

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 492
3084112

BETWEEN MADISON FORCE LIMITED
Applicant

AND REEMA CHANDRA (also known
as REEMA JANSEN)
Respondent

Member of Authority: Eleanor Robinson

Representatives: John Reardon, counsel for the Applicant
Murray Broadbelt, advocate for the Respondent

Investigation Meeting: 17 November 2020

Submissions and/or further
evidence 17 November 2020 from Applicant and from Respondent

Determination: 1 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Madison Force Limited (MFL), seeks recovery of mistaken salary payments in the sum of \$23,640.07 net from the Respondent, Ms Reema Chandra (now Ms Reema Jansen).

[2] Ms Chandra admits receiving the mistaken salary payments in question and claims that she received them in good faith.

The Authority's investigation

[3] 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.

Issues

[4] The issue requiring investigation is whether or not Ms Chandra should repay to MFL the salary payments made in error to her.

Background

[5] Madison is a recruitment agency. Ms Chandra was employed as a Consultant on 2 April 2018 subject to an individual employment agreement (the Employment Agreement) which she signed confirming that she read, understood and accepted the terms and conditions set out in it.

[6] The Employment Agreement stated at clause 10 entitled 'Parental Leave': "... you are entitled to parental leave in accordance with the Parental Leave and Employment Protection Act 1987 or any amending or substituting Acts)." There is no provision in the Employment Agreement stating that Madison would pay salary during an employee's parental leave.

[7] On 26 February 2019 Ms Chandra and her Manager, Mr Oscar Dunn, Northern Regional Manager, discussed her taking maternity leave. It was agreed that it would be convenient for both parties if Ms Chandra left her employment at the end of the financial year on 31 March 2019. It was therefore agreed that that her parental leave would have a start date of 1 April 2019, although the paid parental leave period would start on 8 April 2019.

[8] Mr Dunn said that because Ms Chandra did not want her paid parental leave payments to start until her salary from Madison had stopped she requested that annual leave entitlement be paid to cover the intervening week. Mr Dunn had agreed to this.

[9] Mr Dunn said he told Ms Chandra that she would need to provide a certificate from a health professional with the estimated due date of the birth of her baby, and to complete an Inland Revenue IR880 form which she was to send to Ms Kelly Neal, Payroll Manager. Mr Dunn confirmed the information and discussions in an email to Ms Chandra dated 27 February 2019.

[10] Ms Chandra responded on 4 March 2019 stating:

Hi Oscar,

Thank you for accepting my maternity leave from the 1st of April, 2019 – 1st April 2020. I do appreciate you keeping my role open for 12 months.

I would also like any leave owing to me, if any, paid first before I switch onto paid parental leave. ...

[11] Ms Chandra wrote to Ms Ilse Gerber, Group HR Advisor on 5 March 2019 confirming that she was applying for parental leave. In a return email dated 6 March 2019 Ms Gerber

confirmed Ms Chandra's entitlement to parental leave and her return to work date of 30 March 2020.

[12] Ms Kelly explained that when the Payroll department is informed by the HR department that an employee is taking approved parental leave, the Payroll department maintains the employee's record with start and end dates together with a record of leave taken. In Ms Chandra's case, there had been a lack of communication between the HR and Payroll departments and the fact that she had started her parental leave was not picked up until October 2019.

[13] As a result of this error MFL continued to pay Ms Chandra's fortnightly salary payments.

[14] Ms Chandra said that when she realised that she had continued receiving salary payments from MFL she had been confused. Initially she thought the first fortnight's payment was her annual leave and the second fortnight included commission payment.

[15] Ms Chandra's annual leave outstanding by the date of her last day of work in 29 March 2019 was 5 days. This was paid, as confirmed by the first pay slip provided to the Authority as being paid to Ms Chandra on 1 April 2019. Ms Chandra was also paid one week's salary for the second week of that pay period.

[16] These amounts (annual leave payment of 5 days and the commission owed) did not equate to a full week's salary in either case.

[17] Ms Chandra continued to receive her full salary entitlement of \$60,000 per annum plus entitlements pro rata in regular fortnightly payments from 8 April to October 2019. By the time of the third salary payment into her account on 12 May 2019 Ms Chandra stated that she knew it was her full salary which was being paid by MFL.

[18] Ms Chandra said she had telephoned Ms Gerber on or about June 2019 to ask when her salary payments would end. Ms Gerber said that she recalled the telephone call and believed it was about when the parental leave payments would end and she could not recall any mention of salary payments. Had Ms Chandra mentioned salary payments during the call, Ms Gerber said that would have alerted her to the fact that there was a problem.

[19] At the Investigation Meeting Ms Chandra agreed that there may have been confusion over what was discussed during the call to Ms Gerber

[20] Ms Chandra said she was confused about continuing to receive the salary payments during her period of paid parental leave and so she asked her sister for advice and searched for

information on Google. As a result of her research she said she discovered that some companies did pay employees their salary during parental leave.

[21] Ms Chandra said she did not contact MFL to ask for advice.

[22] Mr Dunn said he had been informed in September 2019 that Ms Chandra's paid parental leave was coming to an end and that she had enquired if there was any more annual leave to which she was entitled. He had authorised the payment of any unpaid leave that had accrued and left the calculation of the amount to the Payroll department.

[23] Ms Neal said that on 30 October 2019 she received an email from Ms Chandra asking: "whether you are able to tell me when my maternity leave ends?". Ms Neal said that the email did not state that Ms Chandra was still receiving her normal fortnightly salary payments. However she had checked the payroll records and realised that the Payroll department had not been informed that Ms Chandra had commenced parental leave.

[24] Mr Dunn was informed by Ms Gerber of the error which had occurred, and he in turn had informed Mr Christian Brown, General Manager, in early November 2019. As a result Mr Brown had made arrangements with Mr Dunn to make contact and arrange a meeting with Ms Chandra, who was at that time living in Whangarei.

[25] Mr Brown and Mr Dunn said their intention in making contact was to have an informal meeting with Ms Chandra and talk about an arrangement for her to repay the monies paid in error by MFL.

Meeting on 14 November 2019

[26] The meeting with Ms Chandra took place on 14 November 2019 and was held at the office of Mr Broadbelt whom Ms Chandra had instructed. Present at the meeting with Mr Brown and Mr Dunn were Ms Chandra and her husband, Mr Jansen, and Mr Broadbelt.

[27] Mr Dunn said that during the meeting the error had been explained and Ms Chandra was advised that Madison believed it to be in her best interests to work with Madison on a repayment arrangement.

[28] He said that Ms Chandra had explained that she had not been expecting salary payments to be made by Madison and had considered it: "strange" when she was continued to be paid salary and had decided to research paid parental leave on Google and by speaking to her sister.

[29] After an adjournment, the meeting concluded with Mr Broadbelt informing Mr Brown and Mr Dunn that Ms Chandra had instructed him not to enter into an agreement for her to

repay Madison. The reasons provided by Ms Chandra during the meeting was (i) that the mistake was MFL's fault,(ii) she had spent all the money, and (iii) there was an Air New Zealand case that said employees did not have to pay back mistaken salary payments.

[30] Ms Chandra said that her response not to repay the overpayment had been given because at that stage she did not have the money to repay the overpayment.

[31] Following the meeting Mr Dunn received a letter dated 15 November 2019 from Ms Chandra in which she offered her resignation effective that same date.

[32] On 20 November 2019 Mr Brown wrote to Mr Broadbelt confirming that the Employment Agreement did not provide Ms Chandra with salary payments during maternity leave. The letter stated:

If Reema accepts liability for the net amount paid to her (\$25,187.79), Madison Recruitment are happy to offer a 10% discount on the total amount payable. This would reduce the amount that Reema repays to \$22,669.01. We would be happy to have this sum repaid to Madison in equal monthly amounts

[33] MFL requested that Ms Chandra disclose what had happened to the mistaken salary payments, but it was only following an Authority direction that limited disclosure was made by Ms Chandra.

Should Ms Chandra repay the salary overpaid in error to MFL?

[34] MFL is seeking restitution of the net sum paid into Ms Chandra's bank account during her parental leave between April and October 2019. This sum is \$23,640.07.

[35] Ms Chandra has no contractual entitlement to that payment under the terms and conditions of the Employment Agreement. The Parental Leave and Employment Protection Act 1987 states at s 42 that: "... the employer of an employee who takes parental leave in accordance with this Act shall not be obliged to pay that employee any remuneration for (a) any period of the employee's parental leave under this Act"

[36] I find that Ms Chandra did not have a statutory entitlement to be paid salary during her paid parental leave period.

[37] There is no dispute that the mistake was a mistake of fact on MFL's part which continued to make fortnightly salary payments to Ms Chandra as if she were still working when in fact she was on parental leave and not working. As a result I find Ms Chandra was unjustly enriched.

[38] The Authority has jurisdiction to hear claims for restitution based on unjust enrichment as confirmed by the Employment Court and the High Court.¹

[39] Unjust enrichment has been defined by the High Court. The three elements to an unjust enrichment claim are set out in *Young v Hunt* as being:

1. proof of the defendant's enrichment by receipt of a benefit;
2. a corresponding deprivation by the plaintiff; and
3. the absence of any juristic reason for the enrichment.²

(i) *Proof of enrichment*

[40] Ms Chandra does not dispute that she received the sum of \$23,640.07 by way of mistaken salary payments during the period April to October 2019 when she was on paid parental leave. Therefore I find that Ms Chandra was enriched.

(ii) *Corresponding deprivation*

[41] MFL made the payments to Ms Chandra therefore I find a corresponding deprivation to MFL.

(iii) *Absence of any juristic reason*

[42] I find no juristic reason for the enrichment on the basis that Ms Chandra had no contractual or statutory entitlement to the mistaken salary payments.

[43] I find that Ms Chandra has been unjustly enriched as a result of the salary payments made in error by MFL.

Defence of Change of position

[44] There is a strict liability to make restitution unless Ms Chandra can establish that as a result of the overpayment she had a change of position i.e. that her position had so changed that it would be inequitable in all the circumstances for her to be made to repay the money. The defence of Change of Position requires Ms Chandra to have changed her position by:

- a) Receiving the payment in good faith; and
- b) Altering her position in reliance on the validity of the payment; so that

¹ cf *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90 at [45] and *Aztec Packaging Ltd v Malevris* [2012] NZHC 243 at [25]

² *Young v Hunt* [2019] NZHC 2822

- c) Having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or relief in full.³

[45] If Ms Chandra is able to establish the defence, she will not become the owner of the money which comprises the mistaken payment, but it would be ‘inequitable’ to oblige her to repay it.

[46] Ms Chandra’s evidence was that she believed that since MFL was at fault in making the salary payments, she should not be expected to repay the monies paid to her in error. However this is not the law. In *Newfoundworld Site 2 [Hotel] Limited v Air New Zealand* the Court of Appeal stated:

It also followed, the Judge found, that Air New Zealand paid the invoices under a mistake – the payment clerk mistakenly believed that Novotel was entitled to include charges for early check ins under the 2013 Agreement. While Air New Zealand might have been careless in paying the invoices, carelessness on its part did not deprive it of its right to repayment of the amount paid - an amount by which Novotel had been enriched.⁴

Received in Good Faith

[47] Ms Chandra’s evidence was that she was confused about the salary payment and thought it ‘strange’, however I find that because Ms Chandra in that situation knew she should have, as an employee with a duty to act in good faith towards her employer pursuant to s 4 of the Act, have made enquiry of her employer. Instead Ms Chandra said she asked her sister for advice, and searched Google.

[48] Ms Chandra was provided with the Employment Agreement which stated that she was entitled to parental leave in accordance with the Parental leave and Employment Protection Act 1987: there was no provision within the Employment Agreement for her to receive salary payment during the paid parental leave period.

[49] In addition to Ms Chandra having declared that she had read, understood and accepted the terms and conditions in the Employment Agreement she confirmed in the Investigation Meeting that she dealt with employment issues during her daily work at MFL. In addition Ms Chandra was a highly educated person who could be expected to know the correct procedure for such an enquiry.

³Cf; *Young v Hunt* Note1 at {32}

⁴ *Newfoundworld Site 2 [Hotel] Limited v Air New Zealand* [2018] NZ CA 261

[50] I find therefore that she would have been aware that there was no provision in the Employment Agreement for the salary payment being made whilst she was absent on paid parental leave.

[51] I find that Ms Chandra did not accept the salary payments in good faith.

Inequitable to repay

[52] Turning to examine whether or not it would be inequitable to make Ms Chandra repay the monies, I examine whether she changed her position and acted to her detriment in such a way so that she should not have to repay the monies.

[53] The onus is on Ms Chandra to prove that she changed her position. Ms Chandra has put forward two possible explanations to Mr Brown and Mr Dunn.

[54] Ms Chandra told Mr Brown that the money had been spent on day to day expenses, however no proof has been provided of this.

[55] However Ms Chandra has stated in her witness statement that she told Mr Dunn that she spent the money on minor renovations to a property on which she had a mortgage, and on booking a trip to South Africa.

[56] The bank statements provided by Ms Chandra show transactions occurring between two separate accounts. There is no document disclosing the amount of money spent by Ms Chandra on reducing her mortgage or on the cost of renovations.

[57] It is submitted by the Mr Reardon on behalf of MFL that Ms Chandra using the mistaken payment to pay off an existing debt resulted in no harm to her overall financial position because she has received the benefit of reduced debt. Such a change of position does not make it inequitable to repay the mistaken payment.

[58] I accept that this submission.

[59] In regard to the expenditure on the trip to South Africa, the evidence establishes that this decision had been made prior to the mistaken salary payments being received, and the evidence was that the commitment to a wedding in South Africa was made in January 2019 which predated the salary being paid.

[60] I find therefore there has been no change of position by Ms Chandra in respect to the trip to South Africa as a result of the mistaken salary payments.

[61] I find that Ms Chandra did not receive the salary payments in good faith, and that she has not established that she changed her position as result of the mistaken payments made to her.

[62] I determine that Ms Chandra should repay the salary overpaid in error to MFL.

Remedies

[63] Ms Chandra owes MFL the sum of \$23,640.07 net by way of restitution.

[64] I order Ms Chandra to repay the amount of \$23,640.07 in full to MFL.

[65] MFL is also seeking interest on this amount from the date the cause of action arose i.e. 14 November 2019.

[66] I order that Ms Chandra pays interest on the outstanding sum from the date of this determination until payment is made in full in accordance with the Interest on Money Claims Act 2016.

Costs

[67] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[68] If they are not able to do so and an Authority determination on costs is needed MFL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Chandra would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[70] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].