

IN THE MATTER OF: An application for Variation
of Labour Order

LIONEL TAHEGA

V

NIUE POLICE

DECISION OF COXHEAD J

[1] On 19 March 2013 Isaac J granted a Labour Order pursuant to s 28(1) of the Niue Act 1966, that Lionel Tahega be discharged from custody on condition that he labours on public works in Niue for the residue of his sentence.

[2] This Labour Order was made on the following conditions:

- a) That in terms of s 28(2) the defendant is to perform labour on public works in Niue for 3 days per week under the control and subject to the direction of an officer nominated for that purpose by the Chief of Police to commence on Monday 25 March 2013 and to conclude on 5 April 2014.
- b) During the whole of that period as set out above the defendant is to live with Rozlyn Hipa at Alofi.
- c) The passport of the defendant is to be held by the Niue Police until 5 April 2014.

The Application

[3] The Applicant has applied for a variation to the Labour Order on the basis that his living arrangements have now changed and it is no longer possible for him to reside with Rozlyn Hipa at Alofi.

[4] The Applicant has been offered accommodation at the homes of Tom Cooper Tahega at Tuapa or alternatively Pamela Falani Togiakona at Vaituku.

[5] The application also notes that the Applicant has complied with all the other conditions of the Labour Order, and that all the other conditions are to remain the same.

Opposition

[6] The application is opposed by the Police upon the grounds that:

- a) The Applicant no longer resides with Rozlyn Hipa and is in breach of the Labour Order. The Police submitted that on 12 July 2013 Mr Tahega returned home after work and saw his belongings outside Rozlyn Hipa's residence. The Police say he had no choice but to go to his brother Tom Cooper Tahega, who resides in Tuapa.
- a) The Applicant now resides on his own at Tuapa in the residence of his brother, Tom Cooper Tahega, who is not resident on the Island at present and will not be resident for the next 3 months. The Applicant has been spoken to on two separate occasions, as to where he was staying and responded that he was staying in Tuapa with his brother.
- b) Given the tensions that still exist within the Hikutavake community, it is not seen as permissible that the Applicant reside in Hikutavake, Vaituku with Pamela Falani Togiakona as alternative accommodation.
- c) The Applicant has recently become involved in an incident involving a firearm which is still under investigation of which he is the prime suspect. The Police



submit that in the early hours of Sunday morning on 21 July 2013, the Applicant was carrying a loaded firearm and made several threats to the occupants of a private residence at Mutalau. Police submit that the Applicant was at this address for some period, and the occupants felt that they could not leave freely. Police have recovered the firearm and submit that there is more than sufficient evidence to charge the Applicant for the unlawful carriage of a firearm, which carries a term of imprisonment. They also submit that they believe they will secure a conviction on the current evidence.

- d) The Applicant is now living in an environment with very little, if any, supervision.

Court directions

[7] Having received the application and opposition from the Chief of Police, I directed that:

- a) The Niue Police were to provide further information with regards to the grounds upon which they object to the application; and
- b) Counsel for the Applicant was provided with the opportunity to respond following the filing of the Police information.

[8] I also noted in my direction of 8 August 2013, that I will be in Niue for Court from 4 to 8 November and it appeared that there is some urgency with this matter and waiting till November may not be ideal. I therefore proposed to deal with the application on the papers, unless the parties can provide good reason for delaying a decision until November.

Decision

[9] Firstly I note that neither the Applicant nor the Police have sought to have this matter delayed until November. In accordance with my directions the Police have provided further information and the Applicant has provided a response.



Application to vary orders

[10] The Applicant has not sought to conceal that he has moved residence – in fact quite the opposite - in that he and has taken the steps of seeking a variation to the Labour Order given his change in circumstances.

[11] What is interesting is that the Police say, the Applicant found his belongings outside of Rozlyn Hipa's residence on 12 July 2013, yet the application for variation is dated 11 July 2013. The Court has confirmed that the application was received by the Court on 11 July 2013.

[12] The application therefore appears to have been made in anticipation of having to move residence.

[13] Police advise that the Applicant was spoken to on two occasions, as to his residence. The first occasion appears to have been soon after 11 July 2013 and the second occasion was on the 29 July 2013 when spoken to by the Chief of Police. On both occasions the Applicant answered truthfully. It is noted that when the Applicant was spoken to on 29 July 2013 this was some time after he had already sought to make application to vary the Labour Order.

[14] Clearly the Applicant can no longer meet condition of the Labour Order made on 19 March 2013, relating to his residence, but, has otherwise complied with all the other conditions of the Labour Order.

[15] In my view the Applicant, having returned home, as submitted by the Police, to find his belongings left outside of the house and with no place to go, has in the circumstances acted reasonably by making this application.

Allegations of further offending

[16] I agree with the Applicant, that while the Police submit that there is sufficient evidence to charge the Applicant with an offence punishable by imprisonment, no charges have been laid against the Applicant.



[17] At present the allegations are just that – allegations.

Recommendation to recall the Applicant

[18] Section 28(3) of the Niue Act 1966 states:

“28 Labour instead of imprisonment

...

(3) If any prisoner so discharged makes default in the due performance of the labour so appointed for him, or is guilty of any insubordination or other misconduct, whether in respect of that labour or otherwise, he may be arrested without warrant by any officer of police or of prisons; and a Judge of the High Court may (without the necessity of any judicial inquiry) revoke the discharge of that prisoner and commit him to prison for a period equal to that for which he would have been imprisoned subsequent to the order of discharge had no such order been made, with such deduction (if any) as the Judge thinks fit, having regard to the seriousness of the default, insubordination, or misconduct, and to any labour duly performed by the prisoner under the conditions of his discharge.”

...

[19] This section sets out when a prisoner, who has been discharged from custody on the condition that he labours on public works, maybe recalled.

[20] The Police have not made any application for the Applicant to be recalled. They have however raised recall as a recommendation in opposition to the Variation of Order application.

[21] The Police have not laid charges against the Applicant.

[22] The Applicant has not been found guilty of any subordinate or other misconduct, whether in respect of that labour or otherwise. Nor has the Applicant been arrested without warrant by any officer of Police or of prisons.

[23] Therefore I think it would be quite inappropriate to recall the Applicant.

[24] That is not to say that, circumstances may change to where s 28(3) is applicable to the Applicant. However, that is not the current situation.



Variation of Orders

[25] In my view the Applicant was correct in making the current application given his change in circumstances. He has been truthful when questioned about his residence and has looked to make alternative arrangements so as to comply with the conditions of his Labour Order.

[26] He has complied with all the other conditions of the 19 March 2013 Labour Order.

[27] The Police raise the concern as the fact that the Applicant will not be supervised as he was when he resided at Rozlyn Hipa's. If he is to live at his brother's residence he would be living on his own.

[28] I agree that supervision is preferred rather than allowing the Applicant to reside on his own.

[29] I therefore do not think that the Applicant should reside at the home of his brother Tom Cooper Tahega.

[30] The Police have also raised concerns with the alternative accommodation of Pamela Falani Togiakona. This is on the basis that tensions still exist within the Hikutavake community. It is not seen as permissible that the Applicant reside in Hikutavake, Vaituku.

[31] I am of the view that while there is some concern raised by the Police as to the alternative residency of Pamela Falani Togiakona, the Court taking all matters into consideration will vary the Labour Order. Pamela Falani Togiakona's residence has the advantage of providing supervision.

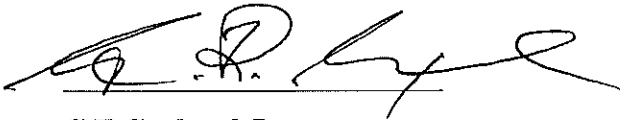
[32] I would also expect that some oversight supervision would also occur at least three days a week when the Applicant attends to perform his labour on public works.

[33] Pursuant to s 28(1) of the Niue Act 1966, Condition 2(ii) of the Labour Order made on 19 March 2013 is varied to provide that the defendant is to live with Pamela Falani Togiakona at Vaituku.

[34] All other conditions are to remain the same.

[35] If the Applicant wishes to remain discharged from custody the onus is on him to ensure he complies with the conditions of the Court order and that he does not give reasons for him to be recalled to prison.

Dated at Rotorua, New Zealand this 30th day of August 2013

A handwritten signature in black ink, appearing to read 'C T Coxhead J', written over a horizontal line.

C T Coxhead J