IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 102
CRC 4/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TRACEY JINKINSON Plaintiff
AND	OCEANA GOLD (NZ) LIMITED Defendant

Hearing: 8, 9 and 25 February 2010
(Heard at Dunedin)

Appearances: Raelene Kelly and Kimberley Phillips, counsel for plaintiff
Lesley Brook, counsel for defendant

Judgment: 4 August 2010

SECOND JUDGMENT OF JUDGE A A COUCH

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[1] Ms Jinkinson worked for Oceana Gold (NZ) Limited (Oceana Gold) over a period of 19 months from May 2005 until December 2006 when she was dismissed on grounds of redundancy. She regarded herself as a permanent employee of Oceana Gold and considered the termination of her employment to be an unjustifiable dismissal. She pursued a personal grievance alleging that the redundancy was not genuine, that her selection for redundancy was unfair and that Oceana Gold breached its obligations of good faith during the process which led to her dismissal.

[2] That personal grievance was investigated by the Authority which gave its determination on 17 January 2008.[1] The Authority initially concluded that Ms Jinkinson was a casual employee of Oceana Gold at all times. Viewing the matter

[1] CA 5/08, 17 January 2008.

from that perspective, the Authority then found that Ms Jinkinson's dismissal was justifiable and that Oceana Gold had acted in good faith during the redundancy process. The only aspect of Ms Jinkinson's claim upheld by the Authority was that Oceana Gold had treated her unfairly by telling her of her dismissal in an uncaring way. The Authority characterised this as an unjustifiable disadvantage grievance and awarded Ms Jinkinson compensation of $2,000.

[3] Ms Jinkinson challenged all aspects of the Authority's determination other than the conclusion that she had been unjustifiably disadvantaged and the remedy awarded in that regard.. The initial focus of the challenge was on the Authority's conclusion that Ms Jinkinson had at all times been a casual employee. By agreement, that issue was argued as a preliminary issue on which I gave my judgment on 13 August 2009.[2] I decided that, as at December 2006, and for a period of at least a year prior to that date, Ms Jinkinson was continuously an employee of Oceana Gold.

[4] Following that preliminary decision, Ms Jinkinson pursued the second part of her challenge which was to the Authority's conclusions that her dismissal had been justifiable and that there had been no breach of good faith. This judgment deals with those aspects of the matter which proceeded before me by way of a rehearing.

Background and sequence of events

[5] Oceana Gold operates a gold mine at Macraes in Otago, about 90 kilometres north of Dunedin and about 40km west of Palmerston. Much of the mine is open cast. The limited amount of gold bearing ore is mixed with large quantities of waste material. The profitability of the mine depends on locating the gold bearing ore and distinguishing it from the waste. Many different skills and processes are used to achieve this. These include geological research and analysis. At the time in question in this proceedings, they also included two particular roles for field staff: grade control sampling and ore spotting.

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[2] [2009] ERNZ 225.

[6] Grade control sampling involves taking samples of material for laboratory analysis from holes drilled in the exposed rock. The location from which each sample is taken is recorded and this information, coupled with the results of analysis, enables geologists to trace and predict the location of the gold bearing ore. Staff performing grade control sample work were known as grade controllers.

[7] Once the location of potentially ore bearing rock has been identified, ore spotters guide the operators of the excavation equipment to ensure as far as possible that ore and waste are correctly identified.

[8] While these were the core aspects of those two roles, each involved a range of other ancillary duties.

[9] Ms Jinkinson was engaged as a grade controller and started work on 26 May 2005. During most of the time she was employed, there were six grade controllers at the mine. They were rostered in pairs, each pair working with one of three crews. By 2006, there were three ore spotters, who were rostered to work with all three crews. In general, each shift was worked by a crew including two grade controllers and one ore spotter.

[10] Initially, there were only dayshifts but, during the course of Ms Jinkinson's employment, Oceana Gold implemented rotating shifts covering day, night and weekend work. The number of grade controllers also reduced to four. They continued to work in pairs covering all three crews.

[11] Oceana Gold operated a formal system of five proficiency levels for both grade controllers and ore spotters. To progress from one level to the next required the employee to demonstrate a range of particular knowledge, skill and experience.

[12] Ms Jinkinson began work as a level one grade controller. In February 2006, she had her first level assessment review but was unsuccessful. In September 2006, she was successful in a second review and progressed to level two. This resulted in a pay increase.

[13] During the first part of Ms Jinkinson's employment, grade controllers and ore spotters were responsible to Lindsay Maw who then held the position of geology superintendant. As Mr Maw agreed, however, he had many other responsibilities and much of the day to day supervision of these staff was done by a mine geologist.

[14] In an effort to more effectively supervise the staff working in the mine, it was decided to introduce a new position of ore zone supervisor. Judd Davenport was appointed to that position and took it up on 17 May 2006. From that date, grade controllers and ore spotters reported to Mr Davenport and he reported to Mr Maw. Mr Davenport had previous experience both as a grade controller and as an ore spotter.

[15] Throughout the period with which this case is concerned, the open pit mining manager for the Macraes site was Tadek Wojtowicz.

[16] On 31 October 2006, Oceana Gold announced its intention to review the positions of grade controllers and ore spotters. This was conveyed to staff in a letter signed by Mr Wojtowicz. It described a proposal to disestablish the six existing positions of grade controller and the three positions of ore spotter and replace them with six new positions of pit technician, later renamed mine technician. Affected staff were invited to attend a meeting on 10 November 2006 to discuss this proposal. The letter invited applications from existing staff but also said that the new positions would be advertised.

[17] It should be reiterated here that, although the letter referred to six grade controller positions, only four were filled at that time. Thus, the proposal was to disestablish seven occupied positions and create six new mine technician positions.

[18] The meeting scheduled for 10 November 2006 duly took place but it appears there was little discussion about the proposal and it was confirmed to go ahead. Along with all other affected staff, Ms Jinkinson sought appointment to one of the new mine technician positions.

[19] Interviews with the seven existing staff members were held between 20 and 25 November 2006. Ms Jinkinson's interview was on 20 November. In each case, the interviews were conducted by Mr Maw and Mr Davenport. They worked from a list Mr Maw had prepared of "desired attributes" and questions. Ten of the questions were of general application. In addition there were two questions specifically directed at ore spotting issues and two directed at grade control issues. The "desired attributes" were:

- Ability to work with others in order to produce results.
- Ability to plan workloads for efficient job productivity.
- Keenness to learn new skills.
- Values the role.

[20] This list of "desired attributes" was not disclosed to candidates prior to their interviews although Mr Maw said that he read them out at the start of each interview. Candidates were not told what the criteria for selection would be. Other than the "desired attributes", the only indications they had of the likely criteria were a position description attached to the letter of 31 October 2006 and an advertisement which was circulated within Oceana Gold and placed in local newspapers. Both of these documents described the work to be done and the personal attributes sought.

[21] When conducting the interviews, Mr Maw and Mr Davenport used the list but they did not have any structured method for recording the answers to questions or their impressions of the candidates' abilities. Each wrote some notes in his diary but, in most cases, those notes were sparse and had no mention of the response to many of the questions.

[22] As well as conducting interviews with the seven grade controllers and ore spotters, Mr Maw and Mr Davenport interviewed three or four external candidates who responded to the advertisement. Their interviews were narrower in scope than those of the existing staff. It was unclear from the evidence when these interviews took place but notes made by Mr Maw suggested they were between 1 and 8 December. Again, very few notes were made.

[23] In addition, another existing employee of Oceana Gold who then worked in a different department, Jeremy Wharerau, was considered for appointment. He was not interviewed by Mr Davenport but it appears that he was interviewed in a limited way by Mr Maw.

[24] On or shortly before 7 December 2006, Mr Maw met with Mr Wojtowicz to discuss who should be appointed to the mine technician positions. Mr Wojtowicz suggested that the selection be done using a matrix system in which candidates were scored on a series of criteria. Largely at Mr Wojtowicz's urging, the following criteria for existing staff were adopted:

> Teamwork
> Skills
> Experience
> Adaptability
> Efficiency
> Resourcefulness
> Potential
> Longevity

[25] Different criteria were adopted in relation to external applicants:

> Work with Others
> Sincerity
> Intelligence
> Longevity

[26] After those criteria were decided in his meeting with Mr Wojtowicz, Mr Maw created a spreadsheet showing the names of the candidates on one axis and the criteria on the other axis. He sent a copy of this by email to Mr Davenport on 7 December 2006 with the instruction: "Score each category on a scale of 1(shit) to five(legend)".

[27] This spreadsheet included the names of all seven grade controllers and ore spotters and three external candidates. Mr Wharerau was not included, nor was one of the external candidates apparently interviewed.

[28] Mr Davenport filled in the spreadsheet and returned it to Mr Maw the following day. Mr Maw then met again with Mr Wojtowicz to discuss the scores he and Mr Davenport had given to the candidates. These were put on a white board and differing weights were then applied to the criteria for existing staff. Those weightings were:

Teamwork	10
Skills	3
Experience	2
Adaptability	8
Efficiency	7
Resourcefulness	7
Potential	4
Longevity	5

[29] This weighting of the scores for internal applicants was never disclosed to Mr Davenport and neither the criteria nor the weighting was ever disclosed to the candidates. There was no evidence that any weighting was applied to the scores given to external applicants.

[30] The scores given to Ms Jinkinson were:

	Mr Maw	Mr Davenport
Teamwork	1	1.5
Skills	3	2.5
Experience	3	2.5
Adaptability	2	2.5
Efficiency	2	2.5
Resourcefulness	3	2.5
Potential	4	3
Longevity	5	5

When the weighting was applied, this produced a "score" of 107 by Mr Maw and 119.5 by Mr Davenport. Compared to other existing employees, this was the sixth highest score according to Mr Maw and the fifth highest according to Mr Davenport.

[31] On 14 December 2006, Mr Maw sent a memorandum to management recommending the appointment of six candidates to positions as mine technicians.

Two of those were grade controllers, two were ore spotters, one was an external candidate and the sixth was Mr Wharerau. That recommendation was accepted by Mr Wojtowicz.

[32] On 19 December 2006, Mr Wojtowicz met with Ms Jinkinson. He gave her a letter of dismissal which recorded that the reason she had not been appointed to one of the mine technician positions was that she was "unsuccessful in meeting the knowledge and skill set required." Ms Jinkinson was required to finish work immediately. She was paid two weeks' wages in lieu of notice and redundancy compensation equivalent to another two weeks' wages.

Issues

[33] The broad issue is whether Ms Jinkinson's dismissal was justifiable. That must be determined according to the test set out in s103A of the Employment Relations Act 2000 (the Act):

> **103A Test of justification**
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[34] In this case, the process which led to Ms Jinkinson's dismissal involved two distinct steps. Firstly, Oceana Gold disestablished her existing position of grade controller and incorporated all her duties into the new mine technician position. Secondly, Oceana Gold decided that Ms Jinkinson ought not to be appointed to one of the new mine technician positions.

[35] For the defendant, Ms Brook accepted that Ms Jinkinson was entitled to challenge the genuineness of the decision to disestablish her position. As to the second step, Ms Brook relied on the decision in *New Zealand Fasteners Stainless Ltd v Thwaites*.[3] She submitted that, in the absence of a specific contractual right, "a redundant employee has no entitlement to be redeployed to a different position, i.e. a

[3] [2000] 2 NZLR 565 (CA)

position that is not substantially similar to that previously held by the employee." This submission largely reflected paragraph [25] of the Court of Appeal's decision:

> [25] In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment.

[36] Referring to paragraph [22] of the decision in *Thwaites*, Ms Brook accepted that Ms Jinkinson was entitled to be considered for redeployment to a mine technician position but submitted that she was not entitled to be appointed to that position. On this basis, Ms Brook submitted that it was not open to the Court to consider the merits of the decision by Oceana Gold not to appoint Ms Jinkinson to a mine technician position and that the scope for review of the process for appointment was limited. She submitted, "It is enough for the Defendant to genuinely consider the Plaintiff for redeployment."

[37] The decision in *Thwaites* was made in the context of the Employment Contracts Act 1991 and the jurisprudence relating to personal grievances as it was in early 2000. The subsequent enactment of the Employment Relations Act later in 2000 and, in particular, the amendments made to it in 2004 have substantially altered the law in this area.

[38] The most significant change has been the enactment of s103A set out above. As the full Court made clear in *Air New Zealand v V*:[4] "In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss." In this case, a critical step in deciding to dismiss Ms Jinkinson was the decision that she would not be appointed to one of the mine technician positions. Put another way, had Ms Jinkinson been appointed to one of the mine technician positions, she would not have been

[4] [2009] ERNZ 185 at paragraph [37]

dismissed. Thus, the selection process and its outcome must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.

[39] The other major change has been the enactment of a statutory duty of good faith in s4 of the Act, the first part of which is:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[40] Subsection (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process. Addressing this provision, Ms Brook invited me to draw a distinction between cases in which employees are being selected for redundancy in a downsizing process and cases in which employees were being selected for redeployment to alternative positions. She submitted that the provisions of s4(1A)(c) apply to selection for redundancy but that they do not apply to "the assessment of staff for possible redeployment in lieu of redundancy."

[41] I do not accept that submission. As noted earlier, the decision to disestablish Ms Jinkinson's existing position as a grade controller and the decision not to appoint her to one of the mine technician positions were both essential aspects of the employer's actions leading to her dismissal. Had either decision been made differently, she would not have been dismissed. In carrying out the selection process, therefore, Oceana Gold was undoubtedly proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. Those who were selected would have their employment continued. The employment of those not selected would be terminated. Section s4(1A)(c) therefore applied to that selection process.

[42] The relationship between s4(1A)(c) and s103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with s4(1A)(c) will not be justifiable.

[43] In light of the conclusions I have reached above, it is apparent that the issues for review under s103A are:

a) Whether Ms Jinkinson's position as a grade controller was genuinely redundant.

b) Whether the process adopted by Oceana Gold to select people for appointment to the mine technician positions was consistent with the good faith obligations imposed by s4(1A) and otherwise met the test in s103A.

c) Whether the decision of Oceana Gold not to appoint Ms Jinkinson to one of the mine technician positions was justifiable.

Was the position genuinely redundant?

[44] The general effect of the restructuring undertaken by Oceana Gold was to combine the positions of grade controller and ore spotter in the new position of mine

technician. Appointment to the position of mine technician could be made at any of six levels. Levels two to six all involved what had previously been grade control tasks and ore spotting tasks. Level one, however, involved only grade control tasks and specifically excluded ore spotting work.

[45] The position description for a level one mine technician described tasks very similar to that of Ms Jinkinson's grade control position. Witnesses for Oceana Gold eventually conceded that the duties of the two positions were effectively the same. They asserted that the difference between the positions lay in the personal attributes required. They said that anyone appointed as a level one mine technician needed to be able to progress through the levels and therefore had to be able to work effectively as an ore spotter, a role they said required greater team work skills than grade control work.

[46] This reasoning was tenuous at best and there was little or no support for it in the contemporary documentation produced. Prior to the restructuring, there was a single level progression document for grade controllers and ore spotters in which the personal requirements were identical. Very similar personal requirements were carried over into the position description and level progression criteria for mine technicians. In all cases, there was no particular emphasis on team work and no distinction at all between the interactive skills required for grade control work and ore spotting work. The significance of these contemporary documents is enhanced by Mr Maw's evidence that he was the author of them and his agreement in evidence that they reflected his view at the time of the attributes required for the position.

[47] Equally, there was no support in the documentation for the proposition that level one mine technicians were required or expected to progress through the levels. In particular, the form of employment agreement offered to people appointed to the mine technician positions contained no such requirement. Consistent with this, Mr Maw agreed in evidence that, while he wanted appointees to progress through the levels, Oceana Gold never disciplined anyone who failed to progress and did not regard it as a disciplinary issue.

[48] A further feature of the evidence was that Oceana Gold consistently gave assurances to existing staff and to applicants for employment that training in all necessary skills would be provided. Mr Maw said that he regarded team work as a skill. It may be inferred from this that Oceana Gold would provide team work training to any employee thought to need it.

[49] I reject the defendant's case on this issue and find as a fact that the level one mine technician position was not significantly different to the grade control position occupied by Ms Jinkinson. Accordingly, her position was not genuinely redundant.

Selection process

[50] There can be no doubt that the process adopted by Oceana Gold to select candidates for the mine technician positions failed to meet the requirements of s4(1A) and was otherwise not what a fair and reasonable employer would have done in all the circumstances.

[51] The particular nature and full scope of those aspects of the duty of good faith imposed by s4(1A) have yet to be the subject of judicial decision and it is not necessary to undertake that exercise in this case. That is because, on any view of the matter, Oceana Gold failed to comply with requirements which undoubtedly form part of that duty. In particular, Oceana Gold failed to inform candidates who were existing employees what the criteria for selection were and the weight to be applied to those criteria prior to their being interviewed. That was "information relevant to the continuation of the employees' employment". As a result of that default, the employees did not have an opportunity to comment on that information prior to the selection decisions being made.

[52] A second aspect of the duty imposed by s4(1A) related specifically to Ms Jinkinson. Mr Maw and Mr Davenport agreed that she had all of the technical skills required for appointment and that the only factor which led them not to recommend her for appointment was their adverse view of her team work skills. Ms Jinkinson was never told that they held that view or, more importantly, that the future of her employment turned on it. As a result, that view was never put to her for comment

nor were the particular incidents on which that view was said to have been based. Given that this was the basis on which she was rejected for appointment and dismissed as a result, it was clearly information relevant to the continuation of her employment. As a matter of good faith, Oceana Gold was obliged to provide her with the information and give her a proper opportunity to respond to it before making the decision to dismiss her.

[53] The selection process was also deficient in many other respects. It is not necessary to go into these in detail and I simply summarise them:

a) The failure to establish selection criteria prior to the interviews meant that Mr Maw and Mr Davenport did not know what to look for and note in the course of the interviews.

b) The delay of more than two weeks between conducting the interviews and scoring the candidates, coupled with the paucity of notes made by Mr Maw and Mr Davenport during the interviews, rendered their assessments of the candidates unreliable.

c) The weighting attached to the criteria was unreasonable and inconsistent with contemporary documentation published by Oceana Gold. In particular, the very heavy emphasis on team work was at odds with the very limited references in other documents including the position description, the level progression document and advertisements. That undue emphasis was aggravated by the great weight also given to "adaptability" which Mr Maw said he regarded as an aspect of teamwork.

d) The use of almost entirely different criteria to assess internal applicants and external applicants made it impossible to fairly compare them.

e) Mr Wharerau was interviewed only by Mr Maw and not assessed according to any of the criteria adopted for other candidates, yet he

was appointed. That was fundamentally unfair to the other internal applicants.

[54] Overall, I find that the process of selection adopted by Oceana Gold was seriously flawed and fundamentally unfair.

Merits of selection

[55] In the course of cross-examination, Mr Davenport conceded that Ms Jinkinson had all of the practical skills necessary for the position of mine technician. In his evidence, Mr Maw was content to adopt Mr Davenport's assessment. They also accepted that Ms Jinkinson was keen to broaden her knowledge and improve her skills and that she was both reliable and flexible. Both men agreed that the only reason she was not appointed to a mine technician's position was their perception that she lacked the necessary team work skills.

