

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 372
5467471

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: From Applicant - 12 November 2015
No submissions from First or Second Respondent

Date of Determination: 27 November 2015

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

Employment relationship problem

[1] In the Authority's substantive determination dated 21 September 2015¹ Mr Kutty succeeded in his wage arrears, unlawful deductions, underpaid salary, holiday pay and KiwiSaver arrears claims. Mr Kutty's claim that Mr Gounder had aided and abetted breaches of Mr Kutty's employment agreement also succeeded. Mr Kutty's penalty claim did not succeed on the basis it was out of time.

¹ [2015] NZERA Auckland 289.

[2] The Authority issued a second determination fixing remedies on 29 October 2015.² Remedies were dealt with on the papers and each party filed evidence and submissions in support of the remedies issues.

[3] The parties were encouraged to attempt to agree on costs but that has not occurred. Mr Kutty now seeks a costs determination from the Authority. The Respondents were served with Mr Kutty's costs submissions but they have not filed any costs submissions.

[1] As the successful party Mr Kutty is entitled to a contribution towards his actual costs.

[2] Mr Kutty produced GST receipts that showed he had incurred total costs of:

- a. \$11,263.83 (inclusion of \$100 disbursements) for the substantive investigation held on 21 September 2015;
- b. \$2,054 for the remedies investigation (determined on the papers);
- c. \$1,332.45 for this costs application;
- d. \$356.50 for document service fees;
- e. \$71.56 for his filing fee.

[3] The substantive investigation meeting was four hours. I will allow a further three hours investigation time for the remedies and costs matters which were determined on the papers as they required evidence and submissions to be filed. I therefore approach the setting costs on the basis that this matter involved a full one day investigation meeting.

[4] The principles relating to an award of costs in the Authority are so well settled I do not need to set them out again here.

[5] The starting point in accordance with the Authority's usual notional daily tariff based approach to costs is therefore \$3,500 (being the notional tariff for a one day investigation meeting). The Authority must then consider on a principled basis

² [2015] NZERA Auckland 336.

whether the notional starting tariff should be adjusted to reflect the particular circumstances of the case.

[6] The First and Second Respondents did not file costs submissions so did not bring to the Authority's attention any factors which warrant a decrease to the notional daily tariff.

[7] Although Mr Kutty did not succeed on his penalty claim, which is a factor that would ordinarily be reflected in costs, I do not consider this should result in the notional daily tariff being decreased because the Respondents never addressed the penalty claim. Also the penalty claim was out of time no investigation meeting time was required to address it.

[8] I therefore find that although Mr Kutty's penalty claim did not succeed it is nevertheless a neutral factor when assessing costs.

[9] Mr Kutty submits that the Respondents' actions unreasonably and unnecessarily increased his costs so the notional daily tariff should be increased to reflect that. I accept that submission.

[10] Mr Gounder was half an hour late to the substantive investigation meeting so Mr Kutty incurred the costs associated with a delayed start to the Authority's investigation meeting. Mr Gounder also failed to comply with the Authority's directions to file evidence and provide relevant documentation prior to the investigation meeting.

[11] Instead of complying with the Authority's directions which were issued to ensure an efficient investigation could be conducted Mr Gounder elected to turn up on the day of the investigation meeting with a box of documents. Mr Gounder did not bring additional copies of this documentation for the Authority or Mr Kutty to enable the documentation he produced to be reviewed, which caused further delay.

[12] This wasted time for everyone because adjournments were required to enable Mr Gounder to copy the new documentation. Further time was then required for the Authority and Mr Kutty time to review this new information.

[13] This sort of behaviour (failing to comply with directions and turning up to an investigation meeting with relevant documentation that has not been disclosed to the

other party) is to be discouraged particularly in light of the new oral determination requirements.

[14] I am satisfied that the notional daily tariff should be increased by \$1,500 to reflect the increased additional costs that the Respondents' actions caused Mr Kutty to unnecessarily incur.

Disbursements

[15] I am satisfied that Mr Kutty incurred \$356.50 in document service fees because he was required to personally serve the Respondents when the Authority's attempts at service were unsuccessful. It is appropriate for Mr Kutty to be reimbursed for that cost.

[16] Mr Kutty is also to be reimbursed for his filing fee of \$71.56.

Outcome

[17] Old Fashioned Small Goods (NZ) Ltd and Mr Sam Gounder are jointly and severally liable to pay Mr Kutty:

- a. \$5,000 towards his actual legal costs;
- b. \$356.50 reimbursement of service fees;
- c. \$71.56 to reimburse the filing fee of \$71.56.

[18] The amounts in paragraph [17] above are to be paid by the Respondents to Mr Kutty within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority