



## **The Employment Agreement**

[4] There is a signed individual employment agreement dated 26 May 2005. It says:

### *II TERM*

*You are employed on a casual basis to support our permanent workforce at peak times, to provide cover when required, or to undertake work that is only required irregularly. You are employed hour by hour to work as and when required. There is no guarantee any hours of work will be offered to you, unless an offer of a specific engagement for hours within a particular period of days has been given by us in writing. These terms of employment apply to each hour's engagement.*

[5] There are other provisions in the agreement that reflect casual employment. For example, holiday pay is paid each pay period. The agreement refers to the employee's entitlement to make themselves unavailable for casual work at any time. There are no minimum or ordinary hours of work.

[6] In practise, Ms Jinkinson worked on a consistent basis initially following a shift pattern of four days on, four nights on, then four days off. That shift pattern changed in October 2006 to eight days on and four days off. Infrequently, Ms Jinkinson was told that no work was available because of the conditions or production requirements so she (and others in the same situation) did not work and were not paid for those periods. Ms Jinkinson occasionally took days off, again without being paid but on at least one occasion was paid at a day in lieu of a statutory holiday.

[7] Despite the provisions in the agreement, Ms Jinkinson was mostly not paid holiday pay each pay period. A lump sum was paid to her at her request in November 2006 even though she did not then take annual leave.

[8] From all this I conclude that it remained part of Ms Jenkinson's terms of employment that she would only work as and when required by Oceania Gold. Hers was not and did not become a contract for permanent employment.

### **Ms Jinkinson's work**

[9] Ms Jinkinson was engaged as a grade controller. That work involved taking samples of ore for delivery to the laboratory for testing. There were several other grade controllers and they worked in pairs alongside a driller. The evidence is to the

effect that Ms Jinkinson quickly became proficient at the technical requirements of this work.

[10] Grade control sampling in a designated area of the mine proceeded mining in the same area. Mining is done by a mine operator who works in tandem with an ore spotter. Those employed as ore spotters and mine operators are generally engaged on permanent employment agreements. When ore spotting work was not required, ore spotters were sometimes deployed on grade control work.

[11] Around November 2006 Ms Jinkinson was on light duties as a result of an accident and did some work alongside an ore spotter. Judd Davenport is Oceania Gold's Drill and Ore Zone Supervisor. Mr Davenport showed Ms Jinkinson how to set up lasers for the diggers and things to look for to identify ore bearing rock, tasks associated with ore spotting. This was because Ms Jinkinson was not fit for her own usual work and might in the future be required to perform ore spotting work. Ms Jinkinson was also interested in developing experience in a greater range of duties.

### **The restructuring proposal**

[12] On 31 October 2006 Ms Jinkinson was given a letter advising her of a restructuring proposal that involved disestablishing the six grade control and three ore spotter positions and establishing six new fulltime pit technician positions. Some details about the proposal were included in the letter, together with a draft job description. Ms Jinkinson and other affected staff were invited to a meeting on 10 November 2006 to discuss the proposal. That meeting took place with Lindsay Maw, the Geology Superintendent. At the meeting Ms Jinkinson asked some questions which Mr Maw answered. In particular, Ms Jinkinson was told that her current light duties restriction would not affect her prospects of getting one of the new positions. Staff were also told that Oceania Gold would help anyone who was unsuccessful getting one of the new positions with finding work elsewhere in the company.

[13] Mr Maw's evidence, which I accept, is that Ms Jinkinson seemed quite excited about the proposal. At the time, Ms Jinkinson regarded herself as likely to be offered one of the new positions and she supported the proposal because of the enhanced job security offered by a fulltime permanent position and the proposed increased scope of

the work. As requested, Ms Jinkinson applied for the new positions which were eventually called mine technicians.

[14] Ms Jinkinson was interviewed for the mine technician position by Mr Maw and Mr Davenport on 20 November 2006. Six other existing grade controllers or ore spotters were also interviewed. These interviews were based on standardised questions and the employees were scored separately by Mr Maw and Mr Davenport against eight desired attributes. The attributes were weighted differently depending on their importance as assessed by Oceania Gold. I have been provided with the scoring matrixes compiled by Mr Maw and Mr Davenport. They record that Ms Jinkinson was rated 49% and 52% of the maximum score. Both interviewers scored Ms Jinkinson poorly on *teamwork* and *adaptability*, the two attributes with the highest weightings. Overall, Ms Jinkinson was ranked 6<sup>th</sup> and 5<sup>th</sup> of the seven internal interviewees.

[15] On 14 December 2006 Mr Maw sent a memorandum to his managers and the HR adviser recommending the appointment of six mine technicians. The recommendations involved one external candidate and one existing employee who was not a grade controller or an ore spotter. The recommendations did not include Ms Jinkinson. Not all those offered an appointment accepted the offer so there was a second opportunity for Oceania Gold to make an offer to Ms Jinkinson, but the company decided against doing so. There remained unfilled mine technician positions at the time Ms Jinkinson's employment was terminated for redundancy. Ms Jinkinson also applied to Oceania Gold for a number of positions advertised after the end of her employment, but without success.

[16] Mr Maw's recommendations were approved by his manager and Oceania Gold proceeded with the appointments.

### **Ms Jinkinson's dismissal**

[17] On 19 December 2006, Ms Jinkinson heard from another employee about his lack of success with the new positions and his consequential redundancy. By that time, Ms Jinkinson had heard nothing about her own fate so she decided to go to the management offices after lunch to find out what was happening. At the office, Ms Jinkinson found several others who had just been told of their new appointments. Mr Davenport was also present. He checked that Mr Maw and Tadek Wojtowicz

were able to meet with Ms Jinkinson and she was sent into Mr Maw's office. Mr Wojtowicz was the Mining Manager.

[18] Mr Maw started by telling Ms Jinkinson that she was not successful in obtaining a mine technician position. Ms Jinkinson asked why and Mr Maw told her that she did not have the skill base and would not fit into the new team dynamic. Ms Jinkinson asked where she stood now that she was redundant but wanting to continue her employment with Oceania Gold. Mr Wojtowicz told her not to burn her bridges, that as one door closes another opens, and that she should talk to Pat Scharven, the HR adviser. Mr Wojtowicz also told Ms Jinkinson that she could take advantage of the employee assistance programme.

[19] After learning at the start of the meeting about not succeeding, Ms Jinkinson was upset and tearful. She asked if she could go home early and that was agreed. She also apologised for holding them up as she could not walk out to face others outside the office until she had regained some composure. After a short while, Ms Jinkinson left the office.

[20] As part of telling Ms Jinkinson of her dismissal, Oceania Gold gave her a letter dated 18 December 2006. The letter refers to the restructuring and Ms Jinkinson's unsuccessful application for a mine technician position. It goes on to advise:

*As a result you are redundant. This will be effective from Tuesday, 19<sup>th</sup> December 2006, which will be your last day of work. You have inquired about being considered for other positions with the company and you are welcome to continue to do so.*

*We offer you the following:*

- *We will pay you two week's pay in lieu of notice, along with your holiday pay entitlement.*
- *Although you have no contractual entitlement to redundancy compensation, we are prepared to pay you redundancy compensation equivalent to two (2) week's wages. This is in addition to your two (2) week's pay in lieu of notice.*
- *We also remind you of our employee assistance programme which you and your family may access if that would be useful.*

*If you have any questions about this in the meantime, please contact myself or Lindsay Maw.*

*I would like to take this opportunity to thank you for your work for the company and wish you all the best for the future.*

*Yours sincerely,*

*Oceania Gold (New Zealand) Ltd*

*Signed*

*Tadek Wojtowicz*

*Open Cut Mining Manager*

[21] As indicated in the letter, Ms Jinkinson did not work at Oceania Gold after 19 December 2006. She was paid for the notice period and a further two week's pay as redundancy compensation. Ms Jinkinson attempted to contact Ms Schraven before Christmas, but Ms Schraven was on annual leave which was then extended because of a bereavement.

[22] Ms Schraven and Ms Jinkinson eventually met on 26 January 2007. As a result of that meeting, Oceania Gold made arrangements for Ms Jinkinson to have access to out placement assistance at its expense provided by an external agency.

[23] Ms Jinkinson raised a grievance by letter dated 15 March 2007. That letter claims that there was no redundancy situation since the number of existing ore spotters and grade controllers matched the number of mine technician positions, one of the existing employees having decided to resign during the process. Complaint is made about Oceania Gold not appointing Ms Jinkinson to vacant mine technician and mine operator positions. It is suggested that Ms Jinkinson's light duties state might have been relevant to Oceania Gold's decision. Finally it is said that the dismissal process, including selection of Ms Jinkinson as redundant, was unfair and unlawful.

[24] Despite mediation, the parties have not been able to resolve this problem.

**Genuineness of the redundancy**

[25] I am satisfied that there existed a genuine redundancy situation. Oceania Gold's evidence, which I accept, is that they anticipated mining much less gold bearing ore, but much more waste material during 2007 and into 2008 as part of the normal mining cycle. That production change potentially affected the availability of work for the casual grade controllers and the permanent ore spotters. It was therefore decided to combine both types of work into a new mine technician position, which would be permanent fulltime employment. This was a business decision that Oceania Gold was entitled to make. It meant that the casual grade controllers' positions became surplus to the company's requirements.

[26] Counsel submits that the question is whether the mine technician's role was substantially different to the grade controller's role. It is said that there is little difference in the work being performed. It is also said that labelling the former

position as casual and the latter position as fulltime does not amount to a significant change that could not have been accommodated under the existing employment agreements. The fallacy of that argument is apparent if one considers the reverse position. If grade controllers had been permanent employees, those terms would not have accommodated Oceania Gold unilaterally deciding to treat the incumbents as casual employees if there was less work available. Ms Jkinson wanted and would have agreed to a variation in her employment agreement to make it permanent, but that does not mean that her existing agreement was substantially the same as permanent fulltime employment. Because of its changed production requirements, Oceania Gold decided that the casual grade controllers' positions were superfluous.

### **Selection for redundancy**

[27] Under this heading, the point is argued that Ms Jkinson should not have been selected for redundancy on the basis of not being a *team player*. However, it is not correct to say that Ms Jkinson was selected for redundancy. She was not selected for a mine technician's position. The situation is analogous to that in *Victoria University of Wellington v. Haddon* [1996] 1 ERNZ 139. In that case procedural irregularities when considering the appointment of an existing employee for a different position with the same employer did not give rise to a personal grievance in respect of the existing employment. Accordingly, even if Ms Jkinson is right to refute the basis on which she was not offered a permanent mine technician position, that would not give rise to a grievance in respect of her casual grade controller position.

### **Breach of good faith**

[28] Section 4(1A)(1)(c) of the Employment Relations Act 2000 requires an employer who is proposing to make a decision that is likely to have an adverse effect on the employee's continuation of employment to give the affected employee access to relevant information and an opportunity to comment before any decision is made.

[29] There is complaint that the selection criteria and the assigned weightings used in the decision about the mine technician positions were not disclosed to Ms Jkinson so she had no opportunity to comment before they were used to decide not to continue her employment. Counsel referred to *Coutts Cars Ltd v. Baguley* [2001] 1 ERNZ 660 and *Nee Nee & Ors v. TLNZ Auckland Ltd*, 30 March 2006, Travis J, AC13/06. Both

cases dealt with the selection of existing employees for redundancy when the employers wanted to reduce the number of employees in a particular category. In such cases, the employer was obliged to disclose the criteria by which the selection was made. *Nee Nee* makes the point that s.4(1A) of the Employment Relations Act 2000 is now also relevant to this circumstance.

[30] Neither *Coutts Cars* nor *Nee Nee* assists Ms Jkinson. This is not a case about selection for redundancy. Ms Jkinson's employment as a casual grade controller was to end once Oceania Gold made the decision to disestablish those positions. The only remaining point was when that employment would end. The criteria and weightings for the new mine technician positions were not relevant to that decision and did not need to be disclosed as part of the consultation about the dismissal. In *Hayden v. Wellington Free Ambulance Service* [2002] 1 ERNZ 299, the Employment Court held that good faith obligations were limited to the existing employment relationship rather than a proposed relationship. In that case, the employee was employed under a fixed term agreement, but had applied for permanent employment. An offer in respect of the application for permanent employment was withdrawn before it was accepted. The Court rejected a submission that the good faith obligations in respect of the fixed term employment were relevant to resolving the litigation about the withdrawn offer. *Hayden* must apply similarly to the current problem.

[31] It follows that Oceania Gold did not breach its good faith obligations by not specifically disclosing the criteria and weightings used for assessing the mine technician's application.

[32] It is submitted that the dismissal of Ms Jkinson does not meet the statutory test for justification. There is an argument that there was no genuine redundancy situation, but I do not accept that point for the reasons expressed above. As the Employment Court said in *Simpson's Farms Ltd v. Aberhart* [2006] 1 ERNZ 825, longstanding principles about substantive justification for redundancy were not intended to be revisited by the introduction of a statutory test of justification.

[33] However, there is one part of the way in which Oceania Gold dealt with the dismissal of Ms Jkinson where it fell below what a fair and reasonable employer would have done in the circumstances. Oceania Gold did not make arrangements for Ms Jkinson to be told of the dismissal in circumstances where she could have been

accompanied by a support person. Oceania Gold knew that Ms Jinkinson expected to be offered one of the new positions, that she had missed out, that she would be given notice to finish work that day, and that she would find all this distressing. Oceania Gold should have ensured that Ms Jinkinson had the opportunity to have a support person with her during that meeting. The grievance that arises from this failure is better seen as one of unjustified disadvantage rather than unjustified dismissal.

### **Remedies**

[34] To a large extent Ms Jinkinson's evidence about distress related to loss of her job and a failure to secure a permanent position at that time and later. Ms Jinkinson disagrees with the critical assessment about her teamwork ability and that is also the source of some of her upset. None of that evidence is relevant for the purposes of assessing proper compensation related to the failure to give her the opportunity to be properly supported when told of her dismissal. That breach did result in a measure of avoidable distress. I assess appropriate compensation at \$2,000 and order Oceania Gold to pay that sum to Ms Jinkinson.

[35] In light of the genuineness of the redundancy there can be no award for the claims of reinstatement or lost remuneration.

[36] Ms Jinkinson did not contribute in a blameworthy manner to the grievance.

### **Summary**

[37] Ms Jinkinson's employment was unjustifiably affected to her disadvantage by Oceania Gold so she has a personal grievance. Oceania Gold is ordered to pay Ms Jinkinson \$2,000 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[38] Costs are reserved.

