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Nelson v Fletcher Steel Ltd AA 387/07 (Auckland) [2007] NZERA 849 (10 December 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 387/07 5039361

BETWEEN ERIC NELSON

Applicant

AND FLETCHER STEEL LTD

Respondent

Member of Authority: James Wilson

Representatives: Eric Nelson (in person) and Ken Nicolson for applicant Carl Blake for respondent

Investigation Meeting: 27, 28, 29 June & 2 July 2007

Submissions received: 24 July and 31 August 2007 from the applicant

15 August 2007 from the respondent

Determination: 10 December 2007

DETERMINATION OF THE AUTHORITY

Mr Nelson's Employment Relationship Problems

[1] The applicant in this matter, Mr Eric Nelson, has raised a number of claims against his former employer Fletcher Steel Ltd (FSL). I will detail more fully Mr Nelson's claims later in this determination but for the purposes of summary they can be grouped as follows.

(i) Mr Nelson says that he was enticed to take up a position with a division of FSL, Pacific Wire Technologies (PWT) in February 2005 and that FSL breached his employment agreement by failing to live up to the represented terms of his employment. These misrepresentations, according to Mr Nelson, included; the lines of management responsibility, access to the company's incentive bonus scheme, availability of resources, job security and prospects of advancement.

(ii) Mr Nelson asserts that, by not honouring the terms of his employment and by *either or both over working him by putting ongoing unreasonable demands on (him) and by failing to safeguard him from stressors at work*, FSL breached its duty of care and this breach directly resulted in his suffering stress related illness i.e. ischaemic heart related illness, the symptoms of which were first diagnosed in July 2005.

(iii) Mr Nelson raised a grievance with FSL regarding these concerns and, Mr Nelson says, the way in FSL handled that grievance claim was unfair, breached their duty of good faith, was to Mr Nelson's disadvantage and caused him further stress and humiliation.

(iv) On 30 May 2006 Mr Nelson was dismissed due to ill health. Mr Nelson says that this dismissal was unjustified both substantively and in the manner in which it was carried out.

[2] Mr Nelson is seeking a range of remedies including compensation for lost wages under various headings and interest on those lost wages, compensation for disadvantage and hurt and humiliation and emotional and physical harm, penalties for breaches of good faith and medical and legal costs.

Explanatory comments

[3] Before dealing with the specifics of Mr Nelson's claims it is appropriate to make two points by way of explanation. Firstly it is necessary to clarify the entities for whom Mr Nelson worked and secondly the extent to which this determination will deal with the large amount of evidence available to me.

Mr Nelson's employer

[4] From February 2005 until May 2006 Mr Nelson was employed by Fletcher Steel Ltd (FSL) However during the course of his employment he was, at separate times, covered by two employment agreements. His initial term of employment, which commenced on 7 February 2005, was with an operational division of FSL, Pacific Wire Technologies (PWT). On or about 1 July 2005 Mr Nelson accepted a new position with another operating division of FSL, Dimond, which he took up in early August 2005. PWT and Dimond, and other divisions of FSL, are expected to

operate as stand-alone businesses but are not registered as separate companies. FSL is an wholly owned subsidiary of Fletcher Building Limited.

The volume of evidence

[5] During the course of this investigation I have been provided with an extremely large amount of written evidence by way of formal statements from the various witnesses together with a large number of relevant documents. In addition I have received detailed written submissions from both parties. The investigation meeting in this matter extended to four days. It is not possible or practical to set out in detail the contents of all of that evidence in this determination. I have attempted to record those aspects of the evidence which are necessary to clarify the party's respective positions. I apologise to the parties if my attempts to truncate this information do not fully and clearly reflect the evidence as presented. I wish to reassure the parties that I have taken account of all of the relevant evidence provided in reaching the conclusions set out below.

Chronology

Previous employment relationship

[6] Prior to taking up his employment with FSL, in February 2005, Mr Nelson had previously been employed by a "division" of FSL, Pacific Wire (PW), on a fixed term employment agreement as *Project Manager, Electro-Magnetic Wiping*. In this capacity Mr Nelson assisted in the development and assessment of the process which subsequently lead to the formation of the "business unit", PWT. While this earlier employment agreement was for a 12 month period (from November 2002 until November 2003) Mr Nelson resigned half way through the period *for mainly personal reasons and a "wait and see" approach by FSL*. I note that there appears to be some confusion in Mr Nelson's mind as to whether he was an employee or a contactor during this period. While it has no direct relevance to the issues in the present case, the agreement signed by the parties at the time makes it clear that this was a temporary employment agreement (contract of service) as opposed to a contractor agreement (contract for services).

The recruitment process

[7] In the latter part of 2003 Mr Nelson exchanged communications with Mr Neil Spencer, Business Unit Manager at PWT, regarding the possibility of Mr Nelson returning to work at PWT on a permanent basis. These negotiations were unsuccessful. However in December 2004 the parties held further discussion and Mr Nelson agreed to accept a permanent position of Operations and Projects Manager with PWT. Mr Nelson says that during these discussions Mr Spencer misrepresented a number of issues. He says that he accepted the position based on these

misrepresentations. According to Mr Nelson and these misrepresentations included:

- (i) The business potential of PWT was unlimited and the necessary resources were obtainable where justified.
- (ii) The business was not for sale and the business plan was to mass produce and sell the new technology on the global market.
- (iii) The third staff member of PWT, Mr Colin Buckley, would report to Mr Nelson and that Mr Nelson would be able to secure further staff and resources to meet "the phenomenal and insatiable global customer demand".
- (iv) Mr Nelson would be invited to be part of an employee incentive scheme which would add as much as 15% on top of his base salary.
- (v) Mr Nelson could not be engaged as a contractor (as he mistakenly believed he had been in the past) as he needed to manage Mr Buckley, and that future staff and contractors would report to him.

Mr Nelson says that in particular he was not told, among other things that:

- (i) The business or technology was for sale.
- (ii) PWT management would shortly be reporting to CSP Galvanising instead of directly to the FSL management.
- (iii) PWT was under review by FSL and would be shut down *if it did not perform* by the end of the 2005 year.
- (iv) Mr Buckley had also applied for Mr Nelson's job and that there were ongoing unresolved problems with Mr Buckley.
- (v) That he, Mr Nelson, would be required to carry out some work for another FSL business.
- (vi) He was expected to work more than eight hours per day and that, initially, he would not have any employees reporting to him.

[8] In response to Mr Nelson's assertions regarding these alleged misrepresentations, FSL say that no misrepresentations were made. They specifically deny that some of the representations attributed to Mr Spencer were in fact made and suggest that, if there were misunderstandings on Mr Nelson's part, these were later clarified by Mr Spencer.

[9] In addition to denying any misrepresentation by Mr Spencer, FSL pointed out that as part of this recruitment process Mr Nelson was required to undertake a pre-employment medical examination and that as part of this medical Mr Nelson specifically stated that he did not have heart disease or high blood pressure.

Employment with PWT: Mr Nelson's view

[10] Mr Nelson has raised a number of concerns regarding his period of employment with Pacific Wire Technologies. The following summary sets out the major issues and his attempts to draw these to the attention of his employer. I must emphasise at this summary does not cover all of the incidents set out in Mr Nelson's evidence but merely attempts to give an indication of the range of concerns and issues he has raised.

- (i) Mr Nelson says that as part of this employment agreement he was to be *invited to participate in the company incentive scheme*. He says that this invitation was never forthcoming and that later, when he went to another subsidiary of FSL, he was refused permission to transfer the bonus between subsidiaries.
- (ii) Despite being *promised* by Mr Spencer that he would have responsibility over another staff member (Mr Buckley) and that Mr Buckley would *assist him with his managerial targets*, Mr Buckley refused to recognize Mr Nelson's position and FSL did not discipline Mr Buckley in this regard. He says that Mr Spencer was

aware Mr Buckley had applied for Mr Nelson's position and *his inability to work with other people and his accident prone disposition*. Mr Nelson says that Mr Buckley's continued disregard for the chain of command and FSL's continued lack of effective action in this regard increased his (Mr Nelson's) workload and stress. Mr Nelson says that FSL eventually changed Mr Buckley's reporting lines *in a public and humiliating manner and without prior agreement or discussion*. Mr Nelson says this action humiliated him and undermined his authority.

- (iii) Mr Nelson says that on 22 March 2005 he wrote to FSL management advising that he was concerned about the increased workload and the stress created by the lack of coordination by his Mr Buckley. He says this memorandum was ignored by FSL. He says this lack of action by management undermined his physical health and increased his stress. He says that in June 2005 he again informed management of the stress levels and was eventually advised that the personality test he had undertaken was their answer to the concerns he had raised in March. He sees this response further undermined his trust and confidence in his employer.
- (iv) Mr Nelson says that despite being promised ongoing job security and given indications that PWT had *unlimited*

business potential and resources, none of these promises were kept and the lack of resources and increasingly unreasonable demands were a major source of stress. He says that in *mid-2005*, while working at CSP Galvanising (see below) he was alerted to the fact that PWT's existence had been under review and it would be disbanded if it did not perform.

(v) In May 2005 Mr Nelson says he was *enticed* into participating in a personality assessment under false pretences. He says he found this invasive, deceitful and unwarranted and further added to his stress.

(vi) Mr Nelson says his workload and stress were further increased when he was *coerced and bullied* by Mr Spencer into working for another FSL subsidiary (CSP Galvanising) with inadequate resources.

In June 2005 Mr Nelson applied for, and 1 July 2005 was offered, a position with another business unit of FSL, Dimond. On 1 July he gave 1 months notice of his "resignation" from PWT. He says that he mistakenly believed that Dimond was an independent company and that he would escape the management problems he had experienced at PWT.

Employment with PWT: FSL's view

[11] PWT refutes all of Mr Nelson's claims. In particular they have responded to the issues are listed in [9] above as follows:

(i) PWT say that Mr Nelson was entitled to participate in the company's incentive scheme. Mr Spencer says that he made it clear to Mr Nelson that payments under the scheme were entirely discretionary and this was reflected in his employment agreement. Due to the relatively short period of employment with PWT he did not become eligible for consideration of a bonus payment for that part of his employment with FSL.

(ii) Mr Spencer says that Mr Buckley did not apply for Mr Nelson's job. He says that he never promised Mr Nelson that Mr Buckley would report to him. He says that he explained to Mr Nelson that the "flat" structure, with only three employees, meant that Mr Nelson and Mr Buckley's roles were essentially the same but focused on different areas of the business. He pointed out that Mr Nelson's job description (which was attached to his employment agreement) does not refer to him having management responsibility for Mr Buckley. Several weeks into Mr Nelson's employment this reporting line was clarified.

(iii) Mr Spencer says that while he did not respond to Mr Nelson's memo of 22 March 2005 in writing he discussed the issues raised with Mr Nelson on a number of occasions. Mr Spencer says he took a variety of steps to address each of Mr Nelson's concerned concerns including arranging for the personality assessment (see [10](v) above), clarifying the management reporting lines, instituting Business Process Mapping and holding one-on-one meetings with Mr Nelson and meetings with Mr Nelson and Mr Buckley together. He points out that Mr Nelson's memo deals exclusively with the management structure and issues surrounding Mr Buckley and nowhere in his memo does he state that he was suffering from stress or that his work was having any effect whatsoever on his health.

(iv) Mr Spencer says that at the time of Mr Nelson's recruitment PWT's vision was to build the business and ultimately to employ more staff to support its growth. He says that he never promised Mr Nelson *unlimited business potential* or resources. Mr Spencer says that he does not accept that he failed to provide Mr Nelson with any promised resources. He also says that as far as he was aware PWT's existence was not under active review at the time Mr Nelson was employed.

(v) Mr Spencer says that the *personality assessment* was an assessment tool to help identify the teams strengths and areas for development. He said it was carried out as one of the means of addressing Mr Nelson's concerns regarding his relationship with Mr Buckley and that all three members of the team completed the questionnaire. He says that he does not accept that the testing was *invasive and unwarranted*. He says that the testing was helpful in gaining a better understanding of the team dynamic at PWT and he had discussed the results with both Mr Nelson and Mr Buckley separately. Mr Spencer says that Mr Nelson never raised concerns with him about the testing and the assessment tool is still widely used at FSL.

(vi) Mr Spencer says that he totally refutes Mr Nelson's claim that he bullied him into working at CSP. Rather, Mr Spencer says, Mr Nelson volunteered to work on the project while he, Mr Spencer, was overseas and without consulting with him. Mr Spencer says that he was in fact concerned at the commitment required by this additional project and expressed these concerns to Mr Nelson. He says he made it clear to Mr Nelson that if at any point he was struggling with his workload he should advise Mr Spencer. He says he reluctantly agreed to let Mr Nelson continue with the project but wanted to ensure it did not impact on Mr Nelson's work for PWT. He says he made it clear to Mr Nelson that his work at PWT must take precedence. He says that Mr Nelson was able to withdraw from the project at any time.

The onset and progression of Mr Nelson's health problems

[12] In mid-July 2005, while working out his notice at PWT, Mr Nelson experienced chest pains. These symptoms resulted in his undergoing angioplasty treatment in late July delaying the commencement of his employment at

Dimond by one day. Unfortunately his health continued to deteriorate and in November 2005 he underwent multiple heart bypass surgery. Despite initial expectations that he would be able to return to work in about three months, complications delayed his return until March 2006. At the end of March it was agreed that Mr Nelson would return to work over a period of time commencing on a part-time basis and gradually readjust his work hours up to full-time. At the end of May 2006 Mr Nelson's employment with FSL was terminated for medical reasons - an action which, Mr Nelson says, was unjustified.

