IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 128

Tribunal Appeal No 5 of 2017

In the matter of Order 55 of the RULES OF COURT
(Cap 322, Rule 5)

And

In the matter of Sections 115 and 119 of the Employment Act (Cap 91)

And

In the matter of the Decision of the Learned Assistant Commissioner for Labour Ms Lim Saw Boon made on 1 February 2017 under Sections 115 and 119 of the Employment Act (Cap 91), Case No 2016000469E-002/A201602392W-001

Between

HASAN SHOFIQUL

… *Applicant*

And

CHINA CIVIL (SINGAPORE) PTE LIMITED

… *Respondent*

JUDGMENT

[Employment law] — [Hours of work]
[Employment law] — [Rest days] — [Hours of work]
[Employment law] — [Termination]

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v
China Civil (Singapore) Pte Ltd

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George Wei J:

Introduction

1 The Applicant, Mr Hasan Shofiqul (hereinafter referred to as "the Claimant"), is a Bangladeshi national who holds a work permit in Singapore. Like many others before him, he came to Singapore to work as a construction worker. On 29 September 2014, the Claimant signed an employment contract with the Respondent Employer ("the Employer"). The period of employment was for 29 September 2014 to 31 January 2016.[1] For the entire duration of his employment, the Claimant worked exclusively at the project known as "T201, Mandai Depot Project" ("the Project").[2] He was paid a basic salary of S$2,200 a month.[3]

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1 Affidavit of Hasan Shofiqul, filed 15 December 2017, [4].

2 Affidavit of Hasan Shofiqul, filed 15 December 2017, [4].

3 Affidavit of Koh Pei Ching, filed 10 January 2018, [21].

2 The Employer is a subsidiary of a Chinese construction company headquartered in China.[4] The Employer's core business is bored piling. In early-2014, the Employer won a contract to install bored piles for the Mandai MRT depot that would serve the future Thomson-East Coast line.[5] In mid-2014, the Employer began recruiting construction workers to commence works on the Project. The Claimant was thus recruited.

3 The Claimant was subsequently upgraded to the role of a site supervisor.[6] His basic salary remained the same. As a site supervisor, the Claimant was in charge of the work of about 6 to 7 other workers.[7] He was always present with his team of workers.[8] He would stay on site with them to finish work.[9] He would often leave for and return from work with his team.[10] During meal times, he would collate his workers' food orders.[11] He worked long hours. There were instances where the Claimant would end work at 3 am and return to his dormitory, only to return to the Project site at 6 am that very morning again for work.[12] There were also occasions where the Claimant worked for 24 hours through the night.[13] When required, the Claimant would also work on his rest days.[14]

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4 Affidavit of Koh Pei Ching, filed 10 January 2018, [4].

5 Affidavit of Koh Pei Ching, filed 10 January 2018, [4].

6 Affidavit of Koh Pei Ching, filed 10 January 2018, [5], [16].

7 ROP, p 18.

8 Affidavit of Rahman Ferdausur, filed 15 December 2017, [16].

9 Affidavit of Rahman Ferdausur, filed 15 December 2017, [10].

10 Affidavit of Rahman Ferdausur, filed 15 December 2017, [16].

11 Affidavit of Rahman Ferdausur, filed 15 December 2017, [11].

12 Affidavit of Rahman Ferdausur, filed 15 December 2017, [13].

13 Affidavit of Rahman Ferdausur, filed 15 December 2017, [13].

14 Affidavit of Hasan Shofiqul, filed 15 December 2017, [6].

4 Under the terms of his contract of employment, the Claimant had to work 44 hours per week.[15] His working days were from Mondays to Saturdays. Sundays were non-working days. So too were public holidays. The Claimant was entitled to payment for overtime work.[16] But the Employer did not keep "proper" records of the Claimant's overtime work. The Claimant kept his own records. He tried to submit these records to the Employer for computation of his overtime pay.[17] Until this day, however, the Claimant has not been paid accordingly.

5 Eventually, the Claimant left his employment with the Employer in late January 2016.[18] The parties dispute whether the Claimant was given the requisite one-month notice of his termination. In any case, a few days after the termination of his employment, the Claimant "lodged" a claim with the Commissioner for Labour for:[19]

(a) overtime pay; and

(b) payment of 1 month's salary in lieu of notice.

6 I pause to note that section 119 of the Employment Act (Cap 91, 2009 Rev Ed) ("the Act") sets out the procedure for claims. A simplified procedure is provided and legal representation is not allowed. The claimant is to either lodge a memorandum or to make the claim in person before the Commissioner. In the present case, there is no evidence of a memorandum. Instead it appears

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15 ROP, p 407.

16 ROP, p 407, see item 5.

17 Affidavit of Hasan Shofiqul, filed 15 December 2017, [23].

18 Affidavit of Hasan Shofiqul, filed 15 December 2017, [10].

19 ROP, pp 6 – 7.

the Claimant simply made his statement and claim in person.[20] I shall return to this point below in respect of the claim for payment for work done on rest days and public holidays.

7 At the conclusion of the MOM Proceedings, the Assistant Commissioner for Labour ("the ACL") found:

(a) that the Claimant, being a site supervisor, was employed in an executive position, and as such, could not rely on Part IV of the Act in calculating payments due for work done on rest days and public holidays between 6 February 2015 and 31 December 2015 ("the Relevant Period");[21]

(b) that based solely on the Respondent's records of the piling works of the Project ("the Bored Pile Records") in the Relevant Period, the Claimant was entitled to overtime payment in the sum of S$5,510.05;[22] and

(c) that the Claimant was not entitled to one month's salary in lieu of notice in respect of the Respondent's termination of his employment, as the Respondent had given the Claimant the requisite notice.[23]

8 The Claimant filed this application by way of an appeal (HC/TA 5/2017) on 14 February 2017, within 14 days of the ACL's order in the MOM Proceedings.[24] I heard the parties on 22 January 2018, at the end of which I

20 Record of Proceedings, pp 6–7.

21 Record of Proceedings ("ROP"), p 359.

22 ROP, pp 366–367.

23 ROP, pp 367–368.

24 ROP, p 368.

reserved judgment.

The issues and the decision below

9 The dispute essentially concerned the Claimant's entitlements under his contract of employment in light of the Act.

10 In so far as an employee's right to remuneration is concerned, I note that four components often need to be taken into account:

(a) remuneration for the normal hours of work on a working day;

(b) remuneration for work done over and above normal hours of work on a working day (overtime);

(c) remuneration for normal hours of work done on a rest day and/or public holiday;

(d) remuneration for work done over and above normal hours of work on a rest day and/or public holiday (overtime).

11 In the present case, the dispute centred on the rate of pay for work done on rest days and public holidays, the calculation of the actual number of hours worked by reference to which overtime could be assessed, and lastly the Claimant's right to one-month notice.

Rate of pay on rest days and public holidays

12 First, parties disputed the applicable rate of pay for work done within the "normal hours of work" on rest days and public holidays. By normal hours, what is meant is the first eight hours of work on rest days and public holidays.

Hours of work beyond the first eight hours on a rest day or public holiday fall into the overtime claim (see section 2(1) of the Act, which defines "overtime" as meaning the number of hours worked in any one day or in any one week in excess of the limits provided for in Part IV).

13 The Employer's position is that the Claimant is only entitled to the flat contractual rate of S$50 per day.[25] The Claimant asserts that he is entitled to the rates under Part IV of the Act. The ACL found for the Employer. In her analysis, section 2(2) of the Act mandates that employees employed in an executive position and earning a basic salary not exceeding S$4,500 cannot avail themselves of the provisions of Part IV.[26] The ACL found that the Claimant was employed in an executive position, and accordingly, was not entitled to rely on Part IV in computing the remuneration payable for work done on rest days and public holidays.

Calculation of overtime hours and entitlement

14 Secondly, parties disputed the actual amount of overtime hours the Claimant had worked over the Relevant Period. The Employer did not keep specific records of the Claimant's overtime work done on working days and on rest days and public holidays. The ACL's conclusion was that the best available record was the Employer's Bored Pile Records, which was referred to as exhibit "R7".[27] I pause to note that R7 is the Employer's own summary and table of overtime hours for the Claimant based on information from the Bored Pile Records. It is stressed that R7 is not the actual Bored Pile Records.

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25 ROP, p 65.

26 ROP, p 359.*

27 ROP, p 366.

15 The ACL disregarded the Claimant's own records of his overtime work, which the Claimant relied on to claim that he had done 1515 hours' overtime in the Relevant Period.[28]

16 Based solely on R7, the ACL found that the Claimant worked for a total of 318.5 hours overtime in the Relevant Period.[29] Of this figure, 289 hours work was for overtime work done on working days. The remaining 29.5 hours work was for overtime work done on the Claimant's rest days and public holidays.

17 The Basic Overtime Rate per hour was agreed (and assessed) at S$17.30 per hour. The ACL, accordingly, awarded S$5,510.05.

18 It appears that in deriving the 29.5 hours of overtime work performed on rest days and public holidays, the ACL only took into account the additional hours worked on a rest day or public holiday (*ie*, work beyond the 8th hour of work). On appeal, the Claimant submits that this approach is inconsistent with section 37(3A)(a) and section 38(1)(b) of the Employment Act. Further the Claimant submits that since he had worked more than his normal 8 working hours on his rest days, he was also entitled to payment at the rate set out in section 37(3)(c) of the Employment Act.[30]

One month's notice

19 Thirdly, parties disputed whether the Employer had given the requisite one month's notice before terminating the Claimant's employment on 31 January 2016. The Claimant alleged that the Employer only gave him two days'

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28 ROP, pp 362 and 365.

29 ROP, p 366.

30 Claimant's submissions at [10] and [11].

notice that his employment would end on 31 January. The ACL found that the Claimant was unable to substantiate his claim. On the other hand, the Employer produced a termination letter dated 31 December 2015, as well as the affidavit of an engineer who affirmed that he handed that letter to the Claimant on 31 December 2015.[31] The ACL hence found in the Employer's favour on this last issue as well.

Issues to be determined

20 The issues to be determined in this application are:

(a) whether the Claimant can rely on Part IV of the Act in calculating payments the Employer owes for the work the Claimant performed on rest days and public holidays in the Relevant Period;

(b) whether the ACL was correct in relying solely on the Bored Pile Records in computing the amount of overtime work the Claimant had done in the Relevant Period; and

(c) whether the Employer had given the requisite one-month notice to the Claimant before terminating his employment.

The nature of this appeal

21 At this juncture, it is appropriate to remind oneself of the applicable standard of review in applications such as the present. Order 55 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) is the governing order. Rule 2(1) therein provides that appeals to which Order 55 applies shall be "by way of rehearing". This means that the court is not constrained to determine only whether the

[31] ROP, p 368.

tribunal's decision below was proper and/or contained manifest errors of fact and law. If it wishes to, the court in its discretion may consider all the evidence before it and go beyond determining the propriety of the tribunal's decision or inquiring into whether there had been manifest errors of fact or law. However, the court does not bear an irrevocable burden to hear the matter anew so that the substantive merits fall to be determined afresh (*Valentino Globe BV v Pacific Rim Industries Inc* [2009] 4 SLR(R) 577 at [11], cited with approval in *Ceramiche Caesar SpA v Caesarstone Sdot-Yam Ltd* [2017] 2 SLR 308 at [16]).

22 The court hearing an appeal to which Order 55 applies "may give any judgment or decision or make any order which ought to have been given or made by the … tribunal … and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it" (Order 55 rule 6(5) Rules of Court (Cap 322, R 5, 2014 Rev Ed).

23 As is evident, Order 55 rule 6(5) confers broad discretion upon the court hearing an appeal from the decision of a tribunal when it comes to determining what to do with the case. Although appeals such as this application are "by way of rehearing" (Order 55 rule 2(1) Rules of Court (Cap 322, R 5, 2014 Rev Ed)), "it is still important … to recognise that the judge having heard the evidence [is] in a better position to know all the circumstances than this court can be even with the assistance of transcripts" (*Jolley v Sutton London Borough Council* [1998] 1 WLR 1546 at 1554E, *per* Lord Woolf MR, in relation to Order 59 rule 10(3) of the Rules of the Supreme Court (SI 1965/1776) (UK), which was in substantially the same terms as Order 55 rule 6(5) of the Rules of Court).

24 It follows that in an appropriate case, the court hearing the appeal may decide to remit the matter with its opinion and directions for the tribunal below to reconsider the evidence (see *Cardshops Ltd v Davies and another* [1971] 1 WLR 591, where the English Court of Appeal remitted the case with directions to the county court judge for rent to be reconsidered accordingly).

Is the Claimant entitled to rely on Part IV of the Act?

25 The Claimant seeks to rely on Part IV of the Act to calculate the remuneration payable by the Employer to him for the work he did on *rest days* and *public holidays*. It is convenient to start with a summary of the employee's

rights under Part IV before I turn to the question as to whether the Claimant is in fact eligible under Part IV.

Part IV entitlements

26 Part IV is titled "Rest Days, Hours of Work and other Conditions of Service." Section 36(1) provides that an employee "shall be allowed in each week a *rest day* without pay of one whole day which shall be Sunday or such other day as may be determined from time to time by the employer" [emphasis added].

27 Special provisions apply where the employee works on a rest day. If the Employer requests that the Claimant work on his rest day, section 37(3) will apply:

> **Work on rest day**
>
> **37**.
>
> …
>
> (3) An employee who at the request of his employer works on a rest day shall be paid for that day —
>
> > (*a*) if the period of work does not exceed half his normal hours of work, a sum at the *basic rate of pay* for one day's work;
> >
> > (*b*) if the period of work is more than half but does not exceed his *normal hours of work*, a sum at the *basic rate of pay* for 2 days' work; or
> >
> > (*c*) if the period of work exceeds his *normal hours of work* for one day —
> >
> > > (i) a sum at the *basic rate of pay* for 2 days' work; and
> > >
> > > (ii) a sum at the rate of not less than one and a half times his *hourly basic rate of pay* for each hour or part thereof that the period of work exceeds his *normal hours of work* for one day.

> [emphasis added]

28 On the other hand, if the employee was the one who requested to work on a rest day, the rate of pay for work done on the rest day is found in section 37(2). In particular, sub-section (c) provides that where the period of work exceeds his normal hours of work for one day he is entitled to (i) a sum at the basic rate of pay for one day's work; and (ii) a sum at the rate of not less than one and a half times his hourly basic rate of pay for each hour or part thereof that the period of work exceeds his normal hours of work for one day.

29 Parties did not dispute that the Claimant's "normal hours of work" under the contract was eight hours a day from Mondays to Saturdays.[32] Mr Chan, who before me represented the Claimant, submitted that the Claimant's "hourly basic rate of pay" is S$11.54.[33] I find that this is in accordance with the second column of row two in the Fourth Schedule to the Employment Act.

30 The Claimant's "basic rate of pay" would be calculated based on the formula in the third column of row two in the Third Schedule to the Act:

> Basic rate of pay for one day =
>
> (12 x monthly basic rate of pay) / (52 x number of days on which the employee is required to work in a week) =
>
> (12 x $2,200) / (52 x 5.5) = $92.31.

31 I turn then to remuneration for work done on public holidays. The governing provision is found in Part X section 88 of the Act:

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[32] Applicant's submissions, [34] and [125]; see ROP, p 407.

[33] Applicant's submissions, [133].

> **Holidays**
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> **88**.—(1) Every employee shall be entitled to a paid holiday at his *gross rate of pay* on a public holiday that falls during the time that he is employed, …
>
> …
>
> (4) Notwithstanding subsection (1), any employee may be required by his employer to work on any public holiday to which he would otherwise be entitled under that subsection and, in such event, he shall be paid an extra day's salary at the basic rate of pay for one day's work in addition to the gross rate of pay for that day…
>
> [emphasis added]

32 An employee's "gross rate of pay" is "the total amount of money including allowances to which an employee is entitled under his contract of service…" (section 2(1) of the Act).

33 The chief difference between an employee's "gross rate of pay" and his "basic rate of pay" is that the former includes allowances (except travelling, food and housing allowances) while the latter does not include any allowance "however described" (section 2(1) of the Act). Parties made no submissions on the Claimant's gross rate of pay.

34 Looking at the Claimant's contract of employment, I find that there is no provision for allowances over and above his monthly basic rate of pay. Thus, I find that the Claimant's gross rate of pay for one day is the same as his basic rate of pay for one day – S$92.31.

35 Finally, I note there is no dispute that, if the Claimant worked overtime on rest days (*ie* beyond the 8th hour of work), the Basic Overtime Rate of S$17.31 per hour (or part thereof) of work would apply.[34] I find that this is in accordance with section 37(2)(c)(ii) and (3)(c)(ii) of the Act.

36 The Basic Overtime Rate also applies to overtime work done on public holidays, in accordance with section 38(4). Parties also did not dispute that the Basic Overtime Rate applies to overtime work done on the Claimant's work days (*ie*, work done beyond the 8th hour of work on Mondays to Saturdays). I will come to the Claimant's claims for overtime pay under the analysis of the second issue in this application.

37 For convenience, the findings I make in respect of the various rates of pay are as follows:

(a) Hourly basic rate of pay is S$11.54.

(b) Basic rate of pay (per day) is S$92.31.

(c) Basic Overtime Rate is S$17.31 per hour of work.

38 Before proceeding further, it is to be stressed that the provisions on holiday and sick leave entitlements are found in Part X of the Act. They are not dealt with in Part IV. I note also that the basic distinction between a "rest day" and a "holiday" is that all employees are entitled to a paid holiday at his gross rate of pay on a public holiday. On the other hand, rest days are days of rest without pay. Further, an employee who works on a public holiday is entitled to be paid (i) his gross rate of pay; and (ii) an extra day of pay at the basic rate of pay. The special provisions on holiday pay in Part X are not subject to the exclusions applicable to Part IV, which are considered next.

Whether Part IV is applicable

39 Section 35 provides, in brief, that Part IV applies to workmen receiving

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[34] ROP, pp 65, 361.

a salary less that S$4,500 per month and also to employees (other than workmen) who are in receipt of a salary less than S$2,500 per month. It is not disputed that the Claimant earns a basic salary of S$2,200 a month.[35]

40 Section 2(1) defines an "employee" as "a person who has entered into or works under a contract of service with an employer and includes a workman … but does not include — … (c) subject to subsection (2), any person employed in a managerial or an executive position."

41 Section 2(2) goes on to provide that "[a]ny person who is employed in a managerial or an executive position and is in receipt of a salary not exceeding $4,500 a month … shall be regarded as an employee for the purposes of this Act except the provisions in Part IV".

42 Section 2(1) also defines "workman" as meaning (a) any person … engaged in manual labour; … (c) any person employed partly for manual labour and partly for the purpose of supervising in person any workman in and throughout the performance of his work…"

43 It will be apparent that the Act recognises a basic distinction between an "employee" and a "workman", and between employees who are "managers or executives" and those who are not. In addition, a distinction is also drawn between workmen earning more than S$4,500 per month and those earning less, as well as employees earning more than S$2,500 per month and those who earn less.

44 The distinctions are important in that they relate to the applicability of some of the core provisions in the Act. For example, a person employed in a

[35] Affidavit of Koh Pei Ching, filed 10 January 2018, [21].

managerial or executive position is not regarded as an employee under the Act for the purposes of Part IV. It does not matter how much or how little he earns – as a manager or executive, he is not entitled to rely on the provisions in Part IV. That said, he is still entitled to assert and rely on the provisions in Part X on holiday and sick leave. Similarly, the provisions on maternity benefits and childcare leave in Part IX remain applicable.

45 Prior to the 2008 amendments, employees who are employed in managerial or executive positions did not have access to the Labour Court for salary claims. It was thought that such employees "are generally in a better bargaining position" and hence do not need statutory protection (*Singapore Parliamentary Debates, Official Report* (18 November 2008) vol 85 at cols 949—950 (Gan Kim Yong, Acting Minister for Manpower)).

46 During the Second Reading of the Employment (Amendment) Bill, however, the Acting Minister for Manpower, Mr Gan Kim Yong, explained that:

> … based on the Ministry's experience, the most common type of assistance managers and executives require is the recovery of salary claims, especially those who are more junior and paid less. They often find it costly to take up civil suits to recover salary arrears.
>
> Therefore, we will allow junior managers and executives earning $2,500 and below in basic monthly salary, to have access to the Labour Court for salary claims. With the increasing proportion of [professionals, managers, executives, and technicians], a significant number of employees will benefit from the access to this lower-cost dispute resolution mechanism. … This will benefit 44,000 [professionals, managers, executives, and technicians].

47 So, section 2(2) was introduced to help a sandwiched class – sandwiched because they are not in the "worst of bargaining positions" such that the Act

was already available for them, but who are also not in the best of positions when it comes to asserting their side of the bargain on their own. Section 2(2) was introduced by the Employment (Amendment) Act 2008 (No 32 of 2008) to confer greater statutory protection on employees who are employed in managerial or executive positions.

48 That was the genesis of section 2(2). It was amended in 2010 to raise the salary cap from S$2,500 to S$4,500 (see Industrial Relations (Amendment) Act 2010 (No 36 of 2010)), thereby expanding the pool of employees employed in managerial or executive positions who fell within its ambit. It was also amended to extend the range of provisions that such employees can have recourse to. Thus, while section 2(2) was initially confined to provisions relating to salary claims, it now applies to the whole of the Act "except the provisions in Part IV".

49 This brings us to Part IV. If the Employment Act is meant to "[safeguard] basic employment standards" (*Singapore Parliamentary Debates, Official Report* (18 November 2008) vol 85 at col 948 (Gan Kim Yong, Acting Minister for Manpower)), then Part IV is meant to "[provide] additional employment protection and benefits for the more vulnerable employees who are engaged in manual labour or are paid lower wages, such as machine operators and cleaners" (*Singapore Parliamentary Debates, Official Report* (18 November 2008) vol 85 at col 950 (Gan Kim Yong, Acting Minister for Manpower)).

50 The class of employees that Part IV protects is quite clearly different from the class that section 2(2) seeks to extend protection to. Section 2(2) is meant to help managers and executives who receive less than S$4,500 per

month. But this class of managers and executives was less likely to need the sort of protection accorded by Part IV. That is why managers and executive employees paid S$4,500 or more are excluded from Part IV although they are entitled to assert and rely on provisions in other Parts such as Part X on holiday and sick leave.

51 In the present case, the distinctions drawn affect the applicability and operation of Part IV and Part X. In the case of an employee who is a manager or executive the combined effect of section 2(1) and 2(2) is that he will fall outside of the protections in Part IV of the Act. The managerial/executive employee can still rely on Part X although there are some differences between his position and employees who are not managers/executives (see section 88(4) and 88(4A)).

52 At the conclusion of the MOM Proceedings, the ACL found that the Claimant could not rely on Part IV to calculate remuneration due for the work he did within his normal hours of work on his *rest* days. This is because the Claimant was found to have been employed in an executive position (*supra* [7(a)]).

53 Section 35 tells us who Part IV covers. There are two groups. The first covers "workmen who are in receipt of a salary not exceeding S$4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described)" (section 35(a)). The second covers "employees (other than workmen) who are in receipt of a salary not exceeding S$2,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described)" (section 35(b)).

54 In oral submissions, Mr Chan argued that the Claimant is essentially a construction worker and entitled to avail himself of the provisions of Part IV by virtue of section 35(a) read together with section 2(1)(d) and the First Schedule to the Act. These provisions state that a workman includes "construction workers". "Constructional work" is defined in section 2(1) as meaning "any building and civil engineering work and includes repair, maintenance, alteration and demolition work". Whilst the Claimant was employed as a supervisor, Mr Chan's position is that the Claimant remains a construction worker, albeit in a more supervisory role.

55 The ACL, in reaching her decision, noted the Claimant's statement that he was not a workman and that he spent more than 80% of his time on supervision.[36] Neither side raised the issue as to whether this statement precluded the Court considering afresh the question whether the Claimant was in fact a workman. In my view, the Claimant's statement that he was not a workman has to be taken in context: namely that he spent the bulk of his time on supervision as opposed to actually doing manual/construction work. This does not mean that as a matter of law, the Claimant is not a workman. Supervisory responsibility does not mean the person cannot be a workman. After all, section 2(1) includes under "workman" any person employed partly for manual labour and partly for the purpose of supervising in person any workman in and throughout the performance of his work. Indeed, section 2(1) also provides (in brief) that a person who is employed partly as a workman and partly in some other capacity is deemed to be a workman unless his work as a workman is less than one-half of his work.

56 The fact of the matter is the Claimant was supervising "in person" the

[36] ROP at p 359.

workmen in his team "in and throughout the performance of his work". He was not supervising off-site or through chains of command. For this reason, I am of the view that there is a good case to be made that the Claimant was a workman for the purposes of the Act.

57 In any event, it is not necessary to reach a definite conclusion on this issue as I find that the Claimant was not in any case employed in an executive or managerial position. Section 35(b) applies Part IV to an employee (other than a workman) provided he is not employed in an executive or managerial position.

58 There is no doubt that the Claimant was employed under a contract of service with the Employer. The only question is whether the Claimant was employed in an executive position.

59 The term "executive position" is not defined in the Act. The word "executive" has been defined as referring to "[a] corporate officer at the upper levels of management" (*Black's Law Dictionary* (Thomson Reuters, 9th Ed, 2009) at p 651). It is not difficult to imagine that such employees are likely to be in a better position to safeguard their own employment interests in respect of the matters falling within Part IV. Thus, Assoc Professor Ravi Chandran, in *Employment Law in Singapore* (LexisNexis, 5th Ed, 2017) at para [4.18], had this to say about why persons employed in executive positions are excluded from the definition of "employee" under section 2(1) of the Act:

> The idea behind [section 2(1)] is likely that persons in … executive positions are *better able to protect their own interests and hence, do not need statutory protection. However, in reality that may not be the case except perhaps for very high level employees. Thus, it is suggested that this provision should be interpreted narrowly so as not to extend to a mere sales 'executive' for instance.* It is suggested that factors such as the

> nature of the job and the responsibilities of the employee, the qualifications of the employee and amount of remuneration payable to the employee should be taken into account in determining the issue [emphasis added].

60 Indeed, Assoc Professor Chandran's views resonate with Parliament's approach to determining which classes of employees should be given statutory protection. In that regard, it is clear that Parliament's decision on whether to afford statutory protection to a class of employees depends heavily on whether that class of employees is able to safeguard its own interests independently of legislation.

61 I have summarised above why Parliament decided to amend the Employment Act in 2008 to afford access to the Labour Court for managers and executives earning S$2,500 and below in basic monthly salary. The Acting Minister for Manpower had explained (*supra* [45]) that "managers and executives are also currently not covered as they are *generally in a better bargaining position* [emphasis added]" (*Singapore Parliamentary Debates, Official Report* (18 November 2008) vol 85 at cols 949—950 (Gan Kim Yong, Acting Minister for Manpower)).

62 Subsequently, the Acting Minister also explained Parliament's intention in introducing a S$4,500 monthly salary threshold for workmen in order for Part IV to apply. In this context, the Acting Minister said (at cols 950—951):

> … highly paid and skilled workmen *are able to negotiate for favourable employment terms without having to be protected under Part IV.*
>
> Accordingly, … we will introduce a basic monthly salary threshold of $4,500 for workmen under Part IV. Workmen with lower income will not be affected, and will continue to be protected under Part IV.
>
> [emphasis added]

63 And perhaps to concretise who this skilled workman, capable of negotiating for favourable employment terms without having to be protected under Part IV is, the Acting Minister stated (at col 951):

> This change will affect a relatively small proportion of workmen, making up about 0.6% of all workmen, the majority of whom are employed in fewer than 10 companies in the petroleum, petrochemical and aerospace industries. The exclusion will provide these highly skilled workmen and their employers the flexibility to offer employment packages that better suit their needs.

64 The courts will approach the question of whether an employee is employed in an executive position by looking at all the circumstances of the case. The decision in *Brightway Petrochemical Group Singapore Pte Ltd v Ang Lily* [2007] 4 SLR(R) 729 ("*Ang Lily*") illustrates this. Chan Seng Onn J held that the respondent employee in that case was not employed in an executive position. The appellant employer had sought to show that the respondent was employed in a managerial, executive or confidential position, arguing that:

(a) the employee was employed as an "accountant" and that was her job description or designation (*Ang Lily* at [9]);

(b) the employee's job responsibilities included setting up the company accounts, which would require the expertise of a trained accountant (*Ang Lily* at [9]);

(c) the high salary paid while the employee was still on probation showed that she was not employed in a mere clerical or administrative position, but was instead employed in a position that required her to exercise managerial and executive functions (*Ang Lily* at [10]); and

(d) that the role of an accountant was foundational to the appellant's growing business. The respondent was the only accountant employed by the appellant at that time and was expected to carry out all the functions expected of a competent accountant (*Ang Lily* at [10]).

65 In rejecting the respondent's arguments, Chan J found:

> 12 … The respondent testified that she *reported to the finance manager*, which indicated to me that she was *playing more of a supportive role although her designation stated in the job offer letter was "accountant"*. According to the respondent, she was in a new set-up with only two of them in the finance department, namely, the finance manager and herself. Clearly, she did not have any supervisory functions or any staff under her charge. The respondent further testified that her work involved setting up the company's accounts, filing of vendor bills, issuing cheques, preparing payment vouchers, creating petty cash and payment voucher forms, booking air tickets for the staff, arranging for interviews for candidates for the operation manager, making enquiries of the medical check-up procedures and performing other duties assigned by the finance manager. *Even though setting up the company's accounts was one aspect of her work, I believed that she would probably be doing so under the direct supervision of the finance manager, whom she reported to.*
>
> …
>
> 14 After considering *all the relevant circumstances and the nature of her employment*, I came to the … conclusion … that the respondent's duties and responsibilities were predominantly administrative … in nature.
>
> 15 At the appeal hearing, I queried *whether the respondent had a degree in accountancy, but was informed that she was a diploma holder. This fortified my view that she was not employed in a managerial, executive or confidential position*, although I accepted counsel's contention that the higher the salary, the less likely it would be a clerical position. *But this was not the only factor that I had to take into account … .*
>
> [emphasis added]

66 In this case, the ACL found that the Claimant was employed in an executive position. She stated:[37]

> As a Site Supervisor, the claimant was in charge of his team. He had to made [*sic*] many decisions in the day to day operations. In fact, one such decision was to check and confirm the safety requirements have been complied with before the Permit to Work for excavation and piling works can proceed … The claimant can influence the workers and decide the manner in which they worked to meet the deadline. The claimant also had influence over his workers' appraisal. The claimant had made recommendation to Mr Zhang … to promote or dismiss the workers.

67 The main points in the ACL reasoning can be summarised as follows:

(a) The Claimant was a site supervisor.

(b) As a site supervisor, the Claimant was in charge of his team and had to make many decisions on a daily basis, one of which was to confirm that safety requirements have been complied with before work can proceed for the day.

(c) The Claimant had influence over his workers' appraisal and had made recommendations to promote or dismiss workers.

68 Respectfully, I cannot see how these reasons are sufficient to show that the Claimant is employed in an executive position. To begin with, the fact that the Claimant was employed as a site supervisor is not sufficient by itself to lead to the conclusion that he is an executive. After all, the fact that a worker has a supervisory role does not even necessarily remove his status as a "workman." Much must depend on the nature and level of supervisory powers that he has been given and all other relevant circumstances. Indeed, in *Ang Lily* (*supra* [64]), the fact that the employee was engaged as an "accountant" did not mean that she was in an executive position. Chan J examined the nature of her actual

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[37] ROP, p 359.

work and other factors including the point that the employee had a diploma instead of a degree in accountancy. This "fortified" Chan J's view that she was not employed in a managerial, executive, or confidential position (at [15], *supra* [65]).

69 In the present case, the Claimant does not have a diploma. He does not possess any specialised skills or training.[38] Whilst he may have passed the standard health and safety at work courses all workers must pass to work at a work-site, there is certainly no evidence that he has taken and passed specialist courses on bored piling or anything else. But it is said that the Claimant is in charge of a team of workers and has to make many decisions on a daily basis. He recorded the Bored Pile Records. He conducted toolbox meetings. He applied for the permit to work daily before work can begin.[39] These tasks require "hands-on" supervision in person of his team of workers. Although the tasks are important, they do not go beyond regular on-site routine administrative work. They do not, with respect, require any specialised expertise or training beyond the normal and routine. Even the Employer seems to think so. The Employer says that bored piling is a highly technical process involving a team of civil engineers and geologists specially trained in such work.[40] The Claimant is not so trained. In fact, the Employer states he does not even trust the Claimant to do the work of the civil engineers and geologists.[41] The Employer says that the Claimant lacks an education and has been working as a construction worker until his appointment as a site supervisor to help with work co-ordination between workers and management.[42] Although the Claimant does play a role in

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38 Applicant's submissions, [24].

39 Applicant's submissions, [22].

40 Affidavit of Koh Pei Ching, filed 10 January 2018, [15].

41 Affidavit of Koh Pei Ching, filed 10 January 2018, [16].

the bored piling process, the Employer clearly takes the position that his role is but a small and not highly technical part of the process.[43]

70 The ACL also found that the Claimant could make recommendations to promote and dismiss workers. There is no dispute that the Claimant was in charge of a team of about six to seven workers.[44] But the Claimant still had to report to his superiors – the Project Manager and Senior Project Manager – who had overall management of the Project and control over the site workers, including the Claimant himself.[45] So while the Claimant can provide feedback to his superiors on the work performance of the workers under his supervision, he did not have direct authority in the hiring, firing, promotion, transfer, reward, and/or discipline of the workers.[46] The fact that he could give feedback on the performance of a worker in his team and to that extent "influence" the Project Manager's assessment of that worker does not mean he is in an executive or managerial position. The decision over firing, promotion *etc* is not his decision to make. In fact, the Employer's evidence is that the Claimant was appointed as a site supervisor "to help with communication and work co-ordination between the workers and management".[47] That is not an executive function.

71 I find, therefore, that the Claimant is not employed by the Employer in an executive position. He is a "mere" employee and accordingly by virtue of section 35(b) of the Act, Part IV will apply to the Claimant's claims.

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42 Affidavit of Koh Pei Ching, filed 10 January 2018, [16].

43 Affidavit of Koh Pei Ching, filed 10 January 2018, [16].

44 ROP, p 18.

45 Affidavit of Hasan Shofiqul, filed 15 December 2017, [18].

46 Affidavit of Hasan Shofiqul, filed 15 December 2017, [19].

47 Affidavit of Koh Pei Ching, filed 10 January 2018, [16].

72 In reaching this decision, I note in passing that the Claimant's contract of employment states expressly his working hours as 44 hours per week.[48] This is also consistent with the requirement under section 38 of the Act that an employee who is protected under Part IV shall not ordinarily be required to work more than eight hours a day or 44 hours a week.

73 For completeness, I add that no arguments were raised as to whether the Claimant was "a manager" or whether "executive" and "manager" were essentially the same concept for these purposes. That said, I make the passing observation that the Claimant is most unlikely to be a "manager" much for the same reasons that I have found him not to be an executive.

74 In reaching my decision on the first issue, I am aware that the Claimant's contract of employment with the Employer states that remuneration for work done on rest days and public holidays shall be at the flat contractual rate of S$50.00 per day.[49]

75 The Act, however, states that "[e]very term of a contract of service which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed by this Act shall be illegal, null and void to the extent that it is so less favourable" (section 8 of the Act). There is no doubt that the flat contractual rate of S$50.00 per day is less favourable than the applicable rates of pay under Part IV of the Act for work done on rest days.[50]

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48 ROP, p 407.

49 ROP, p 407.

50 Certified Transcript of hearing on 22 January 2018, pp 9, 11.

76 Accordingly, I reiterate my finding that Part IV of the Act applies to the Claimant. This means that the Claimant can rely on sections 37(2) or (3) as appropriate to calculate the amounts the Employer must pay to him for the work he did within his normal hours of work on *rest days* (*ie*, the first eight hours of work on rest days).

77 In particular, I note section 37(3) (relied on by the Claimant) that where an employee *at the request of the employer* works on a rest day, then if the period of work exceeds his normal hours of work for one day, the employee is entitled to a sum at the basic rate of pay for 2 days' work *and* a sum not less than one and a half times his hourly basic rate of pay for each hour or part thereof that the period of work exceeds his normal hours of work for one day.

78 That said, as noted (*supra* [28]), under section 37(2) the rate of pay is lower if it was *the employee who made the request* to work on a rest day.

79 To be sure, my finding that the Claimant can avail himself of the provisions of Part IV does not affect his claims for payment for work done on *public holidays*. Payment for work done on public holidays is, after all, governed by section 88 of the Act.

80 If the Claimant had worked on a public holiday, then he must be paid an "extra day's salary at the basic rate of pay for one day's work in addition to the gross rate of pay for that day" (section 88(4) of the Act). I have found that the Claimant's basic rate of pay for one day is the same as his gross rate of pay for one day – S$92.31 (*supra* [34]). The Claimant shall, therefore, be paid S$184.62 per day for work done on a public holiday.

81 For avoidance of doubt, I also note that when asked by the ACL to state his claims at the start of the hearing below, the Claimant's response was that his claim was for:

(a) One month's salary in lieu of notice; and

(b) Overtime pay for the period 6 February 2015 to 31 December 2015.

82 The Claimant did not state to the ACL that there was also a claim to the higher rate of pay applicable when work was done on rest days or public holidays. However, I note also that in the submissions it is stated that aside from overtime, the Claimant is also claiming for work performed on rest days and public holidays in accordance with Part IV of the Employment Act.[51] It is likely that the Claimant (who was unrepresented below) used overtime to refer to pay for work done within normal hours on a rest day and public holiday as well as overtime pay for hours in excess.

Is sole reliance on the Bored Pile Records in assessing overtime hours justifiable?

83 There is no doubt that the Claimant had performed overtime work. The question is how much overtime work? As with many of such claims, the controversy is almost always over the documentary record.

84 But before I come to that, there is a separate question of whether the Employer was obligated to remunerate the Claimant for any overtime work done in the first place. To be sure, this question did not arise before the ACL. It only surfaced *after* the ACL gave her decision.

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[51] Claimant's written submissions at [31].

85 At the hearing before the ACL, the Employer agreed that the Claimant is entitled to overtime pay under the terms of his employment; and the only reason why the Employer did not pay the Claimant overtime was because the Claimant did not submit his time cards:[52]

> Q: Since there was a need for the claimant to supervise workers to do overtime, then surely the claimant as a Supervisor would have to perform overtime?
>
> A: Yes, only at times. *I pay salary and overtime if he present his time card. If there is overtime, then he would be paid overtime. … He just have to get the time cards verified, and get the Project Manager to sign and we would have paid him accordingly.*
>
> [emphasis added]

The Employer re-asserted this position again in response to a question on why the Claimant was not paid for overtime:[53]

> Q: All the workers were paid according to their time card and time sheet and we worked the same hours. Why did the company not pay me according to the contract?
>
> A: I have paid you according to your contract of $2,200 per month … . Nevertheless, from the bore pile records, I am emphasising, *you did not submit any time card.* Through the bore pile records, *there are overtime performed and we acknowledged that and agreed to pay you the overtime hours performed.* The amount was $5000.
>
> [emphasis added]

In fact, the Employer went so far as agreeing that the Claimant was entitled to the Basic Overtime Rate of S$17.31 per hour of overtime work performed:[54]

> Q: If the claimant worked beyond his contractual hours, is he entitled to overtime payment?

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52 ROP, pp 65 – 66.

53 ROP, p 110.

54 ROP, pp 64–65.

> A: Yes. But so far, he did not submit his time card for overtime claim but only record for work on Sunday. … *If he worked overtime, he would be paid $17.31 per hour using MOM formula.*
>
> [emphasis added]

86 But in its affidavit filed close to a year after the ACL's decision ("Koh's Affidavit"), in response to this application, the Employer took a wholly different position. It now claims that the terms of the Claimant's employment did not entitle him to any overtime payment at all; and that this was made clear to the Claimant before he even signed his employment contract.[55]

87 I find it hard to accept the Employer's new evidence that the Claimant was employed on the basis that he was not entitled to overtime payment. It certainly was not the view the Employer took at the hearing before the ACL. Quite apart from its evidence from the stand, if the Employer had genuinely taken that view, why did it adduce over 70 pages worth of bored pile records to contest the amount of overtime hours the Claimant had worked? This change in position casts serious doubt on the credibility of the Employer's evidence.

88 Even if, taking the Employer's case at its highest, the Claimant was informed he was not entitled to overtime payment under his employment contract and that an express provision to that effect was set out in the contract, such a term cannot withstand the statutory regime. The Act provides that a term of the contract "which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed by this Act shall be illegal, null and void to the extent that it is so less favourable" (section 8 of the Act).

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[55] Affidavit of Koh Pei Ching, filed 10 January 2018, [23].

89 An employee who comes within the provisions of Part IV of the Act is entitled to overtime payment at the rate stated under section 38(4). Essentially, the employee will have to be paid for overtime work "at the rate of not less than one and a half times his hourly basic rate of pay irrespective of the basis on which his rate of pay is fixed" (section 38(4) of the Act). This is the Basic Overtime Rate that parties did not dispute at the hearing before the ACL (*supra* [85]). It follows that this is the rate at which the Employer must remunerate the Claimant for the overtime work he did in the Relevant Period.

90 The question then is how best to determine the number of hours of overtime work the Claimant had done in the relevant period, that is, from 6 February 2015 to 31 December 2015?

91 The Claimant claims for 1515 hours of overtime work over the Relevant Period broken down as follows:

(a) 6 February 2015 to 31 August 2015: 750 hours

(b) 1 September 2015 to 31 December 2015: 765 hours.[56]

92 Mr Chan submitted that the ACL was wrong to rely solely on the Bored Pile Records to calculate overtime. His arguments, briefly, were as follows:

(a) The ACL, without good reason, chose to ignore the Bored Pile Records from 6 February 2015 to 13 August 2015;

(b) The Bored Pile Records did not sufficiently capture the actual number of overtime hours the Claimant had worked;

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[56] ROP at p 362.

(c) In choosing to ignore other "contemporaneous" records that support the Claimant's overtime claim, the ACL effectively condoned the Employer's own unfair practices to reject the Claimant's claims.

The documents and evidence that the Claimant presented and relied on

93 Leaving aside his own testimony of his hours of work and the Bored Pile Records, the Claimant relied on the following items of evidence in support of his 1515 hours of overtime.

(a) A handwritten note prepared by the Claimant setting out his estimated overtime hours (750 hours) for the period, 6 February 2015 to 31 August 2015.[57]

(b) Time cards for the period, 1 September 2015 to 31 December 2015 showing a total of 765 hours of overtime. These time cards (for the Claimant) were prepared and signed by the Claimant. They were not endorsed by the Project Manager.[58]

(c) Time sheet record covering the period from 26 August 2015 to 3 January 2016 for other workers.[59] The time sheet signed by the Claimant recorded the time the workers worked after the 10th hour on each day.

(d) Evidence of Mr Rahman Ferdausur. Mr Ferdausur was another employee who worked first as a driver and then as a safety officer. Evidence was given of his own time cards for the period, 13 November 2015 to 30 December 2015. This was the period when he worked with

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57 ROP at C6.

58 ROP at C1.

59 ROP at C2.

the Claimant as a safety supervisor. It was said a supporting inference might be drawn from these time cards on the Claimant's overtime hours.[60]

(e) Evidence of Mr Islam Saimum. Mr Saimum was a worker under the Claimant's supervision from 5/6 September 2015 until 25 November 2015. Mr Saimum's time cards (signed by the Claimant) were submitted as evidence.[61]

(f) Evidence of Messrs Ahmmed Faruk, Rahman Atikan and Alam Mohammad Shahin. These were also workers under the Claimant for various periods. Their time cards, signed by the Claimant, were also submitted as evidence from which an inference might be drawn on the Claimant's likely overtime hours.

(g) Toolbox meeting records. Evidence was also provided of toolbox meeting forms and permits to work as supporting evidence for the Claimant's overtime claim. These records, however, were only for 26 March 2015 and 30 April 2015. It appears that toolbox meeting records and permits to work for other days were not retained by the Employer.[62]

The ACL's decision on the documents and evidence relied on by the Claimant

60 ROP at C3 and CWI.

61 ROP at R11.

62 Affidavit of Hasan Shofiqul filed on 15 December 2017, [51].

94 Leaving aside the Bored Pile Records, the ACL's conclusion was that there was no evidence substantiating the Claimant's claim for 1515 overtime hours as estimated in the handwritten note. Most of the evidence was either given little or no weight for reasons briefly summarised below.[63]

(a) The handwritten note prepared by the Claimant setting out his estimated overtime hours (750 hours) for the period, 6 February 2015 to 31 August 2015. No weight was attached to this at all, as it was nothing more than the Claimant's own estimate of what he claims as the overtime hours for this period. In essence, the handwritten note could not be used as evidence (proof) of its own truth.

(b) The Claimant's own time cards for the period, 1 September 2015 to 31 December 2015, showing a total of 765 hours of overtime were not signed by the Project Supervisor. These were not official in that they had not been countersigned by the Project Manager. It appears that the ACL did, however, rely on these time cards for the limited purpose of opening the door towards reference to and use of the Bored Pile Records for the same period for the purpose of calculating overtime hours.

(c) The time sheet record prepared by the Claimant for the workers in his team for 26 August 2015 to 3 January 2016 did not state the Claimant's working hours and it was also unclear when the Claimant signed the time sheet record. The hours of work recorded for different workers varied. It appears that this time sheet record was not relied upon because of (i) issues of reliability (when was the record made); and (ii) issues of relevance (what inference could be drawn given the documents purported to be a time sheet record of other workers in his team).

63 ROP at pp 362–365.

(d) The time cards of Mr Ferdausur were not official time cards. As a safety supervisor, he was not required to keep time cards. Further, the hours of work the Claimant recorded in his own time cards for November to December 2015 were not always consistent with those in Mr Ferdausur's time cards. On occasions, the Claimant's time card indicated half an hour more working time. Further, Mr Ferdausur was in the process of bringing his own (separate) claim for overtime hours and accordingly had an interest in the case. Accordingly, it appears Mr Ferdausur's time cards were not relied on for reasons similar to (c) above: (i) reliability; and (ii) relevance.

(e) The time cards of Mr Saimun, Mr Faruk, Mr Atikan and Mr Shahin were discounted or not relied on because the Claimant was unable to recall when the cards were signed and because of some discrepancies between the days indicated for one worker and the days the Claimant claimed he had worked as part of the team. Once again, it appears these were essentially not taken into account also because of (i) reliability; and (ii) relevance.

95 The ACL's assessment was that even though the Bored Pile Records were not "the best record" for establishing what were the Claimant's overtime hours, they were the best that were available in the circumstances. The ACL expressed reluctance to use the time cards of other workers as the basis of computing the Claimant's working hours. Quite apart from reliability, there was the issue of relevance. Further, whilst there was no issue over the reliability of the tool box records, these were only available for 2 days.

The ACL's decision and the Bored Pile Records of 6 February 2015 to 13 August 2015

96 At the hearing below, the Employer tendered complete sets of Bored Pile Records for the Relevant Period (*ie*, 6 February 2015 to 31 December 2015).[64]

97 The ACL chose to accept, however, only the records from 14 August 2015 to 31 December 2015 in calculating the amount of overtime work. The other Bored Pile Reports for the earlier period were returned to the Employer. It appears this was because the Claimant only supported his claim with time cards he had filled in himself for the period, 14 August 2015 to 31 December 2015.

98 It, therefore, appears the ACL did at least refer to the fact that the Claimant put in his "unofficial" time cards for the limited purpose of recognising an overtime claim for the period, 14 August 2015 to 31 December 2015. After all, it was for this reason that the ACL accepted the Bored Pile Records for this period.

99 There are, however, two difficulties. First, it appears that the ACL did not actually refer to the Bored Pile Records for this period (*ie*, 14 August 2015 to 31 December 2015) when calculating the overtime hours. Instead, the ACL referred to and used the Employer's own calculation of overtime hours for this period as set out in Exhibit R7. On appeal, the Claimant submits that the Employer's calculation as summarised and set out in R7 was incorrect. For example, R7 states that no piling work was done on 11 September 2015 as that was a public holiday. This could not be correct because the Bored Pile Record for 11 September 2015 indicated piling works started at 9.00 am and finished at 6.30 pm.[65] Further, the Claimant's time card submitted by the Employer also

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64 Affidavit of Koh Pei Ching, filed 10 January 2018, [6](a)(i)].

indicated that the Claimant had worked on 11 September 2015 from 7.30 am to 7 pm.[66]

100 Another example of error in R7 was the statement that no piling took place on 25 October 2015, which was a Sunday. Against this, the Claimant's time card submitted by the Employer for 25 October 2015 showed that he worked from 7.30 pm to 8.00 am. The Claimant also complains that the Employer did not provide the Bored Pile Record for 25 October 2015.

101 The Claimant also submits that errors were also made in calculating the hours of bored piling work on some days recognised in R7 as days when piling was done. For example, R7 states that piling work on 1 September 2015 commenced at 1.30 pm and ended at 11.00 pm which amounted to half an hour's overtime. But the Bored Pile Records for that date shows that bored piling works started at 9.30 am and ended at 10.15 pm. This time period is also consistent with what was recorded in the Claimant's own time card for September 2015.[67]

102 I pause to note that the Claimant in his affidavit sets out a Table as Exhibit HS-6 where he lists some other inconsistencies in the Employer's calculations when compared to the actual Bored Pile Records. I note also that some of the documents set out in the affidavits as exhibits such as HS-5 are hard to read/decipher because the print is faint or unclear. The same is true of some of the Employer's exhibits such as the time cards found at R1. That aside, it does appear that the Employer's calculation of overtime hours as set out in R7 and relied on by the ACL are not accurate and are likely to have understated the

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65 Affidavit of Hasan Shofiqul, filed 15 December 2017, at pp 370–372.

66 Affidavit Hasan Shofiqul, filed 15 December 2017, at [32] and ROP 523–524 and HS-5.

67 Affidavit of Hasan Shofiqul, filed 15 December 2017, at [32].

actual overtime hours. It would have been preferable if the ACL had assessed the overtime working hours directly from the Bored Pile Records or to have asked the parties to come to an agreement as to what the hours of work were based on the actual Bored Pile Records.

103 The second problem is that R7 sets out the Employer's calculation of overtime hours for the whole of the relevant period including February to August 2015. It will be recalled (*supra* [97]) that the ACL returned the Bored Pile Records for this period on the basis that these would not be looked at since the Claimant had not put in any of his own time cards for this period. That said, the ACL did award 185 hours of overtime for this period based on R7. But it is clear that the ACL could not have checked against the actual Bored Pile Records for February to August 2015, as she had returned them. Instead, the ACL simply accepted the Employer's own calculation and summary as set out in R7. Thus, whilst the ACL did make an award of overtime for February to August 2015, the Claimant's complaint is (i) the actual Bored Pile Records were not even before the ACL;[68] and (ii) the figures set out in R7 are too low.

Should the ACL have accepted and examined the Bored Pile Records for February to August 2015?

104 Looking at the evidence as a whole, and with respect to the ACL, I am of the view that the Bored Pile Records for 6 February 2015 to 13 August 2015 should have been referred to in the assessment of overtime hours worked by the Claimant in this period. The ACL's decision was that the onus of proof was on the Claimant to prove the overtime hours. The ACL did not accept the Bored Pile Records for this period because the Claimant did not submit any time cards.

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68 Claimant's submissions at [48].

What was left was a handwritten note prepared by the Claimant setting out his own estimate of the overtime hours in this period.[69]

105 In my view, the Claimant's explanation as to why he did not prepare his own time cards for this first period should have been taken into account. It is clear that there was no proper system for recording actual hours worked by supervisors at the worksite. The evidence below was that, in the absence of any system of attendance tracking, the Claimant decided to keep his own records. The Claimant had, in fact, kept his own records in the first few weeks of his employment. He tried to submit them to the Employer for endorsement. The Employer said there was no need for that. As a result, the Claimant did not continue to keep records.[70] Subsequently, he started tracking his own hours again from around September 2015 to December 2015, as he was doing a lot of overtime work in this period.[71] He provided these records to support his claim in the MOM Proceedings.[72] The ACL did not attach any weight to these time cards for the purpose of assessing the hours worked on account of the fact that these time cards were unofficial.

106 At this juncture, I should point out that although the Bored Pile Records themselves are insufficient measures of the amount of overtime hours (*infra* [109]), that is not a reason to ignore the entire set of records that could have captured, or provided some evidence at the very least, of overtime work done. The Claimant's claim for overtime pay is for the period, 6 February 2015 to 31 December 2015. In principle, unless there are good reasons not to do so, the

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69 ROP, p 362 and C6.

70 Affidavit of Hasan Shofiqul, filed 15 December 2017, [23].

71 Affidavit of Hasan Shofiqul, filed 15 December 2017, [24].

72 ROP, pp 369–374.

ACL's duty must be to consider the relevant records from 6 February 2015 to 31 December 2015. After all, there is no suggestion that no overtime work at all was performed by the Claimant in the period, 6 February 2015 to 13 August 2015.

Assessment of the ACL's decision to compute the Claimant's overtime hours based solely on the Bored Pile Records

107 The ACL chose to rely solely on the Bored Pile Records in determining the amount of overtime work the Claimant did.[73] According to the ACL, this was because the Employer's business was in bored piling, and the Bored Pile Records were the official records of the Employer's. The Bored Pile Records showed the different stages of the bored piling and the times when the piling was done. The Claimant signed off on the Bored Pile Records. The premise is that so long as bored piling was taking place, one can safely infer that the Claimant would be working. In the ACL's view, therefore, these records were the best and most accurate measure of the amount of overtime work the Claimant had done.

108 Based on the Employer's calculation and table summary of bored piling work hours at R7, the total overtime from 6 February 2015 to 31 December 2015 was assessed by the ACL at 289 hours.

109 I agree with the ACL that the Bored Pile records would reflect *some* of the work the employees did. Nevertheless, calculating the amount of overtime payment based *solely* on the Bored Pile Records has the obvious drawback in that they are unlikely to capture the actual hours worked by the Claimant. The Bored Pile Records only disclose the start and end times of the bored piling

73 ROP, pp 365–366.

process.[74] They say little or nothing about all the preparatory work that occurs before and after the bored piling process.

110 It is clear from the transcript of evidence below that the Claimant did a lot more than simply being around when bored piling was actually taking place.[75] For example, there was the need to obtain the permits, installing casings after pre-boring is completed, checking the casing installation (ground level and degree of slant), polymer checking and so on.

111 Take for example, the bored pile record dated 13 November 2015.[76] The timing of the first polymer test is recorded at the top right-hand corner under the header "Polymer/Bentonite Test". Under column "1", the time of the first polymer test is stated as "0930", even though actual piling work started at "1100". In Koh's Affidavit, the Employer sought to downplay this aspect of the Claimant's work as "routine and repetitive".[77] But "routine and repetitive" work *is* still work that has to be remunerated. After all, the Employer agreed in its testimony that the Claimant had to, among other things, perform all the polymer checks.

112 The general point made was that there were other work duties not captured by the Bored Pile Records. As noted above at [110], there were other work duties (including preparatory work) that the Claimant had to attend to.

113 I also note that whilst the Employer submitted the Bored Pile Reports, the Employer appears to take the position that the Claimant's actual hours when

74 Affidavit of Hasan Shofiqul, filed 15 December 2017, [35].

75 ROP, pp 202–210.

76 Affidavit of Hasan Shofiqul, filed 15 December 2017, p 534.

77 Affidavit of Koh Pei Ching, filed 10 January 2018, [28].

he was working might well be much less than the hours indicated in the Bored Pile Records. It appears that the general point made was that there would be periods when the Claimant and his team would not have any tasks to perform whilst the bored piling work was being conducted.[78]

114 This cannot be a sufficient reason for discounting the hours of work in the Relevant Period. In the first place, there is little evidence to suggest that the Claimant had no work to do when bored piling was ongoing. For example, the Employer accepts that "besides supervision, he has to … take charge within working hour. He had to manage the safety in the working areas, housekeeping work along the site and passage way. Any work related to the working area is under his responsibilities. [The Claimant] basically had to give instructions for [his workers] to do the work."[79] It follows that not all of his work is done at the actual bored piling work-site.

115 And even if I were to accept that there would be periods when the Claimant would simply be "sitting around" having nothing to do whilst bored piling was in process, it does not follow that the Claimant is not entitled to remuneration on the basis of hours at work. A chauffeur who is employed to drive between 7.00 am and 7.00 pm is at work even if there are long periods when he is sitting in a rest area waiting for his employer to call for the car.

116 The Act provides that an employee's "hours of work" refers to "the time during which an employee is *at the disposal of the employer and is not free to dispose of his own time and movements*…" (section 2(1)). It does not seem to

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78 ROP, pp 189–190. Certified Transcript of hearing on 22 January 2018, pp 87.

79 ROP, pp 127–128.

me that the Claimant was "free to dispose of his own time and movements" during work hours.

117 The Employer's testimony, which Mr Tng relied on, was that when bored piling was ongoing, the Claimant "is on standby at site". And the reason why the Claimant had to be on standby at site was because the bored piling work was time-sensitive. The point is Mr Tng agreed that bored piling was time-sensitive; and that the Claimant and his team, therefore, had to be on site when bored piling was taking place.[80] It was clearly important that they should be standing ready to attend to any matters that might arise during or after the bored piling as necessary.

118 It follows that the Employer cannot say that just because the Claimant was waiting (or on stand-by) while bored piling was ongoing, he was not doing work and therefore ought not to be remunerated for his hours at work. To be clear, there is nothing to suggest that the ACL actually discounted hours in the Bored Piling Records on account of any suggestion that there would be time periods when the Claimant had no work to carry out. The above comments are made in response to submissions made before this Court. The problem, however, remains that the ACL did not appear to assess the hours directly from the Bored Pile Records and instead relied on the Employer's summary in R7.

Should the ACL have awarded an uplift to the work hours as recorded in the Bored Pile Records?

119 There is no doubt that exclusive reliance on the Bored Pile Records will lead to an under-estimation of the Claimant's actual hours worked in the relevant period. To be clear, even if the complete set of Bored Pile Records was

80 Certified Transcript of hearing on 22 January 2018, pp 87–88.

available and referred to, it is likely that the Claimant's actual working hours would exceed the figures revealed for the reasons that have been referred to above.

120 The problem, however, is that it may not be that easy to determine the appropriate "uplift" to the hours as calculated by reference to the Bored Pile Records. This is especially so if there are no reliable contemporaneous records recording the Claimant's actual work hours.

121 As noted already, at the hearing below, the Claimant adduced various other documentary records in support of his overtime claim. These were "rejected" largely because the ACL had issues with the reliability of the documents as well as on the grounds of relevance (see [94]).

122 In my view, the handwritten note prepared by the Claimant setting out his estimated overtime hours (750 hours, *supra* [93(a)]) for the period, 6 February 2015 to 31 August 2015[81] is nothing more than the Claimant's own assertion of what he claims as the overtime hours for this period. It cannot be used as evidence (proof) of its own truth.

123 For the period between 1 September 2015 to 31 December 2015, the Claimant has submitted his own time cards, which show a total of 765 hours of overtime (*supra* [93(b)]). Whilst these time cards were not referred to in the assessment of the actual overtime hours, they were at least used by the ACL as the basis for reference to the Bored Pile Records for the period. Even so, it appears that the ACL relied on the Employer's own summary of the hours worked as set out in R7.

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[81] ROP at C6.

124 The decision to ignore the hours *in toto* in the time cards may be said to sit ill at ease with the fact that the time cards were the reason why the ACL accepted the Bored Pile Records for August to December 2015. As noted (*supra* [100] – [101]), if the ACL had checked the figures in R7 against the time cards and the Bored Pile Records, it would have been apparent that R7 contained inaccuracies.

125 What is clear is that the ACL did accept that the overtime hours could be more since she agreed with the Claimant that the Bored Pile Records "may not be the best record" for assessing the overtime hours (*supra* [95]). The problem was that she was unable to find assistance in the other documents and records because of (i) reliability; and (ii) relevance.

The correct approach to calculating the Claimant's overtime hours

126 I have found (*supra* [37(c)]) that the Claimant is to be remunerated for overtime work done at the Basic Overtime Rate of S$17.31 per hour.

127 This applies to overtime work done (*ie*, work done beyond the 8th hour) on work days, rest days, and public holidays.

128 To lay down the correct approach in calculating the Claimant's overtime hours, it is useful to break up the Relevant Period into three separate blocks:

(a) February to mid-August 2015;

(b) Mid-August to November 2015; and

(c) November to December 2015.

To be clear, these are merely periods in time that *approximate* the changing patterns of the Claimant's working hours in the Relevant Period.

February to mid-August 2015

129 The Claimant affirmed that he typically worked a 12-hour shift from Mondays to Saturdays during this period up until 13 August 2015. The 12-hour shift could either be a day or a night shift. A day shift starts at 7.30 am and ends at 7.30 pm, while a night shift starts at 7.30 pm and ends at 7.30 am. If required to, however, workers would sometimes work beyond the shift hours, as would the Claimant. At the end of each shift, the supervisor of that shift would hand over the work to the supervisor of the next shift.[82] This is supported by Saimun's testimony at the MOM Proceedings.[83]

130 So, according to the Claimant, the general trend of work across this period for him was this: a 12-hour shift each day from Monday to Saturday (*ie*, either a day shift or a night shift). On this basis, the Claimant would have done about four hours of overtime work each day from Monday to Saturday.

131 In terms of the documentary record, the Claimant is only able to adduce three sets of toolbox meeting forms and three sets of permits to work to substantiate his claims for *this* period. Two sets are dated 26 March 2015 and one set is dated 30 April 2015.[84]

132 Toolbox meeting forms record the toolbox meetings that occur every day before piling works commence for the day. The Claimant will conduct these

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82 Affidavit of Hasan Shofiqul, filed 15 December 2017, [65].

83 ROP, p 233.

84 Affidavit of Hasan Shofiqul, filed 15 December 2017, [41] and [46].

meetings for the workers and would record them down in toolbox meeting forms. These daily meetings were typically conducted around 7.30 am or 7.30 pm, depending on the work schedule for that day.[85] These facts are not disputed.[86]

133 Separately, the Claimant also had to apply for permits to work from the main contractor of the Project on a daily basis before works commenced. These permits to work were necessary before piling and excavation works could commence for that particular day. At the end of the day, the Claimant would then "close" the same permits to work.[87] Again, these facts are not disputed.[88]

134 Unfortunately, the Employer has confirmed that, save for the three sets of toolbox meeting forms and permits to work that were tendered in the MOM Proceedings, it does not keep any other copies of these documents.[89] At the very least, nonetheless, these three copies ought to be considered by the trier of fact in calculating (or estimating) the overtime hours the Claimant had worked on 26 March 2015 and 30 April 2015.

135 For February to August 2015, based on R7 (which is the Employer's own summary and table), the overtime hours for the Claimant amounts to 185 hours. On the other hand, the Claimant's own estimate was much higher: 750 hours.

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85 Affidavit of Hasan Shofiqul, filed 15 December 2017, [40].

86 ROP, pp 63–64.

87 Affidavit of Hasan Shofiqul, filed 15 December 2017, [45].

88 ROP, p 118.

89 Affidavit of Hasan Shofiqul, filed 15 December 2017, [51].

136 There is clearly a very large difference between the ACL's assessment based on the Employer's summary of hours in R7 and the Claimant's assertion.

137 Given the fact that there are clear errors in R7 and the Employer's summary and table of working hours based on the Bored Pile Records, it must follow the overtime hours should be re-calculated by reference to the actual Bored Pile Records (where these are available) for this period.

138 Once this is done, what remains is the question of the appropriate uplift to take account of the fact that the hours as reflected by the Bored Pile Records will not have captured hours of work before or after bored piling work. This, of course, is no easy task. I shall return to this point below.

Mid-August 2015 to November 2015

139 The Claimant gave evidence that he worked "full shifts" during this period.[90] This meant that, instead of working 12-hour day shifts or night shifts, once the Claimant's team started work on the construction of a specific bored pile, his work shift will continue until the completion of work on that particular bored pile. The Claimant gave evidence that he and his team would typically start work at 7.30 am, and that a typical shift would often end late at night.

140 Once again, given the fact that there are clear errors in R7 and the Employer's summary and table of working hours based on the Bored Pile Records, it must follow that the overtime hours should at the very least be re-calculated by reference to the actual Bored Pile Records (where these are available) for this period.

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90 Affidavit of Hasan Shofiqul, filed 15 December 2017, [72].

141 What remains is again the question of an uplift to the hours calculated solely by reference to the Bored Pile Records. There is likely to be a substantial difference between the hours calculated based on the Bored Pile Records and the hours claimed in the unofficial time cards.

142 One approach may be to run through the time cards of the other workers (including Mr Ferdausur), toolbox meeting forms (where available) and to compare these with the time cards of the Claimant. Are the hours claimed generally consistent bearing in mind that the Claimant as the supervisor of his team may well start/finish work before and after workmen in his team? Given that the time cards of the Claimant and Mr Ferdausur are unofficial and un-endorsed, it may also be appropriate to discount the hours set out in the time card in recognition of the possibility of error.

143 The reservations of the ACL in paying regard to the time cards of other workers under the Claimant (including Mr Ferdausur) is understandable. That said, the whole point of the exercise of comparing different workers' time cards and time sheets is not to look for absolute precision, but to look for a broad measure of regularity that paints a picture consistent with the evidence given. In a non-automated system of time recording, it is only to be expected that the timings recorded will not be accurate to the second or even to the minute. Moreover, even in situations where workers work in the same shift, there may be some minor differences in the timings recorded on different workers' time cards as a result of exigencies at work, for example, that may cause one worker to clock-off or clock-in at a time slightly different from another worker's in his shift. The principal duties of the workers are to work and not to keep a detailed and meticulous record of their hours of work.

November to December 2015

144 The Claimant's evidence is that sometime in November 2015, the Employer reverted to the shift system in which teams worked either the day or night shift. He further stated that his team was assigned to work in the night shift in this period.[91]

145 In the MOM Proceedings, the Employer did not dispute that the Claimant worked a 12-hour shift daily during this period. Its contention was that the Claimant's terms of employment did not entitle him to overtime pay even when he worked 12-hour shifts.[92] But, as I have found, the Claimant is indeed entitled to overtime payment.

146 Once again, given the fact that there are clear errors in R7 and the Employer's summary and table of working hours based on the Bored Pile Records, it must follow that the overtime hours should at the very least be re-calculated by reference to the actual Bored Pile Records (where these are available) for this period.

147 Thereafter, it will be necessary to assess the appropriate uplift to the overtime hours as calculated solely by reference to the Bored Pile Records. As above, the Claimant's time cards can be compared to those stated on other workers' time cards (where these are available). Here again, Ferdausur's time cards are relevant and helpful, as Ferdausur was working under the Claimant's supervision most of the time during this period.

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91 Affidavit of Hasan Shofiqul, filed 15 December 2017, [75].

92 ROP, pp 96–97.

Whether the Employer had given the requisite one month's notice to the Claimant before terminating his employment

148 It is not disputed that the contractual notice period was one month. The Claimant claims that the Employer informed him on 29 January 2016 that his last day of work was 31 January 2016. But the Employer adduced a copy of the Claimant's termination letter dated 31 December 2015.[93]

149 The Employer also called on its engineer, one Yao Hong Tao, affirming that he had, on behalf of the Employer, handed the termination letter to the Claimant on the evening of 31 December 2015. In fact, timely notification of the termination of employment may well be why the Claimant began looking for a new employer in January 2016.[94] The Claimant says, however, that he only began looking for a new employer in January 2016 because he was told by the Employer that there was not much work left to be completed under the Project,[95] and that this did not necessarily mean that the Employer gave the requisite notice of termination of his employment. That may well be so. Nevertheless, the fact remains that there is evidence he was given a timely notice of termination. In light of this, I agree with the ACL's decision to dismiss the Claimant's claim for one month's salary in lieu of notice.

Conclusion

150 *Employment Law in Singapore* (Benjamin Yim, ed) (Academy Publishing, 2016) comments at para [1.3] that "the Employment Act has evolved to serve a dual role – to safeguard employment rights, with particular protection for more vulnerable workers; and to regulate employment relations

93 ROP, p 533.

94 ROP, pp 367–368.

95 Affidavit of Hasan Shofiqul, filed 15 December 2017, [81].

by ascertaining the rights and obligations of employers and employees, and providing mechanisms for effective employment dispute resolution." The present case largely concerns an employee's right in respect of remuneration for overtime work and work performed on rest days and public holidays. Leaving aside civil proceedings, in some cases, breaches by the employer are also covered by criminal offences such as section 53 which deals with failure to pay salary in accordance with Part IV.

151 The effective operation of the Act, including Part IV and Part X, depends on a proper system of records that tracks an employee's or workman's hours of work in the first place. *Employment Law in Singapore* comments at para [1.16] that the 2015 amendments to the Employment Act were primarily concerned with new requirements on employers to maintain proper employment records and to provide key employment terms and payslips to their employees. To be clear, this case does not concern the criminal provisions in the Employment Act or the statutory provisions on record keeping. The point that is made is a general one: without proper records of hours of work and work performed on rest days and public holidays, it is not surprising if disputes arise.

152 In the present case, Mr Chan submitted that in rejecting the documentary records the Claimant kept in support of his claims, the ACL had effectively allowed the Employer to rely on its own unfair practices.

153 The evidence as to the system in place for recording hours of work for supervisors was confusing. On the one hand, it appears that no time cards were required for supervisors like the Claimant and Mr Ferdausur. Indeed, not only were these not required but when the Claimant tried to submit time cards these were rejected as being unnecessary.[96] It was only sometime in August 2015

when, according to the Claimant, there was an increase in hours of work that he decided to keep his own unofficial time cards (September to December 2015) once again. These were rejected by the ACL as they were not countersigned by the Project Manager. The difficulty the Claimant was in was that when he tried to submit the time cards in the earlier period to the Employer, they were not accepted. But, on the other hand, the Employer testified that it would have paid overtime if the Claimant presented his time card for verification. It also took the position that the only reason why it did not pay the Claimant's overtime was because the Claimant did not submit his time cards for verification. If this was so, then one would have, at the very least, expected that the Employer would require an employee in the Claimant's shoes to keep time cards to support his overtime claims. One would also have expected that the Employer would have in place some form of record-keeping to track workers' hours of work.

154 It is, therefore, surprising that the transcript of the proceedings before the ACL makes clear that this was not so:[97]

> Q: Was there a need for [the Claimant] to keep his time cards?
>
> A: *There was no need for time card for Site Supervisor, including [the Claimant].* None of the Supervisors kept time cards. The company did not track the attendance because their work is flexible. They are paid on a monthly basis. There is not much need to perform overtime unlike the workers.
>
> Q: Since there was a need for [the Claimant] to supervise workers to do overtime, then surely [the Claimant] as a Supervisor would have to perform overtime?
>
> A: Yes, only at times. *I pay salary and overtime if he present his time card. If there is overtime, then he would be paid overtime. … He just have to get the time cards verified,*

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96 Affidavit of Hasan Shofiqul, filed 15 December 2017, [23].

97 ROP, pp 65–67, 75, 76, 123 and 125.

and get the Project Manager to sign and we would have paid him accordingly.

…

Q: So what type of records do you … have to show [the Claimant's] attendance at work?

A: Last time, we have a time machine to keep track but it was down since last year August 2015.

Q: So would you be able to show his attendance from 6 February 2015 to August 2015?

A: I have to check. The record may not be accurate as the workers usually are not diligent in keeping track of it. I relied more on the workers' time card more than the record provided by the time machine in paying overtime.

…

Q: Do you have anything more to add with regards to the claim for overtime?

A: I am unable to retrieve the time print records for all the workers especially [the Claimant's] record. I can't find the full set of record because it was not updated by my staff diligently. …

…

Q: Did you authorise [the Claimant] to perform overtime during his period of employment?

A: I cannot recall, but we can check the time card. I let him fill in the time card. If there is any overtime work, there should be record for it.

Q: So far, the company had shown me record for work done on rest day and public holiday but no overtime record. Why is it so?

A: No time card filled, no overtime work done.

Q: Have you signed the time cards for overtime for other Supervisors?

A: I cannot recall. All the Supervisors entered the time cards themselves.

…

Q: So did [the Claimant] get your consent to do overtime for himself?

> A: I can't recall. I had to rely on the time cards for his overtime.
>
> [emphasis added]

155 If there is indeed no need for the Claimant to keep his time card, and the Employer's position is that it pays overtime only upon the presentation of a time card, then how is the Claimant supposed to claim for his overtime payment? Moreover, the Employer's evidence appears to suggest that supervisors like the Claimant do not perform much overtime work. Yet the Employer's own summary and table (R7) of overtime hours based on the Bored Pile Records recognises overtime hours for every month in the relevant period (except December 2015). If supervisors were not required to submit time cards, it may be thought that, perhaps, that there is another system of tracking attendance. Yet, the "time machine" was down since August 2015. In any case, the "time machine" does not seem like a very reliable attendance tracker because in the Employer's own testimony, it "relied more on the workers' time card more than the record provided by the time machine in paying overtime".

156 To be clear, the ACL's discomfort with relying solely on the Claimant's unendorsed time cards is understandable. As these are records that the Claimant kept on his own without corroboration, there is a risk that they may not be entirely accurate. An employer's endorsement would have served as corroboration. But the Employer apparently told the Claimant there was no need to endorse. What is clear is that the system for recording the hours of work of supervisors like the Claimant was unclear and, in any case, not well implemented.

157 The present case underscores the importance of Employers keeping and maintaining proper records of hours of work on work days, rest days and public

holidays. Indeed, it is perhaps especially important that there are proper records of hours of work performed on any given day over and above the normal working hours.

158 I now summarise the findings of the Court and the directions that it makes in this appeal.

159 First, save for the matter of payment of salary in lieu of one month's notice, the Claimant succeeds in the appeal.

160 Second, I am of the view that it is appropriate to remit the matter back to the ACL for re-consideration in light of the findings I have made. The ACL has heard the witnesses and will be in the best position to examine the actual Bored Pile Records for the relevant period and to come to a considered decision as to the hours of work as revealed by the actual Bored Pile Records. Whether the parties are able to come to an agreement as to what the correct hours are by reference to the actual Bored Pile Records for the whole of the relevant period is for the parties and I make no further comment on this. In addition, the ACL is also in the best position to determine the appropriate uplift to those hours based on the evidence as a whole.

161 In coming to the decision to remit the matter to the ACL, I note that this is also desirable as the copies of the records and other documents before me in the Record of Proceedings and Affidavits are often hard to read because of the quality of the reproduction. I accordingly order that this case be remitted and the evidence re-considered by, as far as practicable, the ACL herself.

162 For convenience, I summarise my main findings against which the ACL is to reconsider the claim.

(a) The Claimant is not employed in an executive or managerial position.

(b) The Claimant is entitled to the protection and benefits of Part IV of the Employment Act. In particular, the Claimant is entitled to:

(i) The benefit of section 37 which deals with the employee's right of remuneration for work done on a rest day. Section 37 is to be applied bearing in mind the distinction where an employee requests to work on a rest day and where an employee was asked to work on a rest day.

(ii) The benefit of section 38 which deals with hours of work and in particular section 38(4) and payment for extra work (ordinarily over eight hours a day or 44 hours a week) at the rate of not less than one and a half times his hourly basic rate of pay.

(iii) The benefit of section 88(4) which states that where an employee is required to work on a public holiday he shall be paid an extra day's salary at the basic rate of pay for one day's work in addition to the gross rate of pay for that day etc.

(iv) The Claimant's basic rate of pay for one day is the same as his gross rate of pay for one day – S$92.31. The Claimant shall therefore be paid S$184.62 per day for work done on a public holiday.

(v) The Basic Overtime Rate the Claimant is entitled to is S$17.31 per hour of work.

(c) The Claimant is entitled to overtime pay from February to December 2015. In assessing the overtime hours, the ACL must consider

the Bored Piling Records for the entire period. To be clear, the Employer's summary and Table based on the Employer's assessment of the Bored Piling Records (R7) must be verified so far as possible against the actual Bored Piling Records (where available).

(d) After assessing the overtime hours based on the actual Bored Piling Records, the ACL is to consider what uplift to the number of overtime hours is supported by the evidence as a whole including the Claimant's own time cards, the time cards of other workers/employees (where available) and the toolbox records. The appropriate uplift is a matter of judgment which is perhaps best approached on the basis of the goal of being "roughly right." For example, if the tenor of the evidence is consistent with the Supervisor needing to spend an hour or so at work, such as preparing/conducting tool box meetings for his workers obtaining permits and that this is outside of what is captured by the Bored Pile Records, this might form the basis for an uplift. Alternatively, if the evidence indicates that approximately 20% of the Claimant's work involved matters not directly captured by the Bored Pile Records then it might be appropriate to award an uplift on that basis. In other words, that on a balance of probabilities the case has been made out for a 20% uplift to the Bored Pile Record hours in the assessment of overtime hours. These are, of course, just examples to illustrate the approach that might be taken to the evidence as a whole.

(e) Thereafter, the Claimant's entitlement to overtime pay is to be assessed in accordance with the rates set out above. The Claimant is also entitled to be paid for work done (within normal hours) on rest days and public holidays in accordance with section 37(3) and section 88(4).

163 Costs are awarded in favour of the Claimant to be agreed, and if not agreed, taxed. Whilst the Claimant lost on the issue in respect of one month pay in lieu of notice, I am of the view that it is appropriate to award the Claimant his costs without discount.

164 I thank learned counsel for both parties for their efforts and, in particular, learned counsel for the Claimant for his detailed submissions.

George Wei
Judge

Chan Kah Keen Melvin and Tan Tho Eng (TSMP Law Corporation) for the applicant;
Tng Kim Choon (KC Tng Law Practice) for the respondent.
