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Case Comment

REFLECTIONS ON STATUTORY INTERPRETATION OF THE EMPLOYMENT ACT AND EXTRA-CONTRACTUAL CLAIMS TO OVERTIME PAY

Hossain Rakib v Ideal Design & Build Pte Ltd
[2023] SGHC 166

[2023] SAL Prac 26

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I. Introduction

1 The Employment Act 1968[1] ("EA") is a primary piece of legislation under Singapore's labour laws which provides for the basic terms and working conditions for employees. Part 4 of the EA prescribes the working hours, rest days, overtime payments and other conditions of employment for more vulnerable employees such as workmen whose monthly salary does not exceed $4,500 and to other employees whose salary does not exceed $2,600.[2] For instance, s 36(1) of the EA provides that every employee must be allowed in each week a rest day without pay of one whole day which must be Sunday or such other day as the employer may determine from time to time.

1 2020 Rev Ed.
2 Employment Act 1968 (2020 Rev Ed) s 35.

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2 Under the EA, the employee is generally not required to work more than eight hours per day or 44 hours per week.[3] An employee who works more than those hours ("overtime") is generally entitled to the prescribed extra payments under the EA, subject to s 38(5) which provides that "an employee must not be permitted to work overtime for more than 72 hours a month".

3 The recent case of *Hossain Rakib v Ideal Design & Build Pte Ltd*[4] ("*Hossain Rakib v Ideal Design*") concerned s 38(5) of the EA. In this case, the General Division of the High Court had the opportunity to ascertain the legislative purpose of s 38(5), namely, whether s 38(5) was an absolute bar to an employee who was claiming remuneration after working *more* than 72 hours of overtime pay per month. In considering this issue, the court clarified that subsequent statutory amendments may be taken into account to ascertain the legislative purpose of a provision. The High Court eventually found that s 38(5) is a "protective" provision in favour of the employee. The provision protects the employee from being required to work more than 72 overtime hours in a month. Hence, while the legislative purpose of s 38(5) is to prevent an *employer* from requesting an *employee* to work overtime for more than 72 hours per month, s 38(5) does not operate to prohibit an employee from claiming for such overtime pay (in excess of 72 overtime hours) if the employee had been compelled by his or her employer to perform such overtime work.

4 This case note will first examine the facts and decision of *Hossain Rakib v Ideal Design* before delving into an alternative approach to ascertaining the legislative purpose of a provision. Further, it analyses whether the employee's contractual claim for overtime pay could have instead been framed as either a claim in *quantum meruit* and/or a claim in unjust enrichment.

II. Facts and decision

5 In this case, the appellant, Mr Hossain Rakib ("Mr Rakib") is a Bangladeshi national who was employed as a construction

3 Employment Act 1968 (2020 Rev Ed) s 38(1)(*b*).
4 [2023] SGHC 166.

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worker by the respondent, Ideal Design & Build Pte Ltd ("Ideal Design"). Between February 2021 and November 2021, the respondent required Mr Rakib to put in over 700 hours of overtime work. However, despite having completed the work, the Respondent refused to pay Mr Rakib as it was of the view that he was not legally entitled to claim for the overtime hours exceeding the statutorily prescribed limit of 72 overtime hours per month, pursuant to s 38(5) of the EA.

6 At the Employment Claims Tribunal, the tribunal magistrate (the "Judge") found that Mr Rakib was not permitted to claim remuneration for more than 72 hours of overtime pay per month.[5] The Judge had interpreted s 38(5) of the EA as imposing a *maximum* cap of 72 hours (the "Overtime Cap") that an employee may claim as overtime pay per month.[6]

7 Mr Rakib then appealed to the General Division of the High Court. Applying the principles of statutory interpretation as set out in the three-step framework in *Tan Cheng Bock v Attorney-General*,[7] Goh Yihan JC found that s 38(5) was not intended to prevent an employee from claiming remuneration for overtime hours beyond the 72 overtime hours per month. Instead, Parliament had intended for s 38(5) to protect employees and not to prejudice their rights to payment for work done, especially when the employee had been required by the employer to work overtime.[8] In this regard, the general purpose of Pt 4 of the EA, which s 38(5) is part of, is to improve employment standards and to afford better protection to more vulnerable employees who are engaged in manual labour or are paid lower wages.[9]

8 Importantly, Goh JC was of the view that the prevailing specific purpose of s 38(5) is to afford protection against onerous overtime work hours. The primary purpose of s 38(5), when it was first enacted in 1968, was "to regulate and limit the amount of extra work that a worker could do in order to generate

5 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2022] SGECT 109.
6 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [7].
7 [2017] 2 SLR 850.
8 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [3] and [41].
9 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [46] and [47].

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employment for more people in Singapore".[10] However, the specific purpose of s 38(5) changed when Parliament amended s 38(5) to increase the permitted number of overtime hours from 48 to 72 hours due to the change in the employment situation in Singapore, where there was a problem of "labour shortage". In light of this problem, the purpose of s 38(5) had thus shifted from limiting the number of hours employees could work overtime to protecting employees from onerous overtime hours that may be imposed "at the whim and fancy of the employers, without due regard to the health and well-being of the workers" [emphasis in original omitted].[11]

9 Therefore, Goh JC held that it would be inconsistent to construe s 38(5) as a provision to protect an employee but to prohibit the employee from claiming overtime pay after being asked by his employer to perform overtime beyond the Overtime Cap. Accordingly, the High Court held that Mr Rakib was entitled to overtime pay beyond the Overtime Cap.[12]

III. Statutory interpretation: subsequent amendments may be taken into account to ascertain the legislative purpose of a provision

10 A key aspect of the decision was that subsequent statutory amendments were taken into account to ascertain the legislative purpose of s 38(5).[13] Here, the subsequent statutory amendments relate to amending s 38(5) to increase the permitted number of overtime hours from 48 hours to 72 hours through s 2 of the Employment (Amendment) Bill.[14]

10 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [52].
11 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [50]–[53].
12 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [62].
13 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [42].
14 Bill No 28/71972. *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [53].

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A. The approach in Taw Cheng Kong v Public Prosecutor[15]

11 In determining the approach to interpreting s 38(5), Goh JC was of the view that:[16]

> … the court can and should still consider Parliamentary explanations to any subsequent *statutory amendments* to ascertain the legislative purpose behind a provision. In other words, when there has been an amendment to a statutory provision itself, it must not be readily assumed that the amended provision shares the same purpose as that of the previous version of the Act in which the provision is situated. [emphasis in original]

12 In this regard, the High Court re-affirmed the approach to the interpretation of amended statutory provisions in *Taw Cheng Kong v Public Prosecutor*[17] ("*Taw Cheng Kong*"). In *Taw Cheng Kong*, the High Court held that where the court is to determine the meaning of revisions to an Act of Parliament, it is to treat the material explaining the original Act with circumspection and it is not correct to rely on earlier material to interpret subsequent legislation. Instead, the correct approach is to look at the amended legislation "afresh".[18]

13 M Karthigesu JA provided three reasons to justify the *Taw Cheng Kong* approach. The first justification is based on ss 9A(3)(*b*) and 9A(3)(*c*) of the Interpretation Act[19] ("IA") which contemplate "the use of explanatory statements to a tabled Bill or a speech made by a Minister on the occasion of the motion for the second reading of the Bill" in the interpretation of a provision of a written law. Karthigesu JA was of the view that when the court is to interpret an amendment to an Act, the court must look not to the explanations to the Act itself, but to the explanations to the amendment.[20]

14 The second justification is based on s 9A(3)(*d*) of the IA which allows the court to consider "any relevant material in any

15 [1998] 1 SLR(R) 78.
16 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [43].
17 [1998] 1 SLR(R) 78.
18 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [40].
19 Cap 1, 1997 Rev Ed.
20 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [41].

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official record of debates in Parliament". In construing subsequent legislation, the court should not construe all legislation as if Parliament was in some way bound by its intentions when it first passed the original legislation. Instead, the court should construe why Parliament had saw fit to amend the original legislation "in the light of the inadequacies that the passage of time has revealed or new needs carried by the tide of progress".[21]

15 The third justification lies in s 17 of the IA, which provides that when construing an amended Act, it is the first duty of the court to determine whether the amendment was intended to be consistent with Parliament's intentions in passing the original Act. It is only in such a situation where the court may construe the amended Act and the original Act as one.[22]

16 Considering the above three justifications, it is argued that the *Taw Cheng Kong* approach to interpreting an amended legislation ought to remain as good law. As rightfully pointed out by Goh JC, the Court of Appeal in *Public Prosecutor v Taw Cheng Kong*[23] did not criticise the High Court's approach to the interpretation of amended statutory provisions.[24]

B. The Updating Principle

17 Importantly, Goh JC elaborated that the *Taw Cheng Kong* approach finds further support in the Court of Appeal decision of *AAG v Estate of AAH, deceased*[25] ("*AAG v Estate of AAH*"), where the Court of Appeal stated that "[i]t is a settled principle that a statutory provision should be construed in a manner which will take into account new situations which may arise and which were not within contemplation at the time of its enactment".[26] With regard to the approach in *AAG v Estate of AAH*, Goh JC was of the view that the Court of Appeal "must have been referring to statutory amendments when it alluded to 'new situations'

21 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [42].
22 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [43].
23 [1998] 2 SLR(R) 489.
24 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [43].
25 [2010] 1 SLR 769.
26 *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [30].

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which the court can take into account in interpreting the statute concerned".[27]

18 In relation to the above, it is argued that the Court of Appeal in *AAG v Estate of AAH* was not directly referring to statutory amendments when it alluded to "new situations". Instead, "new situations" ought to be read literally and would refer to changes in social conditions, developments in technology, *etc*, which have occurred since the time the statutory provision was first enacted.[28] This technique of taking into account "new situations" in statutory interpretation is known as the principle of updating construction, *ie*, the court is to apply to an ongoing Act a construction that takes account of relevant changes which have occurred since the enactment was enacted (the "Updating Principle").[29]

19 In *Wong Souk Yee v Attorney-General*,[30] the Court of Appeal clarified that the Updating Principle is:[31]

> … premised instead on the assumption that Parliament intends that the court will apply, in respect of a continuing statute, a construction which continuously updates the wording of the statute so as to allow for its application to circumstances as they change after the time the statute was initially framed …

20 The rationale behind the Updating Principle is explained by the learned authors in *Bennion on Statutory Interpretation*[32] ("*Bennion*") (which was cited in *Comptroller of Income Tax v MT*):[33]

> Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history.

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27 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [44].
28 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 410.
29 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 413.
30 [2019] 1 SLR 1223.
31 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [63].
32 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017).
33 *Comptroller of Income Tax v MT* [2006] 3 SLR(R) 688, citing Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 409.

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> While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. … Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.

21 An example of the application of the Updating Principle is illustrated in the case of *Victor Chandler International Ltd v Customs and Excise Commissioners*[34] ("*Victor Chandler*"), which was cited by the Court of Appeal in *AAG v Estate of AAH*.[35] In *Victor Chandler*, the claimant operated an offshore credit betting business in Gibraltar and proposed to broadcast its betting odds in the UK by direct electronic transmission from Gibraltar. The claimant sought a declaration from the English courts that the advertising of betting odds via *electronic* means in the UK would not be a breach of s 9(1)(b) of the Betting and Gaming Duties Act 1981[36] which provided that "any person who knowingly issues, circulates or distributes any advertisement in the United Kingdom relating to the making of bets shall be guilty of an offence". In this regard, the claimant argued that s 9(1)(b) applied only to advertisements of betting odds in *documentary* form. The lower court granted the declaration. On appeal, the English Court of Appeal held that to construe s 9(1)(b) as applying only to advertisements in documentary form without taking into account the technological advances since 1952 would clearly undermine the legislative purpose of s 9(1)(b), which was to protect the revenue derived from betting duty by prohibiting offshore bookmakers from advertising in the UK for business. Sir Richard Scott VC was of the view that although when enacting a provision about advertisements in 1952 Parliament could not have contemplated the means by which advertisements could now be distributed electronically, in order to prevent the provision being undermined, it was necessary and appropriate

34 [2000] 1 WLR 1296.
35 *AAG v Estate of AAH, deceased* [2010] 1 SLR 769, citing *Victor Chandler International Ltd v Customs and Excise Commissioners* [2000] 1 WLR 1296 at [30].
36 c 63 (UK).

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to give the expression "advertisement" an "always speaking" or ambulatory construction to take into account developments since the provision was originally enacted. Therefore, applying the Updating Principle, the English Court of Appeal held that advertisement of betting odds via electronic means would be caught under s 9(1)(b) and accordingly, the claimant's declaration was set aside.

22 In light of the above, it is argued that the Updating Principle may not be the appropriate tool to interpreting the legislative purpose of s 38(5). This is because the Updating Principle is generally used to construe a statutory provision in a manner which allows for relevant changes whilst giving effect to the *original intention* of that provision.[37] As explained by the learned authors in *Bennion*:[38]

> In construing an Act (other than those whose meaning and application are, exceptionally, fixed in time), the interpreter is to presume that Parliament intended that the Act to be applied at any future time in such a way as to *give effect to the true original intention, making allowances for any relevant changes that have occurred since the Act's passing*. [emphasis added]

23 However, in the present case, the court was *not* attempting to construe s 38(5) in a manner which gave effect to the original intention of the provision, *ie*, to regulate and limit the amount of overtime work and pay which a worker could do and earn. Instead, the court's focus was on determining the current legislative intention of s 38(5) in light of the subsequent statutory amendments which were made to s 38(5).

C. The Evolution Technique

24 Aside from the *Taw Cheng Kong* approach, this note argues that the legislative evolution technique of statutory interpretation (the "Evolution Technique") is an alternative tool which can be used to interpret an amended statutory provision such as s 38(5).

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37 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 409.

38 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 409.

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25 A useful explanation of the Evolution Technique is provided by the learned authors in *Bennion*:[39]

> Where a subject has been dealt with by a developing series of Acts, the courts often find it necessary, in construing the latest Act, to trace the course of this development. By seeing what changes have been made in the relevant provision, and why, the court can better assess the intended current meaning.

26 For context, the Evolution Technique has been well accepted and established in English law.[40] The case of *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd*[41] ("*Mitsui Sumitomo Insurance*") serves as an apt illustration of the application of the Evolution Technique. In *Mitsui Sumitomo Insurance*, the UK Supreme Court considered the recoverability of loss caused by the London riots of August 2011. Section 2(1) of the Riot (Damages) Act 1886[42] (the "1886 Act") states that police fund compensation is available to any person who has "sustained loss by … injury, stealing or destruction". The relevant question was whether the word "loss" encompassed only physical damage, or whether it included other heads of loss such as consequential loss.

27 The UK Supreme Court drew its answers "from the interpretation of the 1886 Act in the context of the prior legislative history since 1714".[43] From a historical analysis of the previous iterations of the 1886 Act, the Supreme Court found that (a) the law before 1714 "allowed the community to escape liability if hue and cry were raised and the offenders caught",[44] and (b) previous iterations of the relevant 1886 Act provision (such as that found

39 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at p 594.

40 See Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at pp 594 and 595, citing *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18, *Government of the United States of America v Jennings* [1983] 1 AC 624 at 641, *In re Consolidated Goldfields of New Zealand LD* [1953] Ch 689 at 694 and *NWL Ltd v Woods* [1979] 1 WLR 1294 at 1311–1312.

41 [2016] UKSC 18.

42 c 38 (UK).

43 *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18 at [18].

44 *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18 at [26].

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in the Malicious Damage Act 1812[45] and Malicious Damage Act 1816[46] – both now repealed), contained indications that the statutory compensation was limited to physical damage to property and did not extend to consequential losses. Accordingly, the UK Supreme Court held that the word "loss" in the 1886 Act was limited only to physical damage.

28 On a closer analysis, it could be said that the High Court in the present case was, in substance, applying the Evolution Technique to interpret the current legislative purpose of s 38(5) through tracing the legislative history of s 38(5). In this regard, the High Court traced the legislative history of s 38(5) to its original enactment in 1968. With reference to the speech by the then Minister for Foreign Affairs and Minister for Labour, Mr S Rajaratnam, Goh JC determined that the primary purpose of s 38(5), when it was first enacted in 1968, was to regulate and limit the amount of extra work that a worker could do and consequently, the amount of overtime pay earned by the worker. At that time, this statutory prescribed limit was thus necessary in order to spread out employment opportunities and to generate employment for more people in Singapore during that period.

29 However, the legislative purpose of s 38(5) subsequently changed in 1972 when Parliament amended s 38(5) to increase the permitted number of overtime hours from 48 to 72. At that time, the employment situation in Singapore was faced with a different problem –the problem of "labour shortage". In light of this, the purpose of s 38(5) had thus shifted from limiting the number of hours employees could work overtime to protecting employees from onerous overtime hours that may be imposed "at the whim and fancy of the employers, without due regard to the health and well-being of the workers".[47]

30 This change in legislative purpose, *ie*, to protect employees against onerous overtime working hours has continued to date. In this regard, Goh JC examined the then Acting Minister for

45 52 Geo III, c 130.
46 56 Geo III, c 125.
47 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [53].

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Manpower Mr Tan Chuan-Jin's answers to the following questions in relation to the contravention of overtime work limits:[48]

> … [S]ince 2005[,] (a) how many companies have applied for exemption from Section 38(5) of the Employment Act with regard to the extent of overtime work; (b) how many companies have contravened the Act due to overtime work that exceeded the limits; and (c) whether allowing for such exemptions will put workers from low-wage sectors at a disadvantage.

31 Goh JC found that the Minister's answers uniformly pointed to the employee's welfare being the main focus of s 38(5). Therefore, the current legislative purpose of s 38(5) remained, *ie*, to protect employees against onerous overtime working hours. The court stated:[49]

> In his answer, Mr Tan Chuan-Jin explained that if employers require their employees to work more than 72 hours of overtime in a month, they must apply for an exemption from the Commissioner. He further explained that in granting this exemption, the Ministry of Manpower 'takes into account the company's operational requirements and the workers' welfare[,] particularly their safety and health[,] *to make sure that they are not being compromised*'. He added that the employers have to satisfy the Commissioner that they have, among others, 'obtained the consent of employees in extending their overtime hours … [and that] they have a good record for maintaining both *health and safety as well as employment standards*'. ***As can be seen, Mr Tan Chuan-Jin's responses uniformly point to the employee's welfare as being the main focus of s 38(5).*** In fact, he also explained that the failure to comply with s 38(5) is an offence under the law, and that between 2008 and 2011, 260 employers were found to have contravened the limit of overtime work … ***As such, it is clear that the prevailing legislative purpose behind s 38(5) is to protect employees against onerous overtime hours.*** [High Court's emphasis in *Hossain Rakib v Ideal Design* in italics; emphasis added in bold italics]

32 In light of the above, it is argued that the High Court, through tracing the legislative history of s 38(5), was essentially applying the Evolution Technique to interpret the current legislative purpose of s 38(5). While the Evolution Technique has

48 Singapore Parl Debates; Vol 89, Sitting No 10; Page 1043 (12 November 2012).
49 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [51].

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yet to be endorsed under Singapore law, it is argued that this technique would be in line with s 9A of the Interpretation Act 1965.[50]

IV. *Quantum meruit* and/or unjust enrichment as an alternate claim to breach of contract

33 In the present case, Mr Rakib's claim for overtime pay for hours worked beyond the Overtime Cap was framed as a claim for damages for breach of cl 6.4 of the employment contract between the appellant and respondent ("the Employment Contract"), "which can be measured by the overtime pay he would have been entitled to under the Salary Package"[51]. To elaborate:

(a) Clause 6.4 of the Employment Contract provided, among other things, that the appellant's "[t]otal overtime hours should not exceed 72 hours a month".[52]

(b) The "Salary Package" was a one-page document dated 17 January 2021 entitled "Salary Package", which set out the terms of Mr Rakib's remuneration.[53]

34 An interesting issue for consideration is whether Mr Rakib's claim for overtime pay could have instead been framed as a claim for *quantum meruit* and/or unjust enrichment and/or in the alternative to his contractual claim for damages of breach of cl 6.4 of the Employment Contract. Here, Mr Rakib's claim for overtime pay for hours worked beyond the Overtime Cap could instead be construed as an extra-contractual situation since his Employment Contract can be construed as silent on remuneration for hours worked beyond the Overtime Cap. Although such claims were not raised in this case, this note argues that there is an arguable chance that such claims may have succeeded as a matter of law.

50 2020 Rev Ed.
51 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [16] and [18].
52 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [14].
53 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [5].

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A. *Claim in* quantum meruit

(1) *The law*

35 Generally speaking, the Latin expression "*quantum meruit*" "means 'the amount he deserves' or 'what the job is worth' and denotes payment of a reasonable sum for work done where there is no agreement as to how much one is to be paid for that same work".[54]

36 As Judith Prakash J (as she then was) stated in *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim*,[55] there are two types of *quantum meruit* remedies: (a) contractual *quantum meruit*; and (b) restitutionary *quantum meruit*:[56]

> … two types of *quantum meruit* exist *viz* contractual *quantum meruit* and, secondly, restitutionary *quantum meruit*. Where there is an express or implied contract which is silent on the quantum of remuneration or where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in *quantum meruit* will be contractual in nature. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature. It is also relevant that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum and there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties.

37 As stated by Prakash J and previously stated by the Singapore Court of Appeal in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd*[57] ("*Lee Siong Kee*"),[58] a party cannot recover for *quantum meruit* if there exists a contract for services for an agreed sum.[59]

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54 Yvonne Foo and Ng Guo Xi, *Restitutionary Quantum Meruit Claims for Additional Payment in Construction Contracts* [2022] SAL Pract 24 at para 1.
55 [2007] 2 SLR(R) 655.
56 *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [123].
57 [2000] 3 SLR(R) 386.
58 *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386
59 *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 at [30], citing *Chitty on Contracts* vol 2 (Sweet & Maxwell, 28th Ed, 1999) at para 32-143.

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> *Remuneration under a quantum meruit may be awarded where there is a contract but it does not provide for remuneration, or does not do so for the circumstances which have arisen. But where the contract makes express provision for the agent to be remunerated only upon the happening of a certain event, he will not normally be entitled to claim reasonable remuneration on such a basis.* Such a claim would depend upon an implied promise to pay a reasonable sum if the event does not occur, and such an implication cannot normally be made because it would be inconsistent with the express terms of the contract. Thus, an estate agent was held not to be entitled to payment on a quantum meruit when the principal sold the property elsewhere. A term may only be implied where it is necessary to give business efficacy to the contract or otherwise to effect the intentions of the parties. The implication that a reasonable sum should be paid when the event upon which remuneration is due does not occur will therefore be rare. [emphasis in original omitted; emphasis added in italics]

(2) Application to the present case

38 On the facts of Mr Rakib's case, it may well be argued that he has a claim for contractual *quantum meruit*. While the Employment Contract as well as the Salary Package existed and there were thus contractual terms, it may be argued that these contractual terms were in actual fact silent on whether Mr Rakib should be entitled to overtime pay for hours worked beyond the Overtime Cap, and how the appropriate quantum of overtime pay should be assessed. This is because cl 6.4 of the Employment Contract specifically prohibited Mr Rakib from working beyond 72 hours of overtime a month. Thus, the hours worked by Mr Rakib beyond the Overtime Cap constitute a situation that falls outside the scope of his contractual terms, *ie*, an extra-contractual situation. Accordingly, the overtime hours worked by Mr Rakib *should not* be regarded as a "contract for services for an agreed sum" which is an exception to a *quantum meruit* claim. In the circumstances, Mr Rakib's contractual terms may well be regarded as not providing for overtime pay for the hours he worked beyond the Overtime Cap, and thus he should be entitled to a contractual *quantum meruit*.

39 In terms of assessing or quantifying the contractual *quantum meruit*, the amount of *quantum meruit* Mr Rakib may be entitled to may well be argued to be based on the remuneration

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he received for the first 72 hours of overtime each month that he received, *ie*, based on the stipulated remuneration stated in the Salary Package.

40 As an alternative to a claim for contractual *quantum meruit*, it may be argued that Mr Rakib has a claim for restitutionary *quantum meruit*. Such restitutionary *quantum meruit* can be said to arise from the breach of cl 6.4 of the Employment Contract by his employer, Ideal Design, in making him work more than 72 hours of overtime each month. The basis of such a claim is that Ideal Design was unjustly enriched by the overtime hours worked by Mr Rakib beyond the Overtime Cap, for which it was denying him overtime pay, and thus Mr Rakib be entitled under restitutonary *quantum meruit* to receive recompense for the overtime hours worked beyond the Overtime Cap.

B. Claim in unjust enrichment

(1) The law

41 Further or in the alternative, Mr Rakib could have sought to frame his claim for overtime pay beyond the Overtime Cap as a claim for unjust enrichment. The elements of a claim in unjust enrichment are as follows:[60]

(a) the defendant was enriched (the "first element");

(b) the enrichment was at the expense of the claimant (the "second element");

(c) the enrichment was unjust (the "third element"); and

(d) there were no defences available (the "fourth element").

42 In respect of the first and second elements of unjust enrichment (*ie*, that the defendant received a benefit at the expense of the claimant), there must be a nexus between the value that was once attributable to the claimant and the benefit

60 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [98].

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received by the defendant. This nexus is established where the defendant has (a) received an immediate benefit from the claimant, establishing a direct personal link; or (b) received a benefit traceable from the claimant's assets, establishing an indirect link through the value in the defendant's hands that once belonged to the claimant.[61]

43 In respect of the third element total failure of consideration or failure of basis is regarded as an unjust factor (see *Thong Soon Seng v Magnus Energy Group Ltd*[62] at [47] and [49]):

> 47 *In the law of unjust enrichment, a payer will recover money he has paid to a payee on the unjust factor of a total failure of consideration if the payer can establish that the basis on which the payer paid the money to the payee has completely failed.* It is that failure which renders the recipient's continued retention of the money unjust for the purposes of the law of unjust enrichment. The payee will be ordered to return the money to the payer, unless the payee can make out one of the established defences to a claim in unjust enrichment.
>
> …
>
> 49 It is possible for the basis of a payment to be a contract and for the basis to fail by reason of a vitiating factor rendering the contract void. An example of this is where a party to a putative contract makes a payment to the counterparty while both parties are labouring under a common mistake sufficiently fundamental to render the contract void (see, *eg*, *Ochroid Trading Ltd and another v Chua Siok Kui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [43(c)], citing *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 at [23]–[28]). … In those cases, the parties believed that they had a contract, and that contract formed the basis for a payment at the time the payment was made. Unknown to the parties, the law rendered their putative contract void. The vitiation of the contract served both to destroy the basis for the payment thereby establishing the total failure of consideration as an unjust factor and, at the same time, to wipe away the contract and the allocation of risks agreed within it as a legal bar to recovery in unjust enrichment.
>
> [emphasis added]

61 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [115].
62 [2023] SGHC 5.

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44 In respect of the fourth element, the claim for unjust enrichment is subject to the defence of illegality.[63] The defence is based on the principle of stultification which requires the court to examine whether allowing the claim would undermine the fundamental policy that rendered the underlying contract void in the first place. If yes, the claim should be dismissed on the basis of the defence of illegality.

(2) Application to the present case

45 On the facts of Mr Rakib's case, it may be possible to argue that all four elements of unjust enrichment are met as Ideal Design was unjustly enriched by the overtime hours worked by Mr Rakib beyond the Overtime Cap.

46 In respect of the first and second elements of unjust enrichment set out above (*ie*, that the defendant received a benefit at the expense of the claimant), Ideal Design could be said to have been enriched at Mr Rakib's expense as Ideal Design obtained the benefit of the overtime hours worked by Mr Rakib beyond the Overtime Cap without paying Mr Rakib for those overtime hours worked.

47 In respect of the third element of unjust enrichment set out above, it might be arguable that Mr Rakib could have asserted that there was total failure of consideration as the relevant unjust factor. It may be argued that the basis on which Mr Rakib worked the overtime hours beyond the Overtime Cap, *ie*, in expectation of getting overtime pay/compensation from Ideal Design for those hours, has totally failed.

48 In respect of the fourth element, while Ideal Design contended that Mr Rakib was not legally entitled to claim for the overtime hours exceeding the statutorily prescribed limit of 72 overtime hours per month, pursuant to s 38(5) of the EA, this argument was rejected by Goh JC in the High Court.[64]

63 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [159].
64 *Hossain Rakib v Ideal Design & Build Pte Ltd* [2023] SGHC 166 at [55].

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> … the protection afforded to employees by s 38(5) must extend to the *consequences* of exceeding the Overtime Cap. Thus, the proper interpretation of s 38(5) must be that it does not prohibit an employee from claiming his overtime pay for hours exceeding the Overtime Cap. [emphasis in original]

Hence, Goh JC clearly found that there was no illegality in this case.

V. Conclusion

49 The decision of *Hossain Rakib v Ideal Design* is welcome as it furthers one of the primary purposes of the EA – to set out and afford the minimum standard of protection for employees in Singapore. Such protection is all the more necessary for vulnerable employees such as workmen like Mr Rakib, who are more susceptible to being taken advantage of by their employers. Therefore, the authors agree that the High Court's determination of the legislative purpose of s 38(5) as a "protective" provision which did not bar an employee from claiming overtime pay for hours worked beyond the statutory limit of 72 hours per month, is in line and in furtherance of the general purpose of Pt 4 of the EA, which is focused on the protection of the *employee*.

50 As Goh JC noted, it would be inconsistent to the protective purpose of s 38(5) if the effect of the provision allows an employer to require an employee to work beyond the Overtime Cap, but then hide behind the provision which he himself has breached so as to avoid paying that employee any overtime pay beyond the statutorily prescribed Overtime Cap.

51 Importantly, this decision is significant in clarifying that subsequent statutory amendments may be taken into account when ascertaining the legislative purpose of a statutory provision and will likely serve as a useful illustration of the application of this approach.

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