

2. In a decision of this Tribunal dated 1 May 2014, the Defendant was successful in an application to strike out the first count, on the basis that there was no case to answer.
3. In view of the evidence before this Tribunal, the Tribunal finds the Defendant guilty of the offence of enlisting or recruiting any person for employment under a foreign employment contract of service with no authorisation.
4. In reaching its decision, the Tribunal has relied on the evidence of Mr Joeli Pulu, a Senior Labour Officer who gave evidence that the Defendant admitted during the course of an investigation at 3 Belo Street, Samabula, that he had:-
 - (i) confirmed recruitment of people without authorisation and
 - (ii) that he admitted he was not registered to do so in accordance with the *Employment Relations (Employment Agencies) Regulations 2008*.
5. I am satisfied that based on information provided by the Defendant as part of that investigation, shows that in the relevant period and the contracts in his possession, were those that had been utilised for recruitment. An illustration of this can be seen in Exhibit L3.
6. I am also influenced in my decision by the Fijian Recruitment Agreement entered into between Olive Group FZ LCC and Access United (Fiji Ltd) where at Schedule III, it clearly shows that a commercial arrangement had been entered into for sourcing and recruiting by Access United (Fiji Ltd) and Olive Group FZ LCC dated 26 August 2011.
7. Fijian workers need to be fully protected against the physical and economic dangers associated with some forms of foreign contract work.
8. For that reason there are statutory safeguards in place, requiring the appropriate checks and balances to ensure that no worker will be exploited whether physically or economically for the benefit of another party, interested in sourcing his or her labour.
9. It is for that reason that the *Employment Relations (Employment Agencies) Regulations 2008* is in place and it is for that reason that the protections provided for within Section 37 of the Promulgation exist.

Penalty for Breach

10. The maximum penalty available for a breach of Section 37(4) of the Promulgation is found at Section 37(5). The maximum fine being \$20,000 or to a term of imprisonment not exceeding 4 years or both.
11. Having said that, the powers of this Tribunal are curtailed somewhat by Section 211(3) of the Promulgation, where the Tribunal has powers to impose fines not exceeding \$2000 or a term of imprisonment not exceeding 2 years, otherwise it may refer the matter to the Employment Court for sentencing.

12. As Mr Morin for the Labour Office has indicated, there is only one other matter of this type that has been recently prosecuted before this Tribunal. That matter was referred to the Employment Court on 16 May 2012 and it remains awaiting determination of the appropriate penalty and/or sentence.¹ In the interests of justice this matter cannot be delayed through a referral process.
13. Ordinarily given the seriousness of this type of offence, the Tribunal would consider some period of custodial sentence, if only to provide a strong message that the conduct of this type is highly irresponsible and capable of jeopardising the safety and well being of Fijian workers, independently of whether they wish to be enlisted or recruited for such purposes. A custodial sentence of three months in a minimum security facility would provide an appropriate punishment on such occasions.
14. I am though strongly influenced by the Defense Material provided, that to some extent includes some level of cognisance of the broader responsibilities associated with foreign employment (particularly in war zones such as Iraq) with recognised responsibilities for repatriation etc. This though is no substitute for the appropriate attestation requirements otherwise required by the Promulgation.
15. I convict the Defendant Varinava Vutikalulu Tiko, as managing Director of Access United (Fiji Ltd) to a term of three months imprisonment, wholly suspended.²
16. I further order:
 1. That the Defendant whether personally or through any legal entity or business activity, refrain from being involved in any way or associated with:
 - (a) Enlisting or recruiting any person for employment under a foreign contract of service;
 - (b) 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 any persons for employment outside the Republic of Fiji Islands.
 2. The Labour Office undertake periodic checks in relation to the above, so as to ensure compliance.

¹ See *Labour Officer v Lolohea* [2012]FJET. ERT Criminal 66.2011 (16 May 2012)

² See Section 29 of the *Penal Code*.

3. The terms of the Orders (i) and (ii) remain in force for a period of two years effective from today's date.
4. The Defendant pay the penalty amount of \$2000 within 14 days.
5. The Defendant pay the costs of the prosecution, including investigation costs in the amount of \$5000, such payment made within 14 days.

Other Matter of Concern

17. One final issue that I wish to raise in relation to the conduct of this matter, concerns the failure of Counsel for the Respondent to appear at the continuation of hearing on 14 July 2014.
18. Following from an Interlocutory Decision that was issued by the Tribunal on 1 May 2014, this matter was scheduled for hearing on 26 June 2014. For unavoidable reasons, that date needed to be vacated and on 23 June 2014 an *Amended Notice of Listing for Hearing*, was emailed to the parties³ and I am advised that attempts were made to contact relevant persons by phone.
19. The Tribunal is instructed by Registry Staff that on 26 June 2014, the Registry was contacted by a person identifying as a staff member from the Defendant's lawyers, enquiring whether the matter will proceed on that day. I am advised that the law firm was advised the matter was relisted for hearing on 14 July 2014.
20. To avoid confusion on 4 July 2014, a further email communication was sent to parties notifying of the listing of hearing.⁴ Further on 10 July 2014, the registry staff received another telephone call from the office of the Defendant's lawyers asking if the date of hearing could be confirmed. Again, I am instructed that this was relayed to that person by return phone call.
21. On 14 July 2014, a town agent, Mr Melvin Singh of Melvin Singh Lawyers Suva, appeared on behalf of the Defendant's lawyers, purportedly on the assumption that he was to attend a mention only, for the purposes of taking a further hearing date.
22. I am not satisfied for the reasons given by Counsel for the Defendant, that there was any uncertainty as to the state of affairs and why such representation and wastage of court time should have occurred. Clearly Mr Tiko had been made aware as early as 23 June of the changed date and the Registry Staff confirm that two clarifying calls had been received from the law firm.

³ It is recognised here, that the email communication was only sent to the Defendant and not his lawyers.

⁴ Again, this email communication was only sent to the Defendant, but as he admits and the subsequent email communication shows, he in turn signalled a response to this, that included his own lawyers.

23. The non- attendance of Counsel on that basis is totally unacceptable and a further explanation or investigation of the circumstances that gave rise to the non- appearance is warranted.
24. Relevant sealed orders shall now be prepared to give effect to this decision.



Mr Andrew J See
Resident Magistrate