

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 442  
5443023

BETWEEN

DAVID ADRIAN SMITH  
Applicant

A N D

EZ STEP LIMITED t/a PET  
STOP  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person  
Kaden Nguy, Representative for Respondent

Investigation Meeting: 1 September 2014 at Auckland

Submissions Received: 29 September 2014 from Applicant  
23 October 2014 from Respondent

Date of Determination: 29 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Smith was not unjustifiably constructively dismissed by EZ Step Limited t/a Pet Stop (Pet Stop).**
- B. Pet Stop unlawfully deducted monies from Mr Smith's final pay.**
- C. By no later than 14 days from the date of this determination, Pet Stop must pay Mr David Smith the following sums:**
- (i) \$2769 gross holiday pay.**
  - (ii) \$71.56 being the filing fee.**
- D. Pet Stop failed to pay the employer and employee KiwiSaver contributions on Mr Smith's behalf to the Inland Revenue Department (IRD).**



- E. No later than 14 days from the date of this determination, Pet Stop is pay the employer KiwiSaver contributions that it should have made on behalf of Mr Smith for the period 7 February 2011 to 4 January 2014 in to Mr Smith's Westpac KiwiSaver account.**

### **Investigation Process**

[1] On 19 May 2014, the applicant, Mr David Smith filed a Statement of Problem in the Authority making a number of claims against the respondent, EZ Step Limited t/a Pet Stop (Pet Stop). Pet Stop was required to file a Statement in Reply in the Authority by 3 June but despite a number of reminders, failed to do so.

[2] On 17 June, the Authority directed the parties attend mediation as required by s.159(1)(b) of the Employment Relations Act 2000 (the Act). Pet Stop was further directed to file a Statement in Reply by 19 June.

[3] The parties attended mediation in accordance with the Authority's direction but failed to resolve matters between them. Pet Stop failed to file a Statement in Reply in accordance with the Authority's direction.

[4] In the absence of a Statement in Reply, the Authority convened an investigation meeting to investigate Mr Smith's claims. The investigation meeting was set down for 1 September 2014. On 30 July, a notice of investigation meeting for 1 September 2014 was served on Pet Stop. The notice of investigation meeting was also emailed to and received by Pet Stop.

[5] No steps were taken by Pet Stop to respond to Mr Smith's claim or to respond to the Authority's correspondence regarding the investigation meeting. Mr Smith suffers from a health issue. In the absence of a response from Pet Stop, arrangements were made for the investigation meeting on 1 September. It was arranged that Mr Smith would not be required to attend the investigation meeting in person, rather he would give his evidence by telephone to the Authority on 1 September.

[6] On Friday, 29 August (one working day before the scheduled investigation meeting) a request was made by Pet Stop for a Chinese/English translator to be available at the investigation meeting on Monday 1 September.



[7] The investigation meeting proceeded on 1 September. Mr Ren Tian the owner of Petstop and Ms Connie Li attended the meeting for Pet Stop.

[8] Following discussions with Ms Li and Mr Tian about Pet Stop's failure to engage in the Authority's process, leave was granted by the Authority to Pet Stop pursuant to Regulation 8(3) and (4) of the Employment Relations Authority Regulations 2004 (the Regulations) to respond to the application brought by Mr Smith.

[9] Mr Tian and Ms Li gave verbal evidence in response to Mr Smith's claims. It was then agreed that Mr Smith would respond in writing to written questions from the Authority. The questions and answers were to be copied to Pet Stop so it could respond. It was also agreed that following this process a determination would be made by the Authority 'on the papers'. These were the terms and conditions the Authority thought fit in the circumstances pursuant to Regulation 8(4) of the Regulations.

[10] On 11 September, Pet Stop informed the Authority that it had instructed Jesse & Associates, lawyers to act in respect of the matter before the Authority.

[11] On 30 September, the Authority forwarded Mr Smith's response to the Authority's questions to Jesse & Associates. Jesse & Associates were directed to provide any response by Pet Stop to the Authority by 15 October. Late on 15 October Jesse & Associates sought a further two weeks in which to file Pet Stop's response.

[12] A final extension of a further seven days was granted to Pet Stop to file its response to Mr Smith's claims. A response was received on 23 October.

### **Employment relationship problem**

[13] Pet Stop operates five pet shops throughout Auckland selling pets such as fish, small animals and pet products. Mr Ren Tian is Pet Stop's sole director and shareholder.

[14] Mr Smith was employed by Pet Stop for almost three years initially as a salesperson in the East Tamaki pet shop and shortly before his resignation as manager at the Dominion Road pet shop.

[15] Mr Smith resigned from his employment in December 2013. In his statement of problem which was filed in the Authority on 19 May 2014, Mr Smith claims he resigned because of a conflict with another staff member. Mr Smith has subsequently given evidence that he was forced to resign and believes this amounts to an unjustifiable constructive dismissal. Mr Smith seeks compensation for hurt and humiliation under the Employment Relations Act 2000 (the Act).

[16] Mr Smith also claims at the time of his resignation he reached an agreement with Pet Stop's Human Resources Manager, Jo, that he was not required to work out his period of notice and would still be paid his salary. When Mr Smith received his final pay, Pet Stop had deducted the balance of the period of notice not worked by him from his holiday pay entitlement. Mr Smith seeks reimbursement of his holiday pay. Further, Mr Smith claims payment of KiwiSaver contributions by Pet Stop for the period of his employment which were never made.

[17] Pet Stop denies the claims. Pet Stop says under Mr Smith's employment agreement it was entitled to deduct any moneys owing to it from Mr Smith's final pay. Pet Stop says Mr Smith did not work out his notice and accordingly owed it money. With regard to the KiwiSaver contributions, Pet Stop says Mr Smith never raised KiwiSaver contributions or payment with it and therefore no payments were made.

### **Issues**

[18] The issues for resolution by the Authority are:

- (a) Was Mr Smith unjustifiably constructively dismissed?
- (b) Was Pet Stop entitled to deduct from Mr Smith's final pay the period of notice not worked by him?
- (c) Was Pet Stop obliged to make KiwiSaver contributions on behalf of Mr Smith?



## First Issue

### Was Mr Smith unjustifiably constructively dismissed?

[19] Mr Smith and a representative from Pet Stop signed an individual employment agreement dated 7 February 2011 (the agreement) on 12 February 2011. Under the agreement, Mr Smith was employed from 7 February 2011 as a sales assistant of Pet Stop Pet Shop.

[20] Mr Smith became disenchanted and stressed by the way in which Pet Stop was managed. Mr Smith says he was concerned at the low levels of hygiene, cleanliness, animal welfare and safety. Mr Smith decided to resign which he did in writing on 1 November 2013, (first resignation).

[21] Mr Smith's letter refers to some of the issues with Pet Stop and says:

*The events of yesterday on top of the previous verbal abuse to me in front of customers, it has brought me to a sleepless night of thinking what to do. It upsets me that I have decided to resign even though it was a very productive meeting with Jo but short term I can't see the change needed within the store as that comes down to individuals beliefs. There was yet again no apology by Rebecca yesterday or the previous time which shows no respect or care to how she treated me. Some people don't know how lucky they are to even have a job, as I now will just end up without a job because I just want to do the right thing but I'm losing my passion for my job because of some people and actions.*

*So I wish to say a very big thank you to you Connie, Ben and Joe and many others for my time with Pet Stop in nearly three years, and regret I have chosen my last day to be 30 November 2013.*

*Yours sincerely  
David Smith*

[22] The HR manager, Jo, approached Mr Smith after receiving his resignation and pleaded with him to stay on. Jo offered and Mr Smith accepted a manager's position at the Dominion Road Pet Stop. Mr Smith began at the Dominion Road store the following Monday.

[23] There were a number of issues about the running of the store which Mr Smith discussed with Jo but these were not resolved satisfactorily. On 28 November 2013, Mr Smith tendered his written resignation (final resignation) referring to issues he hoped to see improve at the Store including staff training, safety. Mr Smith also

stated that he was leaving to pursue other goals and to focus more on church and charity. The letter ends:

*I sincerely appreciate the time with petstop and hope the future is one of strong growth and prosperity within NZ. I shall continue to put daily effort and time into the store until the final day.*

[24] Mr Smith gave notice with effect from Saturday, 4 January 2014, being four weeks from the date of resignation (resignation date).

### **Constructive Dismissal – The law**

[25] The law in relation to constructive dismissal in New Zealand is well settled. In the Court of Appeal decision in *Wellington, Taranaki & Marlborough Clerical IUOW v. Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)*<sup>1</sup>, Judge Williamson said:

*There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.*

[26] In the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*<sup>2</sup>, the Court identified three situations where a constructive dismissal might occur:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads an employee to resign.

[27] Mr Smith appears to be relying on categories (b) and (c) in support of his claim that he was constructively dismissed.

[28] Mr Smith refers in his evidence to stress he suffered as a result of the way in which Pet Stop operated. In his first resignation, Mr Smith refers to a number of frustrations and his inability to continue working with some of the staff due to their

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<sup>1</sup> [1983]ACJ 965 at p.975

<sup>2</sup> [1985] 2 NZLR 372



attitude. The letter does not appear to be critical of Pet Stop management, rather some of the employees working there. Similarly, the final resignation on 28 November refers to the standard of ongoing staff and then refers to Mr Smith's desire to pursue other goals.

[29] On the balance of probabilities, I do not find Mr Smith's resignation to fall within any of the three categories of constructive dismissal set out in *Woolworths*. It is my view that Mr Smith mostly enjoyed his work but that in the final month or so of his employment, he became increasingly frustrated with some of the staff and the way in which they attended to their work.

[30] There is no criticism of Pet Stop management in either of the letters of resignation and it was not reasonably foreseeable that Mr Smith was going to resign in the circumstances.

[31] In my view there was no course of conduct followed by Pet Stop with the deliberate and dominant purpose of coercing Mr Smith to resign. Quite the contrary, Jo pleaded with Mr Smith to stay on and offered him a manager's position. Mr Smith accepted the new role but became disgruntled with his co-workers, and decided to leave to pursue other goals.

[32] There was also no breach of duty by Pet Stop in my view which led to Mr Smith's resignation. There were frustrations combined with a desire to pursue other objectives.

[33] In any event, Mr Smith did not raise a personal grievance claim of constructive dismissal until he filed his Statement of Problem on 19 May 2014, almost six months after his employment with Pet Stop concluded. Under s.114 of the Employment Relations Act (the Act), an employee has an obligation to raise a personal grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee<sup>3</sup>, whichever is the later, unless the employer consents<sup>4</sup>.

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<sup>3</sup> Section 114(1) of the Act

<sup>4</sup> Section 114(1) of the Act

[34] There was no evidence of consent by Pet Stop to Mr Smith raising his personal grievance claim of unjustifiable constructive dismissal outside the 90 day period. In the event that I am incorrect in finding that Mr Smith was not unjustifiably constructively dismissed, he did not raise his grievance within the statutory timeframe.

[35] Accordingly, I find that the first claim fails.

## **Second Issue**

### **Was Pet Stop entitled to deduct from Mr Smith's final pay the period of notice not worked by him?**

[36] On 5 December 2013, Mr Smith met with Jo and it was agreed between them that Mr Smith's last day would be on Saturday, 7 December 2013. Mr Smith says he understood he was not required to work his period of notice out but would still be paid until the date his resignation became effective on 4 January 2014.

[37] Following his resignation, Mr Smith received his final pay including his holiday pay, from which three weeks and three days' salary had been deducted. Mr Smith was very angry and upset and approached the Labour Inspector in order to resolve matters. The matter was subsequently referred by Mr Smith to the Employment Relations Authority for resolution.

[38] Mr Smith says he did not owe any money to Pet Stop at the time he resigned because he and Jo had reached an agreement whereby he was not required to work his notice out but would still be paid. Mr Smith says that by deducting the three weeks and three days' wages from his holiday pay, Pet Stop has acted unlawfully.

[39] Clause 6 of the agreement states:

*Except as noted in subclause 3(b), four (4) weeks' notice of the termination of employment shall be given by either party, or in lieu thereof, four weeks' pay shall be paid or forfeited by the party not giving the requisite notice. Where the Employee gives a longer than four weeks' notice period the company shall not be required to accept such notice or be liable to pay more than four weeks' in lieu where the company does not require the Employee to work out the notice period.*

[40] Under clause 7, annual holidays are payable pursuant to the Holidays Act 2003.



[41] Section 4 of the Wages Protection Act 1983 (the WPA) provides that an employer cannot make deductions from wages except in accordance with the WPA. The section states that:

*Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[42] Section 5 of the WPA allows an employer to make deductions for any lawful purpose where the worker has given written consent and has not given the employer written notice withdrawing that consent.

[43] Clause 6 of the agreement did not make provision for any deductions by Pet Stop from wages or final pay. Rather, clause 6 provides that *that four weeks' pay shall be paid or forfeited by the party not giving the requisite notice*. Mr Smith's evidence is that there was an agreement whereby he did not have to work out his notice and would still be paid. I accept his evidence.

[44] Further, even if the requisite notice had not been given, it is my view that it was not open to Pet Stop to deduct moneys allegedly owing to it by Mr Smith from Mr Smith's final pay without written consent from him to do so. Clause 6, in my view, does not comply with s.5 of the WPA. Also, Mr Smith did not give written consent for any deductions from his final pay, at the date of his resignation.

[45] Pet Stop was not entitled to deduct from Mr Smith's final pay unpaid notice it says was owed to it by him.

[46] The wages and time records provided by Pet Stop were deficient. From the evidence, I calculate that Mr Smith is owed one week's holiday for 2012/2013, one day in lieu of holiday for labour day in 2013, three weeks' holiday for 2013/2014. The total in holidays owed by Pet Stop amounted to \$3,600 gross.

[47] Pet Stop paid Mr Smith the sum of \$831 after he filed his application and this amount is to be deducted from that total. I order Pet Stop to pay Mr Smith the sum of \$2,769 gross within 14 days of the date of this determination.



### Third Issue

#### Was Pet Stop obliged to make KiwiSaver contributions on behalf of Mr Smith?

[48] Mr Smith was a member of the Westpac KiwiSaver scheme. Pet Stop had an obligation to make KiwiSaver employee and employer contributions for the relevant period of his employment. Pet Stop failed to do so and acknowledged this failure. Mr Smith is entitled to be compensated for these lost contributions under s131 of the Act.

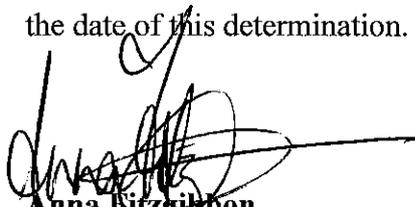
[49] Pet Stop is ordered to pay into Mr Smith's Westpac KiwiSaver account, KiwiSaver employer contributions for the period of 7 February 2011 until the resignation date on 4 January 2014 within 14 days of the date of this determination under s.131 of the Act. From 7 February 2011 until 31 March 2013, employers were required to contribute 2% of the employee's salary to a KiwiSaver scheme. From 1 April 2013 the employer's contribution increased to 3% of the employee's salary.

[50] I order Pet Stop to pay into Mr Smith's Westpac KiwiSaver account KiwiSaver employer contributions of:

- 2% of Mr Smith's salary from 7 February 2011 until 31 March 2013; and
- 3% of Mr Smith's salary from 1 April 2013 until the expiry of Mr Smith's notice of resignation on 4 January 2014.

#### Costs

[51] Pet Stop is to reimburse Mr Smith the filing fee of \$71.56 within 14 days of the date of this determination.

  
Anna Fitzgibbon  
Member of the Employment Relations Authority

