

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 493
3168686

BETWEEN	PATHWAYS HEALTH LIMITED Applicant
AND	DANIA LOMAS Respondent

Member of Authority:	Marija Urlich
Representatives:	Andrea Twaddle, counsel for the Applicant Ms Lomas in person
Investigation Meeting:	On the papers
Submissions and further information received:	14, 18 July and 18 August 2022 from the Applicant 24 August and 21 September 2022 from the Respondent
Determination:	6 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dania Lomas was employed by Pathways Health Limited (PHL) from December 2019 until her resignation effective 28 October 2021. From 15 November 2020 to 15 August 2021 Ms Lomas took a period of unpaid leave. Despite it being a period of unpaid leave, from 15 November 2020 to 15 August 2021 PHL paid Ms Lomas her usual wages totalling \$40,152 (gross).¹ PHL says the wages paid to Ms Lomas during her period on unpaid leave are overpayments and seeks orders to recover from her the outstanding overpayment balance of \$27,637.66 (net). PHL also seeks an order for interest, a penalty for breach of good faith under the Employment Relations Act 2000 and a contribution to costs.

¹ Total net sum paid to Ms Lomas in this period was \$28,437.66.

[2] It is understood from Ms Lomas' statement in reply dated 19 April 2022 and her affidavit dated 21 September 2022 that she accepts she needs to repay this sum to PHL, less repayments made to date of \$800, but has been unable to make further payments due to her circumstances.

The Authority's investigation

[3] By consent this matter is determined on the papers. Affidavit evidence was received from Ms Lomas and Rochelle Trudell who is employed to provide human resource support to PHL. Relevant information was also provided by the parties including submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

Issues

[5] The issues for investigation and determination are:

- i) Did PHL overpay Ms Lomas \$28,437.66 (net)?
- ii) If so, is PHL entitled to recover that amount from Ms Lomas less any sum repaid?
- iii) If recovery is ordered should interest be awarded?
- iv) Has Ms Lomas breached the duty of good faith by either failing to advise PHL she was receiving wages while on leave without pay or failing to repay the amounts received?²
- v) If so should a penalty be ordered payment of whole or part to be made to PHL?
- vi) Should an award of costs be made?

² Section 4 Employment Relations Act 2000 and clause 7(c) of the applicable collective employment agreement 1 July 2020 – 30 June 2023.

Discussion

Was Ms Lomas overpaid wages by PHL?

[6] I am satisfied the evidence establishes PHL overpaid Ms Lomas the wage sum claimed. Ms Lomas does not dispute she was overpaid and has not taken issue with the calculation of the overpayment. She has made some repayments to PHL of the overpaid wages totalling \$800 which, I accept ceased because of her personal circumstances at that time.

Is PHL able to recover the overpaid wages from Ms Lomas?

[7] PHL seeks to recover the overpaid amount by right of restitution. The Authority has jurisdiction to consider such claims.³ To establish a claim in restitution PHL must establish Ms Lomas was enriched through overpayment of wages, this was gained at PHL's expense and it was unjust.⁴ If these elements are established any defences available to Ms Lomas would need to be considered. For completeness, the overpayment cannot be claimed under s 6 of the Wages Protection Act 1983 because the circumstances for recovery under that statutory scheme cannot be met.

[8] The overpayment was made in error - the parties agreed to Ms Lomas taking an extended period of unpaid leave, this was not updated in the payroll system and Ms Lomas continued to receive her ordinary pay for a considerable period until the error was identified by PHL. I accept the failure to update the payroll system to reflect the parties' agreement to unpaid leave was caused by a human error. I also accept the elements of restitution are met - Ms Lomas received the wages and used them to her benefit to meet personal outgoings when, on her own account, she had no reasonable basis to believe she was entitled to those wage payments and the payment of the wages was at the expense of and to the detriment of PHL which has mistakenly used resources which could have been used elsewhere in the organisation.

³ See *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90 at [45], *Aztec Packaging Ltd v Malevris* [2012] NZHC 243 at [25].

⁴ *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 90.

[9] Ms Lomas does not assert an equitable defence against recovery of the overpayment. This is not a situation like *Air New Zealand Ltd v Foai* [2012] NZCA 341 where no particular mistake in fact could be identified which caused the error which led to the overpayment or the employee had altered their position in reliance on assurances from the employer that they were being correctly paid or was dismissed consequent to the discovery of the overpayment.

[10] Having assessed the equities of this situation I am satisfied the justice of the matter weighs in favour of PHL being able to recover the overpaid sum of \$27,637.66 (net) from Ms Lomas.

Interest

[11] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. PHL is entitled to an award of interest on the overpayment ordered.

[12] Ms Lomas is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:⁵

- (i) Interest on the total overpayment to be calculated from date of determination until the date payment is made in full.

Did Ms Lomas breach the statutory duty of good faith?

[13] On the information provided to the Authority I am satisfied Ms Lomas knew from soon after the commencement of her period of unpaid leave when she started receiving income protection payments that PHL's continued payment of wages to her was in error and that she ought to do something about the situation. While it is accepted Ms Lomas' personal circumstances at this time were such that her failure to take immediate action to draw to PHL's attention the wage payments or repay the wages could be seen as understandable in the short term, her continued failure over many

⁵ www.justice.govt.nz/fines/civil-debt-interest-calculator

months not to tell PHL about the payments and not to repay the overpaid amounts was a failure of the statutory duty of good faith. Under that duty Ms Lomas was obliged to be active and constructive in maintaining a productive employment relationship and responsive and communicative. Ms Lomas' action (or inaction), as described above, was inconsistent with this obligation particularly given she was in communication with PHL during the period in question over a range of matters including the income protection payments PHL had actively supported her in securing and she sought agreement from PHL for a further period of unpaid leave to which it agreed.

Should a penalty be ordered against Ms Lomas?

[14] Having found Ms Lomas has breached the statutory duty of good faith in two respects I must next consider whether the award of a penalty is warranted.⁶

[15] In considering whether a penalty is warranted and, if so, at what level, I have had regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁷

[16] The breaches are sufficiently interrelated to warrant a globalised approach. The maximum penalty against a person is \$10,000.

[17] The objects of the Act include building productive employment relationships through the promotion of good faith. Ms Lomas' actions have been found to amount to a breach of those obligations. The breaches arose from Ms Lomas' knowing failure to draw to PHL's attention that she was receiving the wage payments in error and that breach was compounded by the failure to take reasonable steps to repay the wages which Ms Lomas knew she was receiving in error. Given the many months over which Ms Lomas received the overpayments the breaches, as found, must be seen as deliberate, serious and sustained. Ms Lomas' acceptance that the overpayment must be repaid and her payments to date are to be considered to have been made in mitigation of the breaches.

⁶ Sections 4A and 134(1) of the Employment Relations Act 2000.

⁷ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

[18] There is evidence of direct loss or damage suffered by PHL resulting from Ms Lomas' breaches – it continued to pay Ms Lomas wages in error over many months and PHL has used further resources to recover those monies from Ms Lomas. I am satisfied a significant amount of time and resources has been expended in seeking to recover the overpayments as well as the legal cost, all of which will not be fully recoverable through this claim.

[19] There is no relevant previous conduct of Ms Lomas' before the Authority to consider.

[20] On the information before the Authority the repayment of the overpayment is likely to create a financial strain for Ms Lomas and this is a factor to take into account in setting an appropriate level of penalty.

[21] Standing back, looking at all the circumstances of this matter and, in comparison to other cases I conclude that a fair penalty is \$2,000. Ms Lomas is ordered to pay a penalty to PHL of \$2,000 to compensate it for the inconvenience and resources expended in pursuing this matter. The penalty is to be paid within 21 days of the date of this determination.

Outcome

[22] Ms Lomas must pay Pathways Health Limited \$27,637.66 within 21 days of the date of determination.

[23] Ms Lomas is to calculate and pay interest on \$27,637.66 from date of determination until the date the sum is paid in full to Pathways Health Limited.

[24] Ms Lomas must pay a penalty of \$2,000.00 for her breaches of the duty of good faith within 21 days of the date of this determination. All this sum is to be paid to Pathways Health Limited.

Costs

[25] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[26] If they are not able to do so and an Authority determination on costs is needed Pathways Health Limited may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Lomas would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[27] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[28] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Marija Urlich
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.