



Employment
Relations Tribunal

DECISION

Title of Matter: Labour Officer
v
Pacific Green Industries Fiji Ltd

Section: Section 211(1)(a) *Employment Relations Act 2007*

Subject: Failing to Produce Time and Wages Records

Matter Number: ERT Criminal Cases No 112 and 113 of 2017

Appearances: Ms V Doge, Labour Office

Mr NPadarath and Mr Samuel K Ram
Samuel K Ram Barristers and Solicitors for the Employer

Date of Hearing: 5 September 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 8 November 2018

KEYWORDS: Section 45(2) *Employment Relations Act 2007*, Failing to produce time and wages records upon demand of Labour Officer; Section 262 *Employment Relations Act 2007*, Time Period of Instituting Offences

CASES CONSIDERED

Labour Officer vEsei Pictures [2014] FJHC 633; ERCC04.2014 (25 August 2014)

Background

[1] The Defendant has been charged with two counts of failing to produce on demand, time and wages records in accordance with Section 246(1)(b) of the *Employment Relations Promulgation 2007*. The charges as initially drawn up are defective, insofar as the offence of failing to produce on demand time and wages records, is an offence for the purpose of Sections 45(4) of the *Employment Relations Act 2007* and not Section 246(1)(b) of the former named Promulgation. The failure to submit to the demand, is otherwise deemed an offence at least in a prima face sense, because of the statutory obligation that is imposed by Section 45(2) of the Act. For the

purposes of the proceedings, the Tribunal has allowed for the correction of the defect, consistent with Section 57(3) of the *Criminal Procedure Act 2009*.

- [2] A more fundamental objection to these proceedings has been raised by the Defendant within its Notice of Motion filed on 19 March 2018 and that is that the complaint has been commenced outside of the statutory window for bringing such charges consistent with Section 262 of the *Employment Relations Act 2007*. A further issue that is being pursued by the Defendant, is that it challenges Orders issued by the Tribunal on 5 August 2018, whereupon it requested that the Employer provide time and wages records pertaining to the workers the subject of the two demands within seven days.

The Time Limitation for Commencing Proceedings

- [3] During the preliminary agitation of these issues, Counsel for the Defendant Mr Ram, had indicated to the Tribunal that the objections should be considered in a staged approach. That is, that if the first threshold objection raised, dealing with whether or not the complaints were commenced out of time was successful, then the second issue as to whether the Tribunal in fact had the power to make Orders demanding production of the time and wages records, would become redundant from a practical viewpoint.

- [4] The Tribunal is content to deal with the proceedings in that way, although has already intimated to the Defendant that it does not believe that in relation to the second issue, that it has any substance, primarily on the basis that the Orders issued by the Tribunal, are in effect a separate and distinct demand to that initially made by the Labour Officer. The suggestion then that such a demand somehow interferes with the earlier demand issued by the Labour Office on 1 July 2016, appears misconceived on that basis.

- [5] In relation to the question as to whether or not the complaints have been made within time, the Defendant states¹:

The ERP provides proceedings must be instituted within 12 months from the date the alleged offence took place. The charge sheet shows that it was filed on 25 September 2017. The demand notice was sent on 1st July 2016. The time for compliance expired on 15th July 2016. We have submitted that the alleged offence arose on 15th of July 2016. The period of 12 months expired.

- [6] It therefore seems to be that the real argument for the Tribunal to consider, is what are the limitations on Section 262 of the Act, where parties are seeking to institute proceedings outside of the 12 month window.

Section 262 of the Act

- [7] Section 262 of the Act provides:

Notwithstanding anything in any other written law, proceedings for an offence against this Act may be instituted within the period of 12 months after the act or omission alleged to

¹ See Written Submissions filed on 19 October 2018 at Paragraph [2].

constitute the offence except that the Court may grant leave to extend such period for a further 6 months.

- [8] In its submissions, the Defendant has relied on the case of *Labour Officer v Esei Pictures*² to assert that there is no capacity for this Tribunal to entertain leave to extend the period for instituting proceedings, in such case where the application for extension is not made within the 12 month time window. That is, if the offence took place on 15 July 2016 and the proceedings were not commenced (filed) in the Tribunal by 15 July 2017, that unless leave had been granted to extend the period of filing for a further 6 months prior to the 15 July 2017, then after that time (15 July 2017), any complaint would be out of time and unable to be lawfully made.
- [9] On the other hand, the Labour Office argues that they had instituted proceedings in March 2017, when the relevant documents had been given to a court clerk of the Registry who was travelling back from Lautoka to Suva, to file in the Tribunal Registry. As it transpired, the documents were never processed by the Suva Tribunal Registry until 25 September 2017.

Who Has the Responsibility for Instituting Proceedings

- [10] The Tribunal is of the view that it is the Labour Office that has the responsibility for ensuring that proceedings are instituted within the statutory window, not clerks, nor anyone else for that matter. A document once stamped, would be regarded as being received and proceedings thereafter commenced. Until such time as the Labour Office has a copy of the stamped document in order to serve on an individual, it has nothing more than an intention to commence proceedings.
- [11] The variations to such an approach and the circumstances that would otherwise arise, if any other interpretation was to be given, would be unworkable in the extreme. Whilst the Tribunal notes the Affidavit in Opposition of Ms Sulita Lutua filed on 20 March 2018 and in particular the evidence of two emails exchanged between the Tribunal and the Labour Office in May 2017 and again in August 2017, that is in itself nothing more than enquiries between one client of the Tribunal and its staff. The rules that should apply in such matters for the filing of court documents, should be no different for the Labour Office. The Registry must remain at arms-length from all clients, otherwise to be accused of applying its rules and procedures in an inconsistent and irregular fashion. The Tribunal accepts that the proceedings were not instituted by the Labour Office until 25 September 2017.

Could Leave be Granted for an Extension of Time in Which to Institute Proceedings?

- [12] Within Her Honour's decision in *Labour Officer v Esei Pictures*, Wati J states:

If the prosecution wishes to enjoy the extended 6 months for the laying of the charges then an application for extension must be made before the expiration of the initial 12 months given by the legislature.

- [13] To refocus on the words of Section 262, it is "the court" that may grant leave to extend such period for a further 6 months. The definition of court for the purposes of Section 4 of the Act, "means the Employment Relations Court constituted as a division of the High Court of Fiji under section 219". The Tribunal has no role to play in the granting of extensions. An application for extension needs to be made to the Court, prior to the expiration of the 12 month window.

² [2014] FJHC 633

Whether then an application for leave is granted, would no doubt depend on the usual discretionary criteria for evaluating the circumstances of such a case. From a public policy point of view, the aim of the provision in this regard, appears to encourage efficiency and diligence from those who are charged with the responsibility of determining whether or not a complaint against a person or persons should be brought under the Act.

Conclusions

[14] In conclusion, despite the fact that the complaints as served were defective and capable of being corrected, what cannot be corrected is the fact that the complaints have been commenced out of time and without the leave of the court. The complaints must be struck out on that basis.

[15] It nonetheless needs to be said that the Employer had not complied with the initial demands served upon it. Suffice to say, that it was for this reason, that the Tribunal subsequently issued directions on the Employer to produce its time and wages records pertaining to the two workers the subject of the earlier Demand Notice. Whilst the Employer has now provided its records, it also seems apparent that had it complied with the request in the first place, the need to have become involved in the proceedings that followed, would never have taken place. The Tribunal also sympathises to some extent with the conduct of the Labour Office, in relying on the documents being filed in the Tribunal registry, through a third party. At the time in question, it would seem that the Registry had no capacity to receive documents in the town of Lautoka, requiring the filing process to take place in Suva only. Thankfully, that situation has now been remedied. Having said that though, it goes to show that the filing of documents is a very significant step and that parties cannot assume away their responsibilities in this regard, without having to face the possible consequences that may on occasion follow. These proceedings are a good reminder of that fact.

[16] As neither party's conduct is without flaw, the Tribunal will not entertain any cost application. Each party must bear their own costs.

Decision

It is the decision of this Tribunal that:-

- (i) The Complaints made by the Labour Officer in Criminal Cases ERT 112 and 113 of 2017, be struck out.
- (ii) Each party must bear their own costs.




Mr Andrew J See
Resident Magistrate