

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 101/09
5141610

BETWEEN OLAF VAN DAAL
Applicant

AND CALIBRE BOATS NZ
LIMITED
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Shelley Eden for Applicant
No appearance for Respondent

Investigation Meeting: 26 March 2009

Determination: 1 April 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr van Daal resigned from his position with Calibre Boats Limited (“Calibre”) on 2 May 2008. He says that he was constructively dismissed as a result of breaches by the respondent and seeks the following remedies: lost earnings, compensation, and 16 days outstanding holiday pay.

[2] Attached is a Minute dated 23 March 2009 which sets out the history of these proceedings. On the morning set down for the investigation meeting Mr Craig Ross, director of the respondent, provided by email two written statements, one his own and one that of an associate. However he advised the Authority that there would be no appearance for the respondent at the investigation meeting.

[3] I proceeded to take Mr van Daal's evidence and to hear submissions from Ms Eden. This determination is based on that information. I have not taken into consideration the unsworn statements provided by email by the respondent.

[4] The issues for determination are whether there has been a constructive dismissal and whether the respondent owes Mr van Daal arrears of holiday pay.

Constructive dismissal allegation

[5] In July 2006 Mr van Daal and Mr Ross agreed that Mr van Daal would commence work for the respondent (a boat building company) as Project Manager/CEO. The terms and conditions of employment were contained in an individual contract of employment executed on 20 July 2006 together with a separate document executed on the same date and headed "agreement to vary the employment contract". In combination these documents provided that his total remuneration package was \$120,000.00 of which \$80,000.00 was to be paid as salary with the balance put aside for use as consideration for the sale to him of shares in the respondent upon the successful completion of an agreed three month probationary period.

[6] During that first three month period Mr van Daal was engaged full time in managing and supervising the completion of boat building projects. At its conclusion the two men agreed that the employment would continue. However, the sale and purchase of shares did not take place as originally intended. When asked by Mr van Daal to do so, Mr Ross had failed to provide information to show the value of the share offer. Mr van Daal took steps to obtain an independent valuation and finally received this in February or March 2007. It showed that the value was nil. The parties therefore negotiated a variation to the original terms and executed this in November 2007. The variation provided that Mr van Daal would receive a salary of \$120,000.00 per annum and that outstanding salary of \$40,000.00 would be treated as a loan to the company and repaid to him over time. This did eventually happen and no dispute arises in relation to that issue.

[7] Of much greater consequence is the fact that around the time the probationary period ended, Mr van Daal had started to become involved in a separate business

venture of Mr Ross: the development of a marine and industrial park in Helensville by development company Waypoint Industrial Park Limited (“Waypoint”). Over the next 18 months, Mr van Daal worked very long hours, dividing his time between the respondent’s boat building business (comprising the respondent and an associated company, Calibre Yachts Limited) and the Helensville development. Mr van Daal told me he understood himself to be CEO of “the Calibre Group.” From January 2008, the boat building workshop was located at the site of the Waypoint development.

[8] Although he says that Calibre billed Waypoint for his services, Mr van Daal told me he himself received no additional remuneration for the extra work. Instead, he said:

“Payment for those efforts was to be by way of a share in Waypoint as well as a share in Calibre Boats and all Calibre Group companies...”

This payment never eventuated, despite Mr Ross and Mr van Daal entering into a Heads of Agreement on the subject in November 2007.¹

[9] By May 2008, Mr van Daal told me, what had looked like a promising opportunity was turning sour. He had yet to receive a profit share or stake in either Waypoint or Calibre, and in addition he was finding it increasingly impossible to do his job, with Mr Ross overriding his decisions in relation to both businesses and countermanding his instructions to staff.

[10] The situation deteriorated further when Mr Ross began transferring funds from the Waypoint development to prop up the boat building business, leaving Waypoint unable to meet its commitments. Mr van Daal reached the point where he feared becoming personally liable for negligent misstatements to creditors of the development project. After taking legal advice, he adopted a practice of requiring Mr Ross to sign any correspondence which gave undertakings about payment arrangements.

[1] ¹ Mr van Daal did become a minority shareholder and director in an engineering business with Mr Ross (Calibre Engineering Limited) but he says that this was a completely separate matter. Otherwise he acquired no shareholding or directorships in any of Mr Ross’s companies.

[11] Finally, on 2 May 2008 he tendered two weeks notice of resignation, stating:

“Although it would be in my best personal interest to resign with immediate effect, I also acknowledge that without my specific help to the contracted parties and staff, the businesses and Development Company may experience a deteriorating effect of my sudden leave.”

Determination

[12] Although Mr van Daal found himself in a very difficult position, this related primarily to the work he carried out for Waypoint, not the work he carried out for Calibre. His only complaint regarding his role at Calibre was a general assertion that Mr Ross sometimes countermanded his instructions to staff. Without more, this does not amount to a serious breach of duty on Calibre’s part.

[13] His other concerns, particular those about having his integrity impugned by being associated with a company that was letting down its creditors, are more serious. It may be arguable that this could amount to a breach of duty by Waypoint, if he were found to be employed by Waypoint. However, he has not cited that entity as respondent. In submissions it was argued (with reference to the evidence that Calibre invoiced Waypoint for his time) that Mr van Daal’s services were contracted out to Waypoint by Calibre. However, given what I have heard about money being siphoned off from Waypoint to Calibre, I do not consider it safe to infer that Mr van Daal was employed by Calibre in the course of performing duties for Waypoint. As well, this submission is in conflict with Mr van Daal’s own statement that he expected to be separately compensated for his work for Waypoint, as set out in paragraph [8].

[14] Mr van Daal effectively did two different jobs for two businesses that were separate except for their ownership. **I am not satisfied that there is sufficient evidence to establish a breach of duty by the respondent, Calibre Boats (NZ) Ltd. For this reason, the applicant’s claim of constructive dismissal fails.**

Holiday pay claim

[15] In relation to this issue Mr van Daal says that in calculating his final holiday pay, the respondent took into account (as annual leave taken) a period of 16 days leave which Mr Ross had said would be counted as sick leave and time in lieu. He says Mr Ross agreed to this as a way of compensating Mr van Daal for the excessive hours he had been working. In the absence of evidence from Mr van Daal, this assertion is accepted.

[16] **The Respondent is ordered to pay to the applicant 16 days outstanding holiday pay, that is, the sum of \$7,384.62 gross.**

Costs

[17] This issue is reserved. If it cannot be resolved the parties have a period of 28 days from the date of this determination in which to lodge submissions as to costs.

Yvonne Oldfield

Member of the Employment Relations Authority