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Cunneen v Shore Foods Limited (Auckland) [2007] NZERA 35 (14 February 2007)

Determination Number: AA34/07 File Number: 5038422

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Matthew Cunneen

AND Shore Foods Limited

REPRESENTATIVES John Peebles, advocate for Matthew Cunneen

Michael Sumpter, counsel for Shore Foods Limited

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 25 January 2007

SUBMISSIONS RECEIVED 2, 5, 12 and 13 February 2007

DATE OF DETERMINATION 14 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shore Foods Limited ("Shore Foods") employed Matthew Cunneen as a sales representative. Mr Cunneen has raised a personal grievance in that his resignation amounted to an unjustified constructive dismissal. Shore Foods says the resignation was not a dismissal.

The employment relationship

[2] Shore Foods is in the food distribution business, selling chilled food, frozen food and drygoods in the greater Auckland area. To that end it employs delivery drivers, warehouse staff, and - at the relevant time - three sales representatives including Mr Cunneen.

[3] The parties' employment relationship began in or about March 2004. Mr Cunneen began a period of some three months working in the warehouse before being formally appointed as a sales representative in or about August 2004. The parties' written employment agreement, dated 11 August 2004, provided at clause 2:

"The Employee shall perform the duties set out in the Job Description attached to this agreement. These duties may be modified and updated by the Employer from time to time following agreement with the Employee. The Employee also agrees to perform all other reasonable duties and comply with reasonable instructions issued by the Employer."

[4] The job description for the sales representative's position addressed the maintenance of sales and development of new business, meeting sales targets, customer service, and maintaining knowledge of the company's products. It provided further:

". ... you may be required to assist with other areas of Shore Foods Limited at various times - for example delivering product to customers and attend trade shows after hours."

[5] The employment agreement also provided that Mr Cunneen would receive a:

. company vehicle for business and private use, and subject to

retaining a current driver's licence; and

. mobile phone paid for by Shore Foods, with Shore Foods to meet the cost of business calls and Mr Cunneen to meet personal calls.

[6] In or about December 2004 Mr Cunneen had an accident while driving his company car. The car was written off. Mr Cunneen was at fault but no disciplinary action was taken. He was issued with another vehicle and continued to carry out his duties.

[7] Some four weeks later, in or about January 2005, Mr Cunneen had another accident in a company vehicle issued to him. This time he said another vehicle had hit him from behind and shunted him into the car in front. Again the company vehicle was written off. Mr Cunneen was unable to provide any details of the vehicle which hit him.

[8] Because of that inability Shore Foods' general manager, Bruce Baird, took the view that it was likely Shore Foods' vehicle insurer would deem the company liable for the damage. However the company dealt directly with a broker, and not directly with the insurer. Mr Baird said that, in a conversation he had with the broker, the broker commented that Mr Cunneen was 'under 21, he's written two cars off - he will find it hard to get insurance.' Mr Baird took the view that there was a need to sort through 'the issues' with the insurance company, including liability for the second accident.

[9] Mr Baird said he told Mr Cunneen what the broker had said, while Mr Cunneen said Mr Baird told him the insurer would not insure him. It seems Mr Baird said something about the prospects of further insurance, but the comments referred to speculation on the part of the broker and were not passed on as being the position of the insurer itself. I doubt whether Mr Baird made that clear. Moreover, he said that when he checked back with the broker the broker confirmed the statements were no more than comments, and that Mr Cunneen would have to declare the vehicle write offs when he sought insurance in the future. I understand that to be a reference to Mr Cunneen's own prospects of obtaining insurance - not the company's. I doubt Mr Baird made that clear to Mr Cunneen either.

[10] It was common ground, however, that by agreement Mr Cunneen was moved back to work in the warehouse while 'the issues' were worked out with the insurer. Mr Cunneen was issued with a third company vehicle and retained his mobile phone and salesperson's salary.

[11] The move occurred in or about mid-late February 2005. Despite his initial agreement to the move Mr Cunneen said in his statement of evidence that he was upset at his sales representative's duties being removed, and discussed the matter with his father. He also expressed concern at other representatives being given work previously carried out by him, but there was nothing to suggest these representatives were to take over Mr Cunneen's duties permanently. Inevitably coverage was required while Mr Cunneen was in the warehouse.

[12] In or about late March 2005 Mr Cunneen and his father, Noel Cunneen, asked Mr Baird for written confirmation that the company's insurers would no

longer insure Mr Cunneen. Their evidence was that they were told the confirmation would be forthcoming, but they heard nothing more.

[13] Mr Baird accepted he had been asked for something in writing regarding the insurance, but said he was unable to provide it because he had not heard any more about the insurer's position. He also said he was unsure whether he advised the Cunneens of that. However he must have done so at some point, because Mr Cunneen said in evidence that the company kept saying it was waiting to hear about the insurance. He said he felt stuck. He did not know what was going on.

[14] Thus Mr Cunneen was already upset, and was already considering resignation, when Mr Baird sought to raise employment-related issues formally with him early in May 2005. Mr Baird's action was prompted by a five-day period of sick leave of Mr Cunneen's, for which Mr Cunneen had not supplied the medical certificate required under his employment agreement. Mr Cunneen told me he had the necessary documentation, which I accept, but he agreed he had not provided it to the employer at the time. For his part, Mr Baird was also concerned because he believed Mr Cunneen had been making personal calls on his mobile phone and repeatedly failing to follow office procedures regarding payment for those calls.

[15] By letter dated 10 May 2005 Mr Baird notified Mr Cunneen of a need to 'discuss your ongoing employment options with Shore Foods Limited'. In the course of a discussion on Friday 13 May 2005 Mr Baird gave Mr Cunneen a further letter seeking a meeting to discuss:

. negligent vehicle use;

. unauthorised mobile phone usage;

. company car usage; and

. staff complaints regarding 'your attitude'.

[16] Regarding the concerns about 'attitude', Mr Baird advised that full details would be given at the 18 May meeting.

[17] The letter also informed Mr Cunneen he could have a support person present if he wished. Mr Baird gave Mr Cunneen a second letter of the

same date, being a 'written warning resulting from you failing to produce a medical certificate...'. That phrasing is unfortunate but I read the letter overall as an instruction to produce the medical certificate, coupled with a warning about the implications of a failure to do so.

[18] Mr Cunneen discussed these matters with his father during the ensuing weekend. Either then, or in the course of other associated discussions, Noel Cunneen advised his son not to resign.

[19] The requested meeting began on 18 May. Mr Cunneen attended on his own. He said in evidence he explained his position regarding the mobile phone and the use of the vehicle. Matters were not resolved at that meeting. Mr Cunneen said in evidence that the meeting became more of an argument and that, when it ended, Mr Baird said 'something needs to be done'. Mr Baird told Mr Cunneen that he thought Mr Cunneen was going to resign, and told Mr Cunneen he could resign, or could go down a track that might lead to disciplinary action or dismissal.

[20] Mr Baird did comment on the possibility of resignation. He did so because of a conversation he had in April 2005 with Noel Cunneen. Noel Cunneen had telephoned Mr Baird because Matthew Cunneen had been speaking of moving to Australia with a new girlfriend. Clearly that was a

prospect of considerable concern to Noel Cunneen. Noel Cunneen believed his son's thinking was influenced by his unhappiness at work, and was looking for Mr Baird's views on the matter. Mr Baird took the approach that he was, in effect, being warned of the prospect of Mr Cunneen's resignation.

[21] With that understanding - and taking account other comments and queries relating to the termination of employment which Mr Cunneen had made on occasion - at the meeting of 18 May Mr Baird asked Mr Cunneen if he was going to resign. The issues of concern were not resolved because the conversation turned to that question. Mr Baird said he delayed further resolution of them so he could receive Mr Cunneen's decision about whether he was resigning.

[22] Then on 20 May, while making a delivery in a company truck, Mr Cunneen was stopped by the police for speeding, and fined. According to Mr Baird, Mr Cunneen telephoned his supervisor to ask for a driver to come and take over his deliveries, because his licence was suspended from a previous offence. Mr Baird spoke to Mr Cunneen himself, and said he was told Mr Cunneen's truck licence had not been renewed when his car licence had. This created a concern about exactly what kind of licence Mr Cunneen held. For present purposes I accept Mr Cunneen's statement that he did not have an HT licence and was not aware he needed one for the delivery vehicles he was driving. Mr Baird sought a further meeting with Mr Cunneen to 'work through it'.

[23] The meeting went ahead on 24 May. It was common ground that Mr Baird said 'we can't go on like this'. In his written brief of evidence Mr Cunneen said baldly that he was told to resign with a reference or face dismissal with no reference, but the oral evidence indicated that is not quite what happened. Mr Baird referred again to the prospect of disciplinary action and said a further letter would be prepared so that a formal disciplinary meeting could be held. Mr Cunneen asked what would happen if he left. Mr Baird replied that, since there had not yet been a meeting about all of the issues, the decision was Mr Cunneen's.

[24] Mr Cunneen said at the investigation meeting he was trying to work out if resignation was his best option. He said he did not like the prospect of disciplinary action or dismissal, and the most attractive thing for him was to resign. Accordingly he did so, there and then.

Determination

[25] Mr Cunneen's claim that he was constructively dismissed rests on the three classic situations in which a constructive dismissal might arise. They are that Mr Cunneen was:

- (a) given a choice of resigning or being dismissed;
- (b) subjected to a course of conduct with the deliberate and dominant purpose of coercing his resignation; or
- (c) led to resign by a breach or breaches of duty by Shore Foods.

1. Choice of resignation or dismissal

[26] Mr Cunneen was not given a bare choice of resigning or being dismissed. He was told he was facing disciplinary action which could include dismissal. The difference is that in the former dismissal is portrayed as inevitable if a resignation is not forthcoming, and in the latter dismissal is not necessarily inevitable. Not only that, employers are obliged to warn employees if dismissal is a possible outcome of a disciplinary procedure and I

find that is as far as Mr Baird went. Mr Cunneen chose not to face disciplinary action, and to resign instead.

2. Conduct aimed at coercing resignation

[27] Mr Baird discussed the prospect of resignation with Mr Cunneen, but that was because he was under the impression Mr Cunneen was about to resign to move to Australia. That impression came from his conversation with Noel Cunneen, and from Mr Cunneen's own generalised enquiries about terminating employment. I find Mr Baird's dominant purpose in raising the matter was to clarify whether Mr Cunneen was planning to resign because, if that was the case, there would be no need to continue down the disciplinary path.

[28] As for the disciplinary path itself, Mr Baird had genuine reasons for seeking to embark on it. I do not accept that, in deciding to do so, Mr Baird was seeking to coerce a resignation from Mr Cunneen. The fact that, from Mr Cunneen's point of view, there might have proved to be reasonable explanations in response to those concerns does not affect the genuineness of the decision to raise them.

[29] It is unfortunate that the prospect of resignation and the prospect of disciplinary action became entwined as they did, but I do not accept that Mr Baird's conduct amounted to an attempt to coerce a resignation.

[30] In that respect I note there was an allegation that Shore Foods' owner told Mr Baird he did not want to continue to employ Mr Cunneen. Even if the allegation is true, it does not change my view of Mr Baird's conduct or intentions towards Mr Cunneen in the period ending with Mr Cunneen's resignation.

2. Breaches of duty leading to resignation

[31] The alleged breaches of duty which, it was said, led to Mr Cunneen's resignation centre on Mr Cunneen's dissatisfaction with the removal of his sales representative's duties, and with the response to his request for confirmation that the company's insurer would not insure him.

[32] The mere fact of the removal of the sales representative's duties was not a breach of the parties' employment agreement. The agreement expressly gave the employer the right to modify duties. Since Mr Cunneen had written off two company vehicles in a month, I have no difficulty with the proposition that it was reasonable to take him off the road while insurance and other issues were sorted out. Accordingly I do not believe there was a breach of duty by Shore Foods in its decision to remove Mr Cunneen from sales representatives' duties, and in any event Mr Cunneen agreed to the change at the time.

[33] However it defies logic that Mr Cunneen was offered delivery duties afterwards, even more so since an HT licence was required for some of the delivery vehicles. Despite its protestations to the contrary I do not accept that Shore Foods had made an adequate effort to obtain details of Mr Cunneen's motor vehicle licence when his first vehicle was issued, and no-one checked whether Mr Cunneen had a current HT licence when he was given delivery duties. Not only that, a third vehicle had been issued to Mr Cunneen for his own use, in reliance on the terms and conditions of employment to that effect. In the light of Mr Cunneen's recent history I doubt the obligation survived quite that absolutely. Overall Shore Foods sent mixed messages to Mr Cunneen concerning his use of its vehicles, but I regard that as poor management rather than a breach of duty.

[34] The lack of resolution of the insurance issues was also a problem, as was the lack of clarity about what had been said about insurance coverage for Mr Cunneen. It is unsatisfactory that some 2 Vi months after Mr Cunneen had been moved to the warehouse 'the issues' were apparently still not resolved, but Mr Cunneen had become upset and impatient well before that. His upset and impatience were premature, although it is not surprising that he became concerned about whether he would ever be returned to his sales representative's duties.

[35] Overall, although it was approaching, I do not believe the time had come when the ongoing lack of resolution amounted to a breach of duty on the part of Shore Foods.

[36] For the above reasons I am not persuaded Mr Cunneen's resignation amounted to a constructive dismissal.

Costs

[37] Costs are reserved. If the parties are unable to resolve the matter and seek a determination from the Authority they are to file and serve memoranda setting out their positions within 28 days of the date of this determination.

Rosemary Monaghan
Member of Employment Relations Authority