

IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

ERT Criminal Case No 16 of 2012

BETWEEN: LABOUR OFFICER

Complainant

AND: SUDESH GOVERDHAN AS PROPRIETOR OF FUEL CAFE N BAR

Employer

Counsel: Messrs W Tokolau and R Morin, for the Complainant
Mr Sudesh Goverdhan for the Employer

Date of Hearing: Thursday 14 February 2013

Date of Judgment: Tuesday 26 February 2013

DECISION

FAILURE TO PRODUCE ON DEMAND TIME AND WAGES RECORDS – Section 45(2) Employment Relations Promulgation 2007; Failing to pay wages upon demand - Section 247(b) Employment Relations Promulgation 2007; General Penalty Offences -Section 256 Employment Relations Promulgation 2007.

1. The Employer has been charged with having committed two offences under the *Employment Relations Promulgation 2007*.
2. The first is that he failed to produce on demand wages and time records contrary to Section 45(2) of the *Employment Relations Promulgation 2007*. The second, that he failed to pay wages upon demand in writing, contrary to Section 247(b) of the *Employment Relations Promulgation 2007*.

3. The offences relate to the wages of a former employee of the Fuel Café N Bar, who was engaged at the café during the period 13 May 2009 to 29 May 2011.
4. The matter before the Tribunal had some strange elements to it.
5. Firstly at the commencement of proceedings, representatives of the current business attended in court¹, rather than the former business owner, Mr Goverdhan. As it transpires, Mr Goverdhan sold the business in May 2012.
6. Further, Mr Goverdhan's attendance came about only after some enquiry and after his former Industrial Advocate, Mr Kamlesh Sharma had also been called to assist the Tribunal understand the status of the matter.
7. When Mr Goverdhan did attend the Tribunal, he initially indicated that he had no knowledge of the matter being set down and that it was his intention to be represented in proceedings by Counsel. I was not prepared to delay any further this matter, given that it related to outstanding wages owed to a worker, from in excess of three years ago.²
8. In this regard, there appeared to be conflicting submissions made to the Tribunal. In the case of Mr Sharma, the last Industrial Advocate on the record for the Employer, he claimed that he had only been requested to attend one call over hearing, after which time he was not contacted further by Mr Goverdhan. On the other hand, Mr Goverdhan stated to the Tribunal that he had paid Mr Sharma \$900.00 in attending to the matter and for that reason had assumed that the response to the complaints of the Labour Officer were being adequately addressed.³

¹ There is a lesson here for the Labour Office in properly identifying the employer in such cases.

² I was also mindful of the submissions of Mr Tokalau, that indicated the Department had been in frequent contact with Mr Goverdhan in relation to this complaint and that he was well aware that it remained unresolved.

³ I am not necessarily convinced that this was an honestly held belief.

9. The issue as to whether Mr Sharma performed his contractual obligation with Mr Goverdhan is not that pertinent to these proceedings.⁴ Mr Goverdhan would be quite free to pursue Mr Sharma should he think he needs to, for failure to perform his contractual obligations.
10. The issue before this Tribunal remained, that of failure to produce time and wages records and failure to pay wages on demand.
11. I have no doubt that the demands were effected on the former proprietor of the business.
12. Despite Mr Goverdhan initially denying that he had not received the Form ER 17 Demand Notice, I am satisfied from the evidence of Mr Samisoni Mataitoga, Labour Inspector, that he was served with the notice. As Mr Mataitoga was in Nadi, with the use of a telephone device and with the assistance of court staff capturing a photographic image of Mr Goverdhan, he was identified by Mr Mataitoga, as that person who he had personally served the demand notice on.⁵
13. Mr Morin for the Labour Office, also advised the Tribunal that he had served Mr Goverdhan with a *Demand Notice of Payment* by letter dated 11 April 2012, by placing the letter on the counter of the bistro.
14. Given that there appeared to be a prima facie case against Mr Goverdhan and that significant costs had been expended to date by the Labour Office and Tribunal in advancing this matter, I formed the view that it should be dealt with immediately.

⁴ That is not to say that it is not relevant to any defense or excuse that Mr Goverdhan may advance in relation to why the demands were not met.

⁵ Mr Mataitoga gave evidence to the tribunal by way of telephone.

15. Mr Goverdhan entered the witness box at 4.55pm and provided the following evidence:

Upon receipt of the Demand Notice I contacted Mr Kamlesh Sharma. One of the Managers suggested that this person would be most reliable to handle this matter. .. had a meeting within a month ..to find out what else was not correct..

16. Mr Goverdhan was then asked to read the document requirements of Form 17. Particularly where it stated:

Failing to produce such documents at the date, time and place specified above is an offence under the Promulgation and the Employment Relations (Administration) Regulations 2008, punishable on conviction by a fine not exceeding \$20,000.

17. According to Mr Goverdhan, “that is why I engaged the other guy to sort out the document submission”.

18. Mr Goverdhan was asked by the Tribunal, “why didn’t he produce the documents” and he replied, “not sure”.

19. In relation to the demand for wages, Mr Goverdhan’s evidence was, that this letter was brought to his attention by another staff member, Mr Ravneel Kumar.

20. He claims shortly after this, that he held a meeting with Mr Kumar, himself and Mr Sharma.

21. A short adjournment ensued, to allow Mr Goverdhan the opportunity to review his position and to consider whether he would be able to meet the demand for payment.

22. During the course of that adjournment, he did so and it is understood the amount of \$2,499.10 was paid to the Labour Office.
23. Given that development, the Tribunal advised the parties it would consider the remaining issues and asked for any further submissions pertaining to penalty.
24. Mr Tokalau for the Labour Office sought that the former Employer pay costs in the amount of \$3,000.00.
25. Mr Goverdhan, objected to the payment for costs, given the circumstances that gave rise to the misunderstanding and the fact that he has made good the outstanding wages claim.
26. On previous occasions before this Tribunal, the Tribunal has relied on the fixed penalty provisions contained within Schedule 8 of the Promulgation as the basis for determining penalties arising out of breaches of Section 45(2) and 247(b) of the Promulgation.
27. That does not appear to be the correct approach to adopt in cases of this type.
28. The fixed penalty provision should be relied upon, only in circumstances where a Fixed Penalty Notice has been issued in accordance with Section 263 of the Promulgation.
29. Where no penalty amount is otherwise prescribed, the general penalty provision located at Section 256 of the Promulgation, is the appropriate starting point.
30. Section 256 provides:

A person who commits an offence under this Promulgation for which no particular penalty is provided, is liable on conviction—

(a) for an individual, to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 2 years or both;

(b) for a company or corporation or trade union, to a fine not exceeding \$50,000; and

(c) where applicable, to disqualification from holding a post as an officer of a trade union for 5 years from the date of conviction for the offence.

31. Mr Goverdhan's defense of his position, is that he had left the liaison in the hands of his Industrial Advocate, Mr Sharma. Mr Sharma on the other hand, claims to have had no involvement in the matter beyond taking one appearance at a call over hearing.
32. Neither gentlemen, appeared to be completely candid in their dealings with the Tribunal, though little public benefit will be derived in pursuing those issues further on this occasion.⁶
33. I would strongly caution all Industrial Advocates who appear before this Tribunal, that they do so with written authorization and clear instructions. Should they no longer be acting for their client, they should ensure too that they have notified the Tribunal or verified that their former client has done so. Parties to proceedings should not be prejudiced because of the failure of others to maintain appropriate communication during any form of agency.
34. The ultimate responsibility however, rests on the Employer. The complaint is against the Employer, not the Industrial Advocate. The Employer must be responsible for the actions of the Advocate, when she or he appears on its behalf.
35. If that is the only defence of the Employer, it is not adequate. Being an employer brings with it responsibilities that should not be taken lightly. They extend to the individual employee who faithfully performs her or his duties and expects to be compensated appropriately and the broader community, that expect basic

⁶ On another occasion, the reconciliation of those accounts of events may lead to other consequences.

statutory safeguards and protocols will be maintained at all times. Mr Goverdhan as then proprietor of Fuel Cafe N Bar, met neither of these obligations.

36. I am satisfied that for the purpose of Section 174(2) of the *Criminal Procedure Decree* 2009, that Mr Goverdhan did admit to the charges before the Tribunal.

37. I find that Mr Goverdhan as the former proprietor of Fuel Café N Bar is guilty of the two charges. He did fail to produce the time and wages records and he also failed to pay the demand for wages at the time it was made.

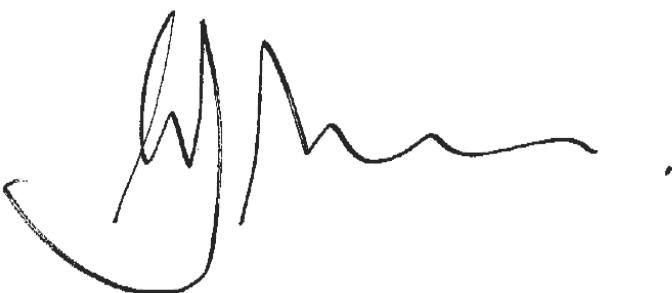
Decision

38. In relation to the first count of failing to produce on demand wages and time records contrary to Section 45(2) of the Promulgation, I find Mr Goverdhan guilty and fine him the sum of \$1500.00, to be paid within 28 days.

39. In relation to the second count of failing to pay wages upon demand in writing contrary to Section 247(b) of the Promulgation, I find Mr Goverdhan guilty and fine him the sum of \$1500.00, to be paid within 28 days.

40. I also order that Mr Goverdhan pay to the Labour Office, the further amount for costs expended, in the amount of \$2000.00. Such costs to be paid within 28 days.

I order accordingly.

A handwritten signature in black ink, appearing to read 'Andrew J See', with a long horizontal flourish extending to the right.

Mr Andrew J See
Resident Magistrate