Determination Number: CA 31/05
File Number: CEA 330/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Darren Ian Jones (Applicant)
AND	George Weston Foods (NZ) Limited (Respondent)
REPRESENTATIVES	Teressa Bassett, Advocate for Applicant Peter Macdonald, Advocate for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	15 February 2005
DATE OF DETERMINATION	4 March 2005

DETERMINATION OF THE AUTHORITY

[1] Darren Jones was employed at Weston Animal Nutrition in Rangiora. He was dismissed on 27 April 2004. The employer received notification that Mr Jones intended to pursue a personal grievance about that dismissal on 28 July 2004 which is 93 days after 27 April. The present employment relationship problem is Mr Jones' application for leave to raise a grievance out of time. That application is strongly resisted by the employer.

[2] It was agreed during the investigation meeting that the employer's correct name is George Weston Foods (NZ) Limited. That company operates a business at Rangiora known as Weston Animal Nutrition. By consent, therefore, I amend the name of the respondent to George Weston Foods (NZ) Limited.

[3] Despite mediation the parties were not able to resolve this problem.

Background

[4] There is little dispute about the relevant facts. At a meeting on 27 April 2004 Mr Jones was told that his employment was terminated. He was not required to work the remainder of his shift. The dismissal related to an allegation of serious misconduct on the part of Mr Jones which the employer found established following a meeting with Mr Jones on that day. Mr Jones was then sent a letter dated 27 April 2004 confirming the decision that day to terminate his employment. That letter specifies that Mr Jones was paid one week's wages in lieu of notice and the employer told me that that was the period of notice specified in the relevant employment agreement.

[5] At the disciplinary meeting Mr Jones was represented by Peter Cahill, also an employee at Weston Animal Nutrition. Mr Cahill also does some work as an advocate, charges clients for that service and that was the basis on which he represented Mr Jones. After the meeting with the employer Mr Jones and Mr Cahill spoke about pursuing a personal grievance claim. The employer was not party to that discussion. There is a dispute between Mr Jones and Mr Cahill about the basis on which the matter was left. Mr Jones said that he instructed Mr Cahill to raise his grievance, and

Mr Cahill says that he asked Mr Jones to get some information from ACC following which they would make a decision whether there was a grievance worth pursuing. The ACC information is connected with the circumstances in which the employer found that Mr Jones had committed serious misconduct.

[6] Over the following several months Mr Jones phoned Mr Cahill a number of times and at the investigation meeting Mr Jones produced his phone records to establish that he made 10 calls to Mr Cahill following the dismissal with the last call on 21 July 2004. All those calls are of very brief duration so that most if not all of them were probably messages left by Mr Jones for Mr Cahill. Mr Cahill told me in evidence, and I accept, that he similarly made calls to Mr Jones and left messages. Mr Jones' sister (Teressa Bassett) told me, and I accept, that she frequently spoke to Mr Jones about pursuing his grievance and it is probable that spurred Mr Jones to make the calls to Mr Cahill.

[7] Mr Cahill says, and I accept, that Mr Jones came to see him three times during the 90 day period, the last of those occasions on about 18 July 2004. Mr Cahill says that they talked about sending the grievance letter that day. Mr Cahill's evidence is that he had drafted a grievance letter on or about 27 April 2004 and kept that draft awaiting the further information regarding ACC to be provided by Mr Jones. Mr Cahill says, and again I accept, that he posted the letter the same day that Mr Jones last came to see him, on or about 18 July 2004. That letter was received by the Department of Labour Mediation Service on 28 July 2004. Mr Cahill also copied it at the same time to Weston Animal Nutrition, who also received it on 28 July 2004. Mr Cahill says, and again I accept, that he posted the letters by fast post. It is not possible to know why there was such a delay in the delivery of those letters.

Issues

[8] Mr Jones said that he made reasonable arrangements to have his grievance raised on his behalf by Mr Cahill and that Mr Cahill unreasonably failed to ensure that the grievance was raised within the required time. He says that that is an exceptional circumstance as defined in the Employment Relations Act 2000 and that he should be granted leave to raise his grievance out of time. In its statement in reply, the employer says that Mr Jones had ample time to take reasonable steps to ensure that Mr Cahill progressed his personal grievance. At that stage the respondent thought that Mr Jones had made very few attempts to contact Mr Cahill within the 90 days period. By the time of the investigation meeting however, the respondent's position had refined somewhat so that it says that Mr Jones and Mr Cahill had an understanding that no grievance would be raised until after the ACC information was provided to Mr Cahill, and Mr Cahill had given advice about the prospects of a grievance in light of that information. It is said that Mr Jones did not make reasonable arrangements to have his grievance raised because he did not provide that information.

[9] I am satisfied that Mr Jones made reasonable arrangements to have his grievance raised on his behalf by Mr Cahill. I prefer the evidence of Mr Jones that he always wanted to pursue a personal grievance claim and asked Mr Cahill to do that on his behalf. If, as Mr Cahill says, there was an agreement to wait until the ACC information arrived before deciding whether a grievance should be pursued, then there would be little point to Mr Jones' reasonably frequent attempts to contact Mr Cahill after 27 April 2004 because it is common ground that Mr Jones never provided the ACC information. In any event, it is agreed between Mr Cahill and Mr Jones that by about 18 July 2004 Mr Jones had given an unequivocal instruction to Mr Cahill to pursue a grievance and raise it with the employer. That fell within the 90 day period by a number of days and Mr Cahill could have effected a valid submission of the grievance by hand delivering the letter, or faxing it, or simply ringing the manager and advising him of the grievance. The responsibility for the delay in delivering the posted letter must fall on the shoulders of Mr Cahill and so it can properly be said that he unreasonably failed to ensure that the grievance was raised within time.

[10] Having found that the delay in raising the grievance was occasioned by exceptional circumstances, I must consider whether it is just to grant leave for the grievance to be raised out of time.

[11] The employer argued that…*it would be quite unfair to expect them to have to now re-litigate this situation.* While I accept that the failure was no fault of the employer, the employer is not able to point to any unfairness to support its argument. It is in just as good a position now to defend the grievance as it would have been if the grievance had been raised within time. I should not be taken as expressing any final opinion about the merits of the grievance but it is not a case where it is apparent at this stage that a grievance will fail. In my view Mr Jones is entitled to have his grievance dealt with on its merits. Accordingly I grant leave for his grievance to be raised out of time.

[12] The parties should consider whether further mediation is appropriate and make arrangements accordingly. However, if it is thought that mediation is not appropriate, the applicant should contact a support officer at the Authority to make arrangements for advancing an investigation.

[13] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority