Employment Relations Tribunal

Decision

Title of Matter:	**Labour Officer on behalf of Muhammed Rafi** **v** **Ever Bright Equipment Hire**
Section:	**Sections 45(1) and 247(b) *Employment Relations Act 2007***
Subject:	**Failing to produce time and wages records and payment on demand**
Matter Number:	**ERT Criminal Case No 89 of 2017**
Appearances:	**Ms R Kadavu, Labour Office Legal Unit** **Mr R Charan, Ravneet Charan Lawyers, for the Employer**
Dates of Hearing:	**Tuesday 20 November 2018** **Tuesday 9 July 2019**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**17 July 2019**

KEYWORDS: Demand for Time and Wages Records; Section 45(1) Employment Relations Act 2007; Demand for Payment of Wages; Section 247(b) Employment Relations Act 2007; Overseas Worker.

Background

[1]On 8 September 2017, the Respondent Employer pleaded not guilty to the following counts within the complaint of the Labour Officer:-

- Count 1 – Failing to produce on demand time and wages records contrary to Section 45(1) of the Employment Relations Act 2007

- Count 2 – Failing to pay upon demand wages due to a worker, contrary to Section 247(b) of the Employment Relations Act 2007.

[2]The charges relate to a complaint made by a Pakistani national Mr Muhammad Rafi, made on 25 June 2017, who claims to have been employed by the Defendant Employer between the period 1 December 2015 and April 2017, and states that he received no wages for an eleven month period during that time.

The Case of the Labour Officer

[3]The first witness to give evidence on behalf of the Labour Office, was Mr Ashad Ali, an Investigating Officer, who stated:-

(i) In response to the initial complaint made by the Worker, he contacted the Employer and held a meeting about the wages claim;
(ii) The Employer did not agree to the dates that the Worker stated he was employed and said that the Worker was just staying at his premises, but was no longer an employee;
(iii) The Labour Office served a Demand for time and wages records on the Employer dated 23 June 2017[1] and in response to that, received a letter from the Employer dated 6 July 2017.[2]
(iv) A further request was made to the Employer for any evidence of Western Union money transfers made as payments to the Worker on his behalf and a photocopy record of one amount of $1900 was provided[3].
(v) The Employer was unable to provide any other records, such as extracts from daily attendance registers.
(vi) A further statement obtained by the Labour Office of a Mr Mukesh Chand, indicated that the Worker had complained to him of non-payment of wages and the fact that the Employer had confirmed that he would purchase an air ticket for Mr Rafi to return to Pakistan, when the prices for tickets were cheap[4].

[4] Mr Ali identified for the Tribunal, the calculation of the statutory demand that was based on the complaint received (Exhibit L6(a)) and a statement provided by the Worker, where it was claimed that he had only been paid:-
- $2,000.00 in March 2016;
- $1900.00 in June 2016;
- $1000.00 sent to his sister in Pakistan; and
- $100 in cash. (See Exhibit 6(b)).

[5] The Witness further produced as documentary evidence:-

(i) The Individual Employment Contract between the Employer and the Worker dated 2 June 2015 (Exhibit 6A);
(ii) Copy of approval of a Work Permit from the Fiji Immigration Department, dated 22 October 2015 (Exhibit 6B);
(iii) A Notice and Termination Letter of the Employer to the Worker dated 13 November 2016, bringing the contract to an end, one month from that date (Exhibit L7).
(iv) A letter from Fiji Immigration Department issuing the Worker a permit number to work as a Mechanic/Diesel Fuel Injector for the Employer (Exhibit 6(c));
(v) A Letter from Employer to Fiji Immigration Department dated 27 September 2016, requesting that the Worker's work permit be cancelled for breach of agreement (Exhibit 6(d)); and
(vi) A Letter to the Immigration Department from the Employer dated 21 April 2017, advising that the Worker was no longer staying on the employer's premises (Exhibit 6(e)).

[6] In his evidence, Mr Ali claimed that Worker had advised he had not received any termination letter from the Employer.
[7] During cross examination, Mr Ali stated:

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[1] See Exhibit L1.
[2] See Exhibit L2.
[3] Exhibit L3.
[4] See Exhibit L4.

(i) That the Worker had advised that his wage rate of $800 per month as initially contained in the contract dated 2 June 2016,[5] had been varied by Agreement of the parties and was $1,000 per month;
(ii) That the Worker first made his complaint to the Labour Office, when he was being held at the Immigration Detention Centre and had complained of wrongful confinement by the Employer;
(iii) The Worker had only been paid $5,000 in wages for work to date;
(iv) That the Worker had entered into a second employment contract with the Employer, although said that the Immigration Department was unaware of that agreement and that the Worker claimed he did not sign the document;
(v) Restated that he had only received partially produced wages records, for the period 1/12/16 to 19/4/17;
(vi) The Labour Office received no written response from the Demand for Payment; and
(vii) That the co-worker Mukesh Chand, provided a statement to the Labour Office having said that he left the Employer because of the working conditions.

[8] When asked by the Tribunal, Mr Ali stated that he did not verify with the Immigration Department, whether it was in receipt of the earlier letter provided by the Employer on 27 September 2016, advising that it wished to terminate the working arrangement with the Worker and have him return overseas.

The Case of the Employer

[9]Mr Naveen Singh is the Managing Director of the Respondent and stated that he came to know the Worker when he was employed in Diamond Engineering in Lautoka. Mr Singh claimed that the Worker was a good friend of his, although became involved in a dispute with Diamond Engineering and ultimately sought his assistance in returning home to Pakistan.

[10]According to the Witness:-

(i) After 6-7 months having not heard from the Worker, he was then contacted by him and asked if he could arrange for him to come back to Fiji;
(ii) The parties entered into a contract and said that on the day he arrived in the country, that the Worker advised he would need to be paid $1,000.00 a month;
(iii) That he paid an Immigration Department Bond of $14,500.00; and
(iv) He organised airfares and income tax clearance (Exhibits E1(a) and (b)) for the Worker and he arrived in the country on 4 December 2015;

[11]The Witness was shown a bundle of timesheet records for the period 4 December 2015 to 5 June 2016 (Exhibit E2). Despite the objection of Ms Doge to their admissibility, presumably on the basis that the documents were not earlier produced and were likely to be an invention of the Employer, the Tribunal has allowed them to be tendered in proceedings for the sake of understanding the argument of the Employer. The Managing Director claimed that after 5 June 2016, a new arrangement had been entered into with the Worker, where he would undertake work as a contractor[6]. A supporting letter of verification was provided by Mr Nacolawa of Counsel, attesting to the fact that he had been a witness to the signing of that contract document[7]. Mr Singh stated that prior to the new arrangement coming into force, on some

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[5] See Exhibit 6A.
[6] See Exhibit E3.
[7] See Exhibit E4.

occasions he had paid the Worker cash as he had requested this, in order to send monies back to Pakistan. The Managing Director stated that on other occasions, he had made overseas money transfers on the Worker's behalf. The Witness was not able to state whether the Immigration Department had ever responded or acknowledged the Employer's notification of wanting to bring the work permit to an end.

[12] During cross examination, the Witness claimed that the reason for now being able to produce the time and wages records, was that his accountant had copies of theses and that the original documents had been stolen from his premises. Mr Singh acknowledged that he had not advised the Immigration Department when he entered into a new contract with the Worker on 2 June 2016 and did not respond to the question put to him, that such failure was a breach of the relevant Immigration laws pertaining to work permits for overseas workers.

Analysis of the Issues

Count One

[13]There are two counts before the Tribunal and in matters of this case, to establish an offence under the Act, the relevant test is one of being satisfied beyond reasonable doubt. The Employer does not appear to have been keeping proper time and wages records for the purposes of Section 45(1) of the Act and there is no evidence that has been put before the Tribunal dealing with the compliance of the specific requirements set out within that provision. Ms Doge had objected to the adducing of the wages records as tendered at trial (Exhibit E2) on the basis that they had not been earlier provided to the Employer, nor did there appear to be any mention of the fact that the records were stolen, when the Employer first provided its response to the Demand Notice, by its letter dated 6 July 2017[8]. The Tribunal is satisfied that the Employer had not complied with the 14 day time requirement of the statutory demand to provide time and wages records and on that basis, finds the Employer guilty of this offence for the purposes of Section 45(4) of the Act.

Count Two

[14] In relation to the Second Count, the evidence is harder to interpret. Mr Singh admits that the monthly wage rate was adjusted upon the arrival of Mr Rafi. There is no doubt that the relationship between Mr Singh and Mr Rafi had soured and that the Tribunal accepts that the Worker and Employer had attempted to enter into a new arrangement where the Worker would provide his services as an independent contractor. Yet it would be very strange indeed if the Immigration Department would countenance such an arrangement, in effect altering the nature of the visa type that was initially granted. Regulation 43(1)(c) of the *Immigration Regulations* 2007 specifically prohibits any such right of the Worker to undertake such activity where a condition imposed for the granting of the visa, is that:

> *if the non-citizen is granted a work permit because he or she will be an employee of an employer in Fiji, to work only for the employer nominated in his or her application for a work permit;*

The Tribunal can only concern itself with the employment arrangements that were on foot and that were the basis upon which the Worker was legally entitled to work. The Employer claims that following a new contract being entered into between the parties on 1 July (Exhibit E3), that

[8] See Exhibit E2.

it no longer should be responsible for making any further wages payments to the Worker. Exhibit L7, that was tendered by the Labour Inspector, is suggestive of the intention of Ever Bright Equipment Hire to bring that contract to an end by 12 December 2016. The Statement obtained by Mr Mukesh Chand, that is contained within the disclosures, supports the view that the Employer had been endeavouring to buy the Worker a cheap return fare to Pakistan, around that time. For whatever reason, Mr Rafi decided to make a complaint to the Labour Office whilst at the Immigration Detention Centre on 23 June 2017. The evidence of the Labour Office suggests, that the Worker may have left the accommodation provided by his Employer on or around 20 April 2017 and it is unclear where he was located during the following two month period.

[15]The Worker breached the terms of his work permit, when he entered into an arrangement with his former Employer to undertake contracting work, other than in his capacity as an employee. Given that the Employer provided the Labour Office with a copy of the Notice and Termination Letter dated 13 November 2016, bringing the contract to an end one month after that date, suggests that the contractor agreement either was not given operative effect until after that date, or the termination letter was just a ruse, designed to give the impression to the Immigration Department that no contractor agreement had not been in place since 1 July 2017. In any event, the contractor agreement was unlawful. The Employer and Worker were prohibited from entering into that arrangement and as a result, the contract is void ab initio. The result of that, is the employment agreement entered into between the parties on 2 June 2015 as varied (Exhibit 6A) remained on foot, until such time as it came to an end on 13 December 2016. The demand for payment of wages under Section 247 of the Act cannot be supported where the Employer and Worker were no longer in an employment relationship after 13 December 2016 and where the wage calculation underpinning that demand, extended beyond that period.

Implications of Dates of Employment on the Demand Made for Payment

[16]The demand for payment, provides a summary of calculations from December 2015 to April 2017, in the amount of $17,000.00, less $5,000.00 having been paid to the Worker on three occasions during that same period. The contract for employment came to an end on 13 December 2016. On that basis, the amount due to the Worker from December 2015 to 13 December 2016, could at best be calculated in the sum of $12,500.00. If the $5,000.00 already paid to the Worker is taken into account, the Worker was entitled to $7,500.00[9]. Despite the Worker not immediately returning to Pakistan, the Employer should not be compelled to make any other payment for wages when the contract had been completed. The Worker was entitled to repatriation at that stage and he would have been free to have approached the Immigration Department and asked for its assistance to facilitate his return home. The charge has not been made out as the monies demanded as contained within the demand, were not due.

Other Issues

[17]That is not the end of the matter. The Worker has not been paid in accordance with the terms of his employment contract during the period December 2015 to December 2016. The Labour Officer claims that during this period, the Worker received an amount of $5,000.00, whilst the Employer produced copies of payment vouchers (Exhibit E5) demonstrating payment of $6,000.00. The evidence of the Employer in this regard is preferred. The Wages owed for the

[9] Note at Exhibit E 5 that the payment vouchers equate to $6,000.00 not $5,000.00.

period 4 December 2015 to 13 December 2016 was $12,500.00. As a result, the Employer will be required to make good the difference against what has already been paid. The Worker is entitled to the $6,500.00 outstanding, as it was due prior to the contract being terminated on 13 December 2016.

Conclusions

[18]The Tribunal finds the Employer

(i) Guilty of Count 1 – Failing to produce on demand time and wages records, contrary to Section 45(1) of the *Employment Relations Act* 2007

(ii) Not Guilty of Count 2 - Failing to pay upon demand wages due to a worker, contrary to Section 247(b) of the *Employment Relations Act* 2007

[19] In relation to Count 1, the matter will be relisted for submissions on penalty. In relation to the outstanding wages owed, the Employer will be required to pay to the Labour Officer on behalf of the Worker, the amount of $6,500.00. A separate Order to give effect to that decision will be issued.

Decision

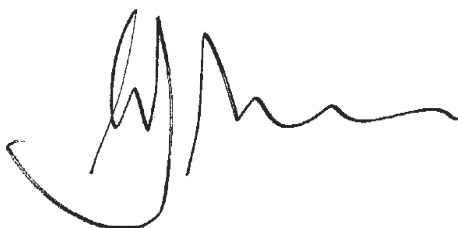
[20] It is the decision of this Tribunal that:-

(i) The Defendant is guilty of the offence of failing to produce time and wages records on demand, contrary to Section 45(1) of the *Employment Relations Act* 2007.

(ii) The Defendant is not guilty of the offence of failing to pay wages on demand, contrary to Section 247(b) of the *Employment Relations Act* 2007.

(iii)The Defendant must pay the Labour Officer the amount of $6,500.00 being unpaid wages for Mr Muhammed Rafi, for the period 4 December 2015 to 13 December 2016.

(iv)The matter be relisted for hearing in relation to submissions on penalty, on a date to be fixed.



Andrew J See
Resident Magistrate