



# New Zealand Employment Relations Authority Decisions

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## Foai v Air New Zealand Limited WA120A/10 (Wellington) [2010] NZERA 896 (8 November 2010)

Last Updated: 29 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 120A/10 5279797

BETWEEN CLINT FOAI

Applicant

AND AIR NEW ZEALAND

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

P R Stapp

Greg Lloyd for Applicant Tim Cleary for Respondent

On the papers

29 July 2010, 15 August 2010 and 3 September 2010 from Applicant  
13 and 23 August 2010 from Respondent

Determination:

8 November 2010

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] This matter arises from earlier proceedings in a determination dated 30 June 2010 (unreported WA 120/10) when the Authority reserved making a determination on the withholding of final pay and the recovery of an overpayment. I have been requested to deal with both issues.

[2] Mr Foai has requested that Air New Zealand be ordered to pay him \$9,363.04.

[3] Air New Zealand has claimed that Mr Foai owes it \$42,635.40.

#### The issues

[4] Is Air New Zealand required to pay Mr Foai the amount of \$9,363.04 plus interest?

[5] Is Air New Zealand's claim to recover the overpayment of wages restricted and does the Wages Protection Act apply?

#### The facts

[6] Air New Zealand has withheld \$9,363.04 from Mr Foai's final pay without written authority to off set the amount of \$42,635.40 overpaid by mistake to Mr Foai during his employment.

## **Determination**

[7] Air New Zealand had no written authority to deduct and withhold \$9,363.04 from Mr Foai's final pay. There was no contractual provision for Air New Zealand to withhold and offset the amount. Air New Zealand has an obligation to pay Mr Foai this amount.

[8] It has been established that Air New Zealand by mistake overpaid the amount of \$42,635.40 to Mr Foai during his employment. It is common ground (from the evidence and submissions) that this is the amount. The parties are in dispute that Mr Foai knew about the overpayment during his employment. Air New Zealand claimed that Mr Foai did not take sufficient action to correct the situation at the time. The overpayment was discovered during an investigation at the time Mr Foai's employment ended. Mr Foai has accepted that there has been an overpayment but denied that he had any knowledge of the detail at the time and does not accept that he had the responsibility to take action to fix it at the time. Subject to getting his job back after being dismissed, Mr Foai offered to make repayments by instalments after finding out about the overpayments.

[9] The fact is that an overpayment has been made by Air New Zealand and that it was made by mistake. On balance Mr Foai received his pay without any improper self enrichment, I hold, because it is not conclusive that he had knowledge of the detail and extent of the overpayments during his employment because of any overtime paid and the salary being an average payment.

[10] I accept that I can not make the inference that because the applicant was dismissed for dishonesty offences it somehow adds weight to the assertion that Mr Foai knew he was being overpaid. There is evidence that Mr Foai did alert Air New Zealand to the potential problem when he noted different amounts in his regular pay and Air New Zealand did not follow it up. I accept that Mr Foai accepted his pay in good faith and did ask some questions to check that he was being properly paid. On the other hand Air New Zealand has established that Mr Foai was overpaid and that it came about as a consequence of error. Upon finding some discrepancies Air New Zealand did take steps to investigate and recover the sum.

[11] The Wages Protection Act is not available to recover the amount sought by Air New Zealand. However, Air New Zealand is not precluded from recovering the amount as a recoverable debt, and the Authority has jurisdiction for this type of claim as it relates to the parties' employment relationship. Mr Foai has given no evidence that he altered his position in any way in reliance on the validity of the payment, although he certainly showed that he had some concern about the correctness of the payment of his wages. I have balanced that Air New Zealand must take responsibility for its pay roll system and has a responsibility to get the pay correct and that Mr Foai would have accepted his regular pay even though he did notice the changes and that they were enough for him to make some questions even though he concluded incorrectly that there was nothing wrong. Mr Foai has not satisfied me that I should deny exercising relief as a matter of any inequity because it cannot be said that Air New Zealand paid the money voluntarily and with knowledge of the facts. This is supported by Air New Zealand only being required to pay wages actually earned by the applicant and prior to an investigation Air New Zealand would not have known that such a payment was being made incorrectly, I hold. This is because Air New Zealand reasonably relied on its pay roll system and until there was a need identified to investigate Mr Foai's pay Mr Foai had not sufficiently raised any detailed problem.

[12] At the time Mr Foai says he was informed by payroll that his pay was correct, but Air New Zealand challenged this, and Mr Foai was not able to corroborate his claims. I accept that Mr Foai accepted his pay in good faith and did ask questions to check that he was being properly paid, but Air New Zealand had no knowledge of a problem.

[13] Later he offered to repay the amount by instalments, albeit conditional on keeping his job. The loss of his job was over an entirely separate matter.

## **Orders of the Authority**

[14] I order Air New Zealand Limited to pay Mr Foai \$9,363.04.

[15] The parties are to calculate interest at the rate of the 90 day bill rate plus 2% per annum from the date the money was due at the time of Mr Foai's final pay until the date of payment. Leave is granted to return to the Authority if a problem on the calculation arises.

[16] Mr Foai is to repay Air New Zealand Limited \$42,635.40 nett.

[17] It would seem to make sense to set off the underpayment from the overpayment, however, that is not an order I can make given the separate recovery actions from the parties.

[18] Costs are reserved.

