

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 336
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
Mr Gounder as Director of First Respondent and in
person as Second Respondent

Submissions received: 14 October 2015 from the Applicant
21 October 2015 from the Respondents
27 October 2015 from the Applicant

Date of Determination: 29 October 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

[1] In the Authority's substantive determination dated 22 September 2015¹ the parties were encouraged to attempt to agree on the actual amounts awarded by the Authority. If agreement was not reached a timetable was set for each party to file evidence and submissions in support of the outstanding calculations that needed to be made regarding:

- (a) Mr Kutty's wage arrears relating to underpaid salary;
- (b) Unpaid annual holiday pay;
- (c) Unpaid compulsory employer KiwiSaver contributions.

¹ [2015] NZERA Auckland 289

[2] Mr Kutty has filed affidavit evidence and submissions in support of his calculations regarding the amounts he says he is owed in accordance with the findings in the Authority's substantive determination.

[3] Mr Gounder submits that the underpaid salary should be assessed on a salary of \$30,000 and that holiday pay entitlements should be assessed on total gross earnings of \$28,153.75. Mr Gounder submits that all holiday pay has been paid (Mr Kutty disputes that). Mr Gounder also submits that Mr Kutty is not entitled to become a KiwiSaver member because he holds a work visa so is excluded from the KiwiSaver scheme.

[4] In the absence of evidence contradicting Mr Kutty's evidence about the days, dates and hours he worked and the amounts he was paid and in accordance with s.132(2) of the Employment Relations Act 2000 (the Act) I accept Mr Kutty's evidence about his actual earnings and regarding what has and has not been paid to him.

Calculations

[5] Mr Kutty is owed wage arrears by Old Fashioned Smallgoods (NZ) limited (OFSG) per paragraphs 25, 27 and 64-68 of the Authority's substantive determination.²

[6] The wage arrears is calculated by taking what Mr Kutty should have been paid namely \$40,000³ then subtracting what he was actually paid namely \$26,395.34 (being \$22,064.18 net paid to him as per his bank statements plus \$4,331.16 as per PAYE recorded by Inland Revenue (IRD)).⁴

[7] Mr Kutty is owed wage arrears of \$13,604.66.

[8] As per paragraph 69 of the substantive determination OFSG owes Mr Kutty \$3,200 unpaid holiday pay (being \$40,000 x 8%) on the basis that the Authority is not satisfied on the balance of probabilities that any holiday pay has been received by Mr Kutty. The "*reasonable notice*" notice period implied into the employment agreement extended the actual duration of Mr Kutty's employment to 12 months.

² Supra.

³ Being salary Mr Kutty was contractually entitled to.

⁴ Mr Kutty's evidence has been accepted as per s.132(2) of the Act.

[9] Mr Kutty has provided evidence that establishes on the balance of probabilities that he actually is/was a KiwiSaver member. He joined around July 2007.

[10] OFSG was contractually and statutorily required to pay Mr Kutty compulsory employer KiwiSaver contributions but I find that did not occur. I am satisfied to the required standard that nothing has been paid.

[11] I find that OFSG is required to pay Mr Kutty compulsory KiwiSaver contributions of 2% of his gross earnings for the period 16 November 2012 to 31 March 2013 and 3% of his total gross earnings for the period 01 April 2013 to 16 November 2013. The rate differential is due to a change in compulsory contribution rate which took effect from 01 April 2013.

[12] The reference to Mr Kutty's gross earnings refers to what he should have been paid (i.e. based on his salary of \$40,000 or \$769.23 gross per week) not what he actually received (which was based on a salary of \$30,000 or \$576.92 gross per week).

[13] Mr Kutty's gross earnings for the period:

- a. 16 November 2012 to 31 March 2013 were \$15,384.60 (being \$769.23 x 20 weeks) so 2% of that is \$307.69.
- b. 01 April to 16 November 2013 were \$24,615.36 (being \$769.23 x 32 weeks) so 3% of that is \$738.46.

[14] Mr Kutty is therefore owed total unpaid compulsory employer KiwiSaver contributions of \$1,046.15 (being \$307.69 + \$738.46).

[15] In accordance with paragraphs 50-53 of the substantive determination Mr Kutty is owed unlawful deductions from his wages of \$1,672.59 (being \$630.48⁵ + 1,042.11⁶).

[16] Mr Kutty has been deprived of the use of money that should have been paid to him at the very latest when his employment ended. OFSG has had the benefit of the use of what should have been (and was in fact) Mr Kutty's money so it is appropriate to award him interest to reflect that.

⁵ Para 50 substantive determination.

⁶ Para 51 substantive determination.

[17] Interest is awarded on:

- a. Wage arrears;
- b. Unpaid holiday pay;
- c. Employer's KiwiSaver Contribution arrears;
- d. The amounts unlawfully deducted from Mr Kutty's wages.

[18] For ease of calculation I order interest at the current prescribed rate of 5%⁷ on the total amount OFSG has been awarded to pay him namely \$19,523.40 (being \$13,604.66 + \$3,200 + \$1,046.15 + \$1,672.59).

[19] This award of interest is to run from 16 November 2013 (being date Mr Kutty's employment ended) until these amounts have been paid in full.⁸

[20] Mr Kutty is owed \$976.17 interest for the period 16 November 2013 to 15 November 2014. He is also owed ongoing interest from 16 November 2014 at the current prescribed rate of 5%⁹ on the amount outstanding until it has been paid in full.

Orders

[21] Within 28 days of the date of this determination Old Fashioned Smallgoods (NZ) Limited is ordered to pay Mr Kutty:

- (a) \$13,604.66 wage arrears being underpaid salary;
- (b) \$3,200 unpaid annual holiday pay;
- (c) \$1,046.15 outstanding compulsory employer KiwiSaver contributions;
- (d) \$1,672.59 reimbursement of unlawful deductions from wages;
- (e) \$976.17 interest for period 16 November 2013 to 15 November 2014;
- (f) \$1,277.34 interest for the period 16 November 2014 to 30 October 2015 (being 349 days at \$3.66 per day);

⁷ Judicature Act 1908.

⁸ Para 81 of the substantive determination incorrectly states interest is to run on the holiday pay arrears from 16 November 2012 – that is an error and this award replaces all awards of interest made in the substantive determination.

⁹ Ibid 7.

- (g) Ongoing interest at the rate of 5% per annum is to be paid on any amounts outstanding until the full amounts awarded in this determination (including the interest referred to above) have been paid in full.

Costs

[22] Mr Kutty as the successful party is entitled to a contribution towards his actual costs for the substantive matter and towards his costs for this remedies determination.

[23] Mr Kutty has 14 days within which to file a costs application (to be supported by evidence of actual costs incurred) and the Respondents have 14 days thereafter within which to file their reply costs submissions. Proof of actual costs incurred is required in support of any costs application.

[24] This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[25] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors which they say should result in the notional daily tariff (which is currently \$3,500) being adjusted.

Rachel Larmer
Member of the Employment Relations Authority