

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 594
3248441

BETWEEN DAVID JAMES SKELTON
Applicant

AND NEW ZEALAND STEEL
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Lawrence Anderson, advocate for the Applicant
Carter Pearce, counsel for the Respondent

Investigation Meeting: 22 and 23 July 2025 in Auckland and by AVL

Submissions Received: 31 July 2025 from the Applicant
7 and 28 August 2025 from the Respondent

Date of Determination: 23 September 2025

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] On 25 March 2025 an interim non-publication order was issued to prevent publication of Mr Skelton’s Accident Compensation Corporation (ACC) records, Police and prison records and his sensitive medical information. The Authority also directed that such information was to be dealt with on a counsel-to-counsel basis only.

[2] It is now appropriate to make the interim non-publication order permanent, subject to the condition that it does not apply to the employment institutions. The non-publication order is necessary to preserve sensitive and confidential information about Mr Skelton to preserve his privacy, on the grounds that is in the overall interests of justice. The non-publication order does not apply to any of the information in this determination, which is a matter of public record.

Employment Relationship Problem

Mr Skelton's claims

[3] The applicant, Mr Skelton claimed he was attacked in his home on 24 May 2020 by persons known to him. He went to work the next day, but said he had to leave work early due to his injuries, and he did not return to work after that.

[4] Mr Skelton claimed he had been unjustifiably dismissed by the respondent, New Zealand Steel Limited (NZ Steel). He sought compensation for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) but not lost remuneration as he has been assessed as having been medically incapacitated since 25 May 2020, so he has not been able to work since then.

[5] Mr Skelton originally claimed he had been unjustifiably disadvantaged for “denial of access to redundancy compensation”, however that claim was withdrawn prior to the Authority’s investigation meeting.

The respondent's position

[6] NZ Steel denied that Mr Skelton had been dismissed, as it said his employment was deemed to have been terminated by him, by operation of the abandonment provisions in clause 75.1 of the Collective Agreement between E tū; First Union; Northern Amalgamated Workers Union Inc and NZ Steel and its subsidiaries and SteelServ New Zealand Limited dated July 2018 and 30 June 2021 (the CA).

[7] Alternatively, if clause 75.1 of the CA did not apply, NZ Steel claimed the employment agreement and employment relationship, had been frustrated by Mr Skelton’s imprisonment on 26 May 2020, his subsequent restrictive bail conditions from 3 September 2020, and his ongoing medical incapacity to perform his job from 25 May 2020 onwards.

[8] NZ Steel further said, that even if Mr Skelton had been dismissed, his dismissal was both substantively and procedurally justified, so he was not entitled to any remedies.

The Authority's investigation

[9] The Authority held a two-day in-person investigation meeting in July. Mr Skelton was his only witness. He had intended to call Mr Lance Gush, the union delegate and Site Convenor, who had provided a witness statement. However, Mr Gush did not appear at the Authority's investigation meeting. Mr Anderson told the Authority that Mr Gush had not responded to his attempts to contact him.

[10] Mr Doug Lloyd – Health and Safety Manager, Mr Bradley Quinn – Central Maintenance Group Manager, Mrs Megan Bell – Human Resources Manager, Mr Dean Keen who is Mr Skelton's son, and Mr Ben Punivala – Shift Supervisory for Pacific Steel Limited, a subsidiary of NZ Steel, all gave evidence for NZ Steel.

[11] The Authority also obtained information from Accident Compensation Corporation (ACC), the New Zealand Police (Police), the Department of Corrections (Corrections) and the Probation Service. Additional sensitive expert medical reports and other such information pertaining to Mr Skelton's injuries, health, and ability to work were also provided to the Authority.

[12] Mrs Bell resides in Tauranga, she has a young baby, and her evidence was non-contentious and limited. She was therefore granted permission to attend the investigation meeting remotely, via a Teams link. Mr Keen also gave evidence remotely via a Teams link.

[13] The parties lodged documents before and during the investigation meeting. The parties lodged submissions and an updated chronology after the investigation meeting.

Issues

[14] Based on the statement of problem, and on Mr Lawrence's memorandum dated 11 February 2025, the parties agreed prior to the investigation meeting that the following issues were to be determined by the Authority:

- (a) Assessment of credibility;
- (b) Findings on the material facts. In particular:

- (i) Why was Mr Skelton absent from work from 25 May 2020 to 3 July 2020?
 - (ii) What did Mr Skelton communicate to the NZ Steel about his incarceration?
 - (iii) What did Mr Skelton communicate to NZ Steel about surgery, ill-health/injury, or his inability to personally communicate with it?
 - (iv) Did Mr Skelton receive NZ Steel's communications (via emails and letters) to him while he was away from the workplace?
 - (v) To what extent was Mr Skelton potentially able to respond to NZ Steel's communications over the period 25 May 2020 to 3 July 2020?
 - (vi) Who sent emails and letters in Mr Skelton's name to the NZ Steel over the period 25 May 2020 to 3 July 2020?
- (c) How, to whom and when did Mr Skelton apply for long service leave?
 - (d) Was Mr Skelton granted long service leave?
 - (e) If so, who granted it, when was it granted and how was that decision communicated to the Mr Skelton?
 - (f) If long service leave was granted to Mr Skelton, then what dates did it cover?
 - (g) What date did Mr Skelton's employment end?
 - (h) Did Mr Skelton abandon his employment?
 - (i) If not, did Mr Skelton's incarceration and/or bail conditions and/or any probationary conditions frustrate the employment relationship, thereby ending it?
 - (j) If not, was Mr Skelton dismissed?
 - (k) If so, was Mr Skelton's dismissal justified?
 - (l) If not, what if any remedies should be awarded?
 - (m) Should any remedies that may be awarded be reduced under s 124 of the Act, on the grounds of contribution?
 - (n) What costs and disbursements should be awarded?

Relevant background

Last day at work

[15] Mr Skelton attended work on the morning of 25 May 2020. However, he felt unwell, so he left work early but was paid his normal pay for the full day. That was the last time NZ Steel had direct contact with him until 20 October 2020.

Mr Skelton's arrest and imprisonment

[16] Mr Skelton was arrested at 10.20pm on 25 May 2020 and by 1am on 26 May 2020 he was detained at Manukau Police Station. At 8.30 am on 26 May 2020 Mr Skelton was transferred to Pukekohe District Court, then to Manukau District Court. Mr Skelton was remanded in custody to Mt Eden Prison on the afternoon of 26 May 2020.

[17] On 26 May 2020 Police laid representative charges against Mr Skelton. On 15 June 2020 further charges were laid against him arising from events that had occurred on 23 May 2020 and 24 May 2020. Mr Skelton plead guilty to the first two charges that had been laid against him and the other charges were withdrawn.

[18] Mr Skelton was held in custody, on remand in Mt Eden Prison until 3 September 2020. Mr Skelton claimed that while on remand he was not offered any medical assistance for injuries he had sustained on 23 and 24 May 2020, and that he only saw a doctor for two minutes. Mr Skelton's evidence about that was contradicted by medical records provided by Corrections that documented the medical assistance he had received.

Initial attempts to communicate with Mr Skelton

[19] NZ Steel first became concerned about the Mr Skelton's whereabouts on 27 May 2020, the day after he had been remanded into custody at Mt Eden Prison.

[20] Mr Quinn, who at that time was Mr Skelton's shift supervisor, sent Mr Skelton text messages on 27 May 2020 to different mobile numbers Mr Skelton had previously given him asking if he would be in to work that day. Mr Quinn also called Mr Skelton on the three phone numbers Mr Skelton had given him and Mr Quinn left voice messages for Mr Skelton asking when he would be back at work. Mr Quinn did the same thing again the next day, 28 May 2020.

[21] On 27 May 2020 Mr Lloyd, who at the time was the P&PL Plant Superintendent and Mr Quinn's manager, also tried calling Mr Skelton and left a voicemail for him. On 28 May

2020, Mr Lloyd said an employee who was an ex-police officer suggested he contact Manukau Police “because they might know where Mr Skelton was”. Mr Lloyd shared that information with Mrs Bell, and it was agreed Mrs Bell would contact the Police to inquire about Mr Skelton’s whereabouts.

[22] On 28 May 2020 Mrs Bell called Counties Manukau Police and was told that Mr Skelton was “not in Police custody”. Mrs Bell then received a call back from the Northern Control Room Branch and was told that NZ Steel should have “no concern for” Mr Skelton but that he “might not be back at work for a while” and NZ Steel “needn’t try to contact him”.

Communications with Don Skelton

[23] On or before 29 May 2020 Mr Skelton had telephoned his father Mr Don Skelton (now deceased) from prison. Mr Skelton said he told his father he had been assaulted and arrested, the phone number for NZ Steel was in the phone book, and he had asked his father to call NZ Steel and “book” one-month long service leave for him.

[24] Although Mr Skelton told the Authority that his father was deaf, he also said his father had understood what he was saying and knew he was in prison. Mr Skelton confirmed he had not told his father (or anyone else for that matter) to inform NZ Steel that he (the applicant) was in prison.

[25] On 29 May 2020 at 1.50pm, Mr Don Skelton telephoned Mr Quinn and asked for one month’s long service leave (LSL) for his son, on the ground he (the applicant) was “crook” and could not attend work.

[26] Mr Quinn’s unchallenged evidence was that he told Don Skelton he would need to take the request to Mr Lloyd, as he was the person who would need to approve the request. Mr Quinn said he told Don Skelton he would check with Mr Lloyd and “get back to him”. However, Mr Quinn never got back to Don Skelton, because he had not heard back from Mr Lloyd.

[27] When Mr Lloyd did get back to Mr Quinn it was to inform him that the application for long service leave had not been approved. Mr Lloyd also instructed Mr Quinn to stop writing “long service leave” on Mr Skelton’s timesheets before signing them and sending them to payroll. Mr Quinn was informed that Mr Skelton’s status was to be “leave without pay” (LWP). Mr Lloyd confirmed that he had taken responsibility for all matters involving Mr Skelton from 26 May 2020 onwards.

[28] Mr Lloyd was informed of Don Skelton's request at around 2pm on 29 May 2020, and he immediately asked for documentation to support the LSL request as it appeared unusual. Mr Skelton had very generous sick leave which would have covered his absence had he been unwell, so it was odd he wanted to use long service leave instead of sick leave if he was "crook". At the time of Don Skelton's request for long service leave the applicant would have been contractually entitled to up to 12 months' paid sick leave.

[29] Mr Lloyd spoke to Mrs Bell, and they decided to call Don Skelton themselves. However, their call to Don Skelton on 29 May 2020 went to voicemail.

[30] On 2 June 2020 Mrs Bell and Mr Lloyd called Don Skelton again, and this time they spoke to him. Mr Skelton's father told Mr Lloyd and Mrs Bell that his son was staying at his (Don Skelton's) house but had a broken jaw and was awaiting an operation, so could not talk and needed three more weeks off work. Mr Lloyd asked Don Skelton to provide a medical certificate for his son, which he agreed to do. However, no medical certificate was ever provided.

[31] Later that afternoon, Mrs Bell called Don Skelton back and asked for an address that NZ Steel could send a letter to his son (the applicant) to. Don Skelton gave her the postal address of his house and an email address to use which he said would get the message to his son.

Payment of long service leave

[32] Mr Skelton was paid long service leave from 28 May 2020 to 19 June 2020. Mr Quinn said this happened because he wrote "long service leave" on Mr Skelton's timesheets and signed them before submitting them to payroll for payment. As the shift supervisor, Mr Quinn processed Mr Skelton's timesheets. Mr Quinn admitted he had put long service leave on the timesheet without first hearing back from Mr Lloyd, and without telling Mr Lloyd he would be doing so.

[33] Mr Quinn agreed that with hindsight that was "a bit of a no-no". However, he had only done that because he "didn't want [the applicant] to miss out on pay". Mr Quinn told the Authority it was easy to reverse an overpayment, but he was concerned about creating a situation where an employee had not been paid on time.

[34] Mr Quinn said he did not have the authority to approve the long service leave request, and he acknowledged it was a mistake to have signed off Mr Skelton's timesheets as LSL without prior authorisation from Mr Lloyd that he should do so. Mr Lloyd was the only person who had the authority to approve long service leave, but Mr Skelton's LSL request was never approved by him.

[35] Mr Lloyd only discovered that Mr Skelton had been paid long service leave "two weeks later, when I saw that Brad had made a mistake". Mr Lloyd immediately stepped in and put a stop to it, instead marking Mr Skelton in his pay records as being on leave without pay.

[36] Mr Quinn was instructed to stop putting long service leave on Mr Skelton's timesheets after 19 June 2020. Mr Quinn and Mr Lloyd agreed not to reverse any of the LSL NZ Steel had already paid to Mr Skelton up to that point. NZ Steel has also not sought to recover these long service leave payments from Mr Skelton.

[37] Mr Skelton confirmed he was not informed by NZ Steel that he had been granted long service leave or that it had been declined. He also did not know he had been paid any long service leave until after he had been released from custody on 3 September 2020.

Letters from NZ Steel to Mr Skelton

[38] Mrs Bell sent a series of letters to the addresses Don Skelton had provided:

- (a) On 5 June 2020, Mrs Bell posted a "pack" dated 29 May 2020, concerning the closure of the Pipe & Light Plate Plant. The pack included a letter inviting expressions of interest in voluntary redundancy, an indicative redundancy calculation, an expression of interest form for redeployment, and a PowerPoint slide deck.
- (b) A letter from Mr Lloyd dated 4 June 2020, sent by email that day, and by post on 5 June 2020. Mr Lloyd said he wrote this letter because he had not received the medical certificate that he asked Don Skelton for and was "not getting clarity" at that point about why the applicant had not been in contact with NZ Steel.
- (c) A letter from Mr Lloyd dated 12 June 2020, sent by email that day, asking the applicant to attend an investigation meeting and advising he had been absent for

more than five consecutive days without satisfactory explanation, which could constitute abandonment of employment under the Collective Agreement.

- (d) A letter from Mr Lloyd dated 26 June 2020, sent by email that day, asking the applicant to attend a disciplinary meeting, stating he had been absent for four weeks without an acceptable reason, and advising him that NZ Steel's preliminary view was that he had abandoned his employment, which was therefore deemed to have terminated his employment under clause 75 of the Collective Agreement.
- (e) A letter from Mr Lloyd dated 1 July 2020, sent by email that day, repeating the preliminary view that the applicant had abandoned his employment and advising Mr Skelton that he was required to attend a disciplinary meeting on 3 July 2020 or to make contact with Mr Lloyd before that time, failing which NZ Steel would make a decision about his ongoing employment based on the information available to it at the time.

[39] Mrs Bell confirmed that only the 29 May 2020 and 4 June 2020 letters were sent by post. The remainder were only sent digitally (as email attachments) to the email address Don Skelton had provided. Mr Lloyd's letters made clear that NZ Steel:

- (a) Considered that the Mr Skelton had been absent from work for more than five consecutive days;
- (b) Had not had any direct communication with him;
- (c) Was not satisfied with the explanations about Mr Skelton's absences that had been provided on his behalf;
- (d) Considered his absence may constitute abandonment of employment; and
- (e) Required Mr Skelton to make urgent contact with NZ Steel to avoid his employment being treated as having been terminated by operation of the abandonment clause in the CA.

Could Mr Skelton communicate with others while he was on remand?

[40] In his witness statement Mr Skelton said he could only make one phone call while in prison, which he made to his father Don Skelton on or before 29 May 2020, but was otherwise

unable to communicate with the outside world. Mr Skelton denied he had communicated with Mr Keen at all, and claimed he was not aware of the letters and emails NZ Steel had sent him.

[41] At the Authority's investigation meeting, Mr Skelton changed his evidence. He conceded he had made several phone calls from prison, including to Mr Keen. Mr Skelton also conceded that he could have asked Mr Keen to pass on information to NZ Steel, but did not do so.

[42] That account conflicted with Mr Keen's evidence, as he said his father was in regular contact with him and Don Skelton by phone, his father was aware of NZ Steel's communications to him (because Mr Keen had relayed their contents to him), so his father could have responded to NZ Steel if he had wanted to.

[43] Mrs Bell made inquiries with Mt Eden Corrections on 15 September 2023 into what, if any, ability remand prisoners had to communicate with the outside world over the period May 2020 to September 2020. She was told that phone and mail remained available to remand prisoners, even through the Covid-19 lockdowns. Mrs Bell's contemporaneous notes recorded that Corrections had told her:

- (a) This [phone calls and emails] is not something we withhold to people in our care;
- (b) Prisoners were given \$5.00 phone cards each week because face-to-face visitation could not be provided under Covid lockdowns;
- (c) Incoming and outgoing mail continued daily even during lockdown periods, so that facilitated ongoing communication by prisoners.

[44] On 21 July 2025, Corrections provided a letter to the Authority which stated that:

- (a) Mr Skelton had the ability to communicate while in custody;
- (b) Records showed that Mr Skelton made six phone calls and attended one Audio-Visual Link (AVL) session while in prison. However, the letter cautioned that this "may not reflect all communications" by Mr Skelton, as the Mt Eden Facility no longer held information about historic calls; and
- (c) Although in-person visits were restricted during Covid lockdowns, phone and video calling remained available to prisoners, as were postal, courier and email

services. Prisoners were also provided with a free weekly phone card by Corrections to facilitate outside communication.

[45] Mr Keen told the Authority he had loaded money onto his father's prison commissary account so that he could buy phone cards, and that his father had called him or Don Skelton "on many occasions". Mr Keen said he was "in regular phone contact" with his father.

[46] During the Authority's investigation meeting, Mr Skelton agreed that Mr Keen put money into his commissary account to buy phone cards, that he could buy phone cards had he wanted to, and that Corrections gave him free phone cards each week he was on remand.

[47] Mr Skelton also agreed he had made at least six phone calls while in prison that had required phone cards, which excluded the free phone calls he had made to his lawyer. Mr Skelton said he had met with a lawyer at least four times while in prison, twice in person and on unspecified "other times" by AVL.

[48] Mr Skelton agreed that he could have asked his lawyer to pass on a message to NZ Steel, but acknowledged he did not do so.

[49] Mr Skelton initially denied he could have sent a letter to NZ Steel, but the evidence established he could and did send letters while on remand. Mr Keen said his father had given him two letters for delivery to NZ Steel while in prison, which had been posted to Mr Keen's address.

[50] Mr Keen said he took both letters to NZ Steel's Glenbrook site reception, as his father had instructed him to do. One of the letters was for Mr Lloyd (who was Mr Skelton's then Plant Superintendent) asking for redundancy, and the other was for Mr Gush (the Union Site Convener). Mr Keen said he received both letters at the same time, but he did not read them.

[51] The letter for Mr Lloyd, in which Mr Skelton purported to "formally accept" redundancy, was left at site reception on 10 July 2020 for Mr Lloyd to collect. The letter to Mr Gush was not produced in evidence. Mr Skelton said he did not recall what the letter said, but he confirmed he had not given Mr Gush instructions to represent him, nor had he given Mr Gush any information to pass on to NZ Steel.

[52] Mr Skelton said he had given both letters to his lawyer to take out of the prison, so it was likely his lawyer had posted them to Mr Keen. Mr Skelton also said his lawyer had given

him the letter with NZ Steel's request for expressions of interest in redundancy, which he had signed on 29 June 2020.

[53] The NZ Steel letter Mr Skelton admitted he had received while on remand was in the "pack" of documents that Mrs Bell had posted to Don Skelton's home. If the applicant got it from his lawyer and not from his father, that indicated NZ Steel's other communications to Mr Skelton could also have been passed on to him. Mr Lloyd's 4 June 2020 letter (posted to Don Skelton at the same time as "the pack") was therefore more likely than not received by Mr Skelton while he was on remand.

[54] Mr Keen's evidence that he (or Don Skelton) relayed the contents of NZ Steel's letters to the applicant over the phone after receiving them was detailed and appeared credible. Mr Keen confirmed this evidence several times in the investigation meeting.

[55] Mr Keen said, about the letters that were sent to Don Skelton, that "he relayed them to me, and I relayed them to David". Asked whether he opened any of the letters while his father was in prison, he said "Yes. David [his father] told me to open two letters while on the phone and read them to him".

[56] Mr Keen's evidence about each letter was as follows:

- (a) The "redundancy pack" documents were given to Mr Keen by Don Skelton. His father asked him by phone to open them and read them to him. Mr Keen said his father then told him he wanted to take voluntary redundancy.
- (b) The 4 June 2020 letter was given to him by Don Skelton, already open. Mr Keen waited for a call from his father and then relayed the letter to him over the phone.
- (c) Mr Keen did not recognise the 12 June 2020 letter.
- (d) Don Skelton told him about the 26 June 2020 letter and asked him to speak to his father about it urgently. Mr Keen spoke to his father by phone the next day, summarised the letter and said, "You need to make contact with Lance Gush or someone asap".
- (e) He read the 1 July 2020 letter at Don Skelton's house (Don said "Read that and tell me what the hell is going on"). Mr Keen spoke to his father about the letter

afterwards and told him that he needed to contact someone asap. Mr Keen also tried to phone Mr Gush, but did not get through to him.

(f) He did not see the 6 July 2020 dismissal letter.

[57] When Mr Keen was asked whether he knew NZ Steel was concerned that his father had abandoned his employment he (Mr Keen) said he did, because Don Skelton had received an email and alerted him to it. Asked whether he told his father this, he said “Yes. I said, ‘They’ll treat it as abandonment if you don’t show up’”. Asked how and when he told his father this, Mr Keen said it was by phone, but he did not remember the exact date.

[58] Mr Skelton denied that Mr Keen had read out the letters to him over the phone, but accepted he could have read him the emails.

[59] During the meeting the parties had on 20 October 2020 to discuss Mr Skelton’s personal grievance after he had left prison, Mr Skelton accepted Mr Keen “was relaying [the letters] to me”.

[60] The Authority therefore considered it implausible that Mr Keen would not have relayed the contents of the letters as well as the emails from NZ Steel to his father during their phone calls.

Did Mr Skelton instruct anyone to inform NZ Steel about his situation?

[61] Mr Keen said that when his father called him or Don Skelton from prison, he “would provide Don and I with instructions for managing things on the outside, including what he wanted us to tell NZ Steel”.

[62] Mr Keen said his father had called him “probably the second to third week of him being inside” and asked him to contact NZ Steel and apply for leave. Mr Keen said his father also gave him instructions, multiple times, to talk to NZ Steel to try to get ACC leave for him or redundancy pay.

[63] Mr Keen said his father had told him to tell NZ Steel he was on ACC, had a broken jaw and was unable to talk. Mr Keen did contact Mr Lloyd and requested leave for his father, so Mr Keen had acted consistently with what he said were his father’s instructions to him. Mr Keen had no other reason to have taken such actions.

[64] Mr Keen also met with Mr Gush in the smoko room (when Mr Keen was onsite working for a different employer) and spoke to him on the phone. Mr Keen said he had kept Mr Gush up to date with his father's court dates. Mr Keen said that after he had spoken to Mr Lloyd or Mr Gush, his father would ask him what they had said, and Mr Keen would then relay that information to his father during their regular phone conversations.

[65] Mr Skelton confirmed he had spoken to Mr Keen while in prison. Mr Skelton also agreed he could communicate with Mr Keen and give him instructions while on remand. However, Mr Skelton denied telling Mr Keen to tell NZ Steel he wanted to go on ACC leave.

[66] Mr Skelton said he only found out Mr Keen had tried to get leave for him later, in August 2020. Mr Skelton maintained he did not ask Mr Keen or anyone else to tell NZ Steel he was in prison, although he said, "I didn't ask anyone to not say it".

[67] Mr Keen contradicted that evidence. Mr Keen said his father had told him to "tell NZ Steel that he was sick at home, and not to tell NZ Steel he was in prison". Asked whether his father told him to hide the fact that he was in prison, Mr Keen said "yes", his father had said "Do not tell them I'm in prison. I will be out soon."

Mr Keen's phone calls to Mr Lloyd

[68] On 16 June 2020, Mr Keen called Mr Lloyd and initially told him that his father had a sore shoulder and wanted to be put on ACC leave. Mr Keen said Mr Lloyd did not agree to this request because he said he needed to speak with his father directly. Mr Keen said at that point he decided to tell Mr Lloyd the truth, that his father was on remand in Mt Eden prison.

[69] When asked what made him disclose that his father was in prison, Mr Keen said, "Because he'd been absent for so many days, and they would take the next steps if he didn't contact them". Mr Keen said it was his own decision to be honest, not something his father had asked him to do. Mr Keen also reported that once his father learned that Mr Lloyd had been told he was in prison "he did not like that".

[70] Mr Lloyd corroborated that. He said Mr Keen told him Mr Skelton was in prison on remand, he expected his father would be released on bail on 28 June 2020, and that Mr Keen had asked Mr Lloyd to reschedule the meeting with his father until after that date. Mr Lloyd agreed to so because he wanted to hear from Mr Skelton directly.

[71] On 26 June 2020 Mr Keen called Mr Lloyd again. Mr Keen said he offered to bring his father on site on 30 June 2020, by which time he had expected his father would have been released from prison.

[72] Mr Lloyd said Mr Keen told him Mr Skelton had a sore shoulder and could not come to work. Mr Lloyd assumed that meant Mr Skelton had been released. However, when Mr Lloyd questioned Mr Keen further, he admitted his father was still on remand.

[73] Mr Lloyd said Mr Keen told him that Don Skelton was on holiday, and he (Mr Keen) was struggling to manage the situation, but that he could bring his father on site for a meeting on 30 June 2020. Mr Lloyd agreed to that.

[74] The meeting on 30 June 2020 was rescheduled to 3 July 2020, because Mrs Bell was not available that day.

Finding

[75] Mr Skelton had the ability to communicate with NZ Steel while he was in prison. His evidence to the contrary was not accepted, as it contradicted the information from Corrections, Mr Keen's evidence, what Mr Keen told Mr Lloyd and Mrs Bell in June/July 2020, what Mr Skelton himself said in the meeting on 20 October 2020, and what he had stated in his statement of problem. Mr Skelton had also accepted under cross-examination that even though he was in prison, he could have communicated with NZ Steel.

[76] As Mrs Bell pointed out, from the start of Mr Skelton's early departure from his shift on 25 May 2020, the first time NZ Steel heard directly from him was on 20 October 2020. Even then NZ Steel was still unclear as to the facts about why Mr Skelton had not returned to work. Clarity about that was only obtained as a result of the Authority's investigation process.

3 July 2020 meeting

[77] Mr Lloyd and Mrs Bell held a disciplinary meeting on 3 July 2020, following which Mr Lloyd decided to treat Mr Skelton's absence as an abandonment of employment situation.

[78] Mr Keen attended the meeting on 3 July 2020. He confirmed that his father was still being held on remand. Mr Keen also said:

I tried my best to explain what I knew about when David would be released and that he had a court date coming up. I told Doug and Megan that I had encouraged David to

communicate with them and provided money for him to use the phone. I confirmed that I had been relaying the content of their letters to David.

[79] Mr Lloyd's evidence was that:

Dean confirmed that Mr Skelton was aware of the content of NZ Steel's letters. He said that Mr Skelton had been in communication with him, and with Mr Skelton's lawyer, and that he (Dean) had given his father money so that he could phone NZ Steel from prison, but Mr Skelton had "bought shopping" with it instead.

[80] Based on this information, Mr Lloyd concluded that:

In my view, the fact that Mr Skelton had been in contact with his lawyer and with Dean Keen, and that Dean had also given him money to be able to call us, meant that Mr Skelton could have communicated honestly with me about his absence if he wanted to (either directly or through his lawyer or a family member), but had chosen not to do so.

[81] Mrs Bell's evidence was similar. She said:

At the meeting, Mr Keen told Mr Lloyd and I that Mr Skelton had been receiving NZ Steel's letters and was aware of the situation with regard to his employment. He said that Mr Skelton was in contact with both him and a lawyer.

Mr Keen told us that he had tried to facilitate Mr Skelton being able to contact NZ Steel, by loading money onto Mr Skelton's prison account so that he could make phone calls. However, Mr Skelton had not called NZ Steel.

On or about 3 July 2020, I checked the Corrections website which stated that "Corrections provides writing paper and envelopes and pays for standard postage for up to three letters per week".

With the above in mind, I considered that Mr Skelton likely had the opportunity to call us but did not do so, he had the opportunity to communicate with us openly and honestly through family (or his lawyer) but had not, and he could have sent us a letter explaining his absence but did not do so.

[82] In oral evidence, Mrs Bell said she confirmed with Mr Keen that his father had received NZ Steel's letters. Mr Lloyd said he had asked Mr Keen whether his father knew the situation was serious and Mr Keen confirmed that he did. Mrs Bell's notes of the 3 July 2020 meeting corroborated her and Mr Lloyd's account of the meeting. Mr Keen's evidence also corroborated Mrs Bell's and Mr Lloyd's evidence.

[83] Mrs Bell was asked whether there was any discussion with Mr Keen at the 3 July 2020 meeting to the effect that NZ Steel would keep his father on unpaid leave or keep his employment open. She said there was not. No such expectation had been set. Ms Bell pointed to NZ Steel's earlier letters which said that if Mr Skelton did not make contact by a certain time, NZ Steel would assume he had abandoned his employment.

[84] Following the meeting, Mr Lloyd phoned Mr Gush at 2.55pm to inform him that NZ Steel considered Mr Skelton had abandoned his employment, as per clause 75 of the Collective Agreement.

Release from prison, bail conditions and capacity for work

[85] Mr Skelton was released from prison on 3 September 2020. He went first to live in a property in Massey, then later to live in a property in Pokeno. At both properties, Mr Skelton was on electronic monitored bail, covering the period from 3 September 2020 to 2 February 2022.

[86] Mr Skelton's bail conditions included a 24-hour, 7-day per week curfew requiring him to remain at home. These conditions meant he would not have been able to attend work at NZ Steel from 3 September 2020 to 2 February 2022, even if he had been medically cleared as fit to return to work.

[87] Mr Skelton accepted his job involved operating heavy machinery and required him to be physically present in the Pipe Plant. It was therefore not a job he could do from home.

[88] On 2 February 2022, Mr Skelton was convicted and sentenced to one year of intensive supervision.

[89] Even if Mr Skelton's bail conditions had been varied to have allowed him to attend work, he would have been unable to perform his role. He produced medical certificates covering the period from 25 May 2020 until 17 February 2025, which certified for ACC purposes that he had been fully unfit for work from 25 May 2020 onwards.

[90] Mr Skelton therefore accepted that since the day he was arrested he has been fully unfit to work. That included the period Mr Skelton was in prison on remand from 26 May 2020 to 3 September 2020, the period he was on bail, the one year he was on intensive supervision (from 2 February 2022 to 2 February 2023) and subsequently.

[91] The medical evidence established Mr Skelton had been medically incapacitated to work in his NZ Steel role from 25 May 2020 onwards. That remained the position, as at the date of the Authority's investigation meeting.

Personal grievance and 20 October 2020 meeting

[92] On 21 September 2020, Mr Gush raised a personal grievance on the Mr Skelton's behalf. On 20 October 2020, Mr Skelton and Mr Gush met with Mr Lloyd and Mrs Bell via Zoom to discuss his personal grievance. Mrs Bell made contemporaneous notes of the meeting.

[93] At this meeting, Mr Skelton said he had been assaulted and had a head injury and "wasn't able to speak at the time". He also confirmed he had received the letters NZ Steel had sent but "not at the time".

[94] Mrs Bell specifically told Mr Skelton that Mr Keen had told NZ Steel he (the applicant) had been getting NZ Steel's communications so was aware of its concerns, and she asked him if that was correct. Mr Skelton confirmed it was, by responding, "He [Dean Keen] was relaying them to me". Mrs Bell's evidence about that was corroborated by Mr Lloyd, and by her notes.

Assessment of credibility

[95] NZ Steel's witnesses were all forthright and appeared to have given truthful evidence. On all material points, their evidence was consistent with each other and with the documentary evidence. The material conflicts in the evidence were between Mr Skelton and his son, Mr Keen.

Mr Skelton's credibility

[96] Mr Skelton was not a reliable witness, as he changed his evidence or gave inconsistent evidence on several key points. A crucial issue involved Mr Skelton's ability to receive and send communications while in prison. Mr Skelton's evidence on that point evolved as follows:

- (a) In his statement of problem (lodged in August 2023), he implied that he gave Mr Keen instructions from prison.
- (b) The Authority's directions (in November 2023) indicated that these communications would be a key issue, and that if Mr Skelton had arranged for others to lie to NZ Steel on his behalf that would be problematic for him.
- (c) In his witness statement, Mr Skelton claimed he did not speak to Mr Keen while in prison and had no ability to contact the outside world other than the one phone call he had made to Don Skelton on or before 29 May 2020.

- (d) That same position was taken in a February 2025 memorandum from Mr Skelton's advocate and implied in emails sent to his advocate.
- (e) The day before the Authority's investigation meeting, Corrections advised the Authority that prisoners had access to phone and video calls, postal and email communications, and that Mr Skelton himself had made at least six phone calls from prison.
- (f) The next day, Mr Skelton revised his evidence to state:
 - (i) He did speak to Mr Keen while in prison; and
 - (ii) The phone call to Don Skelton on 29 May 2020 was not the only call he made from prison, just the only call he made "that day".

[97] Other parts of Mr Skelton's evidence were inconsistent with the documentary evidence or changed under cross-examination. For example, he ultimately had to accept that he had the ability to communicate with NZ Steel from prison.

[98] In his witness statement Mr Skelton said he had no way to make free phone calls, but he told counsel otherwise in cross-examination. Mr Skelton had said he had no money to buy phone cards, but in oral evidence he accepted that Mr Keen had put money on his prison commissary account to buy phone cards and that Corrections had provided him with free phone cards each week.

[99] Mr Skelton said he had no medical assistance for his injuries in prison and that he only had seen a doctor once, for two minutes. That was inconsistent with the medical records released by Corrections.

[100] In oral evidence, Mr Skelton said inconsistent things depending on the line of questioning. On the morning of day one, he told the Authority he had no phone calls with lawyers. That afternoon, he told counsel that he did speak to a lawyer by phone, and that calls to lawyers were free.

[101] When asked when Don Skelton had reported back to him about his request for long service leave, Mr Skelton initially said it was while he was in prison. When it was pointed out this contradicted what he had said to his advocate, Mr Skelton then agreed he had not heard anything back from Don Skelton until after 3 September 2020.

[102] Mr Skelton's evidence was that he was not aware that Mr Keen told NZ Steel he was in prison. Mr Skelton also denied he had asked Mr Keen to say anything to NZ Steel or Mr Gush about him being in prison.

[103] Mr Skelton said he did not give Mr Gush any information to take to NZ Steel on his behalf about his circumstances. However, Mr Skelton later admitted he had given his lawyer two letters, which had been sent to Mr Keen who had taken them to the worksite for Mr Lloyd and Mr Gush to collect.

[104] Therefore, on Mr Skelton's own evidence, he had no reason to consider that NZ Steel knew his whereabouts, so he had every reason to reach out and contact NZ Steel as his employer, which Mr Skelton accepted it was within his power to do.

Mr Keen's credibility

[105] The key disputed points in Mr Keen's evidence were that his father called him from prison and gave him instructions for dealing with NZ Steel, and that he relayed the contents of NZ Steel's communications to his father. Mr Keen's evidence on those key points did not waver and was not shown to be untrue or implausible.

[106] Mr Keen's oral evidence was consistent with his written statement, what he told NZ Steel in June/July 2020, and what Mr Skelton himself had told NZ Steel on 20 October 2020.

[107] Mr Keen was considered by the Authority to be a straightforward and reliable witness. Accordingly, where there was a material conflict in the evidence between him and Mr Skelton, Mr Keen's evidence was preferred.

Why was Mr Skelton absent from work from 25 May 2020 to 3 July 2020?

[108] Late in the evening of 25 May 2020 Mr Skelton was arrested by Police and held in Police custody for the remainder of that night at Manukau Police Station. Mr Skelton was later taken to the Pukekohe and Manukau District Courts. On that afternoon of 26 May 2020 Mr Skelton was remanded to Mt Eden Prison, where he remained until 3 September 2020.

[109] Mr Skelton was absent from work due to his incarceration.

What did Mr Skelton communicate to NZ Steel about his incarceration?

[110] During the relevant period, Mr Skelton did not himself tell NZ Steel that he was in prison, and he did not ask or instruct his father Don Skelton, or his son Dean Keen, his highly experienced union delegate Mr Gush, his lawyers, Corrections, the Police, or anyone else to tell NZ Steel he was incarcerated.

[111] Mr Keen did tell NZ Steel that Mr Skelton was in prison, but he and Mr Skelton both agreed that Mr Skelton had not asked him to do that. Mr Keen further said that his father told him not to do it. There was no evidence that Mr Skelton took any steps to inform NZ Steel that he was unable to attend work because he was incarcerated.

What did Mr Skelton communicate to NZ Steel about surgery, ill-health/injury, or his inability to personally communicate with it?

[112] During the relevant period:

- (a) Mr Skelton did not himself communicate anything about his health, injuries, or inability to personally inform NZ Steel about his situation;
- (b) On 29 May 2020, Don Skelton told Mr Quinn that the applicant was “crook”;
- (c) On 2 June 2020, Don Skelton told Mrs Bell and Mr Lloyd that the applicant had a broken jaw, needed surgery, and could not talk.

[113] It was unclear whether Mr Skelton had instructed his father to say those things, because he did not admit to doing so, and the only other person who could have given evidence about that was deceased. However, the claim that Mr Skelton could not talk (which was obviously untrue, given he had talked to his father on or before 29 May 2020) likely originated with him, because Mr Skelton repeated it himself during his meeting with NZ Steel on 20 October 2020.

[114] Mr Keen told Mr Lloyd that his father had a sore shoulder. He also said that his father told him to tell NZ Steel that he was sick at home, and that he had a broken jaw and could not talk.

[115] On 20 October 2020, after being released from prison, Mr Skelton told NZ Steel he had been assaulted, had been treated for his injuries while on remand and was on ACC for them. He also said he had a head injury and was not able to speak while incarcerated.

[116] However, that was untrue in light of Mr Skelton's admission at the Authority's investigation meeting that he had made phone calls to Don Skelton, Mr Keen and his lawyer from prison, while on remand.

Did Mr Skelton receive NZ Steel's communications (emails and letters) to him while he was away from the workplace?

[117] No witness suggested that Mr Skelton had physically received NZ Steel's emails and letters in prison, except the 29 May 2020 "redundancy pack". However, Mr Keen's evidence was that he relayed the contents of the letters to his father by phone, and that his father was therefore aware that NZ Steel considered his absence unauthorised and wanted to hear from him personally.

[118] Although Mr Skelton denied that, Mr Keen's evidence has been preferred on that point as it was more likely to be correct. In particular:

- (a) Mr Keen's evidence was consistent with his own prior statements to Mrs Bell and Mr Lloyd on 3 July 2020.
- (b) Mr Keen's evidence was consistent with Mr Skelton's own prior statement to Mrs Bell and Mr Lloyd on 20 October 2020.
- (c) There was no challenge to Mr Keen's evidence that he read the letters that were sent to Don Skelton's address to his father while he was in prison.
- (d) Mr Keen was trying to protect his father and preserve his job.
- (e) Mr Skelton and Mr Keen spoke on the phone while his father was in prison.

[119] In those circumstances, it was implausible that Mr Keen would not have relayed the contents (or at least the gist) of NZ Steel's letters to his father during those phone calls.

[120] Accordingly, Mr Skelton was more likely than not aware of the contents of NZ Steel's communications to him while he was in prison on remand.

To what extent was Mr Skelton potentially able to respond to NZ Steel’s communications over the period 25 May 2020 to 3 July 2020?

[121] Mr Skelton should have contacted NZ Steel and informed them of his whereabouts and circumstances. Imprisonment does not relieve an employee of their obligation to be responsive and communicative with their employer.¹

[122] The obligation of good faith under s 4 of the Act is mutual. Mr Skelton should have ensured, at the very least, that NZ Steel knew he was in prison so that it could try to contact him there, given that he would not have been able to answer his mobile phone.²

[123] Mr Skelton could have communicated with NZ Steel had he wanted to do so, as he admitted that he:

- (a) Could (and did) make phone calls while in prison;
- (b) Spoke to Mr Keen by phone, and could have given him instructions to pass on information to NZ Steel;
- (c) Spoke to lawyers while in prison, and could have asked a lawyer to pass on a message to NZ Steel; and
- (d) Had the ability to (and did) write letters in prison and got them delivered to NZ Steel.

Who sent emails and letters in Mr Skelton’s name to NZ Steel over the period 25 May 2020 to 3 July 2020?

[124] The email dated 10 June 2020 saying “Hi Megan. I will be back on Tuesday and explain. Thank you for putting me on unpaid leave. Dave” and the email dated 7 July 2020 both appeared to have been sent by Don Skelton, as there was no evidence anyone else had sent them. It was unclear whether the applicant instructed his father Don Skelton to send these emails to NZ Steel.

[125] Mr Skelton admitted he wrote the two letters he passed to his lawyer, who appeared to have posted them to Mr Keen for delivery to NZ Steel and Mr Gush. Mr Keen confirmed he

¹ *Arora v Restaurant Brands* [2018] NZERA Auckland 363 at [62] and [134].

² See *Mackenzie v Huntington’s Disease Assn* (2020) 17 NZELR 663 (EmpC), at [37] – [39].

had delivered one letter to the NZ Steel site reception on 10 July 2020 and the other letter he delivered to Mr Gush at the same time.

How, to whom and when did Mr Skelton apply for long service leave?

[126] On 29 May 2020 Don Skelton asked Mr Quinn for one month's long service leave for his son. The applicant authorised his father, Don Skelton, to make this request for him.

Was Mr Skelton granted long service leave?

[127] Mr Skelton was not granted long service leave. He was also never informed that he had been granted long service leave.

[128] The unchallenged evidence was that Mr Quinn told Don Skelton he would need to take the request to Mr Lloyd for approval. That approval was not given by Mr Lloyd, so consent to the LSL request was never communicated to either Mr Skelton or anyone who was representing him. Mr Quinn never told Don Skelton his son's one month's long service leave request had been granted.

[129] Although Mr Quinn acted unilaterally to put "long service leave" on Mr Skelton's timesheets from 28 May to 19 June 2020, he was not authorised to do so. When Mr Lloyd found out that had been occurring he immediately put a stop to it, and made it clear that he had not approved the LSL request.

[130] There was no reason for Mr Skelton to have reasonably believed that he had been granted long service leave. Mr Skelton's own evidence was that he had not heard back from Don Skelton until after 3 September 2020, so on 4 June 2020 he had no reason to believe long service leave had been granted. Mr Skelton's request to Mr Keen to apply to NZ Steel for ACC leave also indicated he did not consider that he had been granted long service leave.

[131] NZ Steel also did not consider long service leave had been granted, which is why Mr Lloyd and Mrs Bell tried to contact Don Skelton immediately on 29 May 2020 and 2 June 2020, and why they kept trying to contact him throughout June 2020.

[132] The accidental payment of long service leave from 28 May 2020 to 19 June 2020 was not a grant of LSL. It was simply an administrative error, which had occurred without authority because Mr Skelton's shift supervisor was trying to ensure he did not miss out on being paid.

Mr Skelton was therefore incorrectly paid long service leave over the period 28 May to 19 June 2020.

[133] Mr Skelton agreed that he had not known anything about long service leave being granted until after he had been released from prison on 3 September 2020, when his father Don Skelton had supposedly told him about it.

[134] Prior to September 2020, Mr Skelton had no reason to believe long service leave had been granted. He therefore had every reason to try to communicate with NZ Steel to ensure his long service leave request had in fact been granted. However, he did not do so.

What date did Mr Skelton's employment end?

[135] NZ Steel treated the employment as having ended on 3 July 2020. Mr Skelton had already abandoned his employment within the meaning of clause 75.1 of the Collective Agreement, so the employment had already ended by operation of that clause, after Mr Skelton had been absent from work for more than five days without notice or an acceptable reason.

[136] All that NZ Steel did on 3 July 2020 was to formally record, or give effect to, a termination that was already deemed to have occurred under clause 75.1 of the CA.

[137] Before effecting that termination, Mr Lloyd had called Mr Gush on 3 July 2020 to advise him of Mr Skelton's abandonment of his employment, as required by clause 75.1 of the CA. Mr Gush did not dispute that Mr Skelton had abandoned his employment. Nor did Mr Gush take any action on Mr Skelton's behalf to attempt to preserve his employment.

Did Mr Skelton abandon his employment?

[138] Mr Skelton abandoned his employment as per the provisions of clause 75.1 of the CA. As a result, he was deemed to have terminated his employment by operation of that clause via abandonment.

Principles of abandonment

[139] As the Employment Court in *Cross v Onerahi Hotel* observed:³

An employee may be deemed to have abandoned their employment if they fail to attend work for a consecutive number of days without good cause or communication with his

³ *Cross v Onerahi Hotel* [2014] NZEmpC 26, at [32].

or her employer. In such circumstances, the employee has essentially unilaterally terminated the employment agreement and there is no dismissal.

[140] The Court of Appeal in *Pitolua v Auckland City Council Municipal Abattoir* recognised that if the employment agreement stipulated that if the employee was absent for a certain period, they were deemed to have terminated their employment if they met the requirements of the abandonment clause.⁴

[141] In that scenario, the question for the employment institutions was simply whether the situation contemplated by the clause in the employment agreement had occurred. If it had, the employment ended in accordance with the provisions of the applicable contractual clause. In such circumstances the employee's intention was not relevant.

[142] The Court of Appeal in *Ramsbottom v Chambers* recognised that if there was no abandonment clause in the applicable employment agreement, then the relevant question was whether the employee had in fact relinquished or given up their employment.⁵

[143] In the absence of a contractual abandonment provision, then an employee's intention was relevant, and the employer was required to have made reasonable enquiries before concluding the employee had abandoned their employment.⁶ However, intention was to be assessed objectively, meaning the relevant inquiry was whether an objective bystander would reasonably conclude the employee had given up their employment.⁷

[144] In either scenario, the statutory good faith obligations applied, which required both parties to be responsive and communicative.⁸

[145] This case falls into the *Pitolua* category of abandonment.⁹ Clause 75.1 of the NZ Steel Collective Agreement provided that:

Employees who are absent for more than five consecutive days without notifying the company or providing an acceptable reason for their absence, shall be deemed to have

⁴ *Pitolua v Auckland City Council Municipal Abattoir* [1992] 1 NZLR 6 (CA), at 10.

⁵ *E N Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 (CA) at [21].

⁶ *Ramsbottom Ltd* (CA), above n5, at [13] and [26]; see also *Lwin v Honest International* [2003] 1 ERNZ 387 (EmpC), at [33] – [35]; *Surplus Brokers v Armstrong* (2020) 17 NZELR 524 (EmpC), at [17].

⁷ See *Ramsbottom Ltd* (CA), above n5, at [28] and [30].

⁸ *Cross* above n3, at [33].

⁹ *Pitolua*, above n4.

terminated their employment without notice; provided that the appropriate Union delegate will be advised before such termination is effected.

[146] It was not relevant whether the employee intended to abandon their employment, and it was therefore not relevant whether NZ Steel knew where Mr Skelton was. The question for the Authority involved determining whether the circumstances in clause 75.1 were satisfied, namely whether:

- (a) Mr Skelton was absent for more than five consecutive days;
- (b) Without notifying NZ Steel; and
- (c) Without providing an acceptable reason for his absence.

(i) Summary of relevant facts

[147] Mr Skelton was absent from work for more than five consecutive days. From 26 May to 3 July 2020, he was absent for 28 working days (not counting the Queen's Birthday public holiday on 1 June 2020).

[148] Mr Skelton did not notify NZ Steel that he would be absent. Mr Skelton did not provide an acceptable reason for his absence. Instead, his family members gave NZ Steel reasons that were untrue. Don Skelton said he was "crook" and could not attend work, not that he was in prison. At best, this was untrue by omission. Later, Don Skelton said his son was staying at his house, had a broken jaw, was awaiting surgery, and could not talk. None of that was true.

[149] The only acceptable reason Mr Skelton could have provided to NZ Steel for his absence (because it was the only reason that was true) was that he could not attend work because he was on remand in Mt Eden prison.

[150] However, Mr Skelton did not tell NZ Steel that he was in prison, and he did not instruct anyone else to tell NZ Steel that on his behalf. Mr Skelton had a lawyer, he was a union member, he was in contact with his father and son, all of whom could have advised NZ Steel of the real reason he had not returned to work.

[151] Mr Keen eventually told NZ Steel the truth, but did not do so on his father's instructions. Mr Keen said his father had specifically told him not to tell NZ Steel he was in prison.

[152] In these particular circumstances, clause 75.1 of the CA applied, and it had operated to terminate Mr Skelton's employment. It was not relevant whether Mr Skelton had subjectively

intended to abandon his employment, as the employment ended by operation of contract, once the facts of his situation met the agreed contractual requirements for abandonment.

[153] As the Authority said in *Stevens v Unibag Packaging*:¹⁰

Here, as in *Pitolua*, the parties had explicitly agreed, as part of a collective agreement, that a worker who absented themselves for more than two working days has been deemed to have abandoned their employment. The parties had clearly decided that this period was reasonable for both parties [...] As a matter of contract, that provision must be given effect to.

[154] In this case, the parties had contractually agreed that if Mr Skelton was absent for more than five consecutive days without notification or providing an acceptable reason for his absence, then he would be deemed to have terminated his employment. Mr Skelton's intention was therefore not relevant.

[155] In line with its good faith duty, NZ Steel made reasonable inquiries before concluding Mr Skelton had abandoned his employment. It did not just wait for the five days to expire and then advise him it considered his employment had been abandoned. As Mr Lloyd said, "We took a much longer period and gave Dave every opportunity to put his case forward".

[156] Although Mr Lloyd's 4 June 2020 letter stated, "If I do not hear from you by [12 June 2020] I will assume that you have abandoned your employment". NZ Steel did not act on that indication but instead continued trying to contact Mr Skelton for another month.

[157] It was not until 3 July 2020 that Mr Lloyd decided to treat Mr Skelton's ongoing absence from work as an abandonment, and he only did so once satisfied Mr Skelton had been made aware of NZ Steel's letters, and that Mr Skelton could have responded to NZ Steel, or communicated to it, had he wanted to.

(ii) The proviso to clause 75.1 in the CA

[158] Mr Skelton's submission that the proviso that the union had to be advised of an abandonment before the employment ended had unjustifiably dismissed him did not succeed.

[159] The final subclause of clause 75.1 in the CA is a proviso that "the appropriate Union delegate will be advised before such termination is effected" under the clause. Termination of

¹⁰ *Stevens v Unibag Packaging Ltd* ERA Wellington WA32/07, 1 March 2007, at [32].

Mr Skelton's employment did not take effect until after Mr Gush had been notified, so clause 75.1 of the CA was not breached.

[160] Mr Gush was the Combined Union Site Convenor, the most senior union official on site. The union had an opportunity to have intervened on Mr Skelton's behalf, as Mrs Bell and Mr Lloyd had spoken to Mr Gush multiple times about Mr Skelton's situation, without the union sharing any information with them or taking any steps on Mr Skelton's behalf.

[161] Mr Gush had also apparently spoken to Mr Keen "on several occasions" about his father's situation. The union could have stepped in to represent Mr Skelton but did not do so.

(iii) Analysis of the Court of Appeal's decision in *Ramsbottom*

[162] Mr Skelton's reliance on the Court of Appeal's decision in *Ramsbottom* to support his claim he had been unjustifiably dismissed did not succeed.¹¹

[163] The *Ramsbottom* case did not involve an employment agreement which contained an abandonment clause, like that in the *Pitolua* case or such as clause 75.1 of the CA in this case, that deemed the employment to be terminated after a certain period of absence.¹²

[164] The Court of Appeal's guidance in *Ramsbottom* was therefore directed towards cases where there was no abandonment clause, which meant the relevant question was whether the employee had in fact relinquished their employment.¹³

[165] Where there was a deeming clause, like clause 75.1 in the CA in this matter, the leading case for the Authority to apply was still *Pitolua*.¹⁴ In that scenario, the test was simply whether the factual situation contemplated by the contractual clause had occurred, in which case "the employment [would] come to an end in accordance with that clause". The fact that "there was no intention on Mr Pitolua's part" to have ended his employment was irrelevant.¹⁵

¹¹ *Ramsbottom Ltd* (CA), above n5.

¹² *Ramsbottom Ltd* (CA), above n5, at [13].

¹³ *Ramsbottom Ltd* (CA), above n5, at [21].

¹⁴ The Court in *Ramsbottom* distinguished *Pitolua*, it did not purport to overrule it.

¹⁵ *Pitolua* (CA), above n4, at 10.

[166] The Court of Appeal in *Ramsbottom* made it clear that it was objective intention that was relevant, by stating:¹⁶

We consider an objective bystander would reasonably conclude, as did the company, that Mr Chambers had abandoned the employment.

[167] The information communicated to NZ Steel on 3 July 2020 was that Mr Skelton knew his employer wanted him to get in contact and explain his absence, and he had the ability to do so, but had chosen not to. An objective bystander would likely reasonably conclude, as did NZ Steel, that Mr Skelton had in these circumstances abandoned his employment.

[168] The Court in *Ramsbottom* agreed that where the employee had not clearly evinced an intention to end their employment, trust and fair dealing “should encourage the employer to make inquiries of the employee”.¹⁷ NZ Steel did that. It made extensive inquiries, over an extended period of time.

[169] NZ Steel’s decision to treat Mr Skelton as having abandoned his employment, and to send him a letter notifying him of that decision, is similar to the decision the employer in *Pitolua* made to send the employee a telegram stating “Your employment is terminated – call to collect outstanding wages”, after he had been absent for more than the requisite number of days prescribed in the clause.¹⁸

[170] The Court of Appeal in *Pitolua* said that:¹⁹

In the context of cl 18(q) we do not think it right to read the telegram as being notice of dismissal. It can equally be read, and is more properly to be read, as advice that the clause has taken effect. [...]

The issue has perhaps been clouded by the telegram the employer sent, for it may seem that its dispatch showed that the employer had made a decision, which it had reached without full and fair inquiry. But in view of the meaning and effect of the clause, the telegram was unnecessary. Its dispatch could not add to the obligations imposed by the agreement itself.

¹⁶ *Ramsbottom Ltd* (CA), above n5, at [30] and [28].

¹⁷ *Ramsbottom Ltd* (CA), above n5, at [26].

¹⁸ *Pitolua* (CA), above n5, at 8.

¹⁹ *Pitolua* (CA), above n4, at 10 and 11.

[171] The same reasoning applied in this case. Mr Lloyd did make a decision to accept on the available evidence that Mr Skelton had abandoned his employment within the meaning of clause 75.1 in the CA, and NZ Steel sent Mr Skelton a letter advising him of that.

[172] However, in light of the terms of clause 75.1, it was not a decision by NZ Steel to dismiss Mr Skelton, because it was his abandonment of his employment that had ended the employment relationship. Accordingly, the initiative for the ending of the employment had come from Mr Skelton being unavailable and uncommunicative, not from NZ Steel's acts or omissions.

Outcome

[173] Mr Skelton abandoned his employment. Because Mr Skelton was deemed to have unilaterally terminated his employment by operation of clause 75.1 of the CA, he was not dismissed by NZ Steel. Accordingly, his unjustified dismissal personal grievance claim did not succeed.

Costs

[174] The parties are encouraged to resolve any issue of costs between themselves.

[175] If the parties are unable to resolve costs, and an Authority determination on costs is needed, NZ Steel as the successful party may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination.

[176] From the date of service of that memorandum Mr Skelton will then have 14 days to lodge any reply costs memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[177] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards. This matter involved a two-day investigation meeting, so the starting point for assessing costs was \$8,000.00, being \$4,500.00 for the first day plus \$3,500.00 for the second day of investigation meeting time.

[178] The parties are invited to identify any factors they say should result in the notional daily tariff being adjusted, to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority