

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 8  
3129694

BETWEEN                      KENNETH SNOWLING  
Applicant

AND                              SCOTT TECHNOLOGY  
LIMITED  
Respondent

Member of Authority:      Andrew Dallas

Representatives:            Anna Oberndorfer, advocate for Applicant  
James Cowan and John Farrow, counsel for Respondent

Investigation meeting:     1 February 2022 in Dunedin

Submissions received:     2 February & 11 March 2022 for the Applicant  
4 March 2022 for the Respondent

Determination:              11 January 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Scott Technology Limited (Scott) is an automation and robotic company headquartered in Kaikorai Valley, Dunedin. It operates subsidiary businesses overseas including in China and Germany.

[2] Kenneth Snowling held various senior roles with Scott and its subsidiaries in China and Germany. Some of these roles were held concurrently, others contiguously. Mr Snowling says he is entitled to redundancy compensation, annual leave, an “expat” allowance, bonus payments and a contribution to tax related expenses.

[3] Scott denies all of Mr Snowling's monetary claims apart from in relation to redundancy and holiday pay. Scott accepts these are owing to Mr Snowling but says these amounts are currently being withheld. Scott seeks, in effect, to have these amounts 'set off' against its own claims against Mr Snowling, including for overpayments of wages, various amounts associated with tax liabilities, reimbursement of management time, penalties, and interest. All of which, Mr Snowling strenuously denies as being available to Scott.

### **Issues**

[4] The following issues were identified for investigation and determination:

- (i) Does Scott owe Mr Snowling any or all, of the following:
  - (a) redundancy compensation in the amount of \$128,419.20<sup>1</sup>.
  - (b) annual leave in the amount of \$19,300.00.
  - (c) an "expat" allowance in the amount of \$108,333.00.
  - (d) bonus payments in the amount of \$115,146.00.
  - (e) a German tax payment in the amount of \$143,909.74.
  - (d) reimbursement for the cost of German tax advice in the amount of \$4,793.24; and
  - (f) reimbursement for the cost of New Zealand tax advice in the amount of \$39,996.00.
- (ii) Does Mr Snowling owe Scott any or all, of the following:
  - (a) Salary overpayment in the amount of \$225,419.00; and
  - (b) Tax overpayment in the amount of \$185,185.00.
- (ii) Should Mr Snowling reimburse Scott by way of "special damages" for the costs of its investigation into his salary and tax issues;
- (iii) Should Mr Snowling pay penalties for breach of his employment agreement and good faith obligations;
- (iv) Should either party contribute to the costs of representation of the other party?

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<sup>1</sup> All amounts expressed in New Zealand dollars.

## **The Authority's investigation**

[5] During the Authority's investigation meeting, I heard evidence from Mr Snowling and for Scott: Casey Jenkins, Director – Marketing & People and Graeme Fotheringham, Associate Director, Tax for Deloitte, a large transnational accounting practice with offices in New Zealand, including Dunedin.

[6] For completeness, I observe that for reasons which were not fully explained, two Scott employees involved in this dispute, former Chief Executive, Greg Chiles and former Chief Financial Officer, Chris Hopkins did not provide witness statements to the Authority. Notwithstanding, Scott was content to rely on the evidence of Ms Jenkins and Mr Fotheringham in resisting Mr Snowling's claims and in advance of its counter-claims against Mr Snowling.

[7] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I have not referred in this determination to all the evidence or other information lodged in, or otherwise provided to, the Authority during the investigation. I have carefully considered all this material. Further, while I do not refer to all parties' submissions advanced during the Authority's investigation, I have fully considered these.

[8] This determination is issued outside of the statutory three-month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist. I apologise to the parties for the delay in issuing this determination which arises out of the negative impact of the COVID-19 pandemic on the administration of the Authority.

### **What caused Mr Snowling's employment relationship problem?**

[9] Mr Snowling began working for Scott in January 2000. He also worked for subsidiaries of Scott in China between 2012 and 2016 and Germany between 2012 and 2019. Mr Snowling returned to New Zealand in January 2020. His employment with Scott came to end in May 2020 as a result of a restructure.

[10] On 22 May 2020, Mr Snowling received confirmation his employment would end. He was advised by Scott he would receive a redundancy payment of \$128,419.20 and an accrued leave payment of \$19,300.00. Mr Snowling queried the redundancy payment calculation methodology and also raised concerns about Scott's treatment of certain taxation matters while he had been working overseas.

[11] In a response of 15 June 2020, Scott indicated that Mr Snowling's final pay would be withheld until an external reconciliation audit was completed into his pay and tax history including previous alleged salary overpayments dating back to 2015.

[12] In essence, Scott's position is that it identified that Mr Snowling had at certain times while working overseas been receiving three separate salaries concurrently and, as a consequence, been overpaid. Scott said both China and Germany required contractual arrangements and salary payments to be country specific. However, while Scott arranged the payments locally, it says Mr Snowling organised for split payments with New Zealand while he was working and domiciled in China and then Germany.

[13] After visiting the Germany subsidiary operations, Scott's then Chief Financial Officer provided Mr Snowling in December 2017 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. Scott contends that Mr Snowling knew or ought to have known that he was wrongly benefiting from his employer's salary payments' errors, due to the significant excess remuneration he was receiving above his salary entitlements. Scott seeks to recover \$225,419 in salary overpayments from Mr Snowling.

[14] Scott also seeks to recover \$185,185 from Mr Snowling being the amount they say was mistakenly paid on his behalf to settle a complex tax liability on salary payments made in Germany. This claim is advanced on the basis that Mr Snowling should incur personal income tax liability as in any normal employment relationship. Of significance, Scott says its claims against Mr Snowling do not include taxes due on benefits provided during his overseas postings and is not seeking to recover this expenditure.

[15] Scott concedes the salary overpayments were made to Mr Snowling as a result of a series of mistakes, which it, in turn, claims he did not identify to them. These mistakes were:

- (i) failing to stop/suspend Mr Snowling's salary being paid into his New Zealand bank account when he was also receiving salary in his Chinese bank account.
- (ii) failing to stop/suspend Mr Snowling's salary in his Chinese bank account when salary payments were also being made to his German bank account; and
- (iii) failing to stop/suspend payment of Mr Snowling's salary in his New Zealand bank account when salary payments were also made to Mr Snowling's German bank account.

[16] In summary, Scott claims Mr Snowling has been unjustly enriched by way of salary and tax overpayments in the amount of \$410,604 and seeks to recover the same from him. Scott straightforwardly summarised its position in submissions as "the parties had a mutual debt which was partly set-off by withholding funds".

[17] Scott also suggested Mr Snowling breached his good faith obligations by not apprising his employer of his advantageous salary and tax position and when such was brought to his attention, failing to rectify the situation, including instructing Scott's China-based subsidiary to continue to pay him in local currency even after he ceased performing the role to which that remuneration related. Scott seeks penalties for these alleged breaches of good faith.

[18] Scott says in consultation with Mr Snowling, upon discovery of the overpayment, that it withheld \$115,146 owed him in bonus payments, and other amounts Mr Snowling is now claiming, to partially recoup the salary overpayment. Mr Snowling, by contrast, claims that upon the termination of his employment he was entitled to be paid all outstanding remuneration. Mr Snowling contends that a failure to pay such is a breach of s 5 of the Wages Protection Act 1983 and s 27(1)(b) of the Holidays Act 2003. Mr Snowling's total claim against Scott amounts to \$559,897.18.

### **The Authority's view of Mr Scott's employment relationship problem**

[19] Having carefully considered the documentary and oral evidence provided by the parties to the Authority and also their subsequent submissions, I find there is significant force in Scott's primary counterclaim against Mr Snowling of unjust enrichment by mistaken payment. When contrasted with Mr Snowling's claims against Scott, the resultant weakness of his position, save those relating to payment of redundancy and accrued leave, is stark.

[20] At the outset, I accept Scott's contention that Mr Snowling has not in evidence established that it agreed to pay him multiple or concurrent salaries or pay, or otherwise incur the cost of, his personal income tax in excess of tax on fringe benefits in Germany. In contrast, I am not persuaded by, and do not accept, Mr Snowling's claims for payment of an "expat" allowance, bonus-payment, nor his claims in relation to the German tax payment and for reimbursement for tax advice in Germany and New Zealand. Nor do I accept Mr Snowling was entitled to receive multiple salaries from Scott (including its overseas subsidiaries). Mr Snowling's contention that he performed three jobs concurrently, occupying 120 hours per week, is simply not sustainable. On the evidence, Mr Snowling had one job and he performed that single job.

[21] Notwithstanding, some of Scott actions in attempting to resolve matters with Mr Snowling, while understandable within the context of an extant employment relationship, were questionable. I am specifically concerned about the retention by Scott of Mr Snowling's redundancy compensation and his accrued annual leave and, unsurprisingly as a result, I do not accept Scott's submission that had it "reasonable justification for withholding these payments". I return to this below.

[22] So then, on the evidence before the Authority, I find that Mr Snowling was enriched by mistaken payments made to him by Scott and such enrichment was unjust in circumstance where Mr Snowling knew or ought to have known that such payments were not due and owing to him. For completeness, I accept that the quantified amount of the money owed by Mr Snowling to Scott, in the absence of any differing amounts advanced to the contrary by Mr Snowling, is \$410,604 (comprising a salary overpayment of \$225,419 and a tax overpayment of \$185,185).

*Can Scott recover \$410,604 from Mr Snowling?*

[23] As a general proposition of law, having found that Mr Snowling was unjustly enriched through mistake by Scott, restitution is, on its face, available to Scott unless there are defences available to Mr Snowling, or some overriding legal principle exists to decline the remedy.

[24] The Authority has very broad jurisdiction to determine employment relationship problems however described.<sup>2</sup> This includes determining claims for restitution.<sup>3</sup> In determining such claims the Authority applies a three-limb test. First, is there proof of enrichment by party A; second, is there corresponding deprivation to party B and third, is there an absence of any legal reason for the enrichment of party A.

[25] On the facts, Mr Snowling was enriched through the receipt of the benefit of significant additional salary from Scott and incurred a personal income tax liability at Scott's expense. Consequently, the first two limbs of the test are satisfied.

[26] Mr Snowling did not plead any affirmative equitable defence, including most obviously that of a "change of position" defence,<sup>4</sup> in response to the mistaken overpayments of salary received from Scott. In the absence of a defence, I find there is no legal basis for Mr Snowling to either retain the salary or not account for the tax liability and I conclude restitution is an appropriate remedy to order favour of Scott.

[27] However, the issue of the ongoing retention by Scott of Mr Snowling's redundancy compensation and his accrued annual leave must be resolved. As stated above, I do not accept Scott has a reasonable justification for withholding these payments and I do so because the apparent reasonable justification is countered by enforceable contractual and statutory obligations<sup>5</sup> to pay Mr Snowling both. These components of the employment relationship problem are easily severable from the unjust enrichment dispute and the non-payment of Mr Snowling's annual leave is particularly egregious.

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<sup>2</sup> See, *FMV v TZB* [2021] NZSC 102.

<sup>3</sup> See, *New Zealand Fire Service v Warner* [2010] ERNZ 290 at [45] and *Aztec Packaging Ltd v Malevis* [2012] NZHC 243 at [25]

<sup>4</sup> *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548

<sup>5</sup> Holidays Act 2003, s 27(1)(b)

[28] So, while I find Scott has made out its claim against Mr Snowling for restitution in the amount of \$410,604.00 to save the parties exchanging various sums of money to meet other legal obligations, this amount should be discounted by \$147,719.20 being the total of Mr Snowling's redundancy compensation and his outstanding holiday pay due on termination of his employment.

*Special damages and penalties*

[29] I decline to award special damages to reimburse Scott for the costs associated with its investigation into the matters dealt with by this determination in light of its own identified mistakes in resolving the problem with Mr Snowling<sup>6</sup> and its actions in withholding Mr Snowling's redundancy compensation and holiday pay. Further, and in any event, as a large, modern, sophisticated company operating in at least three jurisdictions, Scott should have had systems and processes in place to ensure Mr Snowling (or any other of its employees) was not unjustly enriched in the first place.

[30] As to Scott's penalty claims, even if meritorious, the causes of action arose more than twelve months prior to the penalty actions being advanced and as a consequence they are irrecoverable under the Act.<sup>7</sup>

[31] There is no order for interest.

**Outcome**

[32] Kenneth Snowling must pay Scott Technology Limited \$262,884.80 as restitution.

[33] The parties are directed to use their best endeavours to reach agreement on a payment schedule for payment of the \$262,884.80 and to submit any agreed position to the Authority for approval. If asked, the Authority is open to issuing the agreed position as a consent determination.

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<sup>6</sup> Paragraph [15]

<sup>7</sup> Employment Relations Act, s 135(5)

## **Costs**

[34] Costs are reserved. If a determination of the Authority is required on costs, Scott may lodge a memorandum within 14 days of the date of this determination and Mr Snowling would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas  
Chief of the Employment Relations Authority