

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 344
3285380

BETWEEN HABEEB UR REHMAN SYED
Applicant

AND GORDON & RYAN (2022)
LIMITED (IN LIQ)
First Respondent

AND SALIM AHMED SHAIKH
Second Respondent

Member of Authority: Nicola Craig

Representatives: Gautam Jindal, counsel for the applicant
Iain Shephard and Tom Chisnall for the first respondent
Salim Ahmed Shaikh in person

Investigation Meeting: 7 November 2024 in Auckland and by audio-visual link

Submissions (and other information) received: 18 and 25 November 2024, 19 February and 15 March 2025 from the applicant
21 November 2024 and 25 February 2025 from the first respondent
15 March 2025 from the second respondent

Determination: 16 June 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Habeeb Syed and Salim Shaikh both have engineering backgrounds. They were connected through businesses owned or operated together, including through a company now in liquidation called Best Air Conditioning Limited (Best).

[2] The two discussed purchasing the business of a sheet metal company, Gordon & Ryan Limited.¹ Ultimately Mr Shaikh bought that business through a new company Gordon & Ryan (2022) Limited (GRL or the company). Mr Syed lent some money to support the new business.

[3] From about early October 2022 Mr Syed undertook functions for GRL, along with carrying out work for Best. He was not paid by GRL until early March 2023. From that point he was paid wages as an employee. After concerns about Mr Syed's activities, Mr Shaikh sent Mr Syed away from GRL on 18 May 2023.

[4] Mr Syed comes to the Authority seeking recognition that he was employed by GRL from October 2022 and should be paid as such from then. The liquidator's position is that Mr Syed's employment commenced in March 2022 and prior to that he was engaged on as a contractor on a cross-benefit consultant basis, thus not being owed wages for that period. Mr Shaikh says that he and Mr Syed agreed Mr Syed would not be paid until the business was more established, reflecting what Mr Shaikh had done with the establishment of Best.

The Authority's process

[5] When Mr Syed came to the Authority, Gordon & Ryan, being the only respondent, was not in liquidation. The company was put into liquidation in September 2024. Mr Syed lodged claim in the liquidation for \$75,125. The liquidators, including Iain Shephard, agreed to allow the matter to proceed to the investigation meeting.

[6] There are commercial issues between the parties which are not matters the Authority should properly determine. There have been District and High Court proceedings commenced. All the parties considered it appropriate for the Authority to proceed with its investigation rather than await a court outcome.

[7] An investigation meeting was held by the Authority on 7 November 2024. The company was represented by Mr Shephard as liquidator. Mr Syed provided witness statements and gave evidence. Mr Shaikh attended as a witness. Mr Syed's representative provided to the Authority extensive affidavit evidence of Mr Shaikh from

¹ Gordon & Ryan Ltd has now been put into solvent liquidation, according to the Final Report of the liquidator in the Companies Register.

the High Court proceedings, some of which related to this matter with the Authority. The Authority has wide powers to receive evidence.

[8] At the start of the Authority's investigation meeting Mr Syed's representative Gautam Jindal indicated amounts Mr Syed was seeking for his dismissal claim. However, after some discussion Mr Jindal indicated Mr Syed wish not to pursue his unjustified dismissal personal grievance matter on the basis that complicated things. I note there had been a 90-day issue about the grievance. Instead Mr Syed wished to pursue liability for the director Mr Shaikh. The Authority pointed out that Mr Shaikh was currently not a party to the proceeding and going ahead against Mr Shaikh that day was problematic as he had no notice that there was any claim against him personally. Mr Shaikh was also unrepresented. Mr Shaikh did not agree to be joined as a party at that point.

[9] At the investigation meeting the basis on which Mr Syed sought to proceed against Mr Shaikh was not clearly identified. The Authority indicated that the basis for Mr Shaikh to be joined as a party and proceeded against, needed to be identified, either in this or another proceeding.

[10] The investigation meeting thus proceeded regarding GRL only, with the Authority refusing to add Mr Shaikh as a party at the meeting. It was agreed that timetabled written submissions would be provided and if Mr Syed wished to pursue Mr Shaikh, he could lodge an amended statement of problem identifying Mr Shaikh as a party.

[11] After the meeting submissions were provided and an amended statement of problem lodged.

[12] With Mr Shaikh joined as a party to the proceeding, the Authority asked the parties whether they sought the opportunity to provide further evidence. Mr Syed provided a witness statement with attachments. Further submissions were provided.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings, expressed conclusions and specified orders made as a result.

The issues

[14] The issues for determination are:

- (a) Was Mr Syed an employee of GRL in the period from October 2022 to around early March 2023?
- (b) If so, does GRL owe Mr Syed wage arrears and holiday pay for that period?
- (c) Does GRL owe Mr Syed wage arrears for his employment from March to May 2023, including consideration of his final days of work, notice period and holiday pay?
- (d) Was Mr Shaikh a person involved in breaches of employment standards and should leave be granted to seek money owing from him if GRL is unable to pay?
- (e) Should penalties be awarded regarding breaches of the Employment Relations Act, the Minimum Wage Act 1983 and the Holidays Act 2003 against GRL and Mr Shaikh?
- (f) Should any party have to make a contribution to the costs of another party?

The business background

[15] In his witness statement Mr Syed endorse evidence Mr Shaikh provided by way of affidavit in the High Court proceedings. This appeared to be to avoid Mr Shaikh backing away from that evidence, even though aspects of the affidavits seemed not to Mr Syed's benefit. Both Mr Syed and Mr Shaikh gave additional evidence.

[16] Mr Shaikh and Mr Syed met in 2019 when Mr Shaikh's engineering business Simple Engineering Limited (Simple) sub-contracted work to a business Mr Syed worked for. Mr Syed asked for assistance to get one of his brothers a work permit. A little later Mr Syed introduced two businesses to Mr Shaikh's company and Mr Syed took a half share of the profit made which related to those businesses.

[17] In January 2020 Mr Syed announced that Mr Shaikh was to join him and one of Mr Syed's brothers in a new business – Best Air Conditioning Limited. Although Mr Shaikh was not happy with the proposed profit arrangement he ultimately agreed as he had found working with others beneficial. Mr Syed's brother would hold a 70% share, of which 40% was on behalf of Mr Syed, with Mr Shaikh holding 30%. Profits were

to be split on the same percentages. In order to avoid Mr Syed's then employer knowing he was involved in another business, Simple would invoice for work being undertaken by Best.

[18] Mr Shaikh describes working about 50 hours a week unpaid for Best, receiving only some petrol reimbursement and at one point a lump sum which came out of his director's remuneration. This situation continued for about 18 months. As a result of his Best work he was doing little to promote the part of his Simple business that was not Best related.

[19] Eventually Best was making a profit and Mr Shaikh began being paid a shareholder salary. The amount varied with Mr Syed setting how much was paid. Later PAYE was deducted.

[20] At the Authority's meeting Mr Syed initially said Mr Shaikh had been paid a shareholder salary for the entire period of he worked for Best. A little later Mr Syed spoke about his brother running Best initially, and when Mr Syed became a shareholder, Mr Shaikh told him Mr Shaikh was not being paid. Mr Shaikh then started getting salary. This suggests there might have been around 18 months when Mr Shaikh was not being paid. Mr Syed still denied that.

[21] There were no records kept of Mr Shaikh's hours at Best. Mr Syed seemed unable to explain how Mr Shaikh's pay, which he says was between \$700 and \$1,200 a week was determined.

GRL arrangements

[22] Mr Shaikh thought of acquiring a sheet metal workshop, as Simple and Best did not have one. Mr Syed learned that Gordon & Ryan Limited, a company they dealt with selling its business. Mr Shaikh, Mr Syed, one of Mr Syed's brother and an accountant sat down to discuss how they were going to go about the purchase. A split a third each between Mr Shaikh and the two brothers was discussed. Mr Shaikh says that Mr Syed then decided he did not want to work with his brother. It was decided that whoever was able to finance the business would be the owner and the other would work for the owner. Discussions later involved Mr Syed remaining reluctant to let his employer or recently former employer, find out he was working in sheet metal, nor his brother. Also Mr Syed could not afford the whole price of the Gordon & Ryan

purchase. After obtaining finance, Mr Shaikh's newly incorporated GRL company purchased the assets of the Gordon & Ryan business.

[23] In September 2022 having received money from a family member overseas, Mr Syed offered to lend money to help with GRL's cashflow. Mr Syed lent \$68,000 towards the business's set up or cash flow, paid in stages over September and October. The parties are in dispute about whether Mr Syed was promised a 50% shareholding in return or whether he wished to avoid being publicly known as connected with GRL for reasons related to his previous employment or family members, mentioned above.

[24] It was agreed that if GRL needed installation work done for its customers, it would refer that work to Best. Best would invoice GRL at \$50 an hour and GRL would invoice its customers at \$60 an hour.

[25] Mr Syed acknowledges that he set up the GRL email addresses and internet domain name and paid for them, as Mr Shaikh was not technically competent and was short of money. A domain receipt to Mr Syed identifies him at Best.

[26] Details regarding Mr Syed's role at GRL will be discussed below when looking at when the employment relationship began.

Dispute between Mr Syed and Mr Shaikh

[27] Mr Shaikh reports being told by the Best accountant that Mr Syed and his brother were taking substantial sums of money out of Best.

[28] From one of the affidavits, in February and March 2023 Mr Shaikh noticed he was receiving fewer emails to his GRL inbox, which was in his name. He suspected Mr Syed was forwarding emails from the Gordon & Ryan email account Mr Shaikh had purchased from the earlier business holder, to Mr Syed's GRL email account. The factory still seemed very busy but Mr Shaikh could not see much profit or customer orders.

[29] Mr Shaikh became suspicious that business was being diverted from GRL to Best. He confronted Mr Syed, who denied it. Mr Shaikh noticed his Best payments were no longer coming through.

[30] It seems discussions between Mr Shaikh and Mr Syed were becoming heated. On 18 May 2023 Mr Shaikh told Mr Syed to leave GRL, which he did.

When did employment begin?

[31] Under s 6(1) of the Act an employee is a person employed by an employer to do work for hire or reward under a contract of service. All agree that Mr Syed became a GRL employee in around early March but was he one before then?

The intention of the parties

Mr Syed's evidence

[32] Mr Syed's evidence about the nature of the arrangement between the parties regarding his work was not straightforward.

[33] Mr Syed's witness statement refers to him being offered (by Mr Shaikh) a wage of \$50 an hour for 50 hours a week. He refers to Mr Shaikh not having sheet metal works or Heating Ventilation Air Conditioning (HVAC) experience, implying he himself had expertise. In his oral evidence Mr Syed initially said he was to be paid \$50 an hour, then said he started at \$30 and in January/February 2023 he went up to \$50. This was difficult to reconcile with his position that he was not paid wages at all until March 2023.

[34] After giving evidence that Mr Shaikh/GRL was not going to pay him in the first few months, with no mention of making up for this later, Mr Syed then said he was going to be paid later. Reference was to paying him back for all the hours but it was unclear how that was going to work when Mr Syed was not recording any hours.

[35] When questioned, Mr Syed's oral evidence, which was not reflected in his witness statements, was that he agreed to not be paid initially as it was a start up company for Mr Shaikh and after a few months Mr Syed would start being paid. When asked if he could put a number on the months, Mr Syed said two but later made several references in his evidence to a "few months". This is not particularly suggestive of an employment relationship being in place for the earlier time.

[36] Mr Syed was not without money coming in during this early period. As revealed in documents lodged after the investigation meeting Mr Syed was being repaid for his loan during the period he was with GRL.

[37] Mr Syed described his GRL hours as being from 7am to 5pm or 7pm, sometimes 8pm. Mr Syed's evidence suggested he was not spending large amounts of time with

Mr Shaikh as Mr Shaikh only came into the office a few times a week for a few hours. Mr Syed also said he was doing a small amount of work for Best in this period although he was paid by Best for 30 or 40 hours as shareholder salary.

[38] Mr Syed suggests a payment Mr Shaikh made him after the birth of Mr Syed's child reflects him desperately asking about payment of wages from GRL. Bank statements show Mr Shaikh making a payment of \$2,000 from an "ORBIT Home Loan" account to "Habeb". However, one of Mr Shaikh's affidavits includes bank statements showing amounts in the range of \$1,000 to \$4,000, all rounded to \$1,000, which he describes as loan repayments for the money Mr Syed loaned him.

[39] Mr Syed was not reimbursed for petrol by GRL when he had to visit clients or go to sites. He was not reimbursed for the cost of setting up the website.

Mr Shaikh's evidence

[40] Mr Shaikh says that in early October 2022 the two men met at a café with Mr Syed proposing to him that he could provide services to GRL particularly regarding production and pricing, when doing so would benefit Best. Mr Syed offered his consulting services to GRL in return for no payment, as Mr Shaikh had done for Best. This would continue until GRL developed enough to take on more employees.

[41] The arrangement is described as a cross benefit for GRL and Best – Mr Syed would obtain customer orders via GRL and subcontract Best for the installation work and labour supply if needed. There is a dispute about how much GRL would pay Best for labour supplied by Best but it is not clear that this applied to Mr Syed's work at GRL, seeming rather to apply to labourers assisting with air conditioning installation.

[42] Mr Shaikh says that on 27 February 2023 the two agreed that the business had reached a size where it required and could take on more employees. They agreed Mr Syed would be offered employment with GRL in the coming weeks. On Monday 6 March 2023 Mr Syed commenced work with the company.

[43] A form for employee details has Mr Syed as General Manager. A heading of "Employment", with Start Date below, has 27 February 2023 handwritten in the next column. Mr Syed acknowledges he wrote that date. When asked why he wrote that if he thought he was employed from October 2022, he said Mr Shaikh told him to and he "was not completely aware" of the written reference to start date. When asked if he or

his companies had employed people before he said he did not remember. He then said they did not, but when asked about Best had employees and he was involved in employing them he accepted it did and he was.

[44] Mr Shaikh's evidence is that Mr Syed managed GRL's factory and staff - liaising with suppliers, building relationships with new suppliers and customers, pricing jobs and organising installation work.

Other written evidence

[45] There was no employment agreement between the parties. Mr Syed suggested he had asked for one but nothing was forthcoming. No texts or emails were provided referring to such as request. Mr Shaikh denied any such request was made. This was unlike other staff at GRL who had written employment agreements. Those staff were paid in the September/October 2022 to February/March 2023 period, unlike Mr Syed.

[46] Mr Syed provided an unsworn witness statement on 18 November 2024, describing events associated with attached text messages. He describes himself seeking wage payments. However, messages are equally suggestive of payments from GRL to Best. One from Mr Syed refers to "Transfer 30K to best?"

[47] There was minimal evidence of formal timekeeping at Best or GRL with parties remunerated relatively unrelated to actual hours worked. Mr Syed lived close to the GRL factory and "came and went as he pleased" according to Mr Shaikh.

Control

[48] I go out to consider the other tests for whether someone is an employee or a contractor. Although not necessarily as directly applicable where no payment was made, they still provide some insight.

[49] Mr Syed had a high degree of control over the work he did – its content and where and when he did it. He did a range of jobs, setting up the emails, quoting on jobs and designing on software. These were largely self-instigated.

[50] He describes working relatively set hours but he did not say this was at Mr Shaikh's direction so I conclude it was largely a pattern which suited him. Mr Syed was also working a substantial chunk of hours for Best and made his own decisions about how to fit that in.

[51] Mr Shaikh provided little supervision or direction to Mr Syed.

Integration

[52] Mr Syed was important to the GRL business. He undertook management, quoting and design work.

[53] There were no payments made in this early period so it cannot be said whether he was paid for his hours or paid a fee or on results.

[54] Mr Syed used his own vehicle and was not reimbursed for that. He used some GRL equipment in the company's premises.

Economic reality

[55] Mr Syed did not fix or charge fees for his work in this period. There were no wages or invoices. No tax or ACC levies were seemingly paid.

[56] Mr Syed was operating his own business – Best. GRL hired Best to provide services to it on occasions with Best billing GRL. However, it is not evident that those services included Mr Syed's functions at GRL.

Contractor?

[57] The liquidator suggests Mr Syed was a contractor. Mr Syed did not invoice GRL for his time in the period before March 2023 (or after) and also worked for Best at the same time.

Volunteer?

[58] Employees do work for hire or reward.² Under s 6(1)(c) of the Act a volunteer excluded from the employee definition where they:

- (i) do not expect to be rewarded for work performed as a volunteer; and
- (ii) receive no reward for work performed as a volunteer.

[59] Mr Syed did not receive any direct reward for his time at GRL prior to March 2023. Best did receive business benefits of having its arrangement with GRL but both

² The Act, s 6(1)(a).

Mr Syed and Mr Shaikh were Best shareholders. It was not evident that the arrangement between GRL and Best was conditional on Mr Syed undertaking unpaid work for GRL.

[60] The mutuality of Mr Shaikh working for an extended period without pay for Best and Mr Syed doing so for a shorter period for GRL, must be considered. This is not a situation where Mr Shaikh can be seen as the dominant player who forced Mr Syed to work for nothing.

[61] In this early period Mr Syed did not expect to be rewarded and I conclude on the balance that the benefits through Best should not be seen as a reward for the purposes of the s 6 assessment.

Conclusion

[62] I am not satisfied that Mr Syed was a GRL employee prior to February/March 2023. Considering all the evidence, the agreement between the parties was that Mr Syed would work for an initial period without payment to help the GRL business get established. This was consistent with what Mr Shaikh had done for Best. Once the business was established, payment to Mr Syed would commence. That occurred in late February/March 2023. If there was an agreement about later recompense for the earlier work it was not part of an employment arrangement. There was no agreement for wages to be paid prior to late February 2023.

Wages owing

[63] There are periods of employment where there are arrears.

Week commencing 27 February 2023

[64] The employment form refers to employment starting on 27 February 2023 but Mr Syed was not paid for that week. I consider that he should be paid for that week, at the rate of \$2,500 gross a week which applied to his later work.

Period at the end of employment

[65] Mr Syed's last period of employment, from 8 to 18 May was not paid. He is entitled to nine-days pay at what equates to a daily rate of \$500 - \$4,500 gross.

Notice

[66] Given that Mr Syed was summarily dismissed, there is insufficient evidence to establish that he was entitled to a notice period.

Holiday pay and Kiwisaver

[67] The parties are in agreement that a sum of holiday pay was paid sometime after employment finished. This covers the work he was paid for but does not include the days I have found GRL owes wages for. There are \$7,000 gross in arrears, with holiday on 3% on that amounting to \$560 gross.

[68] GRL should have paid 3% to the IRD as its contribution to Mr Syed's Kiwisaver account. It should have paid the IRD \$210 gross.

Mr Shaikh's responsibility

[69] The next question is whether Mr Shaikh should be found under s 142W of the Act to be a person involved in breaches of employment standards and thus leave given under s 142Y to recover arrears from him if GRL is unable to pay.

[70] The non-payment of wages to Mr Syed is a breach of employment standards as it is a breach of the Wages Protection Act 1983 obligation to pay wages and to the extent that part of the money which should have been paid was the minimum wage, a breach of the Minimum Wage Act 1983.³ Similarly there is outstanding holiday pay, the non-payment of which when employment ends amounts to a breach of the Holidays Act 2003, also an employment standard.⁴

[71] Under s 142W(2) of the Act where the person in breach is a company, a person who occupies a position in the entity may be treated as a person involved in a breach only if that person is an officer of the entity. Directors are specifically defined as an officer.⁵

[72] There is then the question of whether Mr Shaikh has knowledge of the essential facts that establish the employer's contravention.⁶

³ The Act, s 5; Wages Protection Act 1983, s 4; and the Minimum Wage Act, s 6.

⁴ The Act, s 5; and the Holidays Act 2003, s 27.

⁵ The Act, s 142W(3)(a).

⁶ *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705.

[73] A director was found to be “involved in” a breach where he knew the hours worked by an employee and the wages he was paid and thus liable to pay the amounts owed in wages if the company failed to do so.⁷

[74] By contrast in *A1 Communication Limited and Deo v Labour Inspector* the Employment Court was not satisfied that the sole director who relied on an accountant, albeit not attempting to establish a defence under s 142ZD(2) of the Act, was found not to be a person involved in breaches regarding record keeping.⁸

[75] Here both Mr Shaikh and Mr Syed had access to the Xero accounting system. There was uncontested evidence that Mr Syed was in charge of the payroll. He entered the hours of the employees into the system and sent it off to the company’s external accountant. Mr Shaikh had control of the bank account.

[76] A distinction should be drawn between arrears for the first week of employment the last two weeks. A system was in place which involved Mr Syed being responsible for the payroll, along with the accountant. For the first period of employment Mr Syed has not established that Mr Shaikh had knowledge of the essential facts that establish the contravention by the employer.⁹ For the end of employment, Mr Syed would not have been in place to authorise the payroll, a new system was needed and Mr Shaikh had knowledge of those facts. Mr Shaikh is a person involved in the non-payment of the final nine days of employment, along with the holiday pay which should have been paid at the end of employment.

[77] Leave is granted for recovery to proceed against Mr Shaikh of \$4,500 arrears and \$560 holiday pay, if GRL is unable to pay.

Penalties

[78] It is not right to impose a penalty on the company here its breaches. It is in liquidation and the liquidator has indicated that there are insufficient funds to pay all its debts.

⁷ *Shah Enterprise NZ Ltd v Labour Inspector* [2022] NZEmpC 177 at [44].

⁸ *A1 Communication Limited and Deo v Labour Inspector* [2021] NZEmpC 91 at [47].

⁹ *A Labour Inspector v Southern Taxis Ltd*, above at n 6.

[79] Submissions for Mr Syed refer to a penalty under s 142X of the Act regarding Mr Shaikh. Reference is also made to the Authority's jurisdiction regarding penalties under s 133.

[80] Mr Syed's difficulty is that under s 142X(2) of the Act an application for a penalty against a person involved in a breach may only be brought by a Labour Inspector.¹⁰ Mr Syed is this not able to seek a penalty against Mr Shaikh.

Orders

[81] Within 28 days of the date of this determination, GRL is to pay Mr Syed the following sums:

- (a) \$7,000 gross in arrears of wages; and
- (b) \$560 gross as holiday pay.

[82] Within 28 days GRL is to forward to the IRD on Mr Syed's behalf \$210 as Kiwisaver contribution.

[83] If GRL is unable to pay, leave is given to for Mr Syed to seek payment from Mr Shaikh of \$4,500 arrears of wages and \$560 holiday pay.

Costs

[84] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[85] This is a case of mixed success. Mr Syed has been awarded a very modest amount compared to what he sought. As at the investigation meeting he chose not to pursue his personal grievance claim.

[86] I do not envisage any award against the liquidators who participated as part of assessing how much if any money was owing to Mr Syed, who already put in a substantial claim in the liquidation.

[87] If agreement cannot be reached and any party wishes to seek costs, they should lodge and serve a memorandum on costs within 28 days of the date of this

¹⁰ The Act, s 142X(2).

determination. From the date of service of that memorandum other parties would then have 14 days to lodge any reply memorandum.

[88] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.¹¹

Nicola Craig

Member of the Employment Relations Authority

¹¹ See www.era.govt.nz/determinations/awarding-costs-remedies.