IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

BETWEEN	HIGGINS COATINGS (PTY) LIMITED Applicant
AND	WILLIAM WATERS Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Russell Drake, Advocate for Applicant No appearance by Applicant
Investigation Meeting:	11 May 2018 at Auckland
Submissions received:	11 May 2018 from Applicant None from Respondent
Date of oral Determination:	11 May 2018
Date of written Determination:	14 May 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1]   The Applicant, Higgins Coatings (Pty) Limited (Higgins) wishes to recover overpaid wages made to the Respondent, Mr William Waters.

[2]   Higgins claims it has made demands of Mr Waters to repay the overpaid wages and the loan advanced but he has failed to acknowledge the correspondence sent by Higgins.

[3]   Additional information was supplied by Higgins following the Case Management Conference Investigation Meeting from the parties.

Service of documents on the Respondent

[4]   No Statement in Reply was received from Mr Waters. The Authority attempted without success to file the Statement of Problem on Mr Waters.

[5]   As a result Mr Drake effected personal service on 15 March 2018 at the registered office of Commercial Painting Limited, a business which the Respondent is Shareholder and Director.

[6]   Mr Drake has filed an Affidavit of Service with the Authority as confirmation that he served the following documentation with the Registered Office: (i) Notice of Service informing the Registered Office of their obligations to forward the documents to the Respondent; (ii) the Statement of Problem; and (iii) Forms for a Statement in Reply.

[7]   The Respondent was served with the Notice of Investigation Meeting on 2 May 2018 to the Registered Office of Commercial Painting Limited by courier, and a signature confirmed receipt.

[8]   Mr Waters did not attend the Investigation Meeting.

[9]   On the day of the Investigation Meeting an Authority Officer made contact with Mr Waters by telephoning the Registered Office of Commercial Painting Limited which made contact with Mr Waters.

[10]   Mr Waters telephoned the Authority, acknowledging receipt of some of the documents which had been served at the Registered Office, and stating that he was on his way to the Investigation Meeting.

[11]   The meeting was adjourned for 1 and a half hours in order to allow Mr Waters time to attend, but he did not attend, nor did he advise that he was delayed.

[12]   After one hour had elapsed, attempts by the Authority Officer to contact him by the mobile number supplied were not answered and went straight to the message service. Despite a message left asking Mr Waters to make contact, he failed to do so.

[13]   After waiting a further quarter of an hour, the Investigation Meeting was resumed.

[14]   For the reasons set out above I am satisfied that Mr Waters had notice of the application and the date of the Investigation Meeting. Mr Waters has not shown good cause for his failure to attend.

[15]   I have therefore proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 to act as fully as if Mr Waters had attended.

Issue

[16]   The issue for determination are whether or not Mr Waters should repay the overpaid wages received by him

Background Facts

[17]   Mr Waters was employed by Higgins as a Senior Project Manager from 12 October 2016 until 28 February 2017 when his employment was terminated as result of resignation.

[18]   Mr Waters was provided with an individual employment agreement (the Employment Agreement) which stated at clause 19 that overpayments of any entitlements could be recovered by Higgins, but further stated: "*This does not preclude Higgins' legal right to pursue recovery of any outstanding monies*".

[19]   Due to a clerical error Mr Waters continued to receive his salary payments for the period 1 March 2017 to 30 April 2017.

[20]   Upon becoming aware of the error, Higgins attempted to contact Mr Waters by means of email and made multiple telephone calls to request repayment of the overpaid sums, but did not receive a response.

[21]   As a result, on 11 May 2017, the Payroll Officer of Higgins wrote to Mr Waters at his home address requesting that the overpayment of $8,596.20 be paid into the Higgins bank account, details of which were included in the letter.

[22]   Having received no response, Higgins initiated proceedings for recovery in the Disputes Tribunal, but it (the Disputes Tribunal) advised that it was not the appropriate jurisdiction.

[23]   Accordingly Higgins instructed its legal advisors to take the appropriate steps for recovery and a Letter of Demand was sent to Mr Waters by Quigg Partners on 21 November 2017. The Letter of Demand stated that repayment was to be made as a matter of urgency and by no later than 1 December 2017.

[24]   There was no response and Higgins instructed Mr Drake to initiate proceedings in the Authority.

Determination

Did Mr Waters receive an overpayment of wages from Higgins which should be repaid?

[25]   Higgins seeks to recover an overpayment of wages made to Mr Waters. I have the supporting documents filed in evidence and I am satisfied the monies claimed as an overpayment have been paid to Mr Waters.

[26]   There is no evidence that Mr Waters has taken any steps to make repayment.

[27]   Section 6 of the Wages Protection Act 1983 (WPA) governs the circumstances in which an overpayment of wages may be recovered by an employer. The circumstances relate only to recovery of overpaid wages in respect of what the WPA defines as a recoverable period. None of the elements of the recoverable period apply in the present case, and thus the circumstances fall outside of s.6 of the WPA.

[28]   It is appropriate that I determine this issue. In *New Zealand Fire Service Commission v. Warner* [1] then Chief Judge Colgan decided that:

> *The Employment Relations Authority is the appropriate institution at first instance (and is empowered accordingly) in which to determine whether employees are required to repay to their employer monies overpaid mistakenly in the course of their employment relationship. If liability is established, the usual remedies for such causes of action are available to the Authority."*

[29]   In the case of *Foai v Air New Zealand Ltd* [2] Judge Ford considered and rejected an application by Air New Zealand Ltd for restitution in the situation in which it had over paid Mr Foai a significant amount of money. However whilst the application by the employer did not succeed on that occasion, the case highlights the right of an employer to bring such a claim and have it considered by the employment jurisdiction.

[30]   In this case, Higgins is seeking to recover in the Authority an overpayment made by it in error.

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[1] *New Zealand Fire Service Commission v. Warner* [2010] NZEMPC 90 at 45
[2] [2012] NZEmpC 57

[31]   I am satisfied from the evidence presented that Higgins made the overpayment as the result of a simple mistake which is one of the qualifying factors activating claim of unjust enrichment and gives rise to right to restitution.

[32]   Mr Waters received an overpayment of wages from Higgins which should be repaid.

[33]   Accordingly I determine that Higgins made an overpayment of wages to Mr Waters which should be repaid. Mr Waters is to repay to Higgins the total amount of overpaid wages in the sum of $8, 596.20 net.

[34]   This amount is to be repaid within 28 days of the date of this determination..

Costs

[35]   Higgins has applied for costs. The meeting occupied a half day Investigation Meeting.

[36]   The principles on which costs are awarded in the Authority are well known. This matter occupied half a day of an investigation meeting and I award costs at the normal daily tariff rate as applied in the Authority.

[37]   I order Mr Waters to pay Higgins the sum of $2,250.00 to be paid within 28 days of the date of this determination.

Eleanor Robinson
Member of the Employment Relations Authority