

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 289
5467571

BETWEEN	MOIDIN KUTTY Applicant
A N D	OLD FASHIONED SMALLGOODS (NZ) LIMITED First Respondent
A N D	SAM GOUNDER Second Respondent

Member of Authority: Rachel Larmer

Representatives: Sacha Beacham, Advocate for Applicant
Sam Gounder for First and Second Respondents

Investigation Meeting: 21 September 2015 at Auckland

Date of Determination: 22 September 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Mr Sam Gounder is the sole director and shareholder of Old Fashioned Smallgoods (NZ) Limited (OFS). OFS is a small business which makes sausages. Mr Kutty is a specialist in Halal meat practices and processes and he was employed by OFS as its Operations Manager.

[2] The parties signed a written employment agreement on 08 November 2012 (the first agreement). The employment agreement required Mr Kutty to work 40 hours a week with his normal hours of work being from 7am until 2pm Monday to Saturday.

[3] Mr Kutty was also required to work reasonable overtime which would incur overtime payments as per the rate in employment agreement. However the overtime rate was not specified in the employment agreement. Mr Kutty says he regularly worked in excess of 40 hours per week without receiving any overtime payments. Mr Kutty is not seeking to recover wage arrears for those additional hours he says he worked.

[4] Mr Kutty's salary of \$40,000 was based on 40 hours per week. Under the employment agreement Mr Kutty was to be paid weekly on Thursdays into his nominated bank account. Mr Kutty says he was only paid \$576.92 which is \$30,000 per year. Mr Kutty says he was short paid by \$10,000 per annum.

[5] Mr Kutty's salary was paid one week in arrears. His last salary payment was on 11 October 2013. Mr Kutty says he was sent home by Mr Gounder on Friday 24 October 2013 to "rest" and told to come back on Monday but then was not allowed to return to work. Mr Kutty says that on 25 October 2013 he was called in to work to uplift the second agreement which he needed for his work visa renewal application.

[6] Mr Kutty says that OFS unlawfully deducted money from his wages because he did not receive a final pay and did not receive any salary for working after 11 October.

[7] Mr Kutty says he did not take any paid leave while employed but has not been paid any holiday pay. Mr Kutty took 8 ½ days annual leave whilst employed but says he was not paid for these days. Mr Kutty was told his salary had been deducted for the time on annual leave because he had not yet become entitled to paid annual holiday and was not given paid annual holiday in advance.

[8] Mr Kutty was a KiwiSaver member while employed by OFS so OFS had to remit KiwiSaver deductions and contributions to Inland Revenue Department (IRD) on his behalf. Mr Kutty says no KiwiSaver contributions have been credited to his KiwiSaver account.

Mr Kutty's claims

[9] Mr Kutty claims:

- (a) A penalty against OFS for breaching his employment agreement, namely by;
 - a. the failure to pay his contractual salary;
 - b. the failure to pay statutory entitlements (annual holidays and KiwiSaver);
 - c. what Mr Kutty describes as an "*unlawful suspension*" when he alleges Mr Gounder did not let him return to work after 24 October 2013;
- (b) A penalty against OFS for breach of good faith;
- (c) Wage arrears, namely:
 - (i) Salary arrears of \$10,000 per annum;
 - (ii) Unpaid holiday pay;
 - (iii) Unpaid KiwiSaver contributions; and
 - (iv) Unlawful deductions from his wages.
- (d) A penalty against Mr Gounder personally for inciting, instigating, aiding and abetting breaches of Mr Kutty's employment agreement.

[10] OFS denies all of Mr Kutty's claims and says it does not owe him anything.

[11] Mr Gounder says Mr Kutty continued to work as normal up until 30 October 2013. Mr Gounder says that on 30 October he met with Mr Kutty at work and told him he (Mr Gounder) was unhappy with his (Mr Kutty's) work so would not be extending his employment when his work visa expired.

[12] Mr Kutty denies such a meeting occurred. He says he was called in to work on 30 October and the accountant Mr Ritesh Prasad presented him with a Restraint Agreement and asked him to sign it saying Mr Gounder was concerned that Mr Kutty

may be bad mouthing OFS and looking to work elsewhere. Mr Kutty says Mr Gounder was not present when Mr Prasad spoke to Mr Kutty.

[13] Mr Gounder says on 30 October he advised Mr Kutty to start looking for new employment so Mr Kutty left work that day.¹ Mr Gounder says Mr Kutty was paid up to 01 November 2013. Mr Gounder says he wrote to Immigration New Zealand (INZ) on 05 November saying he would not be continuing to employ Mr Kutty. This letter was not copied to Mr Kutty. Mr Kutty suggests that Mr Gounder made up this letter for the investigation meeting.

[14] It would be surprising if INZ had received Mr Gounder's letter because Mr Kutty's work visa renewal application was recorded as having been filed on 06 November 2013 and it identified OFS as his employer. A work visa was issued with OFS as the named employer so INZ cannot have been aware of Mr Gounder's letter or the work visa would not have been issued.

[15] Mr Gounder told the Authority that Mr Kutty met with him on 08 November 2013 and begged him (Mr Gounder) to support his (Mr Kutty's) application for another work visa so he could remain working in New Zealand after his existing work visa expired on 16 November 2013 because he wanted permanent residency and needed a work visa for that. Mr Kutty disputes that meeting ever occurred.

[16] Mr Gounder says he only agreed to do so because Mr Kutty's wife was suffering from cancer and was undergoing treatment so Mr Moidin would have had a better chance of finding new employment if he had a valid work visa. Mr Gounder says Mr Kutty understood he would not be working for OFS even though the parties had signed a second employment agreement.

[17] Mr Gounder claims Mr Kutty provided him (Mr Gounder) with the second agreement on 08 November which Mr Gounder signed that day. Mr Gounder claims it was undated when he signed it so Mr Kutty must have backdated it to 25 October. Mr Kutty says Mr Gounder presented him with the signed second agreement on 25 October 2013.

¹ There is no dismissal grievance before the Authority.

[18] Mr Kutty requires a work visa to be able to legally work in New Zealand. From 19 February 2009 to 19 February 2010 Mr Kutty had a work visa which enabled him to be employed by Caltex. From 31 March 2010 to 15 November 2012 Mr Kutty was on a visitor visa so was not permitted to work. The parties agree that Mr Kutty worked for OFS a period of time without having the necessary work visa to do so.

[19] OFS says Mr Kutty worked “under the table” for approximately six months without a valid work visa during which time he was paid a salary of \$30,000 per annum. Mr Gounder says this was paid by cash cheque and no deductions such as PAYE, ACC or KiwiSaver were remitted to Inland Revenue Department (IRD). Mr Gounder said he knew this was wrong and that he intended after the Authority’s investigation meeting to go to the “*authorities*” to give full disclosure about this.

[20] Mr Kutty disputes Mr Gounder’s account of this. Mr Kutty says he worked for OFS for 12 months but was not paid before being employed as a salaried employee. Mr Kutty is not claiming wages or salary for the period he worked for OFS but was not paid.

[21] Mr Kutty received two work visas which were specifically linked to his employment as the Operations Manager for OFS. This meant he was restricted to working in that position for OFS which was the named employer recorded in both work visas. Any changes required a variation to be made to Mr Kutty’s work visa. No variations were made for the material period.

[22] The first work visa was for one year from 16 November 2012. This was supported by a signed employment agreement dated 08 November 2012. The second work visa was for two years from 21 November 2013. This was supported by a signed employment agreement dated 25 October 2013 (the second agreement).

[23] Mr Kutty’s work visa was amended on 02 April 2014 to enable him to work in a different position with a new named employer. Mr Kutty obtained permanent residency status on 10 September 2014.

Issues

[24] The issues to be determined by the Authority are:

- (a) Did OFS breach Mr Kutty's employment agreement by:
 - a. Underpaying him by \$10,000 per year;
 - b. Failing to pay KiwiSaver contributions;
 - c. Failing to pay holiday entitlements;
 - d. Failing to allow him to return to work after 24 October 2013.
- (b) Should a penalty be imposed on OFS for any breaches of Mr Kutty's employment agreement?
- (c) Did OFS breach its good faith obligations to Mr Kutty?
- (d) If so, should a penalty be imposed on OFS for any breaches of good faith?
- (e) Is Mr Kutty owed wage arrears for:
 - a. Underpaid salary;
 - b. Annual holiday entitlements;
 - c. KiwiSaver contributions;
 - d. Unlawful deductions made from his wages.
- (f) If so, how much is Mr Kutty owed?
- (g) Did Mr Gounder incite, instigate, aid or abet OFS to breach Mr Kutty's employment agreement?
- (h) If so, should a penalty be imposed on Mr Gounder?

Did OFS breach Mr Kutty's employment agreement?

Underpaid salary

[25] Mr Kutty produced three payslips to the Authority² which showed that he had been paid \$576.92 gross for five days' work which amounts to \$30,000 per annum. Under the terms of both employment agreements Mr Kutty was to be paid \$40,000 for working a 40 hour week which amounts to \$769.23 gross per week.

[26] Mr Gounder agrees that Mr Kutty was paid \$30,000 per annum not \$40,000. Mr Gounder says the parties agreed to record a salary of \$40,000 in the employment agreements because INZ would not issue Mr Kutty with a work visa if he was paid less than that. However Mr Gounder says they agreed Mr Kutty would in fact only be paid \$30,000. There is no documentation to prove that and Mr Kutty denies making such an arrangement.

[27] I find that OFS was legally required to pay Mr Kutty his contractual salary. There was no legal basis that entitled OFS to underpay Mr Kutty. I therefore find that OFS breached Mr Kutty's employment agreement by failing to pay him his full contractual salary.

Unpaid annual holiday pay

[28] Mr Kutty said that he did not take any paid leave whilst employed but did not receive any holiday pay upon termination. OFS says Mr Kutty was paid 12 days annual holiday while employed but it did not produce any documentation to establish that. Mr Gounder was unable to tell the Authority what dates Mr Kutty took paid leave. Nor could Mr Gounder show Mr Kutty had been paid annual holiday pay while on leave.

[29] OFS did not provide Mr Kutty's wage and time or holiday and leave records as directed.

[30] In accordance with s132.(2) of the Employment Relations Act 2000 (the Act) I accept Mr Kutty's evidence and find this claim proved to the required standard. It is clear Mr Kutty's employment has ended. OFS has therefore breached Mr Kutty's employment agreement by not paying him his annual holiday pay entitlements upon termination.

² 28 November 2012, 4 December 2012 and 20 June 2013

KiwiSaver

[31] Mr Gounder admits no KiwiSaver contributions were made.

[32] Because Mr Kutty is a KiwiSaver member OFS was legally required to contribute 2% of Mr Kutty's gross earnings to his KiwiSaver scheme from 8 November 2012 until 31 March 2013. The rate of the compulsory employer contribution increased on 01 April 2013 so from then until Mr Kutty's employment ended OFS was legally required to pay 3% of Mr Kutty's total gross earnings to his KiwiSaver account as the employer contribution.

[33] That did not occur. I find OFS breached Mr Kutty's employment agreement by failing to deduct and remit his KiwiSaver contributions to IRD.

Was Mr Kutty unlawfully suspended?

[34] Mr Kutty says that on Thursday, 24 October 2013, Mr Gounder told him to go home and rest but then did not permit him (Mr Kutty) to return to work. On Monday, 28 October 2013 when Mr Kutty went into work, he was advised by Mr Ritesh Prasad (the accountant) that Mr Gounder was not available and was told to come back on Wednesday, 30 October 2013 when Mr Gounder would be there.

[35] On 30 October 2013 Mr Kutty says he met with Mr Gounder at the office and Mr Gounder told him to stay home because there was no point in him returning to work until a contractor that Mr Gounder had employed had finished improvements and streamlining a new product's formulation. Mr Kutty says that Mr Gounder kept fobbing him off and making excuses about why he could not return to work.

[36] Mr Gounder disputes Mr Kutty's evidence and says Mr Kutty worked as normal up to 30 October 2013. Mr Gounder told the Authority he was very concerned about Mr Kutty's poor performance and about other issues he raised during the investigation meeting. These matters are known to the parties so I do not set them out here.

[37] I consider these would not be reasons why Mr Gounder would be reluctant (from his subjective perspective) to have Mr Kutty at work. I have therefore preferred Mr Kutty's evidence so consider it more likely than not he was prevented from returning to work after 24 October.

[38] The failure to allow an employee to work when they want to amounts to a suspension.³ There was no contractual provision that entitled OFS to suspend Mr Kutty nor was there a good reason for it to do so. Mr Kutty wanted to return to work and was ready to do so but was told to stay away by OFS. OFS had an obligation to provide Mr Kutty with work so I find its failure to do so was a breach of his employment agreement.

Should a penalty be imposed?

[39] Mr Kutty first raised the penalty claim in his Amended Statement of Problem which was filed on 01 July 2014.

[40] Section 135(5) of the Employment Relations Act 2000 (the Act) requires an action for the recovery of a penalty to be commenced within 12 months after it became known to the person bringing the action or the date on which it should reasonably have become known to the person bringing the action.

[41] I find this penalty claim relates to matters which occurred outside of the 12 month time limit so there is no jurisdiction to award a penalty.

Did OFS breach its good faith obligations to Mr Kutty?

[42] The Act contains mutual good faith obligations in s.4 of the Act. Section 4(1A) of the Act requires parties in an employment relationship to be “*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*”.

[43] I am satisfied that OFS has failed to comply with its good faith obligations because it underpaid Mr Kutty, it failed to pay his KiwiSaver entitlements and it failed to pay his holiday pay entitlements.

Should a penalty be imposed?

[44] Mr Kutty first raised this penalty claim in his Amended Statement of Problem which was filed on 01 July 2014. This penalty claim relates to matters which occurred outside of the 12 month time limit in s.135(5) of the Act. Accordingly there is no jurisdiction to award a penalty under s.4A of the Act for these breaches of good faith.

³ This was not pursued by Mr Kutty as disadvantage grievance due to 90 day issue.

Is Mr Kutty owed wage arrears?

[45] Because OFS failed to comply with directions to provide copies of Mr Kutty's wage and time records and holiday and leave records in accordance with s.132 of the Act I accept Mr Kutty's evidence regarding the salary he was paid and the hours, days and time he worked in the absence of OFS proving such claims are incorrect.

[46] I find Mr Kutty is owed wage arrears for:

- a. Underpaid weekly salary;
- b. Unpaid salary for Tuesday 29 October 2013;
- c. Unpaid annual holiday entitlements;
- d. Unpaid KiwiSaver contributions;
- e. Unlawful deductions from his wages.

Unlawful deductions from wages

[47] Mr Gounder produced a final pay slip to the Authority which Mr Kutty had not seen before. This identified that Mr Kutty had been paid for 29 and 30 October and 01 November but not for Tuesday 29 October 2013. Mr Gounder could not explain why Mr Kutty had not been paid for that day and had no documentation to establish why that day's pay had been deducted from his final pay was provided.

[48] I find therefore that OFS unlawfully deducted a day's pay from Mr Kutty for Tuesday 29 October 2013.

[49] The payslip also shows that 12 days annual holiday had been deducted. I accept Mr Kutty's evidence that he was not paid annual holidays while employed so this amounts to another unlawful deduction.

[50] The payslip also shows that \$1,042.11 had been deducted from Mr Kutty's pay 01 November pay. Mr Gounder says that deduction was because Mr Kutty had given credit to customers who should not have been given credit so OFS had charged Mr Kutty (i.e. deducted from his pay) the amount of purchases that had been made on these accounts. I find there was no contractual provision which entitled OFS to make such a deduction.

[51] Mr Kutty produced a handwritten note from OFS's accountant which noted that \$630.48 had been deducted from his pay. This was for a course that OFS had required Mr Kutty to attend for work so that he met the legal requirements of a food processor/wholesaler/exporter. There was no contractual requirement for Mr Kutty to pay for this or to reimburse OFS for some or all of these costs.

[52] Mr Kutty did not authorise or approve any these deductions. There was no deduction clause in his employment agreement. OFS did not consult with Mr Kutty before making these deductions. The Wages Protection Act 1983 provides that Mr Kutty is entitled to be paid without deduction. That did not occur.

[53] I find that OFS made a number of unlawful deductions from Mr Kutty's wages.

What is Mr Kutty owed?

Dates of employment

[54] The first step in assessing what Mr Kutty is owed is to determine what dates he was employed. OFS says Mr Kutty was employed from 16 November 2012 to 01 November 2013. Mr Kutty claims he was employed from 15 October 2012 to 27 February 2015.⁴

[55] Mr Kutty acknowledges he was not paid from 11 October 2013 and his evidence is that he did not attend work from 24 October 2013. The 27 February 2015 date is the date Mr Kutty says he treated the employment agreement as having been repudiated.

[56] The evidence is unsatisfactory and contradictory so an assessment needs to be made about what is more likely than not to have occurred based on the information currently before the Authority.

[57] Had OFS complied with the Authority's direction to produce Mr Kutty's wage and time and holiday and leave records and the Employer's Monthly Schedules (EMSs) for the period Mr Kutty was employed then these difficulties may have been easier to resolve.

⁴ This is the date identified in the ASoP.

[58] I find on the balance of probabilities that Mr Kutty was employed for the period of his first work visa i.e. from 16 November 2012 to 16 November 2013. I have selected the termination date of 16 November 2013 on the basis that Mr Kutty's employment more likely than not ended then.

[59] Mr Kutty was not legally permitted to work after that until he got his second work permit on 21 November 2013. So OFS could not have legally employed Mr Kutty from 17-20 November 2013 even if it had wanted to. Mr Kutty never did any work under the second work permit nor was he was not paid.

[60] The first agreement did not contain a notice provision so reasonable notice must be implied. Mr Gounder's evidence was that the employment ended on 01 November (although according to Mr Gounder Mr Kutty actually left work on 30 October after apparently being told to seek alternative employment). There is no evidence that Mr Kutty was paid in lieu of notice and there was no contractual provision for that to occur.

[61] I have therefore proceeded on the basis that Mr Kutty's employment continued subsequent to 01 November (being the date Mr Gounder decided to end the employment) for a reasonable notice period.

[62] I do not accept the employment was ongoing past 16 November because Mr Kutty's own evidence was that he was not permitted to return to work. The accountant had also shown Mr Kutty handwritten notes showing his final pay calculations. Mr Kutty was not paid after that and did not perform any work.

[63] It is therefore reasonable to conclude that after being shown his final pay calculations by the accountant Mr Kutty knew or ought reasonably to have known that OFS had ended his employment. The surrounding facts (no work and no pay) also suggest that the employment relationship had ended and was not ongoing as Mr Kutty suggests.

Underpaid salary

[64] I have determined that Mr Kutty was employed for 12 months so in accordance with his first agreement he should have been paid \$40,000. The final payslip Mr Gounder produced at the investigation meeting is not very clear about what was paid and why.

[65] However it did appear to indicate Mr Kutty had been paid at that point (01 November) \$16,384.53 gross. However that figure doesn't seem to tally with Mr Kutty's evidence about what he was actually paid (which although unclear seems to be more than that).

[66] I am going to reserve fixing this amount to give the parties seven days from the date of this determination to attempt to agree on the amount Mr Kutty is owed in salary arrears. If agreement is not reached then either party has 14 days from the date of this determination to apply to the Authority to fix this amount.

[67] This should be a relatively simple calculation consisting of \$40,000 less the gross amount Mr Kutty has already been paid.

[68] Mr Kutty should be able to calculate what he has already been paid by reviewing his bank records and OFS should be able to calculate that amount from its payroll records and/or from its EMSs.

Holiday pay

[69] Mr Kutty is owed unpaid holiday pay of \$3,200 being 8% of \$40,000. The full 8% has been awarded because OFS did not produce evidence to establish Mr Kutty took paid annual holiday while employed.

KiwiSaver

[70] The Authority has not been advised of the amount of KiwiSaver employer contribution arrears.

[71] The parties therefore have seven days within which to calculate and if possible agree on the amount of OFS's compulsory KiwiSaver contributions. This is to be calculated at the rate of 2% of his total gross earnings for the period 16 November

2012-31 March 2013 and at the rate of 3% of his total gross earnings for the period 01 April 2013-16 November 2013.

[72] If agreement is not reached the parties have 14 days within which to apply to the Authority to fix that amount.

[73] No separate award is made for Mr Kutty's employee KiwiSaver contributions as these were to be deducted from his salary when it was paid so that amount will be taken account of in his award of salary arrears.

Did Mr Gounder incite, instigate, aid or abet OFS to breach Mr Kutty's employment agreement?

[74] I find that Mr Gounder did incite, instigate, aid and abet breaches of Mr Kutty's employment agreement. Mr Gounder was OFS's decision-maker. He was the one who made the decisions which actually breached Mr Kutty's employment agreement. Mr Gounder was also the person with whom Mr Kutty had all material dealings.

Should a penalty be imposed on Mr Gounder under s.134(2) of the Act?

[75] A penalty may be imposed under s.134(2) of the Act on a person who incites, instigates, aids or abets any breach of an employment agreement. Section 135(5) of the Act requires an action for recovery of a penalty to be commenced within 12 months.

[76] The first Statement of Problem did not name Mr Gounder as a party. The action for recovery of a penalty against Mr Gounder personally was not commenced until the Amended Statement of Problem was filed on 27 February 2015.

[77] The employment relationship ended on 16 November 2013 so the penalty claim must have arisen before then. This means the penalty action is outside the 12 month time limit so the Authority does not have jurisdiction to impose a penalty on Mr Gounder.

Orders

[78] The parties are ordered to attempt to agree if possible on the amount of salary arrears and KiwiSaver employer contributions payable in accordance with this determination. If agreement is not reached then either party may apply within 14 days

of the date of this determination for the Authority to fix those amounts. This timetable will be strictly enforced so any departure from it requires prior leave of the Authority.

[79] Any application to fix these amounts must be accompanied by evidence about how the amounts have been calculated and supported by relevant documents relating to each party's calculations. The Authority will then fix these amounts based on the available information.

[80] OFS is ordered within 28 days of the date of this determination to pay Mr Kutty \$3,200 holiday pay. Mr Kutty has been deprived of the use of this money which should have been paid to him upon termination so it is appropriate to award him interest to recognise that.

[81] In accordance with the Judicature Act 1908, OFS is ordered to pay Mr Kutty interest at the rate of 7.5% (the current prescribed rate) on the amount of \$3,200 to be calculated from 16 November 2012 until that amount has been paid in full.

Costs

[82] Costs are adjourned sine die pending the final amounts of salary and KiwiSaver arrears being agreed by the parties or alternatively fixed by the Authority.

Rachel Larmer
Member of the Employment Relations Authority