Monteverde Darvin Cynthia
v
VGO Corp Ltd

[2013] SGHC 280

High Court — Tribunal Appeal No 20 of 2013
Lionel Yee JC
18 December 2013

Employment Law — Contract of Service
Employment Law — Pay — Computation

31 December 2013 Judgment reserved.

Lionel Yee JC:

Introduction

1 This is an appeal from the decision of the Assistant Commissioner for Labour ("the Commissioner") on 31 July 2013 concerning a claim by the Appellant against her former employer, the Respondent, for overtime pay during the period of her employment. At the hearing before the Commissioner, the Appellant appeared in person whereas the Respondent was represented by its human resource and administrative manager. On appeal, the Appellant remained in person but was assisted by a McKenzie friend.

2 By way of background, the Appellant was employed by the Respondent as a senior boutique associate starting from 21 August 2010. She

was promoted to a boutique supervisor with effect from 1 May 2012. It was not disputed that her last drawn monthly basic salary was $1,900 and that she worked 60 hours per week. She ceased her employment with the Respondent when her work pass was cancelled on 17 August 2012. On 3 July 2013, she lodged a claim with the Commissioner for overtime pay for the period from the date of commencement of her employment (21 August 2010) to the date of termination of her employment (17 August 2012).

3 The Commissioner held that by virtue of s 115(2) of the Employment Act (Cap 91, 2009 Rev Ed) ("the Act"), any claim more than one year before the date of lodging the claim (*ie*, any claim before 4 July 2012) could not be taken into consideration.[1] The Commissioner went on to determine that the Appellant was entitled to overtime pay for work done at the employer's request beyond the normal working hours of 44 hours per week, calculated at the rate of 1.5 times the hourly basic rate of pay as provided by s 38(4) of the Act.[2] The Commissioner found that as the Appellant had agreed to work 60 hours a week at a monthly basic salary of $1,900, it was reasonable to presume that the parties had agreed for the Respondent to pay a single rate for all hours of work, including the hours worked in excess of 44 hours a week. Thus, the Respondent had to pay an additional 0.5 times the hourly basic rate for the overtime hours.[3] The number of overtime hours worked by the Appellant between 4 July 2012 and 17 August 2012 was found to be 96 hours and the Commissioner awarded the Appellant the sum of $479.04, computed as follows:

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1 The Commissioner's Grounds of Decision ("the GD") at [16].

2 The GD at [23].

3 The GD at [24].

$$\frac{(\$1900 \times 12)}{(52 \times 44)} \times 96 \text{ hours} \times 0.5 = \$479.04$$

Issues in this appeal

4 On appeal, the main issue was whether the Commissioner had erred in accepting that payments for the overtime hours were already included in the Appellant's basic salary of $1,900, except for the increase of 50% (*ie*, 0.5 times the hourly basic rate of pay) which the Commissioner ordered the Respondent to pay to the Appellant.

5 While the Appellant had initially raised the argument that the limitation period of one year stated in s 115(2) of the Act should not preclude her from claiming her full entitlement of overtime payment, it was clarified at the hearing before me that she was not pursuing this point.

6 The Respondent submitted that the Appellant's appeal against the Commissioner's decision was out of time since she was granted an extension to appeal by 17 September 2013 but only filed her appeal on 25 September 2013. The Appellant explained that she had filed the necessary documents on time but due to issues with the filing system, the appeal was recorded as only having been filed on 25 September 2013. Counsel for the Respondent could not point to any prejudice suffered by the delay in filing. In fact, the Respondent's written submissions described the delay as "technically a procedural irregularity".[4] Since the Respondent had suffered no prejudice, I found it unnecessary to determine exactly what had happened. Instead, to put

[4] Respondent's Submissions dated 13 December 2013 at para 7.

the matter beyond doubt, I granted an extension of time retrospectively for the Appellant to file her appeal by 25 September 2013.

Amount of overtime payment due to the Appellant

7 The key provision in this appeal is s 38 of the Act. Pursuant to s 38(4) of the Act, if an employee at the request of the employer works more than 44 hours in one week, then, subject to certain exceptions, the employee is entitled to be paid for such extra work at the rate of at least one and half times the hourly basic rate of pay. Section 38(6)(*a*) of the Act then explains how this "hourly basic rate of pay" is to be computed in the case of a person employed on a monthly rate of pay, that is, by taking 12 times the "monthly basic rate of pay" divided by 52 times 44 hours. The "monthly basic rate of pay" is thus the proper starting point for calculating the payment due for overtime to an employee under s 38(6)(*a*) of the Act. Section 2(1) of the Act in turn defines "basic rate of pay" as follows:

> "basic rate of pay" means the total amount of money (including wage adjustments and increments) to which an employee is entitled under his contract of service either for working for a period of time, that is, for one hour, one day, one week, one month or for such other period as may be stated or implied in his contract of service, or for each completed piece or task of work but does not include —
>
> (*a*) additional payments by way of overtime payments;
>
> ……..

