



## Employment Relations Tribunal

# Decision

<b>Title of Matter:</b>	<b>Labour Officer v Steps Investments (Fiji) Ltd Trading as Steps Night Club Nadi</b>
<b>Section:</b>	<b>Sections 45, 59, and 247 of the <i>Employment Relations Act 2007</i></b>
<b>Subject:</b>	<b>Failing to produce time and wages records; Failing to pay annual leave; statutory minimum requirements, payment on demand etc.</b>
<b>Matter Number:</b>	<b>ERT Criminal Case No 30 of 2013 ERT Criminal Case No 31 of 2013</b>
<b>Appearances:</b>	<b>Ms V Doge and Ms A Raitivi, Labour Office Mr J Prakashan, for the Defendant</b>
<b>Date of Hearing:</b>	<b>Tuesday 13 February 2018 Tuesday 26 June 2018</b>
<b>Before:</b>	<b>Mr Andrew J See, Resident Magistrate</b>
<b>Date of Decision:</b>	<b>21 October 2019</b>

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**KEYWORDS:** Demand for Payment of Wages; Annual Leave; Time and Wages Records.

### Background

[1] An interlocutory decision was issued in this matter on 6 June 2018, when two complaints each dealing with ten separate counts for breaches of the then *Employment Relations Promulgation 2007* were brought before this Tribunal. With the passing of time, with the death of one claimant and the withdrawal of the complaint by another, following a no case to answer application the following decision was made:

The Tribunal will strike out the counts of failing to comply with a written demand made by a Labour Inspector contrary to Section 247(b) (ii) of the *Employment Relations Promulgation 2007*, as they relate to Messrs Luvelolo, Ratu, Qarau, Kanailagi, Toga, Ravi and Kacilala. In the case of the latter two former employees, this is done on the basis that there does not appear to have been any efforts by the Labour Office to prosecute these matters. The following counts remain before this Tribunal for determination:-

- (i) Failing to produce on demand wages and times records contrary to section 45(4) of the *Employment Relations Promulgation 2007*; (2 counts);
- (ii) Failing to pay a worker annual leave pay as required under section 59 being contrary to section 70(3) of the *Employment Relations Promulgation 2007*; (5 counts)

- (iii) Failing to pay a worker the statutory minimum remuneration as per section 55(1) being contrary to section 55(2) of the Employment Relations Promulgation 2007.(2 counts)

[2] The case of the Prosecutor and that of the Defendant employer are quite simple. The Employer is the operator of a night club that at one point was located in Nadi town, before he decided to close that operation and open a new club at Martintar, Nadi. As part of the process, the Employer made redundant many of its former staff, the majority of whom it would appear to have made claim for underpayment of wages.

[3] When the Labour Office commenced its investigation into the time and wages records of the Defendant and served a statutory demand for those records, there was no compliance. In fact, the Employer now claims that the records were stolen from his office and a report to that effect provided to the Nadi police. All of the Workers who have given evidence in proceedings were adamant that they were underpaid during their engagement primarily as security staff, with claims being made that they would work approximately 66 hours per week. That is for 6 days a week, working 11 hours per day. It is worthwhile noting here, that the Employer claimed that the night club in question, that is now since long closed, was only licensed to operate until 1.00am.

### **The Case of the Labour Officer**

#### Kolinio Luvelovo

[4] The first witness to give evidence was Mr Kolinio Luvelovo who said he was employed at the former Steps Night Club Nadi, as a 'bouncer' in 2009 and was terminated by the Employer in 2013, when the business closed down. The Witness told the Tribunal that he worked 5 days a week, from 7.00pm to 5.00am. In the complaint that he had lodged with the Ministry, the former employee indicated that he had not been paid for sick leave and did not receive pay slips. The Tribunal noted that there was a difference in the statement provided by the worker to the Labour Office, where he claimed to be working six days a week and the oral evidence provided at hearing, in which he had claimed to be working five days a week. The Worker claimed that prior to 2010, he had been working only up until 1.00am in the morning, however claimed that after that time, he had been working after 1.00 am.

#### Samisoni Mataitoga

[5] Samisoni Mataitoga was the Labour officer involved in the investigation of the complaints that gave rise to these proceedings. The Witness identified the complaints that he had received from staff at the night club (Exhibit E1) and thereafter served a demand notice on the Employer, seeking for the production of time and wages records (Exhibit E2)<sup>1</sup>. Mr Mataitoga stated that following from that he calculated the outstanding wages claims for the relevant employees and served it on the employer. The Witness stated that the time and wages records of the Employer had not been provided and nor was there any record of them being stolen, coinciding with that request. In cross examination, Mr Mataitoga indicated that he was unaware as to whether the club had a closing time at 1.00am and said that he was relying on the statements provided by the former employees, to form the basis of the wages claim. In response to questioning from the

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<sup>1</sup> The Tribunal notes that the demand notice bears the notation, that the company representative did not wish to sign as having received this document.

Tribunal, the Witness admitted to not having undertaken an inspection of the workplace the subject of this complaint.

#### Atakisekiseki Ratu

[6] Mr Ratu commenced work as a bouncer with the Employer sometime around 2005-2006. According to the Witness, he would normally work six days a week and when he commenced employment in 2005, was working from 6.00pm to 1.00am. According to Mr Ratu, the hours of work altered sometime between 2009 and 2010, when he would work from 7.00pm to 6.00am. The Witness was shown the complaint he had made to the Labour Office on 26 April 2013 and thereafter admitted to working five days a week, with two days off. The Worker admitted in cross examination that he would not ordinarily work the 66 hours a week that formed the basis of the wage demand that was made to the Employer by the Labour Office and then appeared to resile from his earlier evidence where the hours of work were shortened after 2010. In fact, he responded to the question as to what hours he would work during the years 2009 to 2013, as being from 7.00pm to 5.00am. The Worker denied receiving annual leave and bonus pay in pay envelopes provided to him by the Employer, though conceded that during the one year when the venue would close at 5.00am that he had received bonus pay.

#### Sainivalati Qarau

[7] Mr Qarau commenced working at the Steps Night Club in 2003. He ceased his employment in 2012. According to the former employee, his working hours at the venue during 2003 to 2009, were from 7.00pm to 1.00am or 2.00am. The Witness stated that in 2009 to 2010, that he worked from 7.00pm to 5.00am and that from 2011, that the venue closed again from 1.00am. Mr Qarau claimed to be working five days a week only, despite that his initial complaint form records that he had been working 11 hours a day for six days a week. During cross examination, the Witness was adamant that during 2009 to 2010, that the club remained open until 5.00am. According to the Witness he was paid \$198.00 to \$200.00 per week and was provided his wages in a brown envelope on each occasion.

#### Tomasi Kanailagi

[8] Mr Kanailagi was employed at the night club in January 2009 until 2013 and stated that the hours of work, were from 7.00pm to 5.00am. The Witness claimed that he would work 5 days per week, although sometimes was required to work 7 days. Mr Kanailagi identified the statement that he provided to the Labour Office as evidence of his complaint of underpayment of entitlements in relation to public holidays, annual leave, sick leave, over time and meal claims. In cross examination, the Worker admitted that from 2010, his hours of work were cut down and that he was in receipt of approximately \$150.00 for weekly wages.

#### Ponipate Toga

[9] Mr Toga was employed at the night club from 2003 to 2013. In his evidence he stated that he would work for either four or five days per week. The Worker's evidence was that in 2009 to 2010, that the night club had been operating up and until 5.00am and that the week prior to Christmas of that year, the closing time had reverted to 1.00am. During cross examination, the Witness was referred to his earlier statement that was provided to the Labour Office in which he had claimed that he had been working for six days a week, and in response, stated, that this would depend on the roster. The Worker admitted to having received 'grog money' from his employer, in order that staff could drink yaqona at the end of a working shift. The Witness also conceded that he was placed on a 'black list' by his former employer, as a result of work

performance issues. In response to the proposition, that it was for this reason that the Witness along with other former employees, had “conspired against Steps”, he responded “yes”<sup>2</sup>.

[10] The Witness indicated in response to a question from the Tribunal, that the closing hours of the club were as follows: 2003-2008 at 1.00am; 2009-2010 at 5.00am; and up until his termination in 2013 to 1.00am. Mr Toga stated that the club operated during 2009-2010 with the late closure, until a complaint had been lodged, after which time the hours reverted to 1.00am.

## **Case of the Employer**

### Evidence of Choon Sik Jeong

[11] The Employer’s witness in proceedings was Mr Chook Sik Jeong, the Director of Steps Investments Ltd. According to the Witness, at the relevant time the club was open for the hours of between 8.00pm or 9.00pm, to 1.00 am. According to Chook Sik Jeong, the night club was closed prior to 1.00am when the police would arrive to ensure that the venue complied with the licensing laws. The Witness identified an undated Press Release (Exhibit E1) that referred to the business and liquor hours that had been approved by Cabinet at its meeting on Friday 18 December 2009, in which it set out the restriction on clubs operating hours, where they were located out of the special zones. As evidence as to what was the status quo at the time, the Witness also identified correspondence that was written to the Prime Minister on 26 May 2011, asking for a relaxation of arrangements for his business in Nadi town.

[12] Choon Sik Jeong explained to the Tribunal that he could not satisfy the statutory request for time and wages records, on the basis that the records had been stolen from his premises and to corroborate that fact, identified a police complaint acknowledgement report, provided to him on 5 July 2013<sup>3</sup>. The Company Director stated that he didn’t provide any time and wages records to the Labour Office at the time, because he was really sick, had brain damage and memory loss. Choon Sik Jeong claimed that workers normally worked “sometimes 5 hours, sometimes 4 hours” a day.

[13] The night club owner explained that in 2013 he opened a new venue at Martintar, Nadi and the majority of his former employees, were not brought across with the move. The Director stated that staff were asked to sign for their wages and annual leave, however “staff ran away with paper.” Choon Sik Jeong stated that he had given his 2006 wages records to the Labour Office, but claimed that all years beyond that were gone. When cross examined as to when the Witness suffered from “brain damage”, he claimed from 2010, although stated that he didn’t have any medical report to support that claim. In relation to the letter claimed to have been written to the Prime Minister on 26 May 2011, the Witness stated that he did give it to a Major Nakila, but understood that he did not give it to the Prime Minister at that time. In relation to the demand notice issued to the Defendant Employer on 16 May 2013, the Witness stated on the first occasion that he could not remember seeing the demand notice and then later stated that he was aware of the demand notice and gave it to his lawyer. According to Chook Sik Jeong, some

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<sup>2</sup> The Tribunal is satisfied that the Witness did not understand the meaning of the question that was being put to him in this regard.

<sup>3</sup> It should be noted that the statutory demand was made on 16 May 2013 and the 14 day compliance window for submitting to that request, would have been expired 5 weeks prior to any complaint of records being made.

time and wages information were provided to the Labour Officer in June 2017 (See Exhibit E5), that it was said that these were produced in 2013. The Witness stated that there was only one original book of time records held by the Employer (Exhibit E6) from the Year 2006, that was produced to the Tribunal and identified by the Witness as part of his evidence in proceedings.

### **The Analysis and Evidence**

[14]As said at the outset, following the Interlocutory Decision issued by the Tribunal on 6 June 2019, the following complaints remained:-

- (i) Failing to produce on demand wages and times records contrary to section 45(4) of the Employment Relations Promulgation 2007; (2 counts);
- (ii) Failing to pay a worker annual leave pay as required under section 59 being contrary to section 70(3) of the Employment Relations Promulgation 2007; (5 counts)
- (iii) Failing to pay a worker the statutory minimum remuneration as per section 55(1) being contrary to section 55(2) of the Employment Relations Promulgation 2007.(2 counts)

#### Failing to produce on demand wages and times records contrary to section 45(4) of the Employment Relations Promulgation 2007

[15] The prosecutor has made out the case against the defendant Employer. It is clear that the two demand notices were served on the Employer, that its representative refused to sign for the documents upon service and that the Director of the company was aware of them. The evidence of Choon Sik Jeong was that he handed the demand notices to his lawyer, however that does not somehow absolve him or the company from their obligation to submit to that request. The defence that the time and wages records were stolen, is not accepted by the Tribunal and the fact that the claim that the matter was reported to the police some five weeks after that demand notice was served, supports that view. The Tribunal finds the Defendant guilty of the offences and will impose a fine and conviction in each instance, in the amount of \$1,750.00.

#### Failing to pay a worker annual leave pay as required under Section 59 being contrary to section 70(3) of the Employment Relations Promulgation 2007

[16]In relation to the failure to pay the statutory entitlements of annual leave, this complaint is incorrectly framed. The offence at Section 70(3) of the Act deals with the failure to maintain paid holiday records. Whilst it is accepted that no such records were provided to the Labour Office, neither the prosecutor's case nor the defence of the Employer were focused on the specific complaint. The case has not been made out, however that is not the end of the matter. The Employer did not pay annual leave entitlements to the former employees and the method for calculation entitlements provided by the Labour Office is flawed. The wages calculations of the employees are all based on 6 days a week for 11 hours a day. The evidence of the Workers does not accord with this calculation. At best, on average, workers were employed for five days a week and it would seem, that other than in the period 2009 to 2010 when it seems that the club lawfully or otherwise continued operating until 5.00am, they were working approximately seven hours a day. If Workers remains at work to drink grog supplied by the Employer, one can hardly

expect that they should be paid for this time as well. Annual leave for two of the three years needs to be pro-rated at 35/40 to adjust for the likely hours worked. That is, based on a 35 hour week, rather than 40 hour week. The result will be that annual leave for those two years will be calculated at \$238 per year. A three year claim for annual leave will yield a payment of \$748.00. In the case of Mr Kanailagi his calculation based on the higher hourly rate of \$3.50, shall create an entitlement of \$770.00.

Failing to pay a worker the statutory minimum remuneration as per section 55(1) being contrary to Section 55(2) of the Employment Relations Promulgation 2007

[17]The Labour Office has failed to provide submissions as to how and why the offence under Section 55 of the then Promulgation has been established. The closing submissions do not deal with the issues of law and what is required to establish the offence in such cases. This complaint will also fail. That being said, the overtime calculations for the workers in the period 2009 to 2010, will be recognised as being outstanding, and reliant on the calculations provided by the Labour Office will be accepted. With one exception, an amount of 1/6 will be offset against the calculated overtime amounts, on the basis that the calculations have been incorrectly based on six days per week, rather than five. In the case of Messrs Luvelolo, Ratu, Toga and Qarau, the calculated overtime amount for the 2009 -2010 year period will be \$271.10. In the case of Mr Kanailagi, that amount equates to \$418.60.

### **Conclusions**

[18]Due to the disparity between the statements taken by the Labour Office and the oral evidence adduced by its witnesses during proceedings, the majority of the case against the Defendant has failed. What seems clear is that Workers who make complaints to the Labour Office must have their evidence screened and verified. A bold assertion without more, will often fail at the first evidentiary hurdle for obvious reasons. Further, whilst this industry has seen many improvements over the last few years, issues such as when does work commence and finish, need to be well established. The maintenance of proper time and wages records for employees, is a fundamental requirement of a Fijian employer, as is the requirement to ensure that on each occasion when a worker is paid, that she or he is provided with either a written or electronic wages statement. This is an area where much greater employer awareness, would reduce the need for cases such as these.

[19]An Order will be issued coinciding with this decision. Given the length of time and costs associated with the prosecution of this matter, some award should be made in favour of the prosecutor, despite the fact that it has only been partially successful in pursuing its complaints. An amount of \$1,000.00 has been summarily assessed for that purpose.

### **Decision**

It is the decision of this Tribunal:-

- (i) In relation to the two counts of failing to produce on demand wages and times records contrary to Section 45(4) of the Employment Relations Promulgation 2007, the Defendant is found guilty and is to be fined \$1750.00 on each count.
- (ii) In relation to the five counts of failing to pay a worker annual leave pay as required under Section 59 being contrary to Section 70(3) of the Employment Relations Promulgation 2007, the complaint is dismissed.

- (iii) In relation to the two counts of failing to pay a worker the statutory minimum remuneration as per Section 55(1) being contrary to section 55(2) of the Employment Relations Promulgation 2007, the complaint is dismissed.
- (iv) The Defendant Employer pay the Labour Officer on behalf of Ponipate Toga, the sum of \$1,019.10 within 28 days.
- (v) The Defendant Employer pay the Labour Officer on behalf of Atakisekiseki Ratu, the sum of \$1,019.10 within 28 days.
- (vi) The Defendant Employer pay the Labour Officer on behalf of Kolinio Luvelolo, the sum of \$1,019.10 within 28 days.
- (vii) The Defendant Employer pay the Labour Officer on behalf of Sanivalati Qarau, the sum of \$1,019.10 within 28 days.
- (viii) The Defendant Employer pay the Labour Officer on behalf of Tomasi Kanailagi, the sum of \$1,188.60 within 28 days.
- (ix) The Defendant Employer pay the Labour Officer costs in the amount of \$1,000.00, within 28 days.



**Andrew J See**  
**Resident Magistrate**