered or are surplus to requirements due a change in the size, structure or business requirements of IBM.”

[52] The provisions go on to set out the rights and obligations of the parties where a suitable alternative is offered or if a position that involves a reduction in total package remuneration is made. Compensation for redundancy is calculated according to length of service. Thirteen weeks salary would be paid for the first year of employment and 1 weeks' salary for each additional six months or part thereof.

[53] IBM observed that the contractual requirements triggering redundancy were not met where Mr Bate's employment had not been terminated on grounds of redundancy. The submission does not dispose of Mr Bate's claim.

[54] In *Auckland Regional Council v Sanson* the Court of Appeal held that the application of a redundancy provision could not turn on the employer's unilateral decision to terminate a position.¹⁶ The legal issue was whether the position itself had “in fact” terminated.

[55] An objective assessment as to whether the duties and responsibilities attached to Mr Bate's position were significantly altered or surplus to requirements was challenging for the Authority's investigation. His position does not have an accompanying job description or any other formal documentation that prescribes or defines the actions required by the position.¹⁷ This is said to be due to the autonomous and self-driven nature of the role. The incumbent is responsible for ensuring the business unit meets the financial and growth targets set for the region. How this is achieved is largely up to the holder of the position.

[56] The matters by which Mr Bate says his role was redundant are set out as follows:

Documents setting out the AP executive

[57] Firstly, Mr Bate points towards the 4 July 2017 announcement, and to an email dated 10 July 2017 purported to list Asia Pacific leader members: each of

¹⁶ [1999] 2 ERNZ 597 (CA)

¹⁷ An incentive performance letter (IPL) is said to set out the scope of what the role pays for, but as I understand from the evidence the documents does not detail specific duties. No IPL was furnished to the Authority regarding Mr Bate.

which, by the absence of his inclusion, he says demonstrates he was removed from his leadership role.

[58] I have already accepted Mr Bate had reasonable cause for doubt regarding the creation of an additional executive structure. The failure to actively communicate the detail of the restructure to Mr Bate was a factor that influenced my finding that the dismissal was unjustified. But I am not persuaded the reorganisation resulted in his position becoming surplus. Ms Troughton properly conceded she could have managed the merger announcement better. I accept her evidence that the announcement document was not intended to list all Cloud executive positions. As to the 10 July 2017 email, Ms Troughton notes the document was a draft and incorrect. She notes her name was also not included in the list.

Mr Chee's appointment

[59] Next, Mr Bate asserts that following the merger Mr Chee's appointment to the AP Cloud leadership position effectively resulted in a transfer of his duties. Mr Bate accepts the new leadership position involved executive management of the former Hybrid Cloud and Analytic's business units. Before the restructure he worked "60 hours a week plus or minus 20" due to travel and other exigencies. He agrees Mr Chee was likely the same. I find it implausible that Mr Chee could perform both roles according to the hours Mr Bate says were required to perform each position.

International assignment

[60] Nor have I been persuaded by Mr Bate's contention that the cessation of his international assignment in Singapore on 31 July 2017, in and of itself, demonstrates the position was surplus to requirements. There is no link between the receipt or length of an assignment and the role(s) performed whilst undertaking an assignment.

[61] There is also an email sent to Mr Bate and other AP leaders from the Vice President of Finance AP regarding spending guidelines.¹⁸ Amongst other things, leaders were advised no new or extended assignments were to be offered without Finance approval. That material tends to support a finding that Mr Bate's international assignment came to an end as a consequence of a policy change rather than a specific action directed toward him because his role was redundant.

¹⁸ 19 April 2017

[62] Mr Bate says there were significant impediments to his ability to perform the role if located in New Zealand. IBM accepts his New Zealand location may have presented challenges but does not consider these insurmountable. Ms Lewsley's evidence advised of an employee, at a similar executive level to Mr Bate, who is based in New Zealand but engages with IBM's offices and clients in Britain. Whether Mr Bate could have performed the role in New Zealand is a different consideration to whether the role existed.

[63] IBM's evidence that Mr Bate's position was not fixed to any particular location and could be performed remotely. Mr Bate did not challenge IBM on that issue when he returned to NZ and his email of 28 August 2017 indicated he ready and prepared to work but for the removal of his role.

[64] I am satisfied changes to location was an accepted feature of the role and it was not a term and condition of employment that the position was based in Singapore.

Changes to the role

[65] Mr Bate alleges his leadership responsibilities were eliminated from his position. He says after the merger he had little or no interaction with the executive responsible for running the AP Cloud business, including Mr Chee. He says he was no longer sent business updates, meeting invitations, general correspondence, or communications regarding business direction. Daily interaction with Ms Troughton ceased. Nor was he contacted at all by her successor who commenced in the position on 7 August 2017.

[66] Following the merger Mr Bate says he was no longer invited to a range of business review meetings or his involvement was not mandatory. He says the exclusion did not simply impact on his status but removed access to tools necessary to run the business to which he had been assigned. Ms Troughton was unable to explain Mr Bate's absence from several meeting invitations¹⁹ but I am also satisfied that the previous structure and content of several review meetings had changed as a consequence of post restructure consolidation and to streamline the business.²⁰

[67] Under questioning Mr Bate accepted he did continue to receive invitations to various meetings, but said he was increasingly excluded.

¹⁹ For example Monthly Worldwide Business Review

²⁰ Monthly Hybrid Cloud Software with AP General Manager; Cloud Business OBDR's

[68] In the disciplinary meeting of 1 September 2017 it was conceded that Mr Bate's had not transported meetings scheduled (whilst he remained in Singapore) to his New Zealand scheduler. That omission must account for some absence of invitations. Mr Bate's written evidence before the Authority on the point altered: he now says there was little left to transfer. I prefer the account given to IBM at first instance.

[69] On the second day of the Authority's investigation Mr Bate provided copies of 51 emails sent between 11 August and 8 September 2017 said to involve Cloud business, but for which he was not a recipient. The late production of this evidence was not helpful where there was limited time (both for the Authority and the respondent) to properly consider and assess its importance. Mr Bate was unwilling to disclose the source of the documentation, but IBM did not challenge the authenticity of the material.

[70] Mr Bate spoke to several emails he considered the most relevant. Two of these were invitations to a conference call to review transactions in a particular market. A further email invited attendees to an "informational call". Mr Bate says he would have attended each of these prior to the restructure. A final email reflected Mr Chee sending a motivational email to members of AP Cloud. Ms Troughton could not explain why Mr Bate did not receive these. She noted however that a group of emails were essentially repeated;²¹ sent to a specific person;²² or were regular calls.²³ IBM says if Mr Bate was receiving fewer meeting invitations than would have been expected when he returned to New Zealand, he did not advise it of that matter.

[71] Mr Bate says IBM isolated him from day-to-day operations. IBM says Mr Bate made himself invisible to the organisation. I have already criticized IBM as regards its lack of engagement with Mr Bate in a disciplinary setting. But Mr Bate must also bear some responsibility also for the change in communication. He did not regard as Mr Chee as his manager in the new structure and did not contact him. From 5 July 2017 onwards he advised colleagues he had been removed from the role. He stopped setting up business calls, and removed his sign-off title on electronic documents.

²¹ Pages 39, 45-48;

²² Pages 52, 79, 123

²³ Pages 1, 3, 5, 7

[72] At the outset I must record this matter is finely balanced. However, I am not satisfied Mr Bate has established his duties and responsibilities were significantly altered or that his position was surplus to requirements. General terms of employment remained the same including his remuneration. The role continued to require him to deploy the expertise, skills and experience demanded by it before the restructure. Mr Bate's reporting line did change and there is some evidence that how he reported to the organisation, notably regarding the requirement to attendance at high level review meetings, was moderated. I accept IBM's explanation that the consolidation of its software business transformed the nature and content of several fora. There is insufficient evidence to conclude the alterations resulted in a material change to the activities he was primarily engaged to undertake, or that he was unable to perform his role. In this regard I am unwilling to conclude he was demoted or that his status was diminished.

[73] There is evidence of instances where Mr Bate was not involved in operational functions usually requiring his presence. However the cause for Mr Bate's absence from those activities was either unclear from the evidence or equivocal.

[74] Mr Bate's claim that his position was redundant has not been established. It follows he is not entitled to redundancy compensation.

Is the non-competition agreement enforceable?

[75] Mr Bate requests a declaration that the Noncompetition Agreement is unenforceable. The amended statement of problem simply alleged "*[he] was prevented from engaging in meaningful alternative employment due to the Respondent's allegation of ongoing duties*". The claim appears to have stemmed from a letter sent by IBM to Mr Bate after his dismissal, reminding him of his post-employment contractual obligations. An unjustified disadvantage claim was raised in connection with that event. However, for an action to give rise to a personal grievance, it must occur during an employee's employment.

[76] I have understood Mr Bate's claim regarding enforcement concerns the non-competition provision which I have set out below. I have not replicated those portions of the provision that are not relevant to this matter.

[77] I have also set out the definition of particular phrases, as recorded for the purposes of the agreement, where relevant. Finally, I have included the non-solicitation clause in circumstances where Mr Bate has asked me to consider it in a remedies setting.

1. Covenants

(c) You acknowledge and agree that during your employment with IBM and for twelve (12) months following the termination of your employment, either by you for any reason, [or] by IBM for “Cause” ...

... you will not directly or indirectly within the “Restricted Area” (i) “Engage in or Associate with” any “Business Enterprise” or (b) any competitor of the Company; or (ii) solicit, for competitive business purposes, any customer of the Company with which you were involved as part of your job responsibilities during the last twelve (12) months of your employment with IBM.

...

2. Definitions

“Business Enterprise” shall mean any entity that engages in, or owns or controls an interest in any entity that engages in, competition with any business unit or division of the company in which you worked at any time during the three (3) period prior to the termination of employment.

“Cause” shall mean, as reasonably determined by IBM, the occurrence of any of the following: ... (vi) failure by you to perform your duties or follow management direction, which failure is not cured to the Company’s satisfaction within a reasonable period of time after a written demand for substantial performance is delivered to you ... ;

“Engage in or Associate with” a Business Enterprise or competitor of the Company shall include ... as a ... employee.

“Restricted Area” means “any geographic area in the world for which you had job responsibilities during the last (12) twelve months of your employment with IBM.

[78] The non-solicitation clause is as follows:

You further agree that during your employment with IBM and for the two (2) year period following the termination of your employment by either you or IBM for any reason, you will not directly or indirectly within the “Restricted Area,” hire, solicit, or make an offer to any employee of the Company to be employed or to perform services outside of the company.

[79] Covenants restraining competition are prima facie unlawful. A strict interpretation of an agreement to restrain is therefore necessary as a matter of public policy. I have already found that IBM’s instruction to Mr Bate to perform his role was unreasonable in the circumstances. It follows that IBM cannot rely on the termination of Mr Bate’s employment for “cause” where the “cause” cannot have

been a reasonable determination for IBM to conclude. The non-competition provision is unenforceable.

Additional claims

[80] The statement of problem asked the Authority to determine the issue of breaches: to Mr Bate's employment agreement, and the Employment Relations Act and to award penalties.²⁴ No further specificity was provided as to nature of these claims and I can take these no further.

Remedies

Lost wages

[81] Section 123(1)(b) provides that an employee who has been dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. That section is qualified by s 128(2) which, subject to any reduction that the Authority may make under s 124 for contributory behaviour, provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration, or 3 months' ordinary time remuneration.

[82] The first remedy requiring consideration is Mr Bate's claim for lost wages. At the time of his dismissal his base salary was \$349,900 per annum.

[83] I am satisfied Mr Bate has taken reasonable and appropriate steps to satisfy mitigate his loss. He has not yet been successful in obtaining employment although he expressed some optimism about an interview held shortly before the Authority's investigation. He seeks payment of lost wages, taking as a starting point two years, beginning from the date of his dismissal ("being the period of time that IBM set as the "non-compete period"). I note firstly that the 2 year period corresponds to the non-solicitation clause in the Noncompetition Agreement. The provision does not prohibit Mr Bate from working and cannot be a relevant factor to an assessment of lost wages.

[84] I am unwilling to accept, in the alternative, that I should apply the time period for which his non-competition prohibition stipulates. Reimbursement of lost wages requires an assessment of actual loss, taking into consideration the situation of the employee. Mr Bate says that each of the 9 organisations in which he had been

²⁴ Statement of Problem at 3.3, 3.4, 3.6.

shortlisted, the interviewing organisation expressed concerns about the impact of the restraint. In making the final selection he considers the Noncompetition agreement weighed heavily against him. I accept it likely that the non-competition has negatively impacted on Mr Bate's efforts to find replacement employment. Subject to an assessment regarding contribution, this is a case where I find it is appropriate to exercise the discretion at s 128(3) to extend the claim for lost salary beyond the three month period. Six months' wages is an appropriate award.

Compensation

[85] Turning next to compensation under s 123(1)(c)(i) for humiliation, loss of dignity, and injury to the feelings. The quantum of compensation sought by Mr Bate was not specified in the statement of problem. At the Authority's investigation meeting Mr Bate asked to be awarded \$15,000 under this head of claim.

[86] I accept the testimony of Mr Bate and his wife regarding the impact his dismissal, and the event's leading to it. Both reported he required medication to sleep, and that he was easily agitated and prone to disproportional responses to minor irritations. I have no doubt he was distressed, and humiliated, particularly where his employment with IBM for almost 22 years had been successful, as demonstrated by his placement on international assignments. Subject also to s 124 considerations an award of \$15,000 in compensation is easily appropriate.

Contribution

[87] I must assess the extent to which Mr Bate's actions contributed to the situation that gave rise to his dismissal. Such actions must be causative of the outcome and equate to culpable or blameworthy conduct.

[88] IBM urges the Authority to take into account the following matters which are said to have contributed to his dismissal. It says Mr Bate's uncompromising view of his employment circumstances inhibited constructive dialogue. It refers to his unwillingness to engage in performance discussions. It further points to his failure to attend the meeting scheduled for 28 August 2017 (before disciplinary action was initiated) where IBM sought an explanation for his absence from work and why he had performed the functions of his role before disciplinary action commenced.

[89] I am unwilling to conclude any of these matters should sound in a finding on contribution under s 124. Mr Bate was entitled to have his solicitor accompany him to a meeting to discuss performance issues where IBM intimated disciplinary consequences may result. I agree it was unwise for him to refuse to attend the meeting of 28 August 2017. I am further satisfied Mr Bate choose to be inactive in his role. But each of these behaviours occurred against a background context in which IBM was unwilling to meaningfully engage on the issue of primary dispute; whether Mr Bate's position existed. It is IBM's failure caused the situation that led to Mr Bate's dismissal. Mr Bate did not contribute to that outcome. Mr Bate's remedies are not altered by my assessment as to contribution.

Summary of findings and orders

[90] For all the reasons set out above, I find that:

- (a) Mr Bate was not unjustifiably disadvantaged by IBM's attempts to assess his performance.
- (b) Mr Bate was unjustifiably dismissed:
 - (i) IBM is to ordered to pay \$174,950 to Mr Bate as reimbursement of 6 months' lost wages.²⁵
 - (ii) IMB is ordered to pay Mr Bate \$15,000 as compensation for humiliation, loss of dignity and injury to feelings.²⁶
- (c) Mr Bate's position as Vice President, Hybrid Cloud Software' was not redundant. He is not entitled to redundancy compensation.
- (d) The claim of an unjustified disadvantage regarding the non-competition provision is dismissed.
- (e) The non-competition provision is not enforceable.
- (f) Claims of unspecified breaches to Mr Bate's employment agreement and the Employment Relations Act 2000 were too unspecified to determine, and are dismissed.

²⁵ Employment Relations Act 2000, s 123(1)(b) and 128(2)
²⁶ s 123(1)(c)(i)

Costs

[91] Costs are reserved.

Note: This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.²⁷ The Member wishes to record her apologies to the parties to the delay in determining this matter.

Michele Ryan
Member of the Employment Relations Authority

²⁷ Employment Relations Act 2000, s 174C(4)