



# New Zealand Employment Relations Authority Decisions

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## Jones v Waste Management NZ Limited (Christchurch) [2018] NZERA 1170; [2018] NZERA Christchurch 170 (26 November 2018)

Last Updated: 2 December 2018

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 170

3000204

BETWEEN BRIDGET JONES

Applicant

A N D WASTE MANAGEMENT NZ LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Richard Maze, Counsel for applicant

Daniel Erickson, Counsel for respondent Investigation Meeting: 8 and 9 March 2018 in Christchurch

Submissions Received: Further information May 2018

30 August 2018 from Applicant

5 September 2018 from Respondent

Date of Determination: 26 November 2018

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. **Bridget Jones was unjustifiably constructively dismissed.**
- B. **Waste Management NZ Limited is ordered to pay to Bridget Jones:**
  - (i) **Reimbursement of lost wages under s 123(1)(b) of the**

**[Employment Relations Act 2000](#) in the sum of \$11,192.54 gross.**

**(ii) Compensation under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) in the sum of \$20,000 without deduction**

- C. **I reserve the issue of costs. Failing agreement there is a timetable for an exchange of submissions.**

**Employment Relationship Problem**

[1] Bridget Jones commenced working with Waste Management NZ Limited as a sales account manager in April 2010. Waste Management NZ Limited (“Waste Management”) is a duly incorporated company having its registered office at Auckland and carrying out the business of supply of waste and environmental services.

[2] Ms Jones says that her resignation was in the nature of an unjustified constructive dismissal. The employment relationship ended on 21 July 2016 after the contractual notice period during which Ms Jones remained on sick leave.

[3] Two of the three situations listed by the Court of Appeal<sup>1</sup> where a constructive dismissal might occur are relied on in this matter. Ms Jones says that Waste Management pursued a deliberate course of conduct with the dominant purpose of forcing her resignation and further that there were fundamental breaches that caused her resignation. Alternatively and/or additionally, Ms Jones says that there were unjustified breaches of her employment agreement or conditions thereof that caused her disadvantage.

[4] Ms Jones seeks reimbursement of three months lost wages in the sum of \$18,000 together with compensation and costs.

[5] Waste Management says that Ms Jones resigned of her own volition and that  
*1 Auckland Shop Employees Union v Woolworths (NZ) Ltd* [\[1985\] 2 NZLR 37 \(CA\)](#) at 374  
there were no unjustified actions on their part.

## **The investigation process**

[6] There have been some delays in this matter.

[7] The first dates for an investigation meeting were adjourned at the request of Ms Jones and her then representative.

[8] It then took a while to secure new dates because Ms Jones wanted to call her advocate Robert Thompson to give evidence. He had represented her during a meeting with Waste Management on 7 June 2016.

[9] Mr Maze was then appointed to represent Ms Jones.

[10] Finally at the end of the investigation meeting the Authority wanted further information some of which took time to compile because of its volume.

[11] There were then some delays in obtaining submissions due to Mr Maze being unwell.

## **The issues**

[12] The Authority needs to determine the following issues:

- (a) Was the resignation and the circumstances in which it was given caused by a breach or breaches of duty on the part of Waste Management?
- (b) What method of work did Ms Jones use in her role?
- (c) Did Waste Management become dissatisfied with Ms Jones and ask her whether she wanted to be part of the team and tell her that she had let the team down?
- (d) Did Ms Jones ask for specific clarification of what Waste Management’s concerns were?
- (e) Did Waste Management clarify the concerns and any changes required on her part?
- (f) Was there a change to the performance evaluation plan ratings that Ms Jones thought she was receiving?
- (g) Was Ms Jones’s manager Andrew Shipley the appropriate person to subsequently conduct a work investigation into her work movements?

- (h) Was there a breach of the duty of good faith to provide all relevant information before a response was required from Ms Jones about a potential disciplinary matter?
- (i) Was there a breach of the duty of good faith to complete a full and fair investigation?
- (j) When Mr Thompson advised that Ms Jones would be forced to resign if assurances were not received was there a satisfactory response to reassure Ms Jones she would be treated in accordance with good faith obligations in the workplace?
- (k) If there are breaches found then was the breach or breaches of duty of sufficient seriousness to make it reasonably foreseeable to Waste Management that Ms Jones would not be prepared to continue to work under the same conditions?
- (l) If it is found that Ms Jones was constructively dismissed then was her dismissal unjustified?
- (m) Alternatively or additionally were grievances as to unjustified disadvantages raised in respect of breaches within the statutory time frame? If they were then were the actions unjustified and did they cause disadvantage to Ms Jones?
- (n) If the claim for unjustified constructive dismissal or unjustified disadvantage is made out then what remedies should be awarded and are there issues of mitigation and contribution.

### **Was the resignation and the circumstances in which it was given caused by a breach or breaches of duty by Waste Management?**

[13] Robert Thompson who represented Ms Jones at the time of her resignation advised in a letter dated 22 June 2016 of the resignation. He wrote that Ms Jones had serious concerns regarding her relationship with her manager Mr Shipley. Further that it appeared the relationship between her and Mr Shipley is irrevocably damaged and that Waste Management was not prepared to do anything to ensure that she is treated fairly and sensitively within her workplace. He wrote that confidence and trust has been continually eroded and Ms Jones has been under significant stress because of the relationship with Mr Shipley forcing her to remain on sick leave and that the situation has become completely untenable.

[14] The circumstances of the resignation require consideration of earlier events in the employment relationship.

#### Method of work

[15] The method of work by Ms Jones in her role as sales account manager is important in this case because of events in 2015 and then again before Ms Jones resigned in April 2016.

[16] The Authority heard from the two regional sales managers at Waste Management to whom Ms Jones reported during her employment. Andrew Boyd was Ms Jones' manager from the commencement of her employment in early 2010 until early June 2015. Mr Shipley was then her manager from late June 2015 to the date her employment ended about a year later.

[17] The individual employment agreement entered into between Ms Jones and Waste Management is dated 28 April 2010 (the employment agreement). The employment agreement refers to a minimum of 40 hours per week with normal hours of work between 8.30am to 5.00pm Monday to Friday. It also contains an expectation that Ms Jones will work the number of hours necessary to fulfil the requirements of

her position which may entail work outside her normal hours.

[18] Mr Boyd had worked for about 15 years at Waste Management in a variety of roles and at the time of his resignation on 5 June 2015 he was a regional sales manager. Ms Jones in her evidence said that she got on well with Mr Boyd and that he supported her in her role. She said he also gave her autonomy and she felt he was happy with her performance and challenged her to be even better.

[19] The sales team were issued with iPads in or about 2014 which enabled them to spend more time out "in the field" with customers.

[20] Ms Jones in her written statement of evidence<sup>2</sup> said the following about how she worked:

I live in North Brighton and Waste Management is based in Hornby. It was quite a drive to work on a daily basis and then from Hornby I would travel to town to visit clients. With the new remote working I was able to work from home, doing research and making calls and then travel directly to the clients. This was a far more efficient use of my time and it worked

very well. I continued to achieve well at work.

[21] Ms Jones said that because there was a high level of trust and confidence Mr Boyd agreed that the account managers could look after their own hours and do them when it suited them and the client. She said that this allowed her greater flexibility and meant she could work through her lunch breaks and finish earlier. Ms Jones described this as a “swings and roundabout” type of agreement. As long as her hours were done, clients were seen and happy and targets achieved she said that she was pretty much left to work as she pleased. Her evidence was that Mr Boyd knew she was working from home.

[22] Mr Boyd in his written evidence described Ms Jones as fun and bubbly. He did not agree that he was aware Ms Jones was at times working from home and operating a “swings and roundabouts” approach. Mr Boyd in answer to a question from Mr Erickson as to whether he was aware that Ms Jones was spending significant time at home said that “he had suspicions and would have followed it up if that was the case.” Mr Boyd did not however take any formal steps about any concerns he

2 Written statement of evidence Bridget Jones para. 6

may have had about whether Ms Jones was spending all day on Waste Management business or how she was working. He said he had conversations where he emphasised using her working day efficiently and spending as much time as possible in front of customers. He accepted that there were downtimes between meetings and said that there may be “sitting in cars to check emails.” He did take more formal steps about a different concern he had with Ms Jones taking unplanned leave in 2011/2012.

[23] Mr Shipley commenced his regional sales manager role at Waste Management on 29 June 2015. Ms Jones then reported to him. Mr Shipley said that because of the timing of his appointment he received no handover from Mr Boyd.

[24] There is an email from Waste Management’s human resource manager Daniel Garratt in mid-August 2015 to Mr Shipley. Mr Garratt provided Mr Shipley a copy of the 2012 letter from Mr Boyd about the leave issues. Mr Garratt set out in his email that Mr Shipley intends to raise concerns in the next 1:1 with Ms Jones and to review that situation depending on her response and monitoring in the first instance. The issues were performance – development of wider KPIs, the expectation as agreed with Mr Boyd that annual leave will be scheduled and approved in advance against the balance available and that current levels of unplanned/unscheduled leave were not helpful.

[25] There was a review meeting between Ms Jones and Mr Shipley. An email followed that review meeting from Mr Shipley to Ms Jones dated 15 September 2015. There was another matter referred to in the email but there was also reference to Ms Jones’ method of work as below:

Please also try and start to change the mode in which you work. Suggesting customer visits straight from home in the morning, come into office around 12pm for an hours or so then back out for afternoon visits. Working on this now will make it easier when we move.

[26] Ms Jones said that she considered she got on well with Mr Shipley and was initially “excited about his leadership” and positive change that may come with it. Her view was that there was no change to the “remote working situation” and that Mr Shipley seemed to embrace working remotely. I am not satisfied that Ms Jones changed her method of working after Mr Shipley became her manager but rather continued working in the same way.

[27] It is useful to refer to Ms Jones’ performance plans that were provided when Mr Boyd was manager.

[28] Originally the Authority was only provided with the performance enhancement plan (PEP) prepared by Mr Shipley. The Authority asked for all of the other PEP’s at the end of the investigation meeting for the period of Ms Jones’ employment. Only those for 2012 and 2014 (mid-year review) were able to be found despite a search of both electronic and paper records.

[29] The 2012 review reflected positive comments by Mr Boyd about productive sales. That accords with Ms Jones’

view that she met and often exceeded her sales targets and had a good relationship with her portfolio clients. Ms Jones was said to be a good member of the team and a positive person. The PEP said that she needed to spend more time in the field. Mr Boyd wrote in the 2012 PEP that Ms Jones could do even better with better organisation. She received a score of 4 for quality and quantity of new business and retained accounts for 2012. Ms Jones received a 3 for teamwork for that period and for company commitment and her "extra hours" were noted. Her integrity was recorded as "good." In accordance with the explanation on the back of the PEP a 3 meant that Ms Jones was successfully displaying a broad range of appropriate behaviours. A 4 for an objectives rating meant that the employee achieved over and above the objectives.

[30] In the mid-year review meeting on 31/01/14 Mr Boyd rated Ms Jones behaviours as all 3's.

[31] The next PEP was undertaken by Mr Shipley and was dated 31 July 2015.

Did Waste Management become dissatisfied with Ms Jones?

*8 October 2015*

[32] Ms Jones' said that she was working from home on 8 October 2015. Between about 2.15 and 2.20pm Ms Jones received a call from Mr Shipley who advised her

that he was outside her house and she needed to meet him at his car on the street.<sup>3</sup>

[33] Mr Shipley said he had been at work in Blenheim on 8 October 2015 and was driving back to Christchurch. He said an escalation of a customer complaint involving Ms Jones had come to him via phone but he could not recall when he gave his evidence what the nature of the complaint was. In his oral evidence he said he believed that he had stopped in Kaikoura and tried to contact Ms Jones and then again in Amberley and then from his home.

[34] The Authority sent a request with counsel's agreement to provider Spark to ascertain when calls were made between the two mobile numbers. The Authority asked for information of any connection or attempted connection whatsoever including calls/missed calls/texts/voice messages between Mr Shipley's number and Ms Jones. Spark's records suggest that between the two mobile numbers there were five calls between 14:38 and 14:49. It is common ground that the interaction outside Ms Jones' house occurred at about 2:20 pm on 8 October 2015 so that is somewhat confusing. Neither counsel dealt with that particular matter in their submissions made after this information was provided. Ms Jones in her written evidence did refer to her phone ringing incessantly shortly before Mr Shipley advised he was outside her house. I accept that there could have been some attempts to contact Ms Jones however the records do not support Mr Shipley's evidence that he attempted to contact Ms Jones during his travels from Blenheim to Christchurch.

[35] I cannot be satisfied from the phone records that there would be reasonable grounds for a level of frustration on the part of Mr Shipley because of unreturned or unanswered calls over a lengthy period. Ms Jones' role required her to have face to face interactions with customers. She could have been unavailable for many reasons.

[36] Mr Shipley made a deliberate decision to go to Ms Jones' house on the way to the office. His written evidence was that he saw Ms Jones' car branded with the Waste Management signage as he drove past her place and on that basis pulled over to talk to her. There were photos produced of the access to Ms Jones' house. Ms Jones' property was at the rear of a shared driveway. The photos show a solid material gate

3 Mr Shipley's evidence was that he sent a text message to Ms Jones rather than telephoned her.

separating the end of the shared driveway and the entry to Ms Jones' driveway. In his oral evidence with the benefit of the photographs, Mr Shipley said that he walked up the shared driveway and there was a gap in the fence through which he saw her branded car. If there was such a gap at the time then it is not evident from the photos. I do accept that the photos were recent and not taken at the time of or close to the time of the actual events.

*What was said to Ms Jones?*

[37] Mr Shipley's evidence is that when Ms Jones came to see him on the street the initial discussion was about the customer complaint. Ms Jones denied there was any discussion at all with Mr Shipley about a customer complaint. Emails sent after this interaction from Ms Jones to Mr Shipley make no mention of a customer complaint being

discussed. Likewise the recording of a meeting between Mr Shipley and Ms Jones on 12 October 2015 does not refer to a customer complaint. I accept Mr Maze's submission that even if there was a customer complaint it is an unusual step to take in dealing with that to go to an employee's home to talk about the matter. As set out above I cannot be satisfied that there was any source for frustration.

[38] It is common ground that Mr Shipley asked Ms Jones whether she wanted to be part of the team. She recalled he further said to her that she had let the team down.

[39] There appeared to be some discussion about why Ms Jones was at home. Ms Jones recalled the discussion lasted about five minutes and then Mr Shipley "stomped off to the car." Ms Jones said that the exchange on the street was about five minutes in duration and she felt bullied and intimidated by the event and confused.

[40] Mr Shipley said that Ms Jones was always impeccably dressed for work however, on that occasion was wearing what he described as track pants. Ms Jones did not accept that she was dressed other than for work. There is evidence that shortly after the interaction Ms Jones headed out for an appointment. I cannot resolve the issue of what Ms Jones was dressed in. I do note there was no reference to Ms Jones' attire at the meeting on 12 October 2015.

[41] Ms Jones sent Mr Shipley an email at 2:27pm which referred to her shock that he had turned up at her house. She wrote in her email that her impression was that Mr Shipley thought if she was at home then she was not working but said that he had directed her to work from home and spend less time in the office. To support that she attached a copy of the 15 September email referred to above and also referred to conversations. She advised that she was currently on her way to an appointment and asked Mr Shipley to clarify whether he wanted her to work more in the office or from home.

[42] Mr Shipley did not reply, at least by email.<sup>4</sup> Ms Jones sent a further email at 3.52 pm asking for Mr Shipley to be more specific about his concerns about her working day. She noted in the email it was the first time the concerns had been raised with her and therefore her shock with him coming to her house.

[43] On the following day, Friday 9 October, Mr Shipley and Ms Jones spoke by telephone. Her evidence was that he did not answer her question whether she should work more from the office but there was an agreement that they would meet on Monday to discuss the concerns and it would be "off the record conversation". Ms Jones said she felt uncomfortable and asked him what they would be discussing. Ms Jones said that Mr Shipley told her that she was not part of the team and that she had let the team down. Ms Jones felt that Mr Shipley was being deliberately vague and trying to make her anxious about her job.

[44] She sent a further email on Sunday 11 October 2015 to Mr Shipley. She made five points in the email. One was that although Mr Shipley said he wanted the meeting "off the record" she would have been more comfortable having it out in the open. She wanted the concern that Mr Shipley felt she was not part of the team and had let the team down in the past three months clarified. Ms Jones wrote that she had spent a considerable amount of time after their last two conversations trying to figure out how she had not been a team player and let the team down but was at a loss as to where that impression had come from. Ms Jones wrote that she hoped she was overreacting but the fact that she had written to him on a Sunday should show how concerned and worried she was and that she hoped they could resolve it as she had had a few sleepless nights. Ms Jones concluded by saying that what upset her most

<sup>4</sup> The Spark record suggests the possibility of a telephone call.

was that she loved the job and enjoyed working with the team who are also her friends.

[45] Mr Shipley responded to that message by emailing that he didn't consider it a record of her phone call to him on Friday and that he would see her at work the next day.

[46] In conclusion I find that Mr Shipley had concerns about Ms Jones and her work method. He was not happy to find her at home during the work day and had a suspicion that she was not working.

Did Ms Jones ask for and receive clarification about concerns at the meeting on 12 October 2015?

[47] Ms Jones said that she tried on the Monday morning to meet with Mr Shipley several times but he was always too busy to talk. She then emailed him suggesting that she needed a support person for the meeting and then he agreed to see her later in the day. Ms Jones said that she was determined to understand from Mr Shipley what the concerns were and to fix the situation. That is exactly the sort of good faith behaviour that is to be encouraged in employment relationships. She felt suspicious however about what the meeting would be about and decided to record it covertly. The Authority was provided with the recording and the transcript.

[48] At the outset of the meeting Mr Shipley referred to the latest email from Ms Jones asking for a meeting and asked her whether she wanted to raise concerns. That is in circumstances where Mr Shipley knew that Ms Jones was concerned from her several earlier emails about his visit to her home on 8 October and about what was said to her. He should have wanted to meet with Ms Jones to alleviate her stress and shock at having him go to her home and to explain and clarify his concerns.

[49] Ms Jones immediately in response to that set out again that his comments had upset her and that there was no clarity or specifics about what he wants. She says that if Mr Shipley is not happy with anything she is doing then she needs that clarified. Mr Shipley said the “do you want to be an account manager for Waste Management”

statement made along those lines both at her house and on the phone on 9 October 2015 was in the context where Ms Jones had said she was bored and needed more challenges. Objectively assessed that comment was more likely made in circumstances where Mr Shipley believed that Ms Jones was doing something wrong. It is not usual to ask employees whether they want their jobs for no reason. It then seemed from the recording of the meeting on 12 October 2015 that Ms Jones’ statement that she did want her job was all that Mr Shipley wanted.

[50] Ms Jones did not want to leave the matter there. She wanted to discuss the comment that she had let the team down over the last three months and that she needed to go away and think about it. Mr Shipley said that he did not say that she had let the team down. Ms Jones was adamant that he did. Mr Shipley said not to get into semantics about what he did or did not say. Mr Shipley then refers to it as a “he said/she said scenario and that he can just say he didn’t say it.” Ms Jones responds “that means you’re lying” and Mr Shipley says “I can say you’re lying.” Ms Jones responds with “that’s fairly sad because you and I both know you said that to me.”

[51] Mr Shipley acknowledged his words at this point were inappropriate. They are I find more than simply inappropriate. I find on the balance of probabilities that it is more likely than not that Mr Shipley did indeed tell Ms Jones that she had let the team down over the three months he had been manager during conversations on 8 and 9 October 2015. He told her in all likelihood to think about that although how she could do that in the absence of specifics is unclear and troubling. I conclude this because such a statement appears in Ms Jones’ email of 11 October 2015. That is close to the time of the conversations. I find it less likely that Ms Jones would simply have fabricated that in circumstances where she did not accept and was quite unclear how she had let the team down.

[52] Mr Erickson submits that Mr Shipley was trying to move the conversation along. I do not accept that the matter can be viewed in that way. Mr Shipley had told Ms Jones she had let the team down. He had not provided any specifics. It was something that concerned her and needed to be addressed. Mr Shipley, I find, indicated that he would simply deny he said that in circumstances where they both knew he had. The impact on Ms Jones is obvious. It is at this point of the

conversation that she asks him if he wants her to go. His answers to her are not direct and he talks around the issue. She says that he is playing games with her. Mr Shipley denies that he is.

[53] I turn to what was said during the conversation on 12 October 2015 about work method.

[54] Mr Shipley expresses concern about Ms Jones being at home at 2.20 pm on a Thursday afternoon throughout the conversation. I accept Mr Maze’s submission that Ms Jones understood the concern was that she was not working whilst at home on 8 October 2015. Ms Jones explains that she was between appointments and then elaborates on other work that she undertakes before and after appointments.<sup>5</sup> In short her response was that she was at home working. She said that if Mr Shipley does not want her to work from home then she is more than happy to do that but that she needs him to be specific about his concerns.

[55] Mr Erickson submits that it would have been clear to Ms Jones that she was not entitled to spend significant periods of time working from home. I accept that Mr Shipley said that the intention of not being in the office was

being in front of customers more, not being at home. He referred frequently to customer face to face time during the meeting Those references however did not clarify for Ms Jones any changes that she needed to make because even towards the end of the conversation she still asks what exactly Mr Shipley wants from her. Ms Jones refers to not taking a lunch break and that there are times when she does extra hours and sometimes less hours but not if “she is not hitting those gates and I’m not performing.”

[56] Mr Shipley was entitled to direct Ms Jones to work in a certain way. Indeed Ms Jones wanted him to tell her what he wanted and said that she would change accordingly. I do not find despite being asked Mr Shipley answered Ms Jones’ questions satisfactorily about what he needed her to do differently.

[57] The circumstances of the work environment for Ms Jones included customer face time but there was a need to make and return calls and complete some paperwork and look for new business. There was downtime between appointments. Mr Shipley

5 Tab 10 transcript in common bundle page 46

did not clarify whether Ms Jones could return and make calls and do other non- contact activities from her home or whether she could only do that from her car and the office.

[58] An emphasis on customer face time and mentoring may have been adequate for a regular meeting or a performance meeting. It was not however enough where Ms Jones asked for specifics of what Mr Shipley wanted following a rather extraordinary visit to her home by him after which she remained confused about what she had done wrong and what she should change. At one stage during the meeting Ms Jones said “well I don’t know how to please you then.”<sup>6</sup> Whilst there was no formal time off in lieu arrangement Ms Jones alluded to working in such a way with under and over hours and Mr Shipley did not comment further about the matter.

[59] An employer should not conduct themselves in a way calculated to or likely to destroy or seriously damage the relationship and the necessary trust and confidence in it. There are statutory obligations of good faith to be responsive and communicative and not mislead and deceive. Mr Shipley made a statement on two occasions that caused stress and upset to Ms Jones about letting the team down and then stated to the effect if there is no record then he could say that he did not say it.

[60] There was no specific clarification about how Ms Jones was to work in the future. There were ways some specific and constructive discussion could have occurred around work method. During the meeting Mr Shipley said that he did not want to go down a formal path. There were other informal ways to proceed. There could have been an analysis for example over a period of time about how Ms Jones spent her time. There could then have been constructive feedback on any improvements required in the work method. Instead Ms Jones was told to think about whether being at home at 2.20pm on 8 October was the best use of her time. That was unhelpful because Ms Jones said she was undertaking work at that time from home. I accept Mr Maze’s submission that Ms Jones was being told that she was doing something wrong; she offered to change but was not told how to do so.

[61] Mr Shipley breached the obligations he had to treat Ms Jones fairly and

6 Tab 10 transcript of 12 October meeting page 55

reasonably and in good faith at that time. It was the sort of conduct that was likely to seriously damage the relationship.

[62] Ms Jones said that following the meeting she felt despondent but wanted to keep her job and keep moving forward so she decided she would do the best that she could possibly do. She was still unsure what she had done wrong but decided to be positive around Mr Shipley and continued to achieve well at work.

[63] There were no issues for a period.

[64] Ms Jones said that after the Christmas holiday period interactions were “okay” but she then began to feel bullied by Mr Shipley. She wrote in her written evidence that he would ignore all correspondence from her when she needed information or decisions and treated her differently than other staff members. Particularly that he would acknowledge the successes of her co-workers publicly but never hers. She felt that he was quite dismissive of her and went out of his way to make her working life difficult.

[65] Mr Shipley did not accept that he treated Ms Jones differently and said that he noticed no change in their

relationship.

[66] The Authority asked Waste Management to provide emails between Ms Jones and Mr Shipley from her return to work in the New Year and 15 February 2016. There was a significant volume. Mr Maze acknowledged properly that no pattern of behaviour can be discerned.

[67] I accept that the emails do not support Ms Jones' allegations about the ignoring of her correspondence however previous behaviour supports that Mr Shipley was careful with what he wrote. I do not therefore conclude that the emails reflect the whole picture of the relationship. I accept that from Ms Jones' perspective she felt that Mr Shipley was not treating her in the same way as others.

[68] Ms Jones took two weeks stress leave from 15 February 2016. Waste Management say that they understood the stress was caused by an earthquake on 14 February. Ms Jones said that she lost her confidence at work and was upset a lot of the time and felt stressed when she had to engage with Mr Shipley and she could

not keep going.

Were there changes to the PEP?

[69] In or about late January or early February 2016 Ms Jones attended a performance review with Mr Shipley. I place some weight on this because objectively Ms Jones' view about what occurred reflects the significant lack of trust and confidence she had in Mr Shipley.

[70] Ms Jones said in her written evidence that she was hopeful if there were concerns about her performance that they would be raised and she could understand what they were and change accordingly. She said that there were no issues raised with her by Mr Shipley and that she scored particularly well. She recalled ratings of 4's and 3's. Further that Mr Shipley was positive about her sales. Ms Jones said that she saw the PEP on the screen but that she was not provided with a copy although usually one is emailed out later. In answer to a question from Mr Erickson Ms Jones said that when she asked on 3 June 2016 for a copy of the PEP the scores had been changed from 3's and 4's to 2's and there was a negative comment that had not been discussed.

[71] Mr Shipley said that he did give Ms Jones a copy of the PEP but he could not locate when one was sent.

[72] In or about June 2016 when other matters I shall set out shortly were occurring Ms Jones asked for a copy of her PEP. When one was provided Ms Jones sent an email dated 13 June 2016 to Mr Shipley and copied in Mr Garratt. She noted amongst other matters in her email that the scores had also changed. Further in respect of a comment in the PEP about leave and time off she wrote that those matters had never been discussed. She wrote in her email that this sort of thing was why she was stressed. There was no response to that and it was probably overtaken by the resignation.

[73] There was some confusion about the PEP supplied in the common bundle and the typeface was so small it was barely legible. It still had Mr Boyd's name at the top but there is no dispute that he did not complete the PEP at that time. Mr Shipley did.

The PEP that the Authority was provided at the investigation meeting shows a performance rating overall of 2 with several 2's for various behaviour and for one objective measure. Mr Shipley does not accept that the scores were changed by him or leave and time off not discussed.

[74] There is no way for the Authority to ascertain whether the scores were in fact changed or issues about leave and time off added. Ms Jones clearly believed that they had and that some additional comments had been made.

[75] That is a matter that is significant in that it reflects the lack of trust and confidence Ms Jones had in Mr Shipley shortly before her resignation. This is to the extent that she believed he had changed scores that he had discussed with her and added comments to her PEP shortly before her resignation. The previous PEP's show Ms Jones who was a high performer had never received such low ratings. Mr Erickson asked Mr Boyd as there was some confusion about the PEP whether he entered 2's. Mr Boyd responded "would not have put a 2 in to be honest." The other PEP's completed by Mr Boyd accord with that. The only time a 2 rating appeared in PEP's supplied and completed by Mr Boyd was in 2012 beside safety. That was on the basis that Ms Jones needed to slow down when

entering the driveway and stop running in the office.

Was Mr Shipley the appropriate person to conduct a work investigation into her work movements?

[76] In February 2016 Waste Management put GPS into their work vehicles. Mr Shipley was concerned about some of the GPS data between the periods 4 April– 21 April 2017 from Ms Jones' vehicle.

[77] He wrote to Ms Jones on 22 April 2016 referring at the outset of the letter to "a number of discussions regarding attendance and commitment to work." He also referred to Mr Boyd sending letters in 2011 and 2012 highlighting concerns of unplanned absences and failing to meet attendance expectations. Mr Shipley set out the E road daily activity reports for the period and noted the issues of concern. He stated that he would be investigating the inconsistencies and asked that Ms Jones attend a meeting. He noted that while this was a preliminary investigation meeting

only, not a disciplinary meeting, a disciplinary meeting may follow and if Ms Jones was in breach of employment obligations then disciplinary action including dismissal may follow.

[78] Ms Jones said that she was horrified to receive the letter and it felt like they were back to the meetings in early October and Mr Shipley had refused to answer what his expectations were about where and when she worked.

[79] She said that she became anxious and sick and went to the doctor who put her off on medical leave. She said that she could not face Mr Shipley alone and instructed Mr Thompson to act for her. He advised Mr Shipley that he was acting for Ms Jones and asked for some information. I will come to the information issue.

[80] Waste Management was able to raise its concerns with Ms Jones. In this case there were similarities between the issues raised and those in October 2015. I have found that what occurred in October was a breach of Mr Shipley's obligation to treat Ms Jones fairly and reasonably and in good faith. Indeed there was conduct that could be seriously damaging of a relationship. I find that Ms Jones struggled with trusting and having confidence in Mr Shipley from that time. Matters came to a head with the letter of 22 April 2016.

[81] During the covert recording of a return call Ms Jones made to Mr Shipley on 2 May 2016 she makes a comment to him that reflected she had no trust and confidence in him when discussing her stress:

.....It's stress –It's stressful –it's stressful being accused of things and having your sales manager, you know, lie to you and then – and then make out like you, you know, get on really well and all the while trying to get rid of you.

[82] Mr Erickson says that Ms Jones does not say what Mr Shipley lied about. Mr Shipley did not comment to the lie aspect. In respect of the comment that he was trying to get rid of her he responded that "Bridget, we're not even at that position yet, so I'm not even going to make a comment on that, but what –." He then wanted to know about Ms Jones medical prognosis and return to work date.

[83] Mr Shipley later in the conversation also says that there is a need to get an understanding about when she would be returning to work and "is it going to start impacting on your role."

[84] In an email to Mr Shipley dated 11 May 2016 Mr Thompson says amongst other matters that Ms Jones has the feeling that Mr Shipley is intending to make her role untenable and that he is going through the process to force her out of the employment relationship.

[85] The trust and confidence that Ms Jones needed to have in Mr Shipley had been seriously damaged. Although Ms Jones had continued to work with Mr Shipley since the October 2015 meeting she said that she found the workplace stressful and lost confidence. Her concerns were reignited with the 22 April 2016 letter.

[86] Most significantly Mr Shipley was aware from Ms Jones directly on 2 May 2016 how she felt and that she believed he lied to her and wanted to get rid of her. Mr Shipley continuing to undertake an investigation even of a preliminary nature in those circumstances was problematic. He should have asked for human resource assistance in dealing with the significant trust and confidence issues that Ms Jones had with him.

[87] Objectively assessed Mr Shipley was not the right person to conduct the investigation that commenced with a meeting on 7 June 2016. Continuing to do in light of the October matters, the conversation of 2 May and Mr Thompson's concerns further breached the obligations of good faith and fair dealing.

Was all relevant information provided to Ms Jones in advance of the meeting?

[88] To the extent that it is argued otherwise I am satisfied that the GPS information was supplied and there are no good faith issues with respect to supply of wage and time records.

[89] What did not seem to be supplied was emails and communications requested in relation to working from home that Ms Jones sent in October 2015. Mr Shipley simply said that he had checked his emails and had not come up with anything.

[90] This concern about supply of information is really part and parcel of the finding that Mr Shipley should not have carried out the investigation and a further reason why for him to do so was inappropriate.

Was there an appropriate investigation undertaken?

[91] The Authority heard evidence from Mr Thompson about the meeting that eventually took place on 7 June 2016 to discuss the matter in the 22 April 2016 letter. Mr Thompson attended with Ms Jones and Mr Shipley attended alone.

[92] I weigh in assessing the evidence that Mr Thompson was Ms Jones' advocate at that meeting. Mr Thompson originally said that he intended to record the meeting but there was an issue with retrieval of the recording. Mr Shipley was therefore aware that the meeting could be recorded but, he says, only half way through discussions. The Authority received a copy of Mr Shipley's handwritten notes. Mr Thompson said that the meeting was 15–20 minutes in duration and Mr Shipley said about 30 minutes.

[93] There was a dispute as to whether Mr Shipley had a file with him at the meeting that contained undisclosed material that he was referring to. Mr Shipley said that he had a pad, the GPS information and the letter of 22 April 2016. He did not recall having a file. Mr Thompson said that Mr Shipley was hostile and there was finger pointing, raised voices and that he talked over Ms Jones. He said that Mr Shipley ignored him as Ms Jones' representative. Mr Shipley did not agree with those matters. Mr Thompson said that Ms Jones left the meeting in tears. Mr Shipley said that he did not see that.

[94] It is difficult to resolve what occurred at the meeting. I do not find that I need to, rather I have placed weight on the email that Mr Thompson sent on 8 June to Mr Garratt and the responses to that.

[95] Mr Thompson set out some concerns in his email about how the meeting was conducted. He wrote that Mr Shipley should not be an investigator because he had instructed Ms Jones that working from home was acceptable. Further he was aware that she created time in lieu by working extended time and not taking a lunch break and that he had investigated matters previously and questioned Ms Jones about her

commitment to continue in her role. He also wrote that Mr Shipley "is operating with the intention to bully our client out of her employment" and Ms Jones had formed the view that Mr Shipley's actions had impacted on the trust and confidence to maintain an effective employment relationship. He referred to a refusal to supply information and that the failings are a serious and sustained breach of good faith and that it likely to lead to Ms Jones' forced resignation unless clear assurances are received within 24 hours.

[96] There were two responses from Mr Garratt by email.

[97] The first was on 8 June. The email on that date provided that Mr Shipley had advised Mr Garratt that access to and/or information requested had been provided except for the PEP and details how to access personal payroll data through the Waste Management portal/intranet. The PEP was attached and details of how to access payroll

data provided in the email. Mr Garratt stated that he understood Ms Jones would be returning to work on the Monday and he could be contacted for further assistance directly. Mr Thompson very shortly after he received this email sent an email to Mr Garratt asking when a response to the other issues in the email could be expected.

[98] Mr Erickson says that the nature of assurance sought was not provided in Mr Thompson's email. The email has to be read as a whole. Amongst other matters it refers to an intention by Mr Shipley to bully Ms Jones out of her employment and that he has ulterior motives. There are concerns about his undertaking the investigation fairly and reasons why that was so. I find that there was enough in the body of the email to understand what Ms Jones needed to be reassured about. I accept Mr Maze's submission that this email from Mr Garratt fell well short of addressing the need for assurances.

[99] There was then a second email from Mr Garratt on 9 June 2016. It provided that as information requested has been made available on each occasion Mr Garratt had not identified any good faith failings or evidence of bullying behaviour. He wrote that he was unsure what further response Mr Thompson was seeking. Mr Garratt wrote that he had spoken to Mr Shipley who was reviewing the information discussed

and will advise of any residual issues as soon as able over the next week. In short therefore Mr Shipley was continuing to investigate the matter to see if any further action was required.

[100] By letter dated 13 June 2018 Mr Shipley reported the outcome of the preliminary investigation to Ms Jones. There was no mention of the 8 October 2015 visit to Ms Jones home or the discussion on 12 October 2015 in the letter. After setting out explanations Mr Shipley concluded that there appears to be no satisfactory explanation for significant absences, being at home during working hours or for use of work time without apparent business purpose. He also noted that there are no arrangements in place to operate a self-managed time off in lieu system. Whilst there was not a policy about this Mr Shipley was aware from the 12 October meeting that Ms Jones believed that she was able to operate that way and he did not instruct her differently. He also knew that she worked from home and had not instructed her not to do so.

[101] Mr Shipley indicated that in the circumstances he was to refer his concerns to the General Manager of Sales Craig Wilson.

[102] I do not find that Mr Shipley could conduct a fair preliminary investigation into the concerns in all the circumstances. The failure by Waste Management to recognise that Mr Shipley was not a suitable person to conduct the investigation and the failure to remove him from the process before he made any preliminary outcome decision was a further breach of the obligations of good faith and the duty to maintain and not breach trust and confidence. Referring the matter to Mr Wilson was a step taken too late to provide reassurance that good faith obligations would be complied with.

When Mr Thompson advised that Ms Jones would be forced to resign if assurances were not received was there a satisfactory response to reassure Ms Jones she would be treated in accordance with good faith obligations in the workplace?

[103] I do not find that there was a satisfactory response in all the circumstances from Mr Garratt that reassured Ms Jones she would be treated in accordance with good faith obligations in the workplace. There was no proper investigation into her

concerns and the reasons for her loss of trust and confidence carried out.

[104] Ms Jones then resigned.

Conclusion as to the cause of the resignation

[105] In conclusion I find that there was a causal link between Ms Jones' resignation and the breaches of duty on the part of Waste Management, as set out above, of good faith in [s 4](#) of the [Employment Relations Act 2000](#) and the duty to maintain and not to breach trust and confidence which is essential in the employment relationship.

**Was the breach or breaches of duty of sufficient seriousness to make it reasonably foreseeable to Waste Management that Ms Jones would not be prepared to continue to work under the same conditions?**

[106] I find that the breaches of the good faith obligations and the implied term to maintain trust and confidence as set out above were sufficiently serious to make it foreseeable to Waste Management that Ms Jones would not be prepared to work without clear assurances about her future treatment. Those assurances were not forthcoming and her concerns inadequately investigated. In those circumstances her resignation amounted to a constructive dismissal.

### **Was the dismissal justified?**

[107] The behaviour of the employer objectively assessed was not what a fair and reasonable employer could have done in all the circumstances. I do not find that the dismissal was justified under [s 103A](#) of the [Employment Relations Act 2000](#) (the Act) in all the circumstances.

[108] Ms Jones was unjustifiably constructively dismissed and is entitled to consideration of remedies. The claims of unjustified disadvantage are effectively absorbed in the claim for unjustified constructive dismissal and do not require separate determination.

### **Remedies**

#### *Lost Wages*

[109] Ms Jones claims three months lost wages in the sum of \$18,654.28 based on the taxable income for the year ending 31 March 2016 from Waste Management of

\$74,617.10.

[110] Mr Erickson submits that there is insufficient evidence to support the claim for three months as to why she could not work for that period of time, left her role that she obtained in September for another and no evidence of attempts to mitigate.

[111] Ms Jones advised that she was resigning on 22 June 2016. On the face of Mr Thompson's letter it seemed that the resignation was to take effect immediately. There is then an email from Mr Garratt to Mr Thompson dated 11 July 2016 confirming that Ms Jones had intended to provide one months' notice of resignation and her final day was therefore 21 July 2016. Mr Garratt said in his email that Ms Jones' vehicle and other company property could be dropped off on that day.

[112] Lost wages therefore for the grievance of unjustified constructive dismissal should fall to be assessed from 21 July 2016. Ms Jones said in her evidence that she commenced her new employment on Monday 12 September 2016. It is unclear what her earnings were and whether there was a shortfall. From 21 July to 12 September 2016 is a period of 7 weeks and 4 days.

[113] In terms of mitigation Ms Jones said that she was not well for the first month and her anxiety became worse and she struggled to leave the house. She said that at the end of the month she started looking for work but job interviews became too difficult. She said that she looked on Seek for sales role and she obtained new employment on 12 September 2016. I am satisfied that Ms Jones when well enough did attempt to mitigate her loss and was successful in obtaining other employment from 12 September 2016. Steps taken by her were adequate.

[114] I find that the reimbursement period for lost wages due to the grievance should be 7 weeks and 4 days. Assessed on the gross earnings from Waste Management for the year ending 31 March 2016 of \$74,617.10 that is a weekly sum of \$1434.94. I

have divided that weekly figure by 5 to arrive at a daily figure of \$286.99 to calculate loss for the week that was not a full week. Therefore 7 weeks multiplied by

\$1434.94 is \$10,044.58 gross. 4 days multiplied by \$286.99 is \$1147.96. Subject to any issues as to contribution the reimbursement of lost wages figure is \$11,192.54 gross.

#### *Compensation*

[115] Mr Erickson submits that Ms Jones has provided limited evidence of harm with no medical evidence. He submits that a modest award of \$3000- 5000 would be in order.

[116] Mr Maze submits that the evidence of Ms Jones showed significant hurt, humiliation and loss of dignity.

[117] Ms Jones was on stress leave at the time she resigned. In her written evidence Ms Jones said that she lost confidence and became a “shell of what she was”. The PEP’s from Mr Boyd support that when he was a manager Ms Jones was a positive person and fun and bubbly. It was clear that at that time she had lots of confidence.

[118] I accept that it took Ms Jones some time to regain her mental health after the treatment she had received at Waste Management and her resignation. She said that her husband became her carer but he could not deal with her unwellness and the marriage ended. She said that she had to sell things and borrow money to survive.

[119] She avoided working in the same industry because it made her anxious and her first role in September 2016 was chosen because there was a good group of people and a good employer.

[120] I find in this case that there is significant hurt, humiliation and loss of dignity. I accept Mr Erickson’s submission that I cannot be satisfied that the marriage ending was solely caused by Waste Management. I also accept that there were other stressors in Ms Jones life. Work however had been a good place for her before the issues with Mr Shipley in which she had performed very well with a sales role matching her outgoing personality. I find that because of the treatment received her confidence was significantly diminished and she became less outgoing, describing

herself as withdrawn. She felt forced to leave a job she loved.

[121] Subject to any issue of contribution Ms Jones is entitled to payment of \$20,000 for compensation.

#### *Contribution*

[122] The Authority is required under [s 124](#) of the Act where it determines that an employee has a personal grievance to consider whether the actions of the employee contributed towards the situation that gave rise to the personal grievance and if required reduce any remedies accordingly.

[123] I do not find Ms Jones contributed to the situation that gave rise to the personal grievance.

#### **Orders made**

[124] I order that Waste Management NZ Limited pay to Bridget Jones the sum of \$11,192.54 gross being reimbursement of lost wages under [s 123](#) (1)(b) of the Act.

[125] I order that Waste Management NZ Limited pay to Bridget Jones the sum of \$20,000 without deduction being compensation under [s 123](#) (1)(c)(i) of the Act.

#### **Costs**

[126] I reserve the issue of costs. Agreement may be able to be reached failing which Mr Maze should lodge and serve submissions as to costs by 7 December 2018 and Mr Erickson should lodge and serve submission in reply by 21 December 2018.

