

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 207/09
5129804

BETWEEN WILLIAM SIMPSON
 Applicant

AND TASMAN GLASS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Advocate for Applicant
 Claire Atkins, Counsel for Respondent

Investigation Meeting: 29 July 2009 at Nelson

Submissions received: 24 August and 7 September 2009 from Applicant
 28 August 2009 from Respondent

Determination: 2 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] William Simpson was employed by Tasman Glass Limited (Tasman Glass) as a factory/despatch supervisor from 8 January 2007 until his employment was terminated during a period he was on sick leave, on four weeks' notice, from 20 December 2007. Mr Simpson had previously worked for Tasman Glass for a period of about 2½ years when he was 16 years of age as a factory hand/delivery driver. He was 22 years of age during the second period of employment.

[2] Mr Simpson says that there were unjustified actions on the part of Tasman Glass that caused him disadvantage during his employment. He says that Tasman Glass's expectation that he work extended hours of about 70 hours per week for a period of weeks between August and November 2007 was unjustified and that Tasman Glass breached its obligations as a result to provide him with a healthy and

safe workplace. Mr Simpson says that as a result of working these extended hours he became exhausted and anxious. He took sick leave as a result during which period his employment was terminated on notice. Mr Simpson says that this termination was an unjustified dismissal.

[3] Mr Simpson seeks reimbursement of lost wages; payment of a bonus under s.123(1)(c)(ii) of the Employment Relations Act 2000; compensation for hurt, humiliation and injury to feelings in the sum of \$15,000 and costs. There was no claim for damages. The Authority was advised during the investigation meeting that holiday pay would be paid to Mr Simpson, however, the submissions lodged on behalf of Mr Simpson provide that this matter has not been addressed so will also fall to be considered in this determination. Although not specifically addressed in submissions there were also some items that Mr Simpson wanted returned to him. That matter may well have been resolved but I reserve leave for Mr Simpson to return to the Authority if that is not the case.

[4] Tasman Glass does not accept that it failed to operate a safe system of work or that an expectation that Mr Simpson work the hours was unjustified. It says that Mr Simpson was not required to work 70 hours per week beyond 4 October 2008. Tasman Glass does not accept that it unjustifiably dismissed Mr Simpson from his position. It says that Mr Simpson was justifiably dismissed from his employment because he failed to provide a medical prognosis as to his fitness so that it could assess what was wrong with him and the likelihood that he would return to work on the date of the third medical certificate he provided being 3 January 2008. Tasman Glass does not accept that it is required to pay Mr Simpson a bonus because it says that a clause relating to the same in Mr Simpson's individual employment agreement requires that the company make a profit before a bonus is paid. Tasman Glass says that it did not make a profit and therefore no bonus is owed to Mr Simpson.

The issues

[5] The representatives were in agreement in their final submissions about the issues for the Authority to consider and determine.

They are as set out below:

- Was there unjustifiable action on the part of Tasman Glass that caused Mr Simpson disadvantage;
- Was the dismissal of Mr Simpson by letter dated 20 December 2007, which letter terminated his employment on four weeks' notice, justifiable in terms of the test set out in s.103A of the Employment Relations Act 2000;
- If the dismissal was unjustified, what remedies should Mr Simpson be awarded and are there issues of contribution or mitigation?

The background against which the issues are to be analysed and determined

The Employment Agreement

[6] Mr Simpson was interviewed, prior to his employment commencing in late 2006, by two of the directors of Tasman Glass, Warren Whitfield and Aaron Fitzgerald, about coming to work again at Tasman Glass as a factory manager/supervisor. Mr Whitfield and Mr Fitzgerald advised Mr Simpson that the factory was expanding into the manufacture of double-glazing and that the double-glazing line was to be commenced towards the end of April 2007. There was discussion about Mr Simpson being part of the management team and having an increased responsibility as a result.

[7] I am not satisfied that there was specific discussion about what hours Mr Simpson would be required to work, although he was left with the impression that there would be some overtime.

[8] Mr Fitzgerald recalled that Mr Simpson said he was sick of driving trucks for 70 hours a week and not being appreciated for his efforts. There was some discussion around the salary offered of \$40,000 which Mr Simpson considered was *a bit light*. Mr Fitzgerald said that he told Mr Simpson if he worked well over a three month period his salary would duly increase to \$45,000 and that after the first year of employment there was a further prospect of an increase of salary as profit was gained from the manufacture of the double-glazing.

[9] Mr Simpson duly accepted the role offered by Tasman Glass and signed an individual employment agreement on 22 December 2006. He commenced his

position on 8 January 2007. Ms Sharma referred to Mr Simpson signing two agreements. I find that the document that described Mr Simpson's hours of work and remuneration and job description was a schedule to the employment agreement rather than falling to be considered as a separate document.

[10] The hours of work provision in the employment agreement provided:

6.1 Full Time Hours with an obligation to perform overtime as necessary but without extra payment.

The Employee's normal hours of work shall be AS REQUIRED TO ACHIEVE RESULTS per week, between MONDAY AND FRIDAY. The employee may also be required to perform overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

[11] Clause 10 of the employment agreement dealt with health and safety obligations which included the employer taking all practicable steps to provide the employee with a healthy and safe working environment and the employee likewise complying with all directions and instructions from the employer regarding health and safety and taking reasonable steps to ensure their own health and safety.

Months of work between 8 January and August 2007

[12] Mr Simpson's claims do not relate to this early part of his employment. His evidence was that it was not until later in August that he considered the hours he was required to work were unmanageable and unreasonable. During this earlier part of his employment, Mr Simpson said he was working between 45-50 hours per week and he found that manageable, although noticed that in May 2007, once the company purchased and started assembling its own double-glazing line, his hours crept up to about an 11 hour day. Mr Simpson's salary increased in or about April 2007 from \$40,000 to \$45,000 per annum.

Late August 2007 until 22 November 2007

[13] From late August 2007, the hours required to be worked by Mr Simpson increased quite dramatically. There was some difference in the evidence as to the exact date this occurred, but there was no dispute that the increase in hours coincided with the commissioning of the double-glazing line which was signed off as commissioned on Friday, 17 August 2007.

[14] Mr Fitzgerald accepted in his evidence that Mr Simpson was undertaking hours of work up to 70 hours per week from between 1 September until 4 October 2007 and those hours included, on occasion, weekend work. Sometimes this would be both the Saturday and the Sunday and sometimes just the Saturday. Both Mr Fitzgerald and Mr Simpson could recall one Saturday when they worked until midnight. Mr Fitzgerald agreed that on occasions during this period Mr Simpson would finish between 9.30 and 10pm on a week night. I find that, during that period, Mr Simpson would in all likelihood have commenced work between 7 and 7.30am.

[15] Having assessed the evidence, whilst there may have been some decrease in the hours worked by Mr Simpson after 4 October 2007, I am not satisfied that the decrease was dramatic and/or immediate and that Mr Simpson was still required to work extended hours on a regular basis. He describes as being required to be there when Mr Fitzgerald was there.

[16] Mr Simpson said that before he took some leave on 19 October 2007 he started to feel that he was not coping with the expectation to work the long hours. He did not complain directly during this period to Mr Fitzgerald and kept performing the hours required because he believed, following discussions with Mr Fitzgerald, and also with Mr Whitfield, that he would receive an increase in his salary the next year. He felt a sense of loyalty toward Mr Fitzgerald and did not want to be seen to let him down. Mr Simpson accepted that he had a joke or two with Mr Fitzgerald as they worked. He did start to feel unappreciated over this time and raised the subject of his salary on a few occasions with Mr Fitzgerald and Mr Whitfield describing in his written evidence his life becoming a blur of work. Mr Simpson recalled talking to one of the glass cutters who was taking home about \$500 more than he was because the glass cutter was getting paid overtime.

[17] Mr Simpson's mother, Shelley Simpson, gave evidence that she saw a great deal less of Mr Simpson who lived at home during this period of employment from August 2007 onwards. I also heard evidence from a close family friend, Kristine Carpenter, who said that prior to working at Tasman Glass Mr Simpson would often be around at their home having a meal or simply getting involved with activities with the family but from mid to late August 2007 until the end of November 2007 they seldom saw Mr Simpson.

[18] Mrs Simpson also gave evidence that she noticed changes in Mr Simpson's personality from being a very passive and easy going person who was willing to please to being *like a bear with a sore head*. She described this as being completely unlike Mr Simpson. She recalled him leaving home for work early in the morning and at times not getting home until after 10.00pm.

[19] Mr Fitzgerald said that the company paid Mr Simpson bonuses of \$250 during his employment, on what he could recall was three occasions. There is no written record of such bonuses being paid, but Mr Simpson did recall one payment of \$250. Mr Fitzgerald and Mr Whitfield were obviously both committed to the business and Mr Fitzgerald worked the long hours with Mr Simpson in what I find was a physical role working with glass. Mr Fitzgerald of course had a different motivation to Mr Simpson in putting in the long hours because he stood to gain or indeed lose much more as Managing Director of Tasman Glass by the success or failure of the company and the work throughput. Mr Fitzgerald also by virtue of his position had a measure of control about how and when he worked that Mr Simpson did not. Mr Simpson described feeling a lack of control in terms of the hours he was expected to work and the complete lack of predictability as to when he would finish the work on a weekday or on a Saturday.

[20] Mr Fitzgerald said that Mr Simpson's ability to cope with long hours was supported by the fact that he also drove trucks in the evening or on weekends at the same time as working at Tasman Glass. The evidence from the trucking company is clear however that the last work Mr Simpson performed for that company was on 1 September 2007.

[21] There were regular production meetings with the management team. I am satisfied that at one of these meetings Mr Simpson referred to employees becoming tired and making mistakes during that busy period when two employees had an accident resulting in them sustaining injuries. Mr Simpson recalled that when he reported the accident to Mr Whitfield, Mr Whitfield uttered some expletives about the employees not having followed procedures and that they were at fault in that regard. Mr Whitfield queried with Mr Simpson how employees could be tired on a Tuesday when Mr Simpson had considered that tiredness was a contributing factor to the accident.

[22] During a period of annual leave from 19 October returning to work on 29 October 2007 Mr Simpson said that he took stock of his work situation and realised that he could not go on working the way that he had been. He said that he thought about the fact that he had barely seen any of his friends, including the Carpenter family, and described his relationship with his parents as *ships passing in the night*. He was aware that his relationship with his family had become strained and his mother was finding him difficult to communicate with. Mr Simpson remained hopeful that things would settle down and he was quite comfortable, in his mind, with returning to 10 hour days.

[23] After Mr Simpson returned to work on 29 October 2007, he was asked to attend a meeting of the management team on 30 October 2007. There is no dispute that it was either suggested to Mr Simpson as prudent, or Mr Simpson was simply asked, to start at 6am for a period to show the drivers how to load the trucks. Mr Fitzgerald said that Mr Simpson thought that it was a good idea to do that. Mr Simpson, on the other hand felt there was no acknowledgment by Mr Fitzgerald that he was already working long days and he found himself again caught in a bind of wanting to please Mr Fitzgerald as he always tried to do and wondering how he was going to meet that request with everything else he was doing.

[24] Mr Simpson asked if he could have an hour for lunch during that meeting as he wanted to go to the gym. Mr Fitzgerald agreed that Mr Simpson could have an hour for lunch. Prior to that Mr Simpson was only having a break for lunch of between 10-30 minutes. I accept Mr Simpson's evidence that he did not actually join a gym in the last short period before he went on sick leave because he felt he was not able to have a proper break.

[25] On 31 October 2007, Mr Simpson duly attended work at the earlier hour of 6am. Prior to leaving the house, it was obvious to him that his mother, who is a diabetic, was not well. She told him not to worry about things and to go to work. As it turned out, Mrs Simpson's condition rapidly deteriorated and she was admitted to Nelson Hospital in the intensive care unit where she remained for a week.

[26] Mr Simpson found out later that morning that his mother had been admitted to hospital, having discussed the situation with his brother. He spoke to Mr Fitzgerald about the situation and felt that Mr Fitzgerald was not particularly sympathetic. Mr Fitzgerald said that he was not aware, in terms of his discussions with

Mr Simpson, the serious nature of Mr Simpson's mother's condition. Having considered the evidence, I find it unlikely that Mr Simpson, knowing his mother had been admitted to intensive care, would not have shared that with Mr Fitzgerald. Mr Fitzgerald agrees with Mr Simpson's written evidence that he did say something along the lines *she'll be all right and she's in the best place*, although he said that he did add *let me know how things are going*.

[27] Whilst Mr Fitzgerald in all likelihood wanted to be sympathetic Mr Simpson was left with the view that he was not and therefore felt guilty about having time off to visit his mother. Mr Simpson took 31 October and 1 November 2007 as sick leave to enable him to spend some time at the hospital with his mother and said that he was of the view Mr Fitzgerald would not be sympathetic to any signs on his part of weakness.

[28] Mr Whitfield's referred to the situation in his written evidence in which he said:

I remember him telling me his mother had fallen ill. I also remember asking if there was a father/husband and why he did not care for her. I don't remember William's response but apparently there was one. William left me with the impression it was his responsibility to look after her. I am not sure of the dates and times over the next two months but I do remember how pissed off I was because of the extra work load which was dropped onto us from his absence.

[29] Mr Fitzgerald and other Tasman Glass employees say that from this point on, 31 October 2007 to his last day at work before sick leave, Mr Simpson was only at work for about 40% of the time. Mr Simpson does not accept that that was the position. Mr Simpson says he continued to work long days and tried to persuade other employees to stay later so that everyone could get a chance to go home early but that they were tired of the pace of things and would leave by 8.30pm.

[30] Mr Simpson had two sick days on 31 October and 1 November and it is likely he tried to finish by a reasonable hour until his mother was released from hospital on or about 7 November so that he could visit her. The evidence supports Mr Simpson felt guilty and that he was letting Mr Fitzgerald down as a result of this. Completely consistent with that is Mr Fitzgerald's evidence about the Christmas function on 3 November 2007 which date fell on the Saturday within that week. Mr Fitzgerald says in his evidence that when he telephoned to invite Mr Simpson to the dinner, he responded *I didn't think I'd be welcome after having so much time off*.

[31] That aside I am not satisfied that Mr Simpson reduced his hours after that week to the extent that the respondent witnesses maintain he did for the remaining two weeks he was at work. I conclude that because I think it highly unlikely, against the background I have set out, and the requirements of Mr Fitzgerald, that if he considered Mr Simpson, as one witness put it *had gone AWOL*, that would not have been raised with him.

[32] There was an opportunity for raising such an issue on 19 November 2007. That was the date when both parties agreed Mr Fitzgerald had a discussion with Mr Simpson. Prior to that date Mr Simpson was involved in a near miss incident involving work on the pack lifter unloading a pack of glass in mid November 2007 and he said he did not feel safe working with glass under the working conditions. He believed that the incident was a sign of physical exhaustion.

[33] Mr Fitzgerald wanted to talk to Mr Simpson on 19 November 2007 because he felt that Mr Simpson did not seem like himself and quite appropriately went to talk to him. I find that Mr Simpson advised Mr Fitzgerald that he was tired and I think it likely, in the circumstances, that there was reference by Mr Simpson to the hours that he was working. I do not find that Mr Simpson found it easy to talk about his concerns but I am satisfied that he did tell Mr Fitzgerald that he was not happy with the hours he was working and I think it likely he said he wanted to go back to 10 or 11 hour days. I have reached that conclusion because although Mr Fitzgerald said that there was no discussion about his tiredness being related to the hours he was working but rather trying to adjust after returning from leave and his mother's admission to hospital, there was agreement that Mr Fitzgerald said Mr Simpson should try starting at 7am for a while. I consider that, in light of that suggestion, it is highly likely that Mr Simpson did make reference to the hours he was working as a cause of his tiredness. I accept Mr Fitzgerald's evidence that the words *stressed or burned out* were not used during the conversation.

[34] Another employee, Avril Marshall, said in her evidence, that after 31 October Mr Simpson had not started at work by the time she had arrived at 7.30am. If that had been the case though I think it unlikely Mr Fitzgerald would have suggested, on 19 November, that Mr Simpson start at 7am if he thought Mr Simpson was starting after that time anyway.

[35] By this stage, Mr Simpson said that he was experiencing effects of burn out and was struggling to get to sleep at night because it meant that going to work was that much closer. He said that he was waking up early in the morning and feeling exhausted.

[36] The evidence about Mr Simpson's last day of work is far from clear. The wage records support that he was paid for a sick day on 21 November but Mr Simpson was quite clear that his last day was 21 November and that he then had a medical consultation the following day. I find it likely that his last day of work was 21 November 2007 and that the records are more likely to be incorrect in terms of payment for that day as a sick day.

[37] On 21 November 2007 Mr Simpson slept in and went to work at 8am. He said that he sent a text to Mr Fitzgerald to say that he would be in a bit late and I have no reason not to accept that evidence. Mr Simpson said that as he was feeling tired and, relying in part on what he considered to be a disclosure to Mr Fitzgerald about his physical state on 19 November 2007, he decided to finish up for the day at 4.30pm. He went to say goodbye to Mr Fitzgerald. There is no dispute that Mr Fitzgerald said: *What the fuck's wrong with you? We're fucking busy and you want to go home. You didn't get here until late. Why do you need to go when we've heaps of work left to do?* Mr Fitzgerald also recalls making reference to staff under Mr Simpson asking what was going on because he was never there and not helping. There is no dispute that Mr Simpson did not respond to Mr Fitzgerald because he said that he had resigned himself to Mr Fitzgerald not caring about him and that Mr Fitzgerald said *you do what you think is right*. Mr Simpson then went home.

[38] Mr Simpson said that he could not seem to move past Mr Fitzgerald's comments that evening and they kept going around in his head. He said that he did not sleep well as his mind was racing and woke up the next morning feeling nauseous, apprehensive and stressed and decided to go to see his doctor, Dr Patch Graham, to see what he recommended as he felt he could not continue any longer. Mr Simpson said he was not one to go to a doctor and that it was in fact a very rare occurrence for him.

[39] The Authority heard from Dr Patch Graham during the investigation meeting when he was connected by telephone conference call.

[40] Dr Graham said that he had a very good memory of his consultation with Mr Simpson because of the way he presented and the nature of their discussion. Dr Graham also provided a report for the purposes of the Authority's investigation meeting from the notes that he had taken from his consultation with Mr Simpson. Dr Graham said that the discussion he had with Mr Simpson was that Mr Simpson was working long hours, up to 10-15 in a day as well as Saturday work, and was feeling the pressure and had safety concerns about his work around glass. Dr Graham recorded Mr Simpson as saying that his employer was not sympathetic to his situation and that his mental state was one of agitation/anxiety and distress rather than depression.

[41] Mr Simpson, at that stage, wanted to have a few days off work to reorganise his thoughts and regroup although Dr Graham was of the opinion that weeks rather than days would be required given Mr Simpson's level of distress. Dr Graham said that they did not identify any non-work contributors to his mental state. Under questioning from Ms Atkins, Dr Graham accepted that Mr Simpson had not discussed his mother's admission to hospital with him or some issues with a relationship break up although Mr Simpson did not seem to accept that there was a relationship breakup.

[42] Dr Graham provided an initial medical certificate that confirmed he had examined Mr Simpson on 22 November 2007 and in his opinion Mr Simpson was medically unfit from 22 November 2007 but would be fit to resume work on 28 November 2007. I am satisfied that Mr Simpson provided a copy of that medical certificate to his employer.

[43] An issue arises as to whether Mr Fitzgerald and Mr Simpson talked by telephone during his sick leave on one or two occasions. Mr Fitzgerald said that he only spoke to Mr Simpson during his sick leave by telephone on one occasion being 4 December 2007 after a third medical certificate had been received which extended time off to 3 January 2008. Mr Simpson says in his evidence that there were two telephone calls that he made to Mr Fitzgerald, and the one on 4 December was the second telephone call.

[44] The first telephone call Mr Simpson said he made was in response to a message left by Mr Fitzgerald and was after the second medical certificate which stated that Mr Simpson would be fit to return to work on 3 December 2007 but before the third medical certificate. Mr Simpson said that in this telephone call he advised

Mr Fitzgerald that he was exhausted and burned out but hoped to return to work soon. Mr Simpson said that Mr Fitzgerald said very little during the call and that he concluded that Mr Fitzgerald was not happy.

[45] Having considered the evidence carefully, I find that it is more likely than not that there was that earlier call. Mr Simpson had a good recollection of that call being made because he said he became quite stressed and anxious after the call about how his absence would be viewed by Mr Fitzgerald because he remembered that Mr Fitzgerald would say things about people who took time off on sick leave that they were *soft, useless or could not handle it*. He said that he spoke to Dr Graham about the matter and at that stage Dr Graham suggested that he extend the medical certificate for a longer period of time until 3 January 2008. The medical report from Dr Graham supports in the last paragraph that Mr Simpson had spoken to Mr Fitzgerald before the final medical certificate was issued although curiously records a rather upbeat view of Mr Simpson's that his employer had seemed to have adjusted to his absence and further that Mr Simpson was hopeful that rescheduling of work rosters after Christmas would allow him to resume work successfully.

[46] Having reached a finding that there was an earlier call, I find it likely that Mr Simpson referred to his condition during that call and why in fact he was off work. I accept that Mr Simpson may not have put his condition in any clear medical terms beyond exhaustion and burn out related to hours of work, but I do find that Mr Fitzgerald would have been advised at least of that.

[47] After the third medical certificate was provided to Tasman Glass, Mr Fitzgerald left another message. Mr Simpson did not want to talk to Mr Fitzgerald again but he was encouraged to call him by his mother. It was agreed, on this occasion, his mother had in fact taken the message from Mr Fitzgerald although as submitted by Ms Sharma, Mr Fitzgerald never asked Mr Simpson's mother what was wrong with Mr Simpson.

[48] Mr Simpson said that Mr Fitzgerald asked him what was wrong and why he needed time off. There is a dispute as to how Mr Simpson responded to this. Mr Fitzgerald said that Mr Simpson never discussed anything with him when he asked if they could catch up for 10 minutes so he could let him know what was up. He said that Mr Simpson was very blunt and that at no stage in the short conversation did he mention stress or burn out.

[49] Mr Simpson's mother, although obviously not being able to hear what Mr Fitzgerald said, said that she heard her son say things such as *we have already talked about what the problem is*, and she considered Mr Simpson found it difficult to verbalise to Mr Fitzgerald that he was feeling stressed. She said that Mr Simpson did talk about a previous request about his hours and that she heard Mr Simpson tell Mr Fitzgerald that he would be returning to work once the medical certificate ran out on 3 January 2008. Mr Fitzgerald agreed that Mr Simpson did say when asked what was wrong with him that he had already told him [Mr Fitzgerald]. Mr Simpson agrees that he did say *I've already told you and I'm not fucking repeating myself* at the end of the call. I accept Mr Fitzgerald's evidence that Mr Simpson did not discuss his medical condition during this call. It was difficult for Mr Simpson to talk about and he felt he had already done so at an earlier time and that was why he responded in the way he did. I think it likely though that given this call took place after the third medical certificate that Mr Simpson did say he would be back to work on 3 January 2008.

[50] Mr Fitzgerald said that at that stage he felt that he was getting very limited information and, in his words, he felt that Mr Simpson was *taking the mickey*. He said that Tasman Glass had tried to be open with Mr Simpson and that at that stage he decided to make contact with his lawyers and was advised that the best course of action would be to send a letter to Mr Simpson asking him to attend a meeting to discuss the situation and certain aspects of his medical condition to ascertain the likelihood of Mr Simpson returning to work on 3 January 2008. A letter was duly sent and a meeting requested for 11 December 2007 at 9am. Mr Simpson did not attend the meeting and there was no further communication from him relating to the letter which also advised that if he was uncomfortable in discussing the medical condition then may be it could be discussed with his doctor in more general terms.

[51] A second letter was sent to Mr Simpson on 12 December 2007 advising him that Tasman Glass did not know enough about why he was not at work and what his medical condition was and requested that he make contact with the company by 5pm on Monday, 17 December 2007 or the company would be forced to terminate his employment.

[52] In the absence of any response from Mr Simpson, a third letter was sent to him on Thursday, 20 December 2007 terminating his employment on four weeks' notice.

[53] Mr Simpson said that he did not feel he had the strength of mind to respond to the letters and did not feel together enough to meet with Mr Fitzgerald. He felt that he had made it very clear that he would be returning on 3 January 2007 and said that he felt stunned to receive the letter dated 20 December that his employment had been terminated with four weeks' notice.

[54] Mr Simpson agreed that he had a key role in the company. As to how the company managed in the interim Mr Fitzgerald said that they had been approached by somebody at the end of December who was interested in taking up Mr Simpson's role but that person could not start until August 2008. In the interim, Mr Simpson's position was covered by Mr Fitzgerald, Ms Marshall and Mr Whitfield.

Was there unjustifiable action on the part of Tasman Glass that caused Mr Simpson disadvantage?

[55] The justification of any action has to be objectively assessed in terms of the test under s.103A of the Employment Relations Act 2000 as to whether the actions of Tasman Glass were the actions of a fair and reasonable employer.

[56] Mr Simpson is also required to establish, if the actions of Tasman Glass are found to be unjustified, that there was corresponding disadvantage suffered by him in terms of his conditions of employment.

[57] Mr Simpson's employment agreement did not specifically stipulate the hours of work that he would be required to undertake. There was an obligation to perform overtime as necessary and that the normal hours of work would be as required to achieve results per week and that between Monday and Friday there may be some overtime as may be reasonably required.

[58] The requirement to work overtime under clause 6.1 of his employment agreement was that Mr Simpson work overtime as reasonably required. Whilst an expectation to work additional or extended hours up to 70 hours for a limited period, say one week may not be unjustified, I find that the expectation for Mr Simpson to work extended hours was, objectively assessed, not reasonable. Mr Simpson did not have any control over the hours he worked and felt that he simply had to stay on and work when Mr Fitzgerald did and finish when Mr Fitzgerald decided the work was done. When Mr Simpson tried to leave at an earlier hour on 21 November 2007 Mr Fitzgerald's response confirmed how difficult it was for Mr Simpson to decline

the hours. The role itself was a physical and demanding role. Mr Simpson had a near miss incident and it is fortunate there was not a more serious incident. Objectively assessed, I find that the expectation that Mr Simpson work those hours was unjustified in that it was unreasonable and in breach of clause 6.1 of his employment agreement.

[59] I accept that the expectation Mr Simpson continue to work extended hours for Tasman Glass caused his health to deteriorate and he became exhausted from 22 November 2007 requiring a period of time to rest and recover. The expectation to work such hours in this way caused his disadvantage. Mr Simpson has a personal grievance that there were unjustified actions on the part of Tasman Glass that caused him disadvantage in his employment. He is entitled to remedies.

[60] I have considered the remedies in terms of this grievance. I find that the appropriate remedy is compensation and as a global sum for hurt and humiliation is sought I will consider any compensation award together with any award I may make in terms of the personal grievance of unjustified dismissal.

Was the dismissal of Mr Simpson by letter dated 20 December 2007 justifiable?

[61] Mr Fitzgerald said that he made the decision to terminate Mr Simpson's employment on the basis that he felt Mr Simpson was trying to *take the mickey* and further that there was no communication/medical prognosis from him in terms of whether he would be returning on 3 January 2008. He said that all the company wanted to know was what was happening and he needed to know whether the role was required to be filled in the business.

[62] The letters that were sent to Mr Simpson were seeking confirmation as to whether Mr Simpson would be fit to resume work on 3 January 2008.

[63] The first of the three letters was written at an early point in Mr Simpson's sick leave on 6 December 2007 and prior to that I found there were two telephone calls. They took place within the first two weeks of Mr Simpson's sick leave.

[64] The reason provided in the letters sent to Mr Simpson providing further information over and above that of the medical certificate was so that the company could be satisfied that he would return to work on 3 January 2008. I am satisfied that Mr Simpson advised Mr Fitzgerald that he would return as at that date.

[65] There are two issues to be considered. The first is whether Mr Simpson's non-attendance at meetings or failure to provide further medical information as requested could justify his dismissal on notice. The second matter is whether Mr Simpson's dismissal could be justified on the basis that it was considered he held a key position with the company.

[66] In terms of the first matter, it is necessary to consider Mr Simpson's obligations in terms of his individual employment agreement. Clause 8.4 of the individual employment agreement provides that a medical certificate is required for sick leave where the employee has taken sick leave and has been absent from work for at least three consecutive calendar days. The employer is entitled, under the terms of that clause, to require Mr Simpson to provide proof of entitlement to sick leave at his own cost.

[67] Mr Simpson did provide medical certificates to cover the period of sick leave until 3 January 2008. I have then considered whether there was any justifiable reason for considering that Mr Simpson was not unwell notwithstanding the medical certificates. I heard evidence that Mr Simpson had been seen out driving a truck with the owner of a trucking company by another Tasman Glass employee on one day during his sick leave. Mr Simpson denies that he was with the owner of the trucking company and says he went for a drive with a friend during his sick leave. He recalls seeing the employee. I am not satisfied that the evidence goes so far as to support that he was working during his sick leave. For completeness, the position Mr Simpson obtained in late January 2008 was not with the trucking company. Mrs Simpson confirmed that Mr Simpson went for a drive with a friend in a truck and mentioned on his return seeing a Tasman Glass employee. This matter was not referred to in the letters sent to Mr Simpson. I accept Ms Sharma's submission that this case is distinguishable from the Authority determination in *Kirkwood v On Gas Limited* Member Dumbleton AA 351/04. In that case there was an allegation that the employee had arrived drunk to work, worked briefly and then was on sick leave. He had a medical certificate that covered him for the day he was allegedly drunk at work but following a disciplinary investigation when he returned from sick leave he was dismissed. The Authority noted in that determination that *Producing a medical certificate like the one dated 13 May which did not identify a particular illness, does not create a magic shield removing all doubt as to other (perhaps less worthy) explanations for symptoms.* There is no reference in the letters written to Mr Simpson

before his employment was terminated raising issues of misconduct or suggesting that the medical condition is not genuine. The issue for the company in its letters is whether Mr Simpson would be able to return on 3 January 2008.

[68] There are good faith obligations on both employee and employer to be responsive and communicative within an employment relationship and it may have been that, on his return to work, Mr Simpson could have been required to provide reasons why he did not respond to the requests for further medical information. In this case, too, I think for Mr Simpson's own wellbeing, it was necessary for Tasman Glass to understand that on his return he would not wish to be undertaking the extended hours that he had been working.

[69] Aside from that, which may well go to contribution, I am not satisfied that the failure to attend the meetings or provide further information could justify Mr Simpson's dismissal with respect to failure to act in good faith or any misconduct in terms of his obligations under his employment agreement or otherwise.

[70] I then turn to consider whether failure to communicate or provide further medical information in terms of Mr Simpson's ability to return to his key position by 3 January 2008 would have justified his dismissal. There have been cases where it has been held that an employer can justifiably dismiss an employee who is prevented from carrying out their duties for an indefinite period: *Barry v. Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545.

[71] Mr Fitzgerald wanted confirmation that Mr Simpson would return to work at an early point of the sick leave. I am satisfied that Mr Simpson confirmed verbally during the telephone call on 4 December 2007 that he would return by 3 January 2008. It is also relevant that the factory would have closed for the statutory public holidays at least over Christmas and New Year following the termination on notice of Mr Simpson's employment on 20 December 2007 which is another factor that should have been considered. Mr Simpson accepted that his position was a key position, but what is clear from the evidence is that his position was able to be covered by existing staff until August 2008.

[72] In this case, I find a fair and reasonable employer would not have dismissed Mr Simpson but would have waited until 3 January 2008 to see whether he returned to work at that date. A dismissal on the basis that Mr Simpson filled a key position

before 3 January 2008 could not be justified for reasons set out above. There was an obligation on Mr Simpson to provide information in terms of his own health and wellbeing so that Tasman Glass could be clear in terms of its own obligations in that regard. I do not find that the failure to meet or provide further medical information though could justify Mr Simpson's dismissal.

[73] Mr Simpson has a personal grievance that he was unjustifiably dismissed from his employment with Tasman Glass and he is entitled to remedies.

Remedies

Contribution

[74] Under s. 124 of the Employment Relations Act 2000, the Authority is obliged, when considering remedies, to consider whether the actions of an employee contributed to the situation that gave rise to the personal grievance. In appropriate cases, the Authority may reduce the awards on that basis.

[75] In the submissions of Ms Atkins, there has been reference to Mr Simpson's failure to respond to the letters sent by the company asking for further information about his medical condition. Ms Atkins submits that Mr Simpson did not keep his employer informed of his actions based on the timing of the receipt of the medical certificates and that they were not accompanied by phone calls or text messages.

[76] Ms Atkins also relies on the respondent doubting the genuineness of Mr Simpson's illness due to another employee reporting seeing him driving for a transport company during his sickness although I have not been satisfied that there was sufficient evidence to conclude that Mr Simpson was driving for monetary gain during his sick leave and I do not find contribution in that regard.

[77] I do not find that Mr Simpson failed, as Ms Atkin submits, in his obligation to inform his employer about his illness. He was required to provide, under his contract, medical certificates for a period of absence in excess of three days which he did. I do accept that there is some blameworthy contribution in terms of a failure to be responsive and communicative about his own health when information was requested. I see that more in regard to enabling him to return to a safe workplace and Tasman Glass's obligations toward him in providing that because a fair and reasonable employer would accept that the need for Mr Simpson to be away was for genuine

reasons. In the absence of any communication though in that regard then, to all intents and purposes, Mr Simpson was returning to the same workplace and the same system of work that had caused him to become unwell. I have found however that Mr Simpson did advise Mr Fitzgerald during his first telephone call of his condition and during the second telephone call that he intended to return to work by 3 January 2008. It is more likely in my view that Mr Fitzgerald simply did not consider exhaustion or burn out a proper basis for the absence.

[78] Tasman Glass had, unfortunately, given Mr Simpson some basis to conclude that a diagnosis of stress, exhaustion and burn out would not be viewed sympathetically. This caused him to be reluctant and somewhat fearful to communicate and meet with the company. Whilst that does not mean there is no contribution on Mr Simpson's part at all it is a factor to weigh and take into account.

[79] In all the circumstances. I am of the view that there should be a low level of contribution and I assess that at 15%.

Reimbursement of lost remuneration

[80] Mr Simpson said that he was able to obtain other employment by late January 2008 and I find that he is entitled to reimbursement of lost wages for a period from 3 January 2008 on the basis that there is no good reason to believe that, had his employment not been terminated, he would not have returned to work at that date, until 28 January 2008, a period of three weeks and one day. I find that having secured another role so quickly that he mitigated his loss appropriately. Ms Sharma said that such loss should be assessed on the basis of the higher promised salary. There is no evidence however for me as to what that salary would have been. I have therefore used the existing salary of \$45,000 on which to calculate the loss of wages. On the basis of a gross weekly amount of \$865.38 therefore there is a loss of wages for three weeks and one day of \$2,769.22 gross less contribution assessed at 15% of \$415.38 leaving a balance due and owing of \$2353.83. Tasman Glass placed a lot of emphasis on the payment made to Mr Simpson for the week ending 2 December 2008 which they said went beyond his sick leave entitlement. This was relied on in terms of holiday pay not being paid and general good will. Holiday pay is still required to be paid and I shall make a separate order in that respect shortly. I consider that this additional week was paid as sick leave and would in the ordinary course of events have been regarded as an advance against future entitlement if Mr Simpson returned

to work. I do not adjust the sum ordered for reimbursement on the basis of that payment.

[81] I order Tasman Glass to pay to William Simpson the sum of \$2353.84 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[82] Ms Aitken submits that Mr Simpson cannot contend that he suffered any hurt or humiliation by the ending of his employment. She submits that the evidence that he was shocked by the termination of his employment is nonsensical due to the correspondence from Tasman Glass.

[83] I find that Mr Simpson was quite shocked to have his employment terminated by Tasman Glass and I accept his evidence that he did not expect to lose his job because he had taken a period of sick leave for stress that I found to be work-related.

[84] Mr Simpson said that he felt a sense of betrayal after having worked long and arduous hours and that his goodwill had been exploited. He also felt a sense of humiliation about how his absence would have been portrayed to his fellow employees which, in my view, was somewhat borne out by the evidence of other employees.

[85] In assessing a global award for compensation, I take into account that Mr Simpson, in terms of his dismissal, was able to obtain future employment quite quickly but I also consider that the action of his employer in expecting him to work such long hours was unjustified and led to exhaustion and burn out. I also take into account the unjustified action that I have found to have caused Mr Simpson disadvantage in terms of the requirement to work overtime in breach of clause 6.1.

[86] In all the circumstances, I am of the view that an appropriate global award for compensation would be the sum of \$8,000. \$5000 is an appropriate award for compensation for the unjustified action grievance and \$3000 for the dismissal grievance. I only assess contribution in terms of the \$3000. Taking into account contribution, I find that the amount that should be awarded to Mr Simpson for compensation is the sum of \$7,550.

[87] I order Tasman Glass Limited to pay to William Simpson the sum of \$7,550 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000 without deduction.

Bonus

[88] There was reference to Mr Simpson being promised a bonus payment and that was an incentive for him to continue working the long hours that he did. The bonus payment in terms of the employment agreement was for 2.5% of net profit and the evidence was that no profit was in fact made. On that basis, therefore, Mr Simpson does not have any entitlement under his employment agreement to a bonus payment.

Holiday pay

[89] Tasman Glass Limited is to pay to William Simpson his holiday pay. I have calculated this on the basis of the gross sum received by Mr Simpson of \$39848.21 x 8% which equals \$3187.86 less paid holidays taken of \$951.94 leaving a balance of \$2235.92 gross.

[90] I order Tasman Glass Limited to pay to William Simpson the sum of \$2235.92 gross being holiday pay.

Costs

[91] I reserve the issue of costs. Taking into account the holiday period fast approaching, Ms Sharma has until 19 January 2010 to lodge and serve submissions on behalf of Mr Simpson and Tasman Glass has until 9 February 2010 to lodge and serve submissions in reply.

Summary of findings and orders made

- I have found that Mr Simpson was disadvantaged by the unjustified actions of Tasman Glass in breaching clause 6.1 of his employment agreement with respect to the overtime expected to be undertaken.
- I have found Mr Simpson was unjustifiably dismissed from his employment with Tasman Glass Limited.
- I have not found Mr Simpson contributed to his unjustified action grievance but have assessed contribution to his dismissal grievance at 15%.

- I have not found Mr Simpson entitled to a bonus payment
- I have ordered Tasman Glass Limited to pay to Mr Simpson the following amounts taking contribution into account where appropriate:

Reimbursement of lost wages in the sum of \$2353.84 gross.

Compensation for hurt and humiliation in the global sum of \$7,550

Holiday pay in the sum of \$2235.92 gross

- I have reserved the issue of costs and timetabled for submissions to be lodged and served.

Helen Doyle
Member of the Employment Relations Authority