

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

ATTENTION IS DRAWN TO THE  
ORDER PROHIBITING  
PUBLICATION AT PARAGRAPH  
[4] OF THIS DETERMINATION

AA 195/09  
5147041

BETWEEN                      X  
                                         Applicant  
  
AND                                Y LIMITED  
                                         Respondent

Member of Authority:        Marija Urlich  
  
Representatives:             Margaret Robins, Counsel for Applicant  
                                         Emma Butcher, Counsel for Respondent  
  
Investigation Meeting:       30 March and 14 April 2009  
  
Further Information  
Received:                        16 April 2009  
  
Determination:                18 June 2009

---

**DETERMINATION OF THE AUTHORITY**

---

[1]     Mr X was employed in a senior position with Y Limited. The employment relationship ended in February 2008. The terms upon which the parties ended that relationship are set out in a record of settlement dated 30 May 2008 and entered pursuant to section 149 of the Employment Relations Act 2000. Clause 9 of the record of settlement provides:

*The Employer agrees to fulfil its obligation for Tax Equalisation as set out in the Employee's Employment Agreement.*

[2]     This matter is before the Authority because the parties disagree as to the execution of this clause of the record of settlement. Mr X seeks a compliance order and award of penalties against Y Limited because, he says, it has deliberately delayed

payment due and owing under the record of settlement. Y limited says there is no basis for a compliance order, that the calculation of any tax equalisation credit is not as simple as Mr X professes it to be and until it has more detailed information of Mr X's off shore tax obligations it cannot fulfil its obligations under the record of settlement.

[3] To determine this employment relationship problem the following question must be resolved: how can Y Limited fulfil it's obligations to Mr X under the terms of the record of settlement?

### **Non-publication orders**

[4] Non-publication orders apply to the names of the parties, names of the key respondent witnesses and all commercially sensitive evidence before the Authority which relates to the applicant and the key respondent witnesses: refer schedule 2, clause 10(1) Employment Relations Act 2000.

### **How can Y Limited fulfil it's obligations to Mr X?**

[5] This is a question of interpretation of the employment agreement. As with any interpretation question, the starting point is the words the parties' have agreed. Clause 9 of the record of settlement refers to the parties' employment agreement, the relevant provision of which reads:

*The Company will obtain taxation advice regarding the taxation obligations arising as a consequence of your employment with [Y Limited]. In addition to the cash compensation described above, the Company shall pay you a tax equalisation payment based upon your cash compensation. The tax equalisation payment will guarantee that you will not have to pay any additional tax based upon your employment in New Zealand in comparison with taxes that would have been payable had you been earning similar remuneration in the United States. At the end of the 18 month period, you will submit to the Company an estimate from an independent advisor of taxes payable on your compensation as if it had been earned in the United States. If this estimate is lower than the taxes paid by you while employed in New Zealand, the Company shall pay you within four weeks of your submitting the tax estimate, the difference. [my emphasis]*

[6] There are two issues for interpretation – the relevant timeframes and the appropriate method of calculating any tax equalisation credit.

**(i) the relevant timeframes**

[7] The employment agreement must be read down against the record of settlement; the parties entered that document subsequent to the employment agreement in full knowledge of the obligations owed under the employment agreement. It is reasonable to assume that when they entered the record of settlement they knew the *end of the 18 month period* could not be given any meaningful effect.

[8] Does that mean the other timeframe in question – *the Company shall pay you within four weeks of your submitting the tax estimate* – has no effect? No. First, the internal logic of the clause does not require it – because the 18 month period has no effect it does not follow the 4 week payment period is redundant. Second, the parties entered the record of settlement in full knowledge of the terms of the employment agreement and nothing in that record of settlement disturbs the requirement for a 4 week payment period.

[9] For these reasons, I find Y Limited was obliged to pay any tax equalisation sum within 4 weeks of receipt of the tax estimate.

**(ii) the appropriate method of calculating tax equalisation**

[10] Mr X's tax advisor prepared a hypothetical tax equalisation calculation – she prepared a US tax return converting Mr X's New Zealand cash compensation to US currency. Mr X submitted this document to Y Limited on 29 October 2008. Mr X's tax advisor described to the Authority how she reached that calculation. She said she adopted the methodology in question because those were her instructions from Mr X.

[11] Y Limited's tax expert accepted, in evidence to the Authority, that Mr X's tax advisor had properly applied the methodology used to the figures in question. She went on to say that that was not the only methodology which could be applied. She said using figures based on actual tax paid in Mr X's country of residence would give actual figures and not a hypothetical result.

[12] The expert witnesses agreed the issue for determination is what the parties agreed. That issue goes beyond the scope of their evidence.

[13] The employment agreement does not require Mr X to disclose to Y Limited his total taxable income for the purposes of clause 9. The clause says *in addition to the cash compensation described above, tax equalisation payment will be based upon your cash compensation*. Cash compensation is defined as the cash compensation received from Y Limited during Mr X's employment with that business. The clause does not refer to all income Mr X received in New Zealand and off shore and cannot be interpreted to do so.

[14] The clause goes on to provide that Mr X will *submit to the Company an estimate from an independent advisor of taxes payable on your compensation as if it had been earned in the United States*. Mr X says this is what he has done – he instructed an independent taxation advisor to prepare a taxation estimate and submitted that tax estimate.

[15] Y Limited says the estimate must be able to be tested against actual figures – how else can it be satisfied that any tax equalisation payment is due and owing? There may be alternate methods available to the parties to verify the tax estimate; this is presumably why the parties inserted the provision in the clause requiring Y Limited to obtain taxation advice regarding its taxation obligations to Mr X. Notwithstanding, the parties agreed that the tax estimate would be based on Mr X's cash compensation and that agreement was confirmed when the parties entered the record of settlement. The Authority cannot go beyond that agreement, clear on its face as it is, and require Mr X to provide all his personal tax records to Y Limited.

### **Compliance order**

[16] For the reasons set out above it is appropriate that a compliance order is made, pursuant to section 137 of the Employment Relations Act 2000, in the following terms:

Y Limited is ordered, within 28 days of the date of this determination, to comply with clause 9 of the record of settlement entered by the parties on 30 May 2008 and fulfil its tax equalisation obligations to Mr X as set out in the parties' employment agreement.

### **Interest**

[17] The Authority's jurisdiction does not extend to orders for the payment of interest on sums for which compliance orders relate.

### **Penalty**

[18] Mr X seeks a penalty against Y Limited for failure to abide by the terms of the record of settlement and pay the tax estimate within the terms specified in the employment agreement.

[19] I accept that the parties dispute the meaning of the relevant provisions. However, the parties endorsed those provisions when they entered the record of settlement and the concomitant issues now before the Authority were in the contemplation of the parties for some months prior to the submission of the tax estimate. There was no evidence that Y Limited took tax advice on those issues, as contemplated by the clause, during this period or the twenty day period post submission of the claim. There was no reasonable explanation as to why Y Limited failed to take tax advice as to the obligations it had freely entered with Mr X in a timely manner.

[20] Y Limited has failed to meet part of its obligations freely entered in the record of settlement. That is a serious matter. A penalty is warranted.

**[21] Y Limited is to pay a penalty of \$2000, half to the Crown, to be paid into the Authority, and half directly to Mr X. This order is made pursuant to section 136(2) and section 149(4) of the Employment Relations Act 2000.**

## **Costs**

[22] Costs are reserved. The parties are invited to attempt to resolve themselves. If this is not possible then they may, within 28 days of the date of this determination, revert to the Authority for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority