IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 173/10
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	BETWEEN	DEANNE MARGARET MCKNIGHT Applicant
	A N D	BYRNECUT MINING (NZ) LTD Respondent

Member of Authority:	James Crichton
Representatives:	Kieran Tohill, Counsel for Applicant Kerry Smith, Counsel for Respondent
Investigation Meeting:	14 June 2010 at Queenstown and 13 July 2010 by telephone
Determination:	1 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms McKnight) alleges that she was unjustifiably dismissed from her employment as Occupational Health and Safety Manager by the respondent employer (Byrnecut) at its Macraes Flat gold mine in East Otago. Byrnecut deny that it unjustifiably dismissed Ms McKnight and say that she abandoned her employment.

[2] Ms McKnight was employed from 11 April 2008 and from June 2008 reported directly to Byrnecut's Project Manager. At the time her employment came to an end, the Project Manager was Mick Hill.

[3] On 15 August 2009 Ms McKnight discovered that someone had been printing off her private emails. She was distressed by this as she considered it may have been someone within the organisation collecting information about her. As a consequence

of her distress about this event, Ms McKnight went home sick. She rang the Safety Superintendent of Oceana Gold Ltd (Oceana), the mine owner and he suggested that Ms McKnight ring Mr Redden the Mine Manager for Oceana. The results of that contact between Mr Redden and Ms McKnight was Mr Redden's request that Ms McKnight remain at home pending further contact from him.

[4] Then, Mr Hill, Byrnecut's Project Manager rang Ms McKnight at home, spoke to her husband who said that Ms McKnight was in bed unwell and hung up on Mr Hill.

[5] There were numerous attempts made by Mr Hill to ring Ms McKnight on her work cell phone from the date of her sudden departure from the work place (15 August 2009) down to the date when Byrnecut notified Ms McKnight that by reason of her continued absence, she had abandoned her employment.

[6] Mr McKnight (Ms McKnight's husband) confirmed in his evidence that he had told his wife that Mr Hill had telephoned for her. Despite that fact and despite the fact that she would have known she was to remain on shift through to Tuesday 18 August 2009, Ms McKnight did not contact her employer.

[7] Her evidence is that she relied on the initial and subsequent contacts that she had with Mr Redden and other members of the Oceana management team. The thrust of Mr Redden's advices to Ms McKnight was that he had taken the matter up with Mr Hill of Byrnecut and certainly, the evidence is that the two men had discussions about the issue.

[8] Once Ms McKnight had been absent from work for *three consecutive working days without notification to the company* and Byrnecut had made *reasonable efforts* to contact her, the effect of the abandonment of employment clause in her employment agreement (para.29 Common Terms and Conditions) was to automatically bring the employment agreement to an end on the expiry of the third day *without the requirement for notice of termination of employment.*

[9] Having received a letter from Byrnecut dated 19 August 2009 communicating that fact, correspondence from Ms McKnight's lawyers initiating personal grievance proceedings commenced shortly thereafter.

Issues

[10] It will be convenient if the Authority analyses the following issues:

(a) What was the contractual basis for the employment?

(b) Did Ms McKnight abandon her employment?

The contractual basis of the employment

[11] It is common ground that Ms McKnight was employed pursuant to an employment agreement initially documented on one page and dated 15 April 2008. Those provisions and the arrangements provided for therein, were reconfirmed by further documentation dated 1 July 2009 of which the principal document is styled *Common Terms and Conditions of Employment*.

[12] I am satisfied as a matter of fact that those documents confirm that Byrnecut was Ms McKnight's employer, that the specific person at Byrnecut to whom Ms McKnight reported was Mr Hill, the Project Manager for Byrnecut (who signed one of the documents in the 1 July 2009 package on behalf of Byrnecut) and that there was no reporting relationship or contractual link between Ms McKnight (and/or her position) to Oceana.

[13] Ms McKnight signed her acknowledgement of the terms and conditions of the employment. For our purposes, the particular clause of interest is contained at para.29 of the Common Terms and Conditions document. It reads as follows:

> *In the event the employee has been absent from work for three consecutive working days without any notification to the company, and the company has made reasonable efforts to contact the employee, the employee's employment agreement shall automatically terminate on the expiry of the third day without the requirement for notice of termination of employment.*

[14] Clearly then, it was a term of the employment agreement between the parties that the employment could be abandoned. The central question for the Authority in the present case is whether that is what happened between Ms McKnight and Byrnecut, or not.

Did Ms McKnight abandon her employment?

[15] I am satisfied the evidence clearly discloses that Ms McKnight did abandon her employment within the terms of para.29 of her standard terms and conditions. I am not persuaded by the alternative view Ms McKnight advances that in entering into various discussions with Mr Redden of Oceana she was communicating with her employer within the terms required of her by para.29.

[16] The requirements of para.29 are clear enough. First, there must be an absence from work for three consecutive working days. Ms McKnight departed the job without notifying Byrnecut on Saturday 15 August 2009. She remained absent from the employment at 7pm on Tuesday 18 August 2009 which for all practical purposes was three working days after her unannounced departure from the work place.

[17] Next, para.29 requires that the absence I have just described be *without any notification to the company*. Plainly, *the company* is Byrnecut. Byrnecut is the employer. Byrnecut is referred to throughout the common terms and conditions of employment as *The Company* and it is defined as such. Indeed, on the title page to the document, the words *Byrnecut* and *The Company* are expressed to mean the same thing so the position could not be more plain.

[18] The evidence is incontrovertible that Ms McKnight did not at any time communicate with anybody from Byrnecut during the period of her absence. She did however communicate with various employees of Oceana. In particular, she had a number of conversations with Mr Redden. She says that she relied on Mr Redden's advices to her to variously remain at home until requested to return and/or to take a month off, and so on. Undoubtedly, Mr Redden sought to intercede on Ms McKnight's behalf and gave her to understand that that was his intention. It is clear from the evidence that there were discussions between Mr Redden and Mr Mick Hill of Byrnecut about Ms McKnight. It is also clear that Mr Redden told Mr Hill that he had suggested to Ms McKnight that she remain away from the work place, despite it being plain to everybody (including Mr Redden) that he had no authority whatever for telling a Byrnecut staff member to do anything.

[19] The real question is whether, in placing her trust in Mr Redden, Ms McKnight has obviated her own duty to her employer Byrnecut. I hold that she has not obviated her duty to her employer. She remained obligated to her employer both in terms of

the provisions of para.29 and in terms of her general duty of good faith, a duty which requires her to be, amongst other things, active and communicative.

[20] She was neither of those things. She knew perfectly well that Mr Hill was trying to reach her. Her husband told me in the investigation meeting that he had told his wife that Mr Hill had rung. She would have been in no doubt that Mr Hill wanted to talk to her. Even on her analysis of the situation, Mr Redden had given her to understand that he would engage with Mr Hill and that amongst things, Mr Hill would contact her. In those circumstances, I am entitled to conclude that Ms McKnight's refusal to take Mr Hill's call or to ring him back when it suited her was not inadvertent but wilful.

[21] The next clause in para.29 refers to the requirement that the company make reasonable efforts to contact the employee. Again, the evidence on this point is clear. Once Ms McKnight disappeared from the job, Mr Hill and another Byrnecut colleague searched for her around the mine and subsequently, on that same day, Mr Hill telephoned Ms McKnight, spoke to Mr McKnight, identified himself, but was unable to speak with Ms McKnight. Then, during the balance of the days while time was running on the abandonment clause, Mr Hill made a number of other attempts to contact Ms McKnight by ringing her on the company issued cell phone. Eventually the cell phone was discovered at the work place rather than with Ms McKnight.

[22] It follows that I am satisfied that during the operative period of the three days set out in the abandonment of employment clause, Mr Hill of Byrnecut made every reasonable effort to contact Ms McKnight and that she knew or ought to have known that Byrnecut was endeavouring to contact her. I conclude that Byrnecut's efforts in attempting to contact Ms McKnight were particularly laudable because of the events of Sunday 16 August 2009 when there was a serious injury to a person working in the mine which required significant attendances from Mr Hill and other senior mine managers at Byrnecut. No doubt the absence of the Health and Safety Manager during an incident such as this would have been particularly difficult for Byrnecut.

[23] Paragraph 29 continues with the requirement that the employment agreement automatically terminates in the event that preceding conditions precedent (which I have analysed above) are made out. This automatic termination which is expressed to happen on the expiry of the third working day of absence without notification, happens *by the effluxion of time*. That is the passage of time automatically produces

the conclusion without more. In particular, as the clause spells out at the very end, there is no requirement for notice of termination of employment. Indeed, the law is that once those conditions precedent have been met, the employment relationship ceases. There is no notice of this fact required nor is it right, as Mr Tohill, contends that the letter dated 19 August 2009 from Byrnecut represents the end of the employment. The employment ended at the end of the three days of absence without notification and the letter simply confirmed the existence of that fact. The letter then is not a notice of dismissal; it just records the fact of the employment ending.

[24] In submissions filed on Ms McKnight's behalf, it is contended that Byrnecut had a duty of good faith toward Ms McKnight and that it breached that duty because:

(a) It knew that Ms McKnight had not abandoned her employment;

(b) It knew that Ms McKnight had been granted certain indulgences by Mr Redden; and

(c) It ought to have inquired of Ms McKnight at the end of *abandonment period* rather than simply noting the conclusion of the employment.

[25] I do not accept any of these contentions. First, it is not apparent on the evidence that Byrnecut knew what Ms McKnight's position was. The 19 August 2009 letter, written of course at the time these events were being played out, notes the attempts Byrnecut had made to contact Ms McKnight (including the fact that Mr Hill had identified himself when he rang Ms McKnight's home) noted the fact that Ms McKnight's personal effects had been removed from the office but that the mobile telephone had been left behind, and concluded with this summary statement:

> *… I have interpreted these actions plus your failure to contact the company as consistent with a person intending to abandon their employment.*

[26] I would have thought that was a reasonable assessment for an employer to make in all the circumstances. It was I think particularly a reasonable assessment because the immediate context was also relevant. Two days before Ms McKnight left the job never to return, she had been remonstrated with by Mr Hill (her immediate superior) for absenting herself without notification. Mr Hill described that kind of action by Ms McKnight as discourteous and well he might. But the point, for our purposes, really is that just two days before Ms McKnight left the job, she was

reminded of her obligations to inform the employer of her whereabouts and yet she chose to simply ignore that discussion.

[27] Second, it would have been apparent to Byrnecut and certainly ought to have been apparent to Ms McKnight, that Mr Redden had no authority whatever to grant Ms McKnight leave of any description. Mr Redden was clear about that when I spoke to him by telephone and it seems odd that the only person who seemed to believe that Mr Redden had the authority to grant Ms McKnight any indulgence was Ms McKnight herself. Yet she was a senior manager in Byrnecut's mine operation at Macraes Flat. She knew who her employer was. She had recently been spoken to by her employer about being absent without letting her employer know. If the matter was not fresh in her mind then it ought to have been.

[28] Finally, the suggestion that Byrnecut ought to have reopened the employment relationship or recommenced it with Ms McKnight after the abandonment period, is not supported by authority. The leading case in abandonment remains the decision of the Court of Appeal in *Pitolua v. Auckland City Abattoir* [1992] 1 ERNZ 693. That decision makes absolutely plain that there is no duty on an employer to revisit the end of the employment. When the decision in *Pitolua* was remitted back to the Employment Court before Judge Finnigan reported at [1992] 2 ERNZ 97, His Honour commented that there might well be *grievous consequences* for a loosing party in a Court decision but that did not necessarily make the decision wrong and in the instant case, His Honour was satisfied that the employer had behaved correctly.

[29] The Authority needs finally to consider the impact of the good faith obligations on parties in circumstances such as the present one. My colleague Member Arthur in his decision in *Thomas Brown v. Five Star Pork (NZ) Ltd and The Pork Market International Ltd* AA216/08 comments on this aspect. Amongst other things, Member Arthur asserts that the duty of good faith inserted by the 2004 Amendment places a higher threshold on employers than previously in considering whether a worker had abandoned a position or not.

[30] I think the first principle about good faith is that it is a two way street, or to put it another way, a double edged sword. Good faith obligations are imposed on both parties to the employment relationship and if it be true that there is a higher duty on employers since the 2004 Amendment in abandonment cases, then the same duty must be higher for employees as well. I do not think that the duty of good faith requires

parties to an employment agreement to go further than the employment agreement mandates. If the duty of good faith had been intended to replace the parties' own bilateral obligations in an employment agreement, then Parliament would have said so. The duty of good faith must only be an overlay over the terms and conditions of the parties' own bargain and can only be called in aid where the parties behaviour in respect to their own bargain is called into question. That being the case, I do not accept the proposition that the employer must reopen the employment relationship or inquire further into the reason for its having been abandoned as being accurate statements of the law.

[31] As I have made clear in this determination, I think if there had been breaches of good faith in the present case, those breaches are clearly breaches which could be sheeted home to Ms McKnight rather to Byrnecut. Ms McKnight had an obligation to be communicative and engaged with her employer, who she knew was trying to contact her. She chose to rely on a third party who she knew was not her employer to engage with her employer on her behalf and to, in effect, *sort it out.* That is not good enough. An employee must act on her own behalf with her own employer in order to fulfil her obligations.

Determination

[32] For the reasons I have enunciated above, I am not satisfied that Ms McKnight has a personal grievance.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority