

*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** Teresa Bassett, Advocate for Applicant  
Peter Macdonald, Advocate for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 4 August 2005  
**DATE OF DETERMINATION** 6 September 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] Darren Jones worked for George Weston Foods (NZ) Limited, a company that operates a business based in Rangiora called Weston Animal Nutrition. Mr Jones was dismissed on 27 April 2004 when Weston Animal Nutrition decided that he was guilty of serious misconduct. However, Mr Jones says that he did not commit any act of misconduct and that he should not have been dismissed.

[2] Mr Jones injured his back at work on 9 December 2003 when doing some lifting. He did not get medical assistance but entered the incident in his site's accident register. On 15 December Mr Jones strained his back at work changing a die. Mr Jones saw a Doctor on 16 December who certified him fit for light duties for 14 days. However on 29 December, Mr Jones again visited the Doctor who certified him unfit for work for 14 days from 24 December 2003.

[3] Greg Wilson is the Manager. He told Mr Jones to go back to the Doctor with an alternative duties list and to get the Doctor to complete that in order to assess what light duties Mr Jones could perform. Mr Jones did that on 6 January 2004 and he was certified fit for selected light duties for four hours per day, five days per week for two weeks. He was next certified fit for light duties for eight weeks from 22 January 2004 (to 18 March 2004).

[4] Mr Jones had surgical treatment for his back injury on 24 February 2004. He was then certified fully unfit for work until 8 April 2004. He then returned to work, subject to a minor restriction.

[5] On 14 April 2004, Mr Jones was given a letter requiring him to attend a meeting with his employer on 27 April to discuss ... *allegations of serious misconduct in relation to activities inconsistent with light duties and medical restrictions imposed during January and February prior*

*to your surgery .... The letter advised Mr Jones that these were serious allegations about the ... honesty and trust that is the fundamental basis of our ... relationship ....*

[6] Mr Jones was also given a copy of a written report compiled by private investigators who apparently had kept Mr Jones under surveillance between 17 February and 22 February 2004. Mr Jones was not given a copy of the private investigator's summary, a letter dated 25 February 2004 to Michelle Pleydell. Ms Pleydell is the respondent's national business systems manager whose responsibilities include human resources and industrial relations. The summary reports:

*... that he is moving without apparent discomfort and he is able to perform quite strenuous activity such as bending, lifting, climbing, running and jumping. This is contrary to the information he has provided to his employer, ACC and his Doctor.*

*He has either had a remarkable recovery, he only gets pain while at work or there is no longer any pain at all.*

*It would appear that he is in breach of his employment agreement by failing to advise his employer that he is now fit for full and normal duties or he is not being entirely honest as to the extent and nature of his injury.*

[7] At the meeting on 27 April 2004, Mr Jones had his representative and his sister present. Ms Pleydell, Mr Wilson and a consultant were present for the respondent. I have been given a copy of notes made by the consultant which I accept accurately summarise the meeting. Mr Jones was told that these allegations of serious misconduct being activities inconsistent with light duties when he had been granted light duties as the result of an alleged back injury. Mr Jones presented a medical report from his Doctor dated 26 April 2004. There was some discussion about the allegations and the medical report. Following that, there was an adjournment. Mr Jones was later told that his employment was terminated as a result of serious misconduct. There was some discussion with Mr Jones about whether he wanted to leave work immediately. He indicated that he did wish to leave.

[8] Mr Jones was sent a letter dated 27 April 2004 confirming the dismissal and explaining arrangements for his final pay. The letter refers to his *... serious misconduct in relation to activities inconsistent with light duties and medical restrictions as imposed during January and February ...*

### ***Justification for dismissal***

[9] Although Mr Jones was paid one weeks wages in lieu of notice, the allegation made was one of serious misconduct resulting in a breach of trust and confidence. Accordingly, justification must be measured against the standard for serious misconduct. In *W & H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448, the Court of Appeal held that an employer must show that a fair and full investigation disclosed conduct capable of being regarded as serious misconduct. Conduct is usually capable of being regarded as serious misconduct where it deeply impairs or is destructive of the basic trust and confidence that is an essential part of the employment relationship: see *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ 483. The Authority must be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken; see *Oram*.

[10] During the disciplinary process Mr Jones did not question the private investigator's report that he had been given to review. It reported him as doing things such as bending over at right angles and lifting plastic barrels. He was seen to throw several of these barrels. He picked up a reel of what appeared to be electric fencing tape, held the reel in front of him and held it for about 50 seconds. He was seen to bend over, pick up wooden pallets one at a time and lift or place them elsewhere. The pallets *... appeared to be heavy*. These tasks were being performed on Mr Jones'

farm, a property which he describes as a hobby farm. The employer knew of Mr Jones' interest in this property. The report describes Mr Jones doing a variety of such tasks involving lifting and bending, climbing and picking up items including ... *smaller sheep* ..., perhaps more commonly called lambs at that time of the year. It is not necessary to fully describe all such observations during the period of surveillance.

[11] At this time in February 2004, Mr Jones was subject to the medical certificate dated 22 January 2004 which certified him fit for work involving light duties with the restriction *No lifting or bending. Light work, sitting or standing.* The duty list completed on 6 January 2004 by the Doctor included the comment *Cannot sit or stand for long without a change. Needs to lie down to relieve back pain, approx. every two hours.* Mr Jones was working four hours per day, five days per week doing filing and other paper work in accordance with these restrictions.

[12] By this same time, Weston Animal Nutrition knew that Mr Jones was scheduled for surgical treatment for what the surgeon had described as a ... *major disc prolapse*.... Mr Jones told Mr Wilson on 13 January 2004 that his capacity had increased from 50% to 60-70% since the accident as a result of physiotherapy. On 11 February 2004, Mr Jones told Mr Wilson that he had ... *good days and bad days* ... but was coping with the light duties. Weston Animal Nutrition also knew from a physiotherapist's report dated 23 February 2004 following an examination and two treatments that the MRI scan showed a complete annular rupture but clinical examination showed a glimmer of hope that Mr Jones might avoid surgery. However, the report went on to say that surgery was inevitable when treatment had not worked. Then by the time of disciplinary meeting, Weston Animal Nutrition knew that the surgical outcome had been treatment of a ... *massive prolapse* which had resulted in a near full recovery and fitness for work.

[13] Mr Jones responded to the allegation he faced principally by obtaining a medical report from his Doctor. Dr Ferrar firstly explained that Mr Jones saw his associate, Dr Rogers, while Dr Ferrar was on leave. However, Dr Ferrar made it clear that he had the relevant medical history and reports. Dr Ferrar said that the operative findings made it clear that Mr Jones had been suffering from a ... *very extensive, severe prolapse of his lumbar disc.* It was therefore a credit to him that he had continued working at all while thus affected. Dr Ferrar pointed out that the medical certificates referred to restrictions within Mr Jones' working environment only. He saw no problem with an individual doing ... *a little light recreational activity slowly, carefully and in his own time as he feels able* .... Dr Ferrar thought that the implication that Mr Jones' non-work activity was impacting on his work activity was ... *totally and absolutely absurd.* Dr Ferrar also explained that the back is designed to bend and that Mr Jones' non-work activity could not be construed as detrimental to his ongoing back condition.

[14] In the face of those views, Weston Animal Nutrition concluded that Mr Jones had breached what the consultant's notes describe as the *light duties agreement*, behaviour constituting a considerable breach of trust and confidence amounting to serious misconduct. Weston Animal Nutrition saw conflict in the view of Dr Rogers expressed in the medical certificates and Dr Ferrar expressed in the report dated 26 April. Weston Animal Nutrition resolved that contended conflict by accepting Dr Rogers' advice.

[15] I find that in the circumstances, no fair and reasonable employer would find any misconduct on the part of Mr Jones. By the date of the disciplinary investigation, it was beyond question that he had suffered a serious back injury which required surgery. The physiotherapist, Dr Rogers, Dr Ferrar and the surgeon (Mr Walton) all supported that view. There was no evidence or suggestion that Mr Jones' activity in February as observed by the private investigator had made his injury worse or somehow affected his later recuperation from the surgery. Indeed, the only medical assessment available to the employer at the time was that Mr Jones' non-work activity might have been beneficial to his injury. Dr Rogers' medical certificate and the accompanying material dealt

with restrictions at work only, as Dr Ferrar correctly pointed out. Weston Animal Nutrition simply had no grounds for concluding that there was any difference of view between the doctors or that Mr Jones' non-work activities could have affected the employment relationship.

[16] There being no misconduct on the part of Mr Jones, Weston Animal Nutrition cannot justify its decision to dismiss him.

[17] It is not necessary to discuss whether there was any unfairness with the procedure adopted by Weston Animal Nutrition in dismissing Mr Jones.

### ***Remedies***

[18] I find that Mr Jones has suffered significant distress, humiliation and injured feelings as a result of his dismissal. Weston Animal Nutrition believed his accident claim or at least the extent of it to be fraudulent. Weston Animal Nutrition gave its private investigator's report to ACC so Mr Jones blames his former employer for the subsequent investigation by ACC. He had worked in his employment for about 13 years since leaving school so it was a bitter blow to lose it and even worse in the circumstances created by Weston Animal Nutrition's unfounded suspicions. To remedy the distress, I order Weston Animal Nutrition to pay Mr Jones compensation of \$15,000.00.

[19] Mr Jones has lost remuneration and benefits as a result of his personal grievance. He was dismissed on 27 April 2004 and his grievance was lodged with the Authority on 7 September 2004, initially seeking leave for the grievance to be raised out of time. The resolution of that point took time as it required investigation and a determination following unsuccessful mediation. The additional loss of remuneration after the date of the first investigation meeting should not be attributed to the respondent. Accordingly, I order Weston Animal Nutrition to compensate Mr Jones for the whole of his lost remuneration and benefits between dismissal and 15 February 2005.

[20] Weston Animal Nutrition must calculate that loss taking account of the notice period already paid, any further period of incapacity suffered by Mr Jones and his earnings from other employment during the period. Mr Jones will need to provide appropriate details and documents to assist that process. Leave is reserved if there is any disagreement between Weston Animal Nutrition and Mr Jones over these calculations.

[21] Mr Jones was not legally represented during either investigation meeting. He was represented by his sister but he has not incurred any costs for that representation so it is not appropriate to make an award of costs against Weston Animal Nutrition, except to require the respondent to pay Mr Jones \$70 to cover the lodgement fee.

### ***Summary***

[22] Mr Jones has a personal grievance because he was unjustifiably dismissed.

[23] Weston Animal Nutrition is to pay Mr Jones compensation of \$15,000.00 pursuant to s.123 (c) (i) of the Employment Relations Act 2000.

[24] Weston Animal Nutrition is to pay Mr Jones compensation for lost remuneration and lost benefits for the period indicated above.

[25] Weston Animal Nutrition is to pay Mr Jones \$70.00 costs.

Philip Cheyne  
Member of Employment Relations Authority