Mr Nelson's first personal grievance

[13] In October 2005 Mr Nelson raised a personal grievance with FSL alleging:

- (i) false representations during his recruitment to his position with PWT,
- (ii) constructive dismissal (subsequently withdrawn), and
- (iii) creation of a dangerous workplace due to stress.

On 2 November 2005 Mr Nelson received an initial response to his grievance from Mr Alan Pearson on behalf of FSL. In that letter Mr Pearson set out a process that the company intended to follow in investigating the grievance, asking Mr Nelson to detail in full the nature of his grievance and the settlement he was seeking and offering to meet with him to discuss his grievance. On 23 November Mr Nelson wrote to Mr Pearson rejecting the procedure suggested as being inconsistent with his employment agreement but nevertheless setting out his grievances in detail and suggesting that they meet as soon as possible.

The investigation of the first personal grievance: Mr Nelson's view.

[14] It is somewhat of an understatement to say that Mr Nelson is extremely unhappy about the way in which FSL investigated his first personal grievance. His unhappiness is summarised in a paragraph from his statement of evidence:

As a first step to resolve my PG, FSL requested an "investigation" ... so FSL could find out more. I provided them with (full details of the grievance) prior to our first meeting and I volunteered to participate to help them understand what had happened and settle my claim with them without the ERA involvement. These two meetings took place twice at the FSL premises prior to mediation. The FSL "investigation" concept was flawed in principle from the start as FSL had to defend itself against my allegations. My claims for financial compensation are against FSL only, so FSL had to defend against these claims. There was clearly a conflict of interest in FSL's investigation management style and them using Mr Phil List as he was partisan to FSL and later many claims were against his actions. I continued to address my letters to Alan Pearson as a formality not to offend anyone. Alan Pearson was actually the approving manager listed in my employment agreement. I had later rejected Mr Lists management of these PG meetings at FSL as his conduct was inappropriate, not in good faith and therefore unacceptable to me.

I later requested that Alan Pearson replace Mr List with someone else but this was totally ignored by Alan and he did not respond on that matter at all.

[15] The first investigation meeting into Mr Nelson's personal grievance was held on 19 December 2005. Mr Nelson was accompanied by his lawyer and FSL was represented by Mr List (Group Human Resources Manager for Fletcher Building - Steel Group) and by Mr Alan Pearson (General Manager - Pacific Steel Group.) Mr Nelson says that Mr List appeared *noticeably anxious and impatient* but that Mr Pearson *had his usual moderating and structured approach to meetings*. Mr Nelson says that there appeared to be a possibility of keeping the PG *low-key, positive and avoiding litigation and claims escalating while under Alan's management*. He says he was concerned that he had still not received any written response to the allegations set out in his later of 23 November 2005

[16] A second meeting was held on 13 January 2006. Mr Pearson did not attend and Mr Nelson says that all possibility of a low-key approach to his PG was lost due to *Mr List's aggressive and bullying behaviour*. He says that FSL conducted the second meeting from a list of pre-prepared questions as *a premeditated intimidatory-interrogation*, that the meeting was ad hoc and the nature of questioning was *case building*. In his written evidence Mr Nelson summarises this meeting as *a well practised and orchestrated bully session by Phil List and his behaviour was clearly not in good faith*.

[17] It is important to reiterate that the three paragraphs above set out only a part of Mr Nelson's concerns regarding FSL's investigation process. By way of further illustration of those concerns Mr Nelson, in his evidence, outlines two matters which arose from FSL investigation process which were of particular concern to him.

- (i) During the investigation the company sought a written response from Mr Neil Spencer (Mr Nelson's

immediate manager) regarding Mr Nelson's complaints. A copy of Mr Spencer's responses were given to Mr Nelson but a covering letter explained that these comments were Mr Spencer's comments and not necessarily the company's position. Mr Nelson appears to have believed that Mr Spencer's response was in reality the company's response to his personal grievance. Mr Nelson says that he was not prepared to respond to an informal document and insisted that Mr Spencer's response be put on FSL letterhead. He says that FSL evaded doing so for some time before providing a second version of the document which included a disclaimer. In

his written evidence Mr Nelson alleges that if FSL were uncertain about the accuracy of Mr Spencer's "comments" they should not have presented them to him. He says:

On this basis,, the contents of Mr Spencer's response, the accuracy of (that) response (to Mr Nelson's complaints) and the briefness of this response, I allege that most of the other material and evidence which has surfaced from the respondent subsequently is convenient speculation, fabrication and an orchestrated list of excuses and sidesteps.

In response to Mr Nelson's concerns in regard to Mr Spencer's written comments, FSL say that the response was Mr Spencer's response, as Mr Nelson's manager, to the company investigator (Mr List). It was, according to the FSL, only one part of the information received and did not constitute the companies considered position.

(ii) Following the second investigation meeting Mr Nelson made a formal complaint regarding Mr List to the Psychologist Registration Board (PRB). The tenor of this complaint was that Mr List had undertaken a psychological assessment of him without disclosing his professional qualification and without advising Mr Nelson that he was doing so. Mr Nelson considering this both a breach of good faith and a breach of Mr List's professional responsibilities as a psychologist. Mr Nelson was also concerned that in correspondence with the PRB Mr List had used personal information regarding him, Mr Nelson, again breaching his privacy. He says he found Mr Lists behaviour in this matter *highly intimidating, bullying and designed to frighten me off my progressing with the personal grievance.*

[18] In his evidence in response relating to the company's investigation process, Mr List says he does not accept Mr Nelson's view of the process. He says that the January 2006 meeting was focused on getting clarity on Mr Nelson's grievance. Mr List refutes Mr Nelson's assertion that the company was looking to intimidate him or that he, Mr List, was in any way aggressive or bullying. He sees he simply asked Mr Nelson various questions seeking to resolve his concerns.

[19] Following the second investigation meeting there was a lengthy exchange of correspondence between the company and Mr Nelson regarding the process the company was carrying out and, eventually, mutual acceptance that Mr Nelson's grievance should be discussed under the chairmanship of a Department of Labour mediator. Prior to attending a mediation, on 16 February 2006 Mr List wrote to Mr Nelson formerly advising him of the outcome of his investigation. Mr list says that he considered that the company had got to a point in its investigation where it had adequately investigated Mr Nelson's grievance and sought a response from him. He says that, given Mr Nelson's refusal to participate in the company's investigation any further, the company had no choice but to draw the investigation to a close and make findings on the information they had. In his statement of evidence Mr List summarises his findings as:

(a) The company had not misled Mr Nelson during the recruitment process;

(b) There was no review of PWT in existence at the time of Mr Nelson's recruitment;

(c) There was no constructive dismissal;

(d) The company had not created a dangerous workplace for Mr Nelson.

(e) The company did not unlawfully refused to pay Mr Nelson any incentive payments. The payments were purely discretionary. No promises of any such payments were made to Mr Nelson.

(f) The company accepted it had failed to reimburse Mr Nelson in a timely manner for the Solidworks training course, but this had now been actioned.

[20] Mediation regarding Mr Nelson's first personal grievance claim eventually took place on 22 March 2006. Unfortunately the parties failed to reach agreement and that grievance was outstanding throughout the subsequent events and forms part of Mr Nelson's claims in these proceedings.

Mr Nelson's dismissal

[21] As outlined above Mr Nelson was, in July 2005, appointed to a new position at Dimond. However before he took up this new position he developed symptoms of heart disease and underwent an angioplasty procedure. Mr Nelson took up his new position on 1 August 2005, one day later than expected. Over the next few weeks Mr Nelson continued to receive medical advice and treatment but in November 2005 his

health deteriorated and it was necessary for him to have a coronary bypass operation. Mr Nelson advised his manager, Mr Mark Lawson, that initial indications were that he would be able to return to work in a full capacity about 12 weeks after his operation. On 21 November 2005, a week after his operation, Mr Nelson's doctor advised Dimond that Mr Nelson should be able to return to work by 14 February 2006. In January 2006 Mr Nelson advised Mr Lawson that it was still his intention to return to work on 14 February.

[22] Unfortunately, due to medical complications, Mr Nelson's recovery was not as speedy as had been expected and he contacted Mr Lawson advising that his return to work would be delayed until early March. On 21 February 2006 Mr Lawson and Dimond HR Manager, Mr Allyn Glaysher met with Mr Nelson to discuss his return to work. On 26th of February 2006 Mr Nelson also wrote requesting a written record of Dimond's position so that he could communicate this to his insurer. In a letter dated 1 March 2006, Mr Glaysher wrote to Mr Nelson in the following terms:

On 24 February 2006 you met with both me and Mark Lawson, Dimond International Operations Manager. The following is a brief summary of those matters discussed at this meeting that are relevant to your insurer.

- 1. Dimond has been fully supportive of your request for extended unpaid leave while you underwent medical treatment and recuperated on the basis of your medical advice to us that you would be fit to return to work around 14 February and then be able to resume full duties.*
- 2. Subsequently your medical advice to Dimond in early February is that you required further unpaid leave and that you would now be fit to return to work on 6 March 2006, pending a further examination by your medical provider scheduled for 28 February.*
- 3. Given the key responsibilities and requirements of your role at Dimond as Plant Engineering Manager, and with full consideration of the Health and Safety matters both for yourself and for those of others where your capabilities would need to be relied upon, Dimond must be completely satisfied that you are capable of fulfilling the full requirements of your role prior to any return to work.*
- 4. Dimond thus requested that you provide our medical professionals access to parts of your medical records specifically related to your current condition*

to allow us to assist in managing your return to work and to also discuss these matters with your medical providers, which you declined for your own reasons.

- 5. You stated you would provide Dimond with a copy of the medical certificate immediately following the planned 28th February medical examination.*
- 6. Dimond requested a letter, supported by a medical certificate detailing when you will be able to return to work, on full duties taking into account all the health and safety requirements of your role. If the proposed return to work is acceptable Dimond will also require you to see a company appointed medical professional prior to returning to work, at our cost, to obtain a confirming opinion that you are fully fit and safely able to return to work.*
- 7. However if the company and yourself are unable to agree a date for your return to work your agreement to work for Dimond will be considered frustrated. The frustration of your agreement will be on the grounds of the period of your absence, your inability to return to work and the company's conclusion that you are unfit and unable to perform the duties of the role you are employed for. At this time your appointment with Dimond will be terminated.*

[23] On 10 March 2006 Dimond received a report from Mr Nelson's cardiologist, Dr Warren Smith, regarding Mr Nelson. This report indicated:

I don't think there is any need to investigate ...further, and as stated a further week's rehabilitation will hopefully bring (Mr Nelson) to the point where at least physically he should be able to resume work.

[24] The company felt that this report was not conclusive and requested that Mr Nelson be assessed by another specialist. On 23 March 2006 occupational health specialist, Dr Tom Crocker, provided a report including an assessment that:

Mr Nelson has been diagnosed with quite severe ischaemic heart disease at a young age. He has had extensive both surgical and

nonsurgical procedures to restore his coronary arteries to as close to normal as possible. I understand he has had good result from this and his cardiologist Warren Smith stated on

10.3.2006 that "a further week's rehabilitation will hopefully bring him to the point where at least physically he should be able to resume work"

(Mr Nelson), however, also has other significant limitations listed as his ongoing problems above. I also think it is a bit unrealistic for someone who has had the best part of eight months of work, to resume full-time from the outset.

Dr Crocker went on to recommend that:

I would suggest that Mr Nelson returns to work on a gradual basis starting with two hours a week for the next two weeks, five hours for the following two weeks and progressing on to full-time over eight weeks. It is important that his return to work is monitored either by his own GP or myself.

[25] On 27 March 2006 Mr Nelson met with Mr Lawson and Mr Glaysher. At that meeting it was agreed that Mr Nelson would commence working for two hours per day from 3 April 2006 and gradually increase his hours to seven per day by mid May 2006. On 3 May 2006 Mr Nelson again met with Mr Lawson and Mr Glazer. At that meeting he advised them that his return to work was going to plan. The meeting also discussed some areas of stress that Mr Nelson was experiencing and ways in which this stress could be managed.

[26] On 26 May Mr Nelson met with Mr Lawson to discuss work issues. However at this meeting Mr Nelson gave Mr Lawson a letter stating:

This letter is to notify Dimond that I have not been able to achieve the planned hours of work proposed in the Dimond letter by a significant margin and it is likely to be some months before full-time work can be achieved. my occupational medical specialists report has finally arrived. It recommend's that I not be put in a position of responsibility for others outputs for many more months. For reasons defined below a copy of this report is not available to Dimond until my PG against FSL is resolved to my satisfaction.

This letter is also to notify that more recent attempts to resolve matters relating to my ongoing personal grievance against Fletcher Steel Limited have been exasperated and are being made more stressful by Dimond's acts of involvement. These acts include:

- 1. Allowing Mr Phil List access to my Dimond salary information to be used in litigation against me.*
- 2. Making my private insurance matters available to Mr Phil List for use against me in litigation.*
- 3. Allowing Mr Phil List to question the circumstances and events surrounding my recruitment by Dimond and use them against me in litigation.*
- 4. Sharing matters relating to my return to work with Mr Phil List knowing my displeasure at the sharing of information on me.*

I request that such breaches of good faith, trust, confidentiality and conflicts of interest cease immediately and that Dimond honour its commitment to stay out of involvement in this PG.

[27] Mr Lawson says that he had no idea of the details of Mr Nelson's grievance and distance himself entirely from this. He says he was focused on Mr Nelson's employment with Dimond and seeking to ensure his return to work. He says he told Mr Nelson that Dimond did not want any involvement in his personal grievance as this was a matter between him and PWT.

[28] On 29 May 2006 Mr Lawson wrote to Mr Nelson confirming his recollection of the discussions at the meeting on 26 May. In this letter Mr Lawson specifically refutes Mr Nelson's allegations of any involvement in Mr Nelson's ongoing personal grievance and commented specifically on Mr Nelson's four allegations:

- 1. Dimond is part of Fletcher Steel Limited and payroll and some HR functions are handled by Shared Services. Mr Phil List has access rights to this information through his role.*
- 2. Dimond did not provide any such information to Mr list. Any access to such may have been through a letter to your insurers prepared at your request by Shared Services.*
- 3. Dimond's recruitment of you to your role was through standard FBL recruitment processes. As Dimond is not a party to your PG, and has no wish to be involved, we cannot comment on this allegation further.*
- 4. Dimond has communicated your graduated return to work programme to Shared Services only for essential purposes, these being payroll adjustments and for medical assessment of your progress through the program via the nurse.*

[29] On 30 May 2006 Mr Nelson met with Mr Lawson and Mr Glaysher. Mr Lawson says that at this meeting Mr Nelson advised that he had written his letter of the 26 May 2006 to advise Dimond that he was unable to perform his role within the returned to work criteria agreed and that if he tried to work more than five hours per day he "simply hit the wall". Mr Lawson said that Mr Nelson advised that his most recent medical report stated that *he should not have accountability for others, should not be in a position of responsibility and this could continue for 12 or more months (perhaps longer)*. After an adjournment Mr Lawson and Mr Glaysher advised Mr Nelson and that his employment would be terminated due to incapacity. This decision was confirmed in writing later that day in a letter from Mr Glaysher. This letter included:

We are now drawing to the end of this return to work programme and you have advised us, supported by professional medical advice that you have obtained, that you are still unable to return to work in a full capacity and will not be able to for some time, possibly 6 months.

As advised, and agreed by you, in the many discussions we have had, that if you were unable to return to work in a full capacity within a reasonable time frame, your agreement to work for Dimond would be considered frustrated. The frustration of your agreement is on the grounds of the period of absence from work, followed by your inability to return to work in a full capacity and the company's conclusion that you are unfit and unable to perform the duties of the role you were employed for.

[30] Mr Lawson says that when advised of his dismissal Mr Nelson seemed to understand Dimond's position and the meeting ended very amicably. However in his written statement Mr Nelson says:

I was not expecting to be dismissed when I reported that I was not achieving my graduated return to work rehabilitation programme as earlier letters from Dimond had indicated that the issues could be worked through. I was expecting further support from Dimond but understood they could give me notice of dismissal at any time if they so chose.

I did not consider that I was underperforming in my position, ... and no prior formal notice of actual dismissal for underperforming was received from Dimond before May 2006.

The problem was I could not work normal hours due to the ongoing problems associated with my illness and stress of the PG and as a result I was perhaps a burden on Dimond. I was open and honest about this problem with working full-time hours and being able to achieve 120%. I believe that my ongoing PG against FSL influenced Dimond's decision to dismiss myself. (emphasis added)

Discussion and findings

[31] The determination of many aspects of this case is dependent on interpreting the various parties perceptions of events. While there is a clear divergences of opinion regarding what actually occurred many of these differences are not crucial to determining whether or not Mr Nelson should succeed in his claims against FSL. Except where I have clearly highlighted differences, the chronology set out above would not I believe, at least in general terms, be contested by the parties. My discussion and interpretation of these events below will concentrate on each of Mr Nelson's claims as summarised in paragraph [1] of this determination.

Was Mr Nelson enticed to take up his position with PWT?

[32] In the ordinary meaning of the word Mr Nelson was enticed to take up the position with PWT. However I do not find FSL misled him or acted in bad faith in this regard. Every offer of employment can be said to be an enticement. It is only when the enticement offered is known to be untrue and undeliverable that such enticement can be said to be in bad faith and a breach of the employer's duty. When negotiating the conditions surrounding the offer and acceptance of employment both parties tend to put the best possible "spin" on the job on offer and the conditions pertaining to it. In this instance Mr Spencer, the Business Unit Manager at PWT and an enthusiastic proponent of the business unit he had been asked to establish and develop, spoke about PWT in glowing terms. He was hardly likely to do otherwise. Certainly I accept that, at the time of Mr Nelson's recruitment Mr Spencer was not aware (if indeed it was true) that PWT was likely to be sold in the foreseeable future. Mr Nelson had worked with Mr Spencer previously and had had discussions earlier with him regarding returning to work at PWT/FSL. While he may not have been aware of all of the implications of becoming a permanent employee he was familiar with the environment. In any business, particularly in such a large and diverse business as Fletcher Steel (which is in itself a part of the much larger Fletcher Building Limited) it is impractical for any manager to know exactly what is going on at a more senior level or to predict the future with any certainty. Mr Nelson after taking up his appointment found this uncertainty stressful. Whether FSL knew or should have known about this level of stress, and/or should have done anything about it, is a matter I will discuss later in this determination.

[33] Turning to the more specific areas in which Mr Nelson believes he was misled:

- I do not accept that Mr Nelson was told that Mr Buckley would report to him. Such an arrangement would clearly not have been practical in such a small management group. Rather I believe that what Mr Spencer had been trying to convey was that Mr Nelson would "lead" various projects and that Mr Buckley would assist him on those designated projects. Despite what Mr Nelson says he was told (by another FSL manager?), I accept that Mr Buckley had not applied for Mr Nelson's job. While Mr Nelson found him difficult to work with there is no particular evidence that Mr Buckley harboured any animosity towards him.
- As part of the general discussion about the future of PWT I have no doubt that Mr Spencer did indicate that, as the business developed, the staff and resources would be available to meet the demand. Mr Nelson chose to leave PWT after only a few months. It could not have been clear, after such a short time whether Mr Spencer's optimistic predictions were likely to be fulfilled.
- Mr Nelson seems to have misunderstood his contractual right to take part in the employee incentive scheme. He commenced employment in February and resigned in July. There is no evidence to suggest that, had he stayed with PWT he would not have been a part of the scheme. It is true that PWT did not formally invite him to participate as subsequently happened at Dimond. However I accept the company's position that this lack of formality was due to the relatively small size and newness of PWT (as compared to Dimond) and its lack of administrative resources.
- Although Mr Nelson believes that PWT's insistence that he be an employee was to his disadvantage the evidence does not support his claim. He was previously an employee. He was offered and accepted a new position as an employee. He clearly understood the difference between being an employee and being a contractor and accepted the position offered.

Was Mr Nelson subjected to unreasonable demands and exposed to stressors at work?

[34] Some 20 pages of Mr Nelson's statement of evidence set out in great detail and number of specific incidents which, he says, caused him stress during his employment with PWT. In the interests of brevity I have taken the liberty of grouping these issues and incidents into a number of general headings.:

(i) Mr Nelson's relationship with Mr Buckley: I have already to some extent addressed Mr Nelson's concerns in this regard. Arising from his perception that he had been told that Mr Buckley would be his subordinate Mr Nelson believed that FSL (in particular Mr Spencer) should have taken more decisive action, including disciplinary action, to deal with what Mr Nelson perceived as Mr Buckley's insubordination, refusal to co-operate and verbal abuse. Mr Spencer says that, except while he Mr Spencer was overseas,

Mr Buckley was never Mr Nelson's subordinate. He says that he took a number of steps to improve the relationship between them including holding regular meetings at which the lines of communication were discussed. Mr Spencer also says that the company commissioned a personality assessment of the three members of the team in the hope that this may assist with addressing the issues raised by Mr Nelson. It is clear from the evidence that the relationship between Mr Buckley and Mr Nelson was at times strained. While this relationship was obviously stressful to Mr Nelson I do not accept that Mr Spencer did not attempt to address his concerns. Mr Spencer was in the unenviable position of managing two strong personalities. Conflicts in personality are stressful to all of the parties involved and it is often difficult, as in this case, to attribute blame for that stress on any individual. Under these circumstances Mr Spencer's duty (as the FSL manager responsible for managing the two men, was to attempt to improve the relationship and mitigate the stress. While in hindsight Mr Nelson may believe Mr Spencer's efforts were inadequate Mr Spencer did make concerted efforts to improve the relationship between the two men and, I find, fulfilled his duty as an employer in this regard.

(ii) Memorandum to Mr Spencer: In his evidence Mr Nelson places a good deal of emphasis on the fact that he did not receive a formal response to a memorandum he wrote to Mr Spencer on 22 March 2005. This memorandum set out in detail his concerns regarding Mr Buckley and asked that Mr Spencer address those concerns. As pointed out by PWT, despite the implication in his evidence, this memorandum did not state that this relationship, or any other issues was causing him undue stress. I do accept that Mr Nelson had expressed his concerns verbally to Mr Spencer in terms which no doubt conveyed a level of stress. As pointed out in [30](i) Mr Spencer did, in my finding, address the concerns set out in Mr Nelson's memo, albeit not in written form.

(iii) Change of reporting lines: In mid March 2005 Mr Nelson, along with all other managers, was advised that there had been a change

in management structure within FSL. This change involved changes in reporting lines in senior management within Fletcher Building. Mr Nelson saw this as a demotion for both Mr Spencer and himself. He says he was very disappointed and felt misled by the changes. FSL say that these changes were merely a realignment of management structures and had absolutely no effect on either Mr Spencer or Mr Nelson's seniority within FSL. I accept the company's position in this regard. There is absolutely no evidence that Mr Nelson's position was in any way affected by these changes or that he had been misled in any

way.

(iv) *Hours of work*: I have no doubt that Mr Nelson worked on occasions more than 40 hours. On the other hand I do not regard the hours he did work as being excessive given the nature and seniority of his position. In his evidence he accepts that his hours were often flexible to accommodate his personal circumstances, commuting arrangements etc.

(v) *Secondment to CSP Galvanising*: Mr Nelson says that he was *coerced by Neil Spencer into managing the Fluxcell project at CSP galvanising*. He says that, despite the fact that he was not in favour of the idea and advised Mr Spencer of his concern regarding the impact it would have on his tasks at PWT, Mr Spencer indicated that, in effect, he did not have a choice. Mr Spencer's recollection of this secondment is completely different. Mr Spencer says that in fact he expressed concern to Mr Nelson regarding the time that would be involved and told Mr Nelson that his first priority was to PWT. Mr Spencer says he was sceptical that Mr Nelson could manage both his own work at PWT and the additional work at CSP. He says he accepted Mr Nelson's assurances and reluctantly allowed him to go ahead. Mr Spencer is adamant that he did not coerce Mr Nelson and found out that Mr Nelson had volunteered for the work when he returned from an overseas trip. He says that he had reiterated that Mr Nelson was able to withdraw from the project at any time. On balance I find that in this regard Mr Spencer's recollection is likely to be a more accurate. Mr Nelson's evidence emphasises how busy and stressed he was in his position

at PWT. It seems unlikely that he could be convinced to accept such a major increase in work unless he was confident of his ability to cope with that additional work.

(vi) *Possible disbanding of PWT*: Mr Nelson says that while on secondment to CSP he was advised (by a Mr Parr, a consultant at CSP) that *PWT was to be disbanded it had not did not perform by the end of 2005*. He says he asked Mr Spencer about this but Mr Spencer replied that he was unaware of any such suggestion. Mr Nelson says he accepted what had been told by Mr Barr (because Mr Barr *came across as genuine*) and this advice caused him serious concern regarding his personal position within FSL. I have no doubt whatsoever that the future of PWT, along with a number of other parts of the business were constantly under review by senior management. PWT was based on new and developing technology and its viability and future within FSL would be under constant review. However Mr Barr's comments to Mr Nelson could have been no more than speculation and Mr Nelson should perhaps have had more confidence in his direct manager, Mr Spencer, who would, I am sure, be more informed and therefore a more reliable informant.

(vii) *OPQ personality questionnaire*: Mr Spencer says that, as one way of addressing the personality conflicts between Mr Nelson and Mr Buckley he, on advice from human resources, commissioned an occupational personality questionnaire in an effort to *help identify the team's strengths and areas for development*. He says he advised Mr Nelson that this was the purpose of the questionnaire. He says the testing was helpful in gaining a better understanding of the team dynamic at PWT and he discussed the relevant results with both Mr Nelson and Mr Buckley separately. Mr Nelson says in his evidence that he found the testing *invasive and unwarranted* and asks:

Was OPQ a genuine team building activity or a fait accompli for FSL to use for more insidious purposes of subterfuge? The latter I think!

Mr Spencer says that Mr Nelson had not at the time indicated any concerns and he had certainly not been enticed under false pretences to take part. Personality type profiling and assessment is now a commonly used tool to assist managers to understand team dynamics and to make the best use of the skills available to them. The particular assessment tool used is, I am advised by FSL, widely used within Fletcher's and it would seem to me to have been a positive initiative by Mr Spencer to address some of the difficult issues he was facing. It is regrettable that Mr Nelson appears to have reacted negatively to an initiative which could have made a positive difference to his working environment.

(viii) *Operational issues*: In his evidence Mr Nelson has outlined a number of incidents which for convenience, I have considered under the general heading of operational issues. These include issues such as meeting restrictive budget constraints, installation problems *due to poor workmanship and engineering*, difficulty in recruiting staff, a *seriously messed up* delivery, technical problems etc. these operational issues added to Mr Nelson's stress. There is of course a level of stress inherent in all positions. Mr Nelson was a project manager working in an area of new technology, in a new business unit struggling to establish itself and prove its viability.

[35] Reviewing all of the evidence both from Mr Nelson and from FSL I have concluded that Mr Nelson was under stress during his period of employment at FSL. However on balance I do not believe that the level of stress to which he was subjected was extra ordinary given the position he was in. FSL, and Mr Spencer in particular, knew only that Mr Nelson was under the pressure inherent in the position he held. Mr Spencer himself was under similar pressure. Mr Spencer says, and I accept, that at no point did Mr Nelson indicate that the stress he was

suffering was more than he could reasonably cope with. The relationship between Mr Nelson and Mr Buckley added to the stress for all concerned. Mr Nelson's main concern appeared to be his frustration with Mr Buckley and it was this frustration that he articulated in his memorandum to

Mr Spencer. Mr Spencer addressed that situation to the best of his ability given the circumstances.

[36] To summarise my findings in respect to this aspect of Mr Nelson's claims I find that Mr Nelson was exposed to stress at work but that this level of stress was, for the most part, no more than could be expected for any employee in a similar position. Mr Nelson did not convey to FSL that his level of stress was extreme nor that it was affecting his health. In reality it is likely that Mr Nelson himself did not believe that the stress was affecting his health until much later when, during rehabilitation he was given information which suggested a causal link between stress and heart disease. I also find that FSL appropriately addressed those areas of concern that were brought to their attention. I find that FSL did not breach the duty to provide a safe workplace.

Did Mr Nelson's work stress directly result in his suffering ischaemic heart related illness?

[37] Medical witnesses on behalf of Mr Nelson and FSL for the most part agreed on this point. The medical evidence is that the while stress can be a contributing factor in heart disease to be of any significant effect that stress would have had to be sustained over a lengthy period of time -- i.e. years rather than months. In Mr Nelson's case it is possible that the stress he was under may have acted as a trigger but illness such as that suffered by Mr Nelson would almost certainly have occurred at some point. In other words the stress he felt over his work situation may have triggered the onset of the disease symptoms but not caused the disease itself. The evidence appears overwhelming that heart disease in the nature of that suffered by Mr Nelson develops over many years and has a number of contributing factors; hereditary predisposition, diet and other lifestyle factors, personality etc. (there is evidence, contained in Mr Nelson's medical record, although disputed by him, that he is of a *nervous disposition*). It is almost impossible to say with any certainty which of these factors may have contributed or in what weighting to cause heart disease in a particular individual. In *Attorney General v Gilbert* [2002] NZCA 55; [2002] 1 ERNZ 31, the Court found a direct causal link between high levels of work related stress and a deterioration in health. However in *Gilbert* the stress lasted over a number of years and continued even after Mr Gilbert returned from a lengthy period of sick leave. In *Gilbert* the Court of Appeal said:

[90] In any event, the harm suffered by Mr Gilbert was not confined to psychological injury. Mr Gilbert's breakdown in health included an acceleration in his coronary heart disease which the Employment Court found to have been caused by the Departments breach of its employment obligations. The evidence before the Employment Court referred to the knowledge of links between stress and cardiac disease and its acceleration. No rule of exclusion borrowed from the nervous shock cases prevents contractual liability for loss arising out of such injury. The employer was under statutory and contractual duties to take reasonable steps to exclude unreasonable risk of it.

[91] In some cases, a risk may not be apparent without specific information about the vulnerability of a particular employee. That was the reason the plaintiff in Gillespie¹ failed and why the plaintiff in Walker² was successful only for injuries suffered after the employer became aware that he had already suffered one breakdown (emphasis added)

[38] I have already found that FSL did not breach its duty to provide Mr Nelson was a safe workplace. Although Mr Nelson was under some stress as a result of his employment at PWT the medical evidence is that this stress may have triggered the onset of, but did not cause, his heart disease. Mr Nelson is unequivocal in his evidence that he suffered absolutely no symptoms of heart disease until July 2005, when he had already resigned from PWT. FSL could not have known, any more than Mr Nelson himself knew, that, in his case, this level of stress may precipitate the onset of his heart disease.

Did FSL breach its duty of good faith in the way it investigated Mr Nelson's first personal grievance claim?

¹ *Gillespie v Commonwealth of Australia* [1991] 104 ACTR; 105 FLR 196.

² *Walker v Northumberland County Council* [1994] EWHC QB 2; [1995] ICR 702

[39] Mr Nelson appears to be concerned that the way in which FSL, and in particular Mr List, investigated his first personal grievance was aggressive, bullying and intimidatory. As might be expected Mr List refutes Mr Nelson's allegations in this regard. It is perhaps unfortunate that FSL used the term *investigation* to describe the process they undertook. That term has connotations of independence on the part of the "investigator". Although the company did investigate Mr Nelson's concerns the purpose of this investigation was, at least in part, to ensure that

FSL's liability was minimised. This does not imply that the process was flawed but rather that the objective of the company was clearly different from that of Mr Nelson. Mr Nelson seems not to have fully understood this distinction. Mr Nelson, by formally raising a personal grievance, put the company on notice that, should they not accept his grievances and agree a level of compensation acceptable to him, he could progress his grievance through more formal channels. While the company could perhaps have used a less adversarial approach their reaction was unsurprising.

[40] Mr Nelson's first personal grievance included claims

- that he had been enticed by misrepresentations to take up his position with FSL, that FSL breached his employment agreement by failing to live up to those representations.
- By not honouring the terms of his appointment and by either overworking him by putting ongoing unreasonable demands on him and by failing to safeguard him from stress at work FSL breached its duty of care.
- These breaches of duty of care directly resulted in his suffering stress- related illness i.e. ischaemic heart disease.

It is relevant to note that even with the assistance of a Department of Labour mediator the parties still failed to reach a settlement and that I have found, as set out above, that Mr Nelson's first personal grievance was without foundation.

[41] In addition to the manner in which FSL carried out its investigation Mr Nelson has raised two issues which require particular comment.

(i) Mr Nelson was particularly concerned that Mr Spencer's written responses to his, Mr Nelson's, complaint was said by FSL to be Mr Spencer's comment and opinion and not necessarily the company's position. Mr Nelson's concerns in this regard are unfounded. FSL

(Mr List) requested that Mr Spencer provide a written response, setting out his personal perspective on Mr Nelson's allegations. It was appropriate, in fact necessary, for Mr Nelson to be given a copy of MR Spencer's comments and asked for his response before the Company formed a final view. Mr List's intention was to take into account both statements (i.e. those of Mr Nelson and Mr Spencer) in formulating the company's official response. While Mr Nelson may have considered this "informal" it was a legitimate attempt by Mr List to assemble the various points of view before making a judgement as to the veracity of Mr Nelson's claims.

(ii) Mr Nelson has complained about the way in which he believed Mr List had undertaken a psychological assessment of him without disclosing his professional qualification as a psychologist and without advising Mr Nelson that he was doing so. Mr Nelson lodged a formal complaint with the Psychologists Registration Board and has received a response to that complaint. As I expressed to Mr Nelson during my investigation his concerns regarding Mr Lists alleged breach of his professional ethics is a matter which is not within my jurisdiction. Unfortunately, irrespective of the rights and wrongs of Mr Lists behaviour, that behaviour and Mr Nelson's subsequent complaint to the PRB increased the tension between the parties and may have lessened the likelihood of a settlement. In addition it reinforced Mr Nelson's lack of trust in FSL to the point where he believed that Mr List had influenced Dimond's subsequent decision to dismiss him. I will address Mr Nelson's concerns in that regard later in this determination.

Was Mr Nelson's dismissal unjustified?

[42] The test of whether or not a dismissal, or other action by an employer, is justified is set out in the Employment Relations Act at section 103A:

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The decision to dismiss Mr Nelson was made by Mr Mark Lawson, the International Operations Manager at Dimond. Over a number of months Mr Lawson had been supportive of Mr Nelson. In February and March 2006, based on the medical evidence presented to him, he agreed to a staged return to work for Mr Nelson. When it became clear that Mr Nelson would not be able to return to work as speedily as had been hoped Mr Lawson decided that he could not continue to cover Mr Nelson's work and came to the conclusion that he had to terminate Mr Nelson's employment. Until the final part of this

process Mr Lawson showed a commendable level of patience and support for Mr Nelson. Unfortunately his final decision was made precipitately and in a manner completely at odds with the supportive attitude he had shown previously.

[43] At this point it is appropriate to comment on Mr Nelson's suggestion that Dimond's decision to dismiss him was influenced by Mr List and reflected Mr Lists annoyance at Mr Nelsons complaints to the PRB and his the way in which he was pursuing his personal grievance against FSL. Clearly Mr Lawson was aware of the fact of Mr Nelson's PG if not the substance. However there is no evidence that Mr List influenced Mr Lawson's decision.. In fact Mr Lawson denies any such influence and I accept his assurance in this regard.

[44] It is true that in March 2006 Dimond advised Mr Nelson in writing that if he was unable to return to work his employment may be terminated due to the frustration of his employment agreement. However that letter was written in the light of the situation and medical advice at that time. When the situation changed the company had a duty to properly consult with Mr Nelson before proceeding to dismiss him.

[45] Mr Lawson received advice from Mr Nelson indicating that he may not be able to return to work for 6 months or more. Mr Nelson was invited to a meeting to discuss his ongoing medical condition but was given no indication that any decision would be made at that meeting regarding his future and was not advised that he might like to be formally represented at that meeting. Given what had gone before it is understandable that Mr Nelson would not have expected for the decision to dismiss him to be made so quickly, and certainly not immediately following that meeting. There appears to have been no particular reason why Dimond felt the need to make a decision on that day and, I find, a *fair and reasonable employer* would have advised Mr Nelson that dismissal was now being considered and suggesting that, given that information a further meeting be convened at which Mr Nelson may wish to be represented and may wish to put forward reasons why he should not be dismissed. By rushing to terminate Mr Nelson's employment Dimond did not do what a fair and reasonable employer would have done at that time. In this regard **Mr Nelson's dismissal was unjustified. Mr Nelson has a personal grievance in this regard.**

Summary of findings

[46] By way of summary of the findings set out above

- FSL did not mislead Mr Nelson or act in bad faith when offering him a position at PWT.
- Although Mr Nelson's position at PWT was at times stressful the stress was no more than could be expected or extra ordinary.
- FSL were not aware of any extraordinary stress on Mr Nelson and did take steps to address those concerns that were brought to their attention.
- FSL did not breach its duty to provide Mr Nelson with a safe workplace.
- Although the stress suffered by Mr Nelson may have precipitated the symptoms of his heart disease there is no evidence that his stress caused that disease.
- FSL could not have known that Mr Nelson's stress may precipitate the onset of his heart disease.
- FSL did not breach its duty of good faith in the way it investigated Mr Nelson's first personal grievance claim.
- Mr Nelson's dismissal from Dimond was unjustified.

Remedies

Contribution

[47] Section 124 of the Employment Relations Act (the Act) requires that, were the Authority determines that an employee has a personal grievance the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to that personal grievance. I have found that Mr Nelson has a personal grievance against Fletcher Steel Ltd in that his dismissal from Dimond was unjustified. While Mr Nelson did not assist his own cause by being somewhat circumspect in the information he provided to Dimond regarding his medical condition, he did allow Mr Lawson to read his most recent medical certificate. In fact it was on this certificate that Mr Lawson based his decision to dismiss. There were, at least in Mr Nelson's mind, good reasons for not providing this information in writing to Mr Lawson and Mr Lawson was in possession of all the relevant facts. I find that Mr Nelson did not contribute to the situation that gave rise to his personal grievance.

Recovery of wages

[48] Mr Nelson had been on sick leave either full-time or part-time for a number of months. The latest medical certificate suggested that he would be unlikely to carry out his full duties for at least the next six month's. This medical advice included the suggestion that he *avoid work that requires onerous deadlines* and that he should avoid *being responsible for complex project delivery*. Had Mr Nelson not been dismissed he would certainly not have received his full salary, and given the medical restrictions suggested, may not have been able to work at all for lengthy periods of time. In addition my finding is that Mr Nelson's dismissal was unjustified because of the precipitate nature of the decision-making by Dimond. Had Dimond provided a proper opportunity for Mr Nelson to be represented and had given him an opportunity to debate possible alternatives to dismissal, it is probable that Mr Nelson would have been dismissed and that dismissal would have been justifiable. His dismissal in those circumstances would have had the added benefit of allowing Mr Nelson a more dignified, and therefore less stressful exit from the business.

[49] It is difficult to assess an appropriate level of salary which Mr Nelson should be allowed to recover. Immediately prior to his dismissal Mr Nelson was attending

work but on reduced hours. Taking into account all of the circumstances, in terms of section 123(1)(b) of the Act, FSL is to pay Mr Nelson 50% of one month's salary gross.

Hurt and humiliation

[50] The way which Mr Nelson was dismissed added significantly to the personal trauma he was suffering as a result of his serious illness and it's devastating consequences on his life and that of his family. He is entitled to compensation for that portion of his hurt and humiliation caused by his unjustified dismissal. **In terms of section 123(1)(c)(i) of the Act FSL is to pay Mr Nelson \$7,500 without deduction**

Costs

[51] Costs are reserved and the parties are urged to attempt to settle this matter between themselves in the first instance. Without wishing to pre-empt those discussions the parties may wish to take into account that Mr Nelson has been successful in only one of his many claims against the company. In terms of the amount of time and resources required by the company to defend, that claim was probably the most straightforward. However if the parties are unable to agree on costs either party may, within 28 days of the date of this determination, file and serve submissions in respect to costs. The other party will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority