

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Night 'n Day Foodstores Limited (Applicant)

AND Scott O'Connor (Respondent)

REPRESENTATIVES Denise Lane, Advocate for Applicant
No appearance for Respondent

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 20 January 2005

DATE OF DETERMINATION 28 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Night 'n Day Foodstores Limited ('Night 'n Day'), seeks an order requiring the respondent, Scott O'Connor (Mr O'Connor), to pay the notice period of 4 weeks given Mr O'Connor failed to work the notice period, and to meet certain other costs associated with the claim.

[2] Despite the attempts of the Authority and previously the applicant to contact Mr O'Connor and have him address this matter, no response whatever was received from Mr O'Connor.

[3] The applicant had in the first instance sought to attend mediation provided by the Mediation Services of the Department of Labour but the Mediation Service were unable to make contact with Mr O'Connor either and so mediation was not able to be attempted.

Investigation meeting

[4] Because I considered that the Authority had taken all reasonable and appropriate steps to make Mr O'Connor aware of the nature of the claim against him and the way in which it was proposed to be dealt with, I determined to convene an investigation meeting in Dunedin on 20 January 2005. In the result, Mr O'Connor maintained the stance of not involving himself in the matter and did not appear.

The facts

[5] Denise Lane, a director of the applicant (Ms Lane), gave evidence on behalf of the applicant. She told me that Mr O'Connor had been recruited in the normal way by his answering an advertisement, that his credentials had been checked by staff of the applicant (although it appears

that her own personal involvement at this point was limited) and Mr O'Connor was found to be a good and appropriate person to engage.

[6] Night 'n Day clearly take their induction and training responsibilities seriously as they put a senior supervisor to work shifts with each new employee so that the new employee receives appropriate training in the processes of the business and is correctly and fully inducted into the new employment relationship. Night 'n Day run a chain of 24hr convenience stores and Mr O'Connor was employed at the store in Regent Street, Dunedin.

[7] Ms Lane said that Mr O'Connor appeared personable and able and was well liked by his workmates and by the applicant employer. He started work on 6 June 2004 and the working relationship appeared to be going smoothly. Night 'n Day were able to give Mr O'Connor the shifts that he wanted and he appeared happy and secure in the workplace.

[8] Then without warning Mr O'Connor finished a shift on 16 June 2004 and never returned. Ms Lane was unable to point to anything that distressed him on 16 June and indeed the enquiries that she made suggested that he had been enjoying himself in the new job and was learning the ropes really well with his supervisor buddy.

[9] In any event, Mr O'Connor was rostered to work the following day Thursday 17 June and also Friday 18 June, Saturday 19 June and Sunday 20 June. When he failed to present himself for any of those shifts Night 'n Day were of course put to the trouble and inconvenience of having to staff those shifts without Mr O'Connor. In addition, Night 'n Day were anxious to establish what had happened and why Mr O'Connor had absented himself without notification in this way.

[10] Accordingly, Ms Lane wrote to Mr O'Connor by letter dated 21 June 2004 pointing out that he had absented himself without notifying his intention so to do and seeking an explanation by Thursday 24 June 2004 in the absence of which his employment would be terminated by abandonment of employment.

[11] By Thursday 24 June 2004 there had been no explanation from Mr O'Connor and accordingly on 25 June 2004 Ms Lane wrote again to Mr O'Connor and told him that his employment was terminated by reason of his having abandoned his employment. Ms Lane also attached for Mr O'Connor's reference a copy of the relevant provision of the employee handbook dated 2004 which is clearly incorporated in the individual employment agreement signed by the parties.

[12] As Ms Lane correctly sets out in her letter to Mr O'Connor, that provision quite clearly requires 4 weeks notice of termination of employment by either party.

[13] She then goes on to make clear that this failure to give notice or its monies worth is actionable and she suggests that Mr O'Connor should contact her to discuss the matter failing which she indicates the matter will proceed to be dealt with through the employment institutions.

[14] A further letter was sent by Ms Lane dated 16 August 2004 to Mr O'Connor indicating that the matter was now being proceeded with through the Mediation Service of the Department of Labour.

The law

[15] There are two relevant provisions in the employee handbook 2004 which in terms of the individual agreement signed by the parties is included in the terms of employment. The first of these relevant provisions is the provision relating to termination of employment which provides that

4 weeks notice must be given by either party of the termination of the employment and where a party fails to give that notice or fails to work out that notice as the case may be then 4 weeks wages are to be paid or whatever percentage of that total sum is due pro rata or forfeited as the case may be.

[16] The second relevant provision is that relating to abandonment of employment which simply provides that where a worker has been absent from work for a period of 3 or more consecutive working days without notice of absence then they are deemed to have terminated their employment.

[17] It seems to me to be clear that Mr O'Connor did in fact abandon his employment within the terms of the provision just recited. He was absent for 4 days without notice which brings him firmly within the terms of the abandonment of employment provision.

[18] Further, as he gave no notice of his intention to withdraw his services he is liable in my view for the 4 weeks wages which he would have earned had he given his notice in the proper way and worked it out.

Decision

[19] I find that Mr O'Connor has abandoned his employment within the terms of the relevant provision in his employment agreement, that in consequence he has not given his employer any notice and that he is required by the provision relating to termination of employment to give 4 weeks notice. It follows from the foregoing that Mr O'Connor owes Night 'n Day \$1,920.00 in wages which is 40 hours per week at \$12.00 per hour.

[20] In addition, I order Mr O'Connor to either return the uniforms which he took from the employer or pay the employer the additional sum of \$237.20 which is their value.

[21] Further, the employer has been put to cost and expense by reason of Mr O'Connor's sudden departure and the applicant, Night 'n Day, is entitled to its actual costs in that regard. I note in passing that I am satisfied from Ms Lane's evidence that the intangible costs of having partially trained a worker who then disappeared without trace and has to be replaced are significant but I make no order in that regard. It is however appropriate that Mr O'Connor meet the filing fee which Night 'n Day has paid of \$70.00 together with the fee which Ms Lane advises me Night 'n Day paid in respect to advice received from the Otago/Southland Employers Association amounting to \$126.56.

James Crichton
Member of Employment Relations Authority