



Determination 6: Recovery of Overpayments

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**Government
of South Australia**

Office of the Commissioner
for Public Sector Employment

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Determination 6: Recovery of Overpayments

Date of Operation: August 2022

WHO IS COVERED BY THIS DETERMINATION?

This document applies as a Determination to:

- Employees in the Public Service_employed in a public sector agency that is an administrative unit or attached office as defined by the PS Act; and also
- Public sector employees whose employment has been declared by another Act or the regulations under the PS Act to be employment to which the above Section 16(1) of the PS Act applies.

Under section 14(1)(b) of the *Public Sector Act 2009* (PS Act), the Commissioner of Public Sector Employment may issue determinations relating to public sector employment matters.

For agencies and employees to which Part 7 of the PS act does not apply, this document is a Guideline of the Commissioner for Public Sector Employment. Agencies are encouraged to formally adopt the Guideline as agency policy.

If you are in any doubts as to whether this document applies to your employment, please contact your Human Resource unit to clarify your status.

1. INTRODUCTION

Treasurer's Instruction No. 5 Debt Recovery and Write Offs ("Treasurer's Instruction No. 5"), requires chief executives and other agency heads to seek recovery of debts to the Crown. This includes debts created by the overpayment of wages.

Treasurer's Instruction No. 5 provides that where a debtor is a South Australian Government employee, the debt is not to be written off and the person must be pursued for a prompt repayment.

Pursuant to Treasurer's Instruction No. 5, agencies have an obligation to recover debts arising from overpayments and employees have an obligation to repay debts created during their employment.

The transfer of an employee from employment in one public sector agency to employment in another agency does not remove the existence of a debt to the Crown. Likewise, termination of an employee's employment does not remove the existence of a debt to the Crown.

NOTE: the responsibility to seek recovery of debts created by overpayments rests with the agency in which the employee is (or was) working at the time the overpayment occurred. Shared Services SA is a service delivery business unit and not a stand-alone agency. Shared Services SA is instructed by public sector agencies to perform payroll-related functions, including functions related to the recovery of debts owed by public sector employees. In practice, the functions outlined in this Determination may be performed by Shared Services SA.

For the purpose for this Determination, net fortnightly salary means gross fortnightly salary less income taxation.

2. ADVICE TO EMPLOYEES

As soon as possible after an overpayment to an employee has been identified, in addition to ensuring that steps are taken to ensure that further overpayments do not occur (as necessary), agencies are to advise, or facilitate advice to, the relevant employee (or former employee) that informs them of the following:

- the detail of the overpayment including the reason and amount overpaid
- that there is an obligation for the agency to recover the overpayment and, on the face of it, an obligation for the employee to repay, and
- the proposed basis for an agreed repayment arrangement.

Agencies may agree with employees (or former employees) for repayment of overpayments by entering a written agreement specifying that either the employee will repay the debt by fortnightly deductions from their after-tax salary, or, in the case of a former employee, fortnightly transfer by them from a financial institution or electronic funds transfer.

Agreement may be reached either for repayment in a lump sum or otherwise as follows:

- on a fortnightly basis, at the rate of at least 10% of the employee's net fortnightly salary or other greater rate as agreed, or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deduction to occur at the rate of 10% of net fortnightly salary, a percentage of net salary necessary to repay the overpayment in full within a maximum of five years on a fortnightly basis.

In the case of former employees who are not presently in paid employment, agreement may be reached either for repayment in a lump sum or otherwise as follows:

- on a fortnightly basis, at the rate of at least 10% of the net salary being paid to the former employee at the time their employment in the public sector was terminated, or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deductions to occur at the rate of 10% of applicable net prior fortnightly salary, a percentage of that net salary necessary to repay the overpayment in full within a maximum of five years on a fortnightly basis.

Where the employee disputes the existence of the overpayment the employee should contact their Human Resources unit for advice on the appropriate grievance review process to be followed.

If as a result of the application of this Determination taxation amendment issues arise, employees should seek taxation advice or refer to the following Australian Taxation Office resource (if relevant):

<https://www.ato.gov.au/General/Fix-a-mistake-or-amend-a-return/>.

3. UNILATERAL DEDUCTIONS

Amounts of \$50 or less

Where an overpayment to an employee is \$50 or less, there will be an automatic deduction of the overpayment amount from net fortnightly salary otherwise payable to the employee, by reliance on section 70 of the PS Act.

