In the Supreme Court of St. Helena

Citation: SHSC 16/2023

Civil

Appeal from the Labour Regulating Authority

Axel Oberem

Appellant

-v-

John Nyirenda

Respondent

Judgment on Appeal dated 11th of November 2023

The Chief Justice, Rupert Jones

1. This is my judgment on the appeal of the Appellant, Mr Oberem, from a decision of the Labour Regulating Authority of St Helena ('LRA') on 20 July 2023.

2. I directed a hearing of the appeal in accordance with section 45(1B) of the Employment Rights Ordinance 2010 ('the Ordinance'). The Appellant appeared in person at the hearing on 3 November 2023 which was conducted remotely by video. The Respondent, Mr Nyirenda, was represented by Mr Walter Scott of the Public Solicitor's Office. I am grateful to Mr Oberem and Mr Scott for the quality of their written and oral representations.

The Decision of the LRA

3. The LRA upheld the Respondent's complaint under section 19 of the Ordinance that he had not been paid the minimum wage while working in St Helena for the period of January to March 2023. Its reasons, as relevant, were as follows:

4. Mr Nyirenda is employed by Mr Oberem through Mr Oberem's Malawian company. Mr Nyirenda says that he along with 3 other Malawian men were escorted to St Helena by Mr Oberem on the 14th January 2023 and then he worked on Mr Oberem's farm. This work included building a house, which is not contradicted by Mr Oberem. Mr

Nyirenda says his hours were 8 and a half hours a day 6 days a week. Mr Oberem says from 'near 8' until 'around 17h' with a 1 hour lunch break – i.e. about 8 hours.

5. Mr Oberem asserts that Mr Nyirenda is in St Helena in pursuance of a training course from a company in Malawi which he owns and further, prior to travelling to St Helena, he had been employed in this Malawian company. He therefore claims that Mr Nyirenda is not required to be paid the minimum wage as he is an employee whose work is substantially undertaken outside St Helena under the terms of his Malawian contract. Mr Oberem has not provided the Authority with a copy of that contract to substantiate this assertion.
6. It is also the case that when Mr Nyirenda entered St Helena on the 14th January 2023 he was granted a short term entry permit until the 3rd June 2023 and that is how long it was intended he should work for Mr Oberem in St Helena. Mr Oberem has provided no evidence that Mr Nyirenda is undertaking a training course by providing, for example, a formal programme or advising what the subject of the training course is. We are not told what the duties of employment are in Malawi and how the training course is of relevance to those.
7. It is claimed by Mr Oberem that not only was Mr Nyirenda on a training course but that the other 3 Malawian men that he escorted to the island were also. One of these men is 64 years old and it seems unusual that a company would invest in a lengthy training course for someone towards the end of their working life.
8. We have seen Mr Oberem's reply to the allegation made by Mr Nyirenda. It claims that Mr Nyirenda in fact owes him money because he left his employment. He seeks to resile from the obligation to repatriate Mr Nyirenda and refers to Mr Nyirenda as having 'strategic ideas'. Despite being unrepresented he claims £1000 for legal advice and £500 for his time spent on the claim. He describes Mr Nyirenda as having 'absconded' from his 'care' which gives an indication of the nature of the relationship he believes he has with Mr Nyirenda.
9. We have no doubt that Mr Nyirenda is here to work for Mr Oberem and there is no training programme.
10. It was intended that he be here for a number of months and it cannot be said, in those circumstances, that his work is substantially undertaken outside St Helena under the terms of his Malawian contract. There is no contract for us to consider to ascertain what terms are in place. It is certainly not said by Mr Oberem that Mr Nyirenda's contract provides for him being required to work overseas.
11. Having found that there is no exemption available to Mr Oberem we look at what has been paid and what hours have been worked.
12. We accept that there was work of 51 hours a week over the course of his time with Mr Oberem for the period 16th January 2023 to 17th April 2023. The order determining the minimum wage published in Gazette 26 of 2022 set a rate of £3.37 for those over 18 for the pay reference period 1st August 2022 until the 31st March 2023. There was no minimum wage for the period from 1st April 2023 until 1st July 2023. This means that for the minimum wage claim the Authority can only take into account the period up to and including the 31st March 2023. The 14 days, or 119 hours, worked in April cannot be included in the claim.

13. Mr Nyirenda's basic salary is 115,615.50 Malawian Kwacha a month. Bonuses were paid as was payment in kind in terms of meals and similar. These are exempt from the computation of the minimum wage by virtue of regulation 5 of the Employment Rights (Minimum Wage) Regulations 2013. We go by the basic salary of 115,615.50 Malawian Kwacha which is the equivalent of £90.53. Mr Nyirenda has received during this time 3 such payments in January, February and March. There is a dispute about whether there has been a payment for April but that is of no relevance to the Authority as the claim cannot cover April for reasons already given.
14. For January the salary received for the 17 days he was here equates to 65,515.45 Kwacha. After that there are two payments of 115,615.50 Kwacha for February and March making a total of 296,746.45 Kwacha, this totals £231.52.
15. In January, February and March 2023 Mr Nyirenda worked for 65 days for 8½ hours a day, which is 552½ hours in total. 552½ hours at the minimum wage is £1,861.92. This provides a shortfall of £1,630.40 (£1,861.92 - £231.52).
16. We therefore find the s.19 complaint substantiated by Mr Nyirenda on the civil standard and find against Mr Oberem.
17. We will allow £5 a day for accommodation in fairness to Mr Oberem making a total to be deducted of £370 for the pay reference period of 74 days.
18. This provides a payment of £1,260.40 to pay for the minimum wage claim (£1,630.40 - £370).

The Law

Minimum wage legislation

4. By virtue of the power granted under section 11 of the Employment Rights Ordinance 2010, the Governor in Council on 28 April 2022 prescribed the following relevant hourly rate of £3.37 per hour for persons aged 18 years and older for the pay reference period commencing 1 August 2022 and ending 31 March 2023.

5. The calculation of the minimum wage is provided by Regulations 3-6 of the Employment Rights (Minimum Wage) Regulations 2013 which include the following:

Pay interval
3.The pay interval for purposes of these regulations is one calendar month, or in the case of an employee who is paid in accordance with his or her contract of employment **by** reference to a shorter period than one calendar month, that shorter period.
…
Payments to be excluded from calculation
5. Payments and other matters not to be included in the calculation of the minimum wage are—
(a) payment of expenses actually and reasonably incurred in the performance of the employee's duties;
(b) rest periods whether the time is spent resting at work or not;

(c) payments in kind including meals and whether of monetary value or not, except living accommodation.
(d) remuneration from commission, bonuses or tips.

Determination of hourly rate
6. (1) The hourly rate paid to an employee is to be determined by dividing the amount (whether for output or otherwise) of remuneration paid to the employee by the total hours actually worked in the pay interval.
(1A) In any calculation under sub-regulation (1) that shows payments of less than the minimum wage the employer will be regarded as having paid the minimum wage if the employer can show that within one calendar month of the end, or within one calendar month prior to the beginning of the pay interval, the employer made payments to the employee for work performed during the pay interval which when added to the other remuneration paid for work undertaken during the pay interval shows that the employer paid the employee at a rate at least equivalent to the then applicable minimum wage rate.

…

6. Complaints to the LRA for failure to pay the minimum wage are governed by section 19 of the Employment Rights Ordinance 2010 which provides relevantly:

Complaint for failure to pay at least minimum wage

19. (1) If an employee, after exercising his or her rights under section 17, is of the opinion that he or she has for any period not been remunerated by his or her employer at a rate at least equal to the minimum wage, the employee may lodge a complaint with the Regulator—
(a) within 14 days after receiving the records under section 17; or
(b) if the employer fails to provide such records within the period prescribed under section 17, within 14 days after expiry of the prescribed period.
(2) The Regulator must investigate the complaint and, if he or she thinks fit, may serve a notice on the employer ordering the employer—
(a) to pay to the employee within a time specified in the notice the sum due to the employee under section 16(1);
(b) to remunerate the employee for any further periods ending on or after the date of the notice at a rate equal to the minimum wage; and
(c) subject to subsection (4), to pay a financial penalty equal to 50% of the amount referred to in paragraph *(a)* in respect of all employees to whom the order relates, up to a maximum of £5,000.
(3) The Regulator may in the notice under subsection (2) order the employer to pay to the employee, in addition to the amount referred to in subsection (2)*(a)*, an amount (not exceeding £200) the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by the employee which is attributable to the underpayment or the exercise of the employee's rights in pursuing such underpayment.

…

Jurisdiction of the Supreme Court on an appeal from the LRA

7. Section 45 of the Ordinance provides for the jurisdiction and powers of the Supreme Court when considering an appeal from the LRA regarding the minimum wage:

> **Appeal against order relating to minimum wage**
>
> **45. (1)** A person against whom an order is made under section 18 or 19 may appeal against the order to the Supreme Court within 30 days following the date of service of the notice.
>
> **(1A)** An appeal under subsection (1) must be determined on the basis of written evidence (either sworn or unsworn) and submissions, produced and filed in a manner and form prescribed by rules of court.
>
> **(1B)** If the Chief Justice considers that an oral hearing is necessary in the interests of justice, the Chief Justice may order that a particular appeal must be dealt with at an oral hearing,
>
> **(2)** On an appeal under subsection (1), the Supreme Court must not uphold the appeal, unless it is established with respect to the relevant order—
>
> *(a)* that the facts are such that had the Regulator been aware of them, the Registrar would not reasonably have come to the conclusion giving rise to the order;
>
> *(b)* if the order relates to 2 or more employees, that the facts are such that had the Regulator been aware of them, the Registrar would have had no reason to include some of the employees in the order against the appellant; or
>
> *(c)* if the order imposes a requirement under section 18(2) in relation to an employee—
>
> (i) that no sum was due to the employee under section 16(1); or
>
> (ii) that the amount specified in the order as the sum due to the employee under that section is incorrect.
>
> **(3)** The Supreme Court may uphold the decision of the Regulator or amend the decision and substitute its own decision, and costs will be at the discretion of the Court.

Discussion and Analysis - Consideration of the Appellant's grounds of appeal

Ground 1 – jurisdiction of the LRA

8. In his grounds of appeal dated 17 August 2023 Mr Oberem challenged the jurisdiction of the St Helena LRA to determine the Respondent's complaint and submitted as follows:

1) It is not up to the Labour Regulating Authority to decide whether it has authority over this case or not.

As the first hearing only took a few minutes, the honorable judge mentioned, that first it has to be established, whether this case can be handled by the Labour Regulations Authority or not. In other words, whether it is proven to be an employment ship under St. Helena legislation or not.

Unfortunately, nothing concerning this question is mentioned in the ruling, e.g. what the advise from Magistrate Court has been.

I still object to have been the "employer" of Mr. Nyirenda under St. Helena employment law. My objection started straight when signing the summons. It can be seen on those documents, that I amended the term "employer" to "defendant" while still I signed to have received the documents.

As articulated in the few minutes during the first hearing at court, legally I'm an individual on St. Helena who has no majority shares in St. Helena Coffee Co Ltd.

All goods, machinery, etc. Mr. Nyirenda was trained on, are the property of St. Helena Coffee Co Ltd. and not mine.

Being summoned as if I was his St. Helena "employer", brings up the question about the definition of "work". As commonly known, remuneration is given for provided work.

It is well established by payslips, pension contribution and several affidavits, that Mr. Nyirenda is employed by me in Malawi in my sole proprietorship. While all his so called "work" was provided to St. Helena Coffee Co Ltd.

Is the judgement in accordance with rules and regulations or on "how things appear to be" basis?

9. I reject this argument and am satisfied that there was no error of law in the LRA's decision that it had jurisdiction to determine the complaint. I agree with the original submissions of Mr Scott to the LRA in this regard.

10. The LRA found as a matter of fact that the Respondent was working (and not training) on St Helena - he and three other colleagues have been working from near 8am to 5pm (with 1 hour for lunch) from Monday to Saturday (6 days a week), totalling 51 hours (see [4], [9], [10] & [12] of the judgment). The work was general labouring work along with some specialist electrical repair work associated with the Employer's business interests on St Helena – this included the building of a house (see [4]). It found that the Respondent was working for the Appellant (in his personal capacity). These were findings that the LRA was entitled to make on the evidence available to it and should be upheld – it gave sufficient and rational reasons for its findings within its

decision. I am not satisfied that the facts are such that had the Regulator been aware of them, the Registrar could not reasonably have come to the conclusions that it did.

11. The Ordinance applies to give the LRA jurisdiction to determine claims in so far as the LRA is satisfied that each party to the proceedings before it falls within the definition of Employee and Employer. Those definitions are:-

"employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of service or apprenticeship, whether express (oral or in writing) or implied; or (b) any other contract, whether express (oral or in writing) or implied, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to "employment" and "employed" is to be construed accordingly;

"employer", in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed and in the case of an agency worker, includes for purposes of Chapter III the person who is under section 5(2) deemed to have entered into an employment contract with such agency worker.

12. Section 4(1) (c) of the Ordinance provides that it is the duty of the LRA '-(c) to investigate and determine claims made by employees under this Ordinance'.

13. Chapter III- Part D, section13 of the Ordinance further provides that: – '*Employer to pay at least minimum wage* 13. (1) Every employer must remunerate each employee in respect of his or her work in any pay reference period at a rate which is not less than the minimum wage.'

14. The LRA was satisfied that the parties' relationship was one of employee and employer in accordance with the definitions set out above. Consequently, the employment/work in St Helena covering the activities of the Employee on the Employer's farm falls within the Jurisdiction of the Labour Regulating Authority. It matters not whether the contract of employment is made in or from another jurisdiction such as Malawi.

15. Furthermore, the LRA found the Respondent to be engaged in work (although Mr Oberem still maintains it was training) for the reasons it gave at [4]-[6] and [8] of its decision. I am not satisfied there was any error in the LRA's finding that this was not training but even were the LRA's finding to be unreasonable (facts that the Authority could not reasonable have concluded) it would matter not.

16. This is because training is also captured as work by the Employment Rights (Minimum Wage) Regulations 2013 see sub- Regulation 6(3) *"work includes compulsory training provided by the employer which is incidental to the actual work undertaken under the employees' contract of employment"*

17. Based on the above, the LRA did not err in law when considering it had jurisdiction to deal with the Respondent's complaint. Furthermore, there was no error for the purposes because the high threshold under section 45(2)(a) of the Ordinance was not satisfied – I am not satisfied that the facts are such that had the LRA been aware of them, it would not reasonably have come to the conclusion giving rise to the order.

18. I am satisfied that Employment Rights Ordinance 2010 applies to all employee-employer working relations on St Helena and is not constrained by any extra-jurisdictional source of the contractual relationship of the parties. The Ordinance grants the LRA jurisdiction based upon the location where the work takes place (in St Helena) and so long as the work is undertaken as part of any employment relationship. The location or jurisdiction where the employment contract is agreed or where payment is made do not exclude the work from falling within the jurisdiction of the LRA. I consider this further below when considering the application of section 11 of the Ordinance and whether the work took place substantially outside St Helena.

19. Mr Oberem advanced further points in oral argument. He submitted that there was evidence given by Mr Nyirenda that he had received pension contributions. Mr Oberem had made payments and made submissions of the relevant employment taxes every month taxes to the Malawian government. This made clear that the Respondent has been employed in Malawi, under the jurisdiction of Malawi, and by a sole proprietorship in Malawi, namely the Appellant in person. Mr Oberem argued that the Respondent was not employed by St Helena Coffee Company – but was on a work contract in Malawi from the Appellant personally. The Respondent was not on a contract on St Helena but employed in Malawi.

20. Mr Oberem relied on two handwritten witness statements from his employees before the LRA and on appeal which stated that the contract for work (or training) in St Helena was part of the ongoing and same contract from Malawi.

21. Mr Oberem also relied on the footnote to section 11 of the Ordinance to suggest that the exclusion to the minimum wage legislation applied because there was a Malawian contract of employment which the Respondent was subject to, that Mr Nyirenda performed at least 4 years work in Malawi and in that context, 3 months training (or work) in St Helena did not constitute a substantial amount of work in St Helena.

22. Mr Oberem submitted that virtually all of the Respondent's work under the contract was performed in Malawi rather than in St Helena such that Mr Oberem's work was substantially undertaken outside St Helena under the terms of their contract of employment.

23. I reject these further arguments.

24. Section 11 of the Ordinance and the exclusion in the footnote provide:

> **Determination of minimum wage**
> **11. (1)** The minimum wage is such single hourly rate as the Governor in Council prescribes3 by notice in the *Gazette* for a relevant pay reference period.

3 *Hourly rate prescribed in Gazette Notice No. 47 of 26 March 2018 (with effect from 1 July 2018):*
£3.05 per hour for persons aged 18 years and older and £2.10 per hour for persons under the age of 18 years.
Exclusions under subsection (2):
(a) employees whose work is substantially undertaken outside St Helena under the terms of their contract of employment;
[Emphasis Added]

25. I find no error in the LRA's decision at [10] that the exclusion did not apply:

> 10.It was intended that he [the Respondent] be here for a number of months and it cannot be said, in those circumstances, that his work is substantially undertaken outside St Helena under the terms of his Malawian contract. There is no contract for us to consider to ascertain what terms are in place. It is certainly not said by Mr Oberem that Mr Nyirenda's contract provides for him being required to work overseas.

26. However, it is analysed, there is no error in the LRA's finding that Mr Nyirenda's work was not substantially undertaken outside St Helena.

27. The LRA was entitled to find there to be no contract provided to establish that there was a Malawian contract of employment under which Mr Oberem was working in St Helena. At [10] of the decision the LRA finds there was no written contract provided to establish that the work was substantially outside St Helena. Ultimately, this was within a range of reasonable findings that the LRA was entitled to make on the evidence available to it.

28. Further or alternatively, the LRA would have been entitled to find that the Respondent was working under a separate contract of employment to work in St Helena (one to cover his work in St Helena, whether agreed in St Helena or in Malawi) rather than as part of a contract to work in Malawi. Mr Scott submitted that the Respondent's Malawian contract of employment ended in December 2022 – his submission to the LRA included evidence that the employment contract for work in Malawi was terminated by the Appellant on 31 December 2022 with attached pay slip confirming severance pay.

29. Even if the employees of the Appellant were then switched to 2 year fixed term contracts, these were not presented before the termination date but only to the Respondent's work colleagues in Malawi on 13 February 2023 – and by this time the Respondent was on St Helena. There was no new contract signed in any event and no written contract disclosed.

30. While the LRA made no findings on any of these matters, and the Appellant provided no reliable written evidence regarding the contracts to assist the LRA, the implication of the LRA's findings was that the contract of employment under which the Respondent

worked in St Helena was: either a) under a fresh contract of employment agreed in January 2023 which included a requirement to work in St Helena as well as in Malawi; or b) a fresh contract of employment (wherever agreed) to work in St Helena alone. On either of these analyses, in the relevant period of January to April 2023, there was no substantial work performed by the Respondent outside St Helena (ie. in Malawi) under the employment contract and it matters not where the contract was agreed – the work which was performed took place in St Helena.

31. Even on the Appellant's case, if a Malawian contract was long in existence under which the Respondent previously worked for a number of years in Malawi before being brought to St Helena to work for a number of months, that would still not mean it was unreasonable for the LRA to find that the work was not substantially undertaken outside St Helena. There is no definition of 'substantially' and I agree with Mr Scott that this cannot be decided by a mathematical equation of the proportion of time spent working in any given period inside or outside St Helena.

32. Finally, the question of where the work was undertaken can be analysed by reference only to the time period for which the challenged payments were made to the Respondent. The payment (below minimum wage) were only paid in respect of work in St Helena (and not in respect of any work in Malawi). Irrespective of the location of the contract or the length of its term, in the period January to March 2023 (the period in question), all of the payments by the Appellant to the Respondent were made in respect of work (or compulsory training) undertaken by the Respondent in St Helena rather than any work undertaken outside St Helena. On this analysis, there was no work undertaken by the Respondent outside St Helena, let alone substantial work undertaken outside St Helena.

33. For all these reasons I am satisfied that the LRA did not err in deciding that the exclusion under the footnote to section 11 did not apply and the Respondent's work did not take place substantially outside St Helena. Therefore, the minimum wage legislation applied in respect of this work.

34. It is worth noting that the purpose of the exclusion under the footnote to section 11 of the Ordinance was not designed for circumstances such as this where a person works for 51 hours a week on island for 3 months. Rather it was to address the position for those working temporarily (or an ad hoc or consultancy basis) in St Helena - for agency or visiting workers who provide a minimum of work in St Helena.

35. As Mr Scott submits, to allow the exemption to the minimum wage requirement to apply would be unjust in respect of substantial amount of work undertaken by the Respondent in St Helena and not in accordance with the legislative purpose. Where the Appellant's employees were brought to St Helena to service the permanent need for workers on the Appellant's farm on St Helena their work manifestly falls within the minimum wage legislation.

36. Even if an employer provides no written St Helena contract or attempts to rely on a foreign contract, this does not absolve them of the minimum wage obligations – the

question is the reality or substance of where the work was performed and in respect of which the payments were made. It does not depend on where the contract was agreed or where any payment is then made (and one view there was a separate oral contract agreed with the Respondent to work in St Helena in the absence of any other written contract).

37. Any employer's practice of rotating employees to St Helena to serve employment needs every few months must be viewed in the light of revealing the substantial need for a worker on St Helena to fill this role. Likewise, the work carried out by them must be considered consider substantial. The working demands on St Helena are not insignificant – this was not a short-term consultancy or the like anticipated by the exclusion to the LRA.

38. Whatever the contractual position of the Respondent, it was also accepted by the Appellant that he was the employer personally and that the Respondent worked for him, trading as a sole trader or sole proprietor. The Appellant accepted that the Respondent was not employed by any limited company or separate entity to the Appellant. The Appellant he accepted he was the proper party to proceedings.

39. For all these reasons the LRA did not err in law in finding the work in respect of which the Respondent was paid (below minimum wage) was not work substantially undertaken outside St Helena. Therefore, the minimum wage legislation was not excluded and it applied.

40. Ground 1 of the appeal is dismissed.

<u>Ground 2 - quantum and computation of the hourly rate</u>

41. Mr Oberem argued in his grounds of appeal that the LRA should not have computed the Respondent's pay for the purposes of minimum wage based on upon a salary of only (Malawian Kwacha) MK115,615 (see [13] of the decision) when the payment was far higher. He submitted:

> **2)**Nevertheless, beside the question of LRA having jurisdiction over the case, the applied computation of Mr. Nyirenda's received benefits is wrong.
>
> Mr. Nyirenda's gross pay in Malawi per month was, e.g. for the month of February 2023, MK483,957-83.
>
> This equates to £378.95 per month, using the court's determined exchange rate of 1,277.10 from MK (Malawi Kwacha) to SHP (Saint Helena Pound).
>
> The additional £5.- per day for accommodation, as granted by the judgement, adds £150.- per month.

Having given Mr. Nyirenda a **monthly pay of £528.95** plus the same payment for the whole month of April 2023 clearly proves that Mr. Nyirenda received above minimum wage of St. Helena.

His unproven claim of having "worked additional hours" stands against the witnessed fact, that Mr. Nyirenda was sometimes nowhere to be seen by several days, while the training program was on.

42. In his oral submissions, Mr Oberem pointed to the schedule setting out that for each of the three months in question – January to March 2023, the Respondent was paid MK483,957.83 rather than the 115,615 that the LRA relied upon in calculating the hourly rate. For example, for March 2023 the schedule of payslip pay provides:

Payslip
E Oberem March Wages
Employee Name **Nyirenda John Collis**
Employment No. **1145**
Salary 115,615.50
Absenteeism
Taxable Bonus 261,000.00
Subsistence allowance 30,000.00
Pension at 15% 17,342.33
Translocation allowance 60,000.00
483,957.83

43. Mr Oberem also relied on the photographs of the payslips which record the salary at MK115,615, the taxable bonus at MK261,000, the taxable income at MK376,615 minus 71,184.35 equalling Gross income of 305,131.15. The subsistence allowance is recorded at MK30,000. There is then a table headed deductions with a pension at 5-10% equating – MK17,342.23 but then added 'others' of MK60,000 and 'Memo & Welfare of MK198,000 with a net payment of MK197,2000. There is then a note that 'instructed by John 197,000 goes to Bernhard.

44. Mr Oberem also relied upon the whatsapp messages between the Respondent and fellow employees demonstrating that the Respondent was paid sums far in excess of MK 115,615 but that some of it was paid in cash, some was to be diverted to others, some to repay a loan from the Appellant and only some was directly to be received by the Respondent in his bank account.

45. Mr Oberem therefore submitted that the remuneration for the purposes of sections 16 and 19 of the Ordinance was the total as set out in his written submissions (monthly pay of £528.95). This includes £150 a month for accommodation plus amounts for food.

46. He also submits that the additional amounts for the amount of PAYE tax deducted should be added. He also submitted that the additional pay for April 2023 should be added to the calculation as the Respondent did not work during that month but received payment for it.

47. I reject each of these submissions.

48. The Appellant asserts that the correct calculation of the hourly rate is the gross monthly pay received by the Respondent. Before going any further it worth noting that even on the Appellant's written submission that the Respondent was paid £528.95 for 192 hours a month work (48 hours a week – six 8 hour days), this equates to £2.75 an hour which is well beneath the minimum wage of £3.37 in any event. Taking the 51 hours per week that the LRA found the hourly sum is even less.

49. However, the gross pay relied upon by the Appellant is not the correct calculation. The LRA did not err in law when relying upon only the salary of MK115,615 plus allow £5 a day for accommodation when calculating the remuneration and payments the Respondent received for the purposes of minimum wage.

50. The Appellant's starting point ignores the legal framework provided by the legislation. The Employment Rights (Minimum Wage) Regulations 2013 Regulation 5 which states:-

Payments to be excluded from calculation.

5. Payments and other matters not to be included in the calculation of the minimum wage are—

(a) payment of expenses actually and reasonably incurred in the performance of the employee's duties;
(b) rest periods whether the time is spent resting at work or not;
(c) payments in kind including meals and whether of monetary value or not, except living accommodation.
(d) remuneration from commission, bonuses or tips.

51. Sub- Regulation 5(*c*) exempts the payment in kind for meals of a monetary value being the MK30,000 and the MK60,000 identified in the pay slip as being subsistence allowance and translocation allowance respectively. Both being payments made to the employee were to cover incidental costs incurred by the employee while working away from home. The LRA was correct to exclude these payments from the hourly rate calculation.

52. Likewise, sub-regulation 5(*d*) exempts from the calculation the bonus payments of MK261,000 identified in each of the monthly payslips.

53. The April 2023 remuneration should be discounted for the reasons that the LRA explained at [11]-[12] of its decision and in any event it was paid and received on 4 May 2023 – as confirmed by the Respondent's wife. This was more than a calendar moth after the relevant pay interval as set out in Regulation 6(1A).

54. The LRA was correct not to add any PAYE deductions as it did in making the calculation. Indeed, these cannot be added to the calculation for the sum paid to the Respondent as the Appellant suggests because it was a deduction applied in calculating the Respondent's net pay to be received. Nevertheless, the PAYE was already and properly taken account of in calculating the gross salary payment for the purposes of the minimum wage even though it then went on to be deducted in making the overall payment to the Respondent (including the salary).

55. The LRA correctly identified the basic salary of MK115,615.50 as the starting point of calculating the hourly rate being paid to the Respondent and then properly took into account payment in respect of the accommodation but no other parts of the payment. It made no error of law in applying Regulation 5 to the calculation.

56. I dismiss the substance of the appeal on ground 2.

Conclusion

57. There is only one error that Mr Scott now concedes in the LRA's calculation of the payment made to the Respondent for the purposes of the minimum wage. It should have included the further 11% in pension payments that were paid by the Appellant in respect of the Respondent as part of the calculation of his remuneration for the purposes of the minimum wage calculation.

58. Therefore, there should therefore be a very small adjustment to the calculation as set out at [17] of the LRA decision. In light of this judgment, I will leave the parties to agree the amount of this adjustment when I approve the final order they present.

59. In all other respects I dismiss the appeal and uphold the LRA's decision. There was no material error of law in the LRA's decision – it founds facts that it was reasonably entitled to find on the evidence available to it and applied the law properly. For the purposes of section 45(2)(a) of the Ordinance, I am not satisfied that the facts are such that had the LRA been aware of them, it would not reasonably have come to the conclusion giving rise to the order.

Costs

60. No costs order was made by the LRA and the parties did not address me orally on this issue.

61. In accordance with Section 45(3) of the Employment Rights Ordinance, costs relating to this appeal are at the discretion of this Court.

62. The Appellant asks the Court to make an award against the Respondent as compensation. No evidence of these costs or justification is advanced. The Appellant indicated before the LRA and in the appeal papers that he has not benefited from legal advice. If this is correct, then the Appellant should not be able to claim £1,000 for legal costs not incurred.

63. The Respondent claims costs to be assessed if not agreed. Given that the Respondent has succeeded, I make such an award. There is no good reason not to follow the usual principle that the unsuccessful party pays the costs of the successful party.

Postscript

64. As a result of its decision, the LRA wrote to the Governor on 21 July 2023 and copied the Attorney General. This was pursuant to its duties under section 4 of the Ordinance to advise the Govern in Council and any relevant council committee on labour protection issues. The LRA expressed concerns about the potential for coercive working relationships on island and that, if found to exist, they be investigated, stopped and victims protected.

65. Amongst a number of recommendations, the LRA recommended that the Governor in Council consider adopting into St Helena law such elements of part 1 of the Modern Slavery Act 2015 of England that are suitable to local conditions. I annex a copy of the LRA's letter to this judgment.

Rupert Jones, Chief Justice
11th November 2023

Annex A

Letter of the LRA dated 21 July 2023

Labour Regulating Authority

Ref: LRA
Date: 21st July 2023

HE The Governor
The Castle
St Helena

Dear Governor

Re: Advice pursuant to s.4 of the Employment Rights Ordinance 2010 regarding the Modern Slavery Act 2015

Section 4 of the Employment Rights Ordinance 2010 provides that the duties of the Labour Regulating Authority are:

i. to advise the Governor in Council and any relevant Council Committee on labour protection issues
ii. to investigate and determine claims made by employees under this Ordinance
iii. to prepare and publish guidelines in the Gazette on best practice and codes of practice in employment protection for employers, employees and workers

This letter brings to the attention of the Governor in Council a matter that the Labour Regulating Authority considers pressing. The Authority has recently determined a claim against a Mr Axel Oberem by his employee John Nyirenda and I attach a copy of the ruling. Mr Oberem is importing workers from Malawi and paying them at rates appropriate to Malawi, approximately 44p an hour. The money is being paid into their Malawian bank accounts meaning that while on the island they have no access to any money. They are required to work about 51 hours a week and reside on his farm. This isolates them from the community at large leading to limited opportunity to complain about their treatment.

The Authority understands that this arrangement is intended to continue with other men like Mr Nyirenda and that the immigration authorities have issued short term entry permits to Mr Oberem's employees to come to St Helena. The Authority have found that Mr Oberem is acting unlawfully towards his employees but the reality is that we can only act for others working for Mr Oberem if we receive a complaint. By ensuring his employees are isolated the probability of further complaints is limited. In addition any complaint by his employees would almost certainly lead to a loss of employment in Malawi as he is their employer in that country as well. The poverty, unemployment and underemployment levels in Malawi act as a considerable disincentive to making complaints.

The relationship Mr Oberem has with those that work for him could well be seen as exploitative and may amount to servitude. This can be addressed in the short term by the immigration services paying particular regard to any applications from persons sponsored by Mr Oberem. We also suggest that the welfare of those on his farm is established by adult social care.

The Authority recommends that the Governor in Council consider adopting into St Helena law such elements of Part 1 of the Modern Slavery Act 2015 that are suitable to local conditions. This legislation prohibits slavery, servitude and forced or compulsory labour. There is a prohibition on this type of conduct within section 8 of the St Helena Constitution but the enforcement provisions within section 24 simply allow for an application to the Supreme Court for redress. The Authority believe that the prohibition on slavery, servitude and forced or compulsory labour should be complemented by the criminal law.

Those in the types of relationships prohibited by the Constitution in section 8 are not well placed to seek redress from the Supreme Court, being as they are vulnerable and isolated. The Authority believe that they need the protection of the criminal law to ensure that when these coercive relationships are found to exist that they can be investigated, stopped and the victims protected.

The Modern Slavery Act 2015 was partly a response to criticism by the European Court of Human Rights of the UK in the case of *CN v UK, 13 November 2012, 4239/08.* The criticism was that the UK was not doing enough to address the issue of servitude which is prohibited by article 4 of the European Convention on Human Rights. Section 8 of the Constitution is very similar to article 4 of the ECHR and identical as far as the prohibition on slavery, servitude and forced or compulsory labour is concerned. In the matter of *CN v UK* the Court re-iterated its finding in the previous decision of *Siliadin v. France* that article 4 entails a positive obligation on Member States to effectively penalise and prosecute any act aimed at enslaving someone. It appears that St Helena, by not having in force criminal offences that address servitude and similar, may well not be compliant with its Constitutional obligations.

On a final matter we bring to your attention that the minimum wage provisions expired on 31st March 2023 and were not renewed until the 1st July 2023. The upshot of this was that Mr Nyirenda worked 119 hours in April but was not paid for these hours at all as Mr Oberem did not pay him for April. The Authority could not do anything about this whereas he should have been paid at least £401.03 had there been a minimum wage in place. The Authority also note that the Gazette for last year's provisions was issued on the 28th April 2022 (Gazette 36 of 2022) which is 4 weeks after the expiry of the previous minimum wage (Gazette 45 of 2021), meaning a 4 week period in 2022 without a minimum wage.

Yours sincerely,

Duncan Cooke
Chairman, Labour Regulating Authority

cc. Attorney General