

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 270  
5366281**

BETWEEN                      VINCENZO DALL'OCCO  
Applicant

AND                              SUPAFRAME CONSULTANTS  
NZ LIMITED  
Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Applicant in person  
No appearance by Respondent

Investigation Meeting:      1 August 2012

Determination:                6 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Vincenzo Dall'Occo, claims that the Respondent, Supaframe Consultants NZ Limited (Supaframe), owes him \$3,799.59 gross in respect of unpaid statutory annual leave entitlement, calculated on the basis of 8% of the gross income earned by him during the period 10 January 2011 until 30 September 2011, less 1 day taken as statutory annual leave.

[2]     Mr Dall'Occo further claims that he is owed 6 months salary in lieu of notice in respect of the termination or the redundant nature of his position with Supaframe.

[3]     Mr Dall'Occo is also claiming interest on the amount of the sums owed and reimbursement of the filing fee.

**Service of documents on the Respondent**

[4]     No Statement in Reply was filed by Supaframe, despite Supaframe having been served with the Statement of Problem on 28 December 2011, signed for by Mr Steve Wedd, a director of Supaframe.

[5] The parties were directed to attend mediation and the direction to mediation notification which was served upon Supaframe on 2 March 2012, was signed for by Ms Messina Shaw.

[6] Supaframe did not attend mediation and the matter was passed to the Authority.

### **Failure of Respondent to attend or be represented**

[7] Supaframe did not attend the Investigation Meeting, despite having been served with the Notice of Investigation. Mr Wedd contacted the Authority by email to state that Supaframe was insolvent and it would let the Investigation Meeting proceed without defending or agreeing to any of Mr Dall'Occo's claims.

[8] On the morning of the Investigation Meeting a Support Officer of the Authority contacted Mr Wedd by telephone. Mr Wedd said he had taken advice from a lawyer and Mr Wedd advised that Supaframe was not in a position to defend the matter. Mr Wedd did not attend the Investigation Meeting.

[9] For the reasons set out above I am satisfied that Mr Wedd had notice of the application and the date of the Investigation Meeting. Mr Wedd has not shown good cause for his failure to attend or to be represented.

[10] I have therefore proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 to act as fully as if Mr Wedd or Supaframe had attended or been represented.

### **Issues**

[11] The issues for determination are whether:

- Mr Dall'Occo is owed the sum of \$3,799.59 gross in respect of unpaid statutory annual leave entitlement
- Mr Dall'Occo is owed payment for 6 months contractual notice period.

## **Background Facts**

[12] Mr Dall'Occo commenced employment with Supaframe as a Sales and Marketing Manager on 10 January 2011 at an annual salary of \$100,000.00. Mr Dall'Occo was employed in accordance with a written individual employment agreement which had been signed by Mr Wedd on behalf of Supaframe (the Employment Agreement).

[13] Clause 17 of the Employment Agreement stated:

*17.1 The Executive or the Company may terminate this Agreement by six months prior written notice, or at the Company's discretion, by a payment in lieu of such notice.*

*17.7 The Company may terminate the Executive's employment on the grounds of redundancy. In the event that the Executive's employment is terminated on the grounds of redundancy, the Executive will be entitled to six months' notice of redundancy or, at the Company's discretion, to a payment in lieu of notice.*

[14] Mr Dall'Occo said that from March 2011 his salary payments became irregular and, although he requested salary payment slips, these had been supplied only at the beginning of his period of employment.

[15] Mr Dall'Occo explained that Supaframe had entered into a business arrangement with a UK based company Light Steel Systems Limited (Light Steel) of which Mr Chris Downey was the joint-CEO, and there was a proposal for the two businesses to work together to develop business in China. A company, Lyte Steel Asia Pacific Limited (Lyte Steel), was incorporated for this purpose on 17 March 2011 and Mr Wedd was the sole director.

[16] Mr Dall'Occo stated he believed that there had been an informal arrangement in place whereby Light Steel had contributed 50% of his salary direct to Supaframe during the period January to the end of May 2011 and thereafter Lyte Steel had contributed irregular sums of monies direct to Supaframe in order for it to pay Mr Dall'Occo his salary payments until the end of September 2011. There is no documentary evidence of this alleged arrangement although Mr Dall'Occo was paid by Supaframe until the end of September 2011.

[17] Mr Dall'Occo explained he had become aware that Supaframe had been experiencing financial difficulties and he and Mr Wedd had entered into discussions about his future role. In an email to Mr Wedd dated 22 September 2011 Mr Dall'Occo had set out the details of what he understood had been discussed between them, and had written:

*By mutual agreement Vince [Mr Dall'Occo] will leave Supaframe as an employee and will operate under Lytesteel Asia Pacific, with retainer only – commission, in a new contract still to be finalized with Chris.*

[18] In an email to Mr Downey dated 27 September 2011 Mr Dall'Occo had written:

*Hello Chris,*

*As you know Steve and I are negotiating a way to move forward our collaboration in a different way.*

*Here the key points of the agreement.:*

- *Vince closing contract with Supaframe the 30<sup>th</sup> of September.*
- *Steve will do LyteSteel Asia Pacific share transfer to Vince before leaving to China Friday the 30<sup>th</sup>. So possible start Vince with LyteSteel Asia Pacific 1<sup>st</sup> of October.*
- *For all future jobs we share profit as discussed including all outstanding quotes in the pipeline. Vince to push/pursue them all normally.*
- *Vince will operate under LyteSteel Asia Pacific.*
- ***Chris to confirm to move current contract between LyteSteel UK and Supaframe, to new contract with Vince.***
- *Vince will send shortly a new revised contract to Chris for review.*

[19] In an email dated 29 September 2011 Mr Dall'Occo wrote to Mr Wedd itemising the points of discussions between them as:

- *With mutual agreement disciplined by the below points we agree to close the employment contract Friday 30<sup>th</sup> September 2011.*
- *Payment of all outstanding salary days (including all statutory sick leave, holidays, taxes etc) as per normal practice (please send calculation sheet) to date 30<sup>th</sup> September 2011, received in the bank.*
- *Payment of 6 months Notice ...*
- *Transfer of Lytesteel Asia Pacific to Vince at no cost and underwriting that there are no pending matters with it*

[20] In an email to Mr Wedd dated 30 September 2011 Mr Dall'Occo had written:

*Hello Steve,*

*As per our meeting tonight at Auckland Airport please find enclosed scan copy (same as paper copy given to you during meeting) of the final calculation for:*

- *Salary: Start Jan 10 2011 end Sep.. 30 2011 ...*
- *Notice Period 6 month = 50,000 gross; 35020.79 net (not a big difference from what your figures give)*

[21] Mr Dall'Occo said that he had received no further remuneration from Supaframe after the end of September 2011, and he had entered into an agreement with Light Steel by which it reimbursed him directly. Mr Dall'Occo said that he had not resigned his employment with Supaframe and there had been no formal termination of his employment by Supaframe.

[22] In a response email from Mr Wedd to Mr Dall'Occo dated 3 October 2011, Mr Wedd stated:

*As to the final agreement for settlement I am not prepared to give person guarantee. ....*

*Mentioned several times Supaframe just doesn't have this money right now ....*

*Therefore on this basis we should stick with the status quo to work as normal until we can reach a settlement both Chris and yourself.*

[23] In an email to Mr Dall'Occo dated 4 October 2011 Mr Wedd had written:

*Hi Vince*

*Just had email from pam*

*We will go with your figures so far as the salary is concerned*

*The only other issue I have is the 6 months salary you want*

*This is the item I want to negotiate*

*And won't do it on the internet*

*So suggest we wait until I come back to nz*

[24] Mr Dall'Occo had responded to the suggestion that the issue of his notice period be negotiated when Mr Wedd, who was overseas at this time, returned to New Zealand by commenting that: *"I would prefer that we start negotiating now as it may take several weeks before you get back ...."*

[25] On 7 October 2011 Mr Wedd confirmed in an email to Mr Dall'Occo that he had paid him: *"\$3785.49 being final salary up to the end of September 2011"*. Mr Wedd also stated:

*Can you confirm you wish to invoice direct to Lyte for the September invoice owed to Supaframe as we will need to see how to treat this payment direct to you. My advice is that we should bill direct to Lyte Steel as final to end the contract with Lyte.*

*Then pay the Holiday pay from that which would finalise the contract as far as wages is concerned. If they pay you direct we need acknowledgement from you how it is to be treated.*

*Is why we need to settle the business of holiday pay but I'm taking advise on it so it is Fair and equitable to both sides.*

[26] This email was followed by an email from Mr Dall'Occo to Mr Wedd dated 13 October 2011 in which Mr Dall'Occo stated:

*Hello Steve,*

*....*

*Our contract*

- 1. You mentioned to me in writing that the September retainer would have been used as part of the notice/kick off money, now you are suggesting to use the retainer to offset the holiday payment panting [sic] and close contract. This will further reduce the money that I still have to receive contractually to leave Supaframe, not considering the uncertainty of the notice money.*

*Please note that almost 2 weeks passed sine we decided to close contract ...*

*Here is my proposal:*

- I will agree to negotiate part of my notice value if you can provide a faster payment: so instead of 6 months we can make 4 months or even 3 if it is immediate. In such case I will agree to invoice you the notice as "Sales Consultancy" that will further save tax to you.*

[27] Mr Wedd did not respond to this email and on 16 October 2011 Mr Dall'Occo emailed Mr Wedd stating: "**With this email I have formally exhausted all my patience to negotiate a deal with you about this saga.**"

[28] Mr Wedd replied to this email on 17 October 2011, referred to payment of Mr Dall'Occo's holiday payment and concluded by stating: "*The other matters we can resolve when I am back in 14 days time*".

[29] On 12 December 2011 Mr Dall'Occo filed a Statement of Problem with the Authority.

## **Determination**

[30] I find that the email trail provided in evidence by Mr Dall'Occo indicates that there had been an amicable agreement between himself and Mr Wedd that his employment with Supaframe would terminate on 30 September 2011. Negotiations had been entered into in respect of the monies which were owed to him.

**Is Mr Dall’Occo owed the sum of \$3,799.59 gross in respect of unpaid statutory annual leave entitlement?**

[31] I consider the email dated 7 October 2011 indicates that Mr Wedd accepted that Mr Dall’Occo was owed holiday pay for the period he had been employed by Supaframe i.e., from 10 January 2011 until 30 September 2011.

[32] Mr Dall’Occo was paid \$73,076.85 during the period 10 January 2011 until 30 September 2011, and he took one day of statutory annual leave during that period. Calculated at 8% of gross annual salary payment, less one day, Mr Dall’Occo is entitled to be paid a gross sum of \$5,461.53 in respect of outstanding statutory annual leave entitlement

[33] I determine that Mr Dall’Occo is entitled to be paid \$3,799.59 net in respect of outstanding statutory annual leave entitlement.

**Is Mr Dall’Occo owed 6 months contractual notice period?**

[34] I find that the email trail and in particular the email of 27 September 2011 establishes that there was an agreement between Mr Dall’Occo and Mr Wedd that he would leave the employment of Supaframe at the end of September 2011 and commence working directly for Light Steel. This is what in fact subsequently occurred.

[35] I find that there was no intention that Mr Dall’Occo would continue to work for Supaframe after 30 September 2011, the email from Mr Wedd dated 7 October 2011 referring to the payment of \$3785.49 as “*final salary up to the end of September 2011*”.

[36] The email trail evidence also establishes that Mr Wedd accepted that Mr Dall’Occo had an entitlement to a 6 month notice period, in particular referring to:

*The only other issue I have is the 6 months salary you want  
This is the item I want to negotiate*

The payment of this 6 month notice period I find was however still the subject of negotiation between them at the time Mr Dall’Occo left the employment of Supaframe and commenced working directly for Light Steel on 1 October 2011.

[37] In the absence of a conclusion to the negotiations regarding the notice period, I find that Mr Dall'Occo was entitled to be paid salary in lieu of notice in accordance with clause 17.1 of the Employment Agreement.

[38] I determine that Mr Dall'Occo is entitled to 6 months salary in lieu of notice.

### **Remedies**

[39] Supaframe is to pay Mr Dall'Occo the sum of \$3,799.59 net in respect of outstanding statutory annual leave entitlement.

[40] Supaframe is to pay Mr Dall'Occo the sum of \$50,000.00 gross in lieu of notice in accordance with clause 17.1 of the Employment Agreement.

### *Interest*

[41] Mr Dall'Occo has applied for interest on the outstanding sums awarded in respect of statutory annual leave entitlement and salary in lieu of notice.

[42] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum<sup>1</sup>.

[43] I consider that it is appropriate that Supaframe is ordered to pay interest on the outstanding sums owed to Mr Dall'Occo.

[44] Supaframe is ordered to pay Mr Dall'Occo interest of 5% on the outstanding sums due:

- a. \$189.98 interest in respect of the sum of \$3,799.59 awarded for outstanding statutory annual leave entitlement; and
- b. \$2,500.00 interest in respect of the sum \$50,000.00 awarded for unpaid salary in lieu of notice.

[45] I am satisfied that Mr Dall'Occo has been put to some additional expense in bringing this claim, and order Supaframe to reimburse Mr Dall'Occo the \$71.56 filing fee.

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<sup>1</sup> Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

## **Costs**

[46] While costs are reserved, I note here that, subject to his submissions, Mr Dall'Occo was not legally represented and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**