

Legal update - Employer unable to recover significant overpayment

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Recovery of overpayments normally straightforward

While modern computerised payroll systems are very reliable, occasions still arise where employees receive overpayments of wages, and we have seen a few examples recently.

Typically, where an overpayment has occurred, the employer is able to recover the amount overpaid. The vast majority of employment agreements contain a "deductions clause", under which the employee consents to the employer making deductions from future wages. Employees can revoke this consent at any time, but seldom do.

The Wages Protection Act also entitles the employer to recover overpayments in certain circumstances. It provides a limited time window for recovery. Notice of intention to recover the overpayment must be given promptly (there are technical requirements, but typically notice must be given no later than the next pay day) and the overpayment itself must be recovered not later than two months after the notice is given.

Even without these rights, employers are able to recover an overpayment on the basis that there has been a mistake and it would be unjust for the employee to keep the windfall.

However, the recent Employment Court decision of *Foai v Air New Zealand* is a case where the employer was not able to recover overpayments it had made. Mr Foai was allowed to retain the money he'd been overpaid - some \$42,600.

Pay rate unclear

Mr Foai had worked for Air New Zealand since 2002 as a permanent part-time airline service person in a loading role. By 2007 he was earning approximately \$17 per hour. He was however working shift work and was very keen to take a position with regular full time hours. In May 2007 he applied for a temporary administrator role. He held this position on a rolling three month temporary basis until his employment with Air New Zealand was terminated in July 2009.

Other than a temporary letter of appointment, Air New Zealand had no employment agreement for Mr Foai in this role. In particular there was no mention of his hourly rate - simply that he would be paid an hourly rate based on his "average earnings".

Wages queried on numerous occasions

Within a few months of commencing the temporary role Mr Foai queried whether he was supposed to be getting overtime as part of his payment. He could not understand the calculations and asked what he was supposed to be getting paid. Over the next year and a half Mr Foai queried how much he was paid on a number of occasions. Air New Zealand HR and management also queried it amongst themselves but the matter was never followed up.

In October 2008 Mr Foai went on holiday overseas. While he was away, he saw on internet banking that he had been paid a large amount of holiday pay and he sent an email to ask why he had received so much and then rang payroll when he returned. He had no response until two months later when Air New Zealand advised him that he had been overpaid.

Employee dismissed and overpayment sought

Mr Foai was ultimately dismissed from Air New Zealand in July 2009 for a number of reasons, including that he had not been proactive enough in querying the overpayment. Air New Zealand then brought a claim against him seeking recovery of approximately \$42,600, being the net amount of the overpayment made over the nearly two year period. Air New Zealand said it had a right to restitution of this amount and that Mr Foai had been unjustly enriched.

Technically, Mr Foai had two defences, but in essence they both turned on his claim that he had received the money in good faith, and that he had altered his lifestyle and his position had so changed that it would be unfair to require him to repay Air New Zealand.

Mr Foai entitled to retain the money

The Employment Court had little sympathy for Air New Zealand's position. Air New Zealand could not argue that they had

paid Mr Foai by mistake because the evidence did not identify any particular mistake. All the Air New Zealand witnesses gave evidence that they personally had done nothing wrong. While there was a suggestion that a computer error had calculated Mr Foai's hourly rate higher than it should have been, no evidence was brought to that effect. This meant that Air New Zealand could not claim that Mr Foai had been unjustly enriched.

In any event, the Court found that Mr Foai's defences stood. It found there was no dishonesty or bad faith on Mr Foai's part. He genuinely queried the payments on numerous occasions, but when nothing happened and he was told not to worry by management he felt reassured. The Court also commented that employees are entitled to assume they are being paid correctly, and the lack of detail in the employment agreement meant Mr Foai was unable to check himself whether he had been paid correctly. Overall, the Court found that it would be an injustice if Mr Foai was made to repay Air New Zealand the \$42,600.

Lesson learned

The reality is that employees will not usually query whether they are being overpaid unless they are. The *Foai* case is a reminder that when this sort of issue is raised, it should be resolved promptly and conclusively.

Should an overpayment be discovered some time after the event, we recommend that you engage with the employee as soon as possible, and that you endeavour to reach agreement on repayment terms that are reasonable and within the employee's means. If you believe the employee has acted in bad faith, there may be disciplinary avenues open also.

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