

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 619
3131675

BETWEEN	ALLEN JOHN MATTHEWS Applicant
AND	AIR CONCEPTS SERVICE LIMITED First Respondent
AND	SHAUN PAHALAD Second Respondent

Member of Authority:	Alex Leulu
Representatives:	Applicant in person Respondent in person
Investigation Meeting:	25 July 2023 at Auckland
Submissions received:	8 August 2023 and 29 August 2023 from Applicant 23 August 2023 from Respondent
Determination:	20 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Allen John Matthews was employed by Air Concepts Service Limited (ACSL) as a service manager. He was also a shareholder and director for ACSL. On 1 October 2018 his employment ended when ACSL was sold to new owners.

[2] Mr Matthews said ACSL had failed to properly pay his income tax during his employment. As a result, he was required by the Inland Revenue Department (IRD) to pay tax outstanding arrears, penalties and interest (tax arrears). He paid the outstanding arrears to IRD and has sought reimbursement of the tax arrears from ACSL and its director Shaun Pahalad.

[3] ACSL and Mr Pahalad acknowledged Mr Matthews' income tax should have been paid to IRD. They oppose Mr Matthews' claim for reimbursement because they alleged Mr Matthews, and his wife Nicole Matthews were responsible for ensuring Mr Matthews income tax was paid during his employment.

The Authority's investigation

[4] This matter was initially investigated by another Authority member and was subsequently re-assigned in accordance with clause 16 of schedule 2 of the Employment Relations Act 2000 (the Act). The parties agreed for the matter to proceed to an investigation meeting. As part of the agreed process, written statements were lodged by Mr Matthews and Mr Pahalad. Mr Matthews attended the investigation in person while Mr Pahalad attended via audio-visual link.

[5] As permitted by s 174E of 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.

The issues

- [6] The parties agreed the issues requiring investigation and determination were:
- (a) Was there an agreement between Mr Matthews and the directors of ACSL for Mr Matthews to be paid a monthly shareholders salary of \$5,442.22 nett per month with income tax deducted (which ACSL would then pay to IRD on Mr Matthews' behalf)?
 - (b) If so, was the agreement the basis of Mr Matthews entering into an employment relationship with the ACSL?
 - (c) Was the agreement adhered to for the financial year 2016/2017?
 - (d) For the financial year 2017/18, was only \$4,920 of the \$11,580.10 income tax due paid on Mr Matthews' behalf even though \$11,580.10 was deducted from his shareholder salary?
 - (e) For the financial year 2018/19 did ACSL fail to pay income tax on Mr Matthews' behalf of \$6,235.22 despite that sum being deducted from Mr Matthews' shareholder salary?

- (f) Should ACSL and Mr Pahalad either individually or jointly or severally be ordered to pay to Mr Matthews the sum of \$14,920.29 in respect of income tax owing but not paid by ACSL on Mr Matthews' behalf together with any further and additional interest and penalties as at the date of the Authority's determination?
- (g) Should either party contribute to the costs of the other party?

Background

Shareholding agreement

[7] ACSL operated as an air conditioning repair and maintenance business. Mr Matthews, Mr Pahalad and two others were directors of ACSL. Mr Matthews and Ms Matthews were also shareholders of ACSL.

[8] Before July 2016 the ACSL directors agreed for Mr Matthews to be employed by ACSL as a service manager (shareholding agreement). As part of the shareholding agreement, Mr Matthews was to be paid a monthly shareholder salary and ACSL would deduct income tax from his salary and pay the tax to IRD at the end of the financial year.

[9] Mr Matthews started his employment for ACSL on 1 July 2016 and initially his income was paid in accordance with the shareholding agreement. During this time, the ACSL directors also agreed for Ms Matthews to work for ACSL. She was responsible for wage payments to ACSL staff and was also paid a shareholder salary from ACSL.

Sale of ACSL

[10] On 1 October 2018 Mr Matthews' employment for ACSL ended when the business was sold to a new owner. Upon the sale of the business, Mr Matthews also commenced employment with the new owner.

[11] After the sale of the business, ACSL and Mr Pahalad were in the process of closing ACSL's business accounts and arranging handover of clients to the new business owner. Mr Matthews ceased being both an ACSL director in November 2018 and a ACSL shareholder in March 2019.

Mr Matthews' income tax debt

[12] On 4 October 2019 IRD sent Mr Matthews a letter (the IRD letter) explaining he owed \$7,029.20 in unpaid income tax for his employment with ACSL. To recover the unpaid tax, IRD intended to deduct \$707.92 a week from his salary at the time. The IRD letter was the first time Mr Matthews was made aware of any outstanding tax arrears.

[13] After receiving the IRD letter, Mr Matthews contacted IRD and arranged a suitable repayment plan.

[14] On 15 October 2019 Mr Matthews emailed Mr Pahalad about the IRD arrears and asked whether his tax payments were made to IRD. In response, Mr Pahalad replied by saying he would 'digest the information' and get back to Mr Matthews.

[15] From the next day, Mr Matthews began inquiring further with the ACSL accountant to confirm what payments were made to IRD. He also emailed Mr Pahalad again on 24 October 2019 requesting confirmation of what tax payments were made by ACSL to IRD for the two relevant tax years. Mr Matthews did not receive a response from ACSL or Mr Pahalad.

Continuation of the matter in 2020

[16] On 19 October 2020 Mr Matthews sent a further email to Mr Pahalad reiterating the agreement for ACSL to pay his income tax during his employment. He also confirmed IRD's final assessment of what he owed to IRD which amounted to arrears of \$14,920.29 for the:

(a) 2017/2018 tax year, owing \$7,489.53 including a late payment penalty and interest. For this tax year ACSL paid only \$4,920 in income tax for Mr Matthews; and

(b) 2018/2019 tax year, \$7,430.76 including a late payment penalty and interest. For this tax year ACSL did not pay any income tax for Mr Matthews.

[17] On 30 October 2020 Mr Pahalad responded to Mr Matthews by email with allegations against him on various matters. This including an allegation against Mr Matthews for negligence for previous work he carried out which led to further costs to

ACSL. Mr Pahalad also made an allegation of fraud against Mr Matthews in respect of unauthorised payments to himself. Mr Pahalad also expressed ACSL's intention to complete an investigation into the allegations before considering Mr Matthews' claims.

[18] During December 2020 there were further brief emails between them with Mr Matthews requesting payment of the unpaid income tax and Mr Pahalad requesting a response to his allegations. On 29 January 2021, Mr Matthews lodged his claim with the Authority.

Was the shareholding agreement breached?

What was agreed to?

[19] There is no dispute between the parties about the agreed terms of the shareholding agreement between them. The terms of the agreement were:

- (a) Mr Matthews was employed by ACSL as a service manager from 1 July 2016.
- (b) ACSL was to pay Mr Matthews a shareholder salary of \$80,000 gross a year. Mr Matthews' salary was paid at a monthly amount of \$5442.22 nett.
- (c) ACSL was to pay Mr Matthews' income tax to IRD. For the first financial year (1 July 2016 to 31 March 2017) it amounted to \$11,020.

[20] Apart from a period of time where Mr Matthews received a reduced income (upon agreement with ACSL), the shareholding agreement remained in place throughout Mr Matthews' employment with ACSL.

[21] During Mr Matthews' employment, he had up to five ACSL service staff reporting to him. His role also included organising the work for his staff and to also undertake repair and maintenance repair work for ACSL customers where required.

Was the agreement adhered to?

[22] There is no evidence before the Authority to suggest Mr Matthews' salary and tax was not paid correctly before the 2016/2017 tax year.

[23] ACSL acknowledged its responsibility for paying Mr Matthews income tax as part of the shareholding agreement and accepted it did not properly pay his income tax for the 2017/2018 and 2018/2019 tax years.

Is Mr Matthews entitled to reimbursement of tax payments?

Why wasn't Mr Matthews' income tax paid?

[24] ACSL claimed Ms Matthews was responsible for ensuring Mr Matthews' income tax was paid to IRD. ACSL said at no point was any instruction given to Ms Matthews to halt payment of Mr Matthews' income tax.

[25] Mr Matthews disagreed with ACSL and said Mr Pahalad and ACSL's accountant was responsible for his tax payments.

[26] Although the parties agreed Ms Matthews was responsible for paying ACSL staff wages, there was no evidence to show Ms Matthews was responsible for paying Mr Matthews' salary or his income tax payment to IRD.

[27] I accept Mr and Ms Matthews were not responsible for deducting and paying Mr Matthews' tax to IRD for a number of reasons. Firstly, the IRD letter to Mr Matthews states "At the time of writing this letter, your account was still overdue by \$7,029.20". This meant previous letters about Mr Matthews' tax were sent by IRD but not received by Mr Matthews. It was likely the original letters were sent to an ACSL representative who was responsible for paying Mr Matthews' income tax to IRD.

[28] Secondly, Mr Pahalad said in his email of 15 October 2019 to Mr Matthews:

... I tried calling you on my last trip to NZ to sort out some mail that I received from IRD but you didn't take my call or bother to return it. Thanks for the email, I will digest the information and get back to you.

[29] At the investigation meeting, Mr Pahalad was questioned about the mail he had received from IRD. He was unable to recall what the emails were about. On balance, I find the IRD mail Mr Pahalad was referring to was likely to be earlier IRD notices in respect of Mr Matthews' tax arrears.

[30] Mr Pahalad also said the ACSL accountant was responsible for calculating how much ACSL staff income tax was to be paid to IRD. Although this does not necessarily show the accountant was responsible for Mr Matthews' tax, it does infer a potential for the accountant also having some role in ensuring the correct payment of tax to IRD.

[31] Although it is not clear who from ACSL was responsible for paying Mr Mathews income tax to IRD, ACSL had ultimate responsibility for ensuring income tax was deducted from Mr Matthews' salary and paid to IRD.

Should Mr Matthews be reimbursed and by whom?

[32] The shareholding agreement was essentially part of the employment agreement between ACSL and Mr Matthews. There was a benefit to Mr Matthews in ACSL paying his tax to IRD in return for his work for ACSL.

[33] Mr Matthews lost the benefit of having his tax paid by ACSL and is entitled to be reimbursed for the loss of that benefit. Given ACSL's failure to pay Mr Matthews tax contributed to the imposition of tax penalties and interest, I find ACSL is also liable for reimbursing these amounts to Mr Matthews. Accordingly, I order ACSL to reimburse Mr Matthews for the total claimed amount of \$14,920.29.

[34] There was a discussion between the parties at the investigation meeting as to whether Mr Pahalad was liable for any failures associated with non-payment of Mr Matthews' tax to IRD. Specifically, the discussions were in respect of s 142Y of the Act which allows an employee to recover from their employer wages or other money payable to the employee if (amongst other requirements) there has been a default in the payment of wages or other money payable to the employee due to a breach of employment standards.¹

[35] In this case ACSL's failure to pay Mr Matthews' tax does not fall within the Act's definition of employment standards. For these reasons, Mr Pahalad as the director of ACSL cannot be held liable for ACSL's failure to pay Mr Matthews' tax to IRD.²

Mr Pahalad's allegations

[36] For the sake of completeness, Mr Pahalad also lodged evidence to support the allegations expressed in his email to Mr Matthews on 30 October 2020. I find these allegations were not relevant to the issues before the Authority and were not appropriately raised with Mr Matthews during his employment with ACSL. For these reasons, no determination is made on the outcome of these allegations.

¹ Employment Relations Act 2000, s 142Y.

² Employment Relations Act 2000, s 5.

Costs

[37] Mr Matthews was self-represented and has not incurred costs of representation. The filing fee he incurred in lodging the application can also be recovered from ACSL. ACSL is to pay the sum of \$71.56 to Mr Matthews within 14 days of this determination.

Alex Leulu
Member of the Employment Relations Authority