NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT YOUNG, Plaintiff and Appellant, v. WESTPAC AIR CONDITIONING, INC., Defendant and Respondent.	E036184 (Super.Ct.No. COC017060) OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Reversed with directions.

Levine & Associates, Mark B. Levine; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiff and Appellant.

Kring & Chung, Timothy J. Broussard and Suzanne M. Rehmani for Defendant and Respondent.

1. Introduction

Plaintiff and appellant Robert Young (employee) settled his action against defendant and respondent Westpac Air Conditioning, Inc. (employer), for alleged failure to pay overtime wages, and other wage claims. The settlement agreement failed to indicate any award of attorney fees. The trial court ultimately awarded attorney fees to the employee on the part of the action related to some of the claims, and denied attorney fees as to portions of the action that had been based upon a different statute. The employee filed a notice of appeal as to the portion of attorney fees that was denied. For the reasons which follow, we reverse the order denying attorney fees.

2. Factual and Procedural History

The employee first worked for the employer as a service technician, servicing air conditioning units. He worked in this capacity for approximately one year. The employee then suffered an aggravation of existing medical problems and could no longer work as an air conditioning technician. The employer agreed to train him as a service dispatcher. He worked in that capacity for approximately seven months. He was terminated on March 22, 2002.

The employee then asserted a claim that he was entitled to unpaid overtime wages from the period when he had been a dispatcher. The employer denied the claim.

The employee then filed a limited jurisdiction complaint against the employer. The sole claim in the original complaint was for nonpayment of overtime while the employee worked as a dispatcher. It did not include any claim for overtime relating to

the employee's work as an air conditioning technician. The employee alleged causes of action based upon Labor Code sections 510 (failure to pay overtime) and 558 (failure to pay wages upon termination). The employee's complaint also sought recovery of penalties under Labor Code sections 201, 203, and 204, as well as attorney fees under Labor Code section 1194 (hereafter, § 1194). As the employee claimed less than $25,000 in unpaid overtime wages, the action was filed in a limited jurisdiction court.

At a first mediation session, the employer offered to settle for $15,000. The employee declined this settlement offer. With the court's permission, the employee filed a first amended complaint. The first amended complaint added allegations that the employer had failed to provide the employee with proper meal and rest breaks while he was a service technician (i.e., working in the field). The employee also alleged violation of Business and Professions Code section 17200 (unfair competition law).

In the spring of 2003, the employer made a formal offer to settle, pursuant to Code of Civil Procedure section 998, for $15,000, with each party to bear its own attorney fees. The employee failed to respond to this offer. Because of the added allegations, the employer deposed the employee a second time, in May of 2003.

The employee then notified the employer that the deposition brought to his attention an additional claim, that the employer had failed to pay him travel time. Because the employee broached this new claim approximately one week before the date set for trial, the employer's counsel informed the employee that he would either seek to exclude evidence of the new claim at trial, or move for a continuance to meet the new claim. The employee thereupon abandoned the effort to add the claim for travel time.

Among other things, the employer's motions in limine challenged the employee's claim for equitable relief under Business and Professions Code section 17200. The employee's counsel disavowed that the employee would seek relief on the unfair competition law claim, and indeed dismissed all claims relating to his work as a service technician. When the parties appeared for trial, therefore, the only claims before the court were those framed by the original complaint. Apparently, the employee's counsel intended to reserve the service-technician claims, including the travel time claim, for a different action involving multiple employees. The trial court advised counsel that, under the "one judgment rule," he might be foreclosed from pursuing those claims against the employer in a separate action. On the day set for trial, the employee's counsel asked to file a second amended complaint and to continue the trial, in pursuit of a "newly discovered" claim for travel time expenses, as well as a claim for denial of meal and rest breaks when he worked as a service technician. The court permitted the continuance and amended pleading, but ordered the employee to pay $4,500 to the employer, for costs in preparing for trial.

On July 14, 2003, the employee filed a second amended complaint, including claims for unpaid overtime when he worked as a dispatcher, compensation for meal and rest breaks when he worked as a service technician, and unpaid travel time when he worked as a service technician. The employee no longer claimed unfair competition violations. (Bus. & Prof. Code, § 17200.) The employee sought to reclassify the action as one of unlimited jurisdiction. Over the employer's objection, the court permitted reclassification as an unlimited jurisdiction case.

The employer moved for summary judgment or summary adjudication of issues, and the court ordered the matter to a mandatory settlement conference. At the mandatory settlement conference, on January 27, 2004, the employee's counsel announced he would abandon the travel time claim. The employee provided a breakdown of his other claims. After the settlement conference, the parties agreed to resolve the matter: The employer would pay $20,500. The employer would admit no liability. The employee agreed to dismiss the case. The settlement agreement was silent, however, on the issue of attorney fees.

After settlement, each party moved for attorney fees as the prevailing party. The court denied the employer's request for fees. The court granted in part, and denied in part, the employee's motion for fees. The court denied the employee's claim for fees to the extent any of the causes of action were based on section 1194, on the ground that fees under section 1194 may be awarded only upon a judgment. Inasmuch as the case was resolved by settlement, not judgment, no fees could be awarded. As to the remainder of the employee's claims, the court awarded only a modest amount of fees, $23,000 plus $1,026.25 in costs, under Labor Code section 218.5 (hereafter, § 218.5). The court agreed that the employee was the prevailing party on those claims, but ruled that the case had been overlitigated, so that the employee was not entitled to the full amount requested.

After the court had ruled on the motions for attorney fees, but before filing a notice of appeal from that ruling, the employee voluntarily dismissed the action with prejudice. The employee gave written notice that the action had been settled on or about

February 9, 2004. The court ruled on the motions for attorney fees on or about April 13, 2004, and May 4, 2004. The order of the court was filed on May 21, 2004. The employee filed a dismissal on or about June 9, 2004. The employee filed a notice of appeal on or about June 30, 2004. The hearing scheduled on an order to show cause re dismissal after settlement was vacated on or about July 1, 2004.

3. Discussion

A. The Appeal Is Proper

The employer raises the preliminary argument that, because the employee dismissed the complaint below before filing a notice of appeal, the employee has no standing to appeal. The employee responds, in the reply brief, that a party "has standing" if he or she is "aggrieved" by a judgment or order. Because the employee is aggrieved by the denial of attorney fees on his section 1194 claims, he "has standing" to appeal that order.

The employee is correct. A person aggrieved by an order or judgment has standing to appeal. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) The employee here was aggrieved by the order denying in part his motion for attorney fees. (See *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 396 ["Although Whole Foods is correct Giampietro was not adversely affected by the order denying its motion for final approval of the settlement, he was plainly *aggrieved by the subsequent order denying his request for attorney fees and has standing to appeal that order*"] (italics added).)

The disposition of issues tendered by the operative pleading does not mean that there are no appealable issues. Code of Civil Procedure section 904.1 provides that appeals may be taken from judgments (Code Civ. Proc., § 904.1, subd. (a)(1)), from orders after appealable judgments (Code Civ. Proc., § 904.1, subd. (a)(2)), and from an interlocutory judgment directing the payment of money over $5,000 (Code Civ. Proc., § 904.1, subd. (a)(11)), and in other instances.

The dismissal of the action on June 9, 2004 operated as a "judgment" in the case: "A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) "'A judgment is final "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."' [Citations.] [¶] . . .'A judgment that leaves no issue to be determined except the fact of compliance with its terms is appealable.' [Citation.]" (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.)

"Generally, appellate courts will treat a voluntary dismissal with prejudice as an appealable order if the appellant entered the dismissal after an adverse ruling by the trial court in order to facilitate an appeal from the ruling." (*Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 53.) That is what occurred here. The voluntary dismissal of the second amended complaint did not divest the employee of the standing or the right to appeal the attorney fees order.

In addition, the "collateral order doctrine" permits appeal from the trial court's ruling on a collateral matter, where that ruling is substantially the same as a final

judgment, i.e., it leaves the court no further action on a matter which is severable from the general subject of the litigation. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561.) An order denying attorney fees is an order on a collateral matter, and therefore appealable. (See *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [order reducing temporary spousal support and denying attorney fees is an appealable collateral order].) Here, the attorney fees order was appealable "as a final determination on a collateral matter requiring payment of money. [Citations.]" (*Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 432.)

We are satisfied that the employee's appeal is proper.

B. The Court Erred in Holding That Section 1194 Did Not Permit Recovery of Attorney Fees

(1) The Employee Was Entitled to Reasonable Attorney Fees Under Section 1194

(a) Standard of Review

The trial court denied attorney fees as to the portion of the case brought under section 1194 on the ground that the employee was paid money as a result of a "settlement" rather than a "judgment." In so ruling, the court relied upon certain language in *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, which interpreted section 1194. The case thus turns upon the correct construction of the statute and relevant case law. The crucial issue – statutory interpretation – is one of law, which we review independently. (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 560.)

(b) The Statutory Scheme

The employee's various claims were governed by different parts of the Labor Code. Section 1194 governs the duty of the employer to pay minimum wages and overtime. It provides in relevant part: "(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

As explained in *Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th 805, the attorney fees provision of section 1194 is a one-way fee-shifting statute. It gives employees the right to recover reasonable attorney fees in a successful action for minimum wage or overtime compensation. Employers do not have a corresponding right to attorney fees for successful defense of such claims. The one-way attorney fees provision is a remedial measure intended to protect employees from violation of the minimum wage laws. (See *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1428 [amendment of section 1194 to add attorney fees in addition to costs for minimum wage and overtime claims was intended "to provide to *overtime* compensation claimants the *additional* remedies of interest, liquidated damages and attorney's fees as a 'needed disincentive to violation of *minimum* wage laws'"].)

Section 218.5, on the other hand, governs attorney fees with respect to other wage and benefit claims, aside from the statutorily based minimum wage and overtime claims. Section 218.5 provides reciprocally for attorney fees to be awarded to the "prevailing

party" in these other claims. It provides in pertinent part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. . . . [¶] This section does not apply to any action for which attorney's fees are recoverable under Section 1194." Minimum wage and overtime claims are thus expressly exempted from the bilateral "prevailing party" attorney fee provisions of section 218.5.

The reason is clear: minimum wage levels and overtime are matters governed by statute. Wages above the minimum wage and other incidents or benefits are not. "Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy." (*Earley v. Superior Court*, *supra*, 79 Cal.App.4th 1420, 1430.)

The provisions of section 1194 and section 218.5 are mutually exclusive: "There can be no doubt that the one-way fee-shifting rule in section 1194 was meant to 'encourage injured parties to seek redress—and thus simultaneously enforce [the minimum wage and overtime laws]—in situations where they otherwise would not find it economical to sue.' [Citation.] To allow employers to invoke section 218.5 in an overtime case would defeat that legislative intent and create a chilling effect on workers who have had their *statutory* rights violated. Such a result would undermine statutorily-established public policy. That policy can only be properly enforced by a recognition

that section 1194 alone applies to overtime compensation claims." (*Earley v. Superior Court, supra*, 79 Cal.App.4th 1420, 1430-1431.)

(c) The Employee's Award Was Attributable in Part to Recovery of Overtime Wages

Here, the employee asserted claims for nonpayment of overtime compensation when he worked as a dispatcher. This claim was governed by section 1194. He also asserted claims for unpaid meal and rest breaks when he worked as a service technician, as well as unpaid travel time to and from job sites when he worked as a service technician. These claims were subject to section 218.5. The employee claimed approximately $10,000 to $11,000 in unpaid overtime wages for his work as a dispatcher, approximately $5,500 for unpaid meal breaks and rest breaks as a technician, and approximately $4,400 for unpaid meal breaks and rest breaks as a dispatcher, plus penalties and interest. The employee had abandoned the claim, first raised in the second amended complaint, for unpaid travel time while he worked as a technician.

The settlement agreement does not itself appear in the record. Nevertheless, the parties state that the matter was settled for a payment from the employer to the employee of $20,500. The employer did not admit any liability. The parties apparently agreed that the $20,500 sum was for the purpose of avoiding the time and expense of a trial. The moneys were to be defined as wages, penalty and interest, with no specific designation attributed to the various elements, such as overtime, meal or rest break compensation, or travel time. The parties also apparently agreed that the trial court would make any determinations as to attorney fees.

In making the attorney fees award to the employee, the court agreed that some allocation of the settlement amount would have to be made to distinguish the portion of the claims subject to section 1194 and the portion subject to section 218.5. The employee adverted to the documentation he relied on at the last mandatory settlement conference, in which he asked for approximately $30,000 for all the claims, including approximately $10,000 for unpaid overtime. The court apparently accepted this indication that the settlement value was proportionately approximately one-third attributable to the overtime wages claim: "And I think the cost far exceeded the nature of this particular case. [¶] And I do think that part of the costs are appropriately allocated to overtime wages. [¶] You're indicating now about one third, my indication, I had assumed that, from reading all the papers, that the overtime was one of the bigger issues for you."

The employee had sought approximately $113,900 in attorney fees and $1,331.85 in costs for the entire action. The court ruled that section 1194 did not apply because the payment to the employee was accomplished by a settlement rather than by a judgment. The court therefore determined that attorney fees for the overtime component of the award were not recoverable. As to the remainder of the recovery, attributable to non-overtime issues, the court found that the employee was the prevailing party, under section 218.5, and awarded $23,500 in attorney fees and $1,026.25 in costs to the employee. We now turn to an analysis of this ruling under the applicable statutory language and case law.

(d) "Recovery" of Overtime Wages "in a Civil Action" Under Section 1194 Includes Recovery by Settlement

As noted, section 1194 provides that an employee claiming unpaid minimum wages or statutory overtime, "is *entitled to recover in a civil action* the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Italics added.)

Where an employer fails to pay overtime, an employee has the option of seeking a judicial remedy by filing an ordinary civil action against the employer, or of seeking an expedited administrative remedy before the Labor Commissioner. (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 218.) If an employee chooses to proceed by administrative review, then the authority to award attorney fees is limited to that fixed in the administrative procedure statutes. The administrative procedure is designed to be informal and swift; thus, "the commissioner has no occasion to consider, much less award, attorney fees or other costs in the administrative proceeding . . . ." (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 368.)

Section 1194, on the other hand, applies only to a "civil action." The *Sampson* court held that the reference to "a civil action" was plain, and meant "a court action, not an administrative proceeding under section 98." (*Sampson v. Parking Service 2000 Com., Inc.*, *supra*, 117 Cal.App.4th at p. 223.)

Here, the employee *did* file a civil action in court for the recovery of unpaid statutory overtime. *Sampson* is therefore no bar to the employee's claim for attorney fees under section 1194.

Even though the employee ultimately represented to the court, based on settlement negotiations, that one-third of his settlement request was based upon the overtime claim, it was plain that the overtime claim was one of the, if not the only, primary rights sought in the action. The meal and rest period claims were added many months later, along with the unfair competition law claim, which was ultimately dismissed. The employee proposed to add the travel time claim, withdrew the proffer before adding it, added it, and abandoned it, in the course of the litigation. Each claim proliferated into other claims: for example, the employee alleged that each claim for unpaid overtime, meal breaks, rest breaks, or travel time also resulted in a violation of the statutory obligation to pay an employee all wages upon termination. (Lab. Code, § 201.) The amount of unpaid overtime claimed was consistently stated to be somewhere approximately in the $10,000 to $11,000 range. Each of the other claims was, individually at least, substantially less. Thus, even though, under the settlement agreement, the employer did not *admit liability*, i.e., that unpaid overtime or other compensation was actually owed, there can be no doubt that some significant portion of the employee's recovery was attributable to the claim for unpaid overtime.

Was the "settlement" a "recovery" of overtime payments within the meaning of section 1194? The employer argued, "no," and the trial court agreed. The sole authority for that conclusion was language drawn from *Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th 805.

In *Bell*, the class action plaintiffs won a motion for summary adjudication on one of the employer's affirmative defenses. The class plaintiffs moved for an interim award

of attorney fees, claiming authorization under section 1194. The trial court awarded the fees (over $1 million), and the employer appealed. The appellate court held that in that procedural posture where the case, including other affirmative defenses, remained to be tried, section 1194 could not be applied to award *interim* attorney fees. (*Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th at p. 831.) The court stated, "'We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]' [Citation.] Though the term 'to recover' has a range of possible meanings, we think that in the context of a civil action it ordinarily denotes the securing of a judgment. . . . [T]he narrower legal sense of the term 'recovery' means '"the obtaining [by judgment] of some right or property which has been taken or withheld from him." [Citation.]' [Citation.] [¶] We therefore read the phrase 'to recover in a civil action the unpaid balance of the full amount of . . . overtime compensation' as referring to a recovery by judgment. (Lab. Code, § 1194, subd. (a).) It follows, we think, that the phrase 'including interest thereon, reasonable attorney's fees, and costs of suit' has reference to the existence of such a judgment and refers to items included in that judgment. Indeed, the reference to interest and costs of suit can only refer to items awarded in a judgment. . . . It would be inconsistent with the syntax of the statutory language to construe it as authorizing one kind of prejudgment recovery—attorney fees—and three forms of recovery awarded in a final judgment—unpaid overtime compensation, interest, and costs of suit." (*Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th at p. 831.)

Other discussion by the *Bell* court indicates that "judgment" in that context was to be contrasted with an interim ruling. It was particularly problematic that "the present award is subject to a possible need for future adjustments. Plaintiffs point out that, if the order awarding interim attorney fees is affirmed, the decisional underpinning of the order would apply to later stages of the litigation under the doctrine of the law of the case. But it still remains difficult to project the future course of the litigation. The complaint seeks various forms of relief, including an accounting, injunctive relief, and failure to pay compensation upon employee termination, and the answer raises additional affirmative defenses, which may conceivably still be litigated. Moreover, we note that the order granting the interim award did not entail a review of the order for class certification. A reversal or dramatic modification of this order would potentially affect the determination of a reasonable fee." (*Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th at p. 832.) In other words, the plaintiff employees might ultimately not "recover" at all; section 1194 authorizes an employee to "recover" attorney fees, i.e., at the end of the case.

Here, while the employee's "recovery" was by settlement, it was manifestly not an award based on an interim ruling. The "civil action" was complete, and no further issues remained to be adjudicated with respect to the employee's entitlement to recover on the unpaid overtime claim.

The *Bell* court correctly noted that, "ordinarily," the term recovery "denotes the securing of a judgment." (*Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th at p. 831.) But what does "judgment" mean in this context? In the procedural posture in *Bell*, the term "judgment" was to be contrasted with "interim order." Code of Civil Procedure

section 577 states: "JUDGMENT DEFINED. A judgment is the final determination of the rights of the parties in an action or proceeding." The settlement had precisely this effect: it was an agreement reached by the parties, representing a final determination of all their rights (except for the issue of attorney fees).

The employer argues that, "[c]onspicuously absent" from Code of Civil Procedure section 577 "is the word 'settlement.'" Nonetheless, a stipulated or consent judgment – a settlement – is a judgment on the merits. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 58.) In addition, an order dismissing an action with prejudice is a judgment, and appealable. (See *In re Sheila B.* (1993) 19 Cal.App.4th 187, 197.) The dismissal with prejudice here, although voluntary, was part and parcel of the settlement agreement. The court had calendared an order to show cause re dismissal, to ensure that the dismissal would take place by court order, if not by the parties' actions.

That the attorney fees issue itself was not included in the settlement agreement does not rob the agreement of its force as a final judgment on the merits. The entitlement to attorney fees logically follows a determination of the rights of the parties on the main subject matter of the action. A post-judgment order awarding attorney fees is separately appealable. (*R. P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.) Such post-judgment orders are common.

We agree with the employee that an important policy of section 1194 would be undermined if the employer's interpretation, that a "recovery" requires a "judgment," not a "settlement," were accepted. Parties would be unwilling to settle such claims if, by agreeing to dispose of the case without a trial, the statutory entitlement to attorney fees

would be forfeit. As the employee's counsel argued: "I feel like now I'm being told, 'You had to go to trial, get your judgment; otherwise you're not entitled to the attorney's fees.'" Given the substantial public policy favoring settlement of civil lawsuits (see, e.g., *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 277, 278; *Milicevich v. Sacramento Med. Center* (1984) 155 Cal.App.3d 997, 1006), plaintiff employees would be punished for settlement by the loss of a substantial right.

We strongly disagree with the substance of the employer's contrary argument, that "no employer is incentivized [*sic*] to settle an overtime claim knowing that they will always be hit with an award of attorney fees . . . ." The employer posits that the public policy underlying the attorney fees provision of section 1194 is "to be a deterrent to employers who insist that an overtime claim be taken to trial rather than settle out of court. The purpose," according to the employer, is "to allow an employee to recover their attorney fees if they see their claim for overtime through a trial on the merits; prove the overtime they are owed; recover the full amount of overtime claimed;[1] spend their own money on attorney fees; and are successful on their claims at trial." We discern no such narrow legislative intent.

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1 We reject the employer's suggestion that the language of section 1194, that the employee is "entitled to recover in a civil action the unpaid balance of the *full amount of this . . . overtime compensation*, including . . . reasonable attorney's fees," should be read to deny attorney fees in any case in which an employee actually secures less than "the full amount" of overtime claimed. Such an evanescent attorney fees provision would provide little or no deterrent to employers who fail to meet their statutory obligations to pay overtime wages.

Rather, the Legislature found that adding the attorney fee remedy was "'especially necessary in situations where the employees themselves pursue a private action to recover unpaid wages or overtime.'" As in other cases where claims are generally small and peculiar to an individual, wronged employees might not be able to afford redress for their claims if they could not recover the attorney fees required to pursue them. (See *Earley v. Superior Court*, *supra*, 79 Cal.App.4th at p. 1428.) Liability for attorney fees encourages, and does not "disincentivize" settlement. The parties may include disposition of attorney fees within the settlement agreement. There is no reason to believe that the amount of attorney fees cannot be compromised, as well as any other issue in the case.

There is nothing about the settlement agreement, which encompassed the voluntary dismissal with prejudice, which vitiates its status as a judgment for purposes of section 1194. *Bell* does not suggest otherwise. *Bell* addressed "recovery" in a wholly different context: the distinction between a "judgment", i.e., a final determination on the merits and an "interim," i.e., a non-final, order. The "settlement" here was equally a final determination on the merits as a "judgment" obtained after a trial.

We conclude, therefore, that the trial court erred in holding that the employee was not entitled to recover attorney fees for the portion of the award attributable to the statutory overtime claim. The order denying attorney fees in that respect must be reversed.

C. The Amount of Reasonable Attorney Fees Is Within the Discretion of the Trial Court

The trial court granted attorney fees only for a portion of the settlement award, the portion attributable to all issues other than the section 1194 overtime claim. The employee does not raise any substantive challenge to the trial court's attorney fee award on the non-overtime portion of the case. The sole argument as to the amount of attorney fees was that the court erred in failing to award any fees for the overtime portion of the case. The employee does argue that the overtime claim was "most of the litigation," and that the award as the prevailing party under section 218.5 was "only a small portion" of the attorney fees he was due.

As we have noted, the employee's counsel at argument in the trial court indicated that his allocation, according to his unsuccessful settlement offer at the last mandatory settlement conference before trial, was approximately one-third, or $10,000 of a $29,000 compromise, attributable to the overtime claim. The trial court appears to have accepted that allocation; it expressly stated that it could not make any award without some kind of allocation between the overtime and non-overtime claims.

Because we now reverse the attorney fees order in part, i.e., the part denying attorney fees on the section 1194 claims, it will be incumbent upon the trial court to determine how much to award. The determination of the amount of attorney fees which it may be reasonable to award is, of course, a matter confided to the discretion of the court. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 25; *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) In fee-

shifting cases, the court may select a touchstone figure based upon a reasonable number of hours spent on the litigation, multiplied by a reasonable hourly rate. (*Lealao v. Beneficial California, Inc.*, *supra*, 82 Cal.App.4th 19, 26.) The touchstone figure may then be adjusted, upward or downward, by taking into account other factors, such as the "'quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.'" (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833.) Where the amount of time spent on a particular litigation is unreasonable, and unproductive, the court may employ a negative multiplier reducing a touchstone amount. (*Id.* at p. 834.)

Here, the trial court already had taken account of several of these factors in fixing the award for the non-overtime portion of the case. The court noted that, although the quality of the representation of the employee was good, the case was an average case. It was not particularly difficult, though it required a modicum of skill in the area of law. The court also noted that the result—approximately a $20,000 recovery—did not reach the jurisdiction for an unlimited claim. The employer had offered $15,000 much earlier in the case, when the attorney fees incurred had been much lower. The employee's counsel did "a lot of flip-flopping . . . adding claims, taking them back," over matters which it should have been simple to ascertain by the simple expedient of taking an adequate history, i.e., asking the client. The employee was seeking attorney fees of $113,900 in a $20,000 case. The court remarked, "I'm looking at, you know, hundred-thousand-dollar bills [in] a case that doesn't seem excessively complicated, and seems

that it may have been overlitigated. [¶] And I think the cost far exceeded the nature of this particular case."

Having reviewed the entire record, we agree with the trial court's assessment of this litigation. It was not complex. It was not difficult. The cost of litigating the case compared to the result achieved was severely disproportionate. There were many unnecessary costs incurred. The amount of time spent was excessive, and much of that time was unproductive, justifying a diminution of the fees requested.

Had the court considered attorney fees on the entire settlement amount, including the section 1194 portion, and had it awarded $23,500 for the entire litigation in the first instance, we would be hard pressed to have found that award unreasonable or beyond the bounds of the court's discretion. As it stands, however, the trial court determined that the $23,500 awarded was appropriate for the increment attributable to non-overtime issues. It excluded whatever measure of attorney fees might be attributable to the overtime portion of the litigation.

We remand the matter for the trial court to consider and to award reasonable attorney fees under section 1194, on the portion of the litigation allocable to the overtime claim, already accepted to be approximately one-third of the recovery.

DISPOSITION

The trial court erred in holding that the employee was not entitled to recover attorney fees under section 1194. The order denying attorney fees on that portion of the case is reversed. The matter is remanded for the trial court to consider and award reasonable attorney fees on the increment of the settlement award attributable to the

section 1194 overtime claim, bearing in mind the court's previous findings as to the nature of the litigation, the quality of representation, the skill needed, the result achieved, whether a positive or negative multiplier should be employed, and other appropriate factors.

In the interests of justice, each party is to bear its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ GAUT

J.

We concur:

/s/ RAMIREZ

P. J.

/s/ RICHLI

J.