

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC NO. 4 OF 2012

BETWEEN: LABOUR OFFICER

Complainant

AND: TIMOCI TUPOU LOLOHEA

Respondent

Appearances: Ms. A. Raitivi for the Complainant.

Mr. F. Vosarogo for the Respondent.

Date / Place of Judgment: Wednesday 7 January 2015 at Suva.

Judgment of: The Hon. Justice Anjala Wati.

SENTENCE

Catchwords:

Employment Relations Promulgation Offences – Enlisting and Recruiting people for employment under foreign contract without authorisation in writing from the Permanent Secretary and wilful obstruction of a Labour Officer in the performance of the duty conferred by the ERP – convicted at the Tribunal- matter sent for sentencing to the Employment Court – both offences serious in nature- factors under Sentencing and Penalties Decree 2009 considered- imprisonment unjustified- fine appropriate – fines imposed- imposed fines beyond the jurisdiction of the ERT- proper that matter was sent to ERC for sentencing.

Legislation:

The Employment Relations Promulgation 2007 (“ERP”): ss. 4; 37(4); 37(5); 211(3); 246(1); 246(1) (a).

Sentencing and Penalties Decree 2009 (“SPD”): 4(2).

1. The accused Mr. Timoci Tupou Lolohea has been convicted for the offences under the ERP by the Employment Relations Tribunal (“**ERT**”).
2. The matter was sent to the Employment Relations Court (“**ERC**”) under s.211 (3) of the ERP for Sentencing. Under s. 211(3) of the ERP, the ERT has powers to sentence by imposing fines not exceeding \$2,000 or custodial sentence not exceeding 2 years. If the ERT is of the view that the sentence would exceed its jurisdiction then it may refer the matter to the ERC for sentencing.
3. The first conviction was for enlisting and recruiting people for employment under a foreign contract without authorization in writing by the Permanent Secretary contrary to s.37 (4) of the ERP and the second conviction was for wilfully obstructing a labour officer in the performance of the duty conferred upon by the ERP contrary to s.246 (1) (a) of the ERP.
4. The maximum penalty for the first offence is a fine not exceeding \$20,000 or to a term of imprisonment not exceeding 4 years or both: **s.37 (5) of the ERP.**
5. The maximum penalty for the second offence is a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 12 months: **s. 246 (1) of the ERP.**
6. The employment legislation in Fiji does not provide the factors that the Court needs to consider whilst sentencing a person for offences under the ERP. In absence of any such enactment, it is appropriate that the procedure and guidance provided by the SPD be followed. Section 4 (2) of the SPD provides that in sentencing an offender, the Court must have regard to the following factors:-
 - a. *The maximum penalty prescribed for the offence;*
 - b. *Current sentencing practice and the terms of any applicable guideline judgement;*
 - 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. Since s. 4 (2) of the SPD provides a mandatory list of factors to be considered, I shall deal with those in turn.
8. I have already outlined the maximum penalty prescribed for both the offences. I must state that this is the first conviction under the ERP that has been sent to the High Court for sentencing. There is neither any sentencing practice nor the terms of any applicable guideline judgement which could assist the Court in formulating a sentence. Neither the Labour Office nor the respondent's counsel provided any other case authority or legal material which would assist the Court. The Labour Officer only pressed for a custodial sentence without justifying why a custodial sentence was sought. The office failed to provide the Court with any case law from any other jurisdiction to indicate that that in other jurisdiction similar offences attracted a custodial penalty.

9. A foreign contract of service means a contract of service made within Fiji and to be performed wholly or partially outside Fiji and any contract of service with a foreign state: **s.4 of the ERP.**
10. Any person who enlists or recruits any person for employment under any foreign contract of service must have the written authority from the Permanent Secretary before he so does the enlistment and recruitment.
11. This requirement has to be seen and analysed against the purpose of the ERP which is basically stated in the preamble of the ERP:
 - a. *Creating minimum labour standards that are fair to workers and employers alike, and to build productive employment relationships;*
 - b. *Helping to prevent and eliminate direct and indirect discrimination in employment on the basis of race, colour, gender, sexual orientation, age, physical or mental disability, HIV/AIDS status, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
 - c. *Providing a structure of rights and responsibilities for parties engaged in employment relations to regulate the relationship and encourage bargaining in good faith and close observance of agreements as well as effective prevention and efficient settlement of employment related disputes;*
 - d. *Establishing the mediation services, the Employment Relations Tribunal and the Employment Relations Court to carry out their powers, functions and duties;*
 - e. *Encouraging consultation between labour and management in the workplace for better employment relations and productivity improvement;*
 - f. *Complying with international obligations and giving effect to the Constitution; and*
 - g. *For related matters.*
12. The requirement of authorization by the Permanent Secretary under s. 37(4) has a legally sound purpose. It enables the Permanent Secretary to monitor the number of

people leaving the country for employment, secure the safety of workers by ensuring that they are not led to slavery or trafficking, ensure that minimum protection guaranteed by the ERP and the Constitution are provided to the workers, ensure there is no forced labour, ensure that there are no child labour against the ERP, ensure that there is no discrimination and ensure that all the human rights that are guaranteed by the Laws of Fiji and the Conventions ratified by Fiji are accorded to the workers of Fiji. This provision to a large extent will also enable the Permanent Secretary to be aware of the various places and addresses the citizens are working. This is important for workers safety and protection. The provision also has some bearing on income tax and related matters.

13. If there are people in the country who work against this provision, there will be no guarantee of citizens being protected in a foreign jurisdiction.
14. I thus view that people who act contrary to this provision put the life, safety and security of workers at risk. I thus view this as a serious offence. The maximum penalty for this offence also indicates that this is viewed as a serious offence under the ERP.
15. On the gravity of the conviction for obstruction, I view this as a serious offence too. The ERP vests in certain officer's authority to ensure that the purpose of the ERP is fulfilled. Their role is not only policing but ensuring safety and security of the citizens being the employees. Obstructing these officers is to deprive the employees of their right of having their complaints being investigated and proper resolution being provided to them.
16. The respondent is responsible for this act as he had been contacting people to pay him to secure a job for them. He had also been receiving money in the sum of \$1700 per person to get the applications processed. So he in fact was the person behind the enlistment and he is responsible for the act.

17. The respondent had also asked the two complainants to pay him money in the sum of \$1700 each. The monies were paid to the respondent. Money is property and the complainants lost their property.
18. The offender did not plead guilty. He was convicted at the trial.
19. There is nothing on record to state that the convict was remorseful at the trial. However at the mitigation stage, whenever he appeared in Court, he was remorseful and looked embarrassed and promising that he would not reoffend.
20. It is not disputed that the convict has paid one of the complainants in full.
21. The convict is a first offender under the ERP.
22. There are not any aggravating factors. The counsel for the Labour Office submitted that the elements of offence are aggravating factors. That is incorrect.
23. Mr. Vosaroga submitted the following as mitigating factors.
 - a. *The accused is 55 years of age and is a first offender.*
 - b. *The accused is genuinely remorseful for his actions. His involvement was to provide consultancy service, as a way of sharing his experience with the other Directors of Phoenix Logistics Limited for recruiting people for the foreign employment.*
 - c. *The accused regrets his actions as he has realised the hardship and experience he has placed his wife and children in during the time he spent for the present case before the Tribunal and the Court.*
 - d. *The accused has learnt his lesson and assures this that he will not re-offend, and go through the same experience again. He has made a commitment to his family not to re-offend.*
 - e. *The fact that this is the first time he had to continuously appear at the Tribunal and the Court and that the accused was in remand has given him the consequences of his action.*

- f. An imprisonment sentence will definitely affect the accused's family's livelihood taking into consideration that he is the sole breadwinner. His economic and social well being and his career will be affected.*
 - g. The accused is an individual of good character and has not appeared in any court of law or tribunal for any criminal offence.*
 - h. The accused is now in the process of seeking employment in order to earn adequate income to cater the needs of his family.*
 - i. He has a very humble character and took such risks in order to find better employment opportunities for the people for Fiji, taking into consideration the high cost of living that the country is currently facing.*
 - j. In circumstance where there was a barrier with applications or process of employment, the accused never refused to give back the amount of money paid by the people to the company.*
 - k. A conviction against the accused will impact his social being as he will know within his heart and in his mind that he is a convicted person and he will guess all the time whether the public will still treat him the same after the conviction. This to a certain extent will affect his decision making and also his business and future careers that he wishes to build.*
 - l. A conviction will not assist the accused in his future potential for employment in the event Fiji's economy suffers. It will further hinder his search for future employment, and also in applying to travel overseas.*
24. Although this is serious offence, I do not find that this offence is a one which was committed for lack of moral values. This is also not a case of breach of trust in that the respondent was properly operating a registered business of finding work for people overseas except that he did not follow a very important procedure laid down in the ERP. The accused would have been perfectly within his rights to continue doing what he did if he sought the PS's authorization in writing.

25. Having considered all the statutory and mitigating factors that the accused is the sole bread winner in the family, he honestly tried to find work for people without any unjust enrichment, he did not cause any other harm to any person apart from not being able to find some of them work after taking money from them, and that he had been remanded after being charged, I rule out any imprisonment for this offence. The term of imprisonment will not meet the ends of justice.
26. I find that for the first count an imposition of fine will meet the ends of justice. I find that for the first count a fine of \$5000 is justified.
27. For the second count the respondent told the Labour Officer to leave the premises when he was being inspected. That was not proper of him as the Officers were there for a proper cause. There was otherwise no threat or physical interference to the Labour Officer. I again consider fine to be appropriate for a first offender. I impose a fine of \$1000.
28. I therefore sentence the respondent to pay a total fine of \$6,000 to be paid within 3 months, that is, on or before 7 April 2015. In default of payment of fines the respondent to be imprisoned for 12 months.



To:

1. *Ms. Raitivi for the Complainant.*
2. *Mr. Vosarogo for the Defendant.*
3. *File: ERCC No. 4 of 2012.*