

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 56  
5441417

BETWEEN                      DEAN ARTHUR HOLLIS  
Applicant

AND                              OCEANA GOLD (NEW  
ZEALAND) LIMITED  
Respondent

Member of Authority:        M B Loftus

Representatives:             Phillip de Wattignar, Advocate for Applicant  
Nic Soper, Counsel for Respondent

Investigation Meeting:        10 December 2015 at Dunedin

Submissions Received:        At the investigation meeting

Determination:                2 May 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Dean Hollis, claims he was unjustifiably dismissed on 23 October 2013.

[2]     The respondent, Oceana Gold (New Zealand) Limited (Oceana), accepts it dismissed Mr Hollis but contends the decision was justified.

**Background**

[3]     Mr Hollis worked as an Excavator in Oceana's underground mine at Macraes Flat. He lives in Oamaru and often travels to work on company provided transport.

[4]     In the early hours of 17 October 2013 Mr Hollis was working a night shift. At approximately 4am all staff were called to the surface. No explanation was given and

as a result of rumour and speculation Mr Hollis, along with other staff, feared advice of upcoming redundancies. Before surfacing he went to the toilet.

[5] Upon surfacing he was advised the call was for the purpose of completing a drug test. Such tests are performed routinely at this workplace and Oceana's ability to do this is not contested.

[6] Mr Hollis says he is often one of the last to produce a urine sample and this was once again the case. In fact he, along with another employee, had not done so by the time the shift was due to end at 7.00am.<sup>1</sup>

[7] Mr Hollis then approached the underground manager, Kevin Pattinson. He had already told Mr Pattinson he had urinated prior to surfacing and now advised he still could not provide a sample despite having some water in order to assist the process. That said, he accepts he did not have much despite being advised to drink at about 6.40am for fear he might dilute the sample. He says he told Mr Pattinson the bus was outside and he needed to get home to care for his daughter who had been sick for the last two days.

[8] Mr Hollis says Mr Pattinson told him he was not going anywhere and if he did so *that would be the end of it*.

[9] Mr Hollis says he repeated the fact he had domestic issues which led to Mr Pattinson advising the drug detection van would take him home and wait until he provided a sample. Mr Hollis says he then went and told the bus to go.

[10] Mr Hollis says that after a further half an hour and no sample Mr Pattinson approached and advised Ian Hunter, the health and safety officer, would take him home and stay until a sample had been provided. Mr Hollis says that while he did not agree, he felt he had no choice. He also accepts he considered this preferable to having the drug detection agency van take him.

[11] Mr Hollis says Mr Hunter reminded him of the employment agreement and the fact a failure to provide a sample could lead to dismissal during the trip.

[12] At approximately 11am Mr Hollis' partner, Vicki Murray, returned home. He says that by that time he had made three attempts at providing a sample but all had

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<sup>1</sup> See *Ivamy v Oceana Gold (New Zealand) Limited* [2015] NZERA Christchurch 82

failed. Mr Hunter says it was fairly obvious Ms Murray did not appreciate his presence and he chose to leave. Ms Murray's evidence would suggest Mr Hunter was right in his appraisal of her views.

[13] On returning to the mine Mr Hunter reported to Mr Pattinson and the underground manager, Matthew Mengel. While the three concluded the failure to produce a urine sample meant Mr Hollis was in breach of company policy they would try and make an appointment for him at an Oamaru medical centre.

[14] This they did but they were unable to contact Mr Hollis as he had left to go on a fishing trip soon after Mr Hunter's departure. The following morning Mr Pattinson made contact with Ms Murray who confirmed she had received his messages but had been unable to pass them to Mr Hollis as he had not taken his phone with him.

[15] Mr Pattinson then consulted various managers and, as a result, decided to commence a disciplinary process. A letter was prepared advising Mr Hollis he was required to attend a disciplinary meeting on Tuesday 22 October. It was hand delivered to Mr Hollis' home at approximately 6pm on 18 October.

[16] The letter contained a summary of the facts as seen by Oceana before advising conduct which obstructs or interferes with testing is unacceptable and may constitute serious misconduct warranting dismissal. It explains such conduct includes *an inability to provide sufficient quantities of breath or urine to be tested without a valid medical explanation*. There was also advice that *It is our view that you have deliberately avoided the programme and refusal to participate is taken as a positive result*.

[17] Mr Hollis attended the disciplinary meeting and was accompanied by his union secretary, Calvin Fisher. Oceana Gold then considered Mr Hollis' responses, concluded they were inadequate and decided to dismiss. The prime reason for this decision was the failure to produce a urine sample in the absence of a valid medical reason explaining the failure. Mr Pattinson adds that he also felt the failure to respond to attempts to arrange subsequent testing appeared to be a deliberate attempt to avoid the test.

[18] Mr Hollis was advised of his dismissal by letter dated 23 October. In reaching their decision Oceana concluded:

1. *You were unable to provide sufficient quantities of urine to be tested without a valid medical explanation.*

*Under normal circumstances a normal body produces about 60 mls per hour urine and it would be normal after 2 hours to be able to produce a sample. During the 3 hours at the mine site on Thursday 17 October when you were asked to drink coffee and water, you were still unable to produce a sample.*

2. *You did not attend the appointments made for you in Oamaru for drug testing the same day (17 October) or the following day and failed to have a valid reason for this.*

*You stated during your explanation of events that you did not have your phone with you. ... It is our view that as you had been made aware that the inability to produce a sample is considered serious misconduct, by choosing not to check your phone messages during this period you were deliberately trying to avoid the drug testing.*

3. *You understood the Oceana Gold (New Zealand) Limited drug and alcohol policy and the repercussions of it.*

*You explained that you were unaware of the consequences of the policy however in light of a blanket testing at Fraser's Underground Mine during September and the increase in awareness around the Company's zero tolerance approach to drugs and alcohol we do not accept this as mitigation.*

## **Determination**

[19] Oceana accepts it dismissed Mr Hollis. In doing so it also accepts it is required to justify the dismissal.

[20] Section 103A of the Act states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.*

[21] As already said Mr Hollis was not the only person dismissed due to a failure to provide a urine sample when Oceana's staff were tested on the morning of 17 October 2013.<sup>2</sup> The parties to this grievance asked it be adjourned pending the outcome of Mr Ivamy's case which was heard a while ago. Oceana justified Mr Ivamy's dismissal and it is clear the decision informed the approach taken in this matter with a number of the ancillary issues argued on Mr Ivamy's behalf absent here.

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<sup>2</sup> n 1 above

[22] Mr Hollis' only claim is that he was unjustifiably dismissed. Indeed, and after the hearing of evidence, the argument became even narrower with the parties agreeing the claims outcome would be dependent on one finding.

[23] Section 103A requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind. It is Mr Hollis' view Oceana failed to do so in respect to one crucial point.

[24] It is Mr Fisher's evidence the circumstances were such that he felt there could well be a legitimate medical reason for Mr Hollis' failure to produce a sample. He says he aired this view, asked where things might go if Mr Hollis could obtain a medical certificate confirming he had a legitimate medical excuse and then offered to arrange a medical examination. Oceana's witnesses are adamant Mr Fisher did not raise the issue or offer a medical examination.

[25] The argument is that had Mr Fisher raised these points Oceana did not accept the offer and failed to follow a legitimate line of investigation. It arguably follows Oceana then failed to adequately consider Mr Hollis' response perhaps due to a closed mind.

[26] Conversely it is accepted that should I conclude this was not raised then there is little doubt Oceana's policy supported a dismissal and there was little to stop it applying that sanction. Here it should be noted Mr Hollis has, in his evidence, accepted knowledge of Oceana's policies and the consequences of non-adherence. He also accepted it was unwise to have failed to answer the various messages Oceana left on 17 and 18 October and they could have taken the view they did about that. Here I also note his rationale was not that he had left his phone at home as earlier said but had forgotten to charge its battery.

[27] The relevant submission tendered on Mr Hollis' behalf was, I must say, weak. Opposing that were the numerous points Mr Soper referred as indicating the recollection of Oceana's witnesses were, on balance of probability, more likely to be correct.

[28] Before summarising Mr Soper's submission it should be noted there is no dispute the issue of a medical examination was in Mr Fisher's mind. What Oceana is

asserting is he did not raise it with the company and may be confusing the view he did with a possible discussion he had with Mr Hollis about the issue prior to the disciplinary meeting.

[29] In support of its position Mr Soper notes:

- a. Not one of the Oceana's witnesses has any recollection of the issue being raised in the meeting and their denials went undisturbed by cross-examination;
- b. Even Mr Hollis, when asked, could not assert the issue had been raised in the meeting. He fairly accepted he could not recall;
- c. There is no mention of the issue in notes of the meeting which were prepared contemporaneously;
- d. Indeed the notes expressly state the opposite with reference to Mr Hollis being *asked if there was any medical reasons for not being able to go* and replying *there was nothing*;
- e. Mr Hollis, when asked, stated there were no glaring omissions or inaccuracies in the meeting notes;
- f. Both parties accept there was no request a decision about dismissal be deferred pending a medical examination. It is submitted this would be an odd omission if the request had been made;
- g. The parties accept there was a phone conversation between Messrs Pattinson and Fisher soon after the disciplinary meeting but before a decision had been conveyed. Both accept the issue of a possible medical certificate was not discussed and that raises the question of why not given its apparent importance. Mr Fisher could not answer that;
- h. There is no mention of this key point in Mr Fisher's letter of 30 October 2013 raising Mr Hollis' grievance. Again it is submitted this is a significant omission; and

- i. There was no immediate attempt to act on the suggestion Mr Hollis get medically examined (though there is evidence he eventually did so some five or six weeks later).

[30] Having reviewed these points I agree with Mr Soper's submission that all indicators point to it being more likely than not the issue was not raised in the meeting. There is simply no contemporaneous mention of it.

[31] It follows, given the approach of the parties, that Oceana discharged its obligation to give Mr Hollis an opportunity to respond and duly considered that response.

[32] It therefore follows, given the various concession made both by Mr Hollis and on his behalf (refer [26] above) that Oceana will then be capable of discharging the onus it carries and justifying Mr Hollis' dismissal.

### **Conclusion**

[33] For the above I conclude Oceana has discharged the onus of justifying Mr Hollis' dismissal. His claim therefore fails.

[34] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority