

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 201/10
5314360

BETWEEN JOSEPH DAVY
 Applicant

A N D OCEANA GOLD (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jonathan Mirkin, Counsel for Applicant
 Lesley Brook, Counsel for Respondent

Investigation Meeting: 21 October 2010 at Dunedin

Date of Determination: 27 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joseph Davy seeks to be reinstated on an interim basis pending final determination of his employment relationship problem that he was unjustifiably dismissed from Oceana Gold (New Zealand) Limited (Oceana Gold) whilst a person intending to work for Oceana Gold but before he could start work.

[2] Mr Davy has provided to the Authority an undertaking as to damages and an affidavit in support of the application lodged.

[3] Interim reinstatement is opposed by Oceana Gold. Seven affidavits were provided in opposition to the application for interim reinstatement.

[4] Oceana Gold says it has two alternative defences to the allegation of unjustified dismissal. The first is that an employment agreement offered to Mr Davy was conditional and the conditional offer was withdrawn after one of the conditions was not fulfilled. On that basis, Oceana Gold says that Mr Davy never became an employee. The second alternative defence is that if, on the hearing of the substantive

matter, the Authority determined Mr Davy was an employee, his termination was justified on the basis of serious misconduct.

[5] The parties attended mediation but the matter was not resolved.

Issues

[6] An injunction involves the exercise of a discretion. Mr Mirkin and Ms Brook were in agreement as to the inquiry the Authority is required to make in the exercise of its discretion. The first is to ask whether there is an arguable case and the second is to inquire where the balance of convenience lies and whether there is an alternative adequate remedy available. Finally, the Authority is required to stand back and ascertain where the overall justice lies.

The background

[7] I shall set out the relevant facts from the untested affidavit evidence and documents to provide the necessary background against which the Authority is required to exercise its discretion whether or not to grant an interim injunction. There was agreement by counsel that the events prior to 20 June 2010 were not greatly in dispute although there was a dispute about the discussion that took place preceding the signing on behalf of Oceana Gold of the individual employment agreement. There is also dispute as to Mr Davy's actions on 20 June 2010. I shall indicate the disputes as they arise in the chronology of events. The Authority is not required, at this stage, to resolve them.

[8] Mr Davy worked as a nipper for Byrnegut Mining New Zealand (Byrnegut) from February 2010 in the Frasers underground mining operation at the Macraes site in Otago. A nipper position involves predominantly moving and delivering material and equipment as directed around the underground operation. It is an unskilled position.

[9] At the time that Mr Davy worked for Byrnegut, there was an alliance contract between Byrnegut and Oceana Gold for Frasers underground mine. It is common ground that Oceana Gold was the owner in control of the site.

[10] In early May 2010, employees of Byrnegut were advised that Oceana Gold had decided to bring the alliance with Byrnegut to an end and that on 1 July 2010 Oceana

Gold would become the employer of personnel associated with Frasers underground mine.

[11] On 10 May 2010, Oceana Gold offered Mr Davy a position as a nipper commencing on 1 July 2010. Attached to the letter was an individual employment agreement. Amongst other matters, the letter referred to a condition of employment as follows:

A condition of employment is that we have access to your current personnel file to confirm satisfactory police clearance and conduct. In addition we will require access to your current pre-employment record either held by your employer or Mornington Medical Centre.

[12] Mr Davy wanted to obtain a mortgage to purchase a house in Dunedin. He wanted to have a signed employment agreement with Oceana Gold to assist him in obtaining finance. Mr Davy discussed this with the human resources manager at Oceana Gold, Patricia Schraven. There is a dispute as to the exact nature of the discussion. Mr Davy deposed in his affidavit to explaining to Ms Schraven that the bank required a countersigned unconditional contract so that he could obtain finance for a house (para.1(i)). Ms Schraven, in para.4 of her affidavit, deposes that whilst Mr Davy told her that he wanted to take the employment agreement to the bank to get a mortgage, he did not mention the word unconditional.

[13] On 14 June 2010, a few days after this conversation, Mr Davy arranged by telephone to collect the signed employment agreement from Oceana Gold's offices. He did so on 15 June 2010. The agreement at that time had been signed by Mark Cadzow, chief operating officer on behalf of Oceana Gold. Mr Davy then deposed in his affidavit to using the employment agreement for the purposes of obtaining a mortgage.

[14] On 20 June 2010, Mr Davy was working in the mine. He used a cigarette lighter to cut a piece of rope. Although Mr Davy believed that any fire was extinguished completely, the rope continued to smoulder and then ignited, leading to a fire underground. The fire was extinguished by shift supervisor Aaron Newlove using a fire extinguisher.

[15] There is a dispute about how the supervisor came to the storage area in the underground mine, thereby discovering the fire. Mr Davy in para.1(m) of his affidavit deposes that he alerted Mr Newlove to the situation because he could smell smoke.

Mr Newlove, in para.6 of his affidavit, says that the only reason he went to the storage area in the underground mine was to check if Mr Davy had done the work he had asked him to do and that Mr Davy did not call him. There is no dispute that, when questioned about the fire, Mr Davy admitted responsibility and acknowledged fault for it.

[16] On 21 June 2010, Byrnegut issued Mr Davy with a final written warning for failing to use the appropriate tool for the job when cutting rope in that he used a cigarette lighter that resulted in a fire after he failed to ensure the rope had been extinguished.

[17] Oceana Gold was contacted by Byrnegut about the fire incident. Geoffrey Hender is employed by Oceana Gold as the underground operations superintendent. Mr Hender, on behalf of Oceana Gold as owner and controller of the site, wrote on 23 June 2010 to the Byrnegut manager, Scott Indian, advising that Mr Davy's site access was withdrawn on the basis that the incident was a serious breach of safety that put Mr Davy and his fellow workmates at risk. The use of the cigarette lighter as a tool to cut poly rope was described in the letter as a serious breach of safety in that appropriate tools were not used and a Hot Work Permit was not sought prior to using a naked flame in an uncontrolled environment. Mr Hender notified the Department of Labour about the fire as a fire in a mine is a *high potential incident*.

[18] Mr Davy was advised by Mr Indian of the decision by Oceana Gold to withdraw his site access and that he could not therefore continue to work for Byrnegut. He was paid out for the balance of his employment with Byrnegut until 30 June 2010 in accordance with the earlier advice about termination of the contract between Byrnegut and Oceana Gold.

[19] On 28 June 2010, Mr Davy received a letter from Mr Cadzow dated 25 June with the subject being *Unsatisfactory Personnel File*. That letter provided:

Dear Joseph,

We have been advised that your site access to Oceana Gold's Macraes operation has been removed because of a safety incident on the 24th of June 2010.

Prior to the incident and the removal of site access you had been offered employment with Oceana Gold subject to a satisfactory employment record with Byrnegut. Due to the recent incident you are advised that the offer of employment is withdrawn.

[20] Mr Davy lodged a statement of problem with the Authority on 3 August 2010. In that statement of problem, reinstatement was not sought as a remedy. An amended statement of problem was lodged with the Authority on 13 September 2010 and reinstatement was sought as a remedy. An application for interim reinstatement was then lodged with the Authority on 29 September 2010 and it was only after that application that the parties attended mediation.

Arguable case

[21] Ms Brook conceded on behalf of Oceana Gold that Mr Davy had an arguable case for unjustified dismissal but did not have an arguable case for permanent reinstatement.

[22] In terms of the arguable case for unjustified dismissal, I find it is arguable that Mr Davy was an employee of Oceana Gold when the individual employment agreement was signed on behalf of the company.

[23] If Mr Davy was an employee, it is arguable that his dismissal was unjustified. Oceana Gold relied on the employment agreement still being conditional and that condition not having been fulfilled by virtue of the safety incident on the employment record with Byrnegut and withdrew the offer of employment.

[24] Mr Davy accepts his actions in terms of the lighter and rope. The arguable case if Mr Davy was an employee of Oceana Gold is whether there were matters that Mr Davy could have advanced at a hearing before termination by way of explanation or mitigation that could have gone towards his employment continuing with Oceana Gold.

[25] In terms of the seriousness of the conduct, the affidavit evidence from the respondents is that fire is regarded as one of the biggest risks to an underground worker. Smoking is allowed except near explosives and enclosed areas in Frasers underground operation because of the absence of methane gas danger. Mr Davy deposes to using the lighter because he was not provided with tools. There is a dispute about whether Mr Davy had other tools with him that day - affidavit of Quinton Gibbons who was working on 20 June 2010 with Mr Davy when he cut the rope with a lighter. There is the dispute outlined earlier about whether Mr Newlove was alerted to the smell of smoke by Mr Davy.

[26] Ms Brook submits that the fact Mr Davy, then an employee of Byrncut, was issued with a final warning was not relevant to the substantive determination of the matter. I find it arguable that a fair and reasonable employer would consider this as one of the circumstances.

[27] It is conceded that there is an arguable case about justification of the dismissal but Ms Brook submits there is no likelihood of permanent reinstatement – *Counties Manukau District Health Board v. Trembath* [2001] ERNZ 847. The Court of Appeal judgment in *Madar v. P&O Services NZ Ltd* [1999] 2 ERNZ 174 was referred to in *Trembath*. The Court of Appeal effectively approved a statement in the Employment Court at first instance that:

Overall justice required the Court to decline interim reinstatement where it was foreseeable that permanent reinstatement would be refused.

[28] Whilst recognising that reinstatement is a primary remedy, Ms Brook refers to issues such as the practicality of reinstatement given Oceana Gold's obligations towards its employees in terms of health and safety and matters of contribution to support her submission that it is foreseeable, in this case, that permanent reinstatement would be refused.

[29] At this stage without assessing relevant strengths and weaknesses of the arguments I conclude that it is arguable, in the sense of there being a tenable arguable case for permanent reinstatement for Mr Davy.

Balance of convenience

[30] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not when considering the balance of convenience.

[31] I indicated to the parties that unfortunately, due to other investigation meeting commitments, I would not be able to give them a date for a substantive investigation meeting until February 2011.

[32] Mr Davy, in his affidavit, refers to the financial hardship he has suffered and that he has found it hard to obtain any other employment despite attempting to do so. Mr Davy is the main earner for his family and has three children. He states in his affidavit that he moved to Dunedin in reliance on his job with Byrncut and

subsequently purchased a home in the belief that he had work with Oceana Gold. Mr Davy states in his affidavit that he needs work now and that monetary payment in the future will not address his needs.

[33] Against that, Oceana Gold says that Mr Davy's reinstatement on an interim basis is a risk for it in terms of its obligations to provide a safe workplace for its employees. Mr Hender deposes in his affidavit to the awareness that a fire underground is one of the biggest risk to employees. Underground vehicles and equipment are fitted with aqueous film-foaming foam systems, fire extinguishers are carried, there is training, underground personnel carry oxygen self-rescuers at all times, there is the provision of emergency refuge chambers and the existence of systems such as the hot work permit. There is the legal requirement to report and fully investigate any incident of fire.

[34] Mr Newlove, in his affidavit, deposes that if he had not found the fire when he did, it could have been catastrophic and that the smoke was already toxic. Although close to the end of the shift, the personnel below the storage area underground were evacuated as a precautionary measure. A failure to adhere to good health and safety practices creates a risk for other workers.

[35] Mr Davy had been employed at the time of the incident with Byrncut for less than four months. He had been given a warning in May 2010 for not wearing a seat belt and safety glasses before the fire incident – affidavit of Robert O'Hanlon foreman at Frasers.

[36] Oceana Gold says that any financial losses could be adequately compensated for as the company has the ability to pay damages. I accept the submission of Ms Brook that in this case because of the unskilled nature of the position of nipper there is no affidavit evidence to support that interim reinstatement is required to maintain Mr Davy's skill, status or career.

[37] On final analysis therefore, in terms of balancing the convenience, I find the main consideration for the Authority is between the clear financial hardship Mr Davy will suffer if he is not reinstated on an interim basis and the potential health and safety risk to Oceana Gold if he is reinstated on an interim basis.

[38] In balancing those matters, I accept Ms Brook's submission that the potential health and safety risk is not capable of being compensated for if there is another

incident and Mr Davy or another worker is hurt. The financial hardship to Mr Davy, on the other hand, is capable of being compensated for by damages.

[39] On that basis, I find that the balance of convenience favours Oceana Gold.

Overall justice

[40] I now stand back and consider the overall justice of the case.

[41] I have found that there are arguable and serious issues to be investigated. The evidence before the Authority is untested and in affidavit form. There are some areas of dispute that are important and will require the Authority to hear evidence when the matter comes to a substantive investigation meeting.

[42] It did appear at this stage, on the untested evidence, that Mr Davy has a stronger arguable case for unjustified dismissal than for permanent reinstatement. I have found that the balance of convenience favours Oceana Gold.

[43] I am satisfied that the overall justice in this case requires that the application for interim reinstatement be declined.

[44] I shall ask a support officer to arrange with Mr Mirkin and Ms Brook for a telephone conference so that timetabling orders for further evidence can be organised, and a firm date agreed to in February 2011.

Costs

[45] I reserve the issue of costs and these can be dealt with following determination of the substantive matters.

Helen Doyle
Member of the Employment Relations Authority