



Overpayment of wages. Where do you stand?

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Date: Monday September 21, 2020

Receiving an overpayment of wages claim from your employer can present unexpected legal issues. An overpayment of wages will usually occur as a result of an administrative or clerical error, incorrect data in a payroll system or on the basis of misinterpretation of an applicable industrial instrument, such as an award or enterprise agreement.

The traditional understanding in relation to overpayment of wages is that money can be recovered from an employee if the overpayment arose from a mistake of fact, however, overpayment monies could not be recovered if it arose from a mistake of law.

The leading case on overpayments made under a contract is [David Securities Pty Ltd v Commonwealth Bank of Australia \(1992\) 175 CLR 353](#). In that case, the High Court overturned the rule against recovery for a mistake of law and found that recovery was available for any genuine mistake. It was held at [43]:

“If the payer has made the payment because of a mistake, his or her intention to transfer the money is vitiated and the recipient has been enriched. There is therefore no place for a further requirement that the causative mistake be fundamental”

Overpayment by mistake

In order to be entitled to recovery of the overpayment sum, the employer must first demonstrate that the overpayments were made as a genuine mistake or error.

Recovery will generally not be available if the payment has been voluntarily made; that is, the employer intended to make the payment despite the employee not strictly having an entitlement.

If you are approached by an employer, or former employer, about an overpayment, the first step is to request that they justify how the payment was a genuine mistake in the circumstances. Once you have that information, you will be in a position to assess whether to repay the monies, for example by agreed instalments, or seek further advice about potential defences to the claim.

Change of position defence

Recovery of an overpayment will not be possible where the employee can demonstrate that they have 'changed position' as a result of the overpayment. This basically means that they have utilised those funds in good faith, and if established, is a full defence to any recovery action. The defence however will usually only arise in relatively confined circumstances.

An example of this notion is the case of [TRA Global Pty Ltd v Kebakoska \[2011\] VSC 480](#), where the employee had been denied Centrelink benefits as a result of the overpayment.

In [Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd \[2014\] HCA 14](#) the High Court held that repayment of monies paid by mistake can be resisted on the basis that it would be inequitable. To establish that it would be inequitable to repay the money, it must be shown that the recipient has acted to his or her detriment in reliance on the overpayment.

Given the complexities that arise in the application of the available defences, it is a good idea to seek advice.

Deductions from pay

The *Fair Work Act 2009* (FW Act) contains a strict set of requirements that regulate the ability of an employer to withhold monies from an employee's wages.

A deduction will only be permitted in accordance with [section 324 of the FW Act](#) where the employer is authorised:

1. in writing by the employee and is principally for the employee's benefit; or
2. by the employee in accordance with an enterprise agreement; or
3. by or under a modern award or an FWC order; or
4. by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

An employer cannot deduct
money from your wages
for an overpayment
without your agreement.

Put simply, an employer cannot deduct money from your wages for an overpayment without your agreement. If they do, it is a breach of the Act and serious penalties can apply. However, if you withhold agreement to repay the money, there is a chance your employer could seek recovery through the courts.

You can read more about deducting wages in our article "[Can my employer deduct money from my wages?](#)"

Overpayment of superannuation

An employee is able to make a complaint to their superannuation fund (using the fund's internal dispute resolution process) and to the Australian Taxation Office in respect of the issue.

If the complaint is not dealt with appropriately by the relevant fund, it could be escalated to the Australian Financial Complaints Authority.

Get help from an employment lawyer

If you've been overpaid and your employer is seeking to recoup that overpayment, there may be circumstances where you can retain the payment.

Likewise, if you are having any other issues in relation to your employment, including any issues related to COVID-19, our [award-winning employment law team](#) can assist you in securing your employment rights and entitlements.

We continue to provide our client services during the coronavirus outbreak.

Most of our teams have now returned to their respective offices with others remaining fully equipped to work remotely, where necessary.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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