



Employment Relations Tribunal

Corrected Decision

Title of Matter:	Labour Officer v Pijila Radinikabara Vularewa Naikawakawavesi
Section:	Section 37(4)(5) <i>Employment Relations Act 2007</i>
Subject:	Enlisting or recruiting any person for employment under a foreign contract of service with no authorisation.
Matter Number:	ERT Criminal Case No 7 of 2019
Appearances:	Ms L Vosawale, Labour Office Legal Unit Ms P Naikawakawavesi, Defendant
Date of Hearing:	22-23 January 2020
Before:	Mr Andrew J See, Resident Magistrate
Date of Decision:	23 January 2020

KEYWORDS: Recruitment of worker for foreign employment; *Employment Relations (Employment Agency) Regulations 2008*.

CASES CONSIDERED

Labour Officer v Lolohea [2012] FJET 4; ERT Criminal 66.2011 (16 May 2012)

Labour Officer v Lolohea [2015] FJHC 5; ERC004.2012 (7 January 2015)

Labour Officer v Tiko [2014] FJET 3; Criminal Case 38.2012 (15 July 2014)

Labour Officer v Pijila Radinikabara Kilawaca ERT CC Case No 06/17 (17 August 2018)

Background

[1] The Defendant has entered a plea of guilty to one count of enlisting or recruiting any person for employment under a foreign contract of service without authorisation, contrary to section 37(4) of the *Employment Relations Act 2007*. The particulars of the offence, state that the Defendant “did recruit (sic) enlisted and recruited Kalisito Kalougatane, Tiana Rokosawa, Filipe Yacabeci, Joni Raboralevu on and around 1 November and 4 December 2018, for employment under a foreign contract of service without obtaining authorisation in writing by the Permanent Secretary for Employment, Productivity and Industrial Relations”.

[2] The details to the offence, are set out within statements provided within the Disclosure Documents served on the Defendant whilst in custody at the Korovou Corrections Centre, on 27

September 2019. Included within the disclosed material were the statements provided by four workers said to be enlisted or recruited, together with a statement by the investigating labour officer, Ms Ana Keni. The disclosure documents include photographs taken at the various locations, in which the business of the defendant was being conducted (Naselai, Natogadravu and Narere), as well as a sample of a 'recruitment form' and a template 'last will and testament' form that were obtained during the investigation.

[3] The thrust of the statements contained within the Disclosure Documents are that the workers have paid to the Defendant or her then employees, a registration fee of either \$37.00 or \$38.00, as a precursor step to having the Defendant through either her company or its agents, obtain for them overseas employment. In some cases it would appear that the workers were enticed by the representations made by the Defendant and or her servants, that they would receive an initial upfront payment of \$60,000.00 from the sponsoring company.

Analysis of the Law

[4] There are now several matters of this type that have come before this Tribunal. In *Labour Officer V Lolohea*,¹ this Tribunal found the Defendant guilty and referred the matter to the Employment Court for sentencing, where the offender was fined a total of \$6,000.00². In *Labour Officer V Tiko*,³ this Tribunal sentenced the offender to three months imprisonment fully suspended, and issued orders refraining that business from undertaking any further activities, paying a fine in the amount of \$2,000.00 and costs of the Labour Office, in the amount of \$5,000.00.

[5] In the present instance, it should be noted that this is not the first occasion that the Defendant has been found guilty of this offence. On 17 August 2018, my sister Magistrate Prakash RM, found the Defendant guilty and fined her an amount of \$3000.00⁴. So what is the appropriate punishment against that backdrop on this occasion?

Submissions Regarding Penalty and Mitigation

[6] Ms Vosawale for the Labour Office has submitted that on this second occasion and in light of the disregard that the Defendant has shown to the law and the members of public, that a custodial sentence would be appropriate. In mitigation, the Defendant, Ms Naikawakawavesi made submissions to the Tribunal explaining the way in which her business was operating and the fact that whilst she had at one stage 15 employees, it was claimed none of these were now working in the business and that some of the activities that have been conducted, had occurred without her consent. When asked to explain the company structure and its operations, the Defendant made reference to her business associate Ms Vivian Mackenzie from the United States of America, whom she claimed was operating the 'mother company' of Speenaikcedar Pty Ltd. This company name was given as Mackenzie Corporation Limited. When interrogated further in relation to this issue, the Tribunal was provided from Ms Vosawale a copy of the certificate of registration of Speenaikcedar and it was clear from the associated registration papers, that Ms Naikawakawavesi, was the sole Director and shareholder of that entity. At this juncture, the Defendant took ill and an adjournment was called.

¹ [2012] FJET 4; ERT Criminal 66.2011 (16 May 2012)

² *Labour Officer v Lolohea* [2015] FJHC 5; ERC004.2012 (7 January 2015)

³ [2014] FJET 3; Criminal Case 38.2012 (15 July 2014)

⁴ *Labour Officer v Pijila Radinikarbara Kilawaca* ERT CC Case No 06/17 (17 August 2018)

[7] In a bid to explore what sort of undertakings the Defendant was prepared to give the Tribunal in order that an appropriate determination could be made, with the assistance of her defacto husband, Mr Viliame Bulewa, various discussions ensued regarding the need to alert members of the public that any activities of the business are ceased and that passport documents being held by the company and monies would be returned. Prior to finalising those arrangements, the Defendant became ill once more and ultimately was required to be sent under police escort to receive medical attention and to return for sentencing, the following day. During the ensuing discussions with Counsel for the Labour Office, a request was made that the Defendant with the assistance of her partner Mr Bulewa, return passports believed to be held on behalf of the workers in question. As it transpired and as directed by this Tribunal, 1,266 passports were recovered by the Labour Office staff from the home of the Defendant, with a further 10 being produced by Mr Tuapati Volau, a retired police officer, who also identified himself as a voluntary employee of the Defendant and who claims to have been assisting her on the promise of gaining employment overseas. In addition and again following the instruction given by the Tribunal, “approximately 3,000 employment applications” were recovered in boxes at the home of the former Human Resources Officer, Mr Rupeni Rokodoguni, who in turn, claims to have been directed by the Defendant to hold the same for safe keeping.

[8] Mr Bulewa, a former senior staff member of the Fiji Correction Services, was asked to provide to the Tribunal a list of the names of all persons employed by the Defendant. That list was developed in conjunction with the Defendant and discussions ensued as to whether or not those persons were in fact paid employees. The fact that Mr Rokodoguni was referred to by Mr Bulewa and Mr Volau as the ‘HR’, is suggestive of the business having paid employees, although that is not material to these considerations.

[9] Because of the Defendant’s apparent ill health, the Tribunal was unable to finalise the undertakings required in this case. Those undertakings included the need to take out full page advertisements in the local newspapers, to alert members of the public to the fact that the business had ceased operations and with the details of how passports, documents and perhaps monies could be returned. During proceedings yesterday, the Defendant assured the Tribunal that she had \$20,000 held in a bank account and that she was agreeable to have some monies utilised for the purposes of meeting the costs of the Ministry placing notices in the public newspapers.

Decision

[10] The Tribunal in this case, is particularly concerned about the size of this operation and the number of people who are ostensibly involved in the activity. Mr Bulewa claimed to be unable to provide the Tribunal with information pertaining to the bank account details of the Defendant and her company, despite earlier having been involved in some discussions with the Tribunal as to what would be required to meet the cost of advertising. The assets and monies received by the Defendant and her associates needs to be identified and protected, so as to ensure that any claims made against this operation can be met. The involvement of the fifteen persons identified as employees of the Defendant and her company, are a further separate issue. For the moment though, based on the case before this Tribunal the issue for determination, is what is the appropriate action required to be taken to act as a detriment to others and to endeavour to address some of the immediate practical consequences of this unlawful activity. Obviously there are 1276 passports to be returned to their rightful owners and in addition to that there are likely to be issues involving the claim for return of monies, associated with the application process. The funds of the company and its Director and associates needs to be quarantined in this regard.

[11] Whilst according to Mr Rokoduguni, the fees received were \$38.00 (administration) and \$14.00 (application), it may well be the case that other processing monies have been paid at this point in time. Disputes of this type, may ultimately return to the non-legal Tribunal by way of grievance.

[12] The maximum penalty for an offence under Section 37(4) of the Act, is found at Section 37(5). The maximum fine being \$20,000 or a term of imprisonment not exceeding 4 years, or both. In considering the appropriate penalty and sentence, the Tribunal has had regard to the submissions made by the Defendant regarding her inability to stop persons undertaking recruitment on her behalf. Given the quantity of passports seized from the Defendant, such a submission seems quite meaningless. This is the second occasion within two years, that the Defendant has flagrantly disobeyed the law and given the magnitude of the activity and the harm that this activity has caused to anywhere between 1,000 to 3,000 Fijian families, that aspect cannot be overlooked.

[13] This Tribunal finds the Defendant guilty of the offence and will issue the following Orders:-

(i) Convicting the Defendant to a term of imprisonment of 12 months, of which she serve two months effective immediately, with the remainder period being suspended, subject to a period of good behaviour for three years. (A condition of that good behaviour is that the Defendant whether personally or through any legal entity or business activity, refrain from being involved in any way or associated with:-

- Enlisting or recruiting any person for employment under a foreign contract of service;
- The registration, placing advertisements for, interviewing, or the filling of vacancies and offering of employment contracts, whether for or on behalf of any employer, whether national or foreign, for the purposes of securing a persons for employment outside the Republic of Fiji Islands.

(ii) The Defendant pay the costs of full page advertisements in the Fiji Sun, Fiji Times and Na I Lalakai newspapers, providing notice of the cessation of the enlisting and recruiting activity and notifying members of the public as to the way in which passports and other documents will be returned and where possible, claims for refund of monies made. (An indicative copy of the publication is attached). Those advertisements will be run in all three mainstream languages and the Defendant must pay an amount of \$10,000.00 to the Ministry of Employment, Productivity & Industrial Relations for that purpose within 21 days (This action is necessary given the large number of workers and families affected by this unlawful activity).

(iii) That the Defendant pay the Labour Officer's costs associated with the investigation and resolution of this matter, in the amount of \$10,000.00. That amount to be paid within 21 days (That amount is justified given the enormous amount of further activities that will now require the resources of the Ministry to be deployed, in order to rectify the unlawful conduct).

(iv) That all passports and application forms held by the Tribunal be transferred into the safekeeping of the Ministry of Employment, Productivity and Industrial Relations, where

it will liaise with the Department of Immigration and facilitate the return of those documents to their rightful owners.

[14] Separate orders to give effect to this decision shall be made available to the parties.



Andrew J See
Resident Magistrate

Attachment

PUBLIC NOTICE

**Unauthorised enlisting or recruiting of workers for foreign contract of service.
Speenaikcedar Pty Ltd and Pijila Radinikabara Naikawakawavesi**

Members of the public should note that Speenaikcedar Pty Ltd, its Director, Pijila Radinikabara Naikawakawavesi or any of the following persons (Viliame Bulewa, Setareki Matavucu, Rupeni Rokoduguni, Kuini Tavisia, Luisa Sovalawa, Tuapati Volau, Filimoni Tavatavanawai, Selina Veikoso, Tomasi Ravitikula, Iniasi Toganivalu, Joseva Dewala, Sevanaia Batisarisari, Naivasi Ledua, Kasilina Rasaqa and Matia Laladidi) are not authorised to recruit or enlist any person for employment under a foreign contract of service.

Any person or organization, who have provided their passport or paid monies to the company, its Director or former employees, for the purposes of obtaining a foreign contract of service, should contact the Ministry of Employment, Productivity & Industrial Relations, providing details to the following:-

Atish Kumar
Director Labour Standards
Ministry of Employment, Productivity & Industrial Relations
Mobile: 9906369

Joeli Pulu
Manager Labour Standards
Ministry of Employment, Productivity & Industrial Relations
Mobile: 9906131

Simione Masori
Senior Labour Officer
Ministry of Employment
Mobile: 9908676

The Director of Speenaikcedar Pty Ltd, Ms Pijila Radinikabara Naikawakawavesi, must refrain from any further activities associated with recruitment and enlisting of foreign workers until further notice.

**Ministry of Employment, Productivity &
Industrial Relations**