

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Tracey Jinkinson
AND Oceana Gold (New Zealand) Limited
REPRESENTATIVES Jenny Guthrie for Applicant
Lesley Brook for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 26 June 2007, Dunedin
DATE OF DETERMINATION 27 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship problem

[1] Tracey Jinkinson worked at Macraes for Oceana Gold (New Zealand) Limited as a Grade Control Sampler from May 2005 until her employment was terminated in December 2006.

[2] Initially just a statement of problem was lodged but on 15 June 2007 the Authority received a signed undertaking for damages and an affidavit from Ms Jinkinson in support of an application for interim reinstatement. During a phone conference, dates and arrangements for investigating the interim reinstatement application as well as the substantive personal grievance were discussed. Counsel subsequently advised that Ms Jinkinson wished to proceed with the interim reinstatement application notwithstanding the dates allocated for the substantive grievance. This determination resolves only the interim reinstatement application and findings are made on the untested affidavit evidence for that purpose only.

Arguable case?

[3] It is common ground that Ms Jinkinson's dismissal was dealt with in December 2006 as a redundancy situation affecting her, several staff employed in a similar capacity and some others employed as Ore Spotters. A total of seven staff worked in affected positions. The work of the two positions was allocated to a new class of employees called Mine Technicians. The evidence of the company is that Mine Technicians also perform other work not previously performed by either of the two earlier roles.

[4] This followed a review that identified that there would be less need through 2007 into 2008 for the Grade Control Samplers who were casual employees and the Ore Spotters who were permanent employees. Six Mine Technician positions were established. Around November 2006, affected existing staff (including Ms Jinkinson) were interviewed and considered for redeployment to the new positions which were also externally advertised. Positions were offered to and accepted by four of the affected staff. One other employee resigned. Ms Jinkinson says that this person was offered one of the new positions but Oceana Gold implies that an offer was not made before the resignation. Two of the affected staff (including Ms Jinkinson) were not offered positions. On 18 December 2006, Ms Jinkinson was told that she was not suitable for redeployment as a Mine Technician and given notice of dismissal.

[5] It is common ground that a position could have been offered to Ms Jinkinson. Ms Jinkinson's evidence is that she was told that she did not have the skill base and that she would not fit into the team dynamic. The company's evidence is to that Ms Jinkinson was told that she lacked teamwork ability. There is also evidence in the company's affidavits to the effect that there were earlier discussions with Ms Jinkinson about her ability to work well with colleagues. Ms Jinkinson says that she was a good employee and a team player. She also says that there had been no issues raised with her about her job performance during her employment. For current purposes, Ms Jinkinson is entitled to the presumption that she will be able to prove what she says about her work performance and being a team player. The evidential difference apparent from the affidavits will have to be resolved at a latter time.

[6] Oceana Gold has provided some documents related to the interview process for the new positions. The two managers scored Ms Jinkinson poorly on the teamwork attribute which had the effect of giving her a relatively poor total score. One manager ranked her sixth and the other ranked her fifth. At this point, there is no information about the process used for external candidates or how they ranked against the internal candidates. Oceana Gold says that the material provided demonstrates that it used a fair process for considering appointments or redeployment to the new positions. The weightings given to the various attributes are also said to demonstrate the extent to which the Mine Technicians are genuinely new positions. The information about the attributes, their weightings and the scores given to Ms Jinkinson prior to was not provided to her prior to the decision not to redeploy her except to the extent that questions were put to her during the interview process.

[7] An aspect of Ms Jinkinson's grievance is whether Oceana Gold complied with its obligations under section 4 (1A) of the Employment Relations Act 2000 in respect of the provision of information relevant to the continuation of her employment and an opportunity to comment before the decision that had an adverse effect on her employment was made. Oceana Gold says that the information referred to above is not caught by this requirement

because it related to a new position rather than the decision to disestablish the Grade Control Sampler position.

[8] Arguably however, these decisions overlap so that section 4 (1A) applies to consideration of redeployment. Arguably also, if Ms Jkinson knew of or more about the team work concern and its weighting she could have been scored better by the two managers and included amongst those who were redeployed.

[9] A further aspect of the grievance is whether there was genuinely a redundancy situation in that Ms Jkinson says that she was doing the work of a Grade Control Sampler and an Ore Spotter before any issue arose and that Mine Technicians simply cover both sets of duties. It is too soon to rule this out but the material available to the Authority suggests that there is more to the change than just combining both sets of duties under a new title.

[10] Oceana Gold accepted that an arguable case existed in light of its obligation to justify its decision to dismiss Ms Jkinson and the applicable legal test. It also conceded that Ms Jkinson could mount an arguable case that she should have been redeployed. From Oceana Gold's perspective that is a comment about the low threshold rather than the strength of Ms Jkinson's claim. In light of this concession and because I have reached a clear view about where lies the balance of convenience, it is not necessary to analyse the extent of the arguable case any further.

Balance of Convenience

[11] Ms Jkinson says that she will suffer loss of income and hardship if not reinstated, however there is almost no evidence to establish the extent of the loss and hardship alleged. I accept the point made by counsel for Oceana Gold that this is not one of those cases where the prospective hardship to an applicant if not reinstated outweighs other factors. It is also clear that Oceana Gold will have no difficulty meeting an order for lost remuneration and other compensation to fully restore Ms Jkinson's position if she establishes a grievance.

[12] The evidence indicates that Oceana Gold experiences staff turnover in both Mine Technician and Mine Operator positions. The latter position is also an entry level position which Ms Jkinson says she could perform and for which she has made application unsuccessfully. Counsel for Ms Jkinson argues that the availability of these positions means that interim reinstatement could be ordered without negative impact on third parties or the respondent. However, it also means that this is not a case where interim reinstatement must be ordered to preserve that as a practicable remedy once the grievance has been finally determined. Oceana Gold will be able to accommodate an order for reinstatement just as easily in several months as at present.

[13] The two most significant factors at present are the delay in seeking interim reinstatement and the relatively short time before the matter can be fully investigated. Ms Jinkinson finished up on 19 December 2006. The requirements for an interim reinstatement application were finally in place by 15 June 2007 although there are some earlier communications with the Authority. At best for Ms Jinkinson, there is a delay of about 5 months. Ms Jinkinson applied for various vacancies at Oceana Gold following her dismissal. There is a month or more where Ms Jinkinson was waiting for some response to her application for a Mine Operator's position. Ms Jinkinson also applied for vacant Mine Technician positions. However, a grievance was not raised with Oceana Gold until her solicitor's letter dated 15 March 2007 and an application to the Authority could have followed soon after Oceana Gold's response dated 5 April 2007. A timely application could have been investigated and even determined by now. The other aspect is that the substantive grievance is now set for investigation commencing 28 August 2007. The present issue is whether there is a compelling case for reinstatement before then in light of delays to this point. I find that there is not.

[14] The final point in this balancing exercise is the evidence of Oceana Gold that interim reinstatement would be disruptive to the current team, said to be a *highly functioning team but which easily could become dysfunctional*. This seems to be at odds with the common evidence that Ms Jinkinson had received no warnings for any reason during her tenure but receives some support from comments in a September 2006 performance appraisal. Where it rests at the minute is that there must be some risk of dysfunction if Oceana Gold is required to reinstate Ms Jinkinson pending resolution of the grievance. The relief available to Oceana Gold pursuant to Ms Jinkinson's undertaking if appropriate is not likely be an adequate remedy for such damage.

[15] Overall, I find that the balance of convenience clearly favours Oceana Gold.

Overall Justice

[16] Ms Jinkinson is critical of Oceana Gold for declining mediation outside of these proceedings. Oceana Gold is critical of Ms Jinkinson for misleading the Authority by saying that she has had no response to her post employment applications and using that to support to claim that the redundancy was not genuine. I accept that mediation is voluntary unless there is a direction. Counsel made it clear that Oceana Gold will participate in mediation now that it had been directed to do so. The criticism does not advance Ms Jinkinson's current application. Given the present material before the Authority, I do not make a finding that Ms Jinkinson attempted to mislead the Authority. It appears that Ms Jinkinson has not had all her post employment applications finally resolved although there was some contact at least. Neither point makes a difference to the outcome.

Summary

[17] The application for interim reinstatement is declined.

[18] Cost are reserved to be dealt with following the resolution of the substantive matter.

Philip Cheyne

Member of Employment Relations Authority

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