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## Smith v Wildzog Investments Limited (Auckland) [2018] NZERA 13; [2018] NZERA Auckland 13 (15 January 2018)

Last Updated: 2 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 13  
5638988

BETWEEN GLENN SMITH Applicant

AND WILDZOG INVESTMENTS LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Warwick Reid, Advocate for the Applicant

Kate Ashcroft, Counsel for the Respondent Investigation Meeting: 26 September 2017 in Tauranga Determination: 15 January 2018

DETERMINATION OF THE AUTHORITY

**A. Glenn Smith was unjustifiably disadvantaged and unjustifiably dismissed by Wildzog Investments Limited.**

**B. In settlement of his personal grievances Wildzog Investments Limited must pay Mr Smith the following sums within 28 days of the date of this determination:**

**(i) \$11,639 as reimbursement of lost wages; and**

**(ii) \$12,000 as compensation for humiliation, loss of dignity and injury to his feelings.**

**C. Costs are reserved with a timetable set for memoranda if a determination of costs by the Authority is needed.**

[1] Glenn Smith was dismissed by Wildzog Investments Limited on the grounds of redundancy on 14 July 2016. At the time Wildzog owned Cleantech NZ, a Tauranga-based business selling cleaning and related products used in the commercial and hospitality sectors. Mr Smith worked for Cleantech from September 2014.

Initially he worked as an account manager but from November 2014 he carried out a role that included delivery and warehouse work.

[2] Shortly after a new employee was engaged in January 2016 to do deliveries Mr Smith injured his heel in an accident at home. He was then off work, under ACC cover, for the following ten weeks while he recovered from that injury. The circumstances of his return to work in April 2016, including the work he was asked to do and the pay arrangements for it, became the subject of personal grievances he raised. These grievances alleged he had been unjustifiably disadvantaged on his return to work and was then, in July 2016, unjustifiably dismissed for redundancy.

[3] Daren Saunders is Wildzog's sole shareholder and director. While Mr Smith initially sought to pursue his grievance claims against Mr Saunders in his personal capacity, an earlier determination of the Authority found Mr Smith was only entitled to pursue his claim against Wildzog.<sup>1</sup>

[4] On 28 October 2016 Wildzog sold the Cleantech business. At the time of the Authority's investigation and when this determination was issued Wildzog remained a company registered with the Companies Office. It had begun a voluntary de-

registration process. Its application for removal from the register, lodged in the week before the Authority investigation began, said Wildzog had ceased carrying on business, had discharged in full its liabilities to all known creditors and had distributed its surplus assets.<sup>2</sup> Those assets included funds from the sale of the

Cleantech business that were distributed to Mr Saunders.

[5] As Wildzog remained a registered entity, at least for the meantime, Mr Smith was entitled to have his application to the Authority investigated and determined. The outcome might not be otiose given that the [Companies Act 1993](#) provided some options for objection to removal of Wildzog from the register or for its restoration to the register.<sup>3</sup>

[6] Mr Smith's wife, Julie Dellaway-Smith, had also worked for the Cleantech business when it was owned by Wildzog. She was Cleantech's office manager. She

was dismissed on 22 June 2016, three weeks before Mr Smith's position was made

<sup>1</sup> *Dellaway-Smith & Smith v Wildzog Investments Limited & Saunders* [2017] NZERA Auckland 163.

<sup>2</sup> [Companies Act 1993, s 318\(2\)](#).

<sup>3</sup> [Sections 321](#) and [329](#).

redundant. The Authority's earlier determination, referred to above, had decided she was entitled to pursue Mr Saunders personally for a personal grievance of unjustified dismissal. Her claim was the subject of a separate investigation and separate determination issued at the same time as this determination about Mr Smith's

grievances.<sup>4</sup>

### **The Authority's investigation**

[7] Seven witnesses provided evidence for the Authority's investigation: Mr Smith, his wife Ms Dellaway-Smith, Mr Saunders, Kristy Rowland, Lawrence McDonald, Jenaffa Cooney, and Jamie Campbell.

[8] Ms Cooney was a delivery driver Wildzog employed in January 2016.

[9] Mr Campbell was employed in March 2016, shortly before Mr Smith's return to work, and carried out a range of driving, sales and warehouse roles. He remained employed when Mr Smith was made redundant.

[10] Ms Rowland was the ACC case manager who dealt with Mr Smith over his injury in January 2016 and had contact with Mr Saunders in March 2016 about the prospects for Mr Smith's return to work.

[11] Mr McDonald operated a business near the Cleantech offices and had contact with Mr Smith while he worked there and in the months after his employment ended.

[12] The parties' representatives, in addition to asking questions of witnesses at the investigation meeting, provided closing submissions on the issues for determination. Closing submissions for Mr Smith were made orally at the close of the meeting and for Mr Saunders in writing on 12 October 2017. On 16 October Mr Smith's representative advised he did not wish to use an opportunity that had been timetabled to make further submissions in reply.

[13] As permitted by [s 174](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all evidence and submissions received. It has stated findings of fact and law, expressed conclusions on the issues requiring determination and specified orders made.

<sup>4</sup> *Dellaway-Smith v Saunders* [2018] NZERA Auckland 12.

### **The issues**

[14] The issues for determination were:

(i) Was Mr Smith unjustifiably disadvantaged by his role being assigned to another employee during his absence?

(ii) Was Mr Smith unjustifiably disadvantaged by a reduction in his hourly pay rate?

(iii) Was Mr Smith unjustifiably dismissed for redundancy?

(iv) If Wildzog's actions were not justified (in respect of his disadvantage and/or dismissal grievances), what remedies should be awarded, considering:

(a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

(v) If any remedies are awarded, should they be reduced (under [§124](#) of the Act) for blameworthy conduct by Mr Smith that contributed to the situation giving rise to his grievance/s?

(vi) Should either party contribute to the costs of representation of the other party?

**Role assigned to a new employee: unjustified disadvantage?**

[15] While Mr Smith's initial job title was as an account manager, his role by the time of his January 2016 injury had evolved into a mix of delivery, warehouse, sales and training duties. Through 2015 Wildzog had employed at least three new employees who were intended to take up the delivery role. They were initially trained by Mr Smith, on delivery routes and tasks such as installing product dispensers. For a variety of reasons each of those employees lasted only short periods in the job. Ms Cooney, recruited in January 2016, lasted longer. She was trained by the time Mr Smith suffered his heel injury and he went off on ACC-funded leave for what turned out to be a period of ten weeks.

[16] During Mr Smith's absence in this period Mr Saunders recruited Mr Campbell to work for three days a week. He did so in March 2016 at a time when Ms Cooney and Ms Dellaway-Smith were also on leave and it was not clear to him when Mr Smith might be fit to return to work. Mr Saunders decided he needed someone to cover the work done by Ms Cooney and Mr Smith. In his oral evidence Mr Saunders

described Mr Campbell as "a general dogsbody" who did warehouse, delivery and sales work. Mr Campbell had sales experience from his own business which he continued to operate on days he was not doing Cleantech work. His evidence was that the sales work comprised around one quarter of what he did for Cleantech.

[17] However Mr Saunders' description of what Mr Campbell did also matched the nature and kind of work Mr Smith had been doing for some months before his injury. If Mr Campbell had not been employed in his absence, Mr Smith would, more likely than not, have returned to doing exactly that same work. Mr Saunders did not give a compelling explanation for why that had not happened. He said the role Mr Smith had been doing by January 2016 was temporary and he understood that Mr Smith had back problems that prevented him from returning to doing the same job. He said Ms Dellaway-Smith told him Mr Smith would be unable to drive the delivery truck because of back problems. While there was a conflict in the evidence of Mr Saunders and Ms Dellaway-Smith over whether that was what she said, Mr Saunders could not fairly have relied solely on what she may have said to make such a decision about Mr Smith's employment. Before deciding to keep Mr Campbell in that role when Mr Smith returned to work in April 2016 and to have Mr Smith thereafter carry out the more sales-focused role he had originally been employed to do in September 2014, Mr Saunders should have discussed the proposal and the information it was based on directly with Mr Smith. He did not. It was a breach of Wildzog's good faith obligations to consult with an employee about variations to their terms of employment and on proposals that would impact that employee.

[18] The reality was Mr Saunders had found Mr Campbell to be a willing and effective employee who he wanted to keep so he decided to move Mr Smith from what had been his current role at the time of the injury. He later described that new role as a "new position ... created for [Mr Smith] that required no lifting, warehousing, minimal deliveries and not driving the truck and focused on new business sales only".

[19] Mr Smith was unjustifiably disadvantaged by that failure to consult him and by placing him in that sales-focused role. The effect of that disadvantage became apparent within three months when the role was the subject of a redundancy proposal because Mr Smith had not met the expectations Mr Saunders had for sales results.

[20] This disadvantage could be demonstrated by considering a counterfactual scenario. If Mr Saunders had checked with Mr Smith and been satisfied that any back issues he may have had in lifting or shifting product could be managed by the use of a trolley (while out delivering in the van) or a trolley and a forklift (while in the warehouse), it could have been Mr Campbell rather than Mr Smith who was asked to do the more sales-focused role if Mr Saunders had really thought it was worth employing someone to do. In that scenario it would have been Mr Campbell in the position that Mr Saunders decided to review in June 2016 because he was concerned whether it was, when measured against financial targets, really a viable role.

**Return to work on different pay arrangements: unjustified disadvantage?**

[21] At the outset of his work for Cleantech in September 2014 Mr Smith's pay was to be based on an hourly rate of \$15.25 with an unspecified commission rate for all sales he made. He got one commission payment in January 2015 but no other commission payments during his employment. Instead, once he began also doing delivery duties from November 2014, he was paid on the basis of an hourly rate of

\$19.50. In July 2015 Mr Saunders agreed to increase that rate to \$20.50 an hour. This was the rate Mr Smith was being paid at the time he went on injury leave in January 2016.

[22] In late March 2016 Ms Rowland talked with Mr Saunders about Mr Smith returning to work. Her record of that discussion, held by telephone, noted he told her he had "replaced" Mr Smith so his job was now only two days a week, not

five. She recorded that she asked if Mr Smith knew about that change and Mr Saunders had replied no. Mr Saunders did however, a few days later, ask Ms Dellaway-Smith to talk to Mr Smith about the terms on which he could return to work as a full-time sales account manager. Mr Saunders said to tell Mr Smith the job would be paid at the rate of \$15.50 an hour plus commission. Mr Smith was unhappy at hearing that proposal. Ms Dellaway-Smith passed Mr Smith's response on to Mr Saunders but told both men she expected them to talk to one another directly over whatever arrangements were to be made rather than through her. Mr Smith returned to work on 11 April without having expressly agreed to the proposed pay rate. Mr Saunders met with him on 28

April to discuss the rate, the commission and his expectations for the sales role. The

Tauranga and Mount Maunganui area, with its existing customers, previously covered

by Mr Smith was to be serviced by Mr Campbell. Mr Smith was directed to seek new customers in new areas, starting with Te Puke. Mr Smith told Mr Saunders he did not think there was enough work for two people doing the two roles and there would not be enough interest to generate the sales targets Mr Saunders wanted. Mr Smith left the meeting without agreeing to the proposed pay arrangements. Instead he asked to be reinstated to his previous hourly rate of \$20.50 an hour.

[23] Although Mr Smith carried out the sales work asked of him, canvassing for customers, his actions could not be taken to be acceptance by conduct. The change of role and the change of pay rate was a unilateral variation to Mr Smith's terms and conditions. It was to his disadvantage. As he predicted he was not able to generate sufficient new business to earn a level of commission that, combined with the lower base rate, would have equalled his earnings under his previous hourly rate. Mr Saunders' action in imposing that change was not what a fair and reasonable employer could have done in all the circumstances at the time. The resulting reduction in Mr Smith's earnings was an unjustified disadvantage.

### **Restructuring proposal and redundancy of position: unjustified dismissal?**

[24] On 20 May 2016 Mr Smith had an advocate raise a personal grievance on his behalf about the disadvantages in the role he was asked to do from April onwards. In the following week Mr Saunders began a disciplinary investigation concerning allegations about Ms Dellaway-Smith's conduct in carrying out her work. Before that process ended with Ms Dellaway-Smith's dismissal on 22 June, Mr Saunders started a formal review of the viability of Mr Smith's sales role.

[25] On 17 June Mr Saunders met with Mr Smith and gave him a letter advising of a proposal to disestablish the sales account manager role. The letter said there were no other vacant roles into which he could be redeployed. It said Mr Saunders expected Mr Smith to generate around \$4000 a week in sales to reach a 'break even' point but his work over an 11 week period had generated only \$3301.50 in new sales.

[26] Mr Saunders held three meetings with Mr Smith and his representative about the proposal, providing further information and an opportunity for feedback. He ended the process with a letter of 14 July. It confirmed the position was redundant and gave Mr Smith two weeks' notice of the termination of his employment.

[27] The 14 July letter recorded that Mr Smith had asked to go back to the job he was doing before he was injured in January. Mr Smith had questioned why Mr Campbell was employed when Mr Smith could see existing customers, 'up sell' to them and Ms Cooney could do the deliveries. Mr Saunders described the role done by Mr Campbell as a "swing position", working three days a week, calling on existing customers, seeing new customers, doing warehousing and deliveries, installing product dispensers and filling in driving the delivery truck when Ms Cooney was off work. He said he thought that structure worked better and provided better coverage.

[28] While Wildzog could genuinely decide two positions involved with sales – that is the canvassing done by Mr Smith and Mr Campbell's work with existing customers – was not financially sustainable, it had to fairly assess who was best placed to do what work was available to be done. Mr Saunders made several failures of fairness in what he did during his restructuring exercise. Those failures ultimately made his decision to end Mr Smith's employment substantively unreasonable and therefore unjustified.

[29] Firstly, Mr Saunders said Mr Smith was unable to continue in the role he was doing before the January injury because of "his back injury". However Mr Saunders had not made reasonable inquiries into the nature or the extent of those supposed limitations or whether they might be able to be accommodated so that Mr Smith could carry out that role. Instead he had relied on what he said Ms Dellaway-Smith had said about those limitations.

[30] Secondly, Mr Saunders knew of several instances of what were said to be unsatisfactory activities by Mr Smith at work but had not put them to Mr Smith for comment or correction. Each alleged instance, conveyed to Mr Saunders by Mr Campbell or Ms Cooney, was prejudicial to Mr Smith's standing as a reliable employee.

[31] In his oral evidence Mr Campbell said he had visited some customers or potential customers with Mr Smith and considered Mr Smith failed to make suitable sales pitches. He said Mr Smith only provided "generic" quotes rather than tailoring them to the particular customer. Mr Campbell told Mr Saunders about what he

considered to be Mr Smith's poor performance as a salesman. He also told Mr Saunders that Mr Smith spent time making personal phone calls rather than work calls when they spent some time together out in the van. And he also talked to Mr Saunders about Mr Smith showing him and Ms Cooney a website Mr Smith was developing for a business he hoped to set up. Mr Campbell believed Mr Smith had worked on that project during working hours at Cleantech. He also told Mr Saunders that Mr Smith had taken a police radio scanner in his work van and had talked about wanting to attend road accidents to take photographs to send in to a local newspaper. Mr Campbell and Ms Cooney also told Mr Saunders that they had driven past the house of Mr Smith's parents and seen his work van parked there during working hours.

[32] While Mr Smith offered an explanation for each of those instances during the evidence he gave for the Authority investigation, they were each a serious accusation about whether he had properly attended to his duties while working for Cleantech. On any common sense measure such allegations would have affected Mr Saunders' assessment of Mr Smith's suitability for continued employment at the time he was conducting his restructuring review. He should have told Mr Smith about them and asked for his explanation at the time. It was artificial and not credible to suggest Mr Saunders simply put them aside as irrelevant and of no consequence to the review he carried out or the election he made to continue the employment of Mr Campbell but to discontinue the employment of Mr Smith. It was a decision affected by doubts about Mr Smith's performance that were not fairly put to him.

[33] Thirdly, Mr Saunders more than likely knew from the time of directing Mr Smith to carry out the sales role that there was no realistic prospect he could meet the targets set. Mr Saunders own oral evidence referred to the competitive pressures in the market from larger Auckland-based businesses that were winning customers with sharper pricing than the smaller Tauranga-based Cleantech business could provide. Mr Saunders' recorded comment to Ms Rowland on 30 March, about only having a two day job for Mr Smith, indicated his assessment then of what work was viably available. While an employer may reasonably take risks to expand their business, including by establishing positions that may ultimately not prove viable, Mr Smith was not treated fairly in these particular circumstances because he was put into that position because Mr Saunders had given his existing position to another employee.

[34] Fourthly, Mr Saunders unfairly narrowed the focus of his review to only the position held by Mr Smith. This did not address the reality that the available work, previously done by Mr Smith, was spread between the two roles. The position held by Mr Campbell should have been included in that assessment. Even accepting Mr Saunders' assessment that Cleantech only had the capacity to sustain one position, a fair selection process was still required. Mr Saunders effectively elected not to do so because he was satisfied with Mr Campbell's performance and capabilities but, without reasonably investigating and assessing it, had closed his mind to the prospect that Mr Smith was able and could perform the remaining work adequately.

[35] It would also be naïve to accept as credible Wildzog's submission that conflict with Ms Dellaway-Smith, with the disciplinary process underway that led to her dismissal, played no role in the decisions Mr Saunders made about Mr Smith's employment. The employment relationships with both, from Mr Saunders point of view, had become dysfunctional. Neither met the needs of his business.

[36] While Mr Saunders was entitled to hold such a view, and to act on it, Wildzog was obliged to meet the test of justification in what it did about those concerns. For the reasons given, it failed to do so in respect of decisions made about Mr Smith's position on his return to work in April 2016 and his dismissal for redundancy in July

2016. Because those actions were unjustified, an assessment of remedies for his disadvantage and dismissal grievances was required.

## **Remedies**

[37] For his grievances of unjustified disadvantage and dismissal Mr Smith sought the sum of at least \$11,639 in reimbursement of three months' lost wages and \$20,000 as distress compensation.

### *Lost wages*

[38] In making a claim for lost wages an employee who is found to have been unjustifiably dismissed is obliged to show she or he had tried to offset the extent of that loss by taking reasonable steps to find another job or source of income. The employer may seek to persuade the Authority that the former employee had unreasonably failed to do enough to mitigate the asserted loss. In assessing that claim, and any dispute over whether those mitigation endeavours were sufficient, the

Authority cannot be too stringent in its expectations of a dismissed employee who has been the victim of a wrong.<sup>5</sup>

[39] Mr Smith's evidence was sufficient to establish his entitlement to the award of three months' lost wages he sought. However there were three reasons not to accept his submission that the Authority should exercise its discretion under [s 128\(3\)](#) of the Act to award a greater sum for a longer period.

[40] Firstly, questioning by Wildzog's counsel persuasively challenged the adequacy and accuracy of his evidence about his mitigation efforts over the longer period for which he sought a lost wages award. While he said he had made 118 job

applications, some were for jobs he accepted he was not able or qualified to do.

[41] Secondly, some allowance had to be made for the contingency that Mr Smith may not have remained in the job if a fair assessment of the viability of positions and performance had been made. In that scenario he stood some chance but not a certainty that his employment would have continued.

[42] Thirdly, a counter-factual analysis had to be made, allowing for other realistic contingencies that might also, but for the unjustified dismissal, have resulted in the employment relationship ending anyway.<sup>6</sup> For example, if a reasonably-conducted restructuring proposal had resulted in only one three-day-a-week position being available and that role was offered to Mr Smith, he might have opted not to take it. He had already been exploring other work options prior to his dismissal, including

developing his own business, so may have opted to leave during 2016 anyway.

[43] By order made under [s 123\(1\)\(b\)](#) and [s 128\(2\)](#) of the Act Wildzog must pay Mr Smith the sum of \$11,639 in reimbursement of three months' wages lost as a result of his grievances. It applies to the period of three months from 29 July 2016, that is from the end of the two week notice period he was paid from his dismissal on

14 July. If Mr Smith received an unemployment benefit for some or all of that period, it is up to him to account to Work and Income for any amounts that may need to be

repaid to it once Wildzog has paid him the lost wages award.

<sup>5</sup> *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

<sup>6</sup> *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [37].

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[44] Mr Smith gave evidence that the reduction of his wages on his return to work from injury made him feel "angry and humiliated to be thought so little of". He said he felt humiliated to be "left with zero earning capacity" and "going home to my family with nothing" following his dismissal. After his dismissal he avoided socialising or going to areas he might meet former customers.

[45] Considering the range of awards in similar cases, and mindful of the need not to set such payments artificially low, \$12,000 was an appropriate but relatively modest sum of compensation to address the injury to Mr Smith's feelings and loss of dignity as a result of the unjustified disadvantages and dismissal he suffered.<sup>7</sup> By order under [s 123\(1\)\(c\)](#) of the Act Wildzog must pay Mr Smith that sum.

#### *Any reduction of remedies for contribution?*

[46] Under [s 124](#) of the Act the Authority must consider whether any remedies awarded required reduction due to actions of the employee that contributed, in a blameworthy way, to the circumstances giving rise to her or his grievance.

[47] Wildzog submitted there were two grounds for such a reduction – firstly that Mr Smith had not provided adequate information about his limitations in performing particular duties and, secondly, his failure to meet expected sales levels. Neither factor was established as sufficiently blameworthy conduct by Mr Smith to require a reduction. The obligation to seek better information about Mr Smith's back injury rested with Mr Saunders before making decisions. Similarly Mr Saunders likely knew the sales figures he set for Mr Smith's role were not achievable so his failure to reach them was not blameworthy.

[48] Another factor, the allegations about various conduct by Mr Smith that Mr Campbell and Ms Cooney reported to Mr Saunders, may have been blameworthy conduct if Mr Saunders had properly investigated them at the time. Because Mr Saunders failed to do so, there were insufficient grounds to determine Mr Smith had

contributed in that way to the situation giving rise to his grievance.

<sup>7</sup> *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

#### **Costs**

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

[50] If they are not able to do so and an Authority determination on costs is needed Mr Smith may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Wildzog would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[51] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

Robin Arthur

Member of the Employment Relations Authority

8 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

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