Employees will be notified of the overpayment and intended automatic deduction prior to the automatic deduction being actioned. Where an employee claims that an immediate automatic deduction would cause them significant financial hardship, they must contact their relevant Payroll Team to discuss the matter and attempt to negotiate alternative arrangements for incremental deductions from net fortnightly salary to meet the amount of overpayment. The relevant Payroll Team must ensure that an automatic deduction from fortnightly salary does not occur whilst discussions between the parties are underway.

It is the obligation of the employee who has been overpaid to demonstrate within a reasonable period (not more than one month following notification of the overpayment) that an automatic singular deduction from their fortnightly salary would cause them financial hardship and that they seek to arrange for a smaller quantum of deductions from their salary in order to meet the debt created by the overpayment. Should an employee fail to objectively demonstrate that automatic deductions from their fortnightly salary of an overpayment would cause them financial hardship, the deduction will occur.

Amounts greater than \$50

Where agreement with an employee for repayment of the debt created by an overpayment is not reached, agencies will rely upon section 70 of the PS Act, and facilitate unilateral deductions from the employee's salary as follows:

- on a fortnightly basis at the rate of at least 10% of the employee's net fortnightly salary or other greater rate as agreed; or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deductions to occur at the rate of 10% of net fortnightly salary, a percentage of net salary necessary to repay the overpayment in full within a maximum of five years.

4. FINANCIAL HARDSHIP

The arrangements for repayment of overpayments will apply unless an employee (or former employee) demonstrates on an objective basis they are currently experiencing, or would experience, financial hardship if required to repay at the rate of a minimum of 10% of net fortnightly salary. Only in such cases, may agencies agree to the employee repaying the overpayment at a lesser rate or over a longer period of time.

If an employee can demonstrate on an objective basis that having received an overpayment in good faith (i.e. they had no knowledge of it) and that they changed their circumstances in reliance on the monies to their detriment, they may not be required to repay the debt created by the overpayment. Agencies should seek advice from the Crown Solicitor's Office when an employee asserts that they should not be required to repay a debt created by an overpayment on this basis.

Where an employee's employment in the public sector terminates, and the employee has a liability to the Crown, an agency is to ensure that section 70 of the PS Act is relied upon, and that deductions to pay off the liability are made from any payment to the employee upon separation.

Where there are no monies otherwise payable to an employee upon termination of their employment, or monies otherwise payable are insufficient to fully repay a liability, agencies are to attempt to reach agreement with the person for fortnightly repayments of the relevant amount, as above.

5. ACTION TO RECOVER

The Commissioner for Public Sector Employment has determined that where an agency relies upon section 70 of the PS Act to recover a debt owed by an employee created by an overpayment, the agency may only commence recovery of the debt within six years of the debt being created.

In the absence of agreement with a former employee, including when agreement of repayment is not reached after unilateral deductions from monies otherwise payable to the employee upon termination of their employment does not fully satisfy the debt, it may be appropriate to seek the assistance of the Crown Solicitor's Office to enable appropriate legal action to be taken to recover the debt to the Crown created by an overpayment.

6. RECREATION, LONG SERVICE AND RETENTION LEAVE

The taking by an employee of recreation, long service or skills and experience retention leave on the basis of an error (however caused) as to actual accrued entitlements (i.e. where an employee has taken leave without the requisite accrued entitlement) does not give rise to an overpayment of salary, other than where an amount is paid for leave loading in respect of the period.

This is different to where an employee is permitted by management to take leave in the knowledge that they have not accrued an entitlement (i.e. in advance of accrual). In such circumstances, where an employee's employment is terminated prior to their leave balance being neutral or positive, a debt will exist.

7. POTENTIAL MISCONDUCT

Where an employee knowingly allows a debt in the form of an overpayment of salary to accrue, they may have committed misconduct in contravention of the Professional Conduct Standards in the *Code of Ethics for the South Australian Public Sector*. Managers should seek advice from their Human Resources unit in the first instance where it is suspected that an employee has acted in this manner.

**Office of the Commissioner
for Public Sector Employment**

Street Address

Ground Floor, State
Administration Centre,
200 Victoria Square
(Tarndanyangga),
Adelaide SA 5000

Mailing address

GPO Box 464,
Adelaide SA 5001

E publicsector@sa.gov.au

T 1800 317 333

W publicsector.sa.gov.au



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