8 The root of the present dispute is the parties' disagreement on what sum of money constitutes the "basic rate of pay". The Respondent did not dispute that the Appellant was entitled to additional payment for overtime hours worked but argued that since she had already received some of her overtime pay in her monthly salary of $1,900 at a multiplier of 1, she should only be awarded additional payment for the overtime hours worked at a

multiplier of 0.5.[5] What the Respondent was essentially saying was that the Appellant's "basic rate of pay" was *not* $1,900 because $1,900 was for 60 hours of work per week and 16 of those 60 hours were overtime hours.[6] In contrast the Appellant's position appeared to be that her monthly salary of $1,900 as stated in her contract of service was her "basic rate of pay" as it did *not* include any overtime payments. Accordingly, the Appellant calculated her hourly basic rate according to s 38(6)(*a*) of the Act as follows:

$$\frac{(\$1900 \times 12)}{(44 \times 52)} = \$9.97$$

The Appellant therefore submitted that she was entitled to additional payments for overtime totalling $1,435.68 (being her hourly basic rate of $9.97 x 96 hours x 1.5).

9 Since s 2(1) of the Act defines "basic rate of pay" with reference to the total amount of money "to which an employee is entitled under his contract of service", I have to examine the terms of the Appellant's contract of service. Clause 3 of the Appellant's contract provided that her basic salary was $1,800 per month, which was later revised to $1,900 per month when she was promoted in May 2012. Clause 6 provided that the Appellant was "required to work a maximum of sixty (60) hours per week subject to the outlet's roster". Clause 7 stated that "[t]here shall be no claim for overtime and / or replacement hours off as you are hired for job completion and not for number of hours worked".

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5 Respondent's Submissions dated 13 December 2013 at para 21.

6 Respondent's Submissions dated 13 December 2013 at paras 14–15.

10 In my judgment, the Appellant's "monthly basic rate of pay" for the purposes of s 38(6)(*a*) of the Act is the sum of $1,900. First, the Appellant's contract of service only provided for a salary of $1,900 per month covering a maximum of 60 working hours per week. It expressly disclaimed the concept of additional payment for overtime hours worked, stating that the Appellant was "hired for job completion and not for number of hours worked". Second, as pointed out by the Appellant, clause 6 of the contract of service does not provide for a fixed number of hours to be worked but purportedly imposes an obligation on the part of the Appellant to work a *maximum* of 60 hours per week.[7] If the Respondent had required her to work fewer than 60 hours a week in any given month — and this would include the situation where she was asked to work fewer than the statutory limit of 44 hours a week — it would still be obliged to pay her a monthly salary of $1,900 and no less. Therefore the monthly salary of $1,900 cannot be said to have included any "additional payment by way of overtime payments" as envisaged by the definition of "basic rate of pay" in s 2(1) of the Act and must be taken to be the "monthly basic rate of pay" for the purposes of calculating payments due for overtime to the Appellant.

11 Thus, using $1,900 as the Appellant's monthly basic rate of pay and applying this figure to the formula laid out in s 38(6)(*a*), the Appellant is *prima facie* entitled to additional payment of $1,435.68 for the 96 overtime hours she worked.

12 I should add that my finding would not be different even if clause 6 of the contract required the Appellant to work a fixed number of 60 hours a week

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[7] Appellant's Submissions filed on 12 December 2013 at para 14.

rather than expressing this as a maximum. This is because s 8 of the Act renders every term of a contract of service which provides a condition of service which is less favourable to an employee than those prescribed in the Act illegal, null and void to the extent that it is so less favourable. As correctly pointed out by the Appellant, clause 6 of her contract of service would, in this situation, be void to the extent that it required her to work more than 44 hours in a week and the clause would be consequently be treated as one which only imposed an obligation to work no more than 44 hours a week. But the Respondent's contractual obligation to pay her a monthly salary of $1,900 would remain unchanged and $1,900 would accordingly constitute her "monthly basic rate of pay" under s 38(6)(*a*) of the Act.

13 I next consider whether any payments already made by the Respondent can be said to have been paid to the Appellant for her hours worked in excess of 44 hours a week and accordingly have to be deducted from the sum of $1,435.68. Given my earlier findings that the Appellant's salary of $1,900 under her contract of employment did not include any overtime component and that under the contract of employment, the Appellant would have been entitled to be paid $1,900 per month even if she worked only 44 hours a week, I am unable to conclude that any such credit can be given to the Respondent in this case.

14 For the sake of completeness I will also deal with the Appellant's argument that the Respondent had made false declarations to the Ministry of Manpower when applying for the Appellant's work pass (known as an "S Pass") by declaring that the Appellant would be paid a monthly salary of $1,800 per month which, under the relevant rules, necessarily *excluded* any overtime payments, contrary to the Respondent's submissions before the Commissioner. According to the Appellant, the minimum monthly salary for

an "S Pass" holder was increased to $2,000 in July 2011 but the Respondent failed to increase her salary from $1,800 and did not declare to the Ministry her revised salary of $1,900 in May 2012. In the hearing before me, counsel for the Respondent sought leave to file a further affidavit to address these points. However, I am of the view that this issue is not relevant to this appeal. Whether or not the Appellant's employment pass had been properly obtained and whether there had been any related breach of statutory provisions by the Respondent is not a matter which needs to be determined in this case. I therefore decline to give the Respondent leave to file a further affidavit in this respect.

Conclusion

15 For the reasons set out above, I allow the appeal and vary the Commissioner's award of $479.04 to the Appellant to $1,435.68. As for costs, since the Appellant is in person, the Respondent is to pay to the Appellant her reasonable disbursements.

Lionel Yee
Judicial Commissioner

The Appellant in person;
Charles Phua and Loh Ling Wei (Tan Kok Quan Partnership) for the Respondent.