



## **Employment relationship problem**

[1] Evolve Education Group Limited says Helen Hobbs was overpaid \$14,750.00 gross during her employment as administrator for two childcare centres due to a mistake.

[2] Evolve says Ms Hobbs refused to repay the money when asked. However, Evolve said it managed to recover \$6615.18 gross by deduction from her final pay when she resigned. Evolve seeks to recover the outstanding amount of \$8,134.82.

[3] Ms Hobbs resists the claim of an overpayment on the basis Evolve's claim was outside the recovery period specified in s 6 of the Wages Protection Act 1983. She also resists Evolve's claim for the overpayment through the right of restitution, a common law remedy.

## **The Authority's investigation**

[4] Given the relatively narrow issues involved and the lack of significant factual contest, the parties were content to have the matter heard "on the papers".

[5] Evidence was provided in affidavit form from Ms Hobbs, Evolve payroll manager, Amuthini Mohanraj and former Evolve regional business manager – South Island, Melissa Hempstalk. The parties also provided relevant documents and submissions through their respective representatives.

[6] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Issues**

[7] The issues for investigation and determinations are:

- (i) Was Ms Hobbs overpaid wages by Evolve?;
- (ii) If so, is Evolve able to recover the overpaid wages?;
- (iii) If so, what amount is payable and over what period?; and

- (iv) Should either party contribute to the costs of representation of the other?

### **Narrative**

[8] Ms Hobbs initially worked 25 hours per week for Artemis Early Learning undertaking human resources, accounting and payroll functions. She was paid \$25 per hour. In late 2014, Artemis was bought by Evolve.

[9] Ms Hobbs was given a new individual employment agreement by Evolve effectively in identical terms as those provided by Artemis. However, as Evolve's head office was in Auckland, the functions performed by Ms Hobbs were no longer available for her to perform in Christchurch.

[10] In discussions with Ms Hempstalk, it was agreed Ms Hobbs would perform 25 hours work per week undertaking administration duties at two of Evolve's childcare centres and some auditing and training at other centres. Due to earthquake and space related issues Ms Hobbs appears to have predominately performed her duties from home. She said she asked Evolve to provide her with a computer at her house, but this was not forthcoming.

[11] At the request of Evolve's financial controller, Ms Hempstalk asked Ms Hobbs to fill out a timesheet. The reason for this was because Ms Hobbs' hours were being recorded against an operations budget and not a childcare centres budget. The timesheet was attached to an email sent by Ms Hempstalk to Ms Hobbs on 14 August 2014. Ms Hobbs claimed not to have received this timesheet. However, Ms Hobbs said she did email her hours per week to Ms Hempstalk. However, it appears Ms Hobbs only provided one email to this effect; otherwise Ms Hempstalk said she was not provided with her hours or the spreadsheet.

[12] In July 2016, the manager of one of the childcare centres requested that someone work in the office for four hours each morning. As Ms Hobbs was studying part-time, she was unable to perform those hours and someone else then undertook this work. Consequently, from that point on Ms Hobbs was only performing five hours work per week for the other childcare centre and some training.

[13] Ms Hobbs said Ms Hempstalk was aware of the situation and she presumed her pay would be adjusted accordingly. However, this was not the case.

[14] On 18 July 2016, having become aware there had been no adjustment to her pay, Ms Hobbs emailed Ms Hempstalk and advised her she was only working 5 hours per week at one of the childcare centres. Ms Hobbs asked for a new employment agreement to reflect the situation. Ms Hobbs said she received no response to this email.

[15] On 16 August 2016, Ms Hobbs again emailed Ms Hempstalk expressing concern she was being overpaid. Ms Hempstalk said she responded to this email by advising she could not find information from Ms Hobbs about how many hours she had been working at each childcare centre. Evidently this information was needed to activate a change to Ms Hobbs' hours for what appears to be accounting reasons.

[16] Ms Hobbs advised Ms Hempstalk she had been working 15 hours per week at one childcare centre and 10 hours per week at another (totally 25 hours per week) and was now working 5 hours per week at one centre.

[17] Ms Hempstalk said after her discussion with Ms Hobbs she submitted a form to Evolve's former payroll manager to commence the process of altering the payroll data for Ms Hobbs and her employment agreement.

[18] Ms Hobbs was provided with the employment agreement on 5 September 2016 with an effective date of 12 September 2016. Ms Hempstalk said Ms Hobbs did not sign and return the agreement. Ms Hobbs said she did not immediately attend to the agreement as she was dealing with other unrelated matters including her studies and because she was contemplating resigning. Ms Hobbs also said she thought someone from Evolve would go through the agreement with her. She said the agreement "fell off her radar".

[19] At or about this time, a new payroll manager, Ms Mohanraj began investigating Ms Hobbs' employment because she did not recognise her name on the payroll. After inquiries, Ms Mohanraj was advised by the manager of the childcare centre where Ms Hobbs performed her duties, she was not familiar with her work patterns but was working a "few hours per week". Ms Mohanraj was subsequently advised Ms Hobbs was working 5 hours per week.

[20] Ms Mohanraj undertook further investigations including finding various documentation relevant to Ms Hobbs' employment including the revised employment agreement. However, Ms Hobbs appears to have been again overpaid on 31 March 2017, due to an inability to correct the payroll system in time.

[21] Ms Mohanraj said Ms Hobbs had been provided with the revised employment on 5 September 2016, with an effective date of 12 September 2016, but had not returned it for "reasons unknown".

[22] In discussions with Evolve's general manager of people and capability Allan McGilvray, Ms Mohanraj was instructed to calculate the overpayment to Ms Hobbs from 12 September 2016 until 10 April 2017, when the payroll error for her was corrected.

[23] Ms Mohanraj using payslip history calculated the gross overpayment as \$18,500.00. She calculated the amount that should have been paid to Ms Hobbs as \$3750.00. This gave rise to a gross overpayment to Ms Hobbs of \$14,750.00 for the period 12 September 2016 until 10 April 2017.

[24] Evolve then attempted to negotiate with Ms Hobbs in relation to the overpayment. However, Ms Hobbs gave notice of resignation.

[25] In calculating final pay, Ms Mohanraj was instructed to deduct \$6,615.18 gross as part-repayment of the overpayment. Evolve said it was entitled to recover overpayments under cl 10 of Ms Hobbs' employment agreement. Clause 10 of the agreement relevantly provided for agreed deductions from wages, including final pay. One of the circumstances covered at sub-cl 10.1.5 was: "for any compensation payments made, for which the employee was ineligible". Ms Hobbs disputed the deduction at the time it was made and said it was undertaken without consultation and she did not consent to it.

[26] For completeness, the employment agreement provided to Ms Hobbs by Evolve in September 2016 contained a similar provision, but she did not sign this agreement.

[27] Evolve said the outstanding overpayment after this deduction was made was \$8134.82 and this is the amount it seeks to recover through the Authority.

## **Evaluation**

### *Was Ms Hobbs overpaid wages by Evolve*

[28] I am satisfied from the evidence Ms Hobbs was overpaid by Evolve. Indeed, Ms Hobbs did not actually dispute she had been overpaid; in the sense she asserted she had performed the extra 20 hours of work per week. Further, Ms Hobbs alerted Evolve to the overpayment, requested a change to her employment agreement to reflect her new hours and for reasons that are not entirely clear did not sign and return the agreement to Evolve when it was provided to her.

[29] While Ms Hobbs took issue with Evolve's calculation of the overpayment, she did not provide alternative calculations or other documentary evidence suggesting an alternative, presumably, lesser amount. Of concern here, is Ms Hobbs was provided with a template for recording her weekly hours when she commenced employment with Evolve. It is not unusual for employers to ask employees to complete timesheets, whether in paper or electronic form and use these as a means of assisting them to maintain accurate wage and time records as they are required to do. That Ms Hobbs did not complete this template actually contributed to the situation giving rise to the overpayment.

[30] I accept Ms Mohanraj used the best information available to her to calculate the overpayment, having discovered and investigated the error. It is unfortunate that corrective action was not taken earlier – most obviously in response to when first raised by Ms Hobbs with Ms Hempstalk – but the position was complicated by Ms Hobbs not returning the new employment agreement. In any event, Ms Hobbs has not been disadvantaged in respect of this because the calculation of the overpayment only commenced from 12 September 2016, being the effective date of the new agreement, until the date of her resignation.

[31] The period for the calculation is reasonable and attenuated by a genuine mistake of fact by Evolve. I find Ms Hobbs was overpaid \$14,750.00 in wages.

*Is Evolve able to recover the overpaid wages?*

*Through deduction from Ms Hobbs final pay?*

[32] As stated above, Evolve deducted \$6,615.18 from Ms Hobbs' final pay under cl 10 of her employment agreement. However, based on Ms Hobbs' evidence she withdrew her consent – which had been gained by Evolve through operation of cl 10 of the agreement – to the deduction prior to it being made under s 5(2) of the Wages Protection Act. Consequently, there is some doubt about whether the deduction was lawfully made. Ms Hobbs did not raise any counterclaim or seek penalties and/or interest arising out of this deduction so it is not necessary to consider such matters. Moreover, it is not for the Authority to create additional employment relationship problems between the parties. Consequently, the matter must be resolved carefully.

[33] In order to resolve the concern about whether the deduction from Ms Hobbs' final pay was lawful and to ensure a proper legal basis exists for the recovery of the overpayment, Ms Hobbs and Evolve are directed to exchange \$6,615.18 gross by cheque or equivalent electronic means.

*By right of restitution?*

[34] The Wages Protection Act 1983 is not available to Evolve to recover the amount of \$8,134.82 because recovery is sought outside the recovery period.<sup>1</sup> However, Evolve is not precluded from recovering this money outside the auspices of that Act. Indeed, it has sought to do so through an asserted right to restitution. Both the Employment Court and the High Court have found the Authority has jurisdiction to consider such claims.<sup>2</sup> I am satisfied Evolve has properly constructed its case, thereby distinguishing it from the difficulties found to exist in respect of a restitution claim for overpayment of wages in the recent decision of the Court in *Faoi v Air New Zealand Limited*.<sup>3</sup>

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<sup>1</sup> Wages Protection Act 1983, s 6.

<sup>2</sup> See, *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90 at [45] and *Aztec Packaging Ltd v Malevris* [2012] NZHC 243 at [25].

<sup>3</sup> [2012] NZEmPC 57. Confirmed on appeal in *Air New Zealand Limited v Faoi* [2012] NZCA 341.

[35] The right is usefully summarised as follows:

English law provides that a claimant will be entitled to restitution if he (sic) can show that a defendant was enriched at his (sic) expense, and that the circumstances are such that the law regards the enrichment as unjust. For example, a claimant will have a prima facie right to restitution where he (sic) has transferred a benefit to a defendant by mistake, under duress, or for a basis that fails.<sup>4</sup>

[36] The Court of Appeal has recently considered the basis upon which the remedy of restitution may be granted.<sup>5</sup> Applying those principles enunciated in that case, Evolve must establish Ms Hobbs was enriched through overpayment of wages, this was gained at Evolve's expense and it was unjust. Where these elements are established, restitution of the overpayment is on its face available to Evolve unless there are defences available to Ms Hobbs or some overriding legal principle exists to decline the remedy.

[37] Standing back and assessing the matter, I find Evolve has established the three requisite elements for making restitution, at least, available to it. The question then becomes are there any defences available to Ms Hobbs? In this regard, Ms Hobbs relied on the equitable defence of change of position. She did not raise the statutory defence contained in s 94B of the Judicature Act 1908 (as it was then).

[38] From the outset, however, Ms Hobbs faces difficulty in sustaining the defence of change of position. Ms Hobbs' assertion of the defence, based on her evidence, appears founded on a wrong assumption Evolve fixed the overpayment issue and because her wages were paid into a joint account, which dealt with such things as mortgage repayments and automatic payments, the overpayments were "absorbed by our general bills".

[39] Evolve submitted the defence was unavailable to Ms Hobbs because she knew she was being overpaid, advised Evolve of this and therefore it cannot be said she reasonably believed she was entitled to the overpayments or had received them in good faith. I accept this submission.

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<sup>4</sup> Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8<sup>th</sup> ed, Sweet & Maxwell, London, 2011) at [2.01].

<sup>5</sup> *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 90.

[40] I am satisfied Evolve's right to restitution is, on the facts, an available remedy and, in the absence of a defence by Ms Hobbs, it should be granted. For completeness, I am satisfied in the present circumstances there are no overriding legal principles which would make the grant of restitution to Evolve inappropriate.

*What amount is payable by Ms Hobbs to Evolve and over what period?*

[41] Ms Hobbs must pay Evolve \$8,134.82 as overpayment of wages. In addition, as stated above, the parties are directed to exchange \$6,615.18 by cheque or equivalent electronic means to resolve the issues arising out of a deduction from Ms Hobbs' final pay.

[42] The parties are directed to use their best endeavours to reach agreement on a payment schedule for \$8,134.82 and a timeframe for the exchange of \$6,615.18 and to submit any agreed position to the Authority for approval. If asked, the Authority will issue this agreed position as a determination or, preferably, a consent determination.

### **Costs**

[43] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.<sup>6</sup>

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>6</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].