



Employment Relations Tribunal

Decision

Title of Matter: Amena Sakulu & Ramise Biu
v
Four R Electrical & General Contractors Limited

Section: Section 214 *Employment Relations Act 2007*

Subject: Recovery of wages and other money

Matter Number: ERT Miscellaneous Applications No 19 and 20 of 2018
Appearances: Ms T Vosawale, Labour Office, on behalf of the Plaintiffs
Mr S Singh, for the Respondent

Date of Hearing: Tuesday 20 November 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 10 January 2019

KEYWORDS: *Recovery of outstanding meal allowance and annual leave; Regulation 10 Meal Allowance; Wages (Building and Civil and Electrical) Regulations 2012 and 2015; Provision of decent hot meal.*

Background

- [1] The Plaintiffs were engaged by the Defendant Employer at the FNPF building site at the Boulevard, Suva. Both employees were engaged under the terms of the *Wages (Building and Civil and Electrical) Regulations 2012*¹ ("the Wages Order").
- [2] In the case of Mr Sakulu, he had been engaged as a Steel Fixer during the period March 2014 to March 2016. Mr Biu had been working at the building site as a Plumber, during the period March 2015 to July 2016. The claim in both cases is that the Employer was requiring the Workers to undertake significant amounts of overtime work and failed to provide their relevant entitlements to annual leave, overtime and meal allowances, as provided for under the *Wages Order*.
- [3] Prior to the initiation of these claims, the Employer has made good payments to the Workers for outstanding overtime entitlements. It is a matter of record, that the quantum in each case was quite considerable.

¹ This Regulation was subsequently superseded by the *Wages (Building and Civil and Electrical) Regulations 2015*.

[4]The present proceedings have been narrowed down to two issues. The first, relates to the failure by the Employer to provide the Workers with their meal allowance on the occasions in which they had worked overtime in excess of two hours on any normal working day, as required by Section 11 of the Wages Order. The second component to the claim, arises out of the decision by the Employer to offset any outstanding wages owed and not pay the accrued annual leave otherwise due the Workers, reliant on Section 59(2) of the *Employment Relations Act 2007*. That provision, with some exceptions, states that a Worker is not entitled to paid annual leave in respect of any year during which she or he has been absent from work for more than 20 normal working days during that year.

The Meal Allowance Claim

[5] Regulation 11 of the *Wages (Building and Civil and Electrical) Regulations 2015* provides:

Every worker who is required to work overtime in excess of 2 hours on any normal working day shall be entitled to a meal allowance of \$7 or a decent hot meal.

[6]Mr Sakulu, said that he was previously living in the Western District of Ba, before he moved to the Employer's staff quarters in Vatuwaqa, Suva. According to Mr Sakulu, whilst being accommodated at these quarters, he was provided three meals a day by the Employer. Later in submissions made by Mr Singh, the Tribunal was made aware of a 'Guest Accommodation Agreement' that the workers entered into with the company, where employees living in 'camp' pay \$2.00 a day toward the costs of the three meals provided. According to Mr Sakulu, when working overtime he would be required to finish at 10.00pm on some occasions and on others, at around 1.00am. The Claimant explained that when the ordinary day would conclude and prior to commencing overtime, that employees on site would be provided with one third of a 'long loaf' and a cup of tea. Mr Sakulu told the Tribunal that around 10.00pm he would be provided with another meal, that typically consisted of tinned fish, dahl and rice, or tinned fish with onion. The second Worker, Mr Blu also gave similar evidence to that of Mr Sakulu, insofar as he would be provided with some 'long loaf' and tea, prior to the commencing of overtime. In the case of Mr Blu, he claimed to receive no further meal during the overtime period and says that no meal allowance was paid to him whilst engaged by the Employer.

[7]To support the case of the Employer, several company employees were called to give evidence. The first witness, Sanmogan Naicker, is a Purchasing Officer who has been employed with the company for 15 years. Mr Naicker told the Tribunal that he was responsible for the purchasing of groceries and building materials and stated that whilst he was based in the Ba Office of the Employer, that he would attend site approximately once a fortnight. Mr Naicker said that he was aware of the two Workers involved in making the claim against the company, though did not know much about their hours of work. The second witness to give evidence for the Employer, was Mr Chandrika Prasad Maharaj, who was a cook employed at the Suva camp site. Mr Maharaj stated that he would take meals to the work-site for lunch and dinner and claimed anyone who worked overtime would be provided with a meal. The Camp Cook said that he never received complaints regarding the quality of the food prepared for the workers. When pressed under cross examination, Mr Maharaj admitted to having an assistant who would bring food to the work-site and said that he did not know the workers living in the camp. The next witness to give evidence was Mr Mohammed Izaaz Khan, a cook who had worked for the Employer for the past five years. Mr Khan told the Tribunal that he would take meals to the work-site at 12 o'clock mid-day and again in the afternoon and said he would serve the meals to the employees. Mr Khan stated that he knew both Messrs Sakulu and Blu and indicated that both men worked over-time.

In response to a question from the Tribunal, Mr Khan indicated that both men lived in the camp at Vatuwaqa².

- [8] The next witness to give evidence was Mr Rafaeli Vutaga who was an Electrician employed by the company and resided in the work camp. Mr Vutaga explained that he would receive tea with bread at 6.00pm whilst working overtime and later around 8.00pm provided with a meal. The witness claimed to have known both Messrs Sakulu and Biu. The final witness to give evidence was Mr Waisea Rawa who was a trade's assistant working at 4R Electrical for the past three years. Mr Rawa claimed that his wages were not deducted for the meals supplied and also admitted not to having been paid overtime by the Employer.

Analysis of Evidence Regarding Meal Allowance

- [9] The Tribunal is of the view that the Employer did provide tea and bread at the start of an overtime shift, however is not completely satisfied with the quality of the evidence provided in relation to the meals provided by the Employer, so as to meet the obligation of Regulation 11 of the Wages Order. The language of the Order makes it very difficult to ascertain what is meant by the words "a hot decent meal." Certainly the photographs of the illustrative meals that were tendered during proceedings by Mr Singh,³ do not accord with Mr Sakulu's account of what was provided. Mr Biu on the other hand, claimed that he never received a meal during the overtime shift. For that reason and having regard to all of the witness evidence, the Tribunal is of the view that the Employer only provided its workers who were living in camp, a meal when they remained at the construction site working overtime. It would seem most unlikely that an Employer who had initially failed to pay overtime to its workers, somehow decided to provide the workers with a hot meal, consistent with the Wages Order's overtime requirements. It is more than likely that the meal that was provided at the work-site, was so as to comply with the obligations under the Guest Accommodation Agreement, where the workers in camp were to be supplied with three meals per day.

- [10] Insofar as the claim for meal allowances is concerned, Mr Sakulu is claiming for the back payment of meal allowances in the amount of \$707.00, being the equivalent of 101 days of entitlement. In the case of Mr Biu, he has claimed 62 meal allowances @ \$7.00 per occasion, equating to \$434.00. The Tribunal accepts that Mr Biu received no meal allowance or 'a decent hot meal' as required under the Wages Order. In Mr Sakulu's case, the Tribunal accepts that he would have received a meal as he was a camp employee and believes that this would have been provided to camp employees working overtime at the site. The Tribunal accepts that Mr Sakulu was unhappy with the quality of the meals provided and also holds the view that it is more likely than not that the meals received by the workers during overtime, were not always of a standard as portrayed in the photograph that was Marked for Identification 'A'. Clearly, if the meal was of a standard as illustrated in MFI A, that together with some bread (eg half a 'long-loaf'), would satisfy the requirement for Regulation 11 of the Wages Order. For the present purposes though and having regard to the totality of the claim, the Tribunal is nonetheless satisfied that Mr Sakulu was provided with a meal and no Order will be made against the Employer arising out of that aspect of his claim. That is not the end of the matter though. The attention of all parties should be drawn to the *Health and Safety at Work (General Workplace Conditions) Regulations 2003*, that set out the additional amenities that must be available to workers whilst taking meal breaks. It is essential that the obligations contained within the Regulations are properly applied.

² Of course, that was not true for Mr Biu, he resided in Suva and did not live in the camp.
³ See documents marked for Identification "A".

Offsetting of Annual Leave

[11]The issue of whether the Employer should now be able to retrospectively offset annual leave is a separate consideration. In the case of Mr Sakulu, he rejected the claims that he had taken 32 days unauthorised leave between 27 March 2015 to 26 March 2016 and 30 days unauthorised leave for the period 27 March 2016 to 21 July 2016⁴. In the case of Mr Biu, he too disputed the levels of unauthorised annual leave that the Employer claimed he had taken, that was said to be 35 days during the period 24 March 2015 to 24 February 2016 and 31 days for the period 24 February 2016 to 12 July 2016⁵. Given such an approach, it is surprising that neither of the former employees appear to have had any issue that their pay for those days does not appear to have been taken into consideration, when making their claims for underpayment of wages.

[12]Certainly insofar as the Labour Officer's calculations for unpaid wages are concerned, it appears to be accepted that the employees were marked absent on certain days. A comparison of Exhibit L2 with Exhibit E1 and Exhibit L3 with Exhibit E3, suggests that the Labour Officer has recognised that these days were not worked. So what is the result of all of this? Section 59 (2) of the *Employment Relations Act 2007* provides:

Notwithstanding subsection (1), a worker is not entitled to the paid annual holidays in respect of any year during which the worker attended work if the worker has been absent from work for more than 20 normal working days during that year, except where the absence has been due to sickness certified by a medical practitioner, or the worker is excused from work by the employer or is prevented from attending work by any other cause acceptable to the employer.

[13] According to the attendance records provided by the Employer⁶, Mr Sakulu was paid 45 hours annual leave coinciding with his termination of employment. Mr Sakulu's claim for outstanding accrued annual leave, is based on the period 28 March 2016 to 21 June 2016⁷, an amount calculated to be \$78.75. In the case of Mr Biu, it is claimed by the Employer and it appears undisputed by the Labour Officer, that two weeks of his annual leave were taken in the pay period 30/3/16 to 13/4/16. The Employer has flagged an amount of \$52.50 being accumulated entitlement owing at the time of termination.

Conclusions

[14]The Tribunal is satisfied that the employees in question were working significant amounts of overtime, often without appropriate rest periods or days off. It is unsurprising when workers are scheduled to work such arrangements, that they will absent themselves from the roster, in order to recuperate and have some time off. For workers in the construction industry, the traditional rule of thumb in the case of workers working overtime, is that they should receive 10 hours break after completing the overtime shift before returning to work. The primary reason for this is to ensure safety from fatigue.

[15]It is clear that the arrangements worked under the rosters provided, show an excessive amount of overtime worked by the claimants, that in turn are likely to have encouraged absenteeism. The

⁴ See Exhibit E4.

⁵ See Exhibit E3.

⁶ See Exhibits E1 and E3.

⁷ This figure has been rounded up to equate to 3 months equivalence @ 10 days per 12 months.

Tribunal believes that the Employer's records demonstrate that the Employer has condoned the practice and on that basis should be regarded as giving rise to a situation where the "worker is excused from work by the employer" or comes about as a result of any "other cause acceptable to the employer". If the Employer was genuinely concerned with the levels of absenteeism taken, it should have and could have taken necessary steps to curb the conduct. Given the levels of overtime that have been worked and the fact that the Employer had failed to correctly pay overtime, creates a situation on this occasion where the Tribunal is unwilling to interpret Section 59(2) of the Act in favour of the Employer⁸.

[16]As a result of the above, Mr Biu is entitled to be paid for the outstanding accrued annual leave entitlement, as well as for the meal allowances that should have been paid to him in the case where no hot meal was provided. In the case of Mr Sakulu, on the basis that the Tribunal finds that he has received his nightly meal from the Employer, he shall only be entitled to be paid the outstanding annual leave entitlement. The Labour Officer will be required to prepare Orders to give effect to the decision as under.

Decision

[17] It is the decision of this Tribunal that the Defendant Employer pay the Labour Officer:

- (i) In the case of Mr Ramise Biu, the sum of \$486.50 within 21 days.
- (ii) In the case of Mr Amena Sakulu, the sum of \$78.75 within 21 days.



Andrew J See
Resident Magistrate



⁸ Had the workers not been exposed to long periods of unpaid overtime work, the situation would otherwise have been quite different.