

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 103  
3026491

BETWEEN      Robert Adriaan Sies  
                         Applicant

AND              KED Investment Limited t/a Saggio Di Vino  
                         Respondent

Member of Authority:      Peter van Keulen

Representatives:              Georgia Milne, Counsel for Applicant

                         David Benjamin, representative for Respondent

Investigation Meeting:      On the papers

Date of Determination:      23 July 2018

Member of Authority:      Peter van Keulen

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]      KED Investment Limited employed Robert Sies as an apprentice chef from January 2017. In August 2017, Mr Sies resigned.

[2]      Mr Sies has raised personal grievances for unjustified dismissal and unjustified action causing disadvantage. He has also claimed wage arrears for unpaid wages relating to one shift worked immediately prior to his resignation and accrued holiday pay, which KED did not pay to him at the end of his employment. And he has claimed for KiwiSaver contributions that he says KED have not paid.

[3] KED denies the unjustified dismissal and unjustified disadvantage grievances. It also says it validly withheld any final payment owing to Mr Sies based on a deductions clause in Mr Sies' employment agreement and its estimate of the loss it suffered because Mr Sies did not give the required eight weeks' notice of resignation.

### **Progress of this matter**

[4] On 15 May 2018, I directed the parties to attend mediation and suspended any further progress of this matter in the Authority pending the outcome of that mediation.

[5] Prior to the parties attending mediation an article was published about KED's restaurant, which indicated that the director and majority shareholder was considering selling the restaurant or closing down in the near future.

[6] Counsel for Mr Sies contacted the Authority and requested that I reactivate my investigation notwithstanding that the parties had not been to mediation because, based on the article, there were concerns that KED's restaurant might close leaving KED with little or no income or assets to pay Mr Sies should he be successful in his claims. Counsel suggested that I could investigate and determine the wage arrears claim and the KiwiSaver claim on the papers as there was no real factual dispute and the issue appeared to be largely about KED's right to withhold payment.

[7] I convened a case management conference to discuss this request. KED did not participate in the telephone conference, despite being served with notice of the date and time of the call.

[8] After hearing from Counsel for Mr Sies I decided I would consider dealing with this on the papers. I directed Mr Sies to lodge and serve an affidavit setting out his wage arrears and KiwiSaver claims, providing any wage slips or other evidence to support the claims. I directed KED to lodge and serve wage and time records.

[9] Mr Sies lodged his affidavit as directed and this quantifies his wage arrears claim at \$1,578.53 for accrued holiday pay based on his last wage slip and \$108.90 for his last shift on 14 August 2017.

[10] KED lodged the relevant wage and time records as directed and in a cover email KED's director explained that:

- (a) He had not received the notice of the case management conference and he apologized for not being available for the call.
- (b) It never received a signed KiwiSaver enrolment form from Mr Sies so it was not required to make KiwiSaver contributions for him.
- (c) Mr Sies resigned and walked out leaving KED's restaurant short staffed, which led to KED cancelling restaurant bookings and losing revenue.

[11] In essence, reading the statement in reply and the email from KED's director I conclude that KED's defence to the wage arrears and KiwiSaver claims is:

- (a) As Mr Sies never signed up to KiwiSaver there was no obligation on KED to make any contributions for him.
- (b) KED suffered a loss from Mr Sies not giving the required notice when he resigned and in these circumstances, the deduction clause in the employment agreement means it was entitled to withhold Mr Sies' final pay including any holiday pay.

[12] Given KED's position in respect of the Kiwisaver claim, I am not prepared to make a determination on that claim on the papers. It seems clear to me that I need to hear evidence about whether a KiwiSaver form was completed and give both parties an opportunity to set out their evidence on this before I make a decision on what occurred. I defer this claim to be investigated with the personal grievance claims at a later date.

[13] I can however deal with the wage arrears claim on the papers as this turns on a legal issue – the right of an employer to withhold the payment of wages and/or holiday pay based on a deductions clause in the employment agreement.

### **Wage arrears**

[14] The starting point in my analysis is that an employer has no right to withhold payment or deduct any amount from any final pay due to an employee<sup>1</sup> except for an authorised deduction from wages or holiday pay due pursuant to s 5 of the Wages Protection Act 1983<sup>2</sup>.

[15] There are two deductions clauses in Mr Sies' employment agreement. Clause 5 of the employment agreement provides:

You consent, pursuant to the Wages Protection Act 1983, to the Employer deducting from your pay (including holiday pay) any overpayments, outstanding debts or moneys owed to the Employer, including the value of any unreturned property, or, in the event that you fail to give the correct period of notice, a sum equivalent to the remuneration that would have been paid during the notice period.

[16] Clause 9 in the schedule to the employment agreement provides:

- 9.1 Either party may terminate employment by giving no less than 8 weeks' Notice must be given in writing.
- 9.2 ...
- 9.3 If you do not give the required notice the Employer is entitled to deduct the sum equivalent to the remuneration for the required notice period from any money owed to you, including holiday pay, or to otherwise recover the sum.

[17] From these two clauses, there are two possible arguments for KED's deduction. First, Mr Sies did not give eight weeks' notice and KED can deduct eight weeks wages from any final pay. Second, as a result of Mr Sies not giving notice KED suffered a loss of revenue and

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<sup>1</sup> *Edwards (Labour Inspector) v Topo Gigio Restaurant Ltd* AEC 109/95

<sup>2</sup> *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA)

can deduct this as money as an outstanding debt or money owed to it. I will consider each of these arguments.

[18] First, the deduction based on the purported contractual right to deduct up to 8 weeks wages is not an enforceable right. It is a penalty clause and not an estimate of loss<sup>3</sup>.

[19] Second, the right to deduct an amount for the alleged loss based on a general deductions clause is subject to ss 5 and 5A of the Wages Protection Act. Section 5(1A) requires an employer to consult with an employee before making a deduction under a general deduction clause. Section 5A provides that a deduction made under a general deduction clause (in reliance on s 5) must not be unreasonable.

[20] Whilst clause 5 of the employment agreement might be a suitable general deduction clause, KED has not complied with ss 5 and 5A of the Wages protection Act. There is also a second issue with the use of the general deduction clause. I do not accept that it covers an alleged amount owing for a claim against an employee. Rather I read clause 5 as providing for the deduction of amounts that are owed which are largely not disputed such as a loan, credit advanced for items purchased from an employer or an advance of wages to an employee.

[21] This means the deduction, or withholding of Mr Sies' final pay, is not lawful<sup>4</sup>. And, as a result KED must pay Mr Sies his final pay for accrued but untaken holiday pay and one shift calculated to be \$108.90.

[22] This determination does not rule out the possibility that KED has a valid counterclaim against Mr Sies for the alleged loss it incurred because of his failure to give the required notice of resignation – it just means it cannot take what it claims to be owed by deduction from Mr Sies' final pay. If KED want to pursue this alleged loss then it remains an issue for

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<sup>3</sup> *GL Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120

<sup>4</sup> *Online Contractors Ltd v Wetere* [2017] NZERA Auckland 17

the parties to discuss in mediation along with the remaining parts of Mr Sies' claims. If the remaining claims are not resolved then I will investigate them in an investigation meeting<sup>5</sup>.

### **Determination**

[23] KED Investments Limited must pay Robert Sies \$1,578.53 (gross) for accrued holiday pay and \$108.90 (gross) for his last shift of work.

### **Costs**

[24] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[25] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of either:

- (a) any subsequent determination I am required to issue on the remaining claims;
- or
- (b) the remaining claims being withdrawn.

[26] The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>5</sup> The Authority is currently holding the week of 5 November 2018 free for a one day investigation meeting to be scheduled pending the parties advising their availability.