

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 32
5324697

BETWEEN GARY JOHN McAUSLIN
 Applicant

AND GEORGE WESTON FOODS
 (NZ) LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Stephen McAuslin, Counsel for Applicant
 Vlad Purgaric & Carolyn Moyle, Representatives for
 Respondent

Investigation Meeting: 2 December 2011 at Dunedin

Further information received: 17 January 2012 from Respondent

Determination: 22 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Gary McAuslin worked as a merchandiser for George Weston Foods (NZ) Limited (GWF) from December 2008 until he resigned in August 2010 in the face of GWF initiating disciplinary investigations.

[2] Mr McAuslin's grievance is one of unjustified disadvantage caused by GWF's decision to initiate the disciplinary investigations. He has specifically not claimed any grievance arising from the termination of his employment.

[3] To resolve Mr McAuslin's grievance I must explain more about the circumstances that resulted in GWF's decision to initiate disciplinary investigations. I

will then apply the statutory test in order to assess justification for any actions that might have disadvantaged Mr McAuslin in his employment.

Events prior to the first disciplinary allegation

[4] At the time Carolyn Moyle was GWF's Dunedin based regional sales manager. Maree Morris was a territory manager and was Mr McAuslin's manager. Vlad Purgaric was a senior manager with GWF based in Auckland.

[5] On 7 May 2010 Mr McAuslin filled in on another merchandiser's run. Ange Jarvis was the territory manager for this run. Mr McAuslin visited a New World Supermarket, signing in at 2.00pm and signing out at 2.10pm. After Mr McAuslin left, a New World manager rang and complained to Ms Moyle about Mr McAuslin not completing all his in-store merchandising duties. Ms Moyle rang Ange Jarvis, the relevant territory manager. Ms Jarvis apparently was in town so she headed to Mr McAuslin's next stop, the Countdown Supermarket. However, Mr McAuslin had left five minutes before she arrived. Ms Jarvis apparently had to spend half an hour merchandising the bread at Countdown. She took some photos to show the state of affairs as at the time of her arrival. Ms Jarvis then went on to the New World Supermarket where she arranged for a message to be passed on to Mr McAuslin who was expected to call back there a little later in the afternoon.

[6] Mr McAuslin eventually got the message and called Ms Jarvis. They had a brief discussion about the situation.

[7] In evidence there is a copy of an email timed at 12.19pm on 7 May 2010 from the New World manager to Ms Moyle with attached photos apparently showing the state of the bread displays after Mr McAuslin first left the shop that day. The printed email shows that Ms Moyle forwarded it to Ms Jarvis at 11.40am on 8 May 2010. There is also an email from Ms Jarvis to GWF's HR advisor timed at 4.49pm on 10 May 2010 asking for advice on how to proceed. I have not been given any explanation about how photos attached to an email timed at just after midday could show any misconduct by Mr McAuslin in work performed by him about two hours later. Perhaps that would have been a complete answer to the allegation if GWF had been able to investigate the matter.

[8] Ms Jarvis wrote to Mr McAuslin on 11 May 2010 setting out an allegation of misconduct. Under the heading *Unsatisfactory work performance* the letter set out a broad summary of the allegations, which if established, could result in a first written warning. Mr McAuslin was asked to attend a meeting on 19 May 2010 and was advised of his right to bring a representative or support person.

[9] This letter was delivered by courier to Mr McAuslin at home. That evening he was having a party to celebrate his engagement. That fact was apparently known to at least some people at GWF. Mr McAuslin believes that Ms Jarvis knew of his engagement party because Ms Morris apparently sent a group text message to other GWF employees congratulating Mr McAuslin on his engagement. The only direct evidence I have on the point is from Ms Moyle and Mr Purgaric who both told me that they did not know about the significance to Mr McAuslin of the date. There is no reason to doubt their evidence. If Ms Moyle did not know, there is no reason to think that Ms Jarvis knew. Mr McAuslin's evidence, no doubt true, is that he was extremely upset and embarrassed to receive this letter shortly before his engagement party. However, I do not accept that Mr McAuslin's employer intended to upset and embarrass him by initiating the disciplinary process in this way.

GWF's attempts to meet and the second disciplinary allegation

[10] Mr McAuslin's brother happens to be a solicitor. Mr McAuslin decided to instruct his brother to represent him. A postponement of the scheduled meeting was sought and agreed. There is a letter dated 18 May 2010 rescheduling the disciplinary meeting for Friday 21 May 2010.

[11] At the time Mr McAuslin had been seeing a clinical psychologist for assistance with an unrelated problem. The psychologist thought that Mr McAuslin should not attend the disciplinary meeting because it could have an adverse effect on Mr McAuslin's stress. That information was communicated to GWF who agreed to defer the disciplinary meeting.

[12] There is a further letter dated 11 June 2010 this time from Ms Moyle to Mr McAuslin rescheduling the disciplinary meeting for Friday 18 June 2010. That

letter repeated the allegation about misconduct/unsatisfactory work performance from the two earlier letters but included a further allegation as follows:

2. *Serious Misconduct*

Falsifying any company document or form (including time cards)

- *Due to further investigation of the alleged incident on Friday 7th of May sign in books for the stores in question were checked and it was discovered that you had submitted timesheets for payment of hours which you did not actually work. Details of actual merchandising on the day versus roster have been provided via email on 8th June.*

[13] The letter explained that the new allegation might result in disciplinary action up to and including a final written warning.

