Employment Court of New Zealand

Dolev v Netafim Australia Pty Ltd [2013] NZEmpC 133 (18 July 2013)

Last Updated: 31 July 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2013] NZEmpC 133

CRC 15/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ELDAD DOLEV Plaintiff

AND NETAFIM AUSTRALIA PTY LTD Defendant

Hearing: 10, 11 and 12 June 2013

Appearances: Mr B A Fletcher, counsel for plaintiff

Mr A Russell, counsel for defendant

Judgment: 18 July 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Mr Dolev, commenced employment with the defendant, Netafim Australia Pty Ltd (Netafim), on 1 February 1997. He initially worked in Australia. In February 2002 he was transferred to New Zealand.

[2] Over the period of the employment, Mr Dolev and Netafim entered into a series of employment agreements. The first agreement dated 10 October 1996, covered Mr Dolev's employment while he resided in Australia. Upon his transfer to New Zealand, three written agreements were entered into dated 15 January 2002, 10

April 2003, and 20 February 2006, respectively. Later when Mr Dolev returned to live in Israel, there was an employment agreement written in Hebrew dated 20 July

2008 between Mr Dolev and the Netafim parent company (Netafim Israel).

[3] Mr Dolev's employment with Netafim finally terminated at the end of November 2008 as a result of Mr Dolev's return with his family to Israel. Upon his return he was to take up employment with Netafim Israel. He was attached to the Africa division of Netafim Israel and was to work in Ethiopia. At the time of termination of employment with Netafim, Mr Dolev had service with that company just short of 12 years.

[4] An arrangement was entered into between Netafim and Netafim Israel for a smooth transition of Mr Dolev's employment between the two companies. This involved his working in New Zealand for periods whilst he was also stationed in Ethiopia.

[5] Following termination of his employment with Netafim, issues arose as to unpaid wages, long service leave entitlements, commission owing, allowances, relocation expenses and calculation of the holiday pay to be paid to Mr Dolev as an employee at termination of employment. In addition, interest was sought on any money held to be owing to Mr Dolev.

[6] The parties could not resolve their differences on all of these items although some were compromised. The outstanding

issues were pursued as an employment relationship problem in the Christchurch Employment Relations Authority (the Authority). The outcome of the Authority investigation was a determination dated

17 April 2012.1 Mr Dolev was successful to a minor degree in respect of two items

of expenses and holiday pay. His other claims were dismissed. The small amount of holiday pay and expenses were to be set-off by the bringing into account of an also relatively small sum paid by Netafim to Mr Dolev by mistake. In a costs determination of the Authority dated 9 August 2012, Mr Dolev was ordered to pay

$3,500 as a contribution to Netafim towards its costs.2

[7] Mr Dolev filed a challenge in this Court against the substantive determination. He sought a full hearing de novo. The pleadings consist of an

amended statement of claim dated 13 July 2012. The defendant filed a statement of

1 [2012] NZERA Christchurch 65.

2 [2012] NZERA Christchurch 165.

defence dated 10 July 2012 to an earlier amended statement of claim. That appears to have been treated as the defendant's pleadings to the later filed document.

[8] No formal challenge has been filed to the later determination on costs. However, it will need to be dealt with in accordance with the findings in this judgment.

Factual background

[9] Mr Dolev was employed by Netafim Israel from the early 1990s. He accepted a position with the subsidiary in Australia and subsequently transferred to New Zealand. He received relocation costs for these transfers, which included transporting his household furniture. He was South Island manager from 2002 until his resignation in 2008. He then returned to Israel.

[10] Mr Dolev stated in his evidence that upon return to Israel he was to become the manager of Netafim Israel, Africa Division in Ethiopia. He informed Netafim in February 2008 that he intended to relocate to Israel. He agreed with Netafim's request to defer the move until the end of that year. He officially resigned in September 2008 but agreed to stay on until the end of November 2008. This was by arrangement between Netafim and Netafim Israel. The full-time permanent employment with Netafim Israel for the position in Ethiopia was to take effect from

1 December 2008.

[11] The disputes arising out of the termination of employment with Netafim to be considered in this judgment come under several heads. These are the issue of long service leave, the cost of transporting Mr Dolev's dogs back to Israel, holiday pay on office service allowances, a dispute over commission to be paid on sales concluded following termination of employment, expenses incurred in Sydney, Australia caused by delays on the return to Israel as a result of the Bangkok riots, a claim to payment of a home living allowance and the application of holiday pay calculations upon termination of employment. In addition if sums are held to be owing to Mr Dolev, then he claims interest.

Long service leave claim

[12] The long service leave dispute has a background to be found in the series of employment agreements. The first agreement entered into while Mr Dolev was employed in Australia did not specifically provide for long service leave. However, it is conceded by Netafim that under Australian employment law there was a statutory requirement to provide long service leave.

[13] When the New Zealand employment agreements were executed the following provisions appeared:

a) "Long service leave entitlements will be rolled over to New Zealand"

(sch 2 New Zealand agreements dated 15 January 2002 and 10 April

2003).

b) "Long service leave accrued in Australia (42.6 days as at 28 February

2006) will be transferred to your annual leave entitlement" (sch 2 - New

Zealand agreement dated 20 February 2006).

[14] In fact the provision in the final New Zealand agreement is inaccurate because by then the long service leave had

accrued for service in both Australia and New Zealand. This is confirmed in the evidence of both Mr Dolev and Mr Levy Schneider, the current managing director of Netafim.

[15] There can be no real dispute as to the amount of leave owing to Mr Dolev to that point, although in evidence he stated that the accrued leave was 45 days and not

42.6 days. That accrued leave of 42.6 days was paid to him. What he claimed is that the accrual of the long service leave continued after the execution of that agreement until final termination of employment – a further period of service from 28 February

2006 until 31 November 2008. He quantified the claims in the amended statement of claim at $1,611.04 for the 2.4 days shortfall and $8,020.51 for the continued accrual from 28 February 2006. He also claimed in addition that if he is entitled to the further accumulated long service leave then by operation of ss 24 and/or 25 of the Holidays Act 2003 he is entitled to a further annual leave payment.

[16] To understand Netafim's position on this, and indeed some of the other claims, it is necessary to consider the employment position operating with Mr Dolev and his wife in New Zealand prior to the 2006 agreement. When Mr Dolev came to New Zealand, his wife Dorit Dolev was listed as an employee of Netafim. This was apparently an income splitting device to reduce Mr Dolev's tax liability. However, Dorit Dolev did carry out office administration functions for her husband in his position as South Island manager. This arrangement had been established by the then managing director of Netafim, Mr Raviv Rom.

[17] Mr Schneider gave evidence for Netafim. He took over the role of managing director on the resignation of Mr Rom and remained in the position until the end of

2007. Between January 2008 until November 2009 he assumed the role of managing director of another company but returned to the present position in December 2009. When Mr Schneider first took over from Mr Rom he noticed what he called the unusual employment arrangement for Mr and Mrs Dolev. He did not consider such a structure appropriate and entered into discussions with Mr and Mrs Dolev. This was on the basis that Mrs Dolev would cease to be an employee of Netafim but on the basis that the total net financial remuneration package (including Mrs Dolev's salary) for Mr Dolev would not be affected. I infer from the totality of Mr Schneider's evidence that the final position was grossed up so that in total monetary terms the total net position previously applying would be maintained or perhaps bettered. It is clear from the correspondence, which took place between Mr Dolev and officers of Netafim, that the long service leave was discussed as part of the equation in the restructuring of his financial remuneration. The issue is whether there was a concluded agreement in the restructuring that further accumulation of such leave was to cease. Netafim claims there was.

[18] The company's position on what transpired in respect of this part of the claim is quite succinctly contained in the following paragraphs from Mr Schneider's brief of evidence in Court:

20. Mr Dolev claims the payment of long service leave. This was paid to him by a transfer of 42.6 days in or around March 2006 at the time of the new 2006 Employment Agreement. In Australia, long service leave is a statutory requirement that accrues to employees. As such, when in Australia between 1997 and 2002, Mr Dolev was entitled to it. His 2002 New Zealand

employment agreement provides that those long service leave entitlements will be "rolled over" to New Zealand (p 21). That meant that Mr Dolev would continue to accumulate long service leave, an Australia entitlement, while employed in New Zealand.

21. The 2003 New Zealand Employment Agreement similarly stated that long service leave would be "rolled over" to New Zealand (p 40). This also meant that he continued to accumulate his entitlement to long service leave while employed in New Zealand.

22. However, I was instrumental in changing this by the provisions contained in the 2006 New Zealand Employment Agreement. The 2006

Agreement clearly stated that "long service leave accrued in Australia (42.6

days as at 28 February 2006) will be transferred to your annual leave

entitlement". (p 58)

23. Therefore there was a transfer of long service leave entitlement that

Mr Dolev had accrued in Australia from 1997 until February 2006 (2002-

2006 through the operation of the New Zealand Employment Agreements rolling it over to New Zealand). The transfer was premised on the basis,

communicated in emails and through discussions, that the long service leave

would stop accruing in New Zealand. In his email of 10 February 2006, Mr

Dolev acknowledges that Long Service Leave "can be wiped by paying it now". (p 105). This agreement was reflected by the exclusion of the previous provision about rolling up long service leave to New Zealand from the 2006 Employment Agreement.

24. The computer snap shot (p 108) shows the transfer of the 42.6 days of long service leave to Mr Dolev's annual leave entitlements in New Zealand in March 2006.

25. Further, it should be noted that Mr Dolev received a large payout of annual leave upon his termination in November 2008. An amount of

$48,122.84 gross for annual holidays and $1,771.28 gross for public

holidays was paid in his final pay of 30 November 2008 for annual leave accrued up to 1 February 2008 (p 109). A large proportion of this related to the long service leave so transferred in 2006.

26. However, once the transfer of long service leave occurred in March

2006, there was no longer any contractual or statutory requirement for Mr

Dolev to continue to accumulate long service leave in the period from March

2006 to November 2008. The spreadsheet produced in regards to the new

arrangement and provided to Mr Dolev at the time, explicitly stated "No more accrual of LSL". (p 82)

[19] There was an amount of evidence at trial on the statement contained at the bottom of the spreadsheet. Mr Dolev maintained in evidence that he received other versions of the spreadsheet document, which did not contain the words "No more accrual of LSL". He maintained that in the total restructuring of his overall financial remuneration, he was to continue receiving long service leave, regardless of the fact that the then total accrued leave was crystallised as at 28 February 2006 and rolled

into his annual leave entitlement. He claimed that he was not given notice of what Netafim now claims was the position in respect of his long service leave. He disputed that he agreed to the accumulation ceasing.

[20] Both Mr Schneider and another witness Mr Tal Brod, chief financial officer for Netafim, maintained that the spreadsheet with the statement as to long service leave was attached to an email sent to Mr Dolev. They gave some evidence of attempts to retrace the email trail and obtain confirmation of receipt by Mr Dolev. Mr Schneider in addition, said in his evidence quite categorically that the statement on long service leave was in the version sent to Mr Dolev.

Home office invoices

[21] This claim also related to the restructuring of the income package. As part of the variation and the method whereby Mr Dolev's total package was calculated and paid, agreement was reached that a total annual reimbursement payment of $19,800 would be paid to Mr Dolev to cover his expenses in operating the South Island office of Netafim from his home. Following the expenses being paid to him by Netafim upon ceasing employment, Mr Dolev claimed two smallish amounts representing what he alleged were discrepancies in calculating the actual allowance. In addition he claimed that as the reimbursement payments were part of his total remuneration and gross earnings, he was entitled at termination of employment to receive further termination holiday pay on them.

[22] He maintained in his evidence and through submissions of his counsel, Mr Fletcher, that the payment of this sum by way of monthly payments of $1,650 far exceeded the office expenses actually incurred. Rather than being an actual reimbursement they were simply part of the attempt to ensure that he did not suffer any financial disadvantage as a result of the cancellation of the previous income splitting device with his wife. It is difficult to assess whether this was so or not. Netafim was endeavouring to restructure the remuneration to remove what was clearly an income splitting device to avoid tax. It is unlikely that it would allow an equally risky allowance in its place. In addition little, if any, evidence was presented to show that the payment was in excess of the actual expenses.

[23] The company's position on this claim was that in order to obtain a tax advantage, Mr Dolev and his wife set up two companies, Dolev's Limited and Dolev's (2006) Ltd, both of which submitted GST invoices to Netafim for the office expenses. There was no doubt that this was done and indeed the defendant produced copies of GST returns filed by one of the companies against the income that company received by way of the payments from Netafim. Mr Dolev maintained that nevertheless the payments were in reality part of his income package. He maintained that despite the invoices being generated by the companies, the payments were made into a joint banking account held by him and his wife. He claimed

therefore, that upon termination of employment he was entitled to further holiday pay not otherwise included in the final payment of his holiday pay owing. These claims were made pursuant to ss 24 and/or 25 of the Holidays Act 2003.

Cost of repatriating Mr Dolev's dogs to Israel

[24] In the 2006 New Zealand employment agreement it was provided that Netafim would cover the cost of Mr Dolev's return to Israel. This would include his personal and household effects and obviously reimbursement of airfares for himself and his family. From the email correspondence produced, there appeared to have been some dispute as to the cost of insuring the effects. However, that was resolved.

[25] While in New Zealand Mr Dolev and his family acquired two Labrador dogs. The family repatriated these dogs to Israel when they returned there and Mr Dolev made a claim for the cost of doing so, which amounted in total to $5,893. Netafim's position was that it was not required under the employment agreement to cover the cost of repatriating the dogs and that they were not covered by relocation costs. The company submitted, through counsel, that expenses to be covered under the 2006 employment agreement were premised on the basis of expenses paid for Mr Dolev's original location from Israel to Australia and eventually on to New Zealand. No pets were brought to New Zealand from either country.

[26] Mr Dolev's position on the matter was that pet ownership is a normal incident of New Zealand life. Pets are viewed as family chattels pursuant to the Property (Relationships) Act 1976 and pet relocation costs are deductable expenses when

relocating family for employment purposes insofar as the Inland Revenue Department is concerned. Mr Dolev submitted that if the employer wished to exclude any common household items including dogs, it had the opportunity to do so during the contract negotiations, and no such exclusion was taken. In addition, Mr Dolev pointed to the fact that other employees of Netafim have had such an item reimbursed. However, in the example that was given, there was a clear contractual provision, insofar as that employee was concerned, requiring the reimbursement. No such specific provision existed in Mr Dolev's agreements. The claim remained in dispute. However, the company did pay the costs of relocating the dogs to Israel, but then deducted the costs from the total capital sum, calculated to be paid to Mr Dolev as his termination payment.

Sydney expenses

[27] Whilst dealing with the relocation of Mr Dolev and his family to Israel, further claims arose in respect of the family being stranded in Sydney as a result of the Bangkok riots. Accommodation, meals and other expenses were incurred as a result of the family having to remain in Sydney for a period. These expenses were reimbursed to Mr Dolev except for two or three items where Mr Dolev was unable to produce a dated receipt. Netafim's chief financial officer, Mr Tal Brod, indicated in his evidence that company policy required the claim to be accompanied by a dated receipt. Apparently it was maintained that without the date there was no evidence acceptable to Netafim that the expenses were actually incurred while Mr Dolev and his family were stranded in Sydney. The total amount claimed in the original pleadings has been largely accepted by Netafim except for a final balance claimed of AUD$120. It is accepted that the claims were incurred in Sydney but without the date the company claimed to be unsure they were incurred during the time the family was stranded there and not at some other time.

Commission

[28] Again there was quite a deal of evidence at the trial about this particular part of the claim. Under the salary reimbursement arrangement between Netafim and Mr Dolev he was entitled to commission on sales he achieved for the company. Mr

Dolev said in his evidence that when he first commenced working for Netafim in Australia from 2002, he did not receive payment of commission for the first three months of employment. It was his understanding that the outgoing Queensland manager for Netafim would receive commission for a period of three months after they ceased employment. The logic for this, he stated, was that the outgoing manager before leaving the employment carried out the majority of work on sales actually concluded after the termination of employment. Therefore they would receive commission on those sales to fairly recognise the work done in the period leading up to termination of employment. He said that the corollary to this arrangement was that he too would receive commission three months following his departure from the company for sales concluded in that period and upon which he had been working prior to termination of employment. He stated that he received an assurance on this from Mr Raviv Rom who was the then managing director, when he commenced employment with Netafim in 1997. On this basis he claimed commission payments on sales concluded by Netafim during the three months after he left his employment in November 2008. The periods he claimed for were December 2008, January 2009 and February 2009. The total sum he claimed amounts to $7,598.23.

[29] Evidence upon which Mr Dolev specifically relied was first a notation he said Mr Rom (who did not give evidence) endorsed upon his initial letter of offer of permanent employment, dated 18 December 1996. This notation was written in Hebrew and has been translated to mean:

Start of the commission calculation will be from the ending of the first three months of the probationary period.

[30] In addition to that Mr Fletcher in his submissions on behalf of Mr Dolev, pointed to what he considered was corroboration for Mr Dolev's evidence, being a clause in the first New Zealand agreement, which stated:

... Your commission structure will be: 0.75 percent on your territory sales, plus 1.5 percent of your territory's sales growth over the previous year's sales. You will become entitled to the commission one month after commencing work in New Zealand. However, during your first month you will still be entitled to your (previous) commission on your Queensland territory sales.

[31] Neither the endorsement on the original appointment letter in Hebrew, nor the contractual provision referred to by Mr Fletcher, specifically confirmed Mr Dolev's allegation that he was entitled to commission on sales initiated by him but having concluded in the three month period after termination of employment. The Queensland situation of course was not a termination of employment, but simply a transfer of location during continuity of employment.

[32] Netafim's position on this claim was that there was simply no contractual entitlement to it, which Mr Dolev could point to. If such an arrangement did exist, which Netafim denied, then it was certainly extinguished by the contractual provision contained in the first New Zealand employment agreement, to which Mr Fletcher referred. That contractual provision confirmed discussions on Mr Dolev's terms and conditions to apply upon his transfer to New Zealand. In an email from Mr Rom to Mr Dolev dated 27 January 2002, there was a paragraph directly reflected by the clause later inserted into the employment agreement.

[33] Insofar as Mr Dolev's calculation of the quantum of these commissions was concerned, it appeared that he had based the calculation on evidence he received as to concluded sales, following his final departure to Israel. The company did not lead any evidence to dispute this quantification. However, the issue is whether Mr Dolev is, in any event, contractually entitled to it.

Home living allowance

[34] Mr Fletcher stated in his submissions that this claim might be more appropriately termed the living away from home allowance. Mr Dolev claimed from Netafim under this head a total sum of $4,126.42 for 75 days while he was working in Ethiopia and Israel during the interim period and carrying out work for both Netafim and Netafim Israel.

[35] Mr Dolev's basis for claiming this related to Netafim's expense claim policy. Each of the written employment contracts contained a provision requiring Mr Dolev to be subject to and observe and comply with all rules, policies and procedures in

force from time to time as set out in Netafim's Policy and Procedure Manual/House

Rules.

[36] Section 8 of the expense claim policy stated as follows:

8. Overseas Travel Allowance

8.1 When an employee travels abroad, they are entitled to accommodation and breakfast at the company's account as per section 4 above. The company will also reimburse work related transport expenses.

8.2 Employees travelling overseas will receive a daily travel allowance of USD$45.

[37] Mr Dolev's basis for making this particular claim can best be shown by

setting out paragraphs 47-53 of his brief of evidence as follows:

47. Netafim Africa wanted me to start with them in May 2008. I was asked by the defendant to stay on in New Zealand until the end of November 2008. The company made the arrangements between its divisions in Israel and Australia. I had no involvement in these arrangements. It was agreed that I would work in New Zealand until the end of 2008 and that I would work one month on one month off in Israel and New Zealand until I left. I agreed even though it was actually quite inconvenient to my family because I wanted to end my

12 years service with the company in Australia and New Zealand on a positive note.

48. However up until [30] November, 2008 I remained an employee of Netafim Australia. Netafim Australia paid me for the total period of time and any time I spent working or travelling to Africa was reimbursed between the two companies. I had full responsibility for the New Zealand South Island Sales and activities even when I was in Ethiopia. I did my job by email or phone during those periods. The periods that I was travelling in 2008 were from 17 July – 31

August and 1 October until 31 October 2008. This was a total of 75 days.

49. I received my normal payments from Netafim Australia while based in Israel and working for Ethiopia and New Zealand. This included salary, commission, kiwi saver , annual leave and office services. It is for this reason that I say that I was owed

“HLA” for the time that I was working from Israel. It was part of my remuneration package.

50. The HLA or Home Living Allowance was a standard payment that was made by the company to employees who are working away from their home. [doc 130] We were paid $40 per day for being away from our homes while in New Zealand and US$40 or NZ$65 per day for being away from our homes and overseas. This was in

addition to any working expenses that we were reimbursed for including accommodation and breakfasts and working expenses.

51. I was not paid the $65 per day for the 75 days that I was working away from New Zealand in 2008.

52. I had considerable additional expenses during this time when continuing to work for and being paid by Netafim in New Zealand, but also covering Africa and working out of Israel. While my family lived in our house I owned in Israel, I needed to retain my house in Christchurch. I was therefore unable to rent it out with a resultant loss of income.

53. The arrangement for me to work out of Israel and cover the New Zealand position and the Africa position was for the benefit of Netafim. The home living allowance was payable in accordance with the company policy and there was no reason for withholding it in this case.

[38] As expressed by both Mr Schneider and Mr Moshe Wolfson, the Chief Financial Officer for Netafim at the time, during the interim period while Mr Dolev was continuing to work in New Zealand his salary and expenses were met by Netafim. Whilst he was working in Israel or Ethiopia, the responsibility rested with Netafim Israel. Certainly there is evidence from the contemporary documents that the two branches of the company had reached an arrangement between themselves as to how Mr Dolev was to be reimbursed during this period. Netafim’s view was that it was not its responsibility to reimburse Mr Dolev while he was carrying out duties for Netafim Israel.

[39] Mr Russell, on behalf of Netafim, in his submissions, pointed to the reasons why the company resists this claim. First, under the policy, home leave allowance was not in any event paid when full reimbursement of claimed expenses occured. Mr Dolev confirmed that he had received a full reimbursement of his claimed expenses.

[40] Secondly, there was no contractual obligation for Netafim to meet this claim in view of the agreement reached between Netafim and Netafim Israel, to which Mr Dolev was a party by participating in the correspondence exchanged on the point at the time. The contemporary documents show that Mr Dolev indeed participated in these discussions, and as Mr Russell pointed out, Mr Dolev was actually instrumental in the arrangement that while outside New Zealand in the interim

period his costs would be the responsibility of Netafim Israel and included in the agreement.

[41] Thirdly, there was a subsequent concession by Mr Dolev, again contained in contemporary documents being the emails, where he confirmed that he received full reimbursement of expenses while in Ethiopia. It appeared that he lived in his own home in Israel and did not incur any travelling expenses while there.

[42] Finally, Mr Russell pointed to a schedule contained in the bundle of documents (page 135) which showed money paid to Mr Dolev in both US dollars and Israeli shekels for charges incurred by him and claimed while he was in Ethiopia. The first ten items in the schedule clearly cover the interim period, when he was carrying out duties both for Netafim and Netafim Israel prior to finally taking up employment with Netafim Israel at the end of 2008. Mr Dolev, when questioned about this schedule initially claimed that the schedule showed his reimbursement to the company for some draw down on a cash float arrangement. However, it is clear from the document on its face, that this could not be correct. The document showed accounting to a final nil balance of Mr Dolev’s claims and the payments made to him in reimbursement. Mr Russell submitted that Mr Dolev misled the Court about this particular document. Mr Dolev’s explanation was that he had just been confronted with it. While that cannot be so, Mr Dolev was obviously non-plussed when questioned about the document and gave what he thought at the time was a correct explanation about what the document disclosed. I am not prepared to find he deliberately misled the Court. However, it does raise a question about Mr Dolev’s recollection on all of these matters.

[43] In reply, on this point, it is to be noted that Mr Dolev asserted and Mr Fletcher submitted on his behalf, that during the interim period he continued to be employed by Netafim and was entitled to claim the benefits provided by his employment agreement. He was not a party to any arrangement reached between the companies as to how they accounted to each other for the expenses.

Conclusions

[44] It is accepted that Mr Dolev continued to accrue long service leave upon transfer to New Zealand. He maintained that this was not expunged when the remuneration package was reviewed and amended in 2006 and that the long service leave continued to accrue until his ultimate resignation in November 2008.

[45] When that review took place the witnesses confirmed that the intention was to ensure that Mr Dolev was not financially disadvantaged by the restructuring of the total package, which had previously included the salary paid to Mrs Dolev. Mr

Dolev mentioned that this was so in the email exchanges and it was also accepted by Mr Schneider. This is an important point in the consideration of the long service leave entitlement along with the fact that accrual of such leave did not cease when Mr Dolev transferred from Australia to New Zealand. In the context of the intention not to financially disadvantage Mr Dolev, no capitalisation of future accrual of long service leave was negotiated or included in the restructured package.

[46] Nothing in the emails considering the long service leave accruals specifically confirmed that long service leave was no longer to continue to accrue once the 2006 agreement was concluded. The employer sought to rely upon what was effectively the only reference to long service leave no longer continuing to accrue. This was the statement "No more accrual of LSL" endorsed at the bottom of the series of reconciliations setting out the calculation of Mr Dolev's total package after restructuring in 2006. That endorsement was entered on the document on page 82 of the bundle and in a varied form attached to an email from Mr Schneider to Mr Dolev produced as defence exhibit D.

[47] If the long service leave was to come to an end as Netafim asserted, then it would be expected that the total package would contain some capitalisation of future accrual of long service leave if the agreed intention was to ensure that Mr Dolev by the restructuring was to maintain effectively the same financial package overall. In addition, it would be expected that following the specific narrative on the point in contemporary documents, the 2006 agreement would then have provided specifically that long service service leave would cease to accrue. It was an opportunity for such

a provision to have been put into the agreement because that agreement specifically dealt with long service leave, by stating that the accrual of long service leave in both Australia and New Zealand at that point was to be transferred to and merged with his annual leave entitlement. It is curious that this transferral and merger of the categories of leave was to take place. There was no real need for it as the entitlement to leave to that point would remain the same. It may well be that it was to be accompanied by a condition that no further accrual would occur but nothing definite was agreed. Specific words to that effect were not inserted into the formal agreement.

[48] Mr Dolev stated he was of the view that despite the restructuring he was to continue to accumulate long service leave from that point. Such continued accrual of long service leave was not then capitalised to ensure Mr Dolev did not suffer any deterioration in overall remuneration. During the course of the exchange of emails, Mr Dolev, at one point, indicated that Netafim could wipe the liability for long service leave "by paying it now". Mr Schneider suggested this was corroboration that Mr Dolev agreed to cessation of the accrual from that point. However, from the context of that email all Mr Dolev was suggesting was that if Netafim did not wish to allow him to actually take the accrued long service leave to that point it could pay him out for it. For some reason it was then merged into the annual leave by the employment agreement. However, none of the emails contained any bilateral confirmation that long service leave would discontinue for future service with Netafim from that point. Mr Schneider has misunderstood Mr Dolev's comment to the Human Resources Manager in the email dated 10 February 2006.

[49] Both counsel in their submission referred to the principles applying to contractual interpretation. They referred to *Vector Gas Ltd v Bay of Plenty Energy Ltd*,3 and a consideration of that decision in the employment jurisdiction in *Silver*

*Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc.*4 Mr

Fletcher, in his submissions also referred to a passage from *New Zealand*

3 [2010] NZSC 5, [2010] 2 NZLR 444.

4 [2010] NZCA 317, [2010] ERNZ 317.

*Professional Firefighters Union v New Zealand Fire Service Commission*5 to which the Authority Member had referred in his determination.

[50] I find that I am in agreement with the Authority's determination, when it stated that one should be cautious in interpreting an agreement so as to remove a benefit. However, I reach a different conclusion from the Authority on this point of long service, having regard to the matters I have discussed already. There can be no argument from the terms of the employment agreements up until 2006, that after his transfer to New Zealand, Mr Dolev was to continue receiving an accumulation of long service leave and indeed he did so. Cancellation of such accrual was not provided for in the 2006 New Zealand agreement, nor was that specifically stated in the contemporary documents being the exchange of emails leading to the calculation of the final remuneration package. All that was agreed in the 2006 agreement was that the long service leave accumulated to that point was to be merged with the annual leave entitlement. It may well be that Netafim intended in the overall package that long service leave accumulation was to cease. However, Netafim was unable to point to any agreement to that effect with Mr Dolev. The statement endorsed on the two reconciliations that I have referred to can be nothing more than a unilateral declaration by Netafim.

[51] Mr Fletcher, in his submissions for Mr Dolev, referred in particular to the statement from *New Zealand Professional Fire Service Commission* to submit that the contractual position is clear. He submitted that as opposed to what the defendant interprets the position to be, the following relevant evidence favours Mr Dolev's contractual entitlement to receive continued

accrual of long service leave:

a. It was the agreed position that Mr Dolev's income and benefits would

not reduce as a result of the 2006 agreement;

b. By virtue of the First and Second New Zealand Agreements, long service leave became an entitlement that Mr Dolev was to receive in New Zealand;

c. The Third New Zealand Agreement expressly brings the Australian payment into the New Zealand jurisdiction *("long service leave accrued in Australia... will be transferred to your annual leave entitlement.")*;

5 [2011] NZEmpC 149.

d. There is nothing express in the Third New Zealand Agreement which terminates any future entitlement to long service leave. The contra proferentem rule applies;

e. The words "as at 28 February 2006" must be interpreted as allowing for the figure to be different "as at" a different date. The only logical way that the figure might change is because Mr Dolev would remain longer with Netafim and accordingly accrue more long service leave;

f. Comparing the relevant provisions of the First, Second and Third New Zealand Agreements suggests that they are simply different ways of expressing the same idea.

[52] I agree with Mr Fletcher's submissions on this point. There is no basis or need to rely upon the authorities cited to interpret the contract. I find Mr Dolev is entitled to the further long service leave, which accrued whilst he continued to remain employed by Netafim in New Zealand, beyond the point where the previous accrual of long service leave had been merged with annual leave. However, insofar as the extra 2.4 days he claimed as having accrued to that point were concerned, the same principle applies. Mr Dolev signed a clear contractual provision in the 2006 agreement that his accumulated long service to that point was 42.6 days and not the

45 days he now alleges. He is not entitled to succeed with that part of the claim.

[53] Insofar as the home office invoices are concerned, this definitely relates to the restructuring of the remuneration package following the ending of Mrs Dolev's employment. However, in order to obtain a tax benefit on the finally agreed monthly office services allowance, invoices required by Netafim were generated in the name of the two companies of which Mr Dolev and his wife were proprietors. In addition to that GST was included. The companies filed GST returns showing the payments made by Netafim as income received by the companies. Presumably some GST refunds were procured. As stated earlier in this judgment the dispute is not over whether or not the service allowance was paid, but rather whether it was part of Mr Dolev's remuneration. If so then Mr Dolev claimed Netafim would be required to include it in the calculation of ordinary weekly pay or average weekly earnings for the purposes of s 24 or gross earnings for the purposes of s 25 of the Holidays Act. Further annual holiday pay would then be payable upon the termination of employment depending on which, if either, of those sections applied.

[54] It was Mr Dolev's choice to structure the payment of office service allowances in this way. He now wishes to allege that in fact the payment was made personally to him as part of his earnings. Presumably if that was the case not only would he have to have his own income tax position now reviewed, but so would the two companies. In addition to that there would be difficulty from the point of view of Netafim in that it could face penalties for not making and forwarding to the Inland Revenue Department PAYE deductions in respect of the payments presently disclosed as income of the two companies.

[55] It may well be that the payments were made into a joint account held by Mr and Mrs Dolev. However, from the accounting for the payments they were clearly shown as income of the companies. This is clear from the documents produced by the defendant. The clear inference is that the proprietors of the companies, including Mr Dolev, received further financial benefit from structuring the position in the way that they did. Mr Dolev in his evidence, suggested that because of the large amount paid by way of the home office expenses it was a sham given the fact that the actual expenses could not possibly have been at the level reimbursed. There was no evidence that this was so. Mr Russell submitted that Netafim relied upon representations made by Mr Dolev as agent for the companies as to how the office services were to be provided and made payment accordingly. Netafim would now be exposed if Mr Dolev's claim was accepted. I agree with Mr Russell that Mr Dolev is now estopped from succeeding with his allegation that these payments should be treated as part of his earnings and therefore subject to the further holiday pay entitlement upon termination of employment.

[56] Insofar as the cost of repatriating Mr Dolev's dogs to Israel is concerned, the contractual provision carried through the series of agreements was that "the company will cover the cost of your return to Israel (as per the agreement relating to your employment in Australia)". Apparently at the time of Mr Dolev originally travelling from Israel to Australia to take up the position there, the company paid for transportation of his personal and household effects and the cost of transportation for himself and his family. The dogs were not acquired in Australia. Accordingly, there was no claim for such transportation

from there to New Zealand for animals. Two dogs were acquired while the family resided in the South Island of New Zealand.

The outcome on this point is decided by what was contemplated by the contractual provision.

[57] It is correct that, as submitted by Mr Fletcher, pets are viewed as family chattels pursuant to the Property (Relationships) Act 1976. Further, the New Zealand Inland Revenue Department apparently allows relocating pets in such circumstances as deductable expenses. I do not consider that those matters alter the position as to what was contemplated with this particular set of agreements. The resistance of Netafim to this claim is corroborated by the fact that where pet relocation has been allowed in the past, it was the subject of a clear contractual provision. That does not exist in this case. Accordingly, that claim is not allowed.

[58] As to the Sydney expenses, with the compromises now reached, this is a relatively trivial claim. The company's intransigence on this point may seem curious. However, the policy was clear that as part of its auditing requirements, reimbursement would only be made for dated invoices. This is so that the company is sure that they relate to the period for which a valid claim is being made. This claim is also disallowed.

[59] With the commission claim, again I rely upon the contractual provisions. The original Australian employment agreement provided that for the first three months of Mr Dolev's employment with Netafim he was not to receive commissions. There would probably be good reason for that because during that period concluded sales would involve little input from him in initiating and fortifying them. I had no documentary evidence, however, that at the conclusion of the employment Mr Dolev would receive commission on sales he had transacted but not finalised in the period immediately leading up to his termination of employment. The original endorsement on the letter of appointment that he would not receive commission for the first three months of employment was not carried through into the subsequent agreements. There was no contractual provision Mr Dolev could point to, or any corroborative evidence, for his claim to such commissions. This claim is also not allowed.

[60] Insofar as the home living allowance is concerned, or as Mr Fletcher refers to it, the living away from home allowance, I also disallow this claim. Mr Dolev relied upon the expense claim policy in Netafim's Policy and Procedure Manual/House Rules. (Somewhat inconsistently he did not wish to accept the rules in respect of the undated Sydney expenses). The transition period, when he seemed to have been carrying out work for both Netafim and Netafim Israel was somewhat unusual. However, the expenses claim policy would logically only apply when an employee is overseas carrying out work for Netafim. When Mr Dolev was in Israel and Ethiopia, he was there for the purposes of his employment in the transition period with Netafim Israel. His own evidence was that during these periods he was not left out of pocket for expenses. They were fully reimbursed when he claimed them, as the schedule referred to earlier discloses. I cannot find any proper contractual basis why Netafim should be liable to Mr Dolev for the daily rate living allowance on top of all other reimbursed expenses when he was not overseas undertaking duties for the benefit of Netafim.

The claim to holiday pay

[61] Mr Fletcher submitted that while it may seem counter-intuitive, if Mr Dolev was allowed the further accrued long service leave it would also carry an entitlement to the addition of holiday pay. This claim is made in reliance on the combination of the definition of gross earnings in s 14 of the Holidays Act 2003 and ss 25(2) and 26 of that Act. He submitted that the rationale for this is that an employee is typically entitled to four weeks holiday in addition to the 52 weeks worked. It follows, he stated, that a payment in lieu of holiday pay requires an additional eight percent in order to take into account the fact that one accrues holidays while on holiday. This, he submitted, is the effect of s 26 upon s 25(2) of the Act.

[62] As Mr Dolev is claiming a further eight percent on the long service leave now allowed, he is clearly relying upon s 25(2). Section 25 provides:

25. **Calculation of annual holiday pay if employment ends before further entitlement has arisen**

(1) Subsection (2) applies if—

(a) the employment of an employee comes to an end; and

(b) the employee is not entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not worked for the whole of the second or subsequent 12 months for the purposes of section 16.

(2) An employer must pay the employee [8%] of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount—

(a) paid to the employee for annual holidays taken in advance;

or

(b) paid in accordance with section 28.

[63] I am presuming that upon termination of employment Mr Dolev received a payment calculated upon the basis of s 25 for outstanding holiday pay. To succeed with the claim for extra holiday pay on the long service leave now allowed, he has to establish that the long service leave payment would be included in his gross earnings as that is defined in s 14 of the Holidays Act. The definition is not exclusive. However, as annual holiday pay is included in gross earnings I cannot see why pay for long service leave should be excluded. If Mr Dolev did indeed receive a payment pursuant to s 25 that will need to be recalculated on the basis of the new increase in gross earnings. The difference is to be paid to him.

Disposition

[64] In summary, therefore, I allow Mr Dolev's claim for long service leave accrued from the date of crystallisation of his then long service leave entitlement and merging with annual leave in 2006, to the date of termination of his employment with Netafim at the end of November 2008. He may be entitled to additional holiday pay if he received a payment based on gross earnings under s 25 of the Holidays Act. I will leave it to the parties to calculate the quantum of the long service leave pay, the holiday pay and the tax deductions, which will be required. All other claims are dismissed. Insofar as interest is concerned, I allow Mr Dolev interest on the gross sum now awarded, at the rate now specified in cl 14 of Schedule 3 of the Employment Relations Act 2000. That will be calculated from the date of termination of employment until the date of this judgment.

[65] I note that during the course of the hearing it was indicated that certain of the original claims had been abandoned and others compromised. I will accordingly need to leave it to the parties to calculate the final sum owing to Mr Dolev as a result of this judgment. If need be, any further issues arising on quantum can be dealt with by memoranda and leave is reserved for that.

[66] There is still the outstanding issue of costs. I note that in the determination Mr Dolev was ordered to pay Netafim costs of $3,500. In view of this judgment on the challenge, I will review the costs award in the determination and also give consideration to costs in respect of these Employment Court proceedings. It may be a matter the parties are able to agree upon. However, if no agreement can be reached I allow 14 days from the date of this judgment for Mr Dolev to file a memorandum in respect of costs and Netafim shall have 14 days thereafter to respond.

M E Perkins

Judge

Judgment signed at 10 am on 18 July 2013
