IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 9/09
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: On the papers - submissions received 30 January and 19 February 2009

Appearances: Richard Smith, Counsel for the Plaintiff
Lesley Brook, Counsel for the Defendant

Judgment: 13 August 2009

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 her employment came to an end, Ms Jinkinson made a number of claims against Oceana Gold. Those claims were investigated by the Employment Relations Authority which gave its determination on 17 January 2008 (CA 5/08).

[2] In its determination, the Authority reviewed aspects of the written agreement between the parties and noted the manner in which it operated in practice. The Authority then said:

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

[3] That conclusion affected the way in which the Authority then determined Ms Jinkinson's claims that the redundancy was not genuine and that she had been unfairly selected for redundancy.

[4] Ms Jinkinson challenges the Authority's conclusion about the nature of her employment by Oceana Gold. If she is successful in that challenge, she wishes to pursue her claim to have been unjustifiably dismissed by reason of redundancy.

[5] Counsel were agreed that the Court should decide as a preliminary issue the nature of the employment relationship between the parties. It was also agreed that this issue should be decided without a hearing on the basis of an agreed statement of facts and written submissions.

Facts

[6] Oceana Gold is engaged in mining in central Otago. Ms Jinkinson was employed by Oceana Gold as one of six grade controllers. Her work involved taking samples of ore for testing. It was technical work requiring a degree of training and expertise.

[7] At the time Ms Jinkinson first began work for Oceana Gold, the parties signed a written agreement. Clause II of that agreement was:

> *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.*

[8] Grade controllers employed by Oceana Gold worked in shifts and were allocated work by a roster. Two 11½ hour shifts were worked each day, a day shift and a night shift. Two grade controllers were rostered to each shift.

[9] Clause V of the agreement described such shift work. It then provided:

> *The Company requires a large degree of flexibility of its employees so that it can properly co-ordinate the various functions and continue to operate during poor weather. Accordingly, you agree that you will work overtime or shift work and that you will make yourself available for call-out and stand-by duties when this is reasonably required by the Company.*

[10] Ms Jinkinson worked on a consistent basis from May 2005 until October 2006 on a shift pattern of 4 days on, 4 nights on and 4 days off. That shift pattern was changed by Oceana Gold in October 2006 to 8 days on and 4 days off.

[11] The roster was the sole means of communicating routine shift arrangements to grade controllers, including Ms Jinkinson. They were only contacted personally when the routine established by the roster was to be varied. This occurred from time to time in two circumstances:

a) When a grade controller was unavailable to work a rostered shift, another employee would be asked to work an additional shift. This might occur when an employee was on leave or was sick.

b) When no grade control work was being done in the mine. This might be because the ground was waterlogged or only waste material was being mined. Such occasions were infrequent and, when they did occur, Ms Jinkinson was often provided with alternative work.

[12] Over the period of 19 months she was employed by Oceana Gold, Ms Jinkinson worked an average of 45 hours per week inclusive of all days off. A grade controller working the established shift pattern of 8 days on and 4 days off would have worked an average of 53⅔ hours per week exclusive of days off.

[13] Ms Jinkinson was paid fortnightly and earned an average of $1,045.82 per week. From March 2006 onwards, she received quarterly bonuses based on the overall mine performance.

[14] Oceana Gold conducted annual reviews of Ms Jinkinson's performance. The company also carried out assessments of her ability and, in September 2006, this resulted in a promotion with a corresponding pay rise.

[15] Ms Jinkinson was able to take holidays when she wished but only in accordance with clause VI of the agreement which provided:

> *If you wish to take leave by making yourself unavailable for casual work at any time, you need to give us not less than two weeks' advance notice unless that is not practical.*

[16] When Ms Jinkinson took leave, she completed a leave application form. At her request, Ms Jinkinson's holiday pay was accumulated. She was paid part of this money in November 2006 and the balance when her employment ended in December 2006.

[17] When she worked on a public holiday, Ms Jinkinson was given an alternative day's holiday on pay.

[18] On 18 December 2006, Oceana Gold terminated Ms Jinkinson's employment on grounds of redundancy. The company paid her 2 weeks' wages in lieu of notice and 2 weeks' wages as compensation.

Issue

[19] Ms Jinkinson wishes to pursue a personal grievance that she was unjustifiably dismissed by Oceana Gold. The personal grievance process is entirely a statutory one, the enactment in question being the Employment Relations Act 2000. Whether Ms Jinkinson is entitled to pursue her personal grievance must therefore be determined by reference to the provisions of that Act.

[20] A personal grievance is defined in s103 of the Act as "… *any grievance that an employee may have against the employee's employer or former employer…*" because of one of the claims set out in six subsequent paragraphs.

[21] It follows from this that it is essential to the right to pursue a personal grievance that the person seeking to do so was an employee for the purposes of the Act of the party against whom the claim is made at the relevant time. The relevant time will be when the action of the employer said to give rise to the personal

grievance occurred. Where the claim is one of unjustifiable dismissal, the relevant time will be when the dismissal occurs.

[22] In this case, that means Ms Jinkinson may only pursue her personal grievance against Oceana Gold if it is established that she was an employee of the company at the time she was dismissed on 19 December 2006. The key issue is whether that was so.

Submissions of the parties

[23] Counsel both addressed this issue by examining the nature of the overall employment arrangement between the parties at the time it was terminated by Oceana Gold. Specifically they focussed on whether it was casual employment or ongoing employment.

[24] The significance of the difference lies in the nature and extent of the parties' obligations to each other. At common law, the essence of casual employment is that an employment relationship exists only during periods of work or engagement to work and the parties have no obligations to each other in between such periods. Where the employment relationship is ongoing, a wide range of statutory rights and duties, together with some derived from the common law, apply continuously until the relationship is terminated. Those rights include access to the personal grievance process.

[25] The key points of the case presented by Mr Smith were contained in the following four paragraphs of his submissions:

> *3.* *It appears to be generally accepted that casual employment is a situation when the employee works "as and when required". Accordingly, a casual employee can have no expectation of ongoing engagements and equally there can be no expectation by the employer that the employee will accept any further engagements:* Barnes (formerly Kissell) v Whangarei Returned Services Association (Inc) *[1997] ERNZ 626.*
>
> …
>
> *5.* *It is submitted that casual employment is typically irregular and lacks continuity. There is often an element of unpredictability as to*

when particular engagements of employment will be available, hence the need for employees "as and when required". For example, waiting or bar staff employed from time-to-time by a caterer.

…

17. It is submitted that ultimately the Court ought to look at the actual realities of the employment relationship rather than the particular label ascribed to the relationship. Without this scrutiny the employment relationship could be open to abuse by an employer by, for instance, withholding entitlements open only to employees recognised as permanent

…

34. It is submitted that "casual employment" is not intended to cater for the situation where an employment relationship has a strong degree of continuity and regularity. A strong degree of continuity and regularity, particularly where there is a roster, indicates to an employee that employment will be ongoing which is inconsistent with casual employment.

[26] In addition to the decision in *Barnes* referred to in paragraph 3 of Mr Smith's submissions, he also relied on three other decisions of the Court: *Canterbury Hotel IUOW v Fell* [1982] ACJ 285, *Avenues Restaurant Ltd v Northern Hotel IUOW* [1991] 1 ERNZ 420 and *B W Murdoch Ltd v Labour Inspector* [2008] ERNZ 38.

[27] Mrs Brook framed her submissions on the basis that all employment is either "casual" or "permanent" and made the following submissions:

21. To be permanent two factors are always present:

a. hours are fixed and regular; and

b. the employee needs leave approval to not work those hours.

22. By contrast, a casual employee:

a. has no guarantee of hours of work; and

b. is not bound to accept offered work.

[28] In support of her submission that Ms Jinkinson ought to be regarded as having always been a casual employee, Mrs Brook relied on the decision in *Schofield Airport Gateway Hotel Ltd v Clarke* [1998] 3 ERNZ 629 and, to an extent, the

decision in *Barnes*. She sought to distinguish the decision in the *B W Murdoch Ltd* case.

Discussion and decision

[29] While the submissions of counsel are of assistance, they approach the issue from the end rather than from the beginning. Each party seeks to persuade me that the arrangement was of a particular overall nature and then invites me to infer from this the particular obligations they had to each other. In my view, a sounder approach is to look at the obligations assumed by the parties and then decide the nature of the relationship created.

[30] As noted above, the personal grievance rights conferred on workers by the Employment Relations Act 2000 are dependent on their having the status of employee for the purposes of the Act. The meaning of the term *"employee"* is set out in s6:

> ***6 Meaning of employee***
> *(1) In this Act, unless the context otherwise requires,* **employee**—
> *(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
> *(b) includes—*
> *(i) a homeworker; or*
> *(ii) a person intending to work; but*
> *(c) excludes a volunteer who—*
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
> *(ii) receives no reward for work performed as a volunteer.*
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
> *(3) For the purposes of subsection (2), the court or the Authority—*
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[31] The core of this extended definition is in subsection (1)(a) which is founded on the existence of a *"contract of service"*. This term is not defined in the Act but is well known at common law. Much useful analysis has been done by the English courts, a useful starting point being the dictum of MacKenna J in *Ready Mixed*

Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515:

> *A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*

[32] The language used in that statement obviously reflects a past era. It has, however, been adopted as the basis for more recent decisions. In *Nethermere (St Notts) Ltd v Gardiner* [1984] ICR 612, the English Court of Appeal conducted an extensive review of authorities. After referring to the passage from the judgment of MacKenna J set out above, Stephenson LJ described this as the *"irreducible minimum of obligation on each side to create a contract of service"*.[1] In the same case, Kerr LJ referred to the *"inescapable requirement"* of a contract of service that an employee *"be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work"* for the employer.

[33] It must be noted that the issue in both the *Ready Mixed Concrete* case and the *Nethermere* case was whether the workers in question were employees or independent contractors. The approach taken in those cases has, however, also been taken in other decisions concerning continuity of employment. The case of *Clark v Oxfordshire Health Authority* [1998] IRLR 125 concerned a nurse who was employed on an "as required" basis with no guarantee of work being available and no obligation to accept work offered. The issue was whether she was an employee only when working or whether there was a "global" or "umbrella" employment relationship which subsisted continuously. The Court of Appeal adopted the *"mutuality of obligation"* approach taken in the *Nethermere* case. It found that, in the absence of any mutual obligations binding the parties between periods of work, there was no global contract of employment between them.

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[1] Page 623 of the report

[34] This approach was further confirmed by the House of Lords in *Carmichael v National Power plc* [1999] 4 All ER 897 (HL), another case concerning continuity of employment. Citing both the *Nethermere* case and the *Clark* case with approval, Lord Irvine referred to *"that irreducible minimum of mutual obligation necessary to create a contract of service"* and the case was decided on that basis.

[35] While these decisions under common law are useful, they can only be adopted or applied in a manner consistent with the provisions of the Employment Relations Act 2000 and, in particular, s6 of that Act. Two aspects of the definition in that section are significant. The first is the inclusion in the definition of an *"employee"* of *"a person intending to work"*, a phrase which is itself defined in s5:

> ***person intending to work*** *means a person who has been offered, and accepted, work as an employee; and* ***intended work*** *has a corresponding meaning.*

[36] This definition recognises that the offer of work and its acceptance creates mutual obligations between the parties sufficient to create a contract of service. Thus, whether or not there may be other mutual obligations sufficient to create an ongoing employment relationship, the worker will be an *"employee"* for the purposes of the Act from the time each offer of a period of work is made and accepted until that work is completed. This may be of particular significance where a roster is used to effectively offer periods of work to a worker well in advance of the time at which the work is to be performed.

[37] The other significant aspect of the definition in s6 is the direction in subs(2), and amplified in subs(3), about the manner in which the Authority and the Court are to decide whether there is a contract of service between the parties. The decision must be based on the *"real nature of the relationship"* between the parties. All relevant matters are to be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative. In this case, the fact that the parties have described Ms Jinkinson's employment as *"casual"* is one of the relevant matters to be taken into account but the more important inquiry must be into the true nature of the relationship. If the result of that inquiry is that the

nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form.

[38] These statutory directions impact on the third condition suggested by MacKenna J in the *Ready Mixed Concrete* case. It may also be seen as recognising that the nature of relationships may change with time and requiring the Authority or the Court to assess the nature of the relationship at the time appropriate to the proceedings. For example, where the claim is one of unjustifiable dismissal, what needs to be decided is the nature of the relationship at the time it was terminated. That may differ from what it was when the relationship was first established.

[39] In applying these statutory directions, it is important not to lose sight of the issue to which they are to be applied, that is deciding whether or not the worker is employed under a contract of service at the relevant time. That, in turn, depends on whether there was sufficient mutuality of obligation between the parties at that time.

[40] Against this background, it is also important to understand what is meant by the terms "casual" and "ongoing" or "permanent". Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[42] It is important to recognise that an employment arrangement may be varied over a period of time to the extent that its essential nature changes. Occasionally, such change will be the result of an explicit agreement between the parties. Much more often, changes occur in day to day conduct which justify the conclusion that the parties have implicitly agreed to vary their original agreement. Many of the decided cases deal with this sort of implied variation.

[43] Looking firstly at New Zealand cases, I mention three decisions. The first is the *Fell* case referred to earlier. The grievant, Mrs Jellyman, was paid as a casual employee for the purposes of the applicable award but was rostered to work 5 days per week. It was argued that her employment could be terminated by no longer including her on the roster and that this did not amount to a dismissal. At page 287 of the report, Chief Judge Horn said:

> *The history of the matter shows Mrs Jellyman as a regular member of the staff working, week by week, the hours set out above. There was continuity. Both parties were entitled to regard that arrangement as continuous. Mrs Jellyman was not just a casual, occasionally or irregularly called in for some limited or purely casual purpose. Because of the longstanding continuity she was a regular employee and therefore in our view had to be dismissed and could not be merely rostered off.*

[44] As is apparent from this passage, the Court in that case regarded regularity of work and continuity of the employment relationship as indicative of ongoing employment as opposed to casual employment.

[45] In the *Avenues Restaurant* case, the grievant worked no particular pattern of days but, other than when on holiday, had worked at least 2 days every week for 6 months. Giving the decision of the Labour Court, Finnigan J noted the decision in *Fell* and took a similar approach based on regularity of work and continuity of employment. On that basis, the Court concluded at page 287 that *"her engagement was not casual in its essence."*

[46] In the *Barnes* case, the parties entered into a written employment contract at the outset which unequivocally defined the employment relationship as casual. Initially Ms Barnes worked occasionally and only after being telephoned by the employer. After a period of time, this changed. She was included on a roster and no

longer telephoned on each occasion she worked. She then regularly worked 3 nights a week for several months. Travis J accepted the submissions of counsel for Ms Barnes based on the decisions in *Fell* and *Avenues Restaurant*. He found that the later pattern of work was sufficiently regular and continuous to make the employment ongoing, not casual.

[47] In Australian cases, a series of indicia were developed to determine whether there was an ongoing employment relationship in an employment arrangement otherwise described as casual[2]. These included:

a) The number of hours worked each week.

b) Whether work is allocated in advance by a roster.

c) Whether there is a regular pattern of work.

d) Whether there is a mutual expectation of continuity of employment.

e) Whether the employer requires notice before an employee is absent or on leave.

f) Whether the employee works to consistent starting and finishing times.

[48] To a large extent, these indicia expand on the criteria of regularity of work and continuity of the employment relationship emphasised in the New Zealand decisions. The one addition is the inclusion as a factor of the number of hours worked per week.

[49] In Canada, similar considerations have been taken into account but the emphasis has been on the regularity of work as opposed to the amount of work done. In a case involving the interpretation of the term *"employment of a casual nature"* in a statute[3], the Federal Court of Appeal concluded:

> *…the duration of the time a person works is not conclusive in categorizing employment as casual; the length of time may be a factor to be considered, but a more important aspect is whether the employment is "ephemeral" or*

[2] See for example *Licensed Clubs Association of Victoria v Higgins* (1988) 4 VIR 43; (1988) 30 AILR 497

[3] *Roussy v Minister of National Revenue* 148 NR 74

> *"transitory" or, if you will, unpredictable and unreliable. It must be impossible to determine its regularity. In other words, if someone is spasmodically called upon once in a while to do a bit of work for an indeterminate time, that may be considered as casual work. If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one.*

[50] A related attribute of casual employment emphasised in several decisions of the Canada Labour Relations Board is the unpredictability of work. For example, in one case, the Board said:[4]

> *What is a genuine casual employee? In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part-time work is automatically created: the employee is not a casual worker but a part-time one. Moreover, as soon as an employee's availability is guaranteed and assured, a part-time job is automatically created.*
>
> *Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.*

[51] In another case, the Board said:[5]

> *What do we mean when we refer to casual employees? Generally speaking, this term has been used to describe employees who are employed on a call-in basis. Usually these employees work very irregular hours as required. When they are called by an employer about their availability for work there is no obligation for them to accept the hours offered. Conversely, there is no obligation upon the employer to call the casuals to work.*

[52] The common theme of these cases is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[53] Turning to the facts of this case, there can be no doubt that Ms Jinkinson was an employee of Oceana Gold while she was working. The question is the extent to which she was an employee between shifts.

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[4] *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044
[5] *British Columbia Government Employees' Union v Canadian Imperial Bank of Commerce* 91 CLLC 16,014

[54] The employment agreement between the parties has some indications that the employment arrangement was intended to be casual rather than ongoing. The agreement itself has a front page headed *"INDIVIDUAL EMPLOYMENT AGREEMENT [CASUAL]"*. Clause II which is headed *"TERM"* begins *"You are employed on a casual basis…"*, refers to Ms Jinkinson being employed *"hour by hour"* and records *"There is no guarantee any hours of work will be offered to you…"*. Consistent with this, Clause V begins *"There are no minimum or ordinary hours of work."* Mrs Brook relied on these aspects of the agreement.

[55] Mrs Brook also submitted that, under the agreement, Ms Jinkinson was not obliged to accept any work offered to her but there is no express term of the agreement to that effect. Clause VI, which is headed *"LEAVE"* provided under the subheading *"Annual Leave"* that Ms Jinkinson could take leave by making herself *"unavailable for casual work"* but required not less than 2 weeks' notice of any such action. This proviso carries with it the clear implication that, if 2 weeks' notice was not given, Ms Jinkinson could not decline work offered to her.

[56] Other provisions of the employment agreement clearly imposed obligations on Ms Jinkinson to accept work offered to her. Clause V provided *"… you agree that you will work overtime or shift work and that you will make yourself available for call-out and stand-by duties when this is reasonably required by the Company."* Clause 1, headed *"DUTIES"* referred to the job description and then provided: *"Whilst employed by the Company you may be required from time to time to perform other reasonable duties within your capabilities, or work in other areas or locations and you hereby accept such a requirement."*

[57] The agreement contained detailed and comprehensive provisions for termination for cause, on medical grounds, if qualifications were lost or in the event of redundancy. In each case, 2 weeks' notice was required. A similar period also applied if Ms Jinkinson wished to terminate the agreement. If the parties intended this to be a casual employment arrangement under which they had no obligations to each other between periods of work, no such provisions were necessary and their presence suggests this was not what was intended.

[58] Clause 9.4 of the agreement provided:

> ***9.4 Other Employment***
>
> *During the course of your employment you will be expected to devote your full energies to this position and for this reason, together with a need to protect the Company' commercial interests, you are not permitted to engage in any other business activities without the Company's prior written consent.*

This clause clearly contemplated full time employment and was therefore inconsistent with casual employment. In particular, it was inconsistent with the statement in clause II that Ms Jinkinson was employed *"to undertake work that is only required irregularly."*

[59] Another provision of the agreement inconsistent with casual employment was clause 15 which provided *"Should you be required to relocate whilst employed by the Company and at the Company's request, the Company will assist you with all reasonable relocation costs."*

[60] Considering the agreement as a whole, it clearly imposed some ongoing mutual obligations on the parties. These included an obligation on Ms Jinkinson to accept work offered to her but not a corresponding obligation on Oceana Gold to offer her work. On the contrary, the agreement specifically provided that there was no guarantee of any hours of work. Although Oceana Gold assumed several ongoing obligations under the agreement, none of them required payment to Ms Jinkinson in the absence of work.

[61] I find that the obligations imposed by the agreement alone were not sufficient to reach the *"irreducible minimum of mutual obligation necessary to create a contract of service"*. It must be an essential element of any contract of service that the employee have an opportunity to receive payment of wages or other money. The agreement did not provide for Ms Jinkinson to be paid any money other than wages, for example a retainer. The absence of any obligation to provide work therefore meant that she could have no legitimate expectation of payment of any sort.

[62] But that is not the end of the inquiry. While the agreement defined the parties' arrangement at the outset, the time at which the nature of their relationship

needs to be determined for the purposes of this case is when it ended. During the intervening 19 months, Ms Jinkinson worked for Oceana Gold and other events occurred which are relevant to assessment of the real nature of their relationship at the end.

[63] Throughout the 19-month period, Ms Jinkinson worked extensively and consistently. Except when on leave, Ms Jinkinson worked every week and averaged more than 45 hours' work per week. She was allocated shifts through a roster. The pattern of her work was consistent and highly predictable.

[64] On the basis of these factors, Ms Jinkinson was entitled to have a legitimate expectation of continuing employment after they had obtained for a reasonable period. That created a corresponding obligation on Oceana Gold to provide her with work on an ongoing basis. I find that this obligation arose within a matter of months and certainly well before the end of the 19-month period during which Ms Jinkinson was employed.

[65] The fact that Ms Jinkinson was allocated work through a roster had additional significance. It was not recorded in the agreed statement of facts how frequently rosters were issued or how far in advance of the period to which they related. A sample roster was provided covering a period of 6 weeks. I infer from the description of this as a "sample" roster that it was typical of those issued throughout Ms Jinkinson's employment. If such rosters were issued a week or more prior to the date on which they first became effective, this alone would have rendered Ms Jinkinson an employee at all times. The roster constituted an offer of work for each shift. Once accepted by Ms Jinkinson, she became a *"person intending to work"* and therefore an *"employee"* for the purposes of the Employment Relations Act 2000.

[66] Other aspects of the parties' conduct were also consistent only with ongoing employment. Through her routine inclusion in the roster, Ms Jinkinson became an integral part of the workforce of Oceana Gold. This was reflected in the payment to her of quarterly bonuses based on the overall performance of the mine and the fact

that she was paid both wages in lieu of notice and redundancy compensation when her employment was terminated.

[67] In reality, the employment arrangement described in the original agreement was abandoned in favour of an ongoing employment relationship which was undoubtedly based on a contract of service.

[68] In reaching this conclusion, I have not overlooked clause 19 of the agreement which provided:

> *Except as provided in Clause 4 (Work Policies, Procedures and Duties) above this agreement represents a full record of the agreement entered into between you and the Company and any changes or additions to this agreement will need to be mutually agreed in writing by an authorised Company senior manager. This contract replaces all previous written or oral agreements and understandings.*

[69] Although not argued by Mrs Brook, it might be suggested that this clause prevented the agreement being varied or supplemented by conduct as that variation was not "*mutually agreed in writing*". I would reject such a suggestion. As noted above, the real nature of the relationship between the parties as evidenced by their conduct was essentially different in nature to what was described in the agreement and fundamentally inconsistent with it. The effect of the parties' conduct, therefore, was to rescind the original agreement and replace it with an agreement for ongoing employment. Formal requirements which may be necessary to enter into a contract or which apply to a variation of it do not prevent it being rescinded by oral agreement or by conduct.

[70] It is significant also that clause 19 does not specify any consequence of it not being observed. An analogy may be drawn between this clause and s65 of the Employment Relations Act 2000 which requires that all individual employment agreements be in writing. In *Warwick Henderson Gallery Ltd v Weston* [2005] ERNZ 921, the Court of Appeal concluded that failure to comply with s65 did not render the agreement ineffective.

[71] Following a line of English authority, it may even be that the agreement as a whole is unenforceable. In two cases[6], the English Court of Appeal held that any arrangement which did not impose the minimum level of mutual obligation necessary to create a contract of service was not a contract at all.

Conclusion

[72] As at December 2006, and for a period at least a year prior to that date, Ms Jinkinson was continuously an employee of Oceana Gold (NZ) Limited.

[73] The challenge is successful. To the extent that it deals with the nature of the relationship between the parties, the determination of the Authority is set aside and this decision stands in its place.

Further steps in the proceeding

[74] In the statement of claim, the first aspect of the relief sought was a declaration as to the nature of the relationship between the parties. If the challenge was successful, Ms Jinkinson also sought:

> - *A direction back to the Employment Relations Authority to determine whether the Plaintiff's selection for termination on the grounds of redundancy was justified;*
>
> ***OR** in the alternative*
>
> - *A direction that the Employment Court re-hear evidence on the matter of termination of the Plaintiff's employment on the grounds of redundancy.*

[75] The Court does not have jurisdiction to refer the matter back to the Authority. The substantive issue Ms Jinkinson now wishes to have decided must be dealt with by the Court. The current statement of claim does not state with sufficient clarity or particularity what that issue is. The next step should therefore be for an amended statement of claim to be filed in the form required by regulation 11 of the Employment Court Regulations 2000. That is to be filed and served within 28 days of the date of this judgment. Oceana Gold will then have 30 days after the date of

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[6] *Carmichael v National Power plc* [1999] 1 WLR 2042 and *Stevedoring and Haulage Services Limited v Fuller* [2001] IRLR 627.

service of the amended statement of claim to file and serve a statement of defence. The matter will then proceed before the Court in the normal manner.

Costs

[76] Although Ms Jinkinson has been successful in this challenge, the issue was a preliminary one. If she is unsuccessful in her substantive claim, costs will not necessarily follow this event. Costs are therefore reserved.

A A Couch
Judge

Signed at 5.00pm on 13 August 2009