

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 105
3150304

BETWEEN

DAVID MCNABB
Applicant

AND

FLUIDEX TRANSPORT
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Mr McNabb, in person
Alvin Maharaj, for the respondent

Investigation Meeting: On the papers

Determination: 22 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship problem

[1] On 12 July 2021 the parties entered into a record of settlement under section 149 of the Employment Relations Act 2000 (the settlement agreement). A term of the settlement agreement was that Fluidex would pay Mr McNabb arrears of wage arrears within 14 days of that date. The document is silent on the tax treatment of the arrears.

[2] Mr McNabb says Fluidex has breached the terms of the settlement agreement because it did not deduct tax at the appropriate rate from the wage arrears agreed to be paid under the settlement agreement and/or when he drew this to its attention it did not take reasonable steps to remedy the default including paying the balance to him. He says the consequence of this is he did not receive all the monies he could expect to receive under the settlement agreement within the agreed timeframe.

[3] Fluidex says it has not breached the terms of the settlement agreement because it was unaware of Mr McNabb's circumstances which have resulted in the tax refund and that as a consequence of Mr McNabb's interactions with the Inland Revenue Fluidex has received a tax refund for Mr McNabb (which includes an interest calculation) which was on paid to him on receipt.

[4] The issue for determination is whether Fluidex breached the terms of the settlement agreement. The Authority understands Mr McNabb accepts he has received all monies owed under the settlement agreement. What he seeks is a finding that the settlement agreement was breached. He has not sought a penalty.

The Authority's investigation

[5] By consent this matter is determined on the papers. Mr McNabb, Theresa McNabb, Mr McNabb's partner and Alvin Maharaj, Fluidex's chief financial officer, have filed affidavits. The parties have filed submissions.

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

Did Fluidex breach a term of the settlement agreement?

[7] The settlement agreement includes:

3. Fluidex shall pay David all outstanding: salary; payments relating to accrued annual, alternative and public holidays; sick leave and bereavement leave up to the end of his employment... This amount will be paid by way of direct credit within 14 days of this agreement.

[8] The only enforceable terms of settlement are those which are set down in writing in the settlement agreement or must be read into the agreement to give effect to the parties' intention. Where a term of settlement includes arrears of wages tax is to be deducted at source by the employer. It follows then payment of an agreed gross amount of wages less tax would not amount to a breach of a term of settlement.

[9] However, Mr McNabb says the amount of tax deducted was too much which could have been remedied within the agreed 14-day payment period when it was drawn to Fluidex's attention and the fact Fluidex had already reverted the tax component to the Inland Revenue is an unusual practice which compounded the breach and ought to have been remedied by way of credit or other available mechanism. These are different issues to the obligation to deduct tax at source and are outside the terms of the parties' settlement agreement which is silent on the issue of tax treatment.

[10] Fluidex's actions do not amount to a breach of the settlement agreement, and it is not appropriate for me to exercise of my discretion to order compliance.

[11] For this reason Mr McNabb's claim does not succeed.

Outcome

[12] The application is unsuccessful.

Costs

[13] Neither party was represented so, it does not appear there is any issue as to costs. If this is not the case, parties may apply for a costs timetable to be set and should do so within 14 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority