

Employment

# Singapore High Court Clarifies Calculation Of Overtime Payment

## Introduction

The recent judgment of the High Court in *Monteverde Darvin Cynthia v VGO Corp Ltd* [2013] SGHC 280 (“**Monteverde**”) makes it clear that the “basic rate of pay” as provided for under the Employment Act (“**EA**”) does not include payment for overtime hours, for which the law requires employers to pay 1.5 times the employee’s salary. This case note examines the legal basis of the High Court’s decision, which overruled the decision by the Labour Commissioner (“**Commissioner**”), and considers its impact on the development of law in this area.

## Brief Facts

Ms Cynthia Monteverde lodged a claim with the Commissioner for overtime pay for the period of her employment with VGO Corp Ltd (“**VGO**”) from 21 August 2010 to 17 August 2012 (the “**Period**”).

- (i) Under s38(4) EA, overtime hours are to be paid at the rate of not less than 1.5 times the hourly basic rate of pay.
- (ii) Ms Monteverde was contractually required to work for 60 hours per week, which is beyond the maximum 44 hours per week as mandated under s38(1) EA. Her monthly basic salary was \$1,900.
- (iii) The Commissioner found that the \$1,900 included payment for the weekly 16 hours of overtime (less the 50% increase).
- (iv) Hence, the Commissioner ordered VGO to pay Ms Monteverde \$479.04 being the outstanding amount of 0.5 times her hourly basic rate of pay for the 96 hours of overtime she worked for the Period.

On appeal, the High Court overruled the Commissioner's decision and held that the payments for overtime hours cannot be already included in Ms Monteverde's basic salary of \$1,900.

- (i) Under s38(6) EA, the employee's basic rate of pay is used to calculate overtime pay. The High Court noted that the definition of "basic rate of pay" under s2 EA makes reference to the total amount of money to which an employee is entitled under his contract of service and excludes overtime payment.
- (ii) Thus, the monthly salary of \$1,900 stipulated in Ms Monteverde's employment contract was taken to be the basic rate of pay and cannot, by definition, include overtime payment.
- (iii) Consequently, VGO was ordered to pay her 1.5 times her hourly basic rate of pay, which amounted to \$1,435.68.

## Observations

### **Why did the High Court overturn the MOM Tribunal's decision?**

The primary reason why the High Court overruled the Commissioner's decision is that s2 EA clearly defines the "basic rate of pay" to exclude overtime pay. Thus, it cannot be said that Ms Monteverde had already received some of her overtime pay in her monthly salary of \$1,900 on the basis that this was for 60 hours of work per week and 16 of those 60 hours were overtime hours.

The High Court also reasoned that the basic monthly salary of \$1,900 cannot be regarded as containing any overtime payment as Clause 7 of the employment contract between VGO and Ms Monteverde expressly disclaimed the concept of additional payment for overtime hours. Further, since Ms Monteverde would still be entitled to \$1,900 in a month where she worked for less than the statutory limit of 44 hours in a week, the sum does not include overtime payment. Essentially, the Commissioner erred in presuming, contrary to s2 EA, that the monthly basic rate of pay contained partial payment of overtime hours based on the contractual agreement of a single rate of pay.

### **Impact on the development of law in this area**

The High Court's decision in *Monteverde* is welcomed as an authoritative clarification on the meaning of "basic rate of pay" in relation to calculating overtime payments. Its

approach is also consistent with how basic wages which purport to be inclusive of overtime payments are treated in preceding Singapore and Malaysian cases.

- (i) In *Xuyi Building Engineering Co v Li Aidong and another and another appeal* [2010] 4 SLR 1041, two basic rates of pay were provided for in the employment contract for the calculation of additional payments. The Singapore High Court rejected the rate which purported to include the full overtime payment due to its inconsistency with s38(4) EA.
- (ii) In *Eng Giap Public Motor Bus Co Ltd v Gan Eng Keng & ors* [1975] 1 MLJ 106, the employer was found to be in contravention of s60(3) of the Employment Ordinance (equivalent of s38(4) EA) by splitting the basic salary into two components – wages for normal hours and wages for overtime hours.

A practical implication of the *Monteverde* decision is that overtime payment cannot form part of the basic salary, even if so agreed by the parties; it must be calculated separately from the basic rate of pay.

## Concluding Words

The High Court's decision in *Monteverde* is a welcome development in employment law for both employers and employees. It aligns the treatment of basic rate of pay in practice strictly to the EA and clarifies how overtime pay is to be calculated.

This decision provides a greater degree of certainty to employers, allowing them to structure their employment contracts to ensure that they do not fall foul of the provisions in the EA pertaining to the number of working hours, salary and overtime payment.

The approach taken by the High Court also ensures efficacy of the safeguards in the EA as intended by Parliament, and reiterates that any condition of service which is less favourable to an employee than those prescribed in the EA, for example, contractually prohibiting the payment of overtime pay, or contractually stipulating a maximum number of working hours beyond the statutory limit of 44 hours a week, will be treated as illegal, null and void.

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