



It's Pay Back Time!!

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

While not a regular occurrence, there have been occasions where employers have overpaid employees, and then sought to recover these overpayments. Commonly, this is the result of a mistake in payroll. However, there are instances where employees are paid in advance, and then do not return the funds on leaving employment.

There are practicalities to take into account in recovering overpayments. However, the general principle is that where employees are overpaid they will need to pay back any overpayment, as illustrated in the following cases.

Recently, a Noel Leeming employee was required to repay remuneration which was mistakenly paid while he was absent due to an injury and receiving ACC payments; *Noel Leeming Group Limited v Saunders* [2020] NZERA 361. In this case, Noel Leeming claimed that Mr Saunders breached his implied duty of fidelity “*in an honest and truthful way when he was aware, or ought to have been aware, of the overpayment*”. This meant that Mr Saunders was required to notify Noel Leeming of the overpayments but did not do so. The Authority examined the evidence and concluded that it did not support Noel Leeming’s claim. In reaching its conclusion, the Authority noted that:

- (a) There was no evidence advanced to support Noel Leeming’s proposition that Mr Saunders was receiving in effect 180% of his income;
- (b) While Mr Saunders had access to payslips through the internet, there was no evidence to indicate he had accessed the payslips;
- (c) Mr Saunders claimed he believed the money he had received was commission he was due;
- (d) In the context of his health, Mr Saunders was on strong pain medication after surgery and a period of hospitalisation; and
- (e) While Noel Leeming had, in effect, claimed Mr Saunders was acting dishonestly, it did not take disciplinary action against him.

Accounting for the above, the Authority concluded that:

“[34] ... [Noel Leeming’s] claim is essentially that Mr Saunders had a duty to bring the overpayment to the company’s attention but chose not to do so. There is evidence of other possible payments which could have been received from [Noel Leeming], the involvement of a third party administrator and Mr Saunders being on strong medication and hospitalised for complex surgery. On the basis of the evidence before me [Noel Leeming] has not established that Mr Saunders breached his duty of fidelity.”

However, while Noel Leeming had not established a breach of fidelity, the Authority went on to examine the issue in the context of “*unjust enrichment*”. This was an alternative claim advanced by Noel Leeming, as noted by the Authority:

“[35] [Noel Leeming’s] ... claim is unjust enrichment. Mr Saunders has received a payment that he was not entitled to, has been unjustly enriched and should be deprived of it, by being required to pay it back to [Noel Leeming].

[36] The Authority has jurisdiction to determine overpayment claims.

[37] The elements required to be established are:

- (i) The enrichment of Mr Saunders;
- (ii) A corresponding deprivation by [Noel Leeming]; and
- (iii) The absence of some legal principle justifying Mr Saunders enrichment and negating [Noel Leeming’s] claim.”

On examining the facts, there was no question Mr Saunders had been overpaid, this was accepted by him. Therefore, the first and second points above were satisfied.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart, Dean Kilpatrick, Jane Taylor or David Appleton.**

Contact Details:

Level 2

71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Peter Zwart

E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick

E: dean@mgz.co.nz
M: 027 279 1353

Jane Taylor

E: jane@mgz.co.nz
M: 021 1539 147

David Appleton

E: David@mgz.co.nz
M: 027 247 4274

This left an examination of the third point, i.e. the equity of the situation according to the Authority. In this context, the Authority found fault in the conduct of both parties. It also examined whether Mr Saunders had altered his position in reliance on the overpayments and found that he had. However, this did not preclude the requirement to repay what had been overpaid. On examining the evidence, the Authority concluded that *"I am unable to find any basis on which he should not have to pay it all back to [Noel Leeming]"* and ordered the estimated \$14,900 which had been overpaid to be repaid.

The only question was how the repayment was to be made. Mr Saunders had made offers to make monthly repayments, ranging from \$50 to \$150 per month. Noel Leeming sought \$500 per month. The Authority noted that Mr Saunders was still on ACC and ordered he repay the overpayment at \$200.00 per month.

In another case, *Wensley Developments Ltd v Boulgaris* 20 January 2009 CA 5/09, an employee was required to repay advanced commissions.

Wensley Developments was a property development company and employed Mr Boulgaris as a Salesperson in Queenstown from March 2004 to March 2005. The terms of employment were recorded in a written individual employment agreement signed by the parties. The employment agreement provided for commission to be paid in advance at the commencement of Mr Boulgaris' employment. The employment agreement also provided specifically that advanced commission would be recoverable on the termination of employment. At the end of his employment, Wensley Developments sought to recover advanced commission payments that had been paid to Mr Boulgaris, but not earned. There were some sales due to be settled which would offset what was to be recovered, but it was apparent an amount would be owed to Wensley Developments by Mr Boulgaris. After discussions and correspondence between the parties, resolution was not reached, and the matter was referred to the Authority.

In defence of the claim, Mr Boulgaris claimed he was not required to repay Wensley Developments because of the *"wrong projections given [to him] to induce his employment"*. Wensley Developments claimed the sales Mr Boulgaris made were lower than it expected and as a result he did not earn the expected commission. The Authority determined that the projections were only forecasts and, in any case, the employment agreement provided that pre-contractual terms could not be relied upon. Further, the Authority found there were no guarantees in the employment agreement regarding the quantum of commission. It was also found by the Authority that Mr Boulgaris was aware he was being paid more than he was earning.

Perhaps the most important fact however was that the Authority established that in correspondence with Wensley Developments, Mr Boulgaris accepted he had been overpaid. The Authority determined that *"[i]n this equity and good conscience jurisdiction he ought to be held to that acceptance and ought not be permitted to resile from it"*. On this basis, the Authority ordered the repayment of \$165,635.00 advanced commission. There was no order for repayments by instalment in this case, and the Authority also provided that interest would be payable at a rate of 6%.

The above cases illustrate that where overpayments have been made to employees, they can be required to pay them back. There are some legal and practical issues to consider when seeking to recover overpayments, and we can assist in these cases.



David Appleton has joined the team at MGZ Employment Law.

David has been an employment law specialist since 1994. He was a UK qualified solicitor working in a City of London law firm for 17 years, nine of which were as a partner acting for a number of national and international corporations. He moved to New Zealand in 2009 and worked as a NZ employment law adviser for two years, including a spell with the Canterbury Employer's Chamber of Commerce. He was then appointed as a Member of the Employment Relations Authority. David served as a Member of the Authority for seven and a half years before leaving to work in the UK for 18 months. David returned to New Zealand in September 2020.

Both in the UK and New Zealand, David has worked predominantly with employers throughout his career, acting as their trusted adviser.

As a Member of the Authority David investigated and determined hundreds of applications, which encompassed a very wide range of employment law issues. These ranged from personal grievances, contractual disputes, complex contractual interpretation, the issuing of injunctions, breaches of settlement agreements, enforcement actions issued by the Labour Inspectorate, and facilitating collective bargaining.

David is particularly experienced in defending employers against claims and in negotiating favourable settlements for clients.

David looks forward to meeting our clients in due course.