

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 65
5329800

BETWEEN ELDAD DOLEV
Applicant

AND NETAFIM AUSTRALIA PTY
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Quentin Davies & Laurie Murdoch, Counsel for Applicant
Anthony Russell, Counsel for Respondent

Investigation Meeting: 9 March 2012 at Blenheim
27 March 2012 by Phone Conference

Affidavit Received: 2 April 2012 from the Applicant

Submissions and Memoranda received: 9 March 2012, 21 March 2012, 27 March 2012 &
2 April 2012 from Applicant
9 March 2012, 23 March 2012 & 13 April 2012 from Respondent

Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Eldad Dolev worked for Netafim Australia Pty Limited (Netafim) in New Zealand as South Island Sales Area Manager from about 1 February 2002 until 30 November 2008. Prior to then Mr Dolev had worked for Netafim in Australia.

[2] There are a number of aspects to this employment relationship problem. Mr Dolev says that he is entitled to additional leave payments as at the date of the termination of his employment. That arises principally because he says that he should have received a long service leave entitlement (LSL) under the terms of his

employment agreement. However, it does also depend on annual leave entitlements. Secondly, Mr Dolev says that monthly office services payments made by Netafim to companies of which he and his wife are the principals should have been included as gross earnings for the purposes of calculating his LSL and holiday pay at the termination of his employment. Thirdly, Mr Dolev says that he should have been paid commissions on all sales within his sales region during the three months immediately following his resignation. Fourthly, Mr Dolev says that the LSL payment, commission payment and office services payment should have been included for the purposes of calculating proportionate holiday pay at the termination of his employment. Fifthly, Mr Dolev says that he should have been reimbursed for expenses incurred in Sydney when his travel to Israel was interrupted. Sixthly, Mr Dolev says he was entitled to have the costs of shipping his dogs back to Israel paid for by Netafim. Seventhly, Mr Dolev says that he was entitled to an allowance (HLA) while out of New Zealand on Netafim business. Finally, there is a claim for *interest and inflation rate* on the various sums said to be owed.

[3] Mr Dolev lodged his statement of problem with the Authority in September 2011. The Employment Relations Act 2000 permits arrears claims covering the six years preceding the date of filing. Although including service prior to September 2005, the LSL and outstanding holiday pay became payable at the termination of Mr Dolev's employment. That brings that part of the claim within the six year limit. The other claimed entitlements all arose at or near the termination of the employment so fall within the six year limit.

[4] Netafim rejects all these claims

[5] It is convenient to address the claims in the sequence mentioned above.

[6] After the initial investigation meeting in Blenheim counsel for Netafim provided a copy of the executive incentive scheme dated 17 December 2007 between Mr Dolev and Netafim as requested. That gave rise to an application on behalf of Mr Dolev for orders relating to the proper application of the terms of that agreement. The application is resisted by Netafim partly because of its late appearance in these proceedings (at a point when all that remained was to hear evidence from one witness and arrange for further submissions), partly on the basis of a term in the agreement as

to arbitration and partly because the agreement is expressed to be governed by the laws of the State of Victoria. I will deal with this issue last.

Long Service Leave (LSL) and Annual Leave

[7] While working for Netafim in Australia Mr Dolev was accruing an entitlement to long service leave. I am told that it arises as a statutory entitlement in Australia.

[8] For Mr Dolev's employment in New Zealand, there is an individual employment agreement signed in November 2002 but expressed to have come into effect on 1 February 2002. The parties accept that the employment relationship from February 2002 was subject to the laws of New Zealand and the written employment agreement refers expressly to the Employment Relations Act 2000. The employment was based in New Zealand. I therefore agree with the parties that the various claims arising from the New Zealand employment come with the Authority's jurisdiction.

[9] Following the 2002 agreement the parties entered into two further agreements - one signed in 2003 expressed to apply from 1 January 2003 and a third agreement signed in 2006 expressed to apply from 1 February 2006.

[10] I should explain what each agreement says about leave.

[11] The 2002 agreement entitled Mr Dolev to 20 working days paid annual leave calculated in accordance with the Holidays Act 1981 on completion of one year's service. The agreement did not provide for long service leave except the schedule to the agreement covering remuneration states *Long Service Leave entitlements will be rolled over to NZ*. It also says that the New Zealand work agreement will be for a two year period. The parties interpreted this to mean that Mr Dolev continued to accrue the Australian LSL despite no longer being employed within that jurisdiction. I agree that this is what was meant by the provision.

[12] There was no change to these provisions in the 2003 agreement.

[13] There were some significant changes to the remuneration schedule in the 2006 agreement. In particular a statement about the duration of the New Zealand work

agreement was not included. An entitlement to superannuation was removed. Both earlier agreements had said *Superannuation will be maintained at 9% of your gross income* (8% in the 2002 agreement). Both earlier agreements had said *The Company will provide rental assistance as long as you remain an ex-patriot employee* but that provision was removed from the 2006 agreement. The final change I should mention is that the 2006 agreement states *Long Service Leave accrued in Australia (42.6 days as at 28th February 2006) will be transferred to your annual leave entitlement*. The annual holidays clause in the 2006 agreement was unchanged, including the reference to the (by then repealed) 1981 Holidays Act.

[14] For completeness I should mention the various dates relating to the 2006 agreement. There is a printed date of *20th February 2006*. It is expressed to come into effect on 1 February 2006. Mr Dolev signed the agreement on 25 February 2006 and it was signed for Netafim on 7 March 2006.

[15] The issue is whether Mr Dolev was entitled to additional LSL beyond the *42.6 days as at 28 February 2006*, given his continued service after the 2006 agreement came into effect.

[16] Counsel refers me to the law about the interpretation of agreements. With no disrespect intended it is not necessary to canvass those submissions except to mention *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission* [2011] NZEmpC 149 where the Employment Court said at [17] (notations removed):

In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[17] I agree with counsel that the Authority should be cautious in interpreting the agreement so as to remove a benefit. However, the real point is about determining the parties' intention objectively starting with the words used by them.

[18] If one reads the relevant clause without the text in parentheses, it says that an existing Australian entitlement will be transferred to the New Zealand annual leave entitlement. It does not provide for any future accrual or further transfer of the Australian entitlement. The additional words in parentheses were intended to give certainty as to quantity rather than affect the meaning of the provision. I consider that the clause has this clear meaning, under which Mr Dolev's claim fails. However, I will check the context.

[19] The most significant context is that this agreement replaced an earlier agreement. This context also supports the foregoing meaning. I have mentioned above the changes in the 2006 remuneration schedule compared to the 2003 remuneration schedule. The change from *Long Service Leave entitlements will be rolled over to NZ* in particular reinforces the conclusion that the parties agreed in 2006 to cease further accrual of the Australian leave entitlement. If there was to be no change, as submitted by counsel for Mr Dolev, the same words would have been used. The only logical change was from an ongoing entitlement to ending the entitlement subject to protecting the existing accrual. Other textual changes also support the view that the parties intended to sever the previous Australian connection. For example the clause about superannuation being *maintained* and a reference to *home* trips to Australia were also removed.

[20] Mentioned above are the various dates that relate to the 2006 agreement. Strictly speaking one might expect that the protected LSL balance would be the entitlement as at the date of the new agreement (1 February 2006). What appears to have happened is that they agreed not to retrospectively apply the negative effect of the change, given that Mr Dolev did not consent to the change until 25 February 2006. There was then an element of rounding to go to 28 February 2006. There are email communications in the evidence to support this conclusion. None of this is unusual in employment relationships, nor does it affect the interpretation point.

[21] There was some evidential focus on the negotiations that resulted in the 2006 agreement. Much of this would have been excluded as tending to prove subjective intentions if rules of evidence were applied strictly. However I will mention two aspects. As part of the discussions Netafim prepared a spreadsheet showing the existing position and the proposed position concerning Mr Dolev's income. It apparently included the words *No more accrual of LSL*. I have been provided with a copy of an email sent to Mr Dolev on 2 February 2006 which included this spreadsheet. When asked, Mr Dolev could not recall seeing these words. However, there is another printed version of this spreadsheet, identical except for the exclusion of these words. Netafim's evidence is that in the course of these proceedings the spreadsheet was printed but the cell containing those words was not selected. As a result this printed version differs from the spreadsheet file that was sent to Mr Dolev in February 2006. In the end it is unnecessary to resolve the point about what Mr Dolev saw in February 2006. However, whether or not Mr Dolev saw the text *No more accrual of LSL* it indicates that it may have been an exception to the general notion that the 2006 changes were intended not to reduce Mr Dolev's income. I mention these points to illustrate the difficulties that can arise if one looks, in the search for meaning, beyond the words used by the parties.

[22] For the foregoing reasons I find that Mr Dolev was not entitled to any further long service leave beyond the balance of 42.6 days transferred to his annual leave entitlement in 2006.

[23] While Mr Dolev raised some doubt about the accuracy of the 42.6 days given his service at the time he specifically (and properly) did not make any claim before the Authority on this point.

[24] The link between LSL and annual leave is that the LSL balance was transferred to his annual leave balance in 2006. At termination Mr Dolev was entitled to be paid for all untaken annual leave. Amongst the documents at page 109 are the calculations of Mr Dolev's final pay. That shows that Netafim calculated Mr Dolev's annual leave entitlement as at the anniversary date immediately before the termination of his employment and paid him at the proper rate for that leave. There is nothing about either the method or the calculations to suggest that Mr Dolev was not paid correctly for his untaken annual leave and LSL.

[25] There is a spreadsheet in the documents (created by Netafim) that shows slightly higher accumulated annual leave hours owing as at the 1 February 2008 anniversary date. I agree with counsel for Netafim that the late emergence of a claim based on this has prejudiced Netafim's ability to explain the apparent discrepancy. I know nothing about why the spreadsheet was created, the source of the data or even whether it contains errors as spreadsheets often do. The discrepancy does not merit further investigation.

Monthly Office charges

[26] As with other aspects of this claim there was some evidence about the parties' subjective intentions but it is not necessary to canvass that evidence.

[27] The 2002 and 2003 agreements provided *Reimbursement of home office expenses and 80% of your home phone bill*. The 2006 agreement changed to *Home office allowance of \$NZ19,800 (+GST) per annum. Monthly tax invoice to be submitted for reimbursement*. GST Tax invoices in the name of Dolevs Limited or Dolevs (2006) Limited were regularly submitted by Mr Dolev and paid by Netafim. Both companies were entities under the control of Mr & Mrs Dolev.

[28] Prior to the 2006 agreement there was an arrangement where Netafim paid part of Mr Dolev's salary (including commissions and superannuation) to Mrs Dolev. Mrs Dolev did not actually work for Netafim so as to earn the income in her own right. The effect was to expose less of Mr Dolev's taxable income to the top marginal tax rate, thereby reducing the tax that would otherwise have been paid on Mr Dolev's income. Levy Schneider was Netafim's managing director from 2005 until 2007. His evidence is that he inherited this arrangement and wanted to end it but without reducing Mr Dolev's income. The result was the 2006 arrangement about the home office allowance.

[29] The case for Mr Dolev is that the home office allowance is one that Netafim was required to pay him under his employment agreement and comes within the definition of *gross earnings* set out in s.14 of the Holidays Act 2003. The argument is the office charges are an *allowance* but not *non-taxable payments to reimburse the*

employee for any actual costs incurred by the employee related to his or her employment (see s.14(a)(ii)); and are neither a *payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment* (s.14(c)(i)) nor a *payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment* (s.14(c)(ii)). The submission is based on the view that the monthly office charge was more than Mr Dolev's actual costs or any reasonable assessment of costs related to the part of his house and other facilities used for Netafim's business.

[30] The role of the Authority is specified in s.157 of the Employment Relations Act 2000. To summarise, the Authority must resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of a case without regard to technicalities. It must aim to promote good faith behaviour, support successful employment relationships and generally further the object of the Act. The Authority must act as it thinks fit in equity and good conscience but may not do anything inconsistent with the Act, regulations made under the Act and the relevant employment agreement.

[31] If Mr Dolev is right about the classification of the monthly office charge falling outside the exclusionary effect of s.14(c)(ii) he must have involved himself in a sham arrangement so as to minimise his tax liability. The sham was to treat as separate business income to entities controlled by him and his wife a revenue stream that properly should have been treated as part of his salary and subjected to PAYE tax. It would be the antithesis of the Authority's role to now require Netafim to treat the payments it made in response to Mr Dolev's company GST tax invoices as part of Mr Dolev's salary for holiday pay purposes. The substantial merits of the case and the concept of equity and good conscience require the Authority to decline to do so.

[32] Taking this approach is consistent with the terms of the employment agreement freely entered into by Mr Dolev. It is consistent rather than inconsistent with the Employment Relations Act 2000 and infringes no regulations made under that Act.

[33] If this approach was not a proper course available to the Authority in the circumstances of this case I would have found that Mr Dolev was in any event

estopped from asserting an entitlement to anything other than the GST invoiced amounts, all of which were paid during the employment. When Mr Schneider joined the company and became aware of the de facto tax splitting arrangement he could simply have paid the whole gross salary to Mr Dolev and continued with the modest office expense allowance that was paid at the time. Mr Dolev would have paid substantially more tax and received a correspondingly lower net income. However, Mr Schneider sought to resolve the situation and protect the net income being received by Mr & Mrs Dolev. That involved differentiating between salary and commission payments to Mr Dolev as an employee and making a further payment for accommodation services apparently provided by entities controlled by Mr Dolev. In essence the further payment was accepted by Mr Dolev as a reasonable estimate of Mr Dolev's costs and he would be estopped from asserting anything inconsistent with that position.

[34] For the reason referred to above I find that Mr Dolev's claim for the GST invoiced sums to be included as gross earnings for the purposes of holiday pay does not succeed.

Commissions

[35] Mr Dolev's evidence is that when he started with Netafim in Australia, he did not receive payment of commissions for his first three months because the person he replaced received the commissions for those three months after they left. The 1997 Australian letter of offer does not mention this except to say *Commissions will be paid ... only on sales which have been paid in full*. However there is handwritten in Hebrew a note that both parties tell me refers to the commencement of commission payments at the end of a probation period for the first three months. The letter of offer nowhere else mentions a probation period. The hand written note does not say what was to happen at the end of the employment. Nor is there any mention of the previous holder of the position being entitled to commission on Mr Dolev's sales in the first three months.

[36] The 2002 agreement states *Your commission structure will be as follows and will be effective one month after commencing work in New Zealand being from 1st March 2002*. However Mr Dolev remained entitled to commission on sales in his

Australian region for that month. The 2003 agreement states *Your commission structure will be as follows and will be effective from 1st January 2003*. That was the date of the new agreement in any event. Mr Dolev's 2006 employment agreement states *Commission: 1.2% of annual paid sales for allocated dealers*.

[37] Counsel acknowledges that there is no written term entitling Mr Dolev to commission on sales made after his departure from Netafim. However, the submission is that there was an oral term giving Mr Dolev that entitlement. There is the evidence of Raviv Rom, Netafim's former managing director. He refers to the rationale for the disentitlement for the first three months, and says:

However, in line with this logic he would have been entitled to his due sales commission for sales which materialized within three months after his departure from the company.

[38] In his evidence Mr Dolev also relies on the logic of the exclusion at the commencement of the employment as entitling him to a payment on sales made by someone else after the end of his employment.

[39] Both Mr Dolev and Mr Rom go further and say that it was orally agreed in 1997 that Mr Dolev would receive commissions on sales made for the three months after the termination of the employment. I have a substantial doubt as to whether that was actually said or whether Mr Dolev and Mr Rom now think it was agreed because of the implication they take from what was written on the 1997 letter of offer. On balance I think that the doubt is resolved by what Mr Dolev and Mr Rom did in 1997. They recorded the substance of their agreement about commissions. They did not record any entitlement to commissions calculated on sales made after the termination of the employment. If that was to be a term of their arrangement I consider it would have been referred to directly in or on the letter of offer.

[40] The further difficulty is that whatever was said between Mr Rom and Mr Dolev occurred in 1997. In 2002, 2003 and again in 2006 Mr Dolev agreed to terms of employment that included *This agreement may only be amended or varied by written consent signed by both parties*. The agreements all specifically dealt with commissions in various ways. For example, the 2002 agreement dealing with the commencement of the employment in New Zealand disentitled Mr Dolev to

commissions on sales for the first month of the employment. Other detailed provisions were made by the 2003 and 2006 agreements.

[41] For these reasons Mr Dolev's entitlement to commission on his departure falls to be analysed only in terms of the express provision in the 2006 agreement.

[42] For Netafim, Mr Schneider told me that the company's data system allows it to identify particular sales with particular employees. Sales are made to distributors and not directly to end users. The order is placed, delivery is made, the sale is invoiced and payment is collected. Even if payment is received after the departure of an employee they would still be entitled to receive commission on sales that had been ordered during the currency of their employment. That is the basis on which Mr Dolev was paid commission. I accept that it is consistent with the express provision in the 2006 agreement.

[43] There is no evidence to indicate that Mr Dolev has missed out on any commissions in light of the foregoing view of when and how the entitlement arises. It follows that his claims regarding commissions are dismissed.

Proportionate holiday pay

[44] This claim engages s.24, s.25 and s.26 of the Holidays Act 2003.

[45] The calculations for Mr Dolev's final pay (Bundle 109) show that Netafim calculated proportionate holiday pay at 8% of his gross earnings since his last anniversary date and paid that sum with the final pay. Netafim deducted one of the invoices for the relocation of Mr Dolev's pets from the gross before calculating the proportionate holiday pay. I agree with counsel for Netafim (as explained below) that the company was entitled to this deduction. However, the difficulty is that the deduction should have been made after the calculation of holiday pay. In other words the deduction should have come off the net pay not the gross used for the purposes of calculating holiday pay. The result is that Mr Dolev is owed 8% on the sum deducted (\$5,893.00 @ 8% = \$471.44 (gross)). Netafim must pay Mr Dolev that sum as arrears of holiday pay.

[46] There is a submission for Netafim that it overpaid Mr Dolev's final holiday pay because it included the payment for his untaken annual leave and alternative holiday entitlements in his gross earnings for the purposes of calculating his proportionate holiday pay under s.25 of the Act. The submission overlooks s.26 of the Act which specifically provides that gross earnings for the purposes of s.25 includes payments made under s.24 of the Act..

Sydney expenses

[47] Mr Dolev left New Zealand on 26 November 2008 enroute to Israel to commence new employment with Netafim Limited. He was delayed in Sydney for 10 days because of political unrest in Bangkok. That resulted in extra accommodation, meal and transport charges. There was also an Australian Government charge for the quarantine of Mr Dolev's dogs.

[48] Netafim paid hotel, quarantine and transport charges. However, Netafim has refused to reimburse AUD\$71.00 claimed for *Phone calls and Cards*, AUD\$205.40 for *3 days BF* (Breakfast) and AUD\$721.75 for *7 days meals*.

[49] The basis for the claim is the agreement that Netafim would bear the cost of Mr Dolev's relocation to Israel, as described below. Having agreed to that cost, Netafim is said to have assumed the risk of delay and associated costs. It appears that there was no travel insurance or at least no insurance cover for the circumstances that Mr Dolev and his family found themselves in.

[50] I accept the premise that Netafim agreed to bear the risk of travel delay on the basis of covering actual and reasonable expenses caused by the delay provided the claims are supported by proper invoices. The ordinary expenses policy had no application in this situation because Mr Dolev was not travelling on Netafim's business.

[51] There are several undated invoices for meals. Mr Brod's evidence, which I accept, is that Netafim would not reimburse for undated invoices. These claims must be excluded for lack of proof that the costs arose from the travel delay. There is also

an invoice that appears to be for wine which would not constitute an expense claimable against Netafim.

[52] Netafim did meet accommodation charges some of which appear to have included breakfast. However I have not been able to identify any of these payments as relating to the dates for which Mr Dolev is claiming breakfast. That leaves eleven invoices for breakfast and meals totalling AUD\$754.65. Netafim must reimburse Mr Dolev for this expenditure.

[53] There is insufficient evidence that the claims for phone cards and phone calls related to Netafim's business or were a reasonable expense caused by the travel delay.

[54] Again there is a submission that any underpayment should be offset against overpayments by Netafim. I disagree for the reasons explained later.

The dogs' relocation

[55] When Mr Dolev moved from Australia to New Zealand in 2002 there was included in the 2002 agreement the following: *The company will cover the cost of your return to Israel (as per the agreement relating to your employment in Australia)*. The same clause was included in the 2003 agreement. The 2006 agreement read *The company will cover the cost of your return to Israel (as per the initial agreement relating to your employment in Australia)*. The subtly different wording in the phrases in parentheses makes no difference. The written agreement relating to employment in Australia is a letter dated 18 December 1996. It is common ground that it does not refer to relocation costs. However, Netafim paid to relocate Mr Dolev and his family from Israel to Australia in 1996 and from Australia to New Zealand in 2002. On neither occasion did Mr Dolev have any pets.

[56] Mr Dolev acquired two dogs while in New Zealand. It cost \$6,153.00 to ship the dogs to Israel - invoice dated 3 October 2008 for \$5,893.00 and invoice dated 16 October 2008 for \$260.00.

[57] There were communications between Mr Dolev and Netafim about relocation costs in late 2008. Netafim did not agree at that time to cover the cost of the dogs.

Nonetheless Mr Dolev arranged for the invoices for the dogs to be sent to Netafim for payment. Netafim paid these invoices but deducted \$5,893.00 from Mr Dolev's final pay. That followed a discussion between Mr Dolev and Netafim and an email from Netafim to Mr Dolev to that effect.

[58] Mr Dolev says that Netafim is obliged to pay his pets' relocation costs because it is company policy and it has done so for other employees. He also says that the pets were part of his household. Netafim covered the costs of relocating items such as furniture and should similarly cover the cost of relocating the dogs.

[59] Netafim's evidence is that there was a specific written agreement concerning the cost of pet relocations when it has paid those costs for other employees. I have been provided with one such agreement but there may not be a written term regarding a second situation. However, I do not think it can be said that there was a policy or general practice that Mr Dolev can rely on to establish liability on Netafim for the cost of relocating his pets.

[60] Counsel points out that pets are regarded as property by the law generally and family chattels pursuant to s.2 of the Property (Relationships) Act 1976. The cost is a deductible expense for IRD purposes. Pet ownership is very common in New Zealand. I agree that pet ownership is common and that the pets were Mr Dolev's property. However, that is not the same as saying that Netafim undertook to relocate the pets at its cost.

[61] As I read the 2002 agreement, Netafim undertook to pay later relocation costs to Israel of the same type as had been paid in 1997. That arises particularly because of the words *as per*. Netafim paid to relocate Mr Dolev's family. As it happened in 2008 that involved fewer family members but that cannot affect the interpretation point. Netafim paid for furniture and household effects to be relocated in 1997. No doubt in 2008 there were furniture items and other household effects relocated (at Netafim's costs) that were different from the effects paid for in 1997. Again, that cannot affect the issue of interpretation. In any international relocation, pets are treated very differently from other property and generally involve considerable expense. Because Netafim did not pay any pet relocation costs in 1997 I find that it was not obliged to do so in 2008.

HLA

[62] Mr Dolev's 2006 agreement stated he would be subject to Netafim's rules, policies and procedures. In addition clause 9.2 required the employer to reimburse all reasonable travel, accommodation and other expenses properly incurred in the exercise of duties. There is a written expense claim policy. It starts by describing as its purpose that *Employees may claim a refund of work related expenses they have incurred and paid for each month as described below*. Under item 6 employees are entitled to accommodation, internet connection and breakfast paid by the company if their work prevents them from returning home in reasonable time or for a trip longer than a day. Item 8 refers to overseas travel. It provides that an employee travelling abroad is entitled to accommodation and breakfast at the company's cost. It goes on at item 8.2 to say *Employees travelling overseas will receive a daily travel allowance of US\$45.00*.

[63] Mr Dolev's claim before the Authority is pursuant to item 8.2 for the 75 days he was out of New Zealand working in either Israel or in Ethiopia in the months before his employment with Netafim ended on 30 November 2008.

[64] There was an arrangement between Netafim and Mr Dolev's new employer (Netafim Limited) about cost sharing while Mr Dolev remained an employee of Netafim but was deployed in Israel or Ethiopia on the new employer's business. Mr Dolev was aware of the arrangement. The relevant part of the emails reads:

Following our phone call, I want to summarize our understanding:

1. *From 1/7/08 Eldad's wages will be covered (method TBD) by NZ only for the days he will spend in NZ (or on his way) – all other times by Africa.*
2. *Africa will cover Eldad's flights Israel–NZ before 1/7/08.*
3. *NZ will cover Eldad's flights Israel–NZ after 1/7/08.*
4. *After 1/7/08 NZ will cover Eldad's costs in NZ and Africa will cover all other costs.*

[65] There is apparently a difference between Netafim's expenses and travel allowance policy and the new employer's policy in that the latter does not provide any daily travel allowance. Mr Dolev did receive whatever reimbursements or expenses he was entitled to from the new employer.

[66] It is common ground that the trips for which Mr Dolev is claiming expenses were not for the purposes of his work for Netafim. Rather, Netafim co-operated so as to allow Mr Dolev while still in Netafim's employment to travel to Israel and Ethiopia for purposes connected with his new employment. At the same time Mr Dolev agreed to defer his departure from Netafim so as to ensure proper coverage of his Netafim responsibilities in New Zealand. The quid pro quo was that Netafim would release him at certain times to attend to work for his new employer. The work required Mr Dolev to be away from New Zealand. While away Mr Dolev attended to some work in New Zealand by phone calls and the like.

[67] In these circumstances the claim is resolved by consideration of the provisions in the employment agreement and the policy document. These documents make it clear that Mr Dolev had various entitlements while overseas on Netafim's business. I do not think it can properly be said that Mr Dolev was overseas on Netafim's business in respect of the dates for which he is claiming HLA. He is therefore not entitled to any allowance from Netafim and I accordingly reject his claim.

Inflation and interest

[68] There is a general claim for inflation. It is misconceived. The Authority's power is to order the payment of interest in any matter involving the recovery of any money: see clause 11 of the 2nd Schedule to the Employment Relations Act 2000.

[69] The interest claim is formulated on the basis that the Authority should order interest up to 30 March 2011 in reliance on the statutory power as expressed prior to 1 April 2011; and thereafter on the basis of the statutory power as currently expressed. Previously the Authority could order interest at the 90 day bank bill rate plus up to 2% whereas now the Authority may order interest at the rate prescribed under the Judicature Act 1908 (currently 5%) *on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority*: see clause 11 of the 2nd Schedule.

[70] It appears from the extract just quoted that the amendment was expressed so as to apply to all interest orders made on or after 1 April 2011 regardless of when the

cause of action arose. There is a sense in which the amendment will have retrospective effect but with an ancillary power such as interest I think Parliament can be taken as having intended that the new rule should apply to all orders made on or after 1 April 2011.

[71] While Netafim should have reimbursed Mr Dolev AUD\$754.65 on 16 June 2009 with other payments and paid him \$471.44 (gross) in holiday pay on 30 November 2008 Mr Dolev has had the use of NZD\$1,090.00 (see below) since various dates in 2008. On balance he should not receive any interest payment on the residual balance.

Executive incentive scheme

[72] The draft affidavit filed by Mr Dolev indicates that he mistakenly thought that a payment included with his final pay represented payment of his entitlement under the executive incentive scheme. He also says that he was told as such by a Netafim HR advisor. If Mr Dolev was not paid anything under the scheme he will be entitled to certification and may be entitled to payment in accordance with the terms of the agreement.

[73] I agree that the Authority, if it considered that it was *forum conveniens* to apply the laws of the State of Victoria, could extend the present investigation to deal with any dispute about Mr Dolev's entitlement under this scheme. I would need to be satisfied that both parties had had a fair opportunity to present and test evidence and make submissions about the issue. Before embarking on that additional investigation I would need to consider whether I must direct the parties to mediation in accordance with s.159 of the Employment Relations Act 2000. The difficulty with extending the current investigation (assuming mediation did not resolve any dispute) is that I cannot be sure that I would be able to complete a determination of any unresolved issues for reasons that it is unnecessary to explain. The risk is that there would need to be a rehearing of this aspect of the claim before a different Authority member. It is important to avoid this risk which would cause significantly more costs and inconvenience than will declining to extend the present investigation.

[74] In these circumstances, if Mr Dolev considers he has unmet entitlements under the incentive scheme, he should treat the matter as a separate employment relationship problem and proceed in the usual way by discussing the matter with Netafim, engaging in mediation if necessary and lodging a fresh statement of problem in the Authority if matters remain unresolved. I draw counsels' attention to clause 4A of the 2nd schedule to the Employment Relations Act 2000 and Regulation 19A of the Employment Relations Authority Regulations 2000.

[75] I should not be taken as having determined any point arising from the exchanges between counsel and the Authority over this issue except for the procedural point that the Authority will not extend the current investigation so as to include this issue.

Set-off as a defence

[76] In part Netafim's defence is that in some respects it did more than it was required to do for Mr Dolev and that those extra costs or payments should now be brought to bear against any recovery by Mr Dolev based on his legitimate entitlements.

[77] It would be impossible to revisit every circumstance in which Netafim did more than it was contractually obliged to do, quantify those sums and now bring them to account. In addition I would similarly be asked to bring to account instances where Mr Dolev would say that he did more than he was contractually obliged to do.

[78] The decisions made by Netafim at the time to reimburse Mr Dolev were no doubt properly made for good reason. They cannot be revisited now to offset Netafim's contractual and statutory liabilities as assessed above. However there is one matter which merits further consideration.

[79] In 2008 Netafim paid Mr Dolev through the salary payroll system additional payments identified as *Home Office* notwithstanding the payments made to Mr Dolev's company discussed above. I agree that these payments were made to Mr Dolev by mistake which (on his evidence) Mr Dolev recognised at the time. In light of the other arrangements made between Mr Dolev and Netafim concerning a

home office allowance, it would be just to bring these overpayments to account as a set-off against Netafim's liability to Mr Dolev. The total is NZD\$1,090.00.

Summary and orders

[80] Mr Dolev succeeds with his claim for some breakfast and meal reimbursements arising from the travel delay in Sydney and some proportionate holiday pay but otherwise his claims are dismissed for the reasons given above.

[81] Netafim Australia Pty Limited must reimburse Mr Dolev AUD\$754.65.

[82] Netafim Australia Pty Limited must pay Mr Dolev NZD\$471.44 (gross) as arrears of holiday pay.

[83] These obligations are to be partly satisfied by bringing to account the NZD\$1,090.00 Netafim paid by mistake to Mr Dolev in 2008.

[84] The parties may agree on payment in another currency, but in the absence of agreement the payments must be made in the currencies stipulated above.

[85] Mr Dolev has succeeded to a very limited extent. It may be that he should not be entitled to any costs as a result. In any event costs are reserved. Any claim for costs can be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations