IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 15812

BETWEEN: PILIKI SAMOA LIMITED a duly incorporated company having its registered office at Vaitele

PLAINTIFF

A N D: MOHAMMED SAHIB known as BABU of Sinamoga, Workman

DEFENDANT

Counsel: Mr L.S. Kamu for Plaintiff
Mrs R. Drake for Defendant

Date of Hearing: 6.12.1993

Date of Judgment: 8.12.1993

JUDGMENT OF SAPOLU, CJ

Evidence:

In this case the plaintiff company claims from the defendant, a Fijian Indian, the sum of $1,022 being the unpaid balance of a sum of money the defendant is alleged to have borrowed from the plaintiff. The defendant counterclaims for annual leave pay, overtime pay and nightwatchman pay alleged to be due to him under the contract of service he had with the plaintiff company.

It appears from the evidence that the defendant was first employed in September 1990 by the plaintiff which carries on business as manufacturer of pellets or concrete blocks. In the initial period of his employment, the defendant was employed in the office of the plaintiff. He was then made the supervisor of the plaintiff's factory at Vaitele, which was the position held

by the defendant until he resigned from the plaintiff's employment on 24 September 1991 after he returned from his trip to Fiji in the same month.

It also appears to me from the evidence that for the initial period of his employment, the defendant was paid wages of $80 a week and then from November 1990 until August 1991 he was paid wages of $100 a week. And from August 1991 to September 1991 when the defendant resigned from the plaintiff's employment, he was paid $150 a week.

The Court in this case is not concerned with the initial period of the defendant's employment when he was paid wages of $80 a week. The relevant period is from November 1990 when the defendant was paid $100 a week for wages until September 1991 when the defendant resigned. According to the plaintiff's manager the defendant was employed on the condition that he was paid a fixed wages of $100 a week irrespective of the hours that he worked a week. That to me means if the defendant worked more than 40 hours a week or less than 40 hours a week, he would still be paid his fixed wages of $100 a week. In August 1991 the defendant's fixed weekly wages was increased to $150. So it appears from the plaintiff manager's evidence that the defendant was not to be paid any overtime pay when he worked for more than 40 hours a week or if he worked for more than 8 hours a day. Perhaps the idea was that any overtime worked by the defendant will be even out by those days or weeks when the defendant works for less than 8 hours a day or less than 40 hours a week.

The defendant disputes the evidence of the plaintiff's manager and says that he was employed by the plaintiff on the terms and conditions that he was to work from 8.00am in the morning to 4.30pm in the afternoon only from Mondays to Fridays on his fixed wages. The manner in which the defendant carried out his employment seems to me to be more consistent with the evidence of the plaintiff's manager on this point than the evidence of the defendant about the terms and conditions of his employment. I accept the evidence of the plaintiff's

manager on this point.

Now the nature of the work in the plaintiff's factory was that the workers started work at 7.00am in the morning until they have completed manufacturing the quota of concrete blocks allotted to be manufactured for each day and then they knocked off work. This was from Monday to Friday each week. According to the plaintiff's manager the work was usually completed at 1.00pm in the afternoon and then the workers went home. The defendant says that the work was usually completed at about 2.00pm and the workers went home. He also says that the workers had half an hour break for lunch at 12.00 o'clock. It appears clear to me that there was no fixed knock-off time for the workers at the factory. It depends on when the quota of concrete blocks allotted for each day is completed. On some days the quota was completed at 1.00pm and on other days the quota was completed at 2.00pm. No doubt there must have been days when the quota was completed somewhere in between 1.00pm and 2.00pm. There were no records produced to this Court to show the times when the workers at the factory knocked off work during the period of time relevant to this case. What is, however, clear is that when the workers work from 7.00am in the morning to 1.00pm in the afternoon then that is $5\frac{1}{2}$ hours of work having subtracted $\frac{1}{2}$ an hour for the lunch break. If the workers work up to 2.00pm in the afternoon then that is $6\frac{1}{2}$ hours of work having subtracted $\frac{1}{2}$ an hour for the lunch break. This working arrangement seems more consistent with the plaintiff manager's evidence regarding the defendant's terms of employment.

At the hearing, the court asked the defendant whether the kind of work in this case is not really piece work so that his contract of service with the plaintiff was one for piece work. And that as a consequence the hours he worked for the plaintiff after the other workers had gonve hime was under a separate contract. The defendant says that he was employed under one contract of service and not two separate contracts of service. The defendant also did not seem to think that his contract of service was for piece work and neither

counsel for the defendant nor counsel for the plaintiff at any time suggested that the contract of service in this case was a contract for piece work. So the Court will proceed on the basis that this was no contract of service for piece work.

Now what happened in this case, was that after the other workers had knocked off work, the defendant continued to work on. For some days, the defendant says he worked up to 3.00pm, on other days he worked up to 4.00pm, and on those days where there were sales from the factory he worked up to 5.00pm. Here again there are no records produced to show which days that the defendant worked up to 3.00pm, which days he worked up to 4.00pm and which days did he work up to 5.00pm. The defendant wages was also higher than that of any other worker in the factory.

The evidence by the defendant also shows that sometime in October 1990 he was asked by the plaintiff's manager to work on Saturdays driving the loader for piling up the sand at Solosolo for use at the factory to manufacture concrete blocks. The reason for that was because the official driver of the loader is a member of the Seventh Day Adventist Church and therefore cannot work on Saturdays as that is his Sabbath day. The plaintiff's manager admits in evidence that the defendant worked on most Saturdays with the loader. Addording to the defendant, from the time in November 1990 he started working with the loader on Saturday, he worked every Saturday from that time until September 1991 when he resigned except for the month of July 1991 when the plaintiff's manager went overseas and his brother who was driving the truck to cart the sand from Solosolo to the factory at Vaitele did not come to work on Saturdays. The evidence in this connection does not mention which Saturday in November 1990 did the defendant started to work on Saturdays, and which Saturday in September 1991 did he stop working on Saturdays.

The defendant also says that for the Saturday work, he started work at 5.00am in the monring when he drives the loader from the factory at Vaitele. When he arrived at Solosolo he worked up to 3.30pm in the afternoon and he did not get back to Vaitele until 4.00pm. He would then wash and clean the loader of any oil or seawater.

This brings me to the evidence on the question of whether the defendant was employed as a nightwatchman by the plaintiff at its factory. According to the plaintiff's manager, the defendant has a local wife and was staying with his wife's family. The defendant had differences with his wife's family and was ordered out of the house of his wife's family. Being a Fijian Indian and a foreigner in this country, that created accomodation problems for the defendant. The plaintiff's manager says that after trying to provide accomodation for the defendant with a next door neighbour to the plaintiff's factory, the defendant was subsequently allowed to live in on the factory premises free of rent. He asked the defendant to keep watch of the factory premises and a free vehicle was also provided for the defendant's personal use. The plaintiff's manager denies that the defendant was employed as a nightwatchman. It also appears he lived on the factory premises and visited his wife and son only on Sundays and when he left for Fiji in September 1991 he was still living on the factory premises.

The defendant on the other hand says that he was asked by the plaintiff's manager to act as nightwatchman in December 1990 when the then nightwatchman left for Savaii for the Christmas Holiday. That nightwatchman never returned to work so he continued as nightwatchman for the plaintiff's factory until he resigned. He also says that he had problems with his wife's family but his evidence is unclear as to whether that was the reason for staying at the factory premises. He also says that he had a plaintiff vehicle for his use.

There is also the evidence of Perive Isaleli who lives on another factory premises next door to the plaintiff's premises where the defendant stayed. He says that for the period of time that the defendant was living on the plaintiff's premises, the defendant used to come about every night and ate at his house. He knew that the defendant was living on the plaintiff's premises but he did not know whether the defendant was the nightwatchman for the plaintiff. He also says that the defendant was using a vehicle and that on Saturday mornings' the defendant often drives out his plough between 5.00am and 6.00am and does not come back until about 4.00pm. The defendant was seen washing the plough when he returned on Saturday afternoons.

Now there is no dispute that the defendant is a very hard working man. So hard working is he that the plaintiff's manager asked him if he could find another Fijian Indian like him to work for the plaintiff. The defendant mentioned his brother in Fiji. What transpired in the discussions between the plaintiff's manager and the defendant as to the hiring of the defendant's brother as a worker for the plaintiff is now the subject of dispute. The plaintiff's manager says that the defendant asked him for money for his brother to come over to Western Samoa but he refused because he did not know the credentials of the defendant's brother and he also did not know whether the defendant's brother was a qualified mechanic. The effect of the evidence by the plaintiff's manager is that he told the defendant that he was willing to reimburse the defendant's brother airfare from Fiji when he (the plaintiff's manager) was satisfied that the defendant's brother was a qualified mechanic and that was the condition on which the plaintiff agreed to employ the defendant's brother. The plaintiff's manager then applied for a work permit for the defendant's brother but that application was declined by the immigration authorities after the defendant's brother had arrived in Western Samoa in June 1991 and started working for the plaintiff. According to the plaintiff's manager, he found out when the defendant's brother started working for the

plaintiff that he was not a qualified mechanic and his work as a mechanic and welder was unsatisfactory. So there was no need for the plaintiff to reimburse the airfare for the defendant's brother who eventually left the country.

The plaintiff's manager then says that in June 1991 the defendant asked to borrow from him some money for her mother's airfare to Canada. He gave the defendant a bank draft for F$1,230.00 which at the time was equivalent to $2,002. The defendant has paid back $980 tala of that loan leaving a balance of $1,022 tala. That is the amount the plaintiff is now claiming from the defendant.

According to the defendant, when the plaintiff's manager asked him if he could bring another Fijian Indian as hard working as himself from Fiji, he told the plaintiff's manager of his brother who knew work as a mechanic and as a welder. He did not say to the plaintiff's manager that his brother was a qualified mechanic. The defendant also says that the plaintiff's manager agreed that as soon as his brother arrived in Western Samoa he would reimburse his airfare. The defendant also says that he asked the plaintiff's manager for a loan of F$1,230 to pay for his brother's airfare and for his mother's support. He spent F$1,147 on his brother's airfare and the rest of the money was given to his mother. The airfare from Fiji to Western Samoa was then about F$1,500. Now there is also evidence from the defendant that he was not been paid any annual leave. The plaintiff does not dispute that and in fact concedes that annual leave of $300 is due from the plaintiff to the defendant.

That is essentially the general picture of the evidence in this case. I will deal now with the plaintiff's claim and then with the defendant's counterclaim.

Plaintiff's claim:

After careful consideration of the evidence in relation to the plaintiff's claim, I have decided to accept the evidence of the plaintiff's manager that the sum of F$1,230 or $2,002 tala was borrowed by the defendant for his mother's airfare for Canada and not for his brother's airfare to come to

Western Samoa to work for the plaintiff. I was not impressed with the defendant's demeanour when he was giving evidence on this aspect of the case and the manner in which he gave his answers under cross-examination to this aspect of the case.

Not only that, the defendant says that the plaintiff's manager told him that when his brother arrived in Western Samoa his brother's airfare would be reimbursed. What the defendant then says that he borrowed the sum of F$1,230 from the plaintiff's manager for his brother's airfare from Fiji to Western Samoa and for his mother's support is inconsistent with his evidence that the plaintiff's manager told him that his brother's airfare would be reimbursed on his arrival in Western Samoa.

I also accept the evidence of the plaintiff's manager, that the plaintiff would pay for the defendant's brother airfare when he was satisfied of the defendant's brother credentials and that he was a qualified mechanic. Obviously, the plaintiff manager was acting as a prudent businessman and as it turned out the defendant's brother's performance as a mechanic and welder was unsatisfactory. He also turned out not to be a qualified mechanic. The defendant's evidence that there was no condition imposed by the plaintiff's manager that the defendant's brother be a qualified mechanic and that his brother's airfare would be reimbursed when he arrived in Western Samoa is unacceptable. I do not accept that any prudent businessman would be prepared to spend money on bringing in an expatriate mechanic without being first satisfied that that person is a qualified mechanic and meets the requirements of the job for which he is required.

The defenant's evidence on this point also shows that the bank draft that was made out in Fijian currency for the money he obtained from the plaintiff's manager was made in the name of his mother instead of the name of his brother. There has been no explanation for this if the money, as the

defendant claims, was really for his brother's airfare to come to Western Samoa. The defendant also says that of the F$1,230 given to him, F$1,147.20 was spent on his brother's airfare. So the amount that the defendant must have given his mother for her support must have been F$82.80. If the defendant is right in what he has told the Court in evidence, then he should have paid back to the plaintiff's manager only the Western Samoan equivalent of F$82.80 which is much less than the $980 tala he paid back. His action in paying back $980.00 instead of the Western Samoan equivalent of F$82.80 he claims to have given his mother, is inconsistent with the tenor of his evidence that the plaintiff was to pay for his brother's airfare from Fiji to Western Samoa.

In any event, I am satisfied that the money borrowed by the defendant was not for his brother's airfare to Western Samoa but for his mother's airfare to Canada. The defendant has repaid part of that money leaving a balance of $1,022 now claimed by the plaintiff.

I will give judgment for the plaintiff in the sum of $1,022.

Defendant's counterclaim:

I indicated to counsel at the hearing that the provisions of the Labour and Employment Act 1972 apply to the defendant's counterclaim and to the employment situation in this case. I do not see anything about quantum merit in the defendant's counterclaim and in fact in her closing submissions, counsel for the defendant agreed that the Labour and Employment Act applies to the defendant's counterclaim. The fact of the defendant's employment by the plaintiff is also clear from the evidence and from the statement of claim, statement of defence and counterclaim, and from the state of defence to the counterclaim. There is also no suggestion of quantum merit from the evidence or from the documentation filed in this case.

I will deal first with the defendant's counterclaim for overtime pay. In this connexion it must be said at the outset that section 20 of the Labour and Employment Act provides that any term of a contract of service which

contravenes any provision of that Act is unlawful and of no effect. That means that what the plaintiff's manager says about the defendant being paid a fixed wages for a week irrespective of the number of hours he worked a week must be subject to the provisions of the Act for hours worked a day including meal times, hours worked a week, as well as overtime pay. It also appears that an employer cannot contract out of the provisions of the Act because of section 20 and also because of section 41 which makes it an offence for any employer to enter into any contract of service contrary to the Act. This of course does not apply to any employer who entered into a contract of service, which contravenes the Act, prior to commencement of the Act because of the proviso to section 20. But any such contract of service entered into prior to the commencement of the Act became subject to the Act when the Act came into effect.

Now the contract of service in this case was entered into in September 1990, so it was subject to and governed by the Act right from the time of its formation until the time of its termination on 24 September 1992. The defendant does not question the validity of his contract of service or any other matter relating to that contract. All that he is claiming is overtime pay, annual leave pay, and nightwatchman pay. So the Court deals only with those matters and no other matter.

The relevant provisions of the Act to the claim for overtime pay are sections 28 and 29. In broad terms, and insofar as those provisions are relevant to the present case, section 28(a) and (b) provide that no worker shall be required to work for more than 40 hours in any one week or for more than 8 hours in any one day excluding meal times. Section 2 of the Act defines a "week" to mean a continuous period of 7 days, and a "day" to mean a period of 24 hours beginning at midnight. Section 28(e) then provides that where by agreement between an employer and a worker, the worker works for less than 8 hours on one or more days during a week, the worker may be required to work more than 8 hours on the remaining days of the week provided that

the worker does not work for more than 9 hours a day of those remaining of a week or for more than 40 hours a week.

Section 29(1) then provides that where worker works at the request of his employer for more than 8 hours a day, or for more than 9 hours a day as in section 28(3), then he must be paid overtime pay for such extra work at the rate of not less than $1\frac{1}{2}$ times his rate of pay. Section 29(2) then goes on to provide that a worker who works at the request of his employer for more than 40 hours a week must be paid overtime time pay for such extra work at th rate of not less than $1\frac{1}{2}$ times his rate of pay provided the worker has not already been for such extra work under section 29(1).

Section 2 of the Act defines what is "rate of pay". For the purpose of this case the relevant part of that definition is that which provides that the "rate of pay" is the total amount of money including allowances to which a worker is entitled under a contract of service for working one week. But that amount of money does not included overtime and bonus payments, or travelling, food and house allowance.

In this case, the defendant's rate of pay as submitted by the defendant appears to be $2.50 an hour for a 40 hour week from the period November 1990 to August 1991 when the defendant's paid wages was $100 a week. So the overtime rate would be $3.75 an hour. There is no dispute on that point so I accept this part of the defendant's case. Then from August 1991 to September 1991 when the defendant's paid wages was $150 a week, it was submitted by the defendant that his hourly rate of pay at that time was $3.75 an hour so that the overtime rate was $3.625 tala an hour. There is also no dispute on that point.

Now the defendant claims that from November 1990 to August 1991 he worked overtime for 21 hours a week for 40 weeks. So he claims 840 overtime hours at $3.75 an hour which amounts in total to $3,150. Likewise he claims that he worked overtime for 21 hours a week for 4 weeks from August 1991 to

September 1991. So for those 4 weeks he claims 84 overtime hours at $5.625 an hour which amounts in total to $472.50.

It must be said that it is not clear from the evidence when the defendant did start to work overtime hours in November 1990 and when in August 1991 was the defendant's weekly wages increased from $100 to $150. It also appears that under the counterclaim for overtime pay from November 1990 to August 1991, the defendant is claiming overtime pay for the whole month of August. But when it comes to the counterclaim for overtime pay from August 1991 to September 1991, the defendant is again claiming overtime pay for part of August. So the defendant in effect is making a double claim for part of August 1991. Now that cannot be right.

Given the vagueness of the evidence on this part of the case, I am driven to the conclusion that the defendant started to work overtime hours from the beginning of the third week of November 1990 to the end of the second week of August 1991 at the hourly rate of $3.75. The commencement period of the third week of November 1990 must necessarily be a rough estimate in the absence of evidence as to when the defendant actually started to work overtime in November 1990. The second week of April 1991 is taken as the end of the first part of the counterclaim because according to the defendant's evidence, he left for Fiji in September 1991 and when he arrived back he resigned from the plaintiff's employment on 24 September 1991. So in the third week of September 1991 the defendant must have been in Fiji and not working overtime for the plaintiff. Given that the overtime claim at the hourly rate of $5.625 is for 4 weeks from August 1991 to September 1991, that must be with reference to the first two weeks of September and the last 2 weeks of August.

So I find that the first part of the counterclaim for overtime pay relates to the period commencing from the beginning of the third week in November 1990 to the end of the second week of August 1991. That will be a

period of 36 weeks. Subtract from that number of weeks the 4 weeks in July 1991 when the defendant did not work on Saturdays while the plaintiff's manager was overseas, we are left with 32 Saturdays on which the defendant worked during the period from mid November 1990 to mid August 1991. I also find that the second part of the counterclaim for overtime pay relates to the period from the beginning of the third week of August to the end of the second week of September.

Coming now to the number of hours the defendant claims he had worked overtime every week from November 1990 to September 1991, I am not satisfied on the balance of probabilities whether the defendant did in fact work overtime hours during the normal working days, that is, from Monday to Friday each week in view of sections 28 and 29 of the Labour and Employment Act. Even if the defendant did work overtime, in terms of the provisions of the Act, it is not clear from the evidence how many hours did the defendant actually work overtime during the normal working days.

The evidence in this regard is that on normal working days the defendant, like all other workers at the plaintiff's factory, started work at 7.00am in the morning. When the concrete blocks allotted for manufacturing each day had been manufactured, the other workers knock off work. That was sometimes at 1.00pm and sometimes at 2.00pm. There is also a lunch break for ½ an hour at 12.00 o'clock. The defendant continues working until 3.00pm on some days, 4.00pm on other days, and up to 5.00pm when there are sales from the factory.

If that is correct, then on the days that the defendant works up to 3.00pm his total hours of work for that day would be 7½ hours. For those days he worked up to 4.00pm his total hours of work for each day would be 8½ hours. And for those days he worked up to 5.00pm his total hours of work for each day would be 9½ hours. In terms of sections 28 and 29 of the Labour and Employment Act, the defendant would not be entitled to overtime pay for those days he worked 7½ hours. For those days he worked 8½ hours his overtime

would be ½ an hour and for those days he worked 9½ hours his overtime would be 1½ hours.

It is far from clear from the evidence how the defendant arrived at the figure of 21 hours for overtime work for each week from November 1990 to September 1991 with reference to the normal working days. The problem is compounded by the fact that there is no documentary evidence to support this part of the counterclaim.

After the most careful consideration, I am not prepared to surmise on this part of the evidence. As the onus is on the defendant to prove this part of his counterclaim on the balance of probabilities, I am not satisfied that the defendant has discharged that onus. So I put aside the counterclaim for overtime pay for normal working days. However I am satisfied that on the evidence, when the normal working days that the defendant worked for less than 8 hours a day are put together with the normal working days that he worked for more than 8 hours a day, it evens out to about 40 hours for a 5 day working week from Monday to Friday.

That brings me to the work that the defendant did on Saturdays. I am satisfied on the evidence that in terms of the Labour and Employment Act the work that the defendant did on Saturdays was work in excess of 40 hours a week and therefore the defendant is entitled to overtime pay for that extra work. I am also satisfied on the evidence that the defendant worked 10 hours on every Saturday except the month of July 1991. He started at 5.00am in the morning by driving the loader to Solosolo until 4.00pm in the afternoon when he arrived back at the factory and washed and cleaned the loader. The washing and cleaning would probably take about half an hour or $\frac{3}{4}$ of an hour. However I have made allowance for 1½ hours to take into account the fact that it takes ½ an hour to travel from Vaitele to Solosolo and another ½ an hour to return from Solosolo to Vaitele and also because of Perive Isaleli's evidence

that on Saturdays the defendant leaves between 5.00am and 6.00am in the morning.

So for the 32 Saturdays that the Court has found the defendant to have worked from November 1990 to mid August 1991, the total number of overtime hours would be 320. At the overtime rate of $3.75 an hour applicable to that period, the defendant is entitled to a total amount of $1,200 overtime pay for the period from November 1990 to mid August 1991. For the period of 4 weeks between mid August 1991 to mid September 1991, the defendnat is entitled to overtime pay for 40 hours for the 4 Saturdays during that period. At the overtime rate of $5.625 an hour applicable to that period, the defendant is entitled to the total amount of $225.00 for overtime pay.

So the total amount of overtime pay that the defendant is entitled to from the plaintiff is $1,425.00.

This brings me to the counterclaim by the defendant for pay as a night-watchman. The evidence in relation to this part of the counterclaim is conflicting. However, I have decided to accept the evidence by the plaintiff's manager that the defendant was permitted to live in on the factory premises free of rent because of problems he had with the family of his local wife and that the defendant was asked to keep a watch out for the factory while living on the premises. I think that was a proper request from the plaintiff's manager given that the defendant was permitted to live on the premises free of rent and that the family of the defendant's wife had ordered the defendant out of their house. For the defendant to be also given a vehicle for his personal use is a privilege inconsistent with the status of a nightwatchman as we know it in our community. There is also the evidence of Perive Isaleli with whose family the defendant often went to eat. That witness says that during the whole period the defendant lived on the plaintiff's premises and came to eat in his house he did not know that the defendant was

a nightwatchman for the plaintiff. The defendant himself says he had problems with his wife's family but still he was hired as a nightwatchman for the plaintiff. When the defendant also left for Fiji in September 1991, he did not go to his wife's family to prepare for his trip but went straight from the factory premises to the airport.

Overall, I consider the evidence of the plaintiff's manager on this aspect of the case to be more acceptable than that of the defendant. The defendant's counterclaim for nightwatchman pay is therefore dismissed.

As to the counterclaim for annual leave pay of $300, the plaintiff has conceded that part of the counterclaim. The counterclaim for annual leave pay is within the terms of section 26 of the Labour and Employment Act which provides that a worker is entitled to 10 working days paid leave for every 12 months of continuous service with an employer. So the concession made by the plaintiff is quite in order.

In all then, judgment is given for the plaintiff on its claims for $1,022. Judgment is also given for the defendant on his counterclaim for $1,725.

As the plaintiff has succeeded on its claim, and the defendant has also succeeded substantially on his counterclaim, there will be no order as to costs.

T.F.M. Sakalaia

CHIEF JUSTICE