IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 57
WRC 36/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CLINT FOAI Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 31 October and 1 November 2011, 24 November 2011
(Heard at Wellington)

Appearances: Johanne Greally, counsel for the plaintiff
Tim Cleary, counsel for the defendant

Judgment: 4 April 2012

JUDGMENT OF JUDGE A D FORD

Introduction

[1] During the course of a 16-month period between July 2007 and November 2008, the defendant (Air New Zealand) overpaid Mr Foai, who was then on its payroll, a total of $70,428.04. The company now seeks to recover the nett amount of the overpayment which equates to $42,635.40. It was successful in its claim before the Employment Relations Authority (the Authority) and Mr Foai has challenged that particular determination. Mr Foai does not, at this point in time, dispute the overpayment but he maintains that he received his wages in good faith and that he altered his position in reliance on the validity of the wages he was paid. He, therefore, seeks to rely upon the equitable defence of change of position and the statutory defence under s 94B of the Judicature Act 1908 in support of his contention that the defendant is not entitled to recover the overpayment of wages.

[2] Mr Foai's employment with Air New Zealand was terminated in July 2009. Air New Zealand claimed that there had been a fundamental breakdown of trust and confidence in the employment relationship in four respects. Relevantly, one of its allegations was that Mr Foai had not been proactive enough in querying the overpayment. Mr Foai pursued a personal grievance in the Authority claiming that he had been unjustifiably dismissed. The Authority issued a determination[1] in relation to that grievance on 30 June 2010. There was no challenge to that determination and the claim relating to Mr Foai's dismissal, therefore, forms no part of the case before me. The parties accept that the only relevance of the Authority's determination dated 30 June 2010 is that, by agreement, it reserved making a determination on two of the issues that had been raised before it. One of those issues was Air New Zealand's claim in respect of the overpayment and the other was a claim by Mr Foai that Air New Zealand was required to pay to him the sum of $9,363.04 which it had withheld from his final pay and purported to offset against the overpayment.

[3] Subsequently, the Authority was requested to revisit the two issues it had reserved making a determination on and in a further determination[2] dated 8 November 2010, it concluded that Air New Zealand was required to pay Mr Foai the sum withheld of $9,363.04 together with interest and Mr Foai was required to repay Air New Zealand the sum of $42,635.40 being the nett amount of the overpayment. Air New Zealand has accepted that it is required to pay the amount withheld of $9,363.04 but Mr Foai has challenged that part of the determination that dealt with the overpayment. In particular, he challenges the Authority's conclusions that Air New Zealand was not precluded from recovering the amount of the overpayment as "a recoverable debt" and its factual finding that while Mr Foai accepted his pay in good faith and did ask questions to check that he was being properly paid, "Air New Zealand had no knowledge of a problem." Mr Foai told the Court that since his dismissal from Air New Zealand, he has had various casual and part-time jobs. Currently, he is working as a Court Security Officer with the Ministry of Justice.

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[1] WA 120/10.
[2] WA 120A/10.

Background

[4] Mr Foai commenced working for Air New Zealand Airport Services on 20 March 2002 as a casual loader/cleaner at Wellington Airport. Initially, he was not a member of the union but he later joined. His terms and conditions of employment were set out in an individual employment agreement dated 19 March 2002 which incorporated the terms and conditions of the Air New Zealand Ground Staff Collective Employment Agreement. He was employed on an "as required" basis to cover absences of permanent employees. He described his duties as being the loading and unloading of luggage and freight and the interior cleaning of aircraft.

[5] As from 30 September 2002, Mr Foai's status changed from a casual worker to that of "Permanent Part-time Airline Serviceperson". That position was confirmed in a letter dated 27 September 2002. His status under the new individual employment agreement which he signed on 21 October 2002 was shown as "Part time Airline Serviceperson". He continued to be bound by the Ground Staff Collective Agreement. Mr Foai said in evidence that he remained a part-time employee until March 2007. During that period he worked under a roster which required him to work split shifts. He was living at Porirua at the time and he said that he found the split shift work frustrating because of the effects his irregular working hours were having on his young family. For that reason, he became anxious to secure a full-time position. He made four applications for full-time positions during the period he was employed on a part-time basis but on each occasion he was unsuccessful.

[6] Mr Foai's change of status from casual worker to part-time serviceperson did not result in any immediate pay increase. His individual employment agreements, dated 19 March 2002 and 21 October 2002 respectively, stated clearly that he would be paid at a rate of $11.192 per hour (the October agreement actually showed a figure of $11.1928). That hourly rate figure increased over time and Mr Foai said that in early 2007 he was paid $17 per hour for up to 30 hours per week. He would then work overtime according to the roster and be paid at time and a half for the first three hours and double time thereafter. Mr Foai said that when he worked "a lot of overtime" as a part-time loader he could earn "about $2000 per fortnight".

[7] In 2005, Mr Foai was awarded a letter of appreciation from the airport manager for having handed in a wallet which he had found on an aircraft containing a large amount of money. The customer also gave him $50 as a token of appreciation. The airport manager congratulated him on his efforts and integrity and the manager's letter was retained on Mr Foai's employment file.

[8] As a relatively junior employee, Mr Foai appeared to demonstrate some initiative in his work. In an uncontested passage of his evidence, he explained one of the voluntary assignments he undertook in early 2007 which involved Air New Zealand's CEO, Mr Rob Fyfe:

> 8. At the start of 2007 it was announced that there were to be job cuts and major restructuring among Air NZ ground staff. A lot of my colleagues were very unhappy with the newly appointed CEO Rob Fyfe's decision at the time. Especially the Senior Loaders who have been there for more than 20 years. A lot of the staff morale had dropped which had affected the performance of the workers. [Staff] weren't turning up to work and the atmosphere in our environment was increasingly negative.
>
> 9. I took the initiative to do something about this as it was also affecting the way I worked as well, and I did not like the impact it was having on my workmates. I knew that the re-structuring was affecting not only them but most importantly their families. I decided to approach the management team and brought forward the idea of having a "Family Day" for the loaders. I explained in regard to staff morale and negative attitude and thought this would be a good idea for us loaders to enjoy each other's company outside of work and meet and greet our partners and children.
>
> 10. Management thought it was a great idea, and supported my idea and planning of the 'family day' in March 2007. Me and two of my work mates helped organise the event. I also decided to invite the CEO himself to a fun day out. I called Mr Fyfe and asked if he would like to attend our [loaders'] family day and he happily obliged. Despite the fact that he was not a 'popular' person at the time, I knew that given children and family were present, the loaders were restricted to any 'inappropriate' behaviour towards Mr Fyfe.
>
> 11. The day was a success as all families present were treated to fun filled games and entertainment and not much talk of the re-structuring process, though Rob Fyfe did give a full description on what the plans were for the future where those who were present understood a lot more than what was broadcast earlier about the new re-structure. This event also gave the incentive for Mr Fyfe himself to come to Wellington and be a loader for the day to get a better understanding on how our role works and also to answer more questions our colleagues had for him in regards to their futures with Air New Zealand.

> 12. I felt a sense of accomplishment with what the 'family day' achieved. I received a letter from Mr Fyfe himself thanking me for the invite and booking in a date to come down and fulfil his promise as stepping in to being a loader for a day. He also passed on to me and the 2 work mates who helped me organise the day tickets to watch the Wellington Hurricanes game in the Air NZ corporate box. Most importantly it helped [pick] up the morale of the guys I worked with.

[9] Mr Foai said that because of the success of the "Family Day" he was later given the task of organising another event involving something special for all Air New Zealand Wellington airport staff. He carried out that assignment as event organiser even though it was not a duty set out in his employment agreement.

[10] In her evidence, Mr Foai's manager, Ms Tania Budny, made no reference to these extra-curricular activities but she told the Court about four incidents involving Mr Foai. First, she said that on 2 May 2006 she had cause to write to him over an issue involving his failure to swipe his identity card at work. On 16 October 2006, there was an incident where she said Mr Foai refused to carry out instructions but it was resolved through an apology. Ms Budny also noted that on 15 May 2006 and again on 16 January 2007 she had cause to write to Mr Foai about an attendance problem.

New role as Time & Administration Administrator

[11] Ms Budny told the Court that towards the end of May 2007 they needed a temporary Time & Administration Administrator (T&A Administrator) as the incumbent, Mr Keri Fiu, had been seconded to assist her in other work. The position was advertised internally. Ms Budny said that even though Mr Foai was the only applicant, she still formally interviewed him before confirming his appointment. Ms Budny said that she subsequently looked for the contract that should have been signed at that time but she had been unable to find it. The internal advertisement described the skills required as: computer literate; good time management; good understanding of Collective Employment Agreements plus a need to "multi-task". The "Position Description" for the job was produced. It is a detailed, closely typed seven-page document which sets out 36 rather daunting tasks and activities which were all part of the T&A Administrator's role. The "Location" is stated to be "Auckland/Wellington/Christchurch". Mr Foai told the Court that the document had

not been given to him at the time but he had "briefly gone through it" subsequently and there was nothing in it which he disagreed with. The introduction to the "Role Purpose" section of the Position Description reads as follows:

> The purpose of this role (T&A Administrator) is to ensure that post roster publication, unallocated duties are assigned in order of priority and that factors [affecting] manpower levels (such as changing load factors and schedule changes) are reflected in the plan for the day of operation.
>
> Responsible for the accurate, timely and auditable processing of Time & Attendance (OPUS One) data and for the assignment of Unallocated Duties in preparation for the Day of Operation.

