

**IN THE STATUTORY TRIBUNAL, FIJI ISLANDS**  
**SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL**

ERT Criminal No 66 of 2011

**BETWEEN:**           LABOUR OFFICER

**Complainant**

**AND:**                 TIMOCI LOLOHEA

**Defendant**

**Counsel:**            Ms A. Raitivi, for the Complainant  
                              Mr F. Vosarogo for the Defendant

**Dates of Hearing:**   Thursday 12 April 2012  
                              Friday 13 April 2012

**Date of Judgment:**  16 May 2012

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**JUDGMENT**

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**ENLISTING OR RECRUITING ANY PERSON FOR EMPLOYMENT UNDER A FOREIGN CONTRACT OF SERVICE WITH NO AUTHORISATION – Section 37(4) Employment Relations Promulgation 2007; WILFUL OBSTRUCTION OF A LABOUR INSPECTOR – Section 246(1)(a) Employment Relations Promulgation 2007; Companies Act 1958**

**Background**

1. The Defendant has been charged with two offences brought by a Labour Officer in accordance with Section 18(c) of the *Employment Relations Promulgation 2007*.
2. The first offence is that of Enlisting Or Recruiting Any Person For Employment

Under A Foreign Contract Of Service With No Authorisation, contrary to Section 37(4) of the Promulgation. A person who commits that offence is liable on conviction, to a fine not exceeding \$20,000 or to a term of imprisonment not exceeding 4 years or both.

3. The second offence is that of the Wilful Obstruction of a Labour Officer, contrary to Section 246(1) of the Promulgation. A person who commits that offence is liable on conviction, to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 12 months.
4. The charges against the Defendant were consolidated on 23 September 2011.<sup>1</sup>
5. The particulars of the offences, set out within the Consolidated Charge are that:-
  - (a) Timoci Tupou Lolohea, Director Meridian Services Agency Limited, on the 29<sup>th</sup> of December 2010 and 5<sup>th</sup> January 2011, enlisted or recruited Ponipate Bainivalu and Marika Nasegai respectively for employment under a foreign contract of service without obtaining authorization in writing by the Permanent Secretary for Labour, Industrial Relations and Employment; and
  - (b) Timoci Tupou Lolohea on the 11<sup>th</sup> of January 2011, at the registered office of Phoenix Corporation Limited situated at 16 Belo Street, Samabula, wilfully obstructed a Labour Inspector in exercising power or performing her duty conferred by the *Employment Relations Promulgation 2007*.
6. The Defendant has pleaded not guilty to the offences, the onus thereafter being on the Complainant to establish that the offences have been made out in accordance with the standard of proof required in criminal proceedings; that is guilty beyond reasonable doubt.

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<sup>1</sup> Initially two separate charges were laid on 31 May 2011. (Case No 33 and 34 of 2011)

7. I am exercising my powers in accordance with Section 211(3) of the *Employment Relations Promulgation 2007* and as conferred to me by virtue of the *Magistrates Court (Amendment) Decree 2011*.

### **Preliminary Issues**

8. At the outset of proceedings, Ms Raitivi for the Labour Office, flagged that she would be calling four witnesses in proceedings:-
  - Mr Ponipate Bainivalu;
  - Mr Marika Nasegai;
  - Ms Rasalatagane Malani, a then Labour Officer; and
  - The Permanent Secretary for Labour, Industrial Relations and Employment, or his delegate.
9. Mr Vosarogo on the other hand, indicated that he would be making a submission for No Case to Answer; though before the closing of the Complainant's case, resiled from that position and thereafter elected to call the Defendant as his