[14] Mr McAuslin's evidence is that he was shocked by this new allegation. He went to the Countdown Supermarket and obtained a copy of the visitor pass showing he left at 7.15pm. Mr McAuslin's evidence is that he went to his car and finished off paperwork in the car, finishing work at about 7.25pm or 7.30pm.

Mr McAuslin's resignation

[15] Mr McAuslin's psychologist advised him that he should resign. Mr McAuslin also received legal advice that the allegation of falsifying a document was extremely serious and potentially a criminal act. Mr McAuslin's lawyer wrote to GWF answering the misconduct/unsatisfactory work performance allegation and the serious misconduct allegation. The latter response referred to the times on the Countdown visitor pass, working in the car and Mr McAuslin's understanding from his managers that it was permissible on a swings and roundabout basis to record the standard finishing time even if he finished early on any particular day. The letter also set out Mr McAuslin's view that the way the matter had been handled was the result of Ms Jarvis unfairly blaming him over another matter. Mr McAuslin communicated his resignation and raised his complaint that GWF had not dealt with the disciplinary matters in good faith.

Personal grievance

[16] Mr McAuslin says that his employment has been affected to his disadvantage by unjustified actions on the part of GWF. I shall focus on the justification point and apply the statutory test for justification.

[17] GWF has an employee handbook. Clause 3 sets out a code of conduct which includes 3.1 as follows:

The employment relationship between us is one that must be based on a commitment from both sides to each other with trust and respect. This means that employees always act in a manner consistent with the best interest of the business and that the company always acts consistently, fairly and reasonably with staff.

[18] The handbook includes non-exhaustive lists of conduct regarded as serious misconduct and ordinary misconduct. *Falsifying any company document or form (including time cards)* is included in the serious misconduct list while *Failure to perform work to the required standards* is included in the misconduct list. There is also the following:

3.6 Unsatisfactory Performance

From time to time a situation occurs where an employee is not performing their duties to an acceptable standard. This situation should not be confused with that of misconduct unless the person is not performing out of some deliberate failure to perform their duties.

[19] There are several strands to Mr McAuslin's grievance. First, it is his view that Ms Jarvis was motivated by a desire for revenge against him because of his innocent involvement in another person's complaint against her. There are two principal difficulties with this even if I assume it to be true. The complaint about Mr McAuslin's work originated from the New World manager. There is no evidence or suggestion that he had any axe to grind other than his concern about the standard of work apparently done by Mr McAuslin. If indeed the photos fairly represent the standard of Mr McAuslin's work there was a valid concern. However that was not the only possibility so an investigation was required.

[20] Secondly, the document trail demonstrates a perfectly routine handling of a potentially disciplinary matter. The New World manager communicated his concern to Ms Moyle who quite properly alerted the relevant territory manager Ms Jarvis to the concern. Ms Jarvis in turn sought advice from GWF's HR manager, including

Ms Moyle in that email. That resulted in the letter dated 11 May 2010 conveying the first disciplinary allegation. It was perfectly reasonable to characterise the allegation as one of misconduct on the basis that Mr McAuslin had deliberately failed to perform his duties. That was why the letter included reference to Mr McAuslin's training records to demonstrate that he had been trained on the required standards.

[21] In summary, while Ms Jarvis may have been improperly motivated and Mr McAuslin may have had a complete answer to the alleged misconduct, the circumstances were such that any employer would have initiated a disciplinary investigation just as GWF did.

[22] An aspect of Mr McAuslin's complaint concerns the delivery of the first letter to him on the day of his engagement party. There is not sufficient evidence to establish that Ms Jarvis knew about the timing of the party. In any event, the timing was unfortunate rather than unjustified.

[23] The third aspect to Mr McAuslin's grievance is GWF's decision to make the second disciplinary allegation, this time of serious misconduct, in relation to his actual finishing times and timesheets. The evidence from Mr Purgaric and Ms Moyle is that the allegation arose because of the response from Mr McAuslin's lawyer about the timeframes in relation to the first allegation. There is no reason to doubt this evidence. That caused them to look more closely at the documentation including Mr McAuslin's timesheets. This second allegation was conveyed under the signature of Ms Moyle so the allegation about the motivation of Ms Jarvis is not relevant. Again Mr McAuslin's view is that there was a complete answer to the alleged concerns. The difficulty for present purposes is that (at least in part) GWF could not know that without Mr McAuslin telling them that. No-one else knew that he had done some work in the carpark after signing out of the last supermarket visit of the run. I also accept Ms Moyle's evidence that she knew nothing of the swings and roundabouts basis on which Mr McAuslin filled in his timesheet. Her evidence, which I accept, is that if she had known about that she would have taken up the issue with the managers who had given that instruction to Mr McAuslin and Mr McAuslin would not have been held to account for any difference between his timesheet and his actual finishing time.

[24] In all the circumstances known to GWF at the time any employer would have initiated this second disciplinary allegation, as did GWF.

[25] It follows that there was nothing unjustified about GWF's actions so Mr McAuslin does not have a sustainable personal grievance against his former employer.

Summary and orders

[26] Mr McAuslin does not have a sustainable personal grievance against GWF.

[27] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority