



Restitution and other Remedies: Recovery of Money from Employees

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
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Sometimes there are situations where employees have been overpaid, or perhaps obtained company money by theft or fraud. If an employee is still employed, an employer may be able to deduct overpayments from the employee's pay under the Wages Protection Act. However, such deductions must not be unreasonable, and an employee can refuse or withdraw consent for deductions to be made. Also, such deductions cannot be made if the employee is no longer employed by the employer. So what can an employer do in these situations?

Other than reporting criminal activity to the Police, employers may be able to bring claims against employees which can include remedies such as damages and/or penalties for breach of an employment agreement. However, penalty claims are limited to \$10,000.00 for each breach for individuals, and must be raised within 12 months of the occurrence of the breach or the time when it came to the employer's notice. Claims for damages have a six-year limitation period and must be accompanied by evidence of loss.

However, the Employment Relations Authority ("ERA") recently ordered an employee to pay \$262,884.80 to his ex-employer as "restitution" for overpaid salary in *Snowling v Scott Technology Limited* [2023 NZERA 8].

Mr Snowling held various senior roles with Scott Technology Limited ("STL"), including in STL's subsidiary businesses in China and Germany. His employment ended in May 2020 as a result of a restructure.

Mr Snowling was advised that he would receive redundancy compensation and annual leave following the termination of his employment. He queried the calculation of the redundancy compensation, and raised concerns regarding STL's treatment of certain tax matters while he had been working overseas in Germany and China.

STL decided to have an external reconciliation audit undertaken into Mr Snowling's pay and tax history. It advised Mr Snowling his final pay would be withheld until this audit was completed.

Mr Snowling then brought claims against STL in the ERA for redundancy compensation, annual leave, an "expat" allowance, bonus payments and a contribution to tax-related expenses.

During the external reconciliation audit, STL identified that there were times Mr Snowling had received three separate salaries concurrently while he had been working overseas, and therefore he had been overpaid. STL brought counterclaims against Mr Snowling for overpayment of wages, various amounts associated with tax liabilities, reimbursement of management time, penalties and interest. STL argued that Mr Snowling had been "unjustly enriched" by way of salary and tax overpayments and sought a remedy of restitution.

STL advised the Authority that both China and Germany required country-specific contractual arrangements and salary payments. STL arranged the payments locally, but Mr Snowling organised for split payments with New Zealand while was working and living in China, and then in Germany. STL identified a series of mistakes that resulted in Mr Snowling receiving significant excess remuneration above his salary entitlements:

1. Failure to stop salary payments to Mr Snowling's New Zealand bank account while he received salary payments into his Chinese bank account;
2. Failure to stop salary payments to Mr Snowling's Chinese bank account while he received salary payments into his German bank account;
3. Failure to stop salary payments to Mr Snowling's New Zealand bank account while he received salary payments into his German bank account.

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 **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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In December 2017, STL's Chief Financial Officer had provided Mr Snowling with a detailed analysis of concerns, including that Mr Snowling had failed to identify his split salary arrangements and that he had been claiming tax credits in New Zealand. STL argued Mr Snowling knew (or ought to have known) that he was wrongly benefiting from STL's salary payment errors. STL argued that Mr Snowling should have told the company about these errors, and claimed a penalty for breach of good faith against Mr Snowling.

STL also mistakenly paid a large sum to settle a complex tax liability on Mr Snowling's salary payments made in Germany, and sought to recover this from Mr Snowling.

STL accepted that redundancy compensation and annual leave were owing to Mr Snowling, but those amounts were being withheld, and requested that those amounts be "set off" against its claims against Mr Snowling.

The legal test for unjust enrichment involves three limbs:

1. Proof of enrichment by Party A (Mr Snowling);
2. Corresponding deprivation to Party B (STL);
3. An absence of any legal reason for the enrichment of Party A.

It is important to note, however, that there are defences to claims of unjust enrichment. A common defence is the "*change of position*" defence. This is where a person has relied on the payment and changed their position accordingly, noting that:

1. Party A's expenditure must be exceptional or material;
2. That expenditure must have been in reliance on the payment received; and
3. Party A must have changed their position in good faith.

In Mr Snowling's case, he did not plead this defence, so was unable to argue it before the ERA.

The ERA considered that there was "*significant force*" in STL's claim for unjust enrichment by mistaken payment and awarded the full amount of \$410,604.00 to STL. Further, the ERA did not accept Mr Snowling's arguments against STL (particularly his argument that he performed three jobs concurrently). The Authority did, however, find that STL's decision to withhold Mr Snowling's redundancy compensation and annual leave payments was unjustified.

The ERA ordered that the amount for restitution be discounted by \$147,719.20, being the total of Mr Snowling's redundancy compensation and outstanding annual leave, bringing the total sum owed by Mr Snowling to \$262,884.80. The ERA dismissed STL's other claims and noted that the penalty claims were not raised within the statutory 12-month limitation period.

So, while STL's penalty claims failed here, the company was still able to recover a significant sum using another type of claim. There may be circumstances, such as this case, where it is easier to prove an employee was unjustly enriched by overpayments than a specific breach of the employee's employment agreement or breach of good faith.

Fortunately, there is more than one way to recover money from employees, whether they have received it by mistaken overpayment, by a breach of contract, or by criminal means. If you have any concerns about how to recover money from employees, contact us to discuss your options.

Minimum Wage Increase

The Government has announced the hourly minimum wage will go up to **\$22.70** from April 2023, an increase of \$1.50. The existing minimum wage is \$21.20.

The announcement was made by Prime Minister Chris Hipkins at a post-Cabinet press conference on 8 February 2023.



ER Seminars - 2023

As a few clients have asked when we will be running our popular 2 Day Employment Relations Course in 2023 we have set the following dates:

**Wednesday 22 and Thursday 23 March 2023;
FULL**

**Wednesday 21 and Thursday 22 June 2023
(subject to demand); or**

Tuesday 12 and Wednesday 13 September 2023

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training If you wish to enroll simply email your registration and contact details to carey@mgz.co.nz