

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 709  
3171883

BETWEEN                    MICHAEL RAWIRI TAIA  
   Applicant  
  
AND                            AKE INNOVATION LIMITED  
   Respondent

Member of Authority:      Michael Loftus  
  
Representatives:            Applicant in person  
   Steve Franklin, counsel for the Respondent  
  
Investigation Meeting:      28 June 2023 at Whakatāne  
  
Submissions Received:      25 August 2023 by AVL  
  
Determination:              27 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      This is an application seeking an order that the Respondent, Ake Innovation Limited (Ake), comply with the terms of a settlement the parties concluded pursuant to s 149 of the Employment Relations Act 2000 (the Act) on 23 April 2021.

[2]      Ake accepts that it breached elements of the settlement but not to the extent claimed and not to the extent that compliance need be ordered.

**This Determination**

[3]      For the Authority's investigation Mr Tais lodged written witness statements along with reply statements. For Ake statements were received from its director and its accountant with all four answering questions under oath or affirmation from me and the other party. Closing submission were later delivered orally via AVL.

[4] 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.

### **Background**

[5] Mr Taia was employed by Ake in the role of Chief Operating Officer from 1 March 2020 to 9 February 2021.

[6] Ake is an organisation established with the goal of assisting Māori utilise various assets for better economic and social return. It currently has two directors, Raymond Thompson and Briton Williams. There have in the past been others, including Mr Taia who served as a director between 9 June and 15 October 2020 when he removed himself as a Director. The shareholding is evenly split between Messrs Thompson, Williams and Taia, though the latter holds the bulk of his shares through a holding company.

[7] The evidence is that initially Ake was run by its directors with no employees. Payments to those directors were made irregularly when the company earned income and there was no formal directors' remuneration policy. In the words of Mr Thompson, "*We would just have a hui and discuss finances and make equal distribution from time to time*".

[8] Mr Taia was known to the directors, and they had worked with him on some projects from time to time prior to his employment in March 2020. It is the evidence of Mr Thompson that Mr Taia's involvement in Ake grew to the point that he "*installed himself as Chief Operating Officer or at least that is the title he gave himself*". That said, Mr Thompson accepts an employment arrangement was entered into as Mr Taia had indicated he would need to have some kind of regular pay arrangement in place and time to time profit sharing did not meet his needs.

[9] The evidence is the employment agreement was prepared, or at least sourced, by Mr Taia. The main body of the agreement is relatively standard and appended, as a schedule, in a position description which states:

The Employee shall have the following overarching duties to promote the business at Ake Innovation and undertake services to the standard required by

the Business or otherwise to the standard which would normally be expected of someone of the same experience, expertise and background.

[10] The specific responsibilities include:

- (a) Management and supervision of Business projects at Ake Innovation:
- (b) Undertake the core objectives of the Business in accordance with the wishes of the Directors:
- (c) Elicit and develop work for the benefit of Ake Innovation:
- (d) Assist other staff at Ake Innovation to become a leading business within the identified core areas of the Business:
- (e) In addition to recording time (if required), to assist in the invoicing of work, recovering fees and undertake whatever other administrative work as it is required by the Business.

[11] Attached as an additional schedule is one that specifies the place of work, the hours of work and remuneration. With respect to hours, it was stated that it was expected that the employee would work approximately 25 hours a week with that increasing as work demands also increased and that while additional hours might, from time to time, be required the employee was salaried and that took into account all additional hours.

[12] With respect to remuneration, the agreement provided:

- (a) The Employee will be paid \$700 per week based on standard hours referred to above, after any allowance for Leave including holidays; sick leave; statutory etc) and any Employer contribution to KiwiSaver, in accordance with the Employment Agreement.
- (b) In addition, the Employee will be paid periodic bonus payments of sums to be agreed to with the employer for projects that are successfully secured and paid for.
- (c) The Employee will be remunerated for any expenses incurred personally, provided that they are discussed previously with the Employer.

[13] There was also a provision there be a salary review three months after commencement.

[14] It would be fair to say that things did not work out with two key issues arising. The first was that Ake faced difficulties and the weekly payments of \$700 became fortnightly due to covid and a resulting loss of revenue, albeit with an agreement the deficiencies be made up later. Second, and aside from the issue of Mr Taia removing himself as a director, the situation developed to a point that after cessation Mr Taia lodged an application with the Authority in which he claimed that he had been

unjustifiably dismissed; unjustified disadvantaged, and the victim of workplace bullying.

[15] That resulted in a record of settlement the parties concluded pursuant to s 149 of the Employment Relations Act (the Act) on 23 April 2021. Amidst other things it required:

- (a) The payment by Ake to Mr Taia of a sum, payable in three instalments, pursuant to s 123(1)(c)(i) of the Act;
- (b) An undertaking that Ake would place an automated message on Mr Taia's Ake email account advising Mr Taia had resigned and that the email address was no longer active;
- (c) That the terms of settlement are full and final and resolve all matters, claims and issues (whether or not yet known or contemplated), including but not limited to all statutory entitlements, claims in the Human Rights Tribunal, Privacy Commission, Banking Ombudsman, etc;
- (d) *“Ake acknowledges that without undue delay they will complete with the Inland Revenue all outstanding tax requirements arising from (Mr Taia's) employment; and*
- (e) *Ake undertakes that they will, forthwith on the execution of the record of settlement, advise New Zealand Police that the parties have attended mediation and all outstanding matters have been resolved and are at an end.”*

[16] The last point refers to the fact that by this time the parties were in serious dispute about some of Mr Taia's activities and that had resulted in Ake complaining to the local police and accusing Mr Taia of theft by a person in a special relationship.<sup>1</sup> Here it should be noted the parties agree, and Mr Tais admits, it was he who effectively controlled Ake's finances and processed or arranged all payments.

[17] It is Ake's view, disputed by Mr Taia, that he was taking advantage of his position as the sole controller of Ake's money and making payments over and above those to which he was entitled on order to address various financial stressors he as then facing. It is Mr Taia's position he was due the monies in dispute in accordance with

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<sup>1</sup> Section 220 of the Crimes Act 1961

the terms of his employment agreement, in particular the bonus provision, and the practices adopted by the directors with respect to payments they received. As a result of this claim this dispute has reignited and was referred to often in this investigation.

[18] Also discussed was the fact Mr Taia has been the subject of various charges of misconduct levelled by the Law Society. This ultimately saw Mr Taia struck off as a lawyer and led to what later proved an unsuccessful challenge to that decision.<sup>2</sup> Relevant though were the imposts imposed and the fact they, along with apparent arrears on the rental payment Mr Taia owed his landlord, had to be addressed at the time of issues involving Mr Taia allegedly taking money from Ake.

[19] As should already be apparent the settlement was not the end of the matter, with Mr Taia believing Ake had failed to comply with the record of settlement. His dissatisfaction was summarised in a letter he wrote to Ake on 14 April 2022 in which he claimed:

Under the Settlement Agreement, you agreed that the Company would without undue delay complete with the Inland Revenue Department all outstanding tax requirements relating to my employment with the Company. It has come to my attention that:

- (a) The Company has failed to pay the IRD any PAYE for salaries or bonuses paid to me as an employee of the company.
- (b) The Company appears to be asserting that I received “shareholder payments” as opposed to “periodic bonus payments” as defined in my employment agreement whilst I was an employee of the company. There were no such ‘shareholder payments’ made – your assertions are firmly disputed, and your suggestions are a complete contradiction of the terms of my employment agreement (as well as written assertions made by you during the disputes process).

[20] It would be fair to say this dispute is fuelled by the fact Mr Taia is having difficulties with the Inland Revenue which claims he owes considerable sums as a result of the way payments from Ake have been treated and the department has frozen various benefits he might otherwise have received, particularly Working for Family credits.

[21] This led to a further application being lodged in the Authority in which Mr Taia alleged Ake had breached the settlement by:

- (a) Failing to provide a suitable auto reply until well after the settlement date;

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<sup>2</sup> *Taia v Auckland Standards Committee 5 and Southland Standards Committee* [2023] NZSC 16

- (b) Failing to complete all tax requirements relating to Mr Taia's employment; and
- (c) Continuing to victimise Mr Taia by engaging in "workplace bullying" for a period of some 16 months following the resignation.

[22] By way of remedies he sought:

- (a) The payment of all minimum entitlements owed to him under the Minimum Wage Act 1983, and the Holidays Act 2003 and any other payments due to him as an employee of Ake Innovation during the term of his employment.
- (b) An order Ake comply with the terms of settlement, correct the returns filed with the IRD and attend to all PAYE payments (including any accrued penalty sums) owed to the IRD. It is stated that for the avoidance of doubt this will comprise:
  - (i) all PAYE earned on salary payments made;
  - (ii) all PAYE earned on bonus payments made; and
  - (iii) any penalties accruing on these sums.
- (c) \$80,000 as compensation pursuant to s 123(1)(c)(i) of the Act; and
- (d) \$7,500 as a contribution toward costs.

[23] Here it must be noted the reference to penalties in the Statement of Problem relate to those imposed by the Inland Revenue. There is no claim for penalties pursuant to the Employment Relations Act.

[24] The parties appear to agree that in the interim the unpaid weekly payments of \$700 have been made good.

### **Analysis**

[25] As already said, this is an application Ake be ordered to comply with the terms of a s 149 settlement and it is there problems arise for Mr Taia. The problems stem from the fact the Authority's powers in respect to compliance are limited to ordering compliance and imposing penalties for failures that might have occurred. As already said no penalties have been sought which means the only remedies available are a compliance order and costs.

[26] That raises the point other claims and remedies were initially raised. They have, however, since been withdrawn though I feel it necessary to make brief comment. The claim with respect to bullying simply could not be considered as the allegations relate to a period of time following the cessation of employment and the Authority therefore has no jurisdiction.

[27] Similarly, the claim for minimum entitlements would also have faced insurmountable odds if only because the settlement resolved all matters whether known or not and in concluding the settlement Mr Taia agreed he had not forgone such entitlements. That provision cannot, in my view, be read as meaning Mr Taia can later make such claims given case law suggests the grounds for setting aside a s 149 agreement are limited to issues of mental incapacity or duress. Neither applies here and Mr Taia does not suggest they do.

[28] Indeed, I note that even a misrepresentation, be it innocent or even fraudulent, is insufficient to cancel a s 149 settlement and the Court of Appeal has commented on this.<sup>3</sup> It would be contrary to public policy to allow any settlement be reopened by reason of a later wage claim when such limitations apply as that could essentially nullify the finality of a large majority of settlements.

[29] That then leaves the alleged compliance failures – the lack of a message advising Mr Taia’s departure and the allegations regarding Ake’s failure to complete all outstanding tax requirements relating to Mr Taia’s employment.

[30] The first no longer need be considered given, as already said and the way this claim was pleaded, compliance remains the only remedy I can grant. Albeit extremely late, compliance has now occurred.

[31] That then leaves the issues with IRD with Mr Taia claiming considerable amounts remain due with a PAYE shortfall on some \$42,852 though the evidence leaves me a little confused as to whether or not this is an accurate sum. Mr Taia himself admits he does not know and said he is relying on information provided by Ake.

[32] Ake’s accountant, who gave evidence, estimates Mr Taia took approximately \$24,000 to which he was not entitled, and Ake concedes no tax has been paid on this sum. It states that due to the fact Mr Taia was not entitled to these payments under his

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<sup>3</sup> *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12 at [47]

employment agreement and having conceded they will no longer seek the pressing of charges the cleanest way to dispose of the matter was to declare it as 'shareholders distribution' which would make Mr Taia responsible for any tax. Ake concedes no KiwiSaver payments have been made.

[33] For three reasons Mr Taia's claim regarding unpaid PAYE will fail.

[34] As already noted, it was Mr Taia who was responsible for payments made by Ake and these included his salary. It was his responsibility PAYE be deducted from any payment made yet this was not done. The failure is his and it is a nonsense to suggest, as he now does, he was entitled to \$700 a week net and tax remains due. Written employment agreements simply do not express wages or salaries as a net amount and there is nothing in this agreement to suggest it is an exception. Here I also note the evidence is that while he was paying himself a net amount, he was deducting tax from similar payments of the \$700 made to Mr Thompson. The evidence is Mr Williams decided the Ake's state was such he should not take any money and the records show he received less than \$100.

[35] The second reason is Mr Taia received his contracted salary and PAYE has been paid on those amounts. He was with Ake for some 49 weeks which would entitle him to approximately \$34,300. His own evidence is Ake has covered the tax liability in respect to a greater sum of \$49,832.

[36] Mr Taia attempts to justify his additional claims on a speculative rational. For example, he claims he "would be paid regular bonus payments of yet to be confirmed sums to top up weekly salary payments. These payments would be made regularly..." and "it was anticipated that if I was able to help Ake Innovation increase their revenue / income, I would directly benefit from this work."<sup>4</sup>

[37] That however is not what the employment agreement says. It says Mr Taia would receive payments agreed with the employer, yet the evidence shows, and Mr Taia concedes, there was never any such agreement. He has received what he was entitled to under the agreement and tax has been paid on that. There is not therefore a failure to which a compliance order can attach.

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<sup>4</sup> Brief of evidence dated 19 January 2023 at [30(b)]

[38] The third reason is that this is an equitable jurisdiction. An applicant should come with clean hands and here there is more than sufficient evidence to suggest Mr Taia falls short in that respect. Frankly the evidence I have heard leads me to conclude Mr Taia should consider himself lucky Ake has adopted the fiction of treating the additional monies he received as a shareholder distribution.

[39] Finally, there is the KiwiSaver and again a compliance order is not warranted. An employer contribution is dependent on an employee contribution that must then be matched. Again, I note it was Mr Taia making the payments and responsible for whatever deductions were required. He chose not to make an employee KiwiSaver deduction and there is not therefore anything that requires matching. There is no failure warranting a compliance order.

### **Conclusion and Orders**

[40] For the above reasons Mr Taia's claims fail.

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Ake Innovation may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Mr Taia will then have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors require an upward or downward adjustment of that tariff.<sup>5</sup>

Michael Loftus  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).