

**IN THE STATUTORY TRIBUNAL, FIJI ISLANDS**  
**SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL**



## Decision

### *Employment Relations Act 2007*

---

<b>Title of Matter:</b>	<b>LABOUR OFFICER on behalf of Adila Ashiyana Sahib and Farmoz Ansar</b>	<b>(Complainant)</b>
	<b>v</b>	
	<b>ATIL KUMAR ENTERPRISES LIMITED</b>	<b>(Defendant)</b>
<b>Section:</b>	<b>Section 247(b) Employment Relations Act 2007</b>	
<b>Subject:</b>	<b>Failure to pay upon demand</b>	
<b>Matter Number(s):</b>	<b>ERT Criminal Cases 119 and 120/2017</b>	
<b>Appearances:</b>	<b>Ms V Doge, for the Complainant</b> <b>Mr V Prasad, for the Defendant</b>	
<b>Date of Hearing:</b>	<b>13 February 2018</b>	
<b>Before:</b>	<b>Mr Andrew J See, Resident Magistrate</b>	
<b>Date of Decision:</b>	<b>14 February 2018</b>	

---

**OFFENCE – Section 247(b) Employment Relations Act 2007; Failure to pay upon demand wages; 24 Hour Business; Employee Accommodation.**

### **Background**

1. The Labour Officer has brought two separate complaints against the Defendant Employer, for failure to pay upon written demands on 18 July 2018, wages owing to Adila Ashiyana Sahib and Farmoz Ansar in contravention of Section 247(b) of the *Employment Relations Act 2007*. The Defendant Employer has entered a plea of not guilty in relation to the charges. The complaints initially received from the employees against their former employer, allege that the husband and wife couple Ms Sahib and Mr Ansar, worked as Sales Assistants at the Atil Kumar Shop 6, Sukanaivalu Road, Lautoka during the period 18 February 2017 to 16 May 2017. According to the former employees, they were required to operate 'Shop 6' on a 24

hour basis, each of them working 12 hour per day shifts. Ms Sahib working from 6am to 6pm and Mr Ansar, working from 6pm to 6am. The calculated claims for entitlement have been made by the Labour Officer against the statutory entitlements set out within the *Wages (Wholesale and Retail Trades) Regulations 2015*. The Employer claims that each employee was only required to work 45 hours per week and that the shop was not opened for 24 hours a day, but only certain hours consistent with the agreed contract of employment.

### **Evidence of the Labour Officer**

2. The case of the Labour Officer relies on the direct evidence of the two former employees, Mr Ansar and Ms Sahib. Mr Ansar told the Tribunal that he worked at the store whilst employed, for seven days a week, twelve hours a day. In fact, his evidence was that more often than not, that the work requirements would mean that he did not finish his evening shift, until between 9 and 10.00am the following day, because of the need to attend to stock requirements and deliveries. Mr Ansar stated that for this work, he was remunerated with \$125 per week.<sup>1</sup> The worker told the Tribunal that he was forced to leave the employment, after his employer had claimed that there had been a shortfall in takings that was detected following a stock take.

### Evidence of Mr Farmoz Ansar

3. Mr Ansar told the Tribunal under cross examination, that he had applied for the job as Sales Assistant, after seeing an advertisement in the Fiji Times newspaper. The witness conceded that he was allowed to stay at the back of the shop in a small flat free of charge, however was never provided with a contract document. Mr Prasad, provided the witness with a photocopy of a written contract of employment,<sup>2</sup> yet Mr Ansar denied having signed a page within that documentation, that contained a timetable of agreed hours worked as follows:

Days	Times	Hours
Mon	7pm 11pm 5am 9am	7
Tues	7pm 11pm 5am 8am	7
Wed	7pm 11pm 5am 8am	7
Thurs	7pm 11pm 5am 8am	8
Fri	7pm 12am 5am 8am	8
Sat	7pm 12 am 5am 8am	8
Total		45

<sup>1</sup> It was noted that within Exhibit 3(a), that the photocopy of the Weekly/Fortnightly Wages Register showed an amount paid as \$128.34, however Mr Ansar told the Tribunal that he only received the \$125.00 amount and was advised that the residual \$3.34 would be paid into his Fiji National Provided Fund Account.

<sup>2</sup> See Exhibit E1.

4. Mr Ansar told the Tribunal that he was required by the Employer on occasions to sign the wages register before the employer had entered an amount.<sup>3</sup> The former employee told the Tribunal that he was required to leave his employment following the reconciliation of takings with the stock book done by the Employer, when it was claimed that there was a short fall of \$3761.25. According to Mr Ansar, he was not present when that stock take was being undertaken, however was alerted to the fact from his wife and said “they threatened us” and indicated that if the couple didn’t move out, they would be reported to the police. Mr Ansar said that whilst looking for a new place to live, the Employer entered into his flat and removed his personal property, including a fridge, washing machine, flat screen television and a brush cutter.

#### Evidence of Ms Adila Sahib

5. Ms Sahib told the Tribunal that she had worked as a Sales Assistant between February to May 2017. According to the witness, she too was paid \$125.00 a week and not \$128.34 as entered into the Weekly Fortnightly Wages Register. According to Ms Sahib, after working for the employer for approximately one month, she was asked to sign a contract of employment, but was never provided a copy.<sup>4</sup> Ms Sahib also indicated to the Tribunal that she was never given the work time-table claimed by the Employer as forming part of the employment contract.
6. Ms Sahib told the Tribunal that she was desperate for a house at the time when she commenced employment and for that reason did not challenge the practices of the employer. The witness said under cross examination that the wages register that she would sign,<sup>5</sup> was always blank when she would enter her signature, with the employer advising that they would enter the relevant information in the document once the accountant had time. Ms Sahib stated that they were forced to leave their employment, when it was claimed by the Employer that they owed monies for shortfalls in sales.
7. During cross examination, Ms Sahib was referred to the time-table produced by the Employer within Exhibit 2 that reflected the hours of work as being only 45 hours. The witness denied that she had signed and agreed to work those hours, as reproduced as follows:

---

<sup>3</sup> It was also noted in preliminary submissions by the Labour Officer on 14 December 2017 that the employee had identified only three of those signatures within that document as being his.

<sup>4</sup> See Exhibit E2.

<sup>5</sup> See Exhibit 3(b).

Days	Times	Hours
Mon	9am 1pm 3pm 6pm	7
Wed	9am 1pm 3pm 6pm	7
Thurs	9am 1pm 3pm 6pm	7
Fri	9am 1pm 3pm 7pm	8
Sat	9am 1pm 3pm 7pm	8
Sun	9am 1pm 3pm 7pm	8
Total		45

8. Ms Sahib explained during cross examination, that she had raised her concerns with her employer in relation to the hours of work and pay arrangements only once, but after that kept silent on the issue. It was put to the witness that she was absent from the store on Friday afternoons when she would collect her children, consistent with the terms of a Family Court Parenting Order. Ms Sahib indicated that when this would take place, she would have her husband 'cover' for her in her absence.

### **The Case of the Employer**

#### Evidence of Ms Rosina Devi

9. Ms Rosina Devi, is a Director of Atil Kumar Enterprises Limited. Ms Devi told the Tribunal that the company has six shops operating in Lautoka, that sell yaqona and basic grocery items. According to the witness she had advertised for a vacancy for a couple to look after Shop 6 and that upon engaging Mr Ansar and Ms Sahib, had explained to them the rules and regulations governing their employment, including the timetable setting out the hours of work.
10. According to Ms Devi, the former employees agreed to the hours of work and both signed their employment contracts. In relation to the rate of pay, the witness indicated that each of the employees received \$3.10 per hour and would be paid cash and sign for their wages at the time of receipt. Ms Devi told the Tribunal that the workers ultimately said that they would no longer work for her, when it was detected that there had been a shortage of takings, when reconciled against stock. Ms Devi said that there had been several instances where there had been irregularities in the takings. According to the witness, she placed a rental value on the flat adjoining the shop at approximately \$350 per month. Ms Devi denied that the shop operated for 24 hours a day. Under cross examination, Ms Devi admitted to the Labour Officer that there had been no 'sign in' and 'sign out' records held by the employer of the daily hours worked. Ms Devi then explained the opening hours of the shop. The witness stated that during the weekdays, Monday to Friday, that the store would be opened for the following hours: 5am to 8am; 9am to 1pm; 3pm to 6pm and 7pm to 11pm. Ms Devi further claimed that the shop would open on Saturdays from 5am to 8am; 9am to 1pm; 3pm to 12 midnight and on Sundays 9am to 1pm and 3pm to 7pm.

### Evidence of Ms Ashwini Devi

11. Ms Ashwini Devi is a current employee of the Defendant Employer and is now working at Shop 6. Unfortunately and unknown to the Tribunal at the time, Ms Devi was sitting in the court room for the duration of the proceedings, prior to being called to give evidence. This is an unfortunate situation and one that should have been apprehended by Mr Prasad. To that extent, the testimony of this witness is to be considered against that backdrop.<sup>6</sup>
  
12. Ms Devi told the Tribunal that she has worked with the Employer on two occasions, having left on the first occasion, due to a robbery having been attempted at the store.<sup>7</sup> Ms Devi claimed to be managing the store with her partner and says that she has assumed the same roster as that previously provided to the former employees, Mr Ansar and Ms Sahib. Ms Devi said that the store was closed between 8am and 9am each day and also between 6pm to 7pm. The witness was challenged during cross examination, that the shop was opened 24 hours a day and denied that claim. The Tribunal also asked of the witness was the shop opened on the night of the robbery attempt in 2016 and Ms Devi indicated that it was not.

### Evidence of Corporal Vimal Pillay

13. During proceedings, Mr Prasad had told the Tribunal that the Lautoka police were now in possession of the washing machine, fridge, television and grass cutter of the former employees, following a complaint made by Mr Ansar in relation to trespass to property<sup>8</sup>. For the sake of ensuring the Tribunal understood the events that transpired in relation to that issue, Corporal Pillay from Lautoka police station, was summoned to give evidence and clarify the fact that the articles had been seized by the police from Mr Atil Kumar and Ms Rosina Devi, on 12 February 2018.<sup>9</sup>

### **Analysis of Evidence and Issues**

14. The Tribunal does not accept the evidence of Ms Rosini Devi or Ms Ashwini Devi, that the Shop 6 store does not operate on a 24 hour basis. What seems to be the case, is that the employees are to remain on standby to serve customers on a 24 hour a day basis. If it is not busy, it may well be the case that the employees fall asleep in the adjoining rooms behind the shop front, but it would seem that the members of public can enter the shop and knock on the counter to awake the employees if needed.

---

<sup>6</sup> It is noted that Mr Prasad claims not to have known that the witness was in the court room, however the Tribunal finds that an extraordinary claim.

<sup>7</sup> The police investigation into this robbery, would make it reasonably clear, what were the operating hours in place during that time.

<sup>8</sup> See PEP 32/01/18.

<sup>9</sup> (See Exhibit E4).

15. The Employer provided no original documents to the Tribunal as part of its evidence and the Tribunal accepts the some of the documentation and signatures are likely to have been produced after the fact. That is, there would have been occasions that the employees did sign blank records to be filled out later by the employer. The Tribunal accepts the evidence of the employees, that they were not provided with any timetables suggesting their hours of work should be 45 hours per week. It is also accepted that the employees did not sign those pages of the documents that purport to show their agreement to the hours contained in the employer's timetables.<sup>10</sup>
16. Whilst the Tribunal accepts that the accommodation provided to the employees had some value, this is not a relevant consideration to the analysis of the statutory requirements in dispute. If a worker is required to work for 12 hours a day, then subject to the relevant statutory provisions, including those pertaining to occupational health and safety requirements, they are to be paid for that time. If an employer wishes to provide accommodation, then the terms of that Rental Agreement, including its nominal value, should be set out either within the employment contract, or in a separate collateral or complementary agreement. The Tribunal finds that both Ms Rosina Devi and Ms Ashwini Devi were untruthful in the giving of their evidence. This was particularly apparent in the demeanour of Ms Rosina Devi in the witness box and the fact that she appeared to be seeking cues from Mr Prasad, when responding to questions from the Tribunal.<sup>11</sup> The Tribunal prefers and accepts the evidence of the employees that the shop was operating for 24 hours.
17. The parties should also note, that following an inspection by the Tribunal of the store at approximately 8.15am this morning, it was noted that the store was open for business, as was the adjoining store owned by the Employer, at Shop 7.<sup>12</sup> If in future, the Labour Office needs to record customers coming and going at late night and early morning hours and to take video evidence of such business activities, then that may just need to be what is required. '24 Hour' shops are workplaces and the persons employed within them are entitled to the same protections and entitlements, including those relating to work health and safety, as every other employee in the country.
18. The Tribunal accepts that the calculations provided by the Labour Office, accord with the requirements provided for within the *Wages (Wholesale and Retail Trades) Regulations 2015*. The employees are entitled to overtime payments where their normal hours of work exceeded 48 hours per week. On each day, for the first two hours at the rate of time and a half and thereafter for each additional hour, at

---

<sup>10</sup> Again no original documents were offered to the Tribunal.

<sup>11</sup> This was an issue that the Tribunal made clear to Ms Devi was not appropriate.

<sup>12</sup> This is despite Ms Rosina Devi and Ms Ashwini Devi both attesting to the fact that the shop was not opened during 8am to 9am each day, Monday to Friday. Whilst this is a matter of record only and does not form part of the evidence before the Tribunal, it was still decided by the Tribunal to be something that needed to be undertaken, for the sake of peace of mind.

double time. In addition, the employees would be entitled to a meal allowance in accordance with Regulation 9, at \$6.00 per day.

19. The Tribunal has reviewed the *Arrears of Wages Calculation Forms* provided by the Labour Officer<sup>13</sup> and considers that based on the hours claimed for the duration of the employment period, that the arrears have been calculated in accordance with the provisions of the Wages Regulations. The amounts were due and payable and the refusal by Employer to the demands made by the Labour Office on 18 July 2017 give rise to an offence in accordance with Section 247(b) of the *Employment Relations Act 2007*. The maximum offence under Section 247 of the Act is a fine for an individual not exceeding \$20,000 or a term of imprisonment not exceeding five years, or both. In the case of a corporation, the maximum fine is \$100,000.
20. This Tribunal finds the Employer guilty of the offence of failing to pay upon the lawful demands and for each complaint shall be fined the sum of \$2,000.00. In addition, the Tribunal orders that the Defendant Employer pay to each worker the sum of \$2973.16 within 21 days hereof.
21. In relation to the property that was seized from the Employer by the Lautoka Police on 12 February 2018, the Tribunal makes the following remarks. First and foremost, if it is the case that the Employer is claiming that an employee has committed theft as an employee, then there is a readily available mechanism to have such a complaint brought before the court. If on the other hand, there is a discrepancy between takings and 'stock at hand', then that is quite a separate issue.
22. The Employer should have in place mechanisms for ensuring and monitoring the system of reconciling daily takings. It is completely unacceptable for a situation to arise, where the worker is held accountable for any shortfalls after an extended period of time, where he is not otherwise involved in the stocktake process. In any event, any claim that the Employer may seek to make, would have to arise out of a right to offset under contract.
23. It is noted that within the rules and regulations that have been provided by the Employer that it states:

*"If there is a short of funds (sic), then firstly there would be verbal warning where you have to pay and secondly if not then you will be handed over to police and will be terminated"*.
24. It is unlawful to attempt to offset such claims against statutory wages that are otherwise due and owing. The Tribunal is also of the preliminary view that the provision at contract would be unenforceable, as in the circumstances of this case, it

---

<sup>13</sup> See Exhibits 6 and 7.

would be regarded as harsh and oppressive, ab initio. Further, the Tribunal is of the view that any undertakings by the employees to offer up as security their personal property against any claim from the Employer, would have taken place under duress and would likely be void in any event.<sup>14</sup> The fact that it is claimed that the Employer retrieved the personal property from the then residence of the employees, is also of great concern.

25. A rental agreement that supports an employment contract, should provide employees with the same general protections as individuals otherwise entering into rental arrangements within the general real estate market. Ordinarily employees would have a right to exclusive possession and enjoyment of the property during the term of their engagement and would even in the case of termination, be provided with some grace period in which they can organise to vacate the property. This does not appear to have happened in this case.

26. Because of the fact that the property of the employees came into the possession of the Employer as a consequence of the employment relationship, the Tribunal is satisfied that it has the power to order for its return to the employees in accordance with Section 211(e) of the Act, subject to them being able to reasonably satisfy their lawful ownership<sup>15</sup>.

27. An order to that effect will be issued to the Lautoka Police Station, to facilitate the return of the property to the employees.<sup>16</sup>

### **Decision**

28. It is the decision of this Tribunal that:-

- (i) The Defendant Employer, Atil Kumar Enterprises Limited, is guilty of failing to comply with a written demand made by the Labour Inspector on the 18<sup>th</sup> July 2017, in respect of payment of wages for Adila Ashiyana Sahib amounting to \$2,973.16.
- (ii) The Defendant Employer, Atil Kumar Enterprises Limited, is guilty of failing to comply with a written demand made by the Labour Inspector on the 18<sup>th</sup> July 2017, in respect of payment of wages for Farmoz Ansar, amounting to \$2,973.16.
- (iii) In accordance with Section 247(b) of the *Employment Relations Act 2007*, the Defendant Employer is fined the total sum of \$4,000.00, equating to \$2,000.00 for each of the two offences.

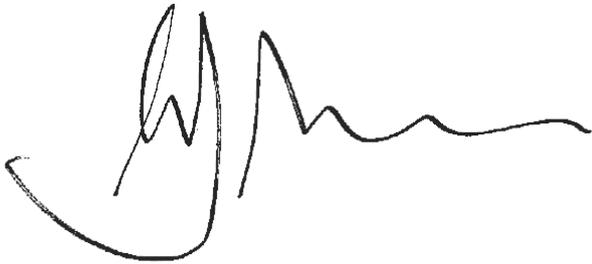
---

<sup>14</sup> See Exhibit E3.

<sup>15</sup> A reasonable test should be applied in the circumstances of the case.

<sup>16</sup> If it is the case that said items are required as evidence in any future proceedings, then it would be seem sufficient that photographic evidence of the same was provided.

- (iv) The Defendant Employer is required to pay the Labour Officer on behalf of Adila Ashiyana Sahib, the sum of \$2,973.16 within 21 days hereof.
- (v) The Defendant Employer is required to pay the Labour Officer on behalf of Farmoz Ansar, the sum of \$2,973.16 within 21 days hereof.
- (vi) The property of Adila Ashiyana Sahib and Farmoz Ansar, seized from the Defendant Employer by the Lautoka Police on 12 February 2018 (PEP 32/01/18), be returned to the employees, upon satisfactory proof of ownership.
- (vii) The Labour Officer is free to make application for costs within 28 days hereof.



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