[56] Mr Maw and Mr Davenport sought to justify their views about Ms Jinkinson's team work by referring to a number of events. When they were questioned closely about those matters, however, it emerged that they were of little real significance.

[57] Mr Davenport initially relied on three specific incidents. The first was based on a note he made in his diary that, on 24 May 2006, Ms Jinkinson had ignored another employee during a shift change. In answer to questions in cross-examination, he agreed that there were communication issues involving all of the grade controllers and that Ms Jinkinson was the one who had drawn it to his attention.

[58] The other two incidents Mr Davenport relied on arose out of events which occurred on 10 July 2006 and 20 September 2006. In answer to questions in cross-examination or from the Court, Mr Davenport said that these matters were satisfactorily resolved at the time and did not play any part in his thinking during the selection process.

[59] Mr Davenport suggested that Ms Jinkinson manipulated other staff because, on one occasion, another staff member had asked a question about Ms Jinkinson's rights. When questioned about this, Mr Davenport agreed that he had no evidence that Ms Jinkinson had prompted the other staff member to ask the question. Rather, he had assumed it. Other suggestions Mr Davenport made were similarly hollow. An example was his complaint that Ms Jinkinson went behind his back by approaching Mr Maw about a request for equipment Mr Davenport had refused. In cross-examination, Mr Davenport agreed that he had specifically told Ms Jinkinson to approach Mr Maw if she was concerned about any decision he made and that, accordingly, she was only doing as he had suggested. Another example was that, in his evidence in chief, Mr Davenport said broadly that all the other staff got on well with each other and none of them wanted to work with Ms Jinkinson. When questioned about this, Mr Davenport was only able to identify one staff member who had made such a suggestion and agreed that he did not investigate the reason for it. He also agreed that there were tensions between other staff which did not involve Ms Jinkinson.

[60] In his evidence in chief, Mr Maw made the very broad statement that Ms Jinkinson "could not work effectively with anyone who had some initiative or experience or who wouldn't just accept what she said." He said that, as a result, some other grade controllers refused to work with her. He then went on to name three other staff members he suggested were unwilling to work with Ms Jinkinson. When questioned about that evidence, Mr Maw agreed that Ms Jinkinson had raised concerns about one of those other staff. Mr Maw also agreed that, rather than investigate the issues in each case, he had simply changed the rosters to have the staff concerned work with other people. He confirmed that he had no good reason to believe that Ms Jinkinson was the cause of disharmony and that, for the most part, he had simply assumed that.

[61] Both Mr Davenport and Mr Maw agreed that they had never received a formal complaint about Ms Jinkinson from another staff member. Rather, they had formed views based on casual remarks and "grumblings". None of the events they referred to had been investigated and no disciplinary process involving Ms Jinkinson was ever initiated regarding her relationships with other staff members. Equally, no

training in team work or team work exercises had ever been conducted. Mr Davenport and Mr Maw also agreed that Ms Jinkinson had good relationships with many of the other staff, including not only grade controllers and ore spotters but also the drillers.

[62] In September 2006, Mr Davenport and Mr Maw were two of four senior staff who conducted a level assessment of Ms Jinkinson. For the category which they agreed reflected team work, Mr Maw scored Ms Jinkinson 5 out of 10 and Mr Davenport scored her 6. Mr Maw agreed that his score reflected his view that "generally she was a pretty good team player". I infer from the fact that Mr Davenport scored Ms Jinkinson higher than Mr Maw did that he regarded Ms Jinkinson's team work at least as well and probably better.

[63] When they scored Ms Jinkinson on team work in course of the selection process, Mr Maw scored her 1 out of 5 and Mr Davenport scored her 1.5. According to the explanation of the scores Mr Maw gave Mr Davenport at the time, a score of 1 reflected an assessment of "shit" which I take to mean, in this context, entirely lacking in all of the desired attributes. Neither Mr Maw nor Mr Davenport could point to any events justifying this major change in their assessment of Ms Jinkinson in the space of three months from September to December 2006. Mr Maw suggested that it was because the mine technician position required greater team work skills than the grade control position but, in light of the conclusions I have reached earlier about the nature of the positions as evident from the contemporary documents, I find this entirely unconvincing.

[64] Having regard to all of the evidence, I find that the views Mr Davenport and Mr Maw expressed about Ms Jinkinson's team work ability were unreasonable and the scores they gave her in this category in the selection process were perverse. As it emerged that the sole reason for the decision not to appoint Ms Jinkinson to a mine technician position was her perceived lack of team work, it follows that this decision was unsustainable.

Was the dismissal justifiable?

[65] For the reasons set out above, I find that the decision to dismiss Ms Jinkinson was not what a fair and reasonable employer would have done in all the circumstances. I therefore find that her dismissal was unjustifiable. That conclusion extends both to the substantive decision not to appoint Ms Jinkinson to the position of mine technician and to the seriously deficient selection process adopted by Oceana Gold.

Remedies

[66] The remedies sought by Ms Jinkinson are:

a) Reinstatement to her former position or to a position no less advantageous to her.

b) Reimbursement of the wages she has lost since her dismissal.

c) Interest on the wages reimbursed.

d) Compensation for humiliation, loss of dignity and injury to her feelings.

I deal with each of these remedies in turn.

Reinstatement

[67] Section 125 of the Act provides that, if reinstatement is sought by a successful grievant, it must be provided "wherever practicable". As the Court of Appeal has recently confirmed,[5] practicability:

> ...involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. ... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be carried out successfully.[6]

[5] *Lewis v Howick College Board of Trustees* [2010] NZCA 320.
[6] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Internmediate School* [1994] 2 ERNZ 414 (CA).

I adopt that approach.

[68] Once it is established that the employer still requires work to be done which the employee is capable of doing, this effectively places the onus on the employer who seeks to resist reinstatement to satisfy the Court that it is not practicable.

[69] In this case, it is clear that Oceana Gold still employ a number of mine technicians doing the work previously done by grade controllers. It is also clear that Ms Jinkinson is amenable to training in ore spotting and other tasks carried out by mine technicians. Mr Davenport and Mr Maw acknowledged this but said in their evidence in chief that they believed reinstatement of Ms Jinkinson was impracticable because of their view that she lacked the team work skills necessary for the mine technician role and that, as a result, she would cause disharmony in the workforce. For the reasons I have given, this view is not justifiable on the evidence and I give it no weight.

[70] On this point, I also note Mr Davenport's evidence that there has been a high rate of turnover of staff employed as mine technicians so that none of the grade controllers or ore spotters with whom Ms Jinkinson previously worked are still working for Oceana Gold as mine technicians. Mr Davenport said that he would have no personal difficulty in working with Ms Jinkinson. Mr Maw now has a position which does not involve contact with mine technicians.

[71] Ms Jinkinson was confident that she could work harmoniously with other staff on the Macraes site. This opinion was given substance by evidence that, in recent months, she has been employed by two different contractors to Oceana Gold to work at that site and has experienced no difficulty.

[72] In light of all the relevant evidence, I find that it is not impracticable for Ms Jinkinson to be reinstated and, applying s125, I must do so.

[73] As Oceana Gold no longer employs staff as grade controllers, Ms Jinkinson cannot be reinstated to her former position. The order I make, therefore, is that she be reinstated to a position no less advantageous to her than her former position. Ms

Kelly submitted that the appropriate position as at December 2006 would have been as a mine technician level two and that, in all likelihood, Ms Jinkinson would have progressed to level three after a year.

[74] As to the first part of that submission, my conclusion that Ms Jinkinson's position was not genuinely redundant would require her reinstatement to the equivalent position of mine technician level one. My further conclusion that the decision not to appoint Ms Jinkinson to one of the mine technician positions was unjustifiable, however, leads to a different outcome. Ms Jinkinson met all of the requirements in the mine technician level description document for appointment to a level two position. To that extent, I accept Ms Kelly's submission. On the evidence available to me, however, it would not be appropriate to conclude that Ms Jinkinson would have advanced to any higher level since December 2006. I therefore find that the appropriate alternative position to which Ms Jinkinson should be reinstated is mine technician level two.

[75] Given that it is now more than 3 years since Ms Jinkinson was last employed by Oceana Gold, it would be unreasonable to require reinstatement to take place immediately. Reinstatement is to take effect 20 working days after the date of this judgment.

[76] In my preliminary judgment, I found that the parties, by their conduct, had rescinded their written employment agreement and replaced it with an agreement for ongoing employment. The resumption of their employment relationship gives the parties an opportunity to negotiate a new employment agreement if they wish. Otherwise, the terms of employment which existed at the time Ms Jinkinson was dismissed must apply. If the parties are unable to agree what those terms of employment were, leave is reserved to apply to the Court to decide the matter.

Reimbursement

[77] Reimbursement of remuneration lost as a result of a personal grievance is dealt with in s128 of the Act. Subsection (2) requires the Court[7] in a case such as this to order the employer to pay the employee either the amount of remuneration lost or three months ordinary time remuneration, whichever is less. Subsection (3) confers a general discretion to order reimbursement of a greater amount.

[78] In this case, Ms Jinkinson seeks reimbursement of all the wages lost since she was dismissed in December 2006. Since December 2007, she has had alternative work with several employers but has not been continuously employed. Ms Brook submitted that this reflected a failure by Ms Jinkinson to properly mitigate her loss. In particular, Ms Brook relied on a concession by Ms Jinkinson that she had not sought work in Dunedin and only one position in Oamaru. Ms Jinkinson explained why she had not done so. She lives near Palmerston, which is a little over 50 kilometres from both Dunedin and Oamaru, and has small children. She said that the cost of commuting and child care would make work uneconomic at the basic rates of pay for the work possibly available to her in those places. That evidence was unchallenged and I accept it. In other respects, I am satisfied by Ms Jinkinson's evidence that she made sufficient efforts to obtain work during all but one part of the time since her dismissal.

[79] A factor in this assessment is that, during the time since Ms Jinkinson's dismissal, Oceana Gold has advertised vacancies for mine technicians, including positions at level one, on 14 occasions. On many of those occasions, Ms Jinkinson applied but was not appointed. Given the findings of fact I have made above which lead to the conclusion that she was suitable for appointment as a mine technician, Oceana Gold must be held responsible for extending Ms Jinkinson's loss of wages by not appointing her to one of those positions.

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[7] In their text, s128(2) and (3) refer only to the Authority but these provisions were undoubtedly intended to apply also to the Court – see the decision of the full Court in *Norske Skog Tasman Limited v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342.

[80] The one exception I make regarding mitigation is in relation to a period shortly after Ms Jinkinson was dismissed. As part of the package she received on dismissal, Ms Jinkinson was provided with access to outplacement assistance from late January 2007. Following an initial meeting with the provider, Ms Jinkinson decided not to use the service. She explained in her evidence that she declined assistance because she was seeking reinstatement and thought it would create a conflict of interest to use the outplacement services paid for by Oceana Gold to seek employment elsewhere. This was a misconception. Regardless of the remedies sought in her personal grievance, Ms Jinkinson had a duty to mitigate her loss by all reasonable means until the grievance was resolved. The evidence provided does not enable me to assess with any precision the effect of this failure on Ms Jinkinson's overall loss. I give it effect by reducing the reimbursement of wages by three months' wages calculated at the rate applicable in February 2007.

[81] In deciding the extent to which s128(3) ought to be applied, I must also take into account the likelihood that Ms Jinkinson would still be employed by Oceana Gold had she not been dismissed. In many cases, it would be difficult to say with any confidence that an employee dismissed more than three years ago would not have left for one reason or another during such a period. In this case, however, there are several factors which lead me to that conclusion. At the time of her dismissal, Ms Jinkinson was not subject to any warnings or justifiable concerns about her performance. She enjoyed the work she did for Oceana Gold and is keen to return to it. She has returned to work at the Macraes site for two other employers in recent times. Palmerston is a relatively isolated town with few alternative employment opportunities and, because her partner is employed by Oceana Gold at Macraes, she has little mobility. I find it very likely that Ms Jinkinson would still be employed by Oceana Gold had she not been dismissed. This is consistent with the assessment by Mr Davenport and Mr Maw who both scored Ms Jinkinson 5 out of 5 for "longevity" in the selection process.

[82] Subject to the reduction I have found ought to be applied in respect of her failure to take advantage of outplacement assistance, it is appropriate to apply s128(3) to order reimbursement of the whole of the wages Ms Jinkinson has lost since her dismissal.

[83] Oceana Gold is ordered to reimburse Ms Jinkinson for all of the wages she has lost from the time of her dismissal down to the date of her reinstatement, less three months' wages. I direct that calculation of that sum be based on what Ms Jinkinson would have earned had she worked during that period as a level two mine technician. Allowance must then be made for all income Ms Jinkinson has actually earned during that period and three months' wages, calculated at the rate applicable in February 2007, deducted. I leave those calculations to the parties in the first instance. If they are unable to agree, leave is reserved for either party to apply to the Court to determine the amount.

[84] In her final submissions, Ms Kelly invited me to order reimbursement not only of wages but also of bonuses and profit share payments she suggested Ms Jinkinson would have received had she remained employed by Oceana Gold. I decline to do so. That is for two reasons. At the conclusion of my preliminary decision, I directed that an amended statement of claim be filed specifying, amongst other things, the remedies sought. Reimbursement of lost wages was sought but no claim was made for any other remuneration said to have been lost. Secondly, there was no evidence that Ms Jinkinson would have received payments other than wages had she not been dismissed.

Interest

[85] The Court's power to award interest is conferred by clause 14(1) of Schedule 3 of the Employment Relations Act 2000:

> *14 Power to award interest*
> (1) Subject to subclause (2), in any proceedings for the recovery of any money, the court may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the court thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

[86] In a recent decision,[8] I discussed the anomalous and unsatisfactory nature of this provision but, until it is amended, it must be applied.

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[8] *Porteous v Chief Executive of the Department of Building and Housing* [2010] NZEmpC 67 at paragraphs [87] & [88].

[87] The purpose of an award of interest is to compensate the successful party for the loss of use of money between the time the money ought to have been paid and when it is actually paid. In this case, Ms Jinkinson will receive reimbursement of lost income up to three years and more after the time it would have been paid had she not been dismissed. While it would be arithmetically possible to calculate an award of interest in respect of each week's lost earnings, such an approach would be unduly pedantic and complex. Rather, I direct that interest be paid on the whole amount of reimbursement for a period of 18 months. As to the rate of interest, the 90 day bill rate has varied between about 2.6 percent and 3.3 percent over the last four months and is currently towards the upper end of that range. Taking a relatively cautious approach, I order that interest be paid at the rate of 5.0 per cent.

Compensation

[88] Assessment of Ms Jinkinson's claim for compensation under s123(1)(c)(i) must be based on evidence of humiliation, loss of dignity and injury to her feelings arising out of her dismissal. While her evidence included descriptions of the actions of Oceana Gold which might reasonably have caused her distress, her evidence of actually experiencing distress was contained almost entirely in two sentences of her evidence in chief where she said:

> I was extremely upset that my employment was terminated. ... I cannot describe how it felt to lose my job without warning and in full view of fellow employees.

[89] Based on this evidence, I can make only a modest award of compensation which I fix at $4,000.

Contribution

[90] Having found that Ms Jinkinson has a valid personal grievance, I am required by s124 of the Act to consider the extent, if any, to which she contributed to the situation giving rise to her personal grievance. I find that she did not contribute to that situation in a manner requiring any reduction of remedies.

Conclusions

[91] In summary, my decision is:

a) Ms Jinkinson was unjustifiably dismissed.

b) Oceana Gold is ordered to reinstate Ms Jinkinson to a position as a level two mine technician. That reinstatement is to take effect 20 working days after the date of this judgment.

c) In the event the parties are unable to agree on the terms of employment on which Ms Jinkinson is to be reinstated leave is reserved to apply to the Court to decide what the terms of employment were immediately prior to her dismissal.

d) Oceana Gold is ordered to reimburse Ms Jinkinson for the wages she has lost from the time of her dismissal down to the date of her reinstatement less three months' wages. If the parties are unable to agree on the amount, leave is reserved to apply to the Court to decide that issue.

e) Interest is to be paid on the whole of the reimbursement of lost wages at the rate of 5 per cent per annum for a period of 18 months.

f) Pursuant to s123(1)(c)(i) of the Act, Oceana Gold is ordered to pay Ms Jinkinson $4,000 as compensation for humiliation, loss of dignity and injury to her feelings arising out of her unjustifiable dismissal.

g) By operation of s183(2) of the Act, those parts of the Authority's determination in which it concluded that Ms Jinkinson was justifiably dismissed and that Oceana Gold did not breach its good faith obligations are set aside and this decision stand in their place.

Comments

[92] I am conscious that this decision is given more than five months after the hearing. The inconvenience to the parties is acknowledged. The delay has been caused to a large extent by the pressure of other matters before the Court and its limited resources.

[93] In giving reasons for my decision in this matter, I have referred to much of the relevant evidence in summary form and, in some cases, referred only to examples from the evidence. Had I done otherwise, this judgment would have been very much longer than it is and been further delayed. I record that, in the course of preparing this judgment, I have reviewed all of the evidence, both oral and documentary.

[94] In many respects, I found the evidence in chief of the defendant's witnesses distinctly unreliable. In response to persistent and well directed cross-examination, both Mr Maw and Mr Davenport were obliged to make numerous concessions which, in many instances, entirely contradicted what they had initially said. The disclosure of documents and preparation of some exhibits by the defendant was also unsatisfactory. It was only in the course of the hearing before me that the diary kept by Mr Davenport and Mr Maw's notebook were fully disclosed, revealing significant additional information. Similarly, full copies of some documents which initially had information obscured cast valuable light on important issues. In making these observations, I mean no personal criticism of Mr Maw and Mr Davenport. They had clearly been given instructions about the preparation of their evidence which they carried out.

[95] The conclusions I have reached in this case are entirely different to those of the Authority but this should not be taken as a reflection on the Authority member concerned. My earlier judgment on the preliminary issue dealt with the question of law involved in more depth than had previously been done in this Court and the reasoning I adopted was therefore unavailable to the Authority. On the substantive issues, the Authority's determination turned on its conclusion that Ms Jinkinson remained a casual employee at all times. It is also apparent that the evidence

available to the Court was distinctly superior to that provided to the Authority in both quality and completeness.

[96] I confirm that the Authority's determination that Ms Jinkinson was unjustifiably disadvantaged by the manner of her dismissal remains unchallenged and intact. Thus, the order for payment of $2,000 compensation made by the Authority on that account remains effective.

Costs

[97] Ms Jinkinson is entitled to a contribution to her costs of pursuing her claim, both in the Court and before the Authority. Given that leave has been reserved to apply for further orders in relation to several aspects of my decision, it cannot now be said when the litigation will finally be at an end. When that time comes, the parties are encouraged to agree costs. If they are unable to do so, counsel for Ms Jinkinson should file and serve a memorandum. In any event, such a memorandum must be filed within three months after the date of this judgment unless the Court extends that time. Once a memorandum has been filed and served, counsel for Oceana Gold is then to have 20 working days in which to respond.

A A Couch
Judge

Signed at 2.30pm on 4 August 2010