

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 361
3077352

BETWEEN	NOEL LEEMING GROUP LIMITED Applicant
AND	MICHAEL SAUNDERS Respondent

Member of Authority:	Nicola Craig
Representatives:	June Hardacre, counsel for the applicant The respondent in person
Investigation Meeting:	On the papers
Submissions and further information received:	9 June 2020 from the applicant Nothing received from the respondent
Date of determination:	4 September 2020

DETERMINATION OF THE AUTHORITY

- A. Michael Saunders is ordered to pay to Noel Leeming Group Limited the sum of \$14,768.54 net by way of instalments of \$200.00 per calendar month starting in October 2020, for an overpayment.**
- B. Costs are reserved.**

What is the Employment Relationship Problem?

[1] Noel Leeming Group Limited (NLG or the company) is a subsidiary of The Warehouse Group Limited (TWG), which carries out a large retailing operation. From late 2017 Michael Saunders worked as a Business Development Manager for NLG.

[2] In December 2018 Mr Saunders suffered an accident away from work and was off work almost entirely from 18 December 2018 until 31 March 2019. Upon his return NGL identified that Mr Saunders may have been overpaid during the time he was off work, by an estimated \$14,900. Discussion occurred but no agreement was reached regarding repayment.

[3] Mr Saunders was made redundant by NGL, finishing work on 16 November 2020.

[4] The parties went to mediation but could not resolve the overpayment issue.

What was the Authority's process?

[5] NGL seeks a declaration that Mr Saunders breached his implied duty of fidelity and an order that he repay the overpayment in full and on reasonable terms. No penalties are sought.

[6] Mr Saunders had limited involvement in this proceeding. He initially filed a statement in reply and participated in a case management conference held by telephone but subsequently did not respond to emails or comply with timetables set to file documents. He did not attend a second case management conference despite being informed that decisions may be made in his absence.

[7] During the time Mr Saunders dealt with the Authority, he accepted the amount claimed was owing but indicated he would have difficulty repaying it because of his financial situation.

[8] At the first case management conference the parties agreed to have this matter determined on the papers. NGL then filed an amended statement of problem changing the nature of the duty relied on in the declaration claim. Mr Saunders did not file any amended statement in reply nor documents sought by the Authority. However, his earlier statement in reply is relatively detailed and I refer to information from it in this determination.

[9] NGL filed documents and submissions, including documents specifically sought by the Authority.

[10] Under s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all of the evidence or submissions received but states findings and expresses conclusions.

What happened about the overpayment?

[11] As NGL is seeking a finding regarding Mr Saunders' duty of fidelity, it is necessary to look at events during Mr Saunders' time on ACC and his return to work.

[12] NGL emphasises that two of its managers kept in contact with Mr Saunders during his absence by phone, SMS and email. He was provided with the company's sick leave policy and reminded to contact ACC. Mr Saunders also refers to getting information from a third party claims administrator that the company used to manage claims and liaising with the administrator.

[13] Around the time Mr Saunders returned to work a NGL manager noticed a discrepancy in a pay report. Payroll confirmed that Mr Saunders had been receiving his regular salary in addition to ACC payments during his leave of absence.

[14] The manager spoke to Mr Saunders and followed up in writing. NGL sought confirmation of Mr Saunders' plan to refund the overpayment. Mr Saunders advised that he was meeting with ACC that week and would then update the company.

[15] When NGL perceived a lack of response from Mr Saunders it put a temporary hold on his pay.

[16] On 26 April 2019 Mr Saunders met with NGL. Mr Saunders objected to NGL's failure to transfer his pay and challenged the legality of that action. He said that he did not realise he was being paid both his salary and his pay for ACC. He questioned NGL's enquiry about where the money was but mentioned that he had spent it. He offered to repay at \$100 per month but that was not accepted. In addition, Mr Saunders disputed what appears to have been a small portion of the overpayment, saying he had come in to work on some of the days included or was on annual leave.

[17] NGL agreed to re-look at the figures and asked Mr Saunders to fill in his leave calendar. NGL provided Mr Saunders with a file note setting out the discussion and what the next steps were. It arranged for a manual transfer of his pay.

[18] A few weeks later NGL wrote confirming that the total overpayment was \$14,768.54 net. The reason identified for the overpayment was timesheets not being updated in the pay system to reflect ACC payments. No claim was made for the December period of Mr Saunders' absence, as some of this time he was on unpaid sick leave and some on annual leave.

[19] The company suggested full payment within two months or a repayment plan of \$1,000 per month to be deducted from Mr Saunders' salary. No agreement was reached.

[20] Mr Saunders' role was later declared redundant. The amount of redundancy compensation initially mentioned by NGL was later reduced. Mr Saunders initially thought this may have reflected the overpayment issue however, there is no evidence of any deduction being made from his final pay towards the overpayment.

Did Mr Saunders breach his implied duty of fidelity?

[21] Employees owe a duty of fidelity to their employer. NGL argues that Mr Saunders breached this duty by failing to act in an honest and truthful way when he was aware, or ought to have been aware, of the overpayment.

[22] The duty of fidelity only continues as long as the employment relationship, so does not relate to Mr Saunders' actions after he left NGL.

[23] NGL submits the question is whether the conduct would be looked at by a person of ordinary honesty as dishonest conduct towards an employer.

[24] The company argues that Mr Saunders was aware or ought to have been aware that he was receiving his regular salary as well as weekly payments from ACC. It was submitted that he was receiving 180% of his regular salary, however, I have no contemporaneous evidence to support that.

[25] According to Mr Saunders' agreement his salary was paid monthly. Payslips are said to be available via the intranet. There is no evidence regarding Mr Saunders' access to the intranet when he was on the extended leave of absence.

[26] Mr Saunders says that he believed he was due commission on some big projects which had come to fruition whilst he was on leave and believed he had been paid commissions and not salary. He thought he was entitled to the money and did not think

the company would make a mistake when he was doing what he had been asked to do, namely supply medical certificates to his manager.

[27] Mr Saunders was under an incentive scheme which included two different types of incentives or commission. In the three page incentive document, although there is reference to incentives being paid quarterly, there are also several references in the scheme to monthly and annual incentives.

[28] NGL says Mr Saunders was not entitled to commission payments as he had not met the criteria, not being at work to earn commission. However, the scheme document records:

Where an employee has a leave of absence (such as unpaid leave or parental leave) then any payments will be pro-rated on the number of months in the Scheme.¹

[29] In addition at NGL leave could be used to top up insurance/ACC payments, so payments from the employer could not be said to be entirely unexpected when an employee was off injured.

[30] I also take into account Mr Saunders' health during the payment period although only limited information is available. He refers in a January 2019 email sent to NGL, to being on strong pain medication and this meaning sleep was difficult. Mr Saunders had what could be described as complex surgery requiring hospitalisation in the payment period.

[31] Of significance too is that NGL chose not to take any disciplinary action against Mr Saunders when it discovered the overpayment and discussed it with Mr Saunders.

[32] Other than wanting checks regarding some minor aspects, Mr Saunders did not deny receipt of the money. Mr Saunders effectively admitted that he had been overpaid. He offered to repay.

[33] NGL suggests that Mr Saunders had a duty to bring the overpayment to NGL's attention but chose not to do so. However, the claim is not based on a breach of the duty of good faith. The Employment Court has expressed strong reservations about the

¹ Second page of TS4B Business Development Manager Incentive Scheme.

statutory duty of good faith being translated by into an implied term of employment agreements.²

[34] In conclusion NGL's claim is essentially that Mr Saunders had a duty to bring the overpayment to the company's attention but chose not to do so. There is evidence of other possible payments which could have been received from NGL, the involvement of a third party administrator and Mr Saunders being on strong medication and hospitalised for complex surgery. On the basis of the evidence before me NGL has not established that Mr Saunders breached his duty of fidelity.

Should Mr Saunders have to pay NGL?

[35] NGL's alternative basis for its claim is unjust enrichment. Mr Saunders has received a payment that he was not entitled to, has been unjustly enriched and should be deprived of it, by being required to pay it back to NGL.

[36] The Authority has jurisdiction to determine overpayment claims.³

[37] The elements required to be established are:

- (i) The enrichment of Mr Saunders;
- (ii) A corresponding deprivation by NG; and
- (iii) The absence of some legal principle justifying Mr Saunders enrichment and negating NGL's claim.⁴

[38] Mr Saunders accepted to the Authority that he had received an overpayment. That was salary paid by NGL when it was not required to do so as Mr Saunders was off work and covered by ACC weekly compensation. Mr Saunders has made no repayments to NGL.

[39] I now look at the equities of the situation. NGL implied that it was Mr Saunders' failure to fill out timesheets recording his leave which caused the mistaken payment. However, I cannot be satisfied on the evidence before me that Mr Saunders was at fault or that the fault was entirely his. Mr Saunders' explanation that he was sending in his medical certificates to his manager and liaising with the administrator as requested,

² *Johnston v Fletcher Construction Company Ltd* [2019] NZEmpC 178 at [110].

³ *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90.

⁴ *Commissioner of Inland Revenue v Stiassny* (2012) 10 NZBLC 99,704 CA.

thought HR would do what was required and was not aware of further obligations seems feasible.

[40] On the other hand this is not a situation where Mr Saunders raised concerns about his pay only to be reassured by NGL. NGL did not indicate that all was well or that his pay was correct.

[41] I have examined whether Mr Saunders can be said to have relied on the payment, changing his position for the worse, and thus be able to establish a defence of change of position.⁵

[42] Mr Saunders told NGL he had spent the money. That of itself, does not mean it will be inequitable for him to have to repay it.⁶ However, he did not file information on his financial position, despite being directed to do so by the Authority.

[43] Mr Saunders has not provided any evidence that he altered his position detrimentally in reliance on the money received. I am unable to find any basis on which he should not have to pay it all back to NGL.

Should instalments be ordered?

[44] NGL recognises that Mr Saunders should be required to repay under a fair arrangement.

[45] The statement in reply refers to offers made by Mr Saunders in the past to pay \$100 or \$150 per month towards the overpayment. At the case management conference on 10 February 2020 Mr Saunders indicated that he could only pay \$50 per month, which would take approximately 25 years to repay. Mention was made of another bill he had to pay at that time.

[46] NGL notes that Mr Saunders has not provided any evidence to suggest he would not be able to repay instalments of \$500 per month. However, there is no evidence that Mr Saunders has found other employment. The most recent evidence is that he is still in receipt of ACC. That presumably puts him in the position of receiving 80% of his former NGL income.

⁵ *Foai v Air New Zealand Limited* [2012] NZEmpC 57.

⁶ *Lipkin Gorman (A Firm) v Karpnale Limited* [1991] 2 AC 548 cited in *Foai v Air New Zealand Limited*, above n 5 at [74].

[47] I have attempted to balance what is known of Mr Saunders' circumstances with the undesirability of an instalment plan which runs over decades.

[48] I order Michael Saunders to pay Noel Leeming Group Limited the sum of \$14,768.54 net by way of instalments of \$200 net per calendar month starting in October 2020 until such time as the sum is repaid.

Costs

[49] NGL has been partially successful in its claim. I have not made the breach of implied term finding the company sought but have ordered Mr Saunders to repay the overpayment. NGL is entitled to seek some contribution to its costs of representation. The parties are encouraged to reach an agreement on costs. If they are unable to do so NGL have 21 days from the date of this determination to file a memorandum seeking costs, which must be accompanied by evidence of costs and disbursements incurred. Mr Saunders will then have 14 days from receipt to file a memorandum in reply.

[50] The Authority operates a notional daily tariff regime, which provides for \$4,500 for the first day of an investigation meeting. However, as this matter was resolved in a relatively straightforward manner on the papers, the parties could expect that to be reflected in any costs award.

Nicola Craig

Member of the Employment Relations Authority