

Penalty Decision

Section 256 Employment Relations Promulgation 2007

Title of Matter: LABOUR OFFICER (Complainant)
v
BRIAN NITIN NAIDU REUBEN Trading as CYBER CITY (Defendant)

Section: Sections 97 (1)(a),(b); 97(4); and 99(1)(a),(b) *Employment Relations Promulgation 2007*

Subject: Hours of Work for Children; Requirement to keep register of hours for children.

Matter Number(s): ERT Criminal Case 14/2014

Appearances: Mr A Kumar, for the Complainant
Ms S Colavanua, for the Offender

Date of Hearing: 5 December 2014.

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 5 December 2014

OFFENCES – Sections 97; 99; 256 Employment Relations Promulgation 2007;

Background

1. On 26 November 2014, the Defendant was found guilty of the following offences under the Employment Relations Promulgation:-
 - (i) That he did employ a child for in excess of eight hours per day, in contravention of Section 97(1)(a) of the Promulgation;

- (ii) That during some or all of those occasions, the child was not given at least 30 minutes paid rest for every continuous 4 hour period, in contravention of Section 97(1)(b) of the Promulgation;
- (iii) That during the period from July 2012 to 7 August 2012, the Defendant did not keep a register of children employed in his workplace, in contravention of Section 99(1)(a) of the Promulgation; and
- (iv) That on or around 17 January 2013, he was unable to produce the record for inspection when required by a Labour Officer, in contravention of Section 99(1) (b) of the Promulgation.

Submissions of the Prosecutor

2. Mr Kumar has submitted that this is the first child labour case to be prosecuted under the Promulgation. He argues that the case should be used as a strong deterrent to other persons who seek to engage the services of a child in contravention of the law. He asks that the Offender be given a six month custodial sentence in relation to each offence, though makes no submission as to whether such sentence should be imposed cumulatively or concurrently. In addition, he is claiming \$200 costs to be awarded to the child, as compensation for loss of earnings, travel and related matters associated with his assistance in the investigation and attendance during proceedings. Mr Kumar also sought the further sum of \$200 to meet the investigation costs of the Labour Office.

Submissions on behalf of Defendant

3. Counsel for the Defendant appeared at the hearing on a pro bono basis. Her submissions rely on several factors. First, that the severity of the offences committed should be viewed at the lower end of the penalty spectrum, having regard to the facts and circumstances of the case. Secondly, that the Defendant is the operator of a business that is still developing and where work is intermittent. Thirdly, that the Defendant is relying on his wife's primary income in support of loan commitments relating to business start up and home improvements. And finally, that as a measure of character, the Defendant is involved in various youth organizations supporting and assisting young persons in the local area. Ms Colavanua says that any penalties imposed should be at the lower end of the spectrum and that if a period of imprisonment be imposed, that it be fully suspended based on the good behavior of the Defendant for a period of 12 months.

Penalty

4. In determining this matter, the Tribunal has taken into consideration the relevant provisions of the *Sentencing and Penalties Decree 2009*.
5. Specifically, Section 4(1) of the Decree provides:

The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

- (b) to protect the community from offenders;*
- (c) to deter offenders or other persons from committing offences of the same or similar nature;*
- (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
- (e) to signify that the court and the community denounce the commission of such offences; or*
- (f) any combination of these purposes.*

6. Further, Section 4(2) of the Decree, sets out the matters that a Court or Tribunal must have regard to when sentencing an offender. These are:-

- (a) the maximum penalty prescribed for the offence;*
- (b) current sentencing practice and the terms of any applicable guideline judgment;*
- (c) the nature and gravity of the particular offence;*
- (d) the offender's culpability and degree of responsibility for the offence;*
- (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
- (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*
- (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
- (h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;*
- (i) the offender's previous character;*
- (j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*
- (k) any matter stated in this Decree as being grounds for applying a particular sentencing option.*

7. The general penalty provision provided under Section 256 of the Promulgation is as follows:

- 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.*

8. As identified above, the limits imposed on a Tribunal Member, are provided for within Section 211(3) of the Promulgation. The offences can each be looked at as distinct breaches of the statutory obligation. A child must not be employed for more than 8 hours in a day. She or he is entitled to at least a 30 minute break after four hours continuous work. When employing a child, the employer is required to keep a separate register of employment, containing details of the worker's age, date of commencement and termination, nature of employment and prescribed conditions. That register should be made available to a Labour Officer or Labour Inspector upon demand. On this occasion the employer has not met any of these obligations. He may be of the

belief that this was not required in the special circumstances of this case, but such a view is incorrect.

9. Children need to be protected, so that they are not exploited in the workplace. They lack the same capacity to negotiate terms and conditions of employment and in most cases, are unaware of their rights and entitlements at law. It is for that reason, that in imposing a penalty, the fines imposed should be meaningful in the circumstances. That is, in accordance with Section 4(1) of the *Sentencing and Penalties Decree 2009*, a penalty or sentence should act as a deterrent and as an expression of denouncement. In either case though, the penalty or sentence must remain proportionate to the circumstances of the case. That is, it must be just in the circumstances of the case. In undertaking this task, I have considered the nature of the employment arrangement, the physical work environment and the fact that health and safety risks may not have been as pronounced as in other possible scenarios. For example, where children are engaged to undertake strenuous physical activity or work at heights; with plant and machinery; with hazardous substances; live power and the like.
10. During the trial of the substantive hearing, the Defendant did not appear overly remorseful, nor at any stage did he provide any indication to the Tribunal, that he was intending to make good any shortfalls owed to the child, as a result of the payment arrangement in place. It is also uncontested, that the Defendant was convicted in the Suva Magistrates Court on 15 January 2013, for causing the assault against the child, at a time on or around the relevant period of employment. That situation whilst already dealt with by the Court, is an aggravating factor that needs to be taken into consideration, within the circumstances of this case.

Conclusions

11. For each offence, I fine the Defendant the sum of \$2000.00, making a total penalty payment of \$8,000.00. While these individual penalties are at the lower end of the fine continuum, the cumulative effect serves as a warning to the Defendant, that any breach of Fijian Employment law has serious consequences. A person, who seeks to operate a business and engage individuals in whatever capacity, must do so in accordance with the law. There is an obligation to know what the prevailing employment laws require and to ensure that their terms are complied with. If an employer cannot do that, it needs to evaluate whether or not, it should conduct a business in the first place. The cost of labour, particularly where there are statutory requirements to be met, is a factor that needs to be built into the operating costs of a business. Ordinarily, if an Employer cannot meet those costs, then it is likely that it should not be conducting the business. A business cannot be made profitable through the unlawful underpayment of wages to its workers, or by prescribing unlawful conditions of employment that are harsh and oppressive.
12. In relation to whether or not a term of imprisonment should be imposed, the Tribunal is guided by Parts IV and V of the Decree. Again having regard to the circumstances of this case, there would appear to be justification for assessing the severity of the breaches at the lower end of the spectrum.¹ In part this is a function of the fact that the evidentiary issues were such in the case of the length of hours worked, that there is some doubt as to on how many occasions work in excess of eight hours took place. The case of whether a break was provided after the four hour period, is a similar case in point.

¹ I am of the view, that in the case of a first offence, that no period of imprisonment would be appropriate in relation to offences committed under Section 99 of the Promulgation.

13. For that reason and on this occasion, I am unwilling to impose a sentence of imprisonment, though having said that would recognize that in many other scenarios, particularly where the health and safety of the child was at risk, may give rise to the justification of a period of confinement. Should the Defendant commit similar offences under this Promulgation, the situation may be quite different. I nonetheless intend to impose a restriction on the Defendant, that he not be allowed to engage any child for employment purposes, for a period of 24 months, effective from today's date.²
14. In relation to the request by Mr Kumar that the child be paid some costs arising out of the investigation and trial, I consider in the circumstances that this is warranted and order that the amount of \$150 be paid. It is noted that Mr Kumar was also seeking compensation for the child in the amount of \$1294, being claimed as the entitlement for arrears in wages, outstanding annual leave etc. While I have indicated to Mr Kumar that I am not prepared to entertain that application, based on the evidence and the fact that no parallel application for recovery was made, it is nonetheless noted that the time limitation imposed by virtue of Section 262 of the Promulgation does not allow any such application be made beyond the 18 month window. On that basis and having regard to the evidence of all parties, I will award a further amount of \$250 to be paid to the worker, as a global assessment of the underpaid entitlements arising out of the relevant period.

ORDER

The Tribunal orders that the Conviction against the Defendant be recorded and the following penalties imposed:-

Charge 1

- (a) In relation to the first count, that the Defendant did employ a child for in excess of eight hours per day, in contravention of Section 97(1) (a) of the Promulgation, the Defendant is fined the sum of \$2000.00, to be paid within 60 days.
- (b) In relation to the second count, that the child was not given at least 30 minutes paid rest for every continuous 4 hour period, in contravention of Section 97(1)(b) of the Promulgation, the Defendant is fined the sum of \$2000.00, to be paid within 60 days.

Charge 2

- (a) In relation to the first count, that during the period from July 2012 to 7 August 2012, the Defendant did not keep a register of children employed in his workplace in contravention of Section 99(1) (a) of the Promulgation, the Defendant is fined the sum of \$2000.00, to be paid within 60 days.

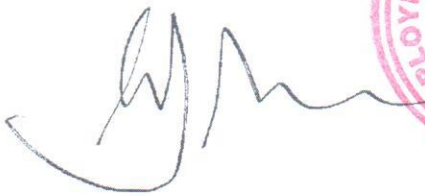
² See Section 15(k) of the *Sentencing and Penalties Decree 2009* and Section 212 of the *Employment Relations Promulgation 2007*.

- (b) In relation to the second count, that on or around 17 January 2013, the Defendant was unable to produce the record for inspection when required by a Labour Officer in contravention of Section 99(1)(b) of the Promulgation, the Defendant is fined the sum of \$2000.00, to be paid within 60 days.

Further Orders

The Tribunal further orders that:-

- (a) The Defendant whether acting as an individual or through any business entity, not be allowed to employ any child in employment, for a period of 24 months, effective from today's date.
- (b) The Defendant pay the Complainant on behalf of the child, costs in the amount of \$150, payable within 14 days.
- (c) The Defendant pay the Complainant on behalf of the child, compensation in the amount of \$250, payable within 14 days.
- (d) The Defendant pay the Complainant the investigations costs in the amount of \$200, payable within 14 days.

A circular official seal in pink ink. The outer ring contains the text "EMPLOYMENT RELATION TRIBUNAL" at the top and "OFFICIAL" at the bottom. A small star is positioned at the bottom center of the seal.

Mr Andrew J See
Resident Magistrate
5 December 2014