



## Decision

Title of Matter:	Labour Officer	(Complainant)
	v	
	Pillays Seafood	(Employer)
Section:	Section 247(b) <i>Employment Relations Act 2007</i>	
Subject:	Failing to Pay Wages On Demand	
Matter Number:	ERT Criminal Case No 11 of 2017	
Appearances:	Mr Ram Swami Pillay, for the Employer Ms V Doge, Labour Office, for the Grievor	
Date of Hearing:	5 September 2018	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	24 September 2018	

**KEYWORDS:** *Employment Relations Act 2007; Failure to Pay Wages; Wages (Wholesale and Retail Trades) Regulations 2015; Time and Wages Records.*

### Background

- [1] This is a complaint that has been served on the Employer, Pillays Foods by the Labour Office, on behalf of Mr Sekope Bouwale.
- [2] The complaint arises under Section 247(b) of the *Employment Relations Act 2007*, following a demand for payment served on the Employer on 14 November 2017. The demand is a claim for wages said to be owed to Mr Bouwale in the amount of \$14,632.43<sup>1</sup>.

### The Case of the Labour Officer and Mr Sekope Bouwale

- [3] Mr Sekope Bouwale gave evidence that he made a complaint to the Labour Office on 2 February 2015, where he claimed he had been underpaid by his former employer Pillays Seafood. According to the witness, he had worked with the employer for 12 hours per day, during the period 15 April 2013 to 29 November 2014, yet was only paid for 8 ordinary hours a day, in the

<sup>1</sup> See Letter of Demand and calculation of entitlements at Exhibit L2.

period that he worked. Mr Bouwale said that he was not paid for his entitlements for overtime, public holiday pay, or annual leave. During cross examination, Mr Pillay put to the witness that he had initially commenced working at the residence of the owner Mr Arunesh Pillay. The witness was shown time and wages records that were held by the Employer, that suggested he had only worked 48 hours per week and had signed for his wages in satisfaction of the payment of those hours. The witness was shown copies of records that contained Mr Bouwale's signature, that were suggestive of the fact that he had only worked 48 hours per week<sup>2</sup>. According to the witness, he was told that if he didn't sign the time records prepared by the Employer, that he would be dismissed. The Worker nonetheless confirmed that he was provided with a meal when he was required to work the hours that he did. During re-examination, Mr Bouwale confirmed that he would receive the payment for his weekly wages and would be required to sign the records of the employer to indicate he had received the same, often several weeks later.

**Ms Priyakna Chand, Labour Officer**

[4] The next witness to give evidence was Ms Priyaka Chand, who was the Labour Officer charged with the task of undertaking the investigation, following receipt of the complaint by the Worker. According to Ms Chand, the time and wages records held by the Employer, were non-compliant for the purposes of meeting the obligations set out within Section 45 of the *Employment Relations Act 2007*. Ms Chand told the Tribunal that the Labour Office had calculated the demand for payment for the Employer based on the statement provided by the Worker and that once the demand had been served, saw the Employer participating in some discussions with the legal officer of the department.

[5] It was put to Ms Chand, that the correct hourly rate that the Worker was entitled to receive was \$2.32, rather than \$2.73 under the *Wages (Wholesale and Retail Trades) Regulation 2012* as claimed within the calculations that she had prepared. Ms Chand refuted that proposition.

**Mr Reginald Kumar, Private Contractor**

[6] The first witness to give evidence on behalf of the employer was Mr Reginald Kumar, who described himself as a contractor who was involved in the collecting of fish from suppliers to provide to Pillay Seafood. According to the witness, Mr Bouwale was working at the Pillay residence and was working normal hours of work from 8am to 5pm. During cross examination, the witness told the Tribunal that when the business became registered it relocated its operations from the Pillay residence to the shop where it was then operating. At that juncture, Mr Kumar was shown a Form 6 Certificate of Registration<sup>3</sup>, issued under the *Registration of Business Names Act* in which the registration was issued under the name "Pillay's Seafood Supplies". The date of that registration was 24 April 2013.

**Mr Ram Swami Pillay**

[7] Mr Pillay is the father of the proprietor of the former business. It should be noted that prior to the giving of his evidence and reliant on a framed 'Health and Safety Policy' that had been issued by the Defendant on 6 January 2014, it was Mr Ram Swami Pillay sought to indicate to the Tribunal, that such a date coincided with when the business was registered. Mr Pillay told the Tribunal that he had sought to assist Mr Bouwale whom he claimed as a former fishing friend, to obtain employment, because at the time he was looking for the same and said that he had made no complaints in relation to his wages, until he was terminated in his employment because of his failure to properly discharge his duties.

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<sup>2</sup> See Exhibit E1.

<sup>3</sup> See Exhibit L3.

#### **Mr Arunesh Avinesh Pillay**

[8] The final witness to give evidence was the former sole trader and proprietor of the business, Mr Arunesh Pillay. Mr Pillay recounted the employment of the Worker and said that invariably he was only retained to continue working, out of a sympathy to him and that often he would not attend work, yet still be paid as if he had worked. According to Mr Pillay, the Worker ultimately was released from duties after a robbery had taken place at the business, at a time that Mr Bouwale was supposed to have been on duty. Mr Pillay said that instead, the Worker was drinking at the Lautoka Hotel.

[9] Mr Pillay further told the Tribunal that following the closure of his business he had sought to work in Rakiraki, although at the present time is working driving taxi cabs as his primary source of income.

#### **Analysis of Issues**

[10] The Tribunal accepts to some extent that the initial reason for why the Worker was engaged in the employ of the business, was because of the relationship that had existed between Mr Bouwale and Mr Pillay Senior prior to that time. It seems reasonably apparent that the business owner, Mr Pillay Jr, had wanted to grow his business and this meant initially taking his operations from the roadside to his home and ultimately to a commercial premises.

[11] There is a danger when small business operators wish to engage workers and fail to have regard to the relevant legislative requirements governing employment arrangements in Fiji. This is a case that demonstrates such an issue, where the Worker who was in the mind of Mr Pillay at least, ostensibly satisfied with an arrangement, ultimately makes a claim against her or his employer, because of a breach of the statutory entitlements. This may take place on occasions, even in cases where the Worker may have given the impression that she or he was waiving their right to make such a claim.

[12] The Tribunal is of the view that the Worker is likely to have worked hours in excess of those that were contained within the time and wages records held by the Employer. The difficulty is always how do you assess what may have been the actual times worked? How is the evidence evaluated and what if it ultimately becomes a case of one person's word against another. In the present case, Exhibit L2, which is the demand for payment made on the Employer, sets out the calculation of the Labour Officer. The amount being claimed on behalf of the Worker is \$14,632.43. This is a large amount of money, particularly where a Worker had not been engaged with an Employer for a lengthy period of time.

#### **Has the Complaint for the Purposes of Section 247(b) of the Act Been Made Out?**

[13] An employer who upon demand in writing by a labour officer, fails within 7 days of the demand to pay any wages due to a worker, commits an offence and is liable on conviction for an individual, to a fine not exceeding \$20,000 or to a term of imprisonment not exceeding 5 years or both.

[14] No offence can be committed if the demand cannot be legitimately established, as being monies owed. In this case, the Tribunal is **not** satisfied that the full claim can be supported and for that reason, the demand is defective. In this regard, there was simply no other person corroborating the version of events presented by the Worker. Whilst the Tribunal is of the view that the Worker has worked more than the hours demonstrated within the time and wages

records provided, there is simply not enough precision of the case of the Labour Officer to recognise the full extent of the claim that has been made. No offence arises, where only a partial demand was established. To that end, the complaint must fail.

#### Remedial Order

[15] Despite that fact, the Tribunal does have powers to order compliance with the relevant contractual entitlements owed to a worker.<sup>4</sup> Having regard to all relevant facts and factors, the Tribunal will only award 30% of the amount claimed, for the reason that whilst it is likely that the Worker had worked additional hours each day, there is simply insufficient evidence to prove that all that the Worker claims, is supported by the evidence. For that reason, the amount awarded will be \$4,877.50.

#### Other Issues

[16] There is one further issue that needs to be canvassed. The former proprietor is no longer operating the business. Any order in relation to payment, must take into account the capacity of the Mr Pillay to pay the outstanding amount. Further Directions will be issued to the parties, so that this issue can be fairly addressed.

#### Decision

It is the decision of this Tribunal that:-

- (i) The complaint against the Employer is dismissed.
- (ii) That the Employer shall be ordered to pay the Labour Office on behalf of the Worker, the amount of \$4,877.50.
- (iii) That further Directions will be issued to the parties, seeking submissions as to the time period for which the payment arrangements shall be made.

  


Mr Andrew J See  
Resident Magistrate

<sup>4</sup> Consider for example, the combined effect of Sections 211(d) and 212(a) of the Act.