

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No. D1361/01

In the matter between:

SHARON HIGGS

Applicant

and

NATAL WHOLESALE JEWELLERS (PTY) LTD

Respondent

JUDGMENT

1. This is a matter concerning a disputed claim for overtime pay. The Labour Court has jurisdiction by virtue of the operation of Section 77(3) of the Basic Conditions of Employment Act ("the BCEA").
2. The Applicant was employed by the Respondent from the 2nd of March 1999 until May 2001, when she resigned. She was so employed in terms of a written contract of employment entered into between the parties on that date.

3. It is common cause that the Applicant's salary was high enough to exclude her from the normal operation of the clauses in the BCEA or any other applicable wage determination, requiring an employer to remunerate employees for overtime by operation of statute.
4. A defence that the Applicant could not claim overtime because her pay exceeded the minimum pay applicable in order for the BCEA to be applicable was pleaded as a point "*in limine*", repeated in paragraph 4 (i) of the pre-trial minute as an issue for this Court to decide and again repeated at length in the written closing argument submitted on behalf of the Respondent (see paragraphs 9, 10 and paragraphs 79 following).
5. This defence has no merit because the Applicant's written contract of employment was common cause in these proceedings. The relevant clause reads as follows :

"You may be required to work overtime at Management's discretion, especially during the peak periods of business for example Easter, Christmas, stock-taking etc. Overtime will be compensated for at the rates dictated by current legislation".

6. Clearly then, the Respondent agreed to pay to the Applicant overtime at the prevailing rates in the current legislation when that overtime was worked in terms of the agreement. The provisions of the legislation are therefore relevant only insofar as they are a reference point for the rate of payment applicable to a claim established in terms of the contract of employment. The fact that the Applicant's rate of pay took her outside of the overtime provisions in either the BCEA, or the applicable wage determination, is an irrelevant factor in the determination as to whether or not she has a claim.
7. What is relevant is whether or not the Applicant has established a claim in terms of her contract of employment. In this regard there is, in my opinion, a distinction between overtime worked at the election of an employee and overtime worked at the election of an employer. If, for example, a professional assistant in a law firm decides to work late into the night, entirely of his own volition, in preparation for a court case the next day, he can hardly present a bill for overtime work to his employer (I am assuming the existence of contractual arrangements similar to the one in this case).
8. In order to succeed, the Applicant therefore had to demonstrate clear authority from her employer to work overtime in respect of clear requirements

from her employer to do so. For the reasons which follow I do not believe that the Applicant has established the requisite authority:

- 8.1. The Applicant testified in support of her claim. In support of the Respondent's defence, two witnesses were called namely Mr David Buxton (the General Manager at the time) and Mr Barry Kirby (the Financial Manager and the person to whom the Applicant reported directly);
- 8.2. soon after the Applicant commenced employment she found it necessary to work extra-ordinary hours because she could not do what she had to do or was told to do within normal office hours;
- 8.3. this required her to work overtime;
- 8.4. it is common cause that she was paid by the Respondent for some of this overtime and in respect of other overtime she concedes that she was given time off in lieu of payment;
- 8.5. in respect of the balance of the overtime (which she now claims) she says that she raised this with Mr Kirby, her immediate superior. Although Mr Kirby

disputed that the Applicant raised with him overtime claims other than the ones he agreed to, I come to the same conclusion about the issue even if I accept the Applicant's version. Her evidence was that Mr Kirby said she was either not entitled to overtime pay and that her predecessor had not been paid overtime, or that he would get back to her but that he always eventually said she was not entitled to overtime pay and that it would set a "*precedent*";

8.6. in my opinion the consistent and early refusal of her employer (through Mr Kirby) to pay overtime in respect of the disputed claims must have indicated to the Applicant that the overtime was not authorised. The early refusal to pay overtime must have alerted the Applicant to the fact that any overtime she continued to work, in the absence of clear authority to work paid overtime, was at her own election;

8.7. the fact that the Applicant worked the disputed overtime at her own election is consistent with the other evidence that :

8.7.1. the disputed claims formed by far the bulk of her overtime claims;

8.7.2. she left all of these claims out when she formulated and submitted a written

claim to the respondent on the 10th of May 2001 (which Mr Kirby did agree to);

8.7.3. the Applicant clearly knew how to claim overtime because, aside from the claim on the 10th of May 2001 she did successfully claim overtime on other occasions;

8.7.4. the bulk of her overtime claims (the disputed claims) were never formulated and put to the Respondent until after she had terminated her employment with the Respondent;

8.8. whilst the Applicant did testify that she was told to do things by the following day "*no matter how long that took*" (and to that extent this was an instruction from her employer to work overtime) I am unable to identify and distinguish such claims from the general body of claims she presented in court because :

8.8.1. the Applicant did not give evidence about each and every claim on her schedule but focused on an entitlement, collectively, to all of them;

8.8.2. in respect of overtime worked she conceded that she had taken time off sometimes in lieu of being paid overtime, but there was no reconciliation presented in this regard;

8.8.3. neither did she properly reconcile her schedule of claims set out at pages 59 to 62 of bundle A. For example, although the Applicant admitted receiving overtime pay in the sum of R8 677,75 pursuant to her written claim of 10 May 2001, all of these claims are duplicated in her schedule of claims and are therefore illegitimate;

8.8.4. the evidence establishes that not all deadlines were given at the end of a particular working day, for the next day. Many of the deadlines were in fact agreed deadlines which arose, so Mr Kirby testified, "*in the nature of accounting*" read together with the schedule of agreed dates for the performance of various things by the Applicant following a meeting with her in that connection.

9. In the premises and on the totality of the evidence, the Applicant has not, in my opinion, demonstrated that the overtime she claims was worked in terms

of a clear authority from her employer. In the result her claims for overtime must fail.

10. At the commencement of the trial in this matter I was informed that the Applicant was proceeding only in respect of the claim for overtime. No evidence was therefore led by either party in regard to the claim for notice pay. Paragraph 1.2 of the pre-trial minutes records an agreement in regard to the claim for notice pay. I asked the representatives for both parties if I should make any order for costs in regard to this claim but, in view of the foregoing, it would be inappropriate to do so.

11. In the result I make the following order :

11.1. the Applicant's claims for overtime pay are dismissed with costs.

DATED at DURBAN this day of MAY 2003.

N P WOODROFFE AJ