

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN North Shore City Council (Applicant)
AND James Nicholas Sutton (Respondent)
REPRESENTATIVES Mike Clark, representative for the Applicant
James Sutton, in person and Glen Finnigan
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 28 February 2005
FURTHER INFORMATION AND SUBMISSIONS RECEIVED 7, 16 March, 11, 22, 29 April and 3 May 2005
DATE OF DETERMINATION 30 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The North Shore City Council (“the Council”) says Mr Sutton has been overpaid the sum of \$11,210.45 and seeks an order requiring Mr Sutton to repay this sum.

[2] Mr Sutton says the overpayment was a mistake on the part of the Council. He says should not be required to repay the overpayment. In addition Mr Sutton has raised a counterclaim for unpaid overtime payments.

[3] At the investigation meeting I received evidence from witnesses for the Council, Trish Purchase and David Law, and Mr Sutton. Mr Sutton was provided with an opportunity to confirm whether he challenged the calculation of the amount of the overpayment following the investigation meeting. Subsequent to the investigation Mr Sutton instructed Mr Finnigan to represent him. Mr Finnigan has provided further information and submissions in opposition to the Council’s claim and in support of Mr Sutton’s counterclaim. The Council have had an opportunity to respond.

Was Mr Sutton overpaid?

[4] Mr Sutton was employed by the Council in 1999 as a part-time parking meter mechanic. His individual employment agreement required an annual review of salary and as a consequence he received a salary increase in each year of his employment. Every year this increase was implemented in identical fashion; Mr Sutton received written notice of the increase at the end of the year in which he was invited to acknowledge and accept the increase by way of countersignature, which he invariably did.

[5] By letter dated 23 December 2002 Mr Sutton received notice of the pay increase for that review year from Don Munro, Group Manager Roading and Transport. The letter included:

“The change to your remuneration will be effective from **6 January 2003**. The details are:

	Current	New
Salary	\$23,438	\$25,000

Please note that this is a Full Time Equivilant (sic) salary and that the change will affect your hourly rate.

As your remuneration cannot be changed without your formal acceptance, I would be grateful if you would sign and return the enclosed copy of this letter before this offer expires (in one month from the date of this letter). Please note that all other terms and conditions of your employment agreement will remain unchanged.”

[6] Mr Sutton duly signed and returned the letter. The date of acceptance recorded by Mr Sutton on the letter is 14 January 2003.

[7] Mr Law is the Council’s human resource manager. He provided unchallenged evidence to the Authority of how the overpayment to Mr Sutton occurred. Mr Law said that following Mr Sutton’s advice of acceptance of the pay rate offer the new pay rate was loaded into the pay system by a pay clerk. The new salary rate was loaded as \$25,000 per annum. The hourly rate was loaded as \$24.038, exactly twice the hourly rate of a salary of \$25,000. The correct hourly rate for a salary of \$25,000 is \$12.019.

[8] Mr Sutton’s next pay following acceptance of the salary increase was 31 January 2003. The pay included a component of back pay and was calculated at the hourly rate of \$24.038. Mr Sutton said he was surprised by the large amount and recalled commenting to his team leader, Ms Purchase, that “this seems an odd amount” and her replying “it is back pay” and that everything was “fine”. Ms Purchase recalled Mr Sutton saying “Santa has come early this year” and that she assumed Mr Sutton was commenting favourably about the back pay. Mr Sutton and Ms Purchase agreed the discussion did not cover specific figures and there was no examination of any documents such as Mr Sutton’s pay slip or bank book. Ms Purchase was not the Council officer responsible for setting salary rates.

[9] Mr Sutton said he let the payment sit in his bank account for a few pay cycles “to see what would happen”. He said he thought if it was a mistake the Council would surely have picked it up. Other than speaking to Ms Purchase, Mr Sutton did not raise the issue about his payment again with the Council.

[10] I was shown copies of Mr Sutton’s payslips. They record his annual salary as \$25,000 and his hourly rate as \$24.038. From 31 January 2003 until Mr Sutton’s resignation in August 2003 his pay was calculated at the hourly rate of \$24.038.

[11] The alleged overpayment was discovered after Council received Mr Sutton’s resignation in August 2003.

[12] The evidence shows Mr Sutton and the Council agreed a specified salary increase on 14 January 2003 and that from 31 January 2003 until his resignation in August 2003 Mr Sutton was paid exactly twice the agreed rate. The parties did not contract to pay Mr Sutton at the rate of \$24.38 per hour. They contracted to pay Mr Sutton at the rate of \$25,000 per annum. Mr Sutton was overpaid the amount of \$11, 210.45.

Is Mr Sutton required to repay the overpayment?

[13] The Authority has jurisdiction to deal with overpayment claims (section 161 Employment

Relations Act 2000).

[14] Mr Finnigan submits it would be inequitable to require Mr Sutton to repay the amount. He submits Mr Sutton has relied on the payments to purchase a business and has no funds to repay the amount. Mr Finnigan submits section 94B Judicature Amendment Act applies and provides Mr Sutton with a defence to the claim for repayment.

[15] This fact situation is distinguishable to that in *Master Builders' Association (Auckland) Inc v Doe* [1997] ERNZ 331. The overpayments made to Mr Sutton were made while the employment relationship was extant.

[16] I am satisfied the error which resulted in overpayments being made to Mr Sutton during the course of his employment were not made recklessly or indifferently. I am also satisfied on the evidence received from Mr Sutton that he was aware the Council had overpaid his wages and that he was aware this overpayment was a mistake.

[17] Mr Sutton and the Council agreed to a specific increase in his salary level on 14 January 2003. The mistaken overpayment was not the result of a further agreement between the parties to increase Mr Sutton's salary level to that paid. The evidence does not establish Mr Sutton received the overpayments in good faith. No valid defence to recovery exists.

[18] James Sutton is required to pay the North Shore City Council the sum overpaid to him in wages, amounting to \$11,210.45.

Overtime payments

[19] Mr Sutton has calculated the amount owed to him in unpaid overtime payments is \$7479.07. The Council have not challenged this amount. I am satisfied on the evidence received this sum is due and owing to Mr Sutton.

[20] North Shore City Council is ordered to pay James Sutton the sum of \$7479.07 (gross) in unpaid wages.

Costs

[21] Costs are reserved. Both parties have been successful so I am inclined to the view costs should lie where they fall. However, if there is any issue as to costs the parties may file memoranda within 14 days of the date of this determination. Any replies should be filed within a further seven days.

Marija Urlich
Member of Employment Relations Authority