

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 97
5442844

BETWEEN STAGES CIVIL AND
 ELECTRICAL LIMITED
 Applicant

A N D JORDAN HENRY COOKSLEY
 Respondent

Member of Authority: James Crichton

Representatives: Roslynd West, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 13 March 2014 at Rotorua

Date of Determination: 17 March 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (SCE) seeks to recover an overpayment of wages made to a former staff member, the respondent (Mr Cooksley) in the amount of \$7,164.96. Mr Cooksley has taken no part in the Authority's investigation and, save for one email from a family member, not even responded to SCE's attempts to obtain repayment.

[2] Mr Cooksley was employed as a labourer by SCE on a Christchurch contract, notwithstanding that SCE are based in Rotorua. On 3 September 2013, Ms West, the office manager for SCE calculated the pay run but by adding an additional erroneous number into the sum that should have been paid to Mr Cooksley, overpaid him significantly. Whereas the gross pay on one line should have been \$1,359, the amount actually entered was \$13,459. The effect of adding in the extra erroneous digit of "4" in the sequence produced a dramatic increase in the pay made to Mr Cooksley, money to which he was not entitled.

[3] Immediately after the pay run was completed, the error was identified and on 5 September 2013 (that is two days after the pay run) an email was sent to Mr Cooksley, together with supporting documentation, identifying that there had been an error made, identifying the amount of the overpayment, and requesting reimbursement of that sum with the appropriate bank account information to effect that.

[4] Three days later, SCE received the only response relating to the matter from Mr Cooksley's sister which suggested confusion about the amount that had to be repaid and asking for further information. That email was responded to promptly the following day with clarification and there were various subsequent attempts to get an engagement from Mr Cooksley or his agents, all without success.

[5] Ultimately, SCE suggested mediation to Mr Cooksley, got no response, and ultimately filed the present proceedings in the Authority.

[6] As the Authority has already noted in this determination, Mr Cooksley did not attend the investigation meeting, nor did he take any part whatever in the Authority's process. He did not, for instance, file a statement in reply or engage with the Authority in a telephone conference on the matter. In that regard then, his behaviour was entirely consistent with the behaviour he exhibited in failing to respond to his employer's request for reimbursement of money that he was not entitled to.

[7] In the meantime, the Christchurch contract on which Mr Cooksley was engaged came to an end and Mr Cooksley, along with other staff employed on that Christchurch job, ceased their employment with SCE. SCE told the Authority at its investigation meeting that the contract in Christchurch came to an end at the end of September 2013 so Mr Cooksley's employment had ceased within a matter of weeks of the overpayment. As a consequence, further funds by way of wages due and owing to Mr Cooksley have accrued such that there is an informal set-off in place which reduces the total amount that Mr Cooksley must repay. Put another way, and more correctly from a legal perspective, Mr Cooksley is indebted to SCE for the total amount of the overpayment and SCE are indebted to Mr Cooksley for the total amount of wages earned by him but as yet unpaid to him. So far as the Authority could discern it, the net amount owed by Mr Cooksley to SCE after the wages owed are taken into account is approximately \$5,600.

Determination

[8] The effect of the Wages Protection Act 1983 and particularly s.6 of that statute must be considered. Section 6 governs the circumstances in which overpayments may be recovered *in certain circumstances*. Those circumstances relate only to recovery of overpaid wages in respect of what the Act defines as a recoverable period. None of the elements of the recoverable period apply in the present case. Broadly speaking, the circumstances in which recovery is possible under the 1983 Act relate to circumstances where the employer is not required by law to pay wages because of industrial action.

[9] It follows from the foregoing brief observations that circumstances in which there has been no industrial action and/or where the employer is in the normal course required to pay wages, fall outside the terms of s.6 of the 1983 Act.

[10] That means that the common law rules apply in the present case. In *O'Halloran v. Attorney-General* [1968] NZLR 472 Justice Tompkins decided that an employer (in this case the Crown) could not recover by deduction overpayments made in an earlier pay period. More recently, two decisions of the Employment Court fall for consideration.

[11] In the first of those decisions, Chief Judge Colgan decided that a “ *claim for repayment of monies allegedly overpaid mistakenly to employees falls within the definition of an employment relationship problem...*” and is therefore able to be pursued in the Authority: *New Zealand Fire Service Commission v. Warner et al* [2010] NZEMPC 90.

[12] His Honour went on to say that his conclusion in that regard was reinforced by the Authority's exclusive jurisdiction by s 161 of the Employment Relations Act 2000 (the Act).

[13] Then in *Foai v. Air New Zealand Ltd* [2012] NZEmpC 57 Judge Ford considered and rejected an application by Air New Zealand for restitution when it overpaid Mr Foai many thousands of dollars. While the Court rejected the application of the employer in this case, on the basis there was insufficient evidence of mistake in the making of the overpayments, the importance of the decision for present purposes is that it plainly identifies the right to bring such a claim and have it considered by the employment institutions.

[14] In the instant case, SCE are endeavouring to recover in the Employment Relations Authority overpayments made by them in error. In effect, SCE is seeking a determination from the Authority on which they can have some hope of recovering the amount overpaid.

[15] The Authority is satisfied on the evidence it heard that the overpayment was a simple mistake which is one of the qualifying factors activating a claim of unjust enrichment which in turn gives rise to a right to restitution. Moreover, the Authority has concluded that it does have the power to grant the relief sought, in reliance on the Employment Court decisions just referred to.

[16] The Authority is conscious of the fact that SCE owes Mr Cooksley wages which has effectively operated as an informal set off, for which of course, there is no legal basis. Accordingly, the Authority will order that Mr Cooksley repay the total amount overpaid, in effect the gross amount, and Mr Cooksley is to receive, in return, the wages owing to him. It follows that the Authority now orders that:

(a) Mr Cooksley is to pay to SCE the sum of \$ 9716.14; and

(b) SCE is to pay to Mr Cooksley the wages due and owing to him.

Costs

[17] There is no issue as to costs.

James Crichton
Member of the Employment Relations Authority