



**cullings** is the newsletter of  
**Cullen – the Employment  
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DISCLAIMER: This newsletter is intended to provide our clients with general information. While all statements are believed to be correct, no liability can be accepted for incorrect statements. Readers should not act or rely on this general information without seeking specific legal advice.

## The big payback

**E**mployers who become aware of an overpayment of salary or wages should act quickly. Failure to act in time can mean losing the right to recover the money. A timely cautionary tale involving Air New Zealand has highlighted the perils of leaving things too late.

### The Time and Attendance Administrator

Clint Foai had worked at Air New Zealand for five years as a part-time loader before being given a temporary assignment as the Time and Attendance Administrator. Still being classed as a part-time worker, Clint's pay was based on his "average earning hourly rate". This amount was the total of the last 52 weeks' earnings divided by the number of hours actually worked. While Clint could not understand how this translated into a precise wage, he understood that it should work out roughly to what he was earning as a loader. Clint was more concerned with the fact that at long last he could spend the weekends with his daughter.

Soon after Clint started he began receiving more money than he had been earning as a loader. He shared his concerns with his manager who assured him that the system would work out his correct rate. Clint also raised the issue with the Human Resources Manager, but he reassured Clint with similar advice.

Air New Zealand continued paying Clint more than what he expected. Clint raised the issue with the Auckland Payroll team and once more with the Human Resources Manager. Each time he was told that he was being paid as he should be.

### Let the good times roll

As the payments continued Clint began to make some major changes to his life. He moved out of home and purchased what he needed to live independently. He took his parents to Samoa to celebrate their 35th wedding anniversary and also visited friends and family living overseas.

Even as a loader Clint had been a conscientious worker. Following a restructure announcement

he had organised a family day for the loaders in Wellington to boost staff morale. Rob Fyfe was invited, and as a result the CEO later worked as a loader for the day. Mr Fyfe later thanked Clint and gave him Hurricanes tickets. In his new role Clint helped to organise outside of work events for staff and their families. Clint thought that perhaps as a result Mr Fyfe was pulling some strings for him to earn more money.

### The gravy train runs dry

By the time Air New Zealand became aware of its error, Clint had been overpaid more than \$70,000. Because too much time had passed it could not claim the overpaid monies under the Wages Protection Act and so turned to the law of restitution.

Air New Zealand's claim failed at the Employment Court as it could not establish a specific fact about which it had been mistaken which led to the overpayment. Even if it had, the Court held that Mr Foai had acted in good faith. He was careful to bring the problem to the attention of Air New Zealand and he was entitled to have a reasonable expectation that Air New Zealand would not misrepresent his pay. Added to this he had spent all the money he had received, so there was nothing for him to give back.

As a result Air New Zealand could not retrieve the overpaid monies. Undoubtedly Air New Zealand's total loss would have been inflated by legal costs.

### Options for employers

#### The Wages Protection Act

The first port of call for employers following overpayment is the Wages Protection Act. This enables an employer to make a deduction from an employee's payslip as a result of a previous overpayment. An employer must give notice of their intent to deduct wages and in most cases this needs to be done no later than the pay day following the overpayment. Once the notice is given the employer has two months to make the deduction.

## Restitution

The *Foai* case demonstrates that an employer can be successful in a claim of restitution so long as they correctly plead their case and the employee has no defence. For restitution an employer needs to show:

- that an employee has been enriched;
- that the enrichment was at the employer's expense; and
- that the circumstances are such that the law regards this enrichment as unjust.

Mistake is one factor which activates the law of restitution. In order to demonstrate a relevant mistake in restitution an employer must identify:

- the payment made by the employer to the employee;
- a specific fact about which the employer was mistaken in making the payment; and
- a causal relationship between the mistake of fact and the payment.

It is important to consider that a claim in restitution involves litigation and may well not be worth the legal costs involved. In the *Foai* case, Air New Zealand has likely spent more than the \$42,000 it is seeking to recover in the Court of Appeal.

## Conclusion

Employers have a small window of opportunity in which to take advantage of the statutory power to deduct an overpayment. It is imperative for employers to create a constructive and responsive culture when dealing with employee pay enquiries. This is especially so for larger corporations where unresolved queries can fall between the cracks.

### Congratulations Fred Cullen – The Employment Law Firm

congratulates Fred Hills upon being admitted as a barrister and solicitor of the High Court of New Zealand.



### Panel for External Legal Services to Government

**Cullen – The Employment Law Firm** is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

## SOCIAL MEDIA and EMPLOYMENT LUNCHTIME SEMINAR — 4 JULY 2012

**S**ocial media has opened a new frontier of communication in the 21st Century. Employers need to be aware of what this will mean for their businesses.

Despite this, many employers remain uncertain about how to properly respond to the use of social media by employees, both in the workplace and in their own time. At the same time many businesses are unaware of the potential competitive advantages that social media can offer.

Peter Cullen, Partner, **Cullen – The Employment Law Firm**, and Tom Reidy, Managing Director of social media agency **Catalyst90**, will be presenting this seminar designed to give practical advice to employers on the legal and competitive implications social media can have for their businesses.

**Date:** Wednesday, 4 July 2012

**Time:** 12:00pm – 1:30pm

**Location:** NZIM Northern, Level 4, DLA Philips Fox Tower, 209 Queen Street, Auckland

**Price:** Members – \$30 including GST  
Non Members – \$40 including GST

**Enrol:** [www.nzimnorthern.co.nz](http://www.nzimnorthern.co.nz)  
or call NZIM 0800 800 694

The seminar will cover the following issues:

- The employment relationship of trust and confidence
- Monitoring employee use of time
- Bringing the employer into disrepute
- Confidentiality and security
- Employee social media policy
- Employee privacy
- Disciplinary action/dismissal
- Safe interviewing tips
- Recent employer breaches
- Maximising business visibility
- Social media as a hiring tool
- Controlling the effect of social media
- Troubleshooting