

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 82
5440861

BETWEEN JAMES GARETH IVAMY
 Applicant

AND OCEANA GOLD (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Richard Smith, Counsel for Applicant
 Nic Soper, Counsel for Respondent

Investigation Meeting: 5 and 6 November 2014 at Dunedin

Submissions Received: 12 November 2014 from Applicant
 21 November 2014 from Respondent

Determination: 18 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

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

[2] Mr Ivamy also claims he was unjustifiably disadvantaged by the timing of an initial drug test that commenced the chain of events which led to his dismissal. Finally he says subsequent efforts to test him outside of work hours constituted a failure to act in good faith as did the refusal of an offer he be tested on an ongoing basis in future.

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

timing of the initial test constituted an unjustified disadvantage and rejects the claim it has not acted in good faith.

Background

[4] Mr Ivamy commenced employment with Oceana in early 2011. He worked at the Macraes Flat mine which is approximately 90kms from his home in Dunedin. He generally travelled to work on a bus provided by Oceana and the trip took approximately 1¼ hours.

[5] Prior to working for Oceana Mr Ivamy had been on the site for some three years with another employer. During the entire period he was required to participate in drug screening programmes and recognises this was due to the hazardous nature of the work. He says the testing process always commenced at the beginning of a shift which, in his case and given 12 hour shifts, meant either 7am or 7pm.

[6] On 17 October 2013 that changed when staff were advised they were required to undergo a drug test at approximately 4am.

[7] At the time, Mr Ivamy was working at the bottom of the mine. He says he did not expect the call to leave the mine was for the purpose of undergoing a drug test and says he urinated prior to departing. As a result he says he was unable to produce the required sample by the time his shift was scheduled to end at 7am. He was also unable to stay on site due to a requirement he look after his son during the day. He says he advised both the underground manager, Kevin Pattinson, and the mine safety officer, Ian Hunter, accordingly.

[8] Mr Ivamy says Mr Hunter insisted he remain until a urine sample had been provided. Mr Ivamy states he repeated he was unable to do so and as he was reliant on the company-provided bus to return to Dunedin he left.

[9] Mr Ivamy says he was advised by his partner, Ms Shields, that Mr Pattinson had been telephoning when he returned home at approximately 8.30am. He says he did not respond then as he needed to deliver his daughter to school and his wife to work. When he returned he noticed he had missed a number of telephone calls from Mr Pattinson and given their number Mr Ivamy decided to consult with his union about his rights regarding the drug testing procedure prior to responding.

[10] At approximately 9.30am Mr Pattinson and Mr Ivamy spoke. Mr Ivamy says Mr Pattinson asked that he complete the drug testing procedure by either going to the testing agency's premises in Dunedin or having the testing agency visit him at home. While both alternatives were, in his view, contrary to Oceana's drug testing procedure, Mr Ivamy agreed to the testing agency visiting his home as his union had advised it would be a *good idea* for him to complete the testing process.

[11] The testing technician, Scott Haines, arrived at approximately 10.10am and the required sample was provided. Mr Haines immediately determined the sample was *diluted* and therefore unsuitable for testing purposes.

[12] Mr Ivamy says that as he intended being away for the weekend he offered to provide a further sample on Monday 20 October but was told that would not be acceptable to Oceana and Mr Haines could return at 3pm. Mr Ivamy advised he would be out collecting his wife and daughter then and says Mr Haines responded by suggesting he come to the testing company's facility at 3.30pm. Mr Ivamy says he immediately said he was not happy with that as by then he would have been awake for some 24 hours and needed to sleep.

[13] Mr Ivamy continued to care for his son until he picked up his wife and daughter around 3pm. He says he then returned home, went to bed and slept until approximately 10pm.

[14] In the interim Mr Haines, who claims Mr Ivamy had agreed to come to the agency's site at 3.30pm, phoned Mr Pattinson and advised accordingly. He rang again shortly after 3.30pm and advised Mr Ivamy had not appeared. He also advised Mr Pattinson that while the sample provided that morning was dilute there were indications it would have provided a *non-negative* result.

[15] The news Mr Ivamy had not completed the test led to further attempts by Mr Pattinson to contact him. At approximately 6pm his calls were answered by Mr Ivamy's mother-in-law who mistakenly advised Mr Ivamy had already departed for a weekend hunting trip.

[16] The following day Mr Pattinson consulted various managers and, as a result, concluded Mr Ivamy had had ample opportunity to comply with the drug and alcohol policy and his failure to do so was grounds for a disciplinary investigation. A letter was prepared advising Mr Ivamy he was required to attend a disciplinary meeting at

10am on Tuesday 22 October. It was hand delivered to his home at approximately 6pm on 18 October. It contained a summary of the facts as seen by Oceana though one of those is contentious in that Oceana states *An appointment was made for 3.30pm at the agency and you were informed not to drink in the meanwhile* (see [12] and [14] above).

[17] The letter advises deliberate conduct which obstructs or interferes with testing is unacceptable and may constitute serious misconduct warranting dismissal. It explains such conduct includes:

- a. the dilution of a urine specimen by, for example, adding water or drinking excessively prior to providing the specimen; or
- b. being unable to provide sufficient quantities of breath or urine to be tested without a valid medical explanation; or
- c. not reporting to the collection site at the allotted time without a valid reason.

[18] 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.*

[19] Mr Ivamy attended the disciplinary meeting and was accompanied by a union official. Mr Ivamy says he reiterated he was not deliberately trying to avoid the test and indicated a preparedness to take one immediately. He goes on to say:

In the early stages of the disciplinary meeting I was told that the drug testing on 17 October was not a "random test" but a test based on "reasonable cause". I was not however advised why the company had reason to believe that I, or any other person, was using drugs. I denied using any drugs and reiterated at the meeting that I was prepared to take a test immediately.

[20] The fact the company had been told the sample was likely to have proven non-negative if it were not dilute was also raised. Mr Ivamy says he was shocked by the suggestion and denied smoking cannabis. He said he considered it unfair for Oceana to rely on a sample that had been deemed unsuitable for testing in drawing such a conclusion. He says he again reiterated a willingness to undertake a test immediately and continue taking a weekly test if required.

[21] Oceana Gold considered Mr Ivamy's responses, concluded they were inadequate and decided to dismiss. Mr Ivamy was advised by letter dated 23 October.

[22] 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 produced a diluted urine specimen upon returning home, for example by adding water to it or drinking excessive amounts of water before the specimen was collected.*
3. *You did not attend the drug testing arranged for you on that same afternoon or provide a valid reason for not attending.*

You stated during your explanation of events you claimed you missed the agreed 3.30pm appointment that was made with NZDA because you were asleep, and will sleep until 10.30pm. However, when Kevin Pattinson phoned at 6pm that night he was told that you were away until Monday 21st. It is our view that you chose not to attend the drug test arranged for you on Thursday 17 October and then failed to contact us that you missed this appointment you were deliberately trying to avoid the drug testing.

4. *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 the mitigation.

Determination

[23] As already said Oceana accepts it dismissed Mr Ivamy. In doing so it also accepts it is required to justify the dismissal.

[24] 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.

[25] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is

clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis.

[26] Essentially Mr Ivamy is trying to argue there is no evidence he used drugs in the mine on the night of 16-17 October 2013 and that as a result he could not be dismissed. That approach misses one key point. Mr Ivamy was not dismissed for actually using drugs. He was dismissed for undermining Oceana's attempts to test him.

[27] As already said Oceana's policies advise serious misconduct may include conduct which obstructs or interferes with drug testing. Such conduct includes a failure to report for testing when required; an inability to provide an adequate sample and the dilution of a sample by, for example, excessive drinking prior to the provision of a sample.

[28] While Mr Ivamy has suggested he was unfamiliar with the policy and did not know the detail I conclude his awareness was adequate. That is confirmed by his acknowledgment this was so when questioned at the investigation meeting and his decision to contact his union before responding to Mr Pattinson calls. He admitted the reason for that was he knew he was potentially in trouble and it was serious.

[29] Having considered the evidence I conclude Oceana was entitled to conclude such conduct had occurred. It is clear Mr Ivamy failed to provide a sample when required.

[30] It is also clear from the evidence of Professor David Gerrard, a Professor in Sports Medicine with extensive experience in anti-doping, that Mr Ivamy's inability to provide a sample within the three hours available was extremely unusual, especially as he had been encouraged to drink an appropriate amount during that time. There is then Professor Gerrard's evidence the subsequent provision of a dilute sample mid-morning indicted excessive consumption of water in the intervening period and his answer, which I accept, that the amount Mr Ivamy concedes he drank after returning home (250mls) is incompatible with the subsequent dilute sample.

[31] While not expressed in the same way as the Professor the evidence also shows Oceana's managers had sufficient knowledge of these matters to reach a similar conclusion and their knowledge was illustrated in their letters.

[32] Having considered the evidence I hold Oceana was entitled to conclude Mr Ivamy had engaged in conduct designed to undermine the testing process.

[33] Turning to process. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[34] The evidence clearly shows Oceana put its concerns and allowed Mr Ivamy an opportunity to respond. It also shows the explanations were considered and I conclude it was not surprising they failed to convince Oceana that he had a valid explanation. As his answers at the investigation meeting confirmed that is because he concentrated on establishing he had not taken drugs on the night of the test and felt he could rectify the issue by making offers regarding future tests. Those answers miss the point. The allegation was not that Mr Ivamy had taken drugs but that he had avoided the testing process. That failure was in the past and not something that could be rectified by a future reaction.

[35] That though is not necessarily the end of the issue. As said in opening there are other issues Mr Ivamy raises as a challenge to the decision to dismiss. They are the timing of the test; the demand he be tested outside work hours; the error regarding his whereabouts on the evening of 17 October; the fact Mr Haines suggested he would have failed the test and an allegation that influenced the decision to dismiss ([14] above); the refusal to accept his offer of future testing and pursuit of an argument as to whether the test was 'random' or 'for cause'.

[36] The timing argument fails to impress. There is nothing in the policy that says when testing should occur. There are then the circumstances which led to this attempt to test.

[37] In recent times there has been considerable public discussion about workplace death and injury along with the obligation on an employer to provide a safe and healthy workplace. Those are absolute obligations which are emphasised by statute.¹

[38] The evidence shows Oceana was told staff had become used to a regime under which testing occurred at the beginning of a shift. If there was no test staff concluded

¹ Health and Safety in Employment Act 1992 (HSE Act)

there was no longer a risk and some had taken to consuming drugs in the workplace later in their shifts. Even if there was no truth to this Oceana was under an obligation to address the issue. It did.

[39] The argument Mr Haines' suggestion Mr Ivamy would have failed the test influenced the decision also fails. That is because, once again, Mr Ivamy was not dismissed for taking drugs but more importantly Oceana's witnesses and the answers they gave convinced me that was not the case.

[40] Turning to the alleged requirement Mr Ivamy undergo the test outside of work hours. Again this fails to convince me Oceana was wrong to dismiss. First Mr Ivamy agreed to this, or at least he did so in respect to a test in the morning and accepts he did so on union advice. With respect to the afternoon test I must say I prefer Mr Haines' evidence that Mr Ivamy agreed but even if that were not the case it would not make much difference. The prime allegation was Mr Ivamy had avoided being tested on site prior to leaving and that event was already a past occurrence by the afternoon of 17 October.

[41] Similarly the incorrect advice as to his whereabouts given by Mr Ivamy's mother-in-law is, I conclude, irrelevant. That is because Oceana appears to have accepted it was wrongly advised and, once again, the offence for which Mr Ivamy was dismissed had already occurred. That, as already said in paragraph [34], is the reason why the refusal to accept offers of future testing also fails. Oceana was, I conclude, entitled to reject that as adequate as it does not explain or excuse the original failure.

[42] Finally there is the issue of whether or not this test was 'random' or 'for cause'. This is raised as there is an argument the test was contrary to Oceana's policy if it was 'for cause'. Such a test is one which targets an individual and his or her ability to perform their work.

[43] That is not what occurred here. This was a randomly timed test of all individuals present on site. It was not aimed at a particular individual and his or her ability to perform their work but a response to concerning information Oceana received about a pattern of behaviour by multiple staff.

Conclusion

[44] Having considered the evidence I conclude Oceana has discharged the onus it carries and justified Mr Ivamy's dismissal. His claim therefore fails.

[45] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority