

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 152/10
5157645

BETWEEN

GRAHAM JONES
Applicant

A N D

OCEANA GOLD (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Calvin Fisher, Advocate for Applicant
Lesley Brook, Counsel for Respondent
Investigation Meeting: 3 May 2010 at Dunedin
Determination: 28 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Jones) alleges that he was unjustifiably dismissed by the respondent Oceana Gold (New Zealand) Limited (Oceana) and Oceana resists that contention.

[2] Mr Jones was employed by Oceana as an operator driving a dump truck on a rotating shift basis at Oceana's goldmine at Macrae's Flat, East Otago.

[3] Mr Jones had worked for Oceana and its predecessors for over 14 years and until the events of 25 February 2009, had never been the subject of any disciplinary procedure.

[4] On the morning of 25 February 2009, at approximately 6.50am, Mr Jones was a passenger in a vehicle returning to the surface after a nightshift. During the course

of the climb out of the mine pit, the vehicle that Mr Jones was in passed another vehicle in breach of Oceana's health and safety policies.

[5] The driver of the vehicle that was passed, a supervisor, asked via the radio telephone system who was driving the vehicle that Mr Jones was a passenger in. It is common ground that Mr Jones took the radio telephone handset from someone else in his vehicle and answered *me. Why?*. In fact, Mr Jones was not the driver.

[6] An incident report was filed by the driver of the vehicle that was passed and an inquiry commenced by Oceana.

[7] The occupants of the passing vehicle (including Mr Jones) returned to the site at 6.30pm on 25 February 2009 to commence their next nightshift. Each of the occupants of the subject vehicle was asked who the driver was and none would respond. There were various attempts made by Oceana to obtain information about who was driving the subject vehicle. Oceana asked each employee to write an account of the overtaking incident. Mr Jones proposed to his fellow workers that they *sign up* to the statement that he had written which did not identify who the driver was. The other employees proceeded to adopt that suggestion.

[8] Because Oceana could not identify who the driver was, it stood down from duty all of the individuals who had travelled in the subject vehicle excluding one individual who Oceana had not identified as a passenger in the subject vehicle.

[9] Two days after the incident, the driver of the subject vehicle admitted to Oceana he was responsible. By this time Oceana had commenced disciplinary investigations in respect of all the occupants of the subject vehicle.

[10] During the course of the disciplinary investigation, Oceana formed the view that Mr Jones was not taking the matter seriously and eventually Oceana determined to dismiss Mr Jones for *dishonest and misleading conduct and for instigating disobedience by other staff*. Oceana's view was clearly strongly influenced by the context in which the conduct complained of happened, that is, in a safety critical environment where a breach of Oceana's health and safety requirements was involved.

Issues

[11] The factual basis on which the termination rests is not in dispute. Mr Jones admits that he:

- (a) Misled the employer by claiming to be the driver of the subject vehicle when he was not; and
- (b) Provided a statement to the employer which other workers signed as being their own, which failed to identify who the driver was.

[12] Mr Jones' contention is that the employer's response to his wrongdoing was disproportionate and that there was disparity of treatment.

[13] Accordingly, it will be useful for the Authority to consider the following questions:

- (a) Was Mr Jones guilty of dishonest and misleading conduct; and
- (b) Was Mr Jones guilty of instigating disobedience by other staff; and
- (c) Was Oceana's response fair and reasonable?

Was Mr Jones guilty of dishonest and misleading conduct?

[14] It is plain from the evidence (including the evidence of Mr Jones himself) that he claimed to be the driver of the subject vehicle when he was not. On a simplistic view of the matter, it might be thought that nothing turns on whether Mr Jones was the driver or not. However, from Oceana's perspective, the issue is overlaid by the health and safety parameters of a very dangerous industry.

[15] The context is that in this dangerous working environment, Oceana quite properly has adopted stringent safety standards to protect staff working underground. Those standards include rules which are inviolate. One such rule is that vehicles of the sort Mr Jones was travelling in at the time of the incident ought not to pass other vehicles on the road up to the surface.

[16] Mr Jones (and the evidence given on his behalf) suggests that there were a number of breaches of this rule. Indeed Mr Jones' own evidence was that the morning after the incident two personnel carriers (the nature of the subject vehicle)

passed each other on the road to the surface and there were *no repercussions*. That view is strongly contested by Oceana which says, in essence, that every breach of its safety policy of which it becomes aware is investigated and dealt with. I prefer Oceana's evidence on this point.

[17] What is more, it is appropriate that an employer fulfils its onerous obligations under the Health and Safety in Employment Act and its other common law obligations to provide a safe workplace by ensuring so far as is possible that practices that are adopted in the workplace are as safe as they can be. The requirement that personnel carriers not pass each other on the road to the surface is such a rule. It is unreasonable for workers to breach a rule knowingly when that rule exists specifically for the purpose of protecting them.

[18] However, it will be evident from the facts in the present case that it was not Mr Jones who committed the passing manoeuvre which was in breach of Oceana's proper health and safety requirements. What Mr Jones did was to take responsibility for something that he was not responsible for and thus mislead his employer in its attempt to identify the actual culprit.

[19] I conclude that Mr Jones has not acted in good faith in claiming to be the driver of the subject vehicle when he was not, deliberately confused the employer's quite proper investigation into a health and safety breach by that false information and that Mr Jones could reasonably expect disciplinary consequences as a result.

Was Mr Jones guilty of instigating disobedience by other staff?

[20] The evidence is clear that once the initial and erroneous claim was made that Mr Jones was the driver of the vehicle, Oceana then proceeded to try to get to the bottom of the matter by talking to all of the workers it knew were on the subject vehicle, and by contrast, those same workers took it upon themselves to thwart Oceana's legitimate pursuit of information about the health and safety breach. It is clear on the evidence before the Authority that Mr Jones prepared a statement (when all of the affected staff were asked by Oceana to write out a statement) and Mr Jones then offered that statement to his co-workers to effectively sign up to.

[21] Mr Adrian Adams, a Union delegate at Oceana, told me at the investigation meeting that the other staff signed the statement prepared by Mr Jones without any pressure from Mr Jones. He said: *No one said that Graham Jones told them to sign*

or that they had any pressure from Graham Jones to sign. This evidence, of course, is hearsay. Mr Adams was not present as he was not a member of the crew in the subject personnel carrier. It does, however, encapsulate Mr Jones' own position which was that he simply made the suggestion and everyone else followed it.

[22] I do not accept that view of the facts. I prefer the evidence of Lindsay Maw, the superintendent of Oceana, who told me that Graham Jones was *a guy people will follow*. He continued:

The others might not have done what they did if it wasn't for his leadership. Graham (Mr Jones) was the senior man as far as I was concerned ... He led the others into error although I accept he didn't have to try very hard but they were given that opportunity by Graham Jones.

[23] I found this testimony compelling. It seemed to me, in reflecting on the matter, that the position would have been different if Mr Jones had behaved differently after the original erroneous claim that he was driving. If instead of trying to cover up who was driving the vehicle Mr Jones had fessed up about his own part and encouraged others to do the same, then it seems to me that the disciplinary sanction which the employer adopted would have been different or, put another way, if Oceana had committed to dismissal in those circumstances, then I should have had no difficulty in finding the dismissal unjustified.

[24] But here, Mr Jones' original mistake of claiming to be the driver when he was not, is compounded by his subsequent determination to ensure that Oceana did not find out who the driver was.

Was Oceana's response disproportionate?

[25] I am satisfied on the evidence before the Authority that Oceana's response was entirely appropriate. As I have just noted, if Mr Jones had committed only the first misdemeanour (that is, claiming to be the driver when he was not), then I am satisfied a dismissal would not have been justified. However, this was a situation where Mr Jones first misled the employer about who was driving and then sought to make it difficult for the employer to establish who the driver actually was. As I have noted above, I am satisfied that Oceana's evidence is to preferred, that Mr Jones took a leading role in trying to make it difficult for Oceana to establish just what had happened. I do not accept evidence from Mr Jones that he simply wrote his statement

and offered it to his workmates to sign up to. I am satisfied he had more of a leadership role than that.

[26] I am also not persuaded that the argument about disparate treatment is made out. Mr Jones was dismissed from his employment because he lied about driving the vehicle and then contributed to making it difficult for the employer to find out who actually was driving the vehicle. He performed both of these actions in contravention of the employer's clear safety policy, a policy which is designed to preserve the lives of workers in what is one of New Zealand's most dangerous industries. In that regard, I simply do not accept Mr Jones' evidence that there were examples of light vehicles overtaking each other on the access road to the mine on a regular basis. Mr Maw told me (and I accept) that he had never had reported to him before an example of a light vehicle passing another light vehicle on the access road and that this situation was *near enough to a unique issue*. In those circumstances, I would have thought it axiomatic that workers would applaud Oceana for doing whatever it can to promote a safe working environment.

Determination

[27] Mr Jones has failed to satisfy me that he has been unjustifiably dismissed. I conclude that a fair and reasonable employer, having conducted a proper investigation, would have dismissed Mr Jones in these circumstances.

[28] Mr Jones' case is dismissed.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority