

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 301
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

Submissions: 08 September 2017 from Applicant
 15 September 2017 from Respondents

Date of Determination: 02 October 2017

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

The substantive determination

[1] Mr Kutty succeeded in obtaining a compliance order against the First and Second Respondents as per the Authority's substantive determination dated 01 September 2017¹.

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

¹ [2017] NZERA Auckland 265.

Costs application

[3] Mr Kutty seeks indemnity costs of \$4,800 on the basis that the Respondents have demonstrated a “*flagrant disregard for the Authority and its various determinations*”.

[4] The Respondents say that no costs should be payable. Alternatively the Respondents say that if costs are payable then indemnity costs should not be awarded.

[5] The First Respondent says that it is in a dire financial situation so should not pay costs.

[6] The Second Respondent says a compliance order should not have been made against him. He says that the sole remedy for him not paying the amount he owed Mr Kutty was a penalty.

[7] The Second Respondent has not challenged the Authority’s compliance order and says that he has now paid Mr Kutty the amount owed.

Authority’s approach to costs

[8] I accept the Respondents’ submission that indemnity costs are inappropriate. The necessary threshold for an award of indemnity costs has not been met.

[9] The Authority will instead adopt its well established notional daily tariff based approach to costs. Such an approach will enable the Authority to achieve a fair and equitable outcome because it is able to adjust the notional starting tariff to reflect the particular circumstances of this case.

[10] For the purposes of assessing costs, I deal with this matter as if it involved a half day investigation meeting. That means the notional starting point for assessing costs is therefore \$2,250.

[11] I must now consider whether there are any factors which warrant adjusting the notional starting tariff in light of the particular circumstances of this matter.

Should the notional starting tariff be adjusted?

[12] I am not aware of any factors which should result in the notional starting tariff for costs being reduced and neither party has identified any such factors to the Authority. The notional tariff is therefore not reduced.

[13] I consider that the piecemeal way in which the Respondents provided their information regarding the ability to comply with the orders made by the Authority in its original substantive determinations which dated back as far as 22 September 2015 is a factor which should result in the notional starting tariff being increased.

[14] The manner in which the Respondents provided information and complied with the Authority's directions unnecessarily increased Mr Kutty's legal costs.

[15] The Respondents' drip feeding of relevant information and incomplete compliance with the Authority's directions required Mr Kutty to have to incur additional costs because he had to continually address new evidence and submissions which were filed by the Respondents.

[16] I consider that this information from the Respondents could and should have been provided at the outset. The Respondents were directed in June 2017 to file an affidavit which fully set out their financial situation. That did not occur.

[17] The partial information filed by the respondents raised additional questions which Mr Kutty also had to address. I consider that Mr Kutty's legal costs would likely have been less than he actually incurred if he had received all relevant financial information from the outset.

[18] I do not accept that the First Respondent should not have to pay cost due to its allegedly dire financial situation. It is clear from its accounts that it has spent significant amounts of money on professional advisors.

[19] There is no reason why the First Respondent should not contribute towards Mr Kutty's actual legal costs. It is a family run entity so is very closely associated with the Second Respondent who has contributed funds to the First Respondent to pay its liabilities.

[20] I do not accept the Second Respondent's submission the Authority could not have issued the compliance order against him. Mr Kutty's claim was for a compliance

order not a penalty. The substantive determination explained why the compliance application succeeded against the Second Respondent.

[21] The Second Respondent had been ordered to pay Mr Kutty money which he admitted had not been paid. Mr Kutty had gone to lengths to recover what he had been awarded without success. His compliance application was a last resort.

[22] The Second Respondent needed to challenge the Authority's compliance order if he considered it was wrong. However he did not do so. The Second Respondent cannot now attempt challenge the Authority's determination by way of costs submissions.

Outcome

[23] I consider that the manner in which the First and Second Respondents elected to conduct their defence of the applicant's successful compliance order application unnecessarily increased Mr Kutty's legal costs.

[24] The notional starting tariff needs to be increased by \$1,125 to reflect that. The total cost awarded to Mr Kutty is therefore \$3,375.

[25] The costs awarded to Mr Kutty need to be equally apportioned between the First and Second Respondents.

[26] Within 14 days of the date of this determination, the First Respondent is ordered to pay Mr Kutty \$1,687.50 towards his actual legal costs plus \$35.78 being half of the filing fee.

[27] Within 14 days of the date of this determination, the Second Respondent is ordered to pay Mr Kutty \$1,687.50 towards his actual legal costs plus \$35.78 being half of the filing fee.

Rachel Larmer
Member of the Employment Relations Authority