

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 9 of 2016

BETWEEN: **KEMUELI VAKATALAI**
1st Plaintiff

AND: **AGEET PRASAD**
2nd Plaintiff

AND: **MANASA LOMALAGI**
3rd Plaintiff.

AND: **FOOD FOR LESS (FIJI) LIMITED**
Defendant.

Appearances: Ms. A. Raitivi for the Plaintiffs.

Mr. Ritesh Naidu for the Defendant.

Date/Place of Judgment: Monday 26 August 2019 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law – Claim for overtime payment and meal allowances- is the claim within the statutory limitation period of 6 years–portion of the claim survives the limitation period - whether the employees are entitled to be paid their overtime, meal allowance and leave pay for the period their claim survives the limitation period – Interest on award – Costs.

B. Legislation:

1. *The Employment Relations Act 2007 (“ERA”): ss. 59(1); 214; and 215.*
2. *Wages Regulation [Wholesale and Retail Trades] Order 2008: Regs. 6;8; and 10.*

Cause

1. The three plaintiffs' were employed by the defendant in various positions at the Supermarket. Kemueli Vakatalai was employed as a Shop Security Officer from 2006 to October 2010; Ageet Prasad was employed as a Dispatch Clerk from 1989 to July 2010; and Manasa Lomalagi was employed as a Shop Security Officer from 2006 until October 2010.
2. The plaintiffs are no longer employed by the defendant. Their claim is for overtime wages and meal allowances due and owing to them. Kemueli Vakatalai's claim for overtime wages and meal allowances is from 7 January 2008 until 26 October 2010 in the sum \$19,470.56. Ageet Prasad's claim from 7 January 2008 until 27 July 2010 amounts to \$18,698.08 and Manasa Lomalagi's claim from 7 January 2008 until 19 October 2010 amounts to \$17,233.84.
3. The defendant denies owing any sum of monies to the plaintiff and asserts that the claim is wholly or partially barred under the ERA. The defendant says that the period of the claim which survives the limitation period cannot be maintained because the plaintiffs were on fixed wages and any overtime worked is not payable to them.
4. The defendant also asserts that the claim is not based on the original records kept by the plaintiff but based on records fraudulently created by the plaintiffs' or on records tempered by them or some third party.
5. It has been agreed by the parties that there was no written contract of service. The plaintiffs' were paid wages on a weekly basis and they were not issued with any pay slips.

Issues

6. The parties have agreed that the following issues are to be tried:
 1. *Whether the plaintiffs' claim is wholly or partially barred under s. 214(2) of the ERA?*
 2. *For the period the plaintiffs' claim survives the statutory limitation, are they entitled to any overtime pay and meal allowances?*

3. *If the answer is yes, then how much is due and owing to each plaintiff?*

Evidence/Law/Determination

7. It is necessary that the question of limitation period be determined first. If the plaintiffs claim survives then I will have to determine whether the plaintiffs worked overtime and whether they are entitled to payment for the same and for any meal allowance as a result of the overtime work.

A. Is the Claim wholly or partially barred under s. 214(2) of the ERA?

8. The relevant law to determine the issue is ss. 214 and 215 of the ERA. I will make reference to the same in full.

9. S. 214 reads as follows:

“(1) Without affecting other remedies for the recovery of wages or other money payable by an employer to a worker under an employment contract, if –

(a) there has been default in payment to a worker of wages or other money; or

(b) payment of wages or other money has been made at a lower rate than that legally payable under this Promulgation or an employment contract,

the whole or any part, as the case may require, of the wages or other money be recovered under this Promulgation by the worker or by a labour inspector on behalf of the worker by action commenced in the prescribed manner in the Tribunal, notwithstanding any acceptance or express or implied agreement by the worker to payment at a lower rate.

(2) An action under this section may be commenced within 6 years after the day on which the money became due and payable”.

10. It is essential that I recite s. 215 in full too as the plaintiffs' excuse for not bringing the claim within 6 years is based under this provision of the law. The section reads:

"If a claim is brought before the Tribunal under section 214 to recover wages or other money payable to a worker, the worker or labour officer or labour inspector may produce evidence to show that the defendant employer failed to keep or produce a wages and time record in respect of that worker as required by this Promulgation and that the failure prejudiced the worker's ability to bring an accurate claim under this Promulgation".

11. Kemueli Vakatalai's claim for overtime wages and meal allowances is from 7 January 2008 until 26 October 2010. Ajeet Prasad's claim is from the period 7 January 2008 until 27 July 2010. Manasa Lomalagi's claim is from 7 January 2008 until 19 October 2010.

12. All the plaintiffs' claim includes and begins from the period 7 January 2008. The claim was filed on 1 August 2016. To work out the time/period when the 6 years begins to run, a finding on when the overtime wages and meal allowances were *due and payable* needs to be made as required by s. 214(2).

13. No one has given evidence as to when the overtime and meal allowances were due but since the plaintiffs' were paid their wages weekly, it is only sensible that they ought to have been paid the overtime and the meal allowances the same week or at least within a month of the work.

14. Different employers have different methods of paying overtime. Some employers pay the overtime with the wages and some process it separately. In case of this employer, no evidence has been tendered as to when the overtime wages for that week was due. I therefore think that it will not be counter-intuitive and unfair, if I were to say that the overtime payment ought to have been made at least within a month of the work. For the purposes of calculating the limitation period I will work on the basis that all overtime ought to have been paid within a month of the work.

15. Prima facie, all the claim for overtime pay and meal allowances from the years 2008 and 2009 are time barred as it should have been filed within 6 years from the time it was due. The

claims for years 2008 and 2009 have been filed past the 6 year period and are thus time barred.

16. The remaining set of claim is for the year 2010. In case of Kemueli Vakatalai, his claim is for a period until 26 October 2010. His claim for overtime wages from the month July 2010 till October 2010 is not time barred. In my findings, if his claim for the period July 2010 should have been paid at least by August 2010, then his claim from July 2010 is not time barred. He can therefore claim for 4 months of overtime payment and meal allowances.
17. Ajeet Prasad's claim is for overtime wages and meal allowances until 27 July 2010. His claim for July overtime should have been paid at least in August 2010. His claim for one month of overtime survives the limitation period.
18. Manasa Lomalagi's claim is for a period until 19 October 2010. He can maintain his claim from July 2010 to 19 October 2010 which is equivalent to 3 months 2 weeks.
19. Ms. Raitivi raised an explanation that since the employer had not provided the wages records when it was demanded to, the claim could not be filed on time. Firstly, the filing of the civil claim did not depend on the production of the wages records. It would definitely affect the accuracy of the amount claim and thus the decision on the forum to file the claim. The Tribunal's jurisdiction is limited to a claim of \$40,000.
20. S. 215 would have assisted the plaintiffs' in a situation where the plaintiffs' found itself in a wrong forum due to the failure of the employer in producing the records or in a situation where the amount claimed became a triable issue and the tribunal or the court was faced with the dilemma on the actual amount due and owing. In such a case, the tribunal or the court was entitled to use the records made available by the employees because their claim cannot be prejudiced by the failure to produce the records.
21. The fact that this defendant did not produce the records on time is not a reason why the claim should not have been made within time. The employees' were free to file a claim on their calculation of what was due and owing to them. It was incumbent on the plaintiff's to do so because the statutory time limitation was binding on them and running against them.

22. It unfolded in the evidence that in the year 2010, the plaintiffs had the record of wages which was kept by the employer. That record was given to the Labour Officer by the plaintiffs. The Labour Officer and/or the plaintiffs' should have used that record to institute a claim. The argument that the records were not produced early, thus, has no basis legally and factually.
23. Having said that, I find that I should mention that I have already decided an appeal between the same parties on a different issue, albeit, in which it was clearly indicated that the employer had produced the records late but had done so by 5 September 2012. The plaintiffs still had ample time left to formulate and file their claims for the period 2008. I do not think that the employer can be blamed in this instance for their late filing of the claim.
24. I further find that the plaintiffs cannot rely on s. 215 to extend the time period beyond 6 years. Firstly there is no provision for extension of time and secondly, s. 215, like I have said, does not grant protection to late filing of the claim for the plaintiff's.
25. Having decided that the plaintiff's large portion of the claim is barred by time, I need to now examine whether they are entitled to overtime pay and meal allowance for the period their claim survives the limitation period.

B. The Entitlement of the Plaintiffs

26. Mr. Ageet Prasad was the first witness. His evidence succinctly was that he was a dispatch clerk and he used to note the time in and time out for the workers of a particular section which covered the other two plaintiffs'. He testified that he used to be the first person to arrive at work with the security guard and leave with him as the last person.
27. According to Mr. Ageet Prasad, he was paid hourly at the rate of \$3.56. He worked 66 hours in a week but he was only paid for 45 hours. His overtime was never paid to him. He used to start work at 7am and finish work at 7pm. He worked from Monday to Saturday.

28. Mr. Prasad indicated that he was paid \$160 per week gross which was for 45 hours only when he should have been paid for 66 hours. He vehemently denied that the wages was fixed at \$160 per week.
29. Mr. Ageet Prasad said that he had to arrive early and prepare the shop for the trading hours and close the same when the trading hours finished. The public could start accessing the shop from 7.30am.
30. It was Mr. Kemueli's evidence that he worked 6 days a week from 7am to 7.30pm. He was paid hourly at the rate of \$3.56. He said that he was paid a sum of \$160 gross per week which was far less than what they were supposed to be paid as the pay was calculated at only 45 hours per week.
31. Mr. Kemueli stated that he had to arrive early and prepare the shop for the public to access. The public could start accessing the shop at 8am. Mr. Kemueli said that since he worked past 5pm, he was entitled to meal allowance too.
32. Mr. Manasa Lomalagi gave evidence that he worked from 7am to 7pm from Monday to Saturday. He was paid an hourly rate of \$3.14. His gross income per week was \$141.30 and net income per week was \$130.00.
33. He was never paid overtime even though he worked overtime. He denied that his wages was fixed at \$160.00 per week. He testified that the shop would start for business either at 7.30am or 8.00am depending on the time it was ready.
34. The defendant's witness Ms. Vikashni Mala who is an accounts officer gave evidence to the effect that the trading hours of the Supermarket was: *Monday to Thursday: 8am to 6pm or 6.30pm; Friday: 8am to 7pm; and Saturday: 8am to 6pm or 6.30pm.*
35. Ms. Mala stated that all the workers would start and finish within the trading hours. She stated that the plaintiffs were paid a fixed salary of \$160.00 a week but she does not know whether there was any agreement to pay overtime. She agreed that the plaintiff's worked

overtime for one hour between Monday to Thursday, 2 hours on Friday and 1 hour on Saturday.

36. Ms. Mala denied that the plaintiffs were entitled to meal allowance because it is supposed to be paid to a worker who works in excess of two hours overtime. In this case they worked one hour overtime.
37. According to Ms. Mala's evidence, most of the workers were paid per hour. Very few workers were paid a fixed salary. The plaintiffs were on fixed salary because that was the agreement they had with the Director of the Supermarket.
38. The Director of the Company Mr. Rudra Prasad also gave evidence. His evidence was that he had personally decided that the plaintiff's would and should be on a fixed weekly wages. They were initially on an hourly rate and seeing their loyalty he decided to put them on a fixed weekly wages. He negotiated their fixed weekly wages and that was done with a formula in mind.
39. The Director said that the three staff worked from the opening till the closing hours. The maximum possible hours they worked in a week was 58 hours. Since 48 hours was normal time in a week, with the minimum wages at \$250 a week, the amount came to \$120.00 per week. Since the plaintiffs worked extra 10 hours, he multiplied that by time and a half and that came to \$32.00 per week. Their rate therefore came to \$155.00 per week if they were paid hourly. It was decided to pay them \$160.00 with no deductions even if they were absent or sick. That was regarded as a fringe benefit.
40. The Director also gave evidence that the plaintiffs worked from 7am to 7.30pm.
41. In respect of all the plaintiffs, I have to make a finding on whether they were paid hourly or on a fixed rate. Firstly, I find the evidence that the plaintiffs were on a fixed weekly salary of \$160 a week, as testified by the Accountant and the Director, incredible. The Director is taking an advantage of the absence of a written contract.

42. Most of the workers in the shop were paid an hourly rate. If these three plaintiffs were employed on a different basis then there ought to have been a written agreement evidencing that. The employer cannot and should not be given the advantage of an agreement which the employees deny having entered into and one which is more disadvantageous to them.
43. If the employer had come to an agreement with the employees, there was no reason why it was not reduced to writing. The only reason I find that there was no agreement is because the employer deliberately stole the workers hours of work and not paid for the same. The act of not reducing the agreement in writing is evidence of that fact.
44. I am further surprised that Mr. Rudra Prasad, the Director stated that the workers were put on a fixed salary because of their loyalty and long service. If that was the case, why were these employees fixed wages calculated at the minimum wage rate of \$2.50 per hour as per the *Wages Regulation [Wholesale and Retail Trades] Order 2008*, which both counsel agree is the applicable Regulation to the matter at hand?
45. These workers would be far better off if they were paid hourly under the applicable legislation. They would be entitlement to claim overtime under the applicable regulation and meal allowance if they worked overtime. In that case why would they agree to a lesser amount as fixed wages? The argument of fixed wages is not beneficial to the employees and only benefits the employer.
46. Further to that, I cannot fathom the basis on which the defendant says that he paid the plaintiff's for their loyalty. If they were to be paid for their loyalty, their wages should be calculated at an amount higher than the minimum wages. Mr. Prasad said that the plaintiffs were paid for time off even if they did not work for some hours. This explanation should be rejected and I do so, on the grounds that the working hours were oppressive. If you subject a worker to work for 66 hours in a week, he is bound to require some time off for himself to attend to his needs at home and otherwise. He will definitely need time off when one is not paid overtime for working. On that basis, to say that wages were not deducted for time off is not an advantage to the employee but bad faith on the part of the employer and inhumane working hours for the employees.

47. I will use the applicable Wages Regulations to show how the Directors calculations is flawed when it comes to his assertion that he paid the employees for their loyalty by fixing their wages at \$160 per week. Before I do that, it is prudent that I direct my attention to the contention on how many hours these plaintiffs' worked for the defendant.

48. I do not accept that these workers only worked during the trading hours. Their nature of the work required them to be there in the shop before the trading hours. Who else was to prepare the shop for trading? To add to that, the Director agreed in his evidence that the employees worked from 7 to 7.30pm.

49. The evidence produced by the plaintiffs tendered as Exhibit 1 shows that plaintiff Ageet Prasad worked for 66 hours a week. I do not doubt the authenticity of the records. If the defendant disputes the record, it should produce a record that it says is the proper record.

50. Under the Wages Regulation, the plaintiffs are entitled to overtime payment. Regulation 8 (b) of the same reads as follows:

"8(1) Overtime remuneration shall be paid to:-

(a) ...

(b) every worker employed on a six day working week for all time worked in excess of 8 hours working day during such week, public holidays;..."

51. Regulation 8 (3) specifies the rate of overtime remuneration as follows:

"8(3) the rate of remuneration payable for overtime worked by workers... shall be:

(a) on week days, one and one half times the workers' normal hourly rate of pay for the first two hours and thereafter twice the workers normal hurly arte of pay;

(b) on public holidays twice the workers' normal hourly rate of pay".

52. I will use the scenario in the case of Ageet Prasad. He worked 7am to 7pm daily. He therefore worked 12 hours per day inclusive of lunch. If he worked 11 hours exclusive of lunch then he worked 66 hours a week. Under the law, he would be entitled 8 hours of normal pay, 2 hours of time and a half, and 1 hour of double time. The Schedule of the Wages Regulations shows that the employee was entitled to a minimum of \$2.50 per hour of work.
53. On the Directors calculation, using the minimum wage, the employee was entitled to \$32.50 a day which calculates to \$ \$195.00 a week. This employee would have never agreed to a fixed rate of \$160.00 a week as he would have got more than that if he was to be paid under the law.
54. The agreement that the Director pledges was in existence orally cannot be given regard to as the law would have ensured the employees a better pay than the professed agreement.
55. Regulation 6 (1) does not permit the employer to enter into an employment contract which fixes work for more than 45 hours excluding overtime. It thus follows that if the wages were to be fixed, that ought to be for 45 hours only and not the overtime worked. The contract which the Director says was orally entered into by the parties is illegal under Reg. 6(1) which reads as follows:
- “Subject to subsections (2) and (3), an employment contract must fix at not more than 45 the maximum number of hours (exclusive of overtime) to be worked in a week by a worker bound by that contract”.***
56. Further to all that, the official wages records produced by the employer shows that the employees were paid an hourly rate. Mr. Ageet Prasad and Kemulei Vakatalai are shown to be employed at a rate of \$3.56 per hour and Manasa Lomalagi is shown to be paid \$3.14 per hour. The Director says that this could be as a result of reverse calculation by the computer from the gross wages. I find this explanation appalling. If there was an agreement for fixed wages, the system needed to be fed in with that accurate information. The computer does not

generate its own information unless fed in humanly. This shows how adamant the Director is in avoiding payment of the employee's rightful wages.

57. I am of the finding that the employees are entitled to overtime wages and meal allowance under Regulation 10 of the applicable law as the workers worked in excess of two hours every day. The entitlement is \$5.00 per day.

58. I find that Ageet Prasad and Manasa Lomalagi worked for 11 hours for 6 days a week totaling to 66 hours a week and Mr. Kemueli Vakatalai worked for 11 ½ hours every day for 6 days totaling to 69 hours a week. Their entitlements are as follows:

(i) *Ageet Prasad (Wages for overtime work for July 2010)*

- Daily Total: \$46.28
- 8 hours x 3.56 = \$28.48
- 2 hours (5.34 x 2) = \$10.68
- 1 hour (3.56 x 2) = \$7.12

- Weekly Total: \$277.68
- Less paid: \$277.68 - \$160 = \$117.68.
- Total short paid per week inclusive of \$5.00 meal allowance per day = \$147.68
- Total short paid for a month = \$147.68 x 4 weeks = \$590.72.
- Interest at the rate of 6 per cent from the date of the claim for 3 years (35.44 x 3) = \$106.32.
- Loss of FNPF at the rate of 10 % on overtime payment for a month: (10% x 470.72) = \$47.10 (rounded off).
- Interest at 6 percent on loss of FNPF for 3 years: (6 x 47.10 x 3) = \$8.50 (rounded off)

- **Total to be paid: \$752.65 (rounded off)**

59. I find that Mr. Ageet Prasad is entitled to be paid a sum of \$752.65 for overtime pay, loss of FNPF on overtime pay, meal allowance, and interest. The question remains to be resolved is his annual leave pay. He has specifically made a claim for that.
60. There is no evidence produced that he had taken the leave or was paid for it. He is therefore entitled to make a claim for the year 2010. No evidence has been tendered as to when the employee's year ended. In that regard I will work on the calendar year and find that the annual leave for 10 working days, as per, s. 59(1) of the ERA, was due by December 2010.
61. If Ageet Prasad's daily rate was \$46.28, his pay for 10 working days would amount to \$462.80. With 6 per cent interest for a period of 3 years from the date of the claim, the amount comes to \$546.10. His total entitlement comes to \$1,298.75. I award him an amount of \$1,298.75.

(ii) *Kemueli Vakatalai*

62. Mr. Kemueli Vakatalai's entitlement works out as follows:

- Daily Total: \$49.84
- 8 hours x 3.56 = \$28.48
- 2 hours (5.34 x 2) = \$10.68
- 1.5 hours (7.12 x 1.5) = \$10.68

- Weekly Total: \$299.04
- Less paid: \$299.04 - \$160 = \$139.04.
- Total short paid per week inclusive of \$5.00 meal allowance per day = \$169.04
- Total short paid for a month = \$169.04 x 4 weeks = \$676.16.
- Total short paid for 4 months = \$676.16 x 4 = \$2,704.64.
- Interest at the rate of 6 per cent from the date of the claim for 3 years (162.28 x3) = \$486.84.

- Loss of FNPF at the rate of 10 % on overtime payment for 4 months: $(10\% \times 2,224.64) = \222.45 (rounded off).
- Interest at 6 percent on loss of FNPF for 3 years: $(6 \times 222.45 \times 3) = \40.35 .
- **Total to be paid: \$3,454. 30 (rounded off).**

63. I make an award in favour of Mr. Kemueli Vakatalai in the sum of \$3,454. 30. I will now work out Mr. Manasa Lomalagi's entitlement. His claim is worked out as follows:

- Daily Total: \$40.82
- 8 hours $\times 3.14 = \$25.12$
- 2 hours $(4.71 \times 2) = \$9.42$
- 1 hour $(3.14 \times 2) = \$6.28$

- Weekly Total: \$244.92
- Less paid: $\$244.92 - \$141.30 = \$103.62$.
- Total short paid per week inclusive of \$5.00 meal allowance per day = \$133.62
- Total short paid for a month = $\$133.62 \times 4$ weeks = \$534.48
- Total short paid for 3 months and 2 weeks = $(1,603.44 + 267.24) = \$1,870.68$
- Interest at the rate of 6 per cent from the date of the claim for 3 years $(6\% \times 1,870.68 \times 3) = \336.75
- Loss of FNPF at the rate of 10 % on overtime payment for 3 months and 2 weeks: $(10\% \times 1,243.44 + 207.24) = \$145. 10$ (rounded off).
- Interest at 6 percent on loss of FNPF for 3 years: $(6 \times 145.10 \times 3) = \26.10 .
- **Total to be paid: \$2,378.63 (rounded off).**

64. I make an award for the sum of \$2,378.63 in favour of Manasa Lomalagi.

Final Orders

65. In final analysis, I find that the three plaintiffs' are entitled for overtime pay and meal allowance for the period their claim is not barred by the limitation period. They are also entitled to loss of FNPF on the overtime pay at the rate of 10 per cent. On these sums, interest at the rate of 6 percent from the date of claim until the date of judgment is also awarded.

66. I award each plaintiff a sum of \$1,000 costs as well. The plaintiffs are therefore awarded the following sums:

a. Ageet Prasud: \$1,298.75 plus \$1000 costs = \$2,298.75.

b. Kemueli Vakatalai: \$3,454.30 plus \$1000 costs = \$4,454.30.

c. Manasa Lomalagi: \$2,378.63 plus \$1000 costs = \$ 3,378.63.

67. I order the defendant to pay the above monies within 14 days of the date of the order. The assessment for costs is summarily made. The parties are at liberty to apply to the court in respect of any error on calculation of the sums.



Anjala Wati

Judge

26. 08.2019

To:

1. Labour Officer for the Plaintiffs.
2. Naidu Law for the defendant.
3. File: Suva ERCC 9 of 2016.