

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 28  
5422702

BETWEEN                      HENRY McCAMBRIDGE  
   Applicant  
  
AND                                VIRIDIAN GLASS LIMITED  
   PARTNERSHIP  
   Respondent

Member of Authority:        Vicki Campbell  
  
Representatives:                Kristina Andersen for Applicant  
   Jo Douglas for Respondent  
  
Investigation Meeting:        25 September 2014  
  
Submissions Received:        8 and 17 October 2014  
  
Determination:                 30 January 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr McCambridge was disadvantaged in his employment when Viridian Glass Limited Partnership unjustifiably withheld payment of his commission of \$4,133.94. Viridian Glass Limited Partnership is ordered to pay Mr McCambridge the sum of \$4,133.94 within 28 days of the date of this determination.**
- B.     Viridian Glass Limited Partnership has breached the terms of Mr McCambridge’s employment agreement by withholding the payment of the July 2013 commission payment.**
- C.     Mr McCambridge was not unjustifiably dismissed.**
- D.     The counter-claim by Viridian Glass Limited Partnership has**

**been successful in part. Mr McCambridge is ordered to reimburse Viridian Glass Limited Partnership the sum of \$1,524.89 without deduction within 28 days of the date of this determination.**

**E. Costs are reserved.**

**Employment relationship problem**

[1] Mr McCambridge claims his employment was affected to his disadvantage by an unjustified action by Viridian Glass Limited Partnership (Viridian Glass), that Viridian Glass has breached the terms of his employment and that he was unjustifiably dismissed.

[2] Viridian Glass denies the claims and counter-claims against Mr McCambridge for overpaid commission payments in the amount of \$16,135.54 and overpaid sick leave in the amount of \$1,648.64.

[3] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr McCambridge and Viridian Glass 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.

**Background**

[4] In November 2005 Mr McCambridge was employed by Euroglass Systems Limited selling frameless glass. Mr McCambridge was paid on a salary plus commission basis.

[5] At the beginning of 2011 Mr McCambridge was employed in a commercial sales position. This position was later distabished. During the restructuring process Mr McCambridge was offered and accepted redeployment to a position in residential sales.

[6] At Mr McCambridge's request, he was advised that he would be allowed a modest level of time to be allocated to a small group of commercial customers, but that the key focus was to be the existing residential customer base. On 18 May 2011

Mr McCambridge signed a new individual employment agreement confirming the change to a residential sales role. The employment agreement also included Appendix 1 which set out the terms of the commission structure that would apply to Mr McCambridge.

[7] The parties agreed to update the commission structure set out in Appendix 1 and this was set out in a new written document dated 7 November 2011.

[8] The agreement set out the basis on which commissions would be calculated in the following terms:

Shower sales over budget figure	5% of sales figure
Mirror sales over budget figure	5% of sales figure
Splashback sales over budget figure	10% of sales figure
Balustrade sales over budget figure	2% of sales figure
Other sales	2% of Sales figure
Glass blocks sales	5% of sales amount
Commercial sales	1% of sales figure

[9] In addition to the commissions, Mr McCambridge would qualify for the payment of a quarterly bonus on achieving the following quarterly sales thresholds:

\$450,000 – 544,999	\$5,000 bonus
\$550,000 - \$699,999	\$10,000 bonus
\$700,000 and above	\$15,000 bonus

[10] The document sets out the conditions which affected the calculation and payment of commissions:

1. The Monthly Commission is only payable on the amount over the budget figure (i.e. No commission on the budget figure).
2. The “Final Sales Price” is the amount of money the Company receives for the job. If a problem is encountered and we receive less money for the job than invoiced or quoted, the Commission is affected accordingly. If the client fails to pay the account, the commission is wiped.
3. You must obtain at least 80% of the Shower Sales Budget and 60% of the other areas Sales Budget to receive any bonus payments.
4. Commission is only payable on your Client Base which will form your department. Customers of other Sales Managers at Euroglass will not form part of your Client Base. Any dispute about Client Base will be settled within 5 working days by Euroglass Management.
5. The person who sells the job has the overall responsibility for the collection of the account. Commission is paid once Euroglass has been paid for the job.

6. Commission is gross. PAYE is to be deducted from the amount.
7. Quoting must be done in the Smart Toolbox at rates and margins set by Euroglass Management and prices or rates can't be altered without the consent of Euroglass Management. Euroglass can change the rates and margins at Management's discretion.
8. Residential sales are defined as "correctly priced" quotations done in structures using the default mark-ups set by Management. Refer to attached chart.
9. Commercial sales are defined as any sales that are priced with a mark-up lower than the acceptable range with the minimum mark-up being 40% overall or with Management's approval.
10. "Correctly Priced" means that there are no significant mistakes made in quantity measured at time of quotation with regard to materials or labour.
11. All quotations are to be done within the limits of your own time resources until such time as Quantity Surveying / Estimating resources are available.

[11] In or about February 2012 Euroglass entered into a joint venture with CSR Viridian. The entity which took over the business employing Mr McCambridge changed to Viridian Glass. Mr McCambridge signed an employment agreement reflecting the change of employing entity on 9 October 2012. The letter of offer signed by Mr McCambridge states that he will be paid an all-inclusive annual salary. There is no express clause in the new agreement for the payment of commissions over and above his salary payments. Despite this, Mr McCambridge continued to receive commission and bonus payments in accordance with the document dated 7 November 2011.

[12] I am satisfied that from 9 October 2012 Mr McCambridge's terms and conditions of employment were those set out in the signed individual employment agreement together with the Commission Structure document dated 7 November 2011.

[13] In September 2012 Mr McCambridge was paid a quarterly bonus of \$15,000 and commissions worth \$4,245.34. The payments were made as a result of a sale Mr McCambridge had quoted in respect of a commercial sale relating to Meadowbank Retirement Village (Aspec Meadowbank project).

[14] On 29 May 2013 Mr McCambridge raised a claim for outstanding wages in the form of commissions and bonuses through his representative. In resolution Mr McCambridge sought payment of outstanding commission and bonus payments

totalling \$6,670.48 and clarification regarding the future calculation of commissions and bonuses.

[15] Viridian Glass denied any outstanding payments were owed to Mr McCambridge as he had failed to achieve all the requirements of the commission structure.

[16] On 21 August 2013, through email correspondence, Mr McCambridge was advised that his commission and bonus payments were being held until a dispute around the Commission Structure and an analysis of the Aspec Meadowbank project had been completed.

[17] In October 2013 Mr McCambridge proceeded on a period of sick leave which he took for the purpose of looking after his mother who was ill. Viridian Glass says the leave was unauthorised.

[18] Mr McCambridge was summarily dismissed from his employment on 31 October 2013 for serious misconduct being the taking of unauthorised sick leave.

### **Issues**

[19] The issues to be determined are:

- a) Was Mr McCambridge disadvantaged in his employment?
- b) Did Viridian Glass breach the terms of Mr McCambridge's employment agreement?
- c) Was Mr McCambridge unjustifiably dismissed?
- d) If Mr McCambridge was disadvantaged or unjustifiably dismissed, what, if any, remedies should be awarded?
- e) Is Viridian Glass entitled to counter-claim against Mr McCambridge for overpaid commission and bonus payments, and overpaid sick leave?

### **Unjustified disadvantage**

[20] To be successful in his claim Mr McCambridge must establish that his employment or one or more conditions of his employment was affected to his disadvantage by an unjustifiable action by Viridian Glass.<sup>1</sup>

[21] The Authority is required to apply the test of justification to the claim for disadvantage having regard to all the circumstances at the time the disadvantage arose.

### ***Disadvantage due to changes in the commission structure***

[22] On 27 February 2013 Mr McCambridge asked Viridian Glass to review his quarterly commission. I find there was no agreement on changes to Mr McCambridge's commission structure at that time.

[23] Following a meeting on 21 March 2013, where the commission and bonus structure was discussed, Mr McCambridge says Viridian Glass began to unilaterally alter the commission structure in order to disadvantage him. Mr McCambridge claims he was told he would have to meet all aspects of his sales targets in order to receive commission payments and not just the sales targets for balustrades and showers.

[24] Mr Walden, Northern Regional Sales and Installations Manager, confirmed the discussions between them on 21 March 2013 in a letter to Mr McCambridge dated 25 March 2013. Relevant to this issue Mr Walden confirmed:

- a) the quarterly bonus was as per the agreement set out in his employment agreement. (I find this included the 7 November 2011 document by way of variation). Mr Walden confirmed that no changes to the agreed commission structure have been made;
- b) a review of the commission structures and quarterly bonus system was underway;

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<sup>1</sup>Employment Relations Act 2000 section 103(1)(b).

- c) Mr McCambridge was to achieve the required 80% of shower targets and 60% of mirrors, balustrades and splashback targets before any bonus would be paid.

[25] Discussion at the meeting also included feedback to Mr McCambridge that a period of grace had been applied to his situation from the change in commercial to residential sales to allow him time to reach his sales targets and earn commissions. Even though he had not achieved all sales targets Viridian Glass had continued to pay Mr McCambridge a quarterly bonus.

[26] Mr McCambridge was on notice at the meeting on 21 March 2013 and as confirmed in the letter dated 25 March 2013 that he was now expected to meet all sales targets otherwise the quarterly bonus would not be paid.

[27] Mr McCambridge was also reminded that he was to concentrate on residential sales only and allow others do the commercial sales.

[28] I find there were no changes, either unilateral or agreed, to the commission structure and Viridian Glass invoked the conditions attached to the commission structure in accordance with its terms. It follows that Mr McCambridge was not disadvantaged in his employment by an unjustifiable action by Viridian Glass in relation to changes in the commission structure.

***Disadvantage due to withholding of commission payments***

[29] In his brief of evidence Mr McCambridge set out various amounts he says he was entitled to for unpaid commission and bonus payments. The only payment Mr McCambridge has established is owed to him for outstanding commission payments is the commission payment for the month of July 2013 totalling \$4,133.94. This amount has been held back by Viridian Glass.

[30] Viridian Glass says it was entitled to hold the payment back until the commission structure dispute was resolved and the analysis of the Aspec Meadowbank project had been completed.

[31] There is nothing in the 7 November 2011 document that allows Viridian Glass to withhold payments of commissions. The terms attached to the payment of commissions require the commission to be paid once Viridian Glass has been paid for the job. This means that once Viridian Glass has received payment, and provided the budget figure has been achieved, commission becomes payable at the appropriate percentage.

[32] The employment agreement contains a general deductions clause for payment of wages in the following terms:

On termination of employment or at such other times as Viridian Glass may require, the Company may make deductions from your pay (including final pay on termination of employment) for any time not worked, (other than authorised paid leave), the value of any unreturned Company property, and any other debt you owe to Viridian Glass (including payments made in advance). The amount and timing of such deductions will be determined by the Company, acting reasonably, following consultation with you.

In the event that you are overpaid, you agree that the Company shall be entitled to make deductions from wages relating to a particular pay period from wages and subsequent pay periods.

[33] The payment of salary and commissions are separate payments. This is evidenced by the signed employment agreement which includes a provision for the payment of a salary, but does not include the commission and bonus structure. Instead the calculation and payment of the commission and bonus structure is dealt with in the document dated 7 November 2011.

[34] The employment agreement allows for “*deductions*” from Mr McCambridge’s pay for specified reasons including for any debt owed by Mr McCambridge to Viridian Glass which includes payments made in advance.

[35] The outstanding commission payment was to have been paid to Mr McCambridge in or about August 2013. At the time the amount was withheld from him there is no evidence from Viridian Glass that there was any debt owed by Mr McCambridge.

[36] I find the withholding of the July 2013 commission payment was an action by Viridian Glass that disadvantaged Mr McCambridge in his employment and that action was unjustified.

[37] Viridian Glass Limited Partnership is ordered to pay to Mr McCambridge the sum of \$4,133.94 gross within 28 days of the date of this determination.

### **Breach of employment agreement**

[38] It has been difficult on the papers and evidence presented to the Authority to clearly and concisely identify the specific aspects of Mr McCambridge's employment agreement he claims have been breached.

[39] I have earlier found that following 7 November 2011 no further amendments or agreements to alter the commission structure were made between the parties. Mr McCambridge has failed to establish that Viridian Glass has breached any terms of his employment agreement with respect to any purported changes to the administration of the commission and bonus structure.

[40] I am satisfied the withholding of the July 2013 commission payment was an action taken by Viridian Glass was outside the terms of the employment agreement. The failure to pay the commission payment when it was due constitutes a breach of the employment agreement.

[41] No penalties for this breach have been sought by Mr McCambridge and I make no order in respect of this breach.

### **Unjustified dismissal**

[42] Mr McCambridge was dismissed on 31 October 2013 for taking unauthorised sick leave.

[43] Mr McCambridge's wife is a travel agent and acts as a Tour Leader. Mr McCambridge had planned to travel to Europe with his wife in October 2013 and visit his mother at the end of the tour. October is a busy time for the business and annual leave requests were generally declined.

[44] On 15 April 2013 Mr McCambridge applied for 17 days annual leave to be taken from 3 – 25 October 2013. In his application Mr McCambridge stated that the

holiday had been approved 18 months earlier and in addition he wished to take 5-6 days sick leave to visit with his mother who was ill.

[45] On 18 April 2013 Mr Walden met with Mr McCambridge regarding the application for leave. Mr Walden reminded Mr McCambridge that he had previously approved 10 days annual leave and that this application amounted to 17 days in total. Mr Walden advised Mr McCambridge that he could not take sick leave to visit his mother and that if he wished to visit his mother he must take annual leave.

[46] Mr Walden told Mr McCambridge that he was to restrict his leave application to a total of 13 days and that if he wished to visit his mother he would have to shorten his trip and visit his mother within the 13 day allowance.

[47] In accordance with Mr Walden's request and on 30 April 2013 Mr McCambridge submitted a new application for leave requesting 13 days annual leave from 3 – 21 October 2013.

[48] On 19 July 2013 Mr McCambridge submitted a new application for leave. He had won a trip to Bali and wished to use it. He applied for 4 days annual leave to be taken from 13 – 16 August 2013. This leave was not approved. Mr Walden responded to Mr McCambridge as follows (verbatim):

As it stands with the leave granted for October – 13 days, you have insufficient accrued leave available for the period we will be closed at Christmas.  
Already, you will have to take LWOP for part of the Christmas break.  
You are aware that we don't grant leave for any time from September through to Christmas as this is our busiest period, yet have made a special case for you.

You may not be aware, but we don't normally grant LWOP to any employees since we provide 4 weeks paid leave already, so again we have made a special case for you.

Sorry, but we cannot grant any further leave period.

If you would like to reduce the October leave, we can exchange the days for some leave in August but you must not take any extra leave days.

[49] Mr Walden followed this up with further advise to Mr McCambridge (verbatim):

I looked through the figures you gave me yesterday and considered again your request for leave.

I have taken the following points into consideration:

- The period between August and December is our busiest period of work especially for Residential business which is the area you are employed to service.
- Normally we do not grant leave during this time other than for a few days here and there.
- However, we have accommodated your request for 12 working days of leave during October against what we do as standard practice and policy. (we had originally understood that there was to be only 10 working days taken).
- We have 18 people in administrative / management / sales roles which also require periods of leave to be managed.
- We have the Homeshow booked for September and have invested approx ... in this exercise which we expect to generate leads for you and Daniel to capitalise on.
- It is your role to gain Residential Sales and meet your Sales Budget and thus far we are not doing so for this financial year.
- You need to have 11 days available for use during the Christmas close-down period and you will fall short of this mark as it stands.

When I weigh up all these points, I am still in the same position that we cannot grant you leave for the period requested in August unless you reduce your leave request for October.

[50] On 25 July 2013 in response to a question from Mr McCambridge regarding the close-down dates over Christmas, Mr Walden again confirmed that Mr McCambridge had to stay within the number of leave days granted. Mr McCambridge advised Mr Walden that he was trying to change the dates of the October holiday and that he would advise as soon as possible. In response Mr Walden advised Mr McCambridge that if he changed his October dates he must submit a new application for both the October and August leave dates and that the October leave dates must be confirmed first.

[51] On 12 August 2013 Mr McCambridge modified his leave application for October to take leave only from 3 – 16 October 2013. As the leave was in accordance with the instruction given by Mr Walden to split his 13 days total leave Mr Walden passed the information onto the payroll office who confirmed that the approved leave dates would be amended in the system. This was done on 13 August 2013.

[52] On 29 August 2013 Mr McCambridge submitted a further application for leave. This time he applied to take sick leave for the period 17 – 25 October 2013. If granted this would provide Mr McCambridge with the same leave period that had already been denied to him. Mr McCambridge noted on his application that he wished to take the leave to visit his sick mother.

[53] Mr McCambridge proceeded on leave for the period 3 – 25 October 2013 inclusive. On his return on 29 October 2013 Mr McCambridge was invited to attend a disciplinary meeting. The allegations included an allegation that Mr McCambridge had taken unauthorised leave after being instructed to return to work on 22 October

2013 together with an allegation that he had failed to follow an instruction to follow up with a customer and that failure resulted in Mr Walden having to sort out a situation that had arisen with the customer in Mr McCambridge's absence.

[54] Mr McCambridge was advised that Viridian Glass considered both matters could constitute serious misconduct, that summary dismissal was a possibility, that he was entitled to bring a representative or support person to the meeting and to contact Mr Walden if he had any questions.

[55] The disciplinary meeting took place on 31 October 2013. Mr McCambridge attended the meeting without representation and advised that he was recording the meeting. During the meeting Mr McCambridge was reminded that it was unusual for leave to be granted between September and December and that Mr McCambridge had been granted two weeks annual leave.

[56] Mr McCambridge was reminded that he had applied for 17 days which had been declined and had been told he could not take sick leave to visit his mother, that if he wished to visit his mother he had to take annual leave which had to total not more than 13 days (which included the leave he took in August).

[57] Mr McCambridge's position in the meeting is that the leave application submitted on 29 August 2013 had not been declined and on that basis he assumed it had been approved. Mr McCambridge said he expected that if the 29 August 2013 leave application was an issue Mr Walden would have spoken to him about it.

[58] After an adjournment Mr Walden advised Mr McCambridge that he believed Mr McCambridge was fully aware that the leave for the period 17-25 October 2013 had not been approved. Mr McCambridge was advised that summary dismissal was being considered and his feedback on this was sought.

[59] Mr Walden considered what Mr McCambridge had to say and decided that summary dismissal was the appropriate sanction. The dismissal was confirmed in writing.

[60] The statutory good faith obligations to be responsive and communicative lay equally on Mr McCambridge as well as Viridian Glass. Mr McCambridge's employment agreement allows for sick leave in situations where either Mr McCambridge, his spouse or a "*dependant*" is sick or injured.

[61] There is no dispute that Mr McCambridge's mother was sick. However, she does not reside with Mr McCambridge or even in New Zealand. In order to qualify to take sick leave to visit with his mother Mr McCambridge must establish that his mother was dependent on him for his care. It is clear from the evidence that his mother was not dependant on Mr McCambridge for her care.

[62] It is equally clear from the evidence that Mr McCambridge knew Viridian Glass would not support him taking sick leave to visit his mother. He had been told this by Mr Walden on 18 April 2013.

[63] It beggars belief that after all the communications Mr McCambridge had had with Mr Walden about his absence in October 2013, Mr McCambridge even made the application for sick leave. Mr McCambridge relies on the fact that Mr Walden did not decline the leave request and says that Viridian Glass acted unreasonably in not advising him before he left that the leave had been declined. Mr Walden's evidence, which I accept, is that Mr McCambridge submitted the sick leave request at a time when he was away from the office. As a result, he overlooked the email request. It was not until Mr McCambridge failed to return to work on 17 October 2013 that Mr Walden checked and noticed there was a sick leave application in the system for Mr McCambridge.

[64] I find it is more likely than not that Mr McCambridge was intent on taking the full period of leave in spite of him being fully aware that he was not allowed to take sick leave and the number of annual leave days he was approved was limited. Good faith is a mutual obligation. Mr McCambridge had previously discussed his leave intentions with Mr Walden but did not do so when he submitted the sick leave application on 29 August 2013. I am satisfied it is more likely than not, that he did not discuss the application with Mr Walden because he already knew it would not be approved, besides Mr Walden was not available as he was away from the office. He simply went on leave, closing his mind to whether the leave was approved or not.

[65] A definition of serious misconduct is not possible, for it is always a matter of degree. What is usually needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship.<sup>2</sup>

[66] The Authority has previously held that an employee taking an extended period of leave, when a leave request has been previously considered and declined, can amount to serious misconduct justifying summary dismissal.<sup>3</sup> The evidence establishes that Mr McCambridge had been told he was not to take more than a total of 13 days annual leave for the leave taken in August and October 2013.

[67] As held by the Employment Court sick leave is a benefit for the employee which incurs a loss for the employer. Sick leave is a facility to be used when needed and not a mechanism to augment annual leave.<sup>4</sup> Mr McCambridge did not just take unauthorised annual leave, he took sick leave in circumstances where he was not entitled to and he used this sick leave to augment his annual leave so that he could take leave for the full period of his pre-planned trip.

[68] There was no evidence that Mr McCambridge ever took any steps to change his travel dates, neither did he consider canceling his trip. His deliberate defiance of Mr Walden's refusal to grant the sick leave is clearly capable of being considered serious misconduct by a fair and reasonable employer. His was a willful and deliberate act which seriously undermined the confidence of his employer.

[69] I find the decision to dismiss Mr McCambridge for serious misconduct was a decision a fair and reasonable employer could make in all the circumstances. I am unable to be of further assistance to Mr McCambridge with respect to the termination of his employment.

### **Counter-claim**

[70] There are two limbs to the counter-claim by Viridian Glass. The first is a claim for repayment of the quarterly bonus and commission payments paid to Mr

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<sup>2</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1990] 3 ERNZ 483.

<sup>3</sup> *Ashton v PMP Print* CA104/07, Employment Relations Authority Christchurch, Member Arthur, 27 August 2007.

<sup>4</sup> *Taiapa v Te Rununga O Turanganui A Kiwa Trust t/a Turanga Ararau Private Training Establishment* [2013] NZEmpC 38.

McCambridge in September 2012. The second is a claim for \$1,648.00 as reimbursement of the unauthorised sick leave taken by Mr McCambridge in October 2013.

***Bonus and commission payments***

[71] In September 2012 Mr McCambridge received commission payments in respect of the Aspec Meadowbank project. A condition of payment for commissions on commercial projects was that a margin of not less than 40% except where there is an agreement otherwise. Mr Walden and Mr McCambridge agreed to a margin of 30%.

[72] Mr Walden gave evidence that he had checked the quote Mr McCambridge had submitted for the project but that as the project work began it became clear that various items had been missed out of the quote and hardware had to be supplied at Viridian Glass cost. Also the work encountered labour cost overruns. The costs associated with the missing items and the labour cost overruns meant the profit achieved on the project was only 16.21%.

[73] In support of its claim Viridian Glass have relied on the wording of the conditions set out in the 7 November 2011 document. In particular Viridian Glass is relying on the fact that Mr McCambridge's quote did not meet the requirement that the sale be "*correctly priced*". The term "*correctly priced*" has been defined in the document to mean there are no significant mistakes made in quantity measured at time of quotation with regard to materials or labour.

[74] I find that the term "*correctly priced*" expressly applies only to Residential Sales. The document defines residential sales as "*correctly priced quotations done in structures using the default mark-ups set by Management*". The Aspec Meadowbank project was a commercial sale. Commercial sale is defined as "*any sales that are priced with a mark-up lower than the acceptable range with the minimum mark-up being 40\$ overall or with Management's approval*". In line with the definition in the 7 November 2011 document, Mr Walden approved the minimum mark-up being reduced to 30%.

[75] Viridian Glass argues that because the project only achieved a profit of 16.21% it fell below the requirements set out in the conditions attached to the bonus and commission payments. There is nothing in the conditions attached to the bonus payments relating to commercial sales requiring Viridian Glass to achieve the minimum of 40% profit (although in this case Management had approved a reduction to 30% profit). The conditions relate only to the pricing of the project.

[76] I find that there is no contractual right for Viridian Glass to seek reimbursement of the bonus or commission payments made to Mr McCambridge. Viridian Glass has not established that Mr McCambridge agreed to any offsetting of commission or bonus payments made to him. Further, I am satisfied, based on the evidence presented at the investigation meeting that any cost over run's with respect to labour costs were not within Mr McCambridge's control.

[77] The claim for reimbursement from Mr McCambridge for the bonus and commission payments made to him in September 2012 is declined.

#### ***Reimbursement of paid Sick Leave***

[78] The sick leave taken by Mr McCambridge was taken without authorisation in circumstance where Mr McCambridge was fully aware any leave beyond the date of 16 October 2013 would not be approved.

[79] Mr McCambridge was paid an annual salary which was paid monthly, partly in arrears and partly in advance. The period 17-25 October 2013 had been paid to Mr McCambridge in advance. This period was unauthorised and the type of leave was not available to him to take for the purpose for which he took it.

[80] Mr McCambridge was overpaid his salary payment in October 2013 by \$1,648.64. At termination Viridian Glass deducted \$123.75 from his final pay including holiday pay (which I do not accept it was able to do<sup>5</sup>). This leaves the amount of \$1,524.89 having been overpaid to Mr McCambridge which Viridian Glass is entitled to recover.

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<sup>5</sup> See *Jonas v Menefy Trucking Limited* [2013] NZEmpC 200 where the Employment Court held that no deduction can be made on the basis of a general clause without the workers express consent.

[81] Mr McCambridge is ordered to reimburse Viridian Glass Limited Partnership the sum of \$1,524.89 without deduction within 28 days of the date of this determination.

**Costs**

[82] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr McCambridge shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Viridian Glass 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.

Vicki Campbell  
Member of the Employment Relations Authority