

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 265
3010431

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
 Radhe Nand, Counsel for Respondents

Investigation Meeting: On the papers

Information: 04 July 2017 Trust Deed of Srikanth Trust
 12 July 2017 from Applicant
 20 July 2017 affidavit of Mr Gounder
 31 July 2017 financial information filed by Respondents
 08 August 2017 Applicant's response to Respondents'
 financial information

Submissions: 08 August 2017 from Applicant
 14 August 2017 from Respondents
 16 August 2017 from Applicant
 16 August 2017 from Respondents
 17 August 2017 from Applicant

Date of Determination: 01 September 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Authority issued a substantive determination involving the parties on 22 September 2015¹ which upheld most of Mr Kutty's claims against his former employer, Old Fashioned Smallgoods (NZ) Limited (Old Fashioned Smallgoods), and one of the two claims Mr Kutty made against Mr Gounder.²

[2] The Authority subsequently issued a remedies' determination on 29 October 2015.³ Paragraph [21] of the 29 October 2015 remedies determination sets out the various amounts that Mr Kutty was awarded by the Authority.

[3] The Authority issued its costs determination on 27 November 2015⁴ which awarded Mr Kutty \$5,428.06 towards his legal costs and disbursements.

[4] Mr Gounder and Old Fashioned Smallgoods were held jointly and severally liable for the costs awarded because Mr Kutty's claim that Mr Gounder had aided and abetted Old Fashioned Smallgoods' breaches of Mr Kutty's employment agreement succeeded. Mr Gounder's conduct had also been held by the Authority to have unnecessarily increased Mr Kutty's costs.

[5] The remedies and costs determinations resulted in Mr Kutty being awarded a total of \$27,204.97 plus ongoing interest at the rate of 5% from 31 October 2015 until the amounts Mr Kutty had been awarded had been paid in full.

[6] On 16 December 2015 the Authority issued Mr Kutty with a certificate of determination for the amounts he had been awarded.

[7] On 05 May 2016 Mr Kutty filed an application with Auckland District Court to seize property in order to enforce the Authority's orders. On 07 July 2016, a civil enforcement bailiff clamped the respondent's vehicle but was unable to seize the vehicle because it was located behind an automatic gate.

[8] On 22 July 2016, the bailiff received a claim from the respondents saying that the Srikland Trustee Limited and the Srikland Trust had a registered security interest against "*all present and after acquired personal property*" of the respondents which

¹ [2015] NZERA Auckland 289.

² The penalty claims did not succeed because they were filed outside the 12 month time limit.

³ [2015] NZERA Auckland 336

⁴ 2015] NZERA Auckland 372

was registered on 09 October 2015 (which was 17 days after liability had been determined and 20 days prior to remedies being fixed).

[9] Mr Kutty claims that Mr Gounder has done all he can to avoid paying any of the amounts Mr Kutty has been awarded by the Authority. Mr Kutty seeks compliance orders to recover the amounts he has been awarded. Mr Kutty also seeks indemnity costs and reimbursement of his filing fee in respect of this application.

[10] The first respondent, Old Fashioned Smallgoods, says that it is no longer trading so it has no ability to make any of the payments that it owes Mr Kutty.

[11] Mr Gounder is the sole director of Old Fashioned Smallgoods. The company "*Sam Trustee Limited*" is the sole shareholder of Old Fashioned Smallgoods. Mr Gounder is the sole director and sole shareholder of Sam Trustee Limited.

[12] Old Fashioned Smallgoods' financial accounts for the Financial Year Ended (FYE) 31 March 2017 showed a deficit of \$71,019.29 which was an improvement from the reported results for the FYE 31 March 2016 which had involved a deficit of \$103,551.13.

[13] The FYE17 accounts for Old Fashioned Smallgoods show a total income of \$37,901.01. The total outgoings in the FYE17 accounts was recorded as \$57,550.30.

[14] A review of the FYE17 accounts shows that Old Fashioned Smallgoods incurred accountancy fees of almost \$12,000, almost \$2,500 in advertising and promotion fees, in excess of \$17,000 in insurance costs, in excess of \$8,000 in legal expenses, in excess of \$8,000 for vehicle expenses and over \$1,000 in various phone costs.

[15] In terms of assets Old Fashioned Smallgoods' FYE17 accounts showed that it had over \$5,000 in a cheque account, in excess of \$19,500 GST refund due and an advance due from Food World of \$92,029.65. Its current assets were therefore listed as \$116,937.74.

[16] Old Fashioned Smallgoods' accountant Mr Rangia says that motor vehicles owned by Old Fashioned Smallgoods were stolen in April 2016.

[17] Old Fashioned Smallgoods' current liabilities were stated to be in excess of \$145,000 accounts payable, an advance of \$232,900 from the Srikand Trust and an advance from Mr Gounder of \$56,220.15.

[18] The FYE17 accounts showed that Old Fashioned Smallgoods had assets consisting of a motor vehicle and plant and equipment in excess of \$52,000.

[19] A letter provided by Mr Dinesh Raniga in support of the respondents stated that as Old Fashioned Smallgoods' chartered accountants, the FYE17 accounts showed a reported loss of \$71,019.29 and that they believed the company was technically insolvent because it was unable to pay its creditors on time.

[20] Mr Raniga stated that Srikand Trust had advanced money to Old Fashioned Smallgoods to meet the expenses on an as-needed basis but could not continue to do so anymore.

[21] Mr Gounder in his affidavit dated 20 July 2017 stated that Old Fashioned Smallgoods did not have any assets which it could use to pay Mr Kutty. Mr Gounder said that while Old Fashioned Smallgoods' financial accounts recorded its current assets as valued at \$117,135.83, current liabilities, including carried over tax liabilities were \$885,437.15.

[22] Mr Gounder claimed Old Fashioned Smallgoods was unable to borrow any more money because it had ceased trading, did not possess any assets (this is contrary to the FYE17 accounts) and was unable to obtain a loan because it had no ability to pay it. I note that Old Fashioned Smallgoods was in the same position when it obtained previous cash injections from entities closely associated with Mr Gounder.

[23] Mr Gounder submits that he is only a director of Old Fashioned Smallgoods so he should not be held liable for Old Fashioned Smallgoods' liabilities. That is true in so far as the awards made against Old Fashioned Smallgoods.

[24] However Mr Gounder still has personal liability under the costs determination as a result of the substantive finding on liability for aiding and abetting a breach of an employment agreement – which was made against him personally.

[25] Mr Kutty points out that Mr Gounder is the settlor and one of the beneficiaries of the Srikand Trust along with his family trust, his wife and their children and that he

is the sole director and shareholder of that Trust's trustee company, the Srikand Trust Limited.

[26] Mr Kutty said that the Srikand Trust Limited was struck off the companies register for years and then reinstated to the register in August 2015 just prior to the Authority's substantive determination being released to the parties.

[27] Mr Kutty says that during the two months Srikand Trust Limited was reinstated to the companies register and under the directorship of Mr Gounder, it lent Old Fashioned Smallgoods up to \$600,000 and/or \$800,000 of the trust's money. It did this by way of a security arrangement signed by Mr Gounder who is the sole shareholder and director of Old Fashioned Smallgoods.

[28] Mr Kutty says that the security arrangement between Mr Gounder and Old Fashioned Smallgoods (Mr Gounder's company) and the trustee company (which is also his company) was created after the Authority determination was released. The security was entered into on 09 October 2015 while the substantive determination was released on 22 September 2015. The remedies determination was dated 29 October 2015.

[29] Mr Kutty says that the security arrangement purports to hold preferential creditor status over wages and holiday pay creditors and that the security document does not appear in the Companies Office records.

[30] Mr Kutty says that there is a new trading entity called Old Fashioned Smallgoods (OFSG) Limited which is so closely connected as to be indirectly owned by Mr Gounder. The registered office of the new company is his personal address and the 99% shareholder and sole director of the new company is his father, Mr Kandsamy Kandsomy, who also resides at the same address as Mr Gounder. The other 1% shareholder is Mr Gounder's mother, Shrimati Sami.

[31] Mr Kutty submits that the minds of Mr Gounder, the Sam Gounder Trust, its administrator, the Srikand Trust Limited (the lender) and the Old Fashioned Smallgoods (the first respondent in this matter) and Old Fashioned Smallgoods (OFSG) Limited (the new company) are directly and indirectly one and the same. I consider that these are all separate legal entities so have to be named as such.

[32] Mr Kutty submits that the only reason that he has not been paid is because Mr Gounder chooses not to pay him. Mr Kutty says this is evident from the comments in Old Fashioned Smallgoods' accountants' letter dated 26 July 2017 which confirms that there are funds available but that they cannot be used to pay Mr Kutty notwithstanding the legal obligation in terms of the Authority determinations for him to be paid.

[33] Mr Kutty also expresses concern that Mr Gounder has failed to record Old Fashioned Smallgoods' liability to Mr Kutty as a liability in the 2016 and 2017 accounts or as a contingent liability because it does not appear in Old Fashioned Smallgoods' financial statements.

[34] Mr Kutty says there appears to have been a complete transfer from Old Fashioned Smallgoods to the new company, Old Fashioned Smallgoods (OFSG) Limited, during 2016 as the accounts do not show any income received for the stock transfer. Mr Kutty says this indicates that Mr Gounder has treated himself as a preferential creditor above all other creditors so he says that the respondents are in a position to comply with a compliance order should one be issued by the Authority.

[35] In response to Mr Kutty's submissions, Mr Nand says that Mr Gounder is not the sole beneficiary of the trust and that he is not the sole director and shareholder of the Srikand Trustee Limited company as alleged by Mr Kutty.

[36] Mr Nand submits that there is no legal requirement for the security document to be uploaded into the Companies Office records. He also disputes that there are funds available to pay Mr Kutty if the Authority orders compliance. Mr Nand says that Old Fashioned Smallgoods is not in a position to pay any creditors.

[37] Mr Nand also points out that Mr Gounder is neither a shareholder nor a director of the new entity, Old Fashioned Smallgoods (OFSG) Limited, and that there has not been a stock transfer of any kind from Old Fashioned Smallgoods to anyone in 2016 or 2017.

[38] In response to those submissions, Ms Beacham points out that the Srikand Trust has advanced money to Old Fashioned Smallgoods to meet its expenses on an as-needed basis. She also expresses concern that Mr Kutty's awards by the Authority were not included in the creditors list in terms of the creditors that benefited from the Srikand Trust's loan to Old Fashioned Smallgoods.

[39] Ms Beacham further says that of the \$232,900 that was advanced by Srikand Trust to Old Fashioned Smallgoods in the 2016/17 financial year, none of those amounts were applied to Mr Kutty's award.

[40] Ms Beacham also points out that Old Fashioned Smallgoods has either retained funds or has access to money in order to pay its accountants and its lawyer in respect of the current Authority proceedings and in respect of other entries in the accounts for outgoings including accounting and legal advice.

[41] Section 137(1)(b) of the Employment Relations Act 2000 (the Act) provides the Authority with a discretion to make a compliance order in respect of a party's non-compliance with an Authority determination.

[42] I am satisfied that Old Fashioned Smallgoods and Mr Gounder have not taken any steps to comply with their legal obligations because they have not paid Mr Kutty anything in response to the Authority's determinations that were issued in 2015.

[43] It is concerning to note from a review of the accounts that Old Fashioned Smallgoods appears to have been paying other creditors and outgoings including paying its professional advisers instead of meeting its legal obligations to Mr Kutty.

[44] I am satisfied that if the Authority does not issue a compliance order that it is unlikely that Old Fashioned Smallgoods and/or Mr Gounder will comply with their obligations to pay Mr Kutty the amounts he is owed under the Authority determinations.

[45] I therefore consider it appropriate to exercise the Authority's discretion to order Old Fashioned Smallgoods to pay Mr Kutty within 28 days of the date of this determination \$21,776.91 being the amount he was awarded under the remedies determination dated 29 October 2015.

[46] Interest runs at the rate of 5% on the amount of \$27,204.97 (being the total amount awarded in para.[21] of the Authority's determination dated 29 October 2015. Interest from 31 October 2015-30 October 2016 is \$1,360.25. Interest from 31 October 2016-01 September 2017 is \$1,141.38 (being 306 days @ \$3.37 per day).

[47] Old Fashioned Smallgoods is ordered to pay Mr Kutty interest of \$2,501.63 for the period 31 October 2015 until the date of this determination (01 September 2017) within 28 days of the date of this determination.

[48] Interest continues to accrue at the rate of \$4.07 per day on the total amount outstanding of \$29,706.60 (being \$27,204.97 due under the remedies determination dated 29 October 2015 plus \$2,501.63 interest payable under this determination) x 5% (current prescribed interest rate) = \$1,485.33 per annum divided by 365 days = \$4.07 interest per day).

[49] Old Fashioned Smallgoods and Mr Gounder were held jointly and severally liable to pay Mr Kutty \$5,428.06 for the costs he was awarded in accordance with the Authority's costs determination dated 27 November 2015. No payments have been made in respect of this liability.

[50] Mr Gounder was ordered to pay costs because Mr Kutty's claim against Mr Gounder alleging that he had aided and abetted Old Fashioned Smallgoods' various breaches of Mr Kutty's employment agreement succeeded.

[51] As the successful party, Mr Kutty was entitled to an award of costs against Mr Gounder to reflect the fact that Mr Gounder's defence of Mr Kutty's claim under s.134(2) of the Act did not succeed. A compliance order can therefore be issued against Mr Gounder in respect of the costs award for which he is jointly and severally liable.

[52] Mr Gounder and Old Fashioned Smallgoods are ordered to comply with the Authority's determination dated 27 November 2015 by paying Mr Kutty \$5,428.06 within 28 days of the date of this determination.

Costs

[53] Mr Kutty as the successful party is entitled to a contribution towards his legal costs. The parties are encouraged to resolve costs by agreement. If that does not occur, Mr Kutty has seven days within which to file a costs application with the respondents having seven days within which to reply. Mr Kutty must file proof of actual costs incurred in support of any costs application.

[54] Mr Kutty will need to provide submissions as to why the Authority should award indemnity costs instead of adopting its usual notional daily rate approach to costs.

[55] The parties should also provide submissions that identify what if any factors warrant adjustments being made to the notional daily tariff to reflect the particular circumstances of the case, should the Authority decide to adopt its usual notional daily based approach to costs.

[56] Mr Kutty has 7 days from the date of this determination to file his costs application and the respondents have 7 days within which to reply. This timetable must be strictly adhered to and any departure from it requires prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority