

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Attention is drawn to the
non-publication order
referred to in paragraph 13
of this determination

Determination Number: WA
110/07
File Number 5052501

BETWEEN

GEORGIA CHOVEAUX
Applicant

AND

ACCIDENT COMPENSATION
CORPORATION
Respondent

Member of Authority: G J Wood
Representatives: Barbara Buckett for Applicant
Peter Churchman for Respondent
Investigation Meeting: 31 May and 14 June 2007 at Wellington
Submissions Received: By 26 July 2007
Determination: 13 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant, Ms Georgia Choveaux, claims that the respondent (ACC) failed to provide her with a safe workplace and subsequently unjustifiably dismissed her, ostensibly for abandonment, when it knew she was attending the bedside of her dying father.
2. ACC denies that the workplace was unsafe and considers that Ms Choveaux terminated her own employment by abandonment.

The Facts

3. On 20 August 2004 Ms Choveaux was offered what was described as casual employment with the ACC on an as and when required basis. ACC stated that each engagement would be undertaken by her as a stand alone employment arrangement and her employment would cease on the completion of each arrangement. The letter of offer also stated that if she was

offered further engagements, any terms and conditions not specified in the offer would be as specified in the original employment agreement. According to the letter ACC was also not required to offer Ms Choveaux any employment subsequent to the initial engagement, notwithstanding that she may be recognised on any list maintained by the ACC to assist in obtaining additional staff.

4. Ms Choveaux's job involved the provision of support and administration assistance to project managers in the Data Warehousing and Business Intelligence Unit of ACC. She was responsible to Mr Tim Boyd-Wilson, the Manager of Scheme Analysis. The original intention between the parties was that Ms Choveaux's employment would be casual and would fit in with her university study requirements. She started off working approximately half-time, but by the time her employment ended over two years later, she was working basically full-time hours. She had branched out into project work and acting as secretary to a number of ACC committees.
5. A large increase in Ms Choveaux's hours followed the difficulty she was having juggling two employers plus study. She had wanted to consider a job with another employer. I accept that Mr Boyd-Wilson preferred to have Ms Choveaux available more to ACC instead. That is not to say, as Ms Choveaux claims, that she was given a "permanent" job. Mr Boyd-Wilson was clear that Ms Choveaux never became a full-time "permanent" employee. I am sure that with ACC's internal procedures that had this occurred an employment agreement would have been drawn up to reflect it.
6. From 17 October 2005 Ms Choveaux commenced receiving a salary from ACC of \$35,195. Over the Christmas holiday period 2005/2006 Ms Choveaux was paid for statutory holidays, although she continued to receive 6% holiday pay in her fortnightly holiday pay. This is an unusual form of payment for somebody whose employment was supposed to terminate at the end of each "engagement".
7. In June 2006 ACC noted that Ms Choveaux had been working almost full-time for the past 11 months and would continue to do so. It was suggested that Ms Choveaux be paid annual leave together with other types of leave paid to full time staff. Ms Choveaux agreed with that proposal.
8. In August 2006 Ms Choveaux was paid a day's sick leave, yet 8 hours were deducted from her pay. When she was not at work later in October 2006 she was paid special leave.

9. By November 2005 it was therefore clear that to describe Ms Choveaux's employment as beginning and ending at the beginning and end of each engagement was completely artificial and did not reflect the real employment relationship between the parties, even if separate engagements could be ascertained.
10. Ms Choveaux worked very closely with Mr Boyd-Wilson and quickly gained his confidence, as is obvious from the above. Unfortunately Mr Boyd-Wilson was to become the subject of some disturbing emails sent from outside the ACC, but most probably written by an ACC employee who worked with or around Mr Boyd-Wilson. While Mr Boyd-Wilson was the target of these offensive emails, Ms Choveaux was mentioned, or else referred to indirectly. The first of the emails relevant to this employment relationship problem was sent on 18 February 2006. The email was sent to the Chief Executive of ACC, amongst others. It was very derogatory of Mr Boyd-Wilson, accusing him of sexual harassment and kowtowing to Ms Choveaux, who was described as:

“a stupid student who has nothing to do at work but to run around flirting and reading story books and joking around along with flirting with Mr Boyd-Wilson and dressing in quite revealing outfits.”
11. An intimate relationship was alluded to, despite it having no basis in fact. The email goes on to state that Mr Boyd-Wilson should be kept away from female staff.
12. ACC took a number of steps to ascertain who the author of that email was. The then General Manager of Human Resources investigated the matter, interviewing Ms Choveaux, amongst others. ACC also engaged a firm then known as Corporate Risks New Zealand (NI) Limited. A forensic consultant investigated the matter, but he concluded, following enquiries with the Police and Microsoft (the email ISP provider), that little information could be obtained without resort to legal avenues that would require a Court order to be effective. While follow up continued on these lines of enquiry, past experience showed they were unlikely to be fruitful, especially as no clear criminal conduct had been displayed through the email.
13. Ms Choveaux remained very concerned, nonetheless, which was to be expected. She told the former HR Manager that she was having difficulties at work as a result of the email and gave him reasons, based on personal previous life experiences, the details of which are subject to an order prohibiting publication, why she was particularly susceptible to this sort of attack. I accept that from that point on ACC were well aware of the reasons for her

genuine greater susceptibility to workplace issues such as the emails, compared to the average employee.

14. In March 2006 Mr Boyd-Wilson was subject to a complaint from one of his employees that he bullied her. Ms Choveaux was interviewed in relation to that complaint. It appeared to her that more work was being done in relation to this complaint than in relation to the email. She also believed that the complainant was quite likely to be the emailer. When this suggestion was put to the complainant she denied it and stated that she had no access to email facilities outside of work.
15. Ms Choveaux sought a similar investigation into the email as to the bullying complaint. ACC then arranged for Ms Marie Donald, the HR Account Manager for Ms Choveaux's area, to provide assistance to her and indicated that the Employee Assistance Programme was also available. Ms Choveaux was also told that it was not possible to trace the email's author but that the Police had been approached.
16. Another abusive email about Mr Boyd-Wilson was sent in April 2006. Because it had been screened by ACC's IT system it was not referred to Ms Choveaux and she only became aware of its contents much later. It did not refer directly to Ms Choveaux.
17. A more serious email about Mr Boyd-Wilson was sent to the Chief Executive and other senior managers in ACC on 11 June. It was ostensibly about ACC's restructuring processes, but was instead a crude, rude and vicious attack on Mr Boyd-Wilson. It did not refer to Ms Choveaux directly, although she quite reasonably believed that she was identified as one of the *young sluts at work*. The email also made reference to sadistic sexual fantasies. Ms Choveaux obtained a copy of this quarantined email, despite being asked not to by Mr Boyd-Wilson. She was quite distraught about its contents, particularly because of its sexual connotations.
18. Ms Choveaux sought professional advice and was advised that it would not be safe to work with the sort of person who would write such an email. Ms Choveaux was convinced that the emailer was someone she worked closely with. Although the previous complainant was the person she thought most likely to be the emailer, there were one or two other staff who she thought it may possibly be.
19. Ms Choveaux emailed Ms Donald and told her that she was stressed and scared and did not feel safe at work. She wanted ACC's assistance in trying to find the author and ensuring

that she did not have to work with them. Ms Donald replied that day stating, verbatim:

“No problem Georgia, I am speaking to someone again in Corporate Risk tomorrow as the nature of the email is extremely offensive to see if we can get anywhere. I will also attempt some internal checks.

I know its hard but try not to worry and take this too much to heart. We will try our best to resolve this issue.”

20. Corporate Risk again confirmed there was nothing further that could be done to trace the author of the email. As noted above, without a Court order Microsoft would not release information necessary to discover who the emailer was. It was clear to Corporate Risk that the emails were not of such a nature as to disclose criminal activity and therefore a Court order could not be obtained.
21. Ms Choveaux later informed Ms Donald of the reasons why she was particularly susceptible to being hurt by the content of the emails and the sorts of behaviour alluded to in them.
22. Ms Choveaux wanted ACC to clone the hard drive of the complainant’s computer so as to help ascertain whether she was in fact the emailer. ACC declined to do so as it had access to all her internal emails, the email had come from an outside source and that if an ACC computer had been used, the evidence of this would be on the server and not the PC.
23. Ms Choveaux later tried to get ACC to investigate the author of comments in a survey conducted on a confidential basis by a contractor to ACC, as the comments had some similarity with the sort of views held by the emailer. ACC was not able to do so because the surveyor refused to breach the confidentiality arrangement it had made with the people who took part in the survey and thus it would not divulge the author’s identity.
24. Following discussions with other people, Ms Choveaux discovered that scanning hard drives, writing sample analysis and “key stroke loggers” could be avenues of inquiry to help ACC discover who the emailer was. She therefore did not believe that every avenue had been tried to date, but as set out above, had had no success in convincing ACC that it should clone or seize the hard drive of the complainant’s computer.
25. I find that accordingly Ms Choveaux then chose to approach Corporate Risk direct. Ms Choveaux claims that she did so in a personal capacity and that it was merely a coincidence that she happened upon the same company as ACC had already used, namely Corporate Risk. I prefer the evidence of Mr Russell Joseph, the principal of Corporate Risk, who stated that Ms Choveaux rang him intimating that she was from ACC and telling him that it

may have a new job for Corporate Risk. This is backed up by a piece of paper which Ms Choveaux left with Mr Joseph when she met with him, where she wrote out her name and title as *PA of sorts*.

26. I accept that Corporate Risk could have been viewed, from a reading of the emails referred to above, as part of ACC itself and therefore that is not conclusive in showing that Ms Choveaux knew that the Corporate Risk referred to therein was an external company, not a part of ACC as she claimed she thought at the time. Ms Choveaux also relied on the fact that she later informed ACC that it took her less than 2 minutes with the Yellow Pages to find Corporate Risk to claim that this showed that it was merely a coincidence that she approached the same firm as ACC for assistance. I have to determine matters on the balance of probabilities and while coincidences may occur, this was a very large coincidence indeed. I conclude that Ms Choveaux's reference to the Yellow Pages was how she found out how to get hold of Corporate Risk, whom she knew had conducted investigations for ACC to date. This is consistent with Ms Choveaux's determination to find out who was responsible for the emails and is also consistent with her cutting corners and breaching confidentiality during her search. Examples of this were her accessing of the last email despite being told not to, and the provision to Corporate Risk of personal correspondence by an ACC employee without authorisation, referred to below.
27. I therefore conclude that Ms Choveaux approached Mr Joseph of Corporate Risk on 29 August 2006 with the prospect of new work and that she went to see him as he was free. She told him about the offensive emails and asked if the writing styles could be compared with someone who was under scrutiny, namely the complainant. She provided Mr Joseph with copies of handwritten and email correspondence from the complainant. This information alerted Mr Joseph to the emails one of his staff members was already investigating. This investigation by Corporate Risk had not, however, been completed, because Corporate Risk was still waiting for a response from Microsoft as to whether they would release the information required.
28. Mr Joseph gave the opinion that an assessment of the material on the complainant's computer might be of assistance, but told Ms Choveaux it was unlikely that any such material would remain on the complainant's computer. After providing the scrap of paper in lieu of a business card, Ms Choveaux told Mr Joseph not to do any further work until he heard back from her. He believed that she was going to discuss matters further with ACC

management. I do not accept that Ms Choveaux suggested actions such as analysing “key stroke loggers” to Mr Joseph, which would have proved ineffective anyway.

29. Ms Denise Cosgrove took up her position as General Manager Human Resources on 19 June 2006. Ms Choveaux went to meet with Ms Cosgrove on 6 September, unannounced, because of her concerns that not enough had been done to locate the emailer. The meeting was interrupted at some point and was of a reasonable duration in total.
30. Ms Choveaux was desperately unhappy about the fact that the emailer had not been identified. She told Ms Cosgrove, who already knew about the email issue in general terms, that she did not want to work in her workplace because she felt unsafe and that ACC could do more, such as document analysis. She said she felt like resigning.
31. Ms Cosgrove suggested three options to her. She could shift to a desk close to a senior manager, she could shift to another floor, or she could take up a new position in a call centre. None were acceptable to Ms Choveaux, who could not accept that she should have to make changes when she had done nothing wrong, that to move desks would not remove her from the perpetrator and that to move floors would make her work much more difficult. She was particularly unimpressed by the offer of work in the call centre, which to her would effectively be a demotion. I accept that Ms Choveaux was extremely upset and in tears and that she suggested that Mr Boyd-Wilson’s team should be gathered together and the “riot act” read, in reliance on Ms Cosgrove’s evidence, as she was new to the issue. Ms Choveaux also claimed that more analysis could be done on the communications of the complainant to see if she was the emailer. Ms Cosgrove rejected these suggestions as impracticable. I accept that Ms Cosgrove did not act in a bullying way during this meeting – she had no reason to do so and had only met Ms Choveaux for the first time that day.
32. Ms Choveaux wrote to Ms Cosgrove the next day expressing her distress about how the meeting went. She did not accept that there had been an adequate level of investigation, based on her meeting with Corporate Risk. She also complained that she felt re-bullied and abused by Ms Cosgrove. She told Ms Cosgrove that she was at a loss as to what to do now.
33. What she did in fact do was to leave work on 7 September, never to return as it transpired. She instructed a lawyer, Mr Shawn Kirby of Phillips Fox, who wrote to ACC the next day raising Ms Choveaux’s health and safety concerns and noting that ACC had done little to investigate the matter since March, despite Corporate Risk having told Ms Choveaux there

was a wide range of options open. A personal grievance was raised on Ms Choveaux's behalf.

34. Ms Cosgrove responded to Ms Choveaux asking whether ACC should respond to her directly or to Mr Kirby as her representative, a significant issue as matters came to pass. Ms Cosgrove was informed that Mr Kirby represented Ms Choveaux. Ms Cosgrove then sent a letter to Mr Kirby on 18 September outlining ACC's actions to address the emails concerned, noting the options given to Ms Choveaux to protect her position and offering her HR and EAP support. Ms Cosgrove then sought Ms Choveaux's decision as to which of the options she preferred. She was to be paid special leave until 19 September and was required to tell ACC which option she preferred and return to work the next day.

35. Ms Cosgrove also noted that Ms Choveaux had dealt with Corporate Risk without the knowledge or authority of her Manager. The letter then states:

"In making this inquiry, Georgia may also have breached the privacy of the other people involved in this inquiry. This is potentially a serious matter that will require further investigation."

36. Ms Choveaux was asked to communicate with Ms Helga Moon, the new HR Account Manager for Ms Choveaux's area.

37. Mr Kirby responded on 19 September raising concerns about ACC's response and noting that Ms Choveaux was a victim not a perpetrator, yet the correspondence was of a threatening nature. Mr Kirby also informed Ms Moon that Ms Choveaux's father had just been diagnosed with a terminal illness and Ms Choveaux had flown to Dunedin to be with him. He asked for an extension of seven days before a decision had to be made.

38. At this point ACC's current representative, Mr Peter Churchman, became involved. He wrote to Mr Kirby on 21 September. He asked Mr Kirby to provide particular suggestions as to how ACC might deal with the matter. ACC agreed to provide an extra seven days special leave due to Ms Choveaux's absence from Wellington and the unforeseen nature of developments with her father.

39. Mr Kirby replied on 26 September, citing amongst other things that ACC had not looked at alternatives that Ms Choveaux stated, mistakenly as I have found, that Corporate Risk had told her could be done. Mr Kirby noted that Ms Choveaux was unable to return to Wellington due to her father's illness until 4 October. Mediation was suggested for this date.

40. Mr Churchman replied noting that ACC was prepared to extend paid special leave until 4 October, *but that is the final extension*. Unfortunately, mediation could not be organised until 17 October. Mr Kirby therefore again requested an extension of special leave. I also note that he stated that Ms Choveaux wanted to continue in employment with ACC and would be interested in alternatives which maintained her level of responsibility and the ability to study. She also required further action by ACC to pursue the emailer.
41. Mr Churchman responded stating that from 4 October Ms Choveaux was on unpaid leave and she had been given three options and therefore the ball was in her court. He stated:
- “ACC has not been able to identify the sender of the three emails, despite having taken all practicable steps to do so. It has received professional advice that it is not possible to identify the sender of the emails. Having sought and obtained that professional advice, ACC is entitled to rely on it.”*
42. Ms Choveaux asked to be placed on annual leave until mediation could occur, which was agreed to.
43. On 12 October Mr Kirby wrote stating that Ms Choveaux did not accept the alternatives, because they either did not meet her safety concerns or that her remuneration and work responsibility would be reduced.
44. Mr Churchman responded on 17 October stating that Ms Choveaux’s employment was to remain that of a casual employee; in particular on the basis of the irregular hours she works. He further noted that no new emails had been received for some months and that the workplace was safe. He asked that Ms Choveaux return to work.
45. The parties then attended mediation. Unfortunately it did not resolve the issues between the parties. Immediately after the conclusion of mediation Ms Moon asked Ms Choveaux to contact her, but I find that Ms Choveaux did not register that request, which is understandable given the stress of the mediation and the illness of her father. In fact, Ms Choveaux left immediately after the mediation to return to her father’s bedside in Dunedin.
46. Following the mediation Mr Kirby wrote to Mr Churchman stating that Ms Choveaux intended to resign, effective the next day, if no suitable alternatives were put forward by ACC or paid special leave was not extended.
47. Mr Churchman responded stating that if Ms Choveaux had any constructive suggestions other than the removal of the alleged emailer, ACC would be happy to consider them. He

noted that Ms Choveaux was effectively asking to be put on permanent paid special leave, which ACC would not agree to.

48. ACC expected Ms Choveaux to return to work. Mr Churchman concluded by stating:

“I am advised that your client did not, as requested, make contact with Helga Moon at ACC to discuss her return to work. Your client is aware that ACC wish to raise with her certain issues regarding her alleged unauthorised contact with Corporate Risk and her apparent disclosure of confidential information. Your client, at the present time, would therefore appear to be absent from her workplace without leave. It is not a situation which can continue.”

49. Mr Kirby replied on 30 October noting that there appeared to be no alternative position for Ms Choveaux within ACC and that she wanted ACC to ensure that she had a safe workplace. In Mr Churchman’s response he invited Mr Kirby to explain what practical steps ACC needed to take but had not. He then concluded the letter by stating:

“I note that your client has now been absent from her workplace without leave since Thursday of last week. Your client has not made contact with Helga Moon as requested. Your client is aware that ACC want her to return to the workplace. Your client is also aware that ACC has certain issues relating to her conduct that they wish to put to your client to receive her explanation. Unless your client makes contact immediately with Helga Moon and makes arrangements to attend to her workplace by 9am on Thursday 2 November, she risks an allegation of abandonment of employment.”

50. By this point Ms Choveaux’s father was gravely ill and Ms Choveaux was acting in a de facto full-time support role to him at a hospice in Dunedin. Understandably, she was under a great deal of stress, and did not want to deal with Ms Moon.

51. Mr Kirby emailed Mr Churchman on 1 November stating that he had been unable to get further instructions from Ms Choveaux, but asked that if she was not comfortable communicating directly with Helga Moon, whether Mr Churchman had any objection with him (Mr Kirby) communicating with Helga Moon on her behalf. Mr Churchman replied stating that the letter did not set out any basis upon which Ms Choveaux could legitimately feel uncomfortable about communicating with Ms Moon and that unless there was some compelling reason why Ms Choveaux should not have to do so, ACC would wish her to continue to do so. He also asked for clarification as to whether or not Ms Choveaux had resigned. Mr Churchman concluded by stating:

“You have previously been put on notice that unless your client contacts Ms Moon as requested and makes arrangements for her to return to her job tomorrow, she risks an allegation of her having abandoned her employment. That remains the situation.”

52. In the meantime Ms Choveaux did not contact Ms Moon but did in fact contact Mr Boyd-Wilson. He was informed of her whereabouts and the reasons for her absence. Mr Boyd-Wilson already knew about the perilous state of Ms Choveaux's father's health, as Ms Choveaux's aunty was also an employee of ACC and worked closely with Mr Boyd-Wilson. Unfortunately, it appears he did not pass this information on to Ms Moon, even although he had the opportunity to do so. It seems clear that Mr Boyd-Wilson, who was soon to be made redundant by ACC, had decided it was better not to get involved in the dispute Ms Choveaux was having with ACC.

53. On 3 November Mr Graham Osborne, ACC's General Manager Information Management, wrote to Ms Choveaux, copied to Mr Kirby, stating:

“Employment Status

I am writing to request confirmation in respect of your continued employment with ACC.

You have been absent from work without leave since 26 October 2006.

You haven't made contact with Helga Moon on the 26th of October as agreed to on 25 October 2006.

We communicated to you in a letter dated 31 October 2006 that you need to make contact by 9.00am on Thursday 2nd November, otherwise you risk an allegation of abandonment of employment.

We draw you attention to the ACC policy on Abandonment of Employment, which states:

Definition

An employee who fails to attend work and continues to be absent from work without notifying or obtaining approval from their manager for a period of more than 3 working days is deemed to have abandoned employment with ACC.

Explanation of absence

Employment may be terminated immediately, unless that employee can provide a satisfactory explanation for their absence and their failure to notify and obtain approval for their absence.

You have now been absent from work for 6 days without formally notifying us of the reason for your absence and without approval for the absence.

Since we have had no response from you and you have continued to absent yourself from work we must advise that if you do not attend work by Wednesday 8th November 2006 you will be deemed to have abandoned your employment.

It may be that you intend the resignation that was intimated in the letter from your lawyer in his letter of 26 October to be effective and that you are under the impression that your resignation was effective as of 5.00pm 27 October. If that is the case, then you will need to clarify that urgently to avoid the possibility of your

employment being terminated on the ground of you having abandoned your employment.

Please contact Helga Moon ...”

54. Mr Kirby replied on 6 November, questioning why he could not communicate with ACC on Ms Choveaux’s behalf as it had been advised, and accepted, since 14 September, that Mr Kirby was acting for her. He also asked for information on roles that Ms Choveaux might be able to apply for. He then advised ACC

“Georgia is currently in Dunedin with her father who is, as previously advised, very ill. Her access to computers is limited and as we are advised she has spent most of her time beside her father’s hospital bed”.

55. Without prejudice correspondence was also entered into by the parties around that time.

56. Mr Churchman responded on 6 November, stating that should Ms Choveaux wish to advance any issues that she would wish to have Mr Osborne consider in relation to her apparent abandonment of her employment she should let them have them prior to 5pm on Wednesday 8 November. No response was received.

57. Mr Osborne subsequently wrote to Ms Choveaux confirming that her employment was terminated effective 9 November 2006 as she had been absent from work without notification or approval since 25 October.

58. Ms Choveaux became aware of the termination of her employment on 10 November. Her father died the next day. Less than two weeks later Ms Choveaux instructed her present solicitor, Ms Barbara Buckett, who wrote to Mr Churchman on 23 November disputing the termination, noting the link in time between the termination and Ms Choveaux’s father’s death, and stating:

“To avoid further harm and damage we must require that our client’s employment be reinstated forthwith without prejudice to her rights to make a further claim against the employer for compensation, costs, etc.

The other matters concerning the safety of her work environment can be addressed once she returns to work.”

59. Mr Churchman responded defending ACC’s position, and noting that Ms Choveaux continued to refuse to come back to work despite a number of requests and having been

given clear warning of the consequences. He then stated, demonstrating ACC's analysis of this matter:

“In paragraph 4 you make the extravagant claim that the reason your client was not at work was because she was “at her father’s deathbed”. As you will no doubt be well aware, ACC had, upon request, granted your client an extended of paid special leave (not deducted from any sick leave or holiday entitlement) to visit her father in Dunedin. Although your client’s then solicitor subsequently informed ACC that Ms Choveaux had returned to Dunedin, in the days immediately after the mediation on 25 October, that was not advanced as the reason for her absence from work. To the contrary, the emails coming from your client’s then solicitor focused on issues relating to the workplace and indicated that your client’s refusal to attend at the workplace emanated from those matters.”

60. The parties have attended mediation again and have attempted to resolve matters between them, but unfortunately this has not been possible. It therefore falls to the Authority to make a determination.

The Law

61. The Act does not categorise workers into “casual” or “permanent” staff. The only special category of employment is fixed term employment, and even then the requirements of s. 66 must be met before an employer can rely on the expiry of a fixed term. In all other cases workers are able to challenge the termination of their employment unless the termination is at the initiative of the worker themselves, such as through a resignation or abandonment of their employment.

62. In *EM Ramsbottom Ltd v. Chambers* [2000] 2 ERNZ 97 the Court of Appeal concluded that a company’s failure to make inquiry of a worker as to his intentions after apparently abandoning the employment can not constitute that worker’s dismissal. The Court of Appeal went on to hold, however, that there was substantial force in the submission that where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold in contending that the employment ended on the employee’s initiative in that way. The Court of Appeal went on to hold that the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly indicated an intention to finally end his or her employment.

63. In *Lwin v A Honest International Co Ltd* [2003] 1 ERNZ 387 the Employment Court took note of the above comments in *Ramsbottom* and stated:

“34. Mr Simon was clearly concerned whether the plaintiff had in fact abandoned her employment and was duly cautious in drawing that inference and took the very proper step of writing to her on 18 June to clarify the position. Had that letter been sent to the correct address then the defendant would have discharged its obligation of trust and fair dealing in the employment relationship. Unfortunately for the parties, the letter did not go to the correct address. This did not allow the plaintiff to clarify the situation but nor did it permit the defendant to assume that she had abandoned her employment and to arrange another teacher in her stead.

35. For these reasons I must conclude, contrary to the Authority’s determination, that there was no abandonment of employment and that the actions of the defendant constituted dismissal.”

64. All of the cases make it clear that the words in specific clauses in the employment agreement and the facts of the case are vital. Also relevant are the provisions provided for in the Employment Relations Amendment Act 2004. In particular, s.4(1A) provides:

“The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...”

65. The good faith obligations in the Employment Relations Act, in particular the 2004 amendment, place a higher threshold on employers when considering abandonment than previously, I find. This is because the duty of good faith clearly goes beyond the need for trust and fair dealing as identified by the Court of Appeal in *Ramsbottom*. Of course, the duty on an employer to be responsive and communicative has to be reciprocated by its employees.

66. Finally, where there is a dismissal or other action by an employer that is challenged by an employee, s.103A provides that the question of whether such a dismissal or action was 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 would have done in all the circumstances at the time the dismissal or action occurred.

Determination

67. Despite ACC’s initial labelling of Ms Choveaux’s employment as casual, this does not affect her claims before the Authority as her employment could not be lawfully terminated at the end of each engagement, as ACC initially envisaged, because of the ongoing work available to Ms Choveaux and because no explanation was given to her at the time as to the

reason for the ending of each or even any engagement referred to, in breach of s.66. In any event all workers are entitled to be treated fairly and reasonably by their employers whatever their employment status. Furthermore, by the time Ms Choveaux's employment was terminated, the reality of her situation was far from a "casual" worker, for all the reasons given above.

68. Rather the issues in this case are two fold. First, Ms Choveaux was in dispute with ACC over the safety of her workplace, and second, was not in a position to return to work when her employment terminated, ostensibly by abandonment, because she was at her father's deathbed.
69. Regarding Ms Choveaux's safety at work, ACC engaged Corporate Risk as an external consultant to assist it in determining who sent the offending emails. I accept the information provided by Corporate Risk, which shows that despite its best efforts, it was not possible to locate the source of the emails and that the other methods suggested by Ms Choveaux, such as checking computer hard drives and undertaking a "key loggers" analysis, would not have proved fruitful.
70. Furthermore, I am satisfied that ACC was supportive of Ms Choveaux, offering her counselling, alternative seating options and a different job. While Ms Choveaux may have been correct that different seating options may not have directly assisted her, the fact is there would have been benefits from her shifting position to be closer to senior management. Thus, while Ms Choveaux was entitled to her view that it could be seen as unfair that she was the one who had to change when she had done nothing wrong, ACC was taking steps to try and minimise the risk to her. The same analysis applies to the alternative job. While Ms Choveaux may well have been correct that it was not as attractive a job, she would have been provided with training to do the job and salary and working conditions could have, with discussion, been equivalent to her old job, I conclude.
71. Ms Choveaux claims that ACC should have launched a full scale employment investigation into the matter. The difficulty for ACC was that it had a number of potential staff it had to investigate and even then it was not beyond the realms of possibility that the emailer could have been an outsider, albeit one closely associated with an employee who had dealings with Mr Boyd-Wilson. Had ACC launched such an investigation, despite having no evidence to suspect any particular staff member (beyond doing what it did, which was to check all internal emails) it would simply have been intruding on a large number of ACC's employees' work time, focus and even potentially their individual rights, without any

demonstrable prospect of success. Furthermore, ACC did put the allegations to the person Ms Choveaux believed was the emailer and this was met with a full denial. Given the overlap of the emailing issue with the complaint into Mr Boyd-Wilson's behaviour, it therefore can not be said that ACC failed to investigate the person Ms Choveaux claims to have been the emailer.

72. In this context it must be remembered that as time went on the likelihood of any further emails diminished, simply because there had been none since June. Therefore, by the time Ms Choveaux did absent herself from the workplace, the prospect of further emails was diminishing by the day and the risk was reducing in severity. I therefore accept that ACC took all practicable steps to provide a healthy and safe work environment for Ms Choveaux.
73. In terms of abandonment or dismissal, as a large public sector corporation responsible for the provision of support services for people subject to various types of injuries, including the kind that Ms Choveaux suffered from, ACC can have been under no illusions as to the gravity of her situation and thus her susceptibility to pressures such as the emails at that time of her life. ACC also knew that Ms Choveaux was pursuing a personal grievance with it through her lawyer based on an alleged lack of safety in the work place. On the other hand, Ms Choveaux was able to contact her lawyer and Mr Boyd-Wilson, so therefore she could have contacted Ms Moon. Although I accept her evidence that she was greatly stressed at the time, I find that she could have contacted Ms Moon had she really wished to do so. There is no doubt, however, that her lawyer and Mr Boyd-Wilson were likely to be a more sympathetic audience than Ms Moon.
74. ACC has relied on its policy in relation to abandonment, but Ms Choveaux was never informed of this policy until the week before her employment was terminated. Even so, I accept that the sending of the policy to her meant that she knew how ACC would deal with the matter. This issue must, however, be assessed on the basis that the policy was not contractual, unlike many other cases relied on.
75. This case can be distinguished from *Ramsbottom* in that despite of Ms Choveaux's threat to resign, ACC knew that she had not resigned and was instead trying to resolve the employment relationship problem with ACC about her safety at work. Neither are the cases relied on by ACC, such as *Loh v. Pauanui Publishing Ltd* [2002] 1 ERNZ 64 (CA) and *Bragg v. Ocean Beach Freezing Co Ltd* [1985] ACJ 249, on point because those were cases of dismissal for repudiatory conduct. Ms Choveaux was not dismissed for repudiatory

conduct but rather her employment was terminated by way of abandonment which, as highlighted above, is a different matter entirely, involving no dismissal.

76. On the other hand, this was not a case like *Lwin*, because ACC had taken steps to try and contact Ms Choveaux directly, but had received no reply, despite Ms Choveaux having received ACC's correspondence. Rather this case has more in common with (although clearly not on all fours with) *Spotless Services (New Zealand) Ltd v. Morrison* (unreported, Shaw J, WC23/06, 4 December 2006), because of negative conclusions drawn about a worker without focus on some key matters. That case involved an employee being denied leave for surgery and then having her employment terminated for abandonment when she took the leave that was necessary once she had decided to have the surgery. The Judge noted at paras.[75] ff:

“But the vexed history between Spotless and Ms Morrison since April 2005 led to its decision about her leave being overly influenced by that suspicion [being a pre-arranged trip to Australia]. By the time she had advised her surgery date and sought leave for it, I find that Mr Starling had sufficient knowledge to rebut his suspicions or was unable to see past them. He had sufficient information to alert him to the fact that a medical condition was serious and justified an operation.

Until the application for leave for surgery, Ms Morrison's absences for a number of reasons including her health had been tolerated and accommodated, even if reluctantly. Unfortunately for Spotless, her managers had reached breaking point at the very time she had a genuine and pressing reason for leave which had every prospect of reducing her subsequent absenteeism or at least depriving her of good reason to make the repetitive requests which preceded the operation.

The reasons Mr Starling gave on 26 August 2005 for refusing her leave were that he had limited information about her condition, as well as her history of unrelated work absences. However, I find that Mr Starling did have sufficient information and his concerns about the date of her return to work should have been allayed by Ms Morrison's 8 September 2005 letter when she advised the date in writing. It is also the case that Ms Morrison had an entitlement to sick leave up to 21 September 2005.

Ms Morrison's history of unrelated work absences was not relevant to whether leave should have been given for important surgery. I therefore find that the refusal to give leave was unreasonable and it is not possible that Ms Morrison abandoned her employment. She had notified Spotless of her surgery dates as soon as she knew them. She also advised them of her reasons for absence and the date of her return. Spotless knew she was absent for her surgery and recuperation and knew she wanted to return.”

77. *Pitolua v. Auckland City Council Abattoir* [1992] 1 ERNZ 693 can be distinguished on the basis that the parties were interpreting an award clause which has extra-statutory effect, unlike here where ACC relied on its internal policy. Given that ACC generated the policy, any ambiguity in it should be construed in favour of Ms Choveaux. The policy can be interpreted in two ways in relation to the words *without notifying or obtaining approval*

from an employee's manager. ACC believes that *or* should be construed as meaning *and*. That would certainly make more sense in the context of what a standard abandonment clause might provide. However, the policy does contain the word *or*, which means that Ms Choveaux is right to argue that while she may not have obtained specific approval from her manager for her absence, she certainly had notified him. Even although I accept that Ms Choveaux rang Mr Boyd-Wilson rather than Ms Moon as instructed, because she had no intention of following that particular instruction at the time, it was not Ms Choveaux's fault that Mr Boyd-Wilson did not, because he was trying to keep out of the dispute, inform Ms Moon or any other manager in ACC about the call from Ms Choveaux.

78. When taken together with the fact that Mr Kirby had requested ACC's approval to contact Ms Moon on Ms Choveaux's behalf, I conclude that ACC were acting unreasonably in this matter by pursuing abandonment, despite Ms Choveaux's defaults. Mr Kirby could not, because of professional ethical reasons, contact ACC directly without its approval. Furthermore, Ms Moon's purpose was twofold. It was not just to get Ms Choveaux back to work, but also to set in place what in effect would have been a disciplinary investigation into Ms Choveaux's release of confidential information about another employee to Corporate Risk. In such a situation Ms Choveaux was entitled to have a representative and ACC had in the past clarified Mr Kirby's role and where communications should be sent, as Ms Choveaux was represented. Had ACC responded to Mr Kirby's request positively then the outcome of the parties' interactions may possibly have been different.
79. ACC were also aware of Ms Choveaux's father's health problems, although they had not necessarily been directly informed that he was in fact on his death bed. In any event, this knowledge would not appear to have made any impact on ACC's decision to terminate Ms Choveaux's employment, as once it became aware that her father had recently died it declined to consider reinstatement.
80. Considered in the round, I conclude that ACC knew or ought to have known that Ms Choveaux had genuine reasons for her absence and as in *Morrison* ignored them in order that it could rely on the wording of its abandonment policy. That is not sufficient to meet its obligations of good faith.
81. In the alternative, ACC could not rely on the abandonment clause because Ms Choveaux had contacted her manager and it was not Ms Choveaux's fault that her manager did not contact Ms Moon.

82. ACC, quite rightly, have never tried to justify dismissal under s.103A in these circumstances, because they did not believe a dismissal occurred. Clearly, as I found this was a dismissal, there can be no justification for it. Ms Choveaux was at her father's deathbed and as ACC accepted, if leave was sought, consideration would have been given to it. No fair and reasonable employer would have denied an employee leave in these circumstances.

Reinstatement

83. While Ms Choveaux sought reinstatement in her statement of problem, her evidence on this point was equivocal. I conclude that her reinstatement is not practicable, not only because the position she formerly held would not be available to her, as many of the tasks she carried out are no longer required by ACC, but primarily because it would place Ms Choveaux back in the situation that has caused her so much anguish, as it would return her to the same workplace. I consider therefore that reinstatement would not be in her best interests, as she perhaps implicitly understands, as she has to move on from the unfortunate situation she faced at ACC.

Compensation

84. Ms Choveaux must be compensated, but only for the fact that ACC dismissed her, although ostensibly terminating her employment for abandonment, at the very time when a fair and reasonable employer would have been supportive of her because of her family and personal circumstances. This is a significant matter in and of itself, however. The impact on Ms Choveaux was exacerbated by ACC's response to Ms Buckett's letter requiring reinstatement. To an independent reader, the letter displays no compassion for Ms Choveaux's position and the overall effect on Ms Choveaux must have been extremely serious, as her evidence and that of her counsellor attested.

85. I therefore consider that compensation in the sum of \$10,000, subject to contribution, is appropriate.

Lost remuneration

86. Ms Choveaux returned to full-time study at university in 2007. She is entitled to lost remuneration for the period between 9 November 2006 and March 2007, subject to mitigation. I am not satisfied that Ms Choveaux has mitigated her losses. She could provide no evidence of efforts to find work before she actually did so in late November. Ms

Choveaux chose to take up part-time work at that point, rather than full-time work - despite the fact that she had no university studies at that time of year. In the job market in Wellington for the types of work Ms Choveaux obtained, I am satisfied that she could have obtained full-time rather than part-time work from that date, had she chosen to do so.

87. I accept, however, that she was entitled to take several weeks to recover from the loss of her father and to seek reinstatement. It was not clear whether she got another job (but for lesser hours) after two weeks or four weeks. I therefore conclude in equity and good conscience that Ms Choveaux should be paid three weeks remuneration, less contribution.

Contribution

88. I conclude that this case involved the parties becoming locked into a battle of wills, which extended even through their representatives. Clearly, Ms Choveaux's behaviour throughout the issues in question was not ideal. She appears to have become fixated with discovering the identity of the emailer and this led her to make some questionable decisions, in particular taking initiatives without the approval of her manager, which gave ACC later cause to doubt her word. In particular, it is clear that she took confidential information relating to another employee of ACC and her work at ACC to an outside organisation, without authority. Had she contacted Ms Moon I consider that ACC would have taken this matter up in a disciplinary context, which could have had very negative repercussions for Ms Choveaux.

89. This was all part of the situation which gave rise to the grievance and therefore must be taken into account by a reduction in remedies. However, that matter was removed in time and place from the issues that led to Ms Choveaux's dismissal and was therefore no more than a minor contributory factor, warranting a 20% reduction in the remedies, because of the seriousness of the actions of ACC, raised above.

90. I make no deduction for Ms Choveaux's refusal to contact Ms Moon because ACC unreasonably refused to allow Mr Kirby to act on her behalf, particularly given the disciplinary issues that were in prospect, or for her failure to formally request leave because of her father's condition, simply because of the seriousness of her father's condition and the understandable turmoil this put Ms Choveaux's life into.

Conclusion

91. I have concluded that Ms Choveaux was not unjustifiably disadvantaged by the failure of ACC to provide her with a safe and healthy workplace.

92. I have concluded that Ms Choveaux's employment did not end by way of abandonment but rather by way of unjustified dismissal.

93. I have concluded that Ms Choveaux contributed to the situation that gave rise to the grievance to such an extent that remedies should be reduced by 20%.

94. I therefore order the respondent, the Accident Compensation Corporation, to pay to the applicant, Georgia Choveaux, \$8,000 in compensation and \$1,619.97 gross in lost remuneration.

Costs

95. Costs are reserved.

G J Wood

Member of the Employment Relations Authority