[12] The T&A Administrator's position was clearly something quite different from Mr Foai's previous part-time position. Ms Budny acknowledged this point when she told the Court:

> 55. The role was very different to Mr Foai's previous role in many respects. First, it was an administrative, office based role as opposed to being a physical mainly outside/loading based role. It was a computer-based job because the T&A system captured electronic records. Computer log-on and extensive computer use was a necessary daily occurrence for the job.
>
> 56. Second, it was a full-time position (i.e. 40 hours per week) which I was aware Mr Foai was seeking to achieve for some time. As well as being full-time it had regular hours i.e. Monday – Friday and without a work roster. I have, on occasion had to fill the role myself. It is one which with minimum application an operator can easily do in fewer than 40 hours per week even with roster fluctuations and other irregular events.
>
> 57. Third, the job had no overtime component attached to it compared with Mr Foai's previous work hours which consisted on 30 hours rostered ordinary time with overtime added on top of that. The only exception was if there was a Monday public holiday, it was a requirement that T&A duties continued as each Monday timesheets had to be finalised and sent to payroll for the day cycle that week.
>
> 58. The role was also different in that it was a temporary assignment until we had sorted out the restructuring and operational changes and once the role was complete it was intended that Mr Foai would return to his loading role.

[13] In an earlier part of her evidence, Ms Budny provided another description of the T&A Administrator's position:

> 5. ... This role was aimed at achieving consistency between the T&A records and employees' actual attendances at work. Essentially the

> role involved reconciling electronic T&A readings as activated by employees' swipe cards with their actual attendances at work, where there was a variation. There was a constant need to check records and amendments with our payroll department which was based in Auckland.

[14] The start date as to when Mr Foai commenced working as the T&A Administrator assumed some significance. Perhaps, understandably, given the passage of time and the inability of Air New Zealand to locate the relevant employment agreement, there was some confusion over when Mr Foai took up his new position as T&A Administrator. In his examination-in-chief, Mr Foai said that he had been "successful in picking up the temporary full time role of Time & Attendance (T&A)" during the month of March 2007. Later he said that he "started the T&A position in May". In cross-examination by Mr Cleary, counsel for the defendant, Mr Foai was again asked about when he started the T&A Administrator's job and he said that it was at the end of April 2007. Mr Cleary then referred the witness to a brief letter on Air New Zealand letterhead dated 3 October 2007 addressed "Dear Clint" which was headed: "Offer of temporary assignment: T&A support, Wellington Ramp". The letter commenced:

> We are pleased to confirm the current arrangements for the above.
>
> This assignment commenced mid June 2007 and will conclude on 3 February 2008. The reason for the assignment is to provide temporary support whilst the operating IT systems and new rostering tools are implemented.
>
> ...

[15] Mr Foai agreed with Mr Cleary that the T&A contract was renewed every three months in the form of the letter dated 3 October 2007. The letters were referred to in evidence as "contracts". The so-called "temporary assignment" continued by way of the three monthly extensions until 20 July 2009. Counsel put it to Mr Foai that going back three months prior to the date of the October 2007 letter would have meant that he commenced the T&A Administrator's job in July 2007. Mr Foai again responded that it was the end of April. The October letter refers to the assignment having commenced "mid-June 2007" and Air New Zealand's own witness, Ms Budny, said in her examination-in-chief that Mr Foai, "started in the role at the end of May 2007. We have looked for the contract that should have been

signed at that time but cannot find it. He was trained in the new role by Mr Fiu but he reported to me as his manager." Mr Foai said that he was also trained in the T&A system by Mr Hugh Galbraith. I make the observation that one explanation for the variation in start dates could relate to the period Mr Foai had in training before assuming the role on his own. That possibility was not fully explored before me but I consider it the most likely explanation. No help is found in Mr Foai's payslips. Not all of his payslips were produced to the Court – only a small sample. It appears, however, from the payslips that were produced, that after Mr Foai took up the T&A Administrator's position the job description in his payslips remained that of his old job description "P/T A/Line Svc/Prsn".

[16] It is not clear whether Ms Budny's reference to the "contract that should have been signed" is a reference to a new individual employment agreement or to an earlier version of the letter dated 3 October 2007. On the facts, however, I am not prepared to accept that a new individual employment agreement had been entered into when Mr Foai took up the T&A Administrator's position. If that had been the case, then I am confident that a reference would have been made to that agreement in the letters extending the term of the assignment every three months but none of the letters make any such reference. Likewise, if an individual employment agreement had been in existence, then there would have been no need for the letter of 3 October 2007 and the subsequent letters of renewal to set out the terms and conditions applying to the T&A Administrator's position because they would have already been stipulated in the individual employment agreement. My conclusion is that the "contract" Ms Budny referred to in this regard was simply an earlier version (date unknown) of the letter dated 3 October 2007 setting out the basic terms and conditions of Mr Foai's "temporary assignment" as T&A Administrator.

[17] The terms and conditions set out in the letter of 3 October 2007 recognised that, although he was to be based in Wellington, Mr Foai may have to make trips to other centres "as required from time to time". The terms also stated that Mr Foai would be employed "on a full-time (40hr pw) basis" and that his employment under the assignment was "part of a continuous period of employment with the company". The change of status to "full time" did not, however, appear to be reflected in Mr Foai's payslips which continued to show his old job description of "P/T A/Line

Svc/Prsn" (the "P/T" presumably being an abbreviation for "part-time"). On the face of it, therefore, Mr Foai was still being paid as a part-time employee and that factor later caused him to query the position.

[18] The significance of knowing whether a fresh individual employment agreement had been drawn up for Mr Foai when he assumed the T&A Administrator's position is because, although the letter of 3 October 2007 set out the terms and conditions which were to apply to the T&A Administrator's role, it did not specify any salary or hourly rate for the role. It simply stated:

> 3. Payment for hours worked will be as now, at your average earnings hourly rate.

I suspect that the same wording would have appeared in the original "contract" which could not be located and I record that the wording continued to appear in each of the three-monthly renewals down to 23 December 2008 when it was changed to read:

> 3. Payment for hours worked will be as now, at your average earnings hourly rate as set $25.30 per hour.

Ms Budny said the change was made in December 2008, "because the overpayment had been identified by that time".

The overpayment

[19] Mr Foai told the Court that the new role "was perfect" for him because he no longer had to work the shift work hours he had worked throughout the previous five years. He said that his contract for the T&A Administrator's position was set up by Ms Budny and Mr Paul Daniell, a Human Resources Manager with Air New Zealand. Mr Daniell was based in Christchurch but he would travel to Wellington periodically. Mr Foai said that when he asked Ms Budny at the outset what "average earnings" were, he was told that, "it was a top up from my original hourly rate and that it prevented me from receiving overtime since I was still classed as Part time in the system". Mr Foai was cross-examined at length as to his understanding of the term "average earnings". He stated, at one point of his cross-examination, that at the time, "I'd had, I had no idea what average earnings was". Shortly before making

that statement he said, "I just, I just knew that it was a top-up, that was the only explanation that was given to me and, I mean, when I query – when I look at my payslip and I see 'average earnings' for the 3rd of the 6th, and there's not rates that it was based on, there's no units it was based on."

[20] In relation to the payment issue, Ms Budny told the Court:

> 24. At the interview I recall we discussed the pay that would apply if he was successful. The intention was that Mr Foai would be paid 40 hours with no overtime. However because Mr Foai's then current remuneration was based on different rates (ordinary and overtime) the first hourly rate to apply was an average rate of those rates spread over the last year. I refer to clause 15.2(ii)(b) of the collective agreement 2007-2009 which refers to average earnings. Mr Foai agreed with me that he would accept that.

[21] The clause in the collective agreement relating to the meaning of average earnings was put to Mr Foai in cross-examination but it was not cl 15.2. Instead it was cl 112, a provision appearing under the heading, "Company Training Course". Subclause (b) of that provision, under a subsection headed: "Away from Home Base" stated:

> (b) Should the period away from home base exceed eight hours the employee shall be paid eight hours at average earnings in lieu of (i) above. The average earnings will be calculated on the basis of the previous 12 [months'] employment.

[22] It is not altogether clear, but if Ms Budny was intending to suggest to the Court that during the course of her interview, she had actually referred Mr Foai to cl 112 or any other provision in the collective agreement dealing with the phrase "average earnings" then I find that most implausible and I do not accept that that would have been the case.

[23] In cross-examination, Ms Budny was asked:

> **Q.** Can you explain, sorry, again what average earnings are and how you would have explained that to Mr Foai?
>
> **A.** So my [understanding] of average earnings, um, which is a little bit different to when calculating annual leave is total of your last 52 weeks' earnings divided by the number of hours that you've worked over that time gives you an average hourly rate.
>
> **Q.** And you're saying that you explained that formula to Mr Foai?

A. Yes.

[24] One of the important witnesses for Air New Zealand was Ms Aruna Singh, a payroll officer based in Auckland. I will need to come back to Ms Singh's evidence but in relation to the phrase "average earnings" the witness told the Court on more than one occasion that Mr Foai was, "getting average earnings paid at the higher amount". She did not clarify what she meant by this statement. Suffice it to say, however, that I am satisfied on the evidence that, although Mr Foai knew he would be receiving "average earnings" when he assumed the role of T&A Administrator, he did not know what the formula would equate to in terms of dollars and cents. Had he turned his mind to the question, I suspect that he would simply have assumed, as he was entitled to assume, that his employer would get it right and he would be paid the correct amount, whatever that figure came to. When Mr Foai was asked in cross-examination to clarify whether he was saying that he didn't know exactly what he was earning because he had no idea of the set contractual rate and the position was, therefore, "up in the air", he replied:

> I was happy enough just to get the job, just to get out of shift work and finally have weekends with my daughter.

[25] One of the documents produced by Air New Zealand was a summary of the overpayments Mr Foai received. It was headed "Retro Calculation Report" (the retro report) and was apparently prepared by Ms Singh. Counsel for the plaintiff, Ms Greally, helpfully accepted the accuracy of the various entries without requiring each individual entry to be formally proved but the defendant did not concede at any stage that the so called "overpayment" was the result of a mistake. What does emerge from the retro report is that even if Mr Foai had been paid correctly, the amount he would have received each fortnight would not have been a set amount but the figure would have varied from one fortnight to another. The difference in amounts could be significant. For example, for the fortnight ending 8 July 2007, the retro report shows that Mr Foai should have received $871.68 but for the fortnight ending 9 December 2007, if correctly paid, he should have received $487.58. No satisfactory explanation was given as to why that should have been the case and, in cross-examination, Ms Singh was unable to give a convincing explanation as to why

there was a significant variation also in the rates used to calculate Mr Foai's annual leave entitlement.

[26] The retro report disclosed that the actual overpayment figures also varied significantly. The initial overpayment for the fortnight ending 10 June 2007 amounted to $59.93. For the fortnight ending 14 October 2007 the overpayment amounted to $462.22, for the following fortnight it reduced to $14.29 and then for the next fortnight ending 11 November 2007 the figure increased again to $622.04. During 2008, the overpayments gradually increased to over $3,000 for the pay period ending 8 June 2008 and the all-time high figure of just over $4,800 for the pay period ending 28 September 2008. The retro report also disclosed that on two occasions during the period in question, Mr Foai was underpaid by $27.24 and $582.07 respectively.

Inquiries

[27] It was difficult to reconcile the evidence of the various witnesses as to precisely when and how Mr Foai raised queries in relation to his wages. I do not think the witnesses were being deliberately obstructive in this regard. I accept that the most likely explanation for the discrepancies in their evidence was the lapse of time since the events in question and the fact that the witnesses were being asked to recall matters which, more than likely, would not have assumed any great significance in their minds at the time. The evidence was that, in the second half of 2007, Air New Zealand was going through a major restructuring exercise with redundancies and other significant developments and, given that scenario, the queries Mr Foai raised about his pay, understandably, may not necessarily have been a particularly high priority. I am satisfied, however, that Mr Foai did raise queries about his pay and, responsibly, Mr Cleary accepted that that was the position. The grey area was the nature and dates of those queries.

[28] To appreciate some of the concerns raised by Mr Foai, it is probably appropriate at this point to refer to certain particulars in his payslips which gave rise to his queries. As already noted, not all of the payslips were produced but only a small sample. The first, for the fortnight ending 15 April 2007 shows a gross

payment of $1,371.52 made up principally of "basic pay" and annual leave; the second, for the fortnight ending 29 April 2007, shows a gross figure of $1,355.36 made up principally of basic pay and overtime; the next payslip for the fortnight ending 13 May 2007 shows a gross figure of $2,724.37 made up again principally of basic pay and overtime with a "Gross Up adjustment" of $521. The payslip for the fortnight ending 27 May 2007 shows a gross figure of $1,609.23 made up of basic pay and overtime. The next payslip for the period ending 10 June 2007 is for a gross figure of $2,234.89 made up principally of basic pay ($1,103.30) and "Average Earning Adj" ($844.44). The payslip for the period ending 24 June 2007 is for a gross figure of $1,997.31 made up principally of basic pay ($1,103.30) and Average Earning Adj ($844.44). Then for the pay period ending 8 July 2007, the gross figure is $2,197.21 made up of basic pay ($1,103.30) and then a figure of $922.72 for what is recorded as: "PP080707, WE1/7 pp080707, we08/". Finally, for the pay period ending 22 July 2007 the gross figure is shown as $2,136.45 made up principally of basic pay ($1,103.30) and Average Earning Adj" ($983.88). It is not easy to reconcile the actual figures shown on the pay sheets with the comparative figures in the retro report. For example, the payslip for the period ending 22 July 2007 records that Mr Foai's net pay, after the PAYE deduction, was $1,440.75, whereas the retro report states that the amount paid to Mr Foai for that same period came to $983.58. The discrepancies were not explored in evidence before me.

[29] Mr Foai said that the first query he raised was with Ms Budny and he had asked whether he was supposed to be getting paid overtime every fortnight as if he was still a part-time loader. He said that Ms Budny told him that he was not supposed to be getting overtime and he should be paid on the basis of average earnings which would work out at a higher hourly rate. He continued: "She told me that the system would be amended to my average earnings rather than the part-time loader rate." In his examination-in-chief, Mr Foai indicated that this conversation with Ms Budny took place around July/August 2007 but in cross-examination and in his answers to questions from the Court, he identified the payslip to which his query related as being the payslip for either the fortnight ending 13 or 27 May 2007. In her evidence, Ms Budny said that she could not specifically recall the conversation that Mr Foai referred to "in July or August 2007 but I would have advised him that he should not be paid overtime. I would not have said the system would be amended as

in my mind at the time that was already happening." Allowing for the correct time of the conversation, which was not identified until his cross-examination, I accept what Mr Foai told the Court.

[30] Mr Foai said that the next query he raised about his payslips was with the HR Manager, Mr Daniell, and that was when he first saw the notation "average earnings" on his payslip. The relevant payslip can be identified from the chronology above as being for the period ending 10 June 2007. That is the first pay period where it is alleged by Air New Zealand that Mr Foai was overpaid. Explaining his discussion with Mr Daniell on that occasion, Mr Foai said:

> 25. Coming from a Part-Time contract (where I was earning on average $700-$800 a fortnight) I still wasn't sure about how the AVERAGE EARNINGS aspect (sic) apart from it being a 'top-up'. I had queried Paul Daniell at the time if I was getting AVERAGE EARNINGS because it was a reasonable amount of money I was receiving and I couldn't understand the calculations on my Payslip. It was my understanding, that because I was still classed as a Part time I must be getting overtime which would make more sense because I am doing 10 hours extra a fortnight over my 30 hours as part time.
>
> 26. Paul Daniell replied that if it says AVERAGE EARNINGS on my payslips then that's what I am getting. I looked no further than that because it was him and Tania that had prepared my contract and it is Paul that confirms my wages with Payroll. At that time it was always easy getting in touch with Paul as he was based in CHC and only came to WLG at certain times. It was also understood that Paul was also dealing with the system errors with Pay and leave during that re-structuring turn over.

[31] The matter was followed up with Mr Foai in cross-examination by Mr Cleary:

> **Q.** You then say relatively early on, you approached Paul Daniell?
>
> **A.** Mhm.
>
> **Q.** Paul Daniell, and you asked him, "If I'm getting average earnings," because it was a reasonable amount of money. I take it you didn't mention that it was a reasonable amount of money to Paul Daniell?
>
> **A.** No, I just said, um, "What am I supposed to be paid?" because on my payslip it said "average earnings."
>
> **Q.** And he was in Christchurch and you were in Wellington?
>
> **A.** No he was in Wellington.

Q. He was in Wellington and now at that time you say, "I couldn't understand the calculations on my payslip," and you couldn't with Tania either because you'd gone to her about that but you didn't show Paul a payslip either did you?

A. No, no I didn't show Paul a payslip.

Q. And yet it was part of your job to explain payslips to other people.

A. Paul could have brought up my payslip. He had access to my payslip. I just went and asked him, "am I getting paid average earnings? Is that what's supposed to be stated on my payslip?" He said yes. I took that and I just went and done my job.

[32] In his evidence, Mr Daniell was unsure about the date, but he told the Court that he recalled being approached by Mr Foai on two occasions "early into his assignment" querying whether his new role should be paid on an average earnings basis.

[33] The evidence about Mr Foai's further inquiries then becomes more complex. The thrust of Mr Foai's evidence was that when he went to Auckland for a T&A Administrators' training session in August 2007, and again on a work visit or visits around October, November or December 2007, as well as on occasions during 2008, he attended the payroll office to sort out issues relating to other Wellington staff. On at least some of those occasions, he would also ask the payroll staff to bring up his own payslip to check and get confirmation from them that his pay was in order. Mr Foai told the Court that he noticed after September 2007 that his pay had escalated but:

27. ... I didn't think of it too much because I was travelling quite a bit to do speeches in Queenstown and Auckland to certain departments within the company and the event organisation was also in the process.

28. During the visits to Auckland I did take time out to go to visit Payroll and meet Aruna Singh (whom I had been dealing with regarding my pay and others). I also visited Amber White and Yvette Faircloth and several others from Payroll. At that time I had sat down with Payroll and gone through problems with not only my pay, but other staff in WLG. At this point I was informed that there was no issue with my pay.

[34] There was no precise evidence about the timing of Mr Foai's visits to the Auckland payroll office. Ms Yvette Faircloth (Ms Faircloth has subsequently

married but, for ease of reference, I shall continue to refer to her by her maiden name) told the Court that she is employed by Air New Zealand as an HR Solutions Centre Consultant and in that role she is the first point of contact for all New Zealand staff regarding any pay related issues. In cross-examination, Ms Faircloth told the Court:

> ... I do remember maybe two or three times after Clint might have called to check that I had received his timesheet and I would check whether it had come through our numbers or whether Aruna (Ms Singh) had received it and then the conversation would usually end up with us talking about how, the amount that he was getting paid as a result of that fortnight's hours that have been processed and that it was quite a large number.

[35] In her examination-in-chief, Ms Faircloth recalled having "a couple of discussions" with Ms Singh as to whether Mr Foai was being paid correctly, "as it did appear that he was being paid a very large sum for the type of work he was doing as an administrator. He was getting paid close to, if not more than, some of the Team Managers in his area and their roles were superior to his." In cross-examination Ms Faircloth said:

> The only discussion I had with Aruna was that it did seem odd that he (Mr Foai) was getting paid a large amount and Aruna had advised that she had been looking into it or has, is escalating it to be looked into so as far as I was concerned, in my role, it had been escalated so I didn't have to look into anything, I didn't have to do anything about it.

Ms Faircloth was uncertain about dates, but she thought that she would have had that discussion with Ms Singh about six months after Mr Foai had moved into the role of T&A Administrator. For reasons which will become apparent, I consider that the conversation Ms Faircloth had with Ms Singh in this regard would most likely have occurred around November 2007. Ms Faircloth explained that her understanding of what Mrs Singh meant when she said that the issue was going to be "escalated" was that she (Ms Singh) was "proposing to have a talk to Paul Daniell about the high amounts that Mr Foai was receiving". Although the date was not pinpointed, it appears that sometime in 2008, Ms Faircloth went on maternity leave and did not return to work until after Mr Foai's dismissal.

[36] Mr Foai also told the Court about the second occasion he raised a query regarding his pay with Mr Daniell:

> 29. In November and December (2007) I was getting paid up to $2000 per fortnight. Sometime in November I asked Paul [Daniell] if I was being paid correctly. Paul said that provided my payslips said I was being paid on average earnings it must be correct. ...

Mr Cleary accepted in his closing submissions that Mr Foai had twice queried Paul Daniell about his pay. Mr Daniell confirmed also in his evidence that Mr Foai had raised more than the one query with him about his pay. In cross-examination he was asked:

> **Q.** When he had these chats with you, when he queried you about the average earnings, where were you when he queried you?
>
> **A.** Um, was in, where typically I was, typically in the admin area of the airport and we were typically working alongside a, you know, desks in fairly close proximity.

Mr Daniell disputed the claim that Mr Foai had asked him if he was being paid correctly. He said that if he had been asked that question, it would have caused him to ask to see a payslip. He said that, on the second occasion, he had simply repeated what he had earlier told Mr Foai and he thought nothing more of it at the time. I accept that Mr Foai's second discussion with Mr Daniell took place around November 2007 as Mr Foai said. Mr Foai's recollection of his query may not be word for word accurate but, in essence, he had again queried his pay and Mr Daniell had responded to the effect that provided his payslips said that he was being paid on average earnings then they would be correct.

[37] In her evidence, Ms Singh told the Court:

> 5. I noticed that he was still in the system as a part time employee and that the average earnings component for Mr Foai was very high. I assumed at that point that his manager had approved the payment.
>
> 6. I noticed the high payments continuing and so in late 2007 I phoned Mr Foai and told him that he was getting overpaid. I advised him not to spend the money.
>
> 7. I asked him to bring this to his Manager and HR Manager's attention. He told me he was entitled to the average earnings as that is what his managers had said.
>
> 8. I raised this with Tania Budny and also Paul Daniell but it was sometime later before the overpayment was fully realised and steps taken to investigate it.

[38] Ms Singh recalled Mr Foai visiting the payroll team on one occasion but she denied that he had ever gone to see her regarding "his payroll issue or to find out whether he had been overpaid". The clear impression Ms Singh conveyed in her examination-in-chief was that Mr Foai had never queried his pay with her but I do not accept that suggestion and, indeed, it was contradicted by her own evidence. During cross-examination by Ms Greally, she was asked:

> **Q.** So it was something that you noticed every now and then, you'd look at it and think that's a bit high?
>
> **A.** Yes every now and then I was liaising with Clint and I was advising him if he can [bring] this to his team managers and HR manager's attention that he is getting average earnings at very high amount and show your payslip to them but I, yeah.

A little later in her cross-examination Ms Singh said:

> ... several times I highlighted this with Clint, that you are getting overpaid of average earnings, please check this with your manager or with your HR manager. ...

And again:

> **Q.** Now these conversation that you had with Clint, did you ever email him, did you ever send him any emails saying it looks like your average earnings component is high. Can you please take your payslip to Paul [Daniell] or Tania Budny. Did you ever email him to tell him that?
>
> **A.** I was looking for it but I couldn't find it but I remember, um, um, talking to him several times and highlighting this to him.

Later, when Ms Singh was asked how annual leave was calculated, she stated: "I think Mr Foai is aware because he was raising queries for that". I accept Mr Foai's evidence that, in fact, he had raised queries about his pay with Ms Singh on a number of occasions in the latter half of 2007 and in 2008.

[39] Ms Singh was also asked during cross-examination whether she had discussed the matter with anyone else:

> **Q.** And did you discuss Mr Foai's pay with anyone else in the payroll section, did you bring it to anyone's attention?

A. Yeah I did with my management and they told me to, um, ask Clint to discuss this with his, um, with his team manager and payroll manager because it was coming through the exception, weekly exception where it was showing that, like he was entitled forgetting, um average earnings.

Q. So who was the manager that you discussed it with?

A. Um, in my – I brought this to Tania Budny's attention and also with HR, um, HR manager Paul Daniell and our office, um, our senior, um, staff, yeah.

Q. Senior staff, who, which senior staff, whose attention –

A. Well I have discussed this with Glennys Morris (the Payroll Team Leader) as well, like I, yeah, that, um, he is getting average earnings paid at the higher amount.

[40] Ms Singh was questioned about the discussions she said she had with Ms Budny and Mr Daniell:

Q. When you talked to Tania Budny and Paul Daniell and your other manager at HR that you talk to, did you actually tell them, "Look, his average earnings amount is this." Did you actually give them a figure? Did you say, you know, his last pay he earned so much average earnings, did you let them know that?

A. Yeah, I brought Tania Budny's and Paul Daniell's attention that, um, this much average earnings, like Clint is getting, yeah, I brought this to their attention.

[41] Ms Morris, the Payroll Team Leader, was not called as a witness. In his evidence, Mr Daniell said that he could not recall Ms Singh contacting him about Mr Foai's overpayment at the end of 2007. Ms Budny, in cross-examination, told the Court that the conversation with Ms Singh may have happened but she could not recall it. For his part, Mr Foai denied that Ms Singh had told him towards the end of 2007 that he was "being overpaid and not to spend the money" but he did agree that she had noticed the high payments in late 2007. He also denied that Ms Singh had asked him to bring the matter to the attention of his manager and HR manager but he said that she did ask him to send her his temporary T&A Administrator's contract which he did. He said he heard nothing back from payroll.

[42] In relation to this passage in the narrative, I accept that towards the end of 2007 Ms Singh, in the payroll office, became concerned about the amount of wages being paid to Mr Foai and she drew that to Mr Foai's attention. I am not convinced

that she told him that he was being overpaid and not to spend the money because at that stage she did not know what his pay was supposed to be but I accept that she did become concerned enough to report the matter to the team leader in the payroll section, Ms Morris, and to Mr Foai's manager, Ms Budny and to Mr Daniell. I also accept that Ms Singh discussed Mr Foai's pay position with Ms Faircloth both towards the end of 2007 when she told her that she had escalated the matter and on further occasions in 2008. Given the fact that he had been informed by the payroll officer, Ms Singh, towards the end of 2007 that there were concerns about the amount of wages he was being paid and he had heard nothing further, even though his wages began increasing from mid-February 2008, I accept Mr Foai's evidence that he continued to make inquiries about his pay. In March 2008, when he was in Auckland, he spoke to Ms Faircloth and asked her to bring up his most recent payslip on her computer. She did so and confirmed to him that the pay was correct. I also accept his evidence that between April and November 2008, he kept in touch with Ms Singh in regards to the increase in his wages. Throughout this lengthy period, Mr Foai's temporary assignment contract was renewed every three months with a repetition of exactly the same income provision, namely: "Payment for hours worked will be *as now*, at your average earnings hourly rate." (emphasis added)

[43] Mr Foai's evidence continued:

> 32. Around August (2008) I was contacted by payroll and they told me that they thought [I] was being overpaid and asked me to send my contract up to them which I did. I was told by the person I spoke to that they needed my contract so they could liaise with Paul Daniell or Tania Budny to check the accuracy of my pay. I never heard anything further from payroll.
>
> 33. Around October 2008 I took annual leave and then went on holiday to Hawaii. While I was away I went to check my bank balance and discovered that I had been paid approximately US$3000. I e-mailed payroll while I was still on holiday and asked them to send me a copy of my payslips which they did. The payslip showed that I earned about NZ$4000 net.
>
> 34. When I got back from annual leave I rang payroll again to find out what was going on. [Aruna] from payroll told me that [her] supervisor [Glennys] was looking into it. [Late in] October Aruna had called stating that I may have been overpaid. I had told her that she would need to sort it out themselves and along with Paul Daniell because I have nothing to do with calculating my wages and that I had queried them a number of times.

> 35. I never heard anything further from payroll until December when Paul [Daniell] approached me and said he wanted to have a talk to me. I went into a meeting with Paul and [Tania]. They asked me if I knew I was being overpaid to which I said no in reminding them that I had raised a number of times including with [Tania], Paul and payroll.

[44] In cross-examination, Mr Foai said that, in response to the contact in August 2008, he faxed a copy of his latest contract to payroll, "as they requested. Nothing happened from there. I queried it again with payroll. They said that there is no issue with the pay." Neither Mr Daniell nor Ms Budny disputed Mr Foai's statement that it was not until December 2008 that they told him he was being overpaid. No explanation for the overpayment appears to have been given to Mr Foai. Ms Singh told the Court that there had been no mistake on her part because the data she had fed into the payroll computer had been approved by Mr Foai's manager. For her part, Ms Budny told the Court that she provided the data to payroll by way of an "employee action sheet" to enable payroll to calculate Mr Foai's pay and she said that the information she had provided to payroll had been correct.

[45] Mr Foai explained to the Court the changes to his lifestyle after he started receiving the overpayments:

> 36. When I was in the T&A role I thought I was entitled to the money as it had been passed through Paul and Tania and also Payroll. I felt the sense of independence and it gave me the option to finally move out and live on my own. I wouldn't have done this [unless] I thought I could afford it. I brought the necessities (furniture, household products, groceries, power, telephone, rent) and took my parents on holiday for their 35 [years'] anniversary to Samoa. It was my mother's first time back to the homeland in 32 years which was great. There were also weddings of close friends we attended overseas and also caught up with family in Australia we had not seen in years.
>
> 37. Me, my partner and daughter were well looked after and I felt the need not to put a foot wrong in the job because it was all going well and after years of struggling as a part time worker and personal issues I felt the need to go the extra mile in my role if I had to and not to 'screw up'. I didn't feel any sense of [wrongdoing] as I had checked through all the correct channels that my wages were correct.
>
> ...
>
> 39. Because I was getting so well paid I put 200% into the job. There were many times I worked late and went the extra mile because I was well paid and felt an obligation to put in the extra effort. For example I organised a ball for staff in Wellington. I organised the gym for the workers and ran classes myself for staff wanting to work out. I took

> the initiative in many tasks and organised for the loaders to have rides with the pilots. This helped develop a good relationship between the loaders and pilots and didn't cost Air New Zealand anything. I was able to recognise problems but more importantly I was able to find solutions to those problems and implement them.
>
> 40. I organised a sports day between Wellington and Christchurch and Auckland employees and this took about four months of planning. I flew down to Queenstown and was a guest speaker at a leadership conference on the weekend. I didn't get any extra pay for this. I also flew to Auckland a number of times to repeat the same speech. I also organised the first ever Wellington staff ball.
>
> 41. I was happy to do those things and probably would have done most of them if I had been on lower pay but felt obliged to do the extra mile because of the good pay I was receiving.

None of this evidence was challenged.

[46] Ms Budny, however, said she did not notice Mr Foai putting in additional effort and she said the staff ball and gym classes "were voluntary exercises". However, Ms Budny was on secondment in Auckland between March and December 2008. Ms Budny also told the Court that at a meeting during the disciplinary investigation in 2009, Mr Foai had told her that he had set aside around $10,000. That remark was not recorded, however, in the minutes Ms Budny took of any of the meetings. She explained that it was made "before minutes were being taken". Mr Foai denied ever mentioning that he had $10,000 saved and said, "I know I wouldn't have mentioned it because I didn't have $10,000 saved." I did not find Ms Budny's evidence on this issue convincing and I accept Mr Foai's denial. Mr Foai did agree with another statement made by Ms Budny to the effect that after he was told during the 2009 investigation that he had been overpaid, he offered to pay back $50 a week out of his wages. But he said, at that stage, he was still employed by Air New Zealand and he had no idea that he was to be dismissed.

The law

[47] There was no dispute that the Court has jurisdiction under s 161(1)(r) of the Employment Relations Act 2000 (the Act) to hear a claim by an employer that it had overpaid an employee, even though the claim has been formulated as one in

restitution - *New Zealand Fire Service Commission v Warner*[3] and *Aztec Packaging Ltd v Malevris.*[4] Practical problems arose in relation to the pleadings in this case. Normally, in an alleged overpayment situation, the person seeking recovery of the overpayment would file a statement of claim setting out the cause of action and the defendant would then file a statement of defence particularising the defences he or she relied upon. In this case, however, because of the procedural requirements of the Act relating to a challenge to an Authority determination, it fell to Mr Foai, as the person electing to make the challenge, to file his statement of claim setting out the grounds of his defence to the overpayment claim before Air New Zealand was required to file its statement of defence particularising its cause of action. At the stage the statement of claim was filed, Mr Foai was represented by his union. Counsel for the union pleaded that: "The Authority provided little in the way of judicial reasoning for its apparent exercising of its equitable powers". The statement of claim, understandably, gave no indication of the cause of action Air New Zealand would seek to rely upon but, more significantly, it failed to particularise the defences Mr Foai intended to advance. For a period, Mr Foai acted on his own behalf but the Court urged him to obtain legal advice. When Ms Greally eventually agreed to accept instructions in the matter, she helpfully filed an amended statement of claim confirming that the principal defences would be the equitable defence of change of position and the statutory defence prescribed in s 94B of the Judicature Act 1908.

[48] In its statement of defence in response, Air New Zealand confirmed that it relied on its right to restitution. That right is summed up in *Goff & Jones: The Law of Unjust Enrichment*[5] in these terms:

> English law provides that a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or for a basis that fails.

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[3] [2010] NZEmpC 90, [2010] ERNZ 290 at [35].
[4] [2012] NZHC 243 at [16].
[5] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [2.01].

[49] The conceptual basis upon which a restitutionary remedy may be granted was recently considered by the Court of Appeal in *Commissioner of Inland Revenue v Stiassny*,[6] where the Court stated:

> [92] It is not in dispute that the conceptual basis upon which a restitutionary remedy may be granted for moneys paid under mistake of fact or law is that the payee had been unjustly enriched. Where the necessary elements are established, a remedy is prima facie available unless there are defences to the grant of the remedy or some overriding legal principle which may justify the payee's enrichment and negate the claimant's right to restitution. This is put succinctly in the most recent edition of *Goff & Jones*: [at [1.09]]
>
> > The courts have held that a claimant must demonstrate three things in order to make out a cause of action in unjust enrichment: that the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust. If these three requirements are all satisfied, then the further question arises, whether there are any defences to the claim, and if there are not, then the court must decide what remedy should be awarded. However, there is an additional consideration that the court must also bear in mind, namely that some overriding legal principle [may] justify the defendant's enrichment and thereby nullify the claimant's right to restitution.

[50] The concept of unjust enrichment was also recently considered by the High Court of Australia in *Equuscorp Pty Ltd v Haxton*[7] where it was stated:

> ... In summary:
>
> . recovery depends upon enrichment of the defendant by reason of one or more recognised classes of "qualifying or vitiating" factors;
>
> . the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;
>
> . unjust enrichment so identified gives rise to a prima facie obligation to make restitution;
>
> . the prima facie liability can be displaced by circumstances which the law recognises would make an order for restitution unjust.
>
> Unjust enrichment therefore has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. In that aspect, it does not found or reflect any "all-embracing theory of restitutionary rights and remedies". It does not, however, exclude the emergence of novel occasions of unjust enrichment supporting claims for restitutionary relief.

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[6] [2012] NZCA 93.
[7] [2012] HCA 7 at [30].

[51] The "qualifying or vitiating" factor relied upon by Air New Zealand in this case is not pleaded but in his closing submissions, counsel referred more than once to "a mistaken overpayment". In *Dextra Bank & Trust Company Ltd v Bank of Jamaica*,[8] the Privy Council stated, in relation to a claim to recover money as having been paid under a mistake of fact:[9]

> To succeed in an action to recover money on that ground, the plaintiff has to identify a payment by him to the defendant, a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact and the payment of the money.

[52] Turning to the defences relied upon by Mr Foai, the equitable defence of change of position, is based upon what the Court of Appeal referred to in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*[10] as the "*Lipkin Gorman* principle". The Court of Appeal confirmed its application in New Zealand.[11] The principle was first enunciated by Lord Goff of Chieveley in *Lipkin Gorman (a firm) v Karpnale Ltd*.[12] Before starting the principle, Lord Goff observed at 578:

> The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.

The statement of principle appears at 580:

> At present I do not wish to state the principle any less broadly than this: that the defence [of change of position] is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.

[53] In *Waitaki International*, Henry J summarised the *Lipkin Gorman* principle as being "a defence to a claim for repayment of money paid under a mistake that the defendant's position has so changed that it would be inequitable in all the circumstances to require restitution in whole or in part."[13]

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[8] [2002] 1 All ER (Comm) 193, PC (Jam).
[9] At [28].
[10] [1999] 2 NZLR 211.
[11] At 219, 228, 232.
[12] [1991] 2 AC 548.
[13] At 219.

[54] The other defence relied upon by Mr Foai is the statutory defence of alteration of position prescribed by s 94B of the Judicature Act 1908. Section 94B provides:

> **94B Payments made under mistake of law or fact not always recoverable**
>
> - Relief, whether under section 94A or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

[55] The statutory defence under s 94B was considered by the Court of Appeal in *Thomas v Houston Corbett & Company*[14] and the Court in that case undertook a balancing of the equities approach, reflecting the relative fault of the respective parties.[15] That approach allowed the respondent to recover only a certain proportion of monies paid under a mistake of fact. In *Waitaki International* the Court of Appeal took the view that the same balancing of the equities exercise, involving relative fault, could be carried out under both the equitable defence of change of position and under s 94B.[16]

[56] In *Dextra Bank*, the Privy Council considered the balancing of equities approach applied by the Court of Appeal in *Thomas v Houston Corbett* in respect to the application of s 94B and noted that in *Waitaki International* the Court of Appeal had concluded:[17]

> ... that the common law defence of [change of position] was, like the defence under section 94B, an "equitable" defence which required the court to undertake a "balancing of the equities" by assessing the relative fault of the parties and apportioning the loss accordingly.

Their Lordships went on to state:[18]

> Their Lordships are however most reluctant to recognise the proprietary of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so.

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[14] [1969] NZLR 151.
[15] At 164.
[16] At 220.
[17] At [44].
[18] At [45].

[57] In *Saunders & Co (a firm) v Hague*,[19] Chisholm J considered that he was bound by their Lordships' pronouncement in *Dextra* that relative fault should not be taken into account when considering the defence of change of position but His Honour took the precaution of considering the issue of relative fault and concluded[20] that even if relative fault had been a legitimate consideration it would not have produced a different outcome.

[58] In *Karl v Accident Compensation Corporation*,[21] which was one of the cases relied upon by Ms Greally, ACC sought to recover an overpayment of weekly compensation payments resulting from an ACC error. Miller J noted that it was not necessary for ACC to establish an obligation to repay the overpayment under the law of restitution because s 320 of the Accident Insurance Act 1998 created an obligation to repay the money unless the defence in s 372 could be made out. The provisions of s 372(2) of the Accident Insurance Act are remarkably similar to s 94B and provide:

> An insurer may not recover all or part of a payment in respect of statutory entitlements which was paid as a result of an error not intentionally contributed to by the recipient if the recipient –
>
> (a) Received the payment in good faith; and
>
> (b) Has so altered his or her position in reliance on the validity of the payment that it would be inequitable to require payment.

After noting the rejection by the Privy Council in the *Dextra Bank* case of the balancing of the equities and relative fault criteria recognised by the Court of Appeal in *Waitaki International*, Miller J concluded that, whatever the position at common law, he was concerned with "a statute that created a change of position defence" and he held that, "the question whether repayment is inequitable for purposes of s 372 may involve balancing of the equities."[22]

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[19] [2004] 2 NZLR 475.
[20] At [118].
[21] [2005] NZAR 97.
[22] At [53].

Discussion

[59] Against that background, I now return to the instant case.

Mistake

[60] As noted in the extract from *Goff & Jones* referred to in [48] above and in the passage cited from the recent High Court of Australia decision in *Equuscorp Pty Ltd v Haxton*, recovery under a claim for restitution is dependent upon the existence of one or more recognised classes of "qualifying or vitiating" factors which the law regards as unjust enrichment giving rise to a prima facie right to restitution. Examples of the factors most commonly recognised in this regard are mistake, duress, illegality or failure of consideration. In this case, Air New Zealand seeks to rely on mistake but mistake was not pleaded. In *Saunders & Co* where mistake had not been specifically pleaded, Chisholm J observed:[23]

> To my mind the statement of claim is defective because it does not specifically include a pleading supporting the mistake of fact allegation. But there cannot be any suggestion that the defendant has been prejudiced or that the course of the trial has been altered by the failure to specifically plead mistake of fact.

In that case, however, the Court specifically recorded that from an early time mistake of fact had been a live issue in the proceeding.[24] That observation cannot be made about the present proceedings.

[61] The Court of Appeal in the recent case of *Commissioner of Inland Revenue v Stiassny* stated:[25]

> We add that it may be open to doubt whether the secured creditors could obtain relief for money paid under mistake of law in the absence of any pleading that they acted under a mistake or that someone acting on their behalf did so.

[62] Ms Greally did not claim that the plaintiff had been prejudiced because of the failure to plead mistake of fact. What she did forcefully submit, however, is that Air New Zealand must be able to point to a specific fact as to which it was mistaken in

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[23] At [87].
[24] At [86].
[25] At [81].

making the payment and a causal relationship between that mistake of fact and the payment of the money, but it has failed to do so. In this regard, counsel relied on the following passage, already mentioned above at [51], from the *Dextra Bank* case:[26]

> To succeed in an action to recover money on that ground, [a mistake of fact] the plaintiff has to identify a payment by him to the defendant, a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact and the payment of the money: see *Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd*. [1980] 1 QB 677, 694.

[63] The difficulty for Air New Zealand is that there was simply no evidence before the Court identifying a particular mistake of fact that contributed to the overpayment. As noted in [44] above, the principal players called as witnesses, namely, the payroll officer Ms Singh and Mr Foai's manager, Ms Budny, expressly denied any knowledge of a mistake. Counsel for Air New Zealand did not purport to identify any mistake of fact in his written opening or closing submissions. When the Court pointed out to him in the course of his closing submissions that there was no evidence of a mistake, Mr Cleary said, "it appears there may have been a computer error when the payslips were generated which inflated various components of his pay". That was not evidence, however. The obvious question that arises is, if there was such a mistake, why was the payroll officer, Ms Singh, or one of the other Air New Zealand witnesses not able to give evidence about it? Why was Ms Morris, the Payroll Team Leader, not called as a witness to give evidence about the alleged computer error? If such evidence had been given, it could then have been the subject of cross-examination by Ms Greally. The retro report in itself does not show any mistake. It does not disclose a fixed proper pay rate for Mr Foai and, as noted in [28], the figures recorded on the retro report cannot be reconciled with the payslips. There was no evidence which would warrant even the drawing of an inference by the Court of a mistake of fact.

[64] This issue assumes particular significance in the present case where there were not just one or two incorrect payments but 40 incorrect payments spread over a 16-month period and in two of those cases there was not an overpayment but an underpayment of $27.24 and $582.07 respectively. There was also the critical factor

[26] At [28].

that, on a number of occasions, Mr Foai had queried his pay with payroll and other officials and on at least one occasion, more than 12 months before the overpayments were formally detected and actioned, the payroll officer had specifically queried the pay position with Mr Foai's managers, providing them with details, but the overpayments continued. The burden of proof in establishing that the overpayments were made as a result of a mistake of fact which gave rise to the alleged unjust enrichment was on Air New Zealand but, for the reasons stated, I am not satisfied that it has discharged that obligation. On that ground alone, I would reject its claim for restitution.

[65] Having reached that conclusion, I nevertheless intend to take the precaution of considering the two defences raised on behalf of Mr Foai. There is, however, an important preliminary consideration relevant to each which needs to be addressed at this point.

Wrongdoing and good faith

[66] There are two recognised basic prerequisites which must coexist before a defendant can avail himself of the change of position defence to an action of restitution. They were explained by Lord Goff in the following passage from *Lipkin Gorman*:[27]

> I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.

[67] There is no suggestion in the present case that Mr Foai was a "wrongdoer" in the sense that he contributed in any way to the overpayment. Mr Cleary did, however, strongly submit that the defence is not open to Mr Foai because he acted in bad faith. Counsel submitted:

> 28. In summary, the plaintiff had knowledge of the facts entitling the defendant to restitution (*Lipkin*); he suspected a mistake from the beginning, told his employers about it, and therefore cannot have received the payments in good faith.

[27] At 580.

[68] In *Commissioner of Inland Revenue v Stiassny*, the Court of Appeal considered the issue of good faith in the context of restitutionary remedies for mistake of law. The issue was whether the High Court was right to decline to strike out the respondents' claim to recover from the Commissioner a significant GST payment following the sale of substantial forestry assets. It had been submitted that the Commissioner had not received the payment in good faith since he was aware, prior to receipt of the GST payment, that the secured creditors claimed the funds were due to them. In allowing the appeal and striking out the respondents' claim, the Court of Appeal made the following observations in relation to the good faith element:

> [102] We except that the relevance of good faith (or the lack of it) remains unclear in the context of restitutionary remedies for mistake of law. A court might be more inclined to grant a restitutionary remedy against a defendant who knew of the payer's mistake, but there is no suggestion here of any such knowledge on the part of the Commissioner. The issue is whether mere notice of an adverse claim is sufficient to demonstrate an absence of good faith on the part of the Commissioner.
>
> [103] The concept of good faith depends entirely on context. It can be a difficult concept to define and applies in a wide variety of circumstances. Analogies with good faith in specific statutory or other contexts may not provide any reliable or appropriate guide. We agree with Lord Goff's view that the courts should be cautious in this area and develop the principles incrementally.
>
> [104] The difficulty is that there are no authorities directly in point on this issue and academic commentary is not of great assistance. There are cases dealing with the separate defence of alteration of position in good faith, but those authorities have no direct relevance here where the defence is that the Commissioner gave good consideration for the payment. If good faith is required as an additional element of the defence, the issue is what is required to show an absence of good faith (or its counterpoint, the existence of bad faith). No doubt dishonesty by the defendant payee will amount to a lack of good faith in this context. Conversely, a suggestion made by Brennan J in his minority judgment in *David Securities Ltd* that an honest belief by the defendant that he is entitled to the payment is enough to deny the plaintiff relief was firmly rejected by Lord Goff in *Kleinwort Benson* on the footing that such a sweeping proposition would exclude the right to recovery in a large proportion of cases.

[69] The concept of good faith, of course, has a special significance under s 4 of the Act to parties in certain defined employment relationships. However, although I did not hear legal argument on the issue, I accept the cautionary observation made by

the Court of Appeal in *Commissioner of Inland Revenue v Stiassny* at [103] that the good faith requirements in s 4 of the Act may not be a reliable or appropriate guide to the assessment of the good faith element in the common law defence of change of position. Perhaps the more relevant test in the present context is encapsulated in the following passage from the Court of Appeal judgment in *Carter Holt Harvey Ltd v National Distribution Union Inc*:[28]

> Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.

[70] In *Avon County Council v Howlett*,[29] the plaintiff, through its computerised system for the payment of wages, overpaid the defendant to the extent of £1,007. The Council sought to recover the overpayment on the grounds that it had been paid by mistake. The Court of Appeal held that as the plaintiff had discharged the onus of proving that the overpayment had occurred due to a mistake of fact, the Council was prima facie entitled to recover the full amount of the overpayment but because the plaintiff had represented to the defendant that he was entitled to the sum of money paid, the plaintiff were estopped from seeking recovery of the overpayment. In the course of his decision, Slade LJ stated:[30]

> However, this point causes no difficulty for the defendant in the present case since the plaintiffs, as the defendant's employers, in my opinion clearly owed him a duty not to misrepresent the amount of the pay to which he was entitled from time to time, unless the misrepresentations were caused by incorrect information given to them by the defendant.

[71] Estoppel has not been pleaded by the plaintiff in the present case but Mr Cleary accepted that, in the absence of misrepresentations caused by incorrect information, an employee is entitled to assume that he or she is being paid correctly. Mr Cleary submitted that Mr Foai's bona fides was questionable in that he never showed his managers a payslip but the short answer to that criticism is that all the relevant information about Mr Foai's pay was held at payroll and Ms Singh or other payroll staff could have accessed his payslips at any time. The evidence was that

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[28] [2002] 1 ERNZ 239 at [55].
[29] [1983] 1 All ER 1073 (EWCA).
[30] At 1086.

this was done by payroll around November 2007 and the details were provided by Ms Singh to Mr Foai's managers but nothing changed.

[72] There was a particularly poignant passage in Mr Foai's evidence which I accept but which is difficult to encapsulate in the raw words of a transcript. It is rather inelegantly expressed but it demonstrates the attempts Mr Foai had made, no doubt naively, to try to rationalise in his own mind why he was receiving the amounts he was being paid. He had been asked to explain his comment that his "mingling with the CEO and other general managers" may have contributed to his increased payments. He responded:

> **A.** I, I just thought that, given the situation I was in I was, it was a high point of my career, I mean, I associated with the chief executive and the general managers who had invited me to a lot of things and I thought, um, maybe this was what I was, you know, getting, you know, manager's pay. I mean it was a ridiculous thought but that's what I thought at the time. This could have, this could have contributed to, to, how why I was getting a high pay. It may not have, may, may have been but I, I just thought at the time may be, cos I was dealing with a lot of executives, you could say, um, that this, yeah, it was contributing –
>
> **Q.** Are you saying that you thought one of them may or some of them or, may have, I mean this is just what you thought not what happened, did you think that maybe there was extra pay because of, of who you were associating with, that they'd made some arrangement.
>
> **A.** Yeah I thought it at the time. I thought maybe Rob Fyfe would have pulled, you know, some strings or something but I knew, it couldn't have been possible but maybe it was, I wouldn't really know because it had gone through HR, my manager, it had gone through payroll and it just kept increasing, hey, maybe that's a fact, it's a possibility, yeah.

[73] I am satisfied that Mr Foai would not have entertained those naive thoughts unless he had a clear conscience. I do not accept that Mr Foai acted dishonestly or in bad faith. At an early stage he queried how his pay was made up but, as his employment agreement did not specify any pay rate, he just assumed, as he was entitled to assume, that he was being paid the correct amount. As the payments increased, he made additional enquiries of management and payroll but nothing happened and he continued to receive assurances from HR and payroll that his pay was in order. Even on the two occasions, in late 2007 and August 2008, when Ms Singh in payroll indicated that his pay situation was going to be checked out,

nothing happened. It was not until December 2008 that the situation was rectified. The obligation to be active and constructive in the employment relationship, which Air New Zealand subsequently accused Mr Foai of breaching, is of course a mutual obligation imposed under s 4(1A) of the Act on both parties to an employment relationship.

Change of position

[74] Turning now to the substance of the equitable defence of change of position, the onus of proof on this aspect of the case rests on Mr Foai. It was for him to establish that he had changed his position and, in all the circumstances, it would be inequitable to require him to make restitution. In *Lipkin Gorman*, Lord Goff stated:[31]

> I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that the mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of the defence which in fact is likely to be available only on comparatively rare occasions.

[75] Ms Greally submitted:

> 34. Mr Foai changed his position in a number of ways
>
> 34.1. He moved into his own accommodation which he would not otherwise have done
>
> 34.2. He went on a number of overseas trips and paid for gifts and trips for others
>
> 34.3. He incurred a child support debt to IRD
>
> 34.4. He decided to get married and bought an engagement ring

[76] The present case is unlike the situation in cases such as *Saunders & Co* where the defendant remains "enriched" in the sense that although he has disposed of the money sought to be recovered in restitution, he has retained the product of the expenditure of that money. In *Saunders & Co*, for example, the defendant had remained enriched in that he had retained a house purchased with the funds in

[31] At 580.

question.[32] In *Commerzbank AG v Price-Jones*[33] the Bank sought restitution from a former employee of an overpayment of £250,000. The Court of Appeal ordered repayment in full concluding that the defendant had been unjustly enriched by a mistake. It noted that there was no obstacle to the money being repaid because the defendant still had it. He had not, as the Court of Appeal described it, "been disenriched".[34]

[77] I accept on the evidence that Mr Foai spent the overpayment on expenses of the type detailed by Ms Greally above. In effect, because of the overpayments he lived beyond his real means for a period of approximately 16 months. He told how he took his annual leave in October 2008 and went on a holiday to Hawaii. He explained in cross-examination how he decided to become independent of his parents and he left home and obtained his own accommodation. He said: "I can have parties at my house now. I can bring people around. Me and my daughter and my partner can have an established base of our own where we can spend time together." In colloquial terms, Mr Foai was "living the dream" before being brought back down to earth rather spectacularly when he was dismissed on accusations which included the allegation that he had not been pro-active enough in querying the overpayments. I accept that given his lifestyle he would have been "disenriched" within a short period of having received the overpayments. The child support debt Ms Greally referred to was confirmed by a statement of account from Inland Revenue which showed Mr Foai as having an overdue balance as at 2 September 2011 of $5,580.37. The evidence was that the amount of Mr Foai's child support payments had increased as a result of the overpayments.

[78] In *Philip Collins Ltd v Davis and another*,[35] the plaintiff company sought restitution of excess royalties paid to the defendants under an alleged mistake of fact by periodic payments over an extended period. In reference to the change of position issue, the Court stated:[36]

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[32] At [102].
[33] [2003] EWCA Civ 1663.
[34] At [45].
[35] [2000] 3 All ER 808 (EWHC).
[36] At 829.

> On the basis of the defendants' oral evidence, coupled with such documentary evidence as they were able to produce, I am unable to find that any particular item of expenditure was directly referable to the overpayments of royalties. Their evidence was simply too vague and unspecific to justify such a finding. On the other hand, in the particular circumstances of the instant case the absence of such a finding is not, in my judgment, fatal to the defence of the change of position. Given that the approach of the defendants to their respective financial affairs was, essentially, to gear their outgoings to their income from time to time (usually, it would seem spending somewhat more than they received), and bearing in mind that the instant case involves not a single overpayment but a series of overpayments at periodic intervals over some six years, it is in my judgment open to the court to find, and I do find, that the overpayments caused a general change of position by the defendants in that they increased their level of outgoing by reference to the sums so paid. In particular, the fact that in the instant case the overpayments took the form of a series of periodical payments over an extended period seems to me to be significant in the context of a defence of change of position, in that it places the defendants in a stronger position to establish a general change of position such as I have described, consequent upon such overpayments.

[79] The evidence in the present case relating to Mr Foai's expenditure consequent upon the overpayments is not as "vague and unspecific" as the defendants' evidence appears to have been in the *Philip Collins Ltd* case but the principle recognised by the Court in that case has equal application to the facts of the case before me. In my view, Mr Foai has succeeded to the required standard of proof in making out the requirements of the equitable defence of change of position and I so hold.

[80] In *Saunders & Co*, Chisholm J held at [98] that he was bound by their Lordships' pronouncement in *Dextra Bank* that relative fault should not be taken into account when considering the common law defence of change of position but his Honour took the precaution of considering the defendant's arguments concerning relative fault. I respectfully adopt the same approach. My findings as to relative fault in the present case, however, are encapsulated in the observations I am about to make on fault and the balancing of the equities in relation to the s 94B defence. My conclusions on those issues would apply equally to the change of position defence.

Section 94B defence

[81] In *Thomas v Houston Corbett*, the Court of Appeal noted that s 94B, which was introduced as an amendment to the Judicature Act 1908 in 1958, was, "an entirely new provision introducing a doctrine of alteration of position hitherto

unknown to English law."[37] Turner J observed that it had no counterpart in any other Commonwealth jurisdiction except in Western Australia.[38] A recent paper[39] published by the Law Commission on reforms to the Judicature Act 1908, considered ss 94A and 94B relating to payments under mistake and observed:

> 14.44 Section 94B provides that relief can be denied in the case of a payment made under mistake of fact or law if three factors are present:
>
> - the payee received the money in good faith;
> - the payee altered its position in reliance on the validity of the payment; and
> - the Court considers it inequitable to grant relief.
>
> 14.45 In cases falling under these provisions, the Court is entitled to look at the equities from the point of view of both the payee and the payer. The weighing up of these equities can be summed up in the question of whether it would be unconscionable to grant relief in the light of the reasonable expectations of the parties. The onus is on the defendant to show that the three factors are present.

[82] Commenting on the effect of the common law developments, the Law Commission noted that the Court of Appeal in *Waitaki International* had held that the statutory defence under s 94B did not exclude the equitable defence of change in position. The Commission also observed:[40]

> This common law defence is wider than section 94B. The payee simply has to have changed their position rather than altering their position in reliance upon the validity of the payment. It has been suggested that the common law rule has now overtaken and encompasses section 94B.

The Law Commission noted that the common law developments raised questions about "whether Parliament would want to retain a statutory defence that has now been superseded by the common law".[41] After considering whether the statutory provision should be amended to reflect the common law developments, the Law Commission paper concluded:[42]

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[37] At 164.
[38] At 169.
[39] Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012)
[40] At 14.48.
[41] At 14.50.
[42] At 14.52.

> There are significant issues to be considered regarding the relationship of statute and the common law. Our preliminary view is that, for the present, these provisions should be retained in statute in their current form.

[83] The Western Australia counterpart to s 94B which Turner J referred to in *Thomas v Houston Corbett* has now been subsumed by s 125 of the Property Law Act 1969 WA and in s 65(8) of the Trustees Act 1962 WA. These sections use analogous wording to s 94B and their consideration in reported decisions may, therefore, provide useful guidance on the interpretation of the statutory defence and its relationship with the equitable defence of change of position. In a recent decision dealing with the issue, *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd*,[43] the Court of Appeal of the Supreme Court of Western Australia considered this issue. The Court noted the distinction between the statutory "narrow version" of the defence which involves the notion of "relative fault" or the weighing of "equities" and the common law "wide version" of the defence based on detrimental reliance.[44] The Court held that on the facts of that particular appeal, it was not necessary to determine whether the elements of relative fault or the weighing of equities were relevant to both the common law defence and statutory defences.[45]

[84] Turning to the relative equities in the present case, it seems to me that they overwhelmingly favour Mr Foai. When Air New Zealand changed Mr Foai's position to T&A Administrator, they provided him with a very brief "contract" which failed to specify his pay or hourly rate. There was no way, therefore, that Mr Foai was able to check for himself the accuracy of his pay which appears to have differed from one payday to another. He was entitled to rely on Air New Zealand to get the figures right. In *Farmers' Mutual Insurance Ltd v QBE Insurance International Ltd*,[46] Barker J considered s 94B in the context of a claim of monies paid under mistake observing:[47]

> Cooke P said in the *New Zealand Law Society* case at p 26 when considering the defences of estoppel, laches and acquiescence in a rectification action:

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[43] [2008] WASCA 119.
[44] At [203], [213].
[45] At [203].
[46] [1993] 3 NZLR 305.
[47] At 316.

> Essentially they require consideration of the equities and can be summed up in the question whether it would be unconscionable to grant relief in the light of the reasonable expectations of the parties.

> I regard the application of s 94B in the same light. This accords with the Court of Appeal's approach in *Thomas v Houston Corbett and Company* [1969] NZLR 151.

[85] Applying that same criteria to the present case, I consider that, in terms of the principle recognised in *Avon County Council* ([70] above) and the good faith provisions under the Act, Mr Foai was entitled to have a reasonable expectation that Air New Zealand would not misrepresent the amount of pay to which he was entitled.

[86] For the reasons already stated in respect of the change of position defence, I am satisfied on the evidence, that for the purposes of s 94B, there is no issue of bad faith and that there had been an alteration of position by Mr Foai in reliance on the validity of the payments in question. Given that the equities clearly favour Mr Foai, his defence under s 94B also succeeds as it would be inequitable to compel repayment.

Conclusions

[87] For the reasons stated, I am satisfied that the injustice that would result from compelling Mr Foai to repay the money in question would significantly outweigh the potential injustice to Air New Zealand if it is denied recovery and for that reason I reject Air New Zealand's reinstatement claim. In terms of s 183(2) of the Act, that part of the Authority's determination relating to the overpayment is hereby set aside and this judgment now stands in its place.

[88] The plaintiff is entitled to costs. If agreement cannot be reached on this issue, then Ms Greally is to file submissions within 28 days and Mr Cleary will have a like time from receipt of those submissions in which to respond.

A D Ford
Judge

Judgment signed at 3.30 pm on 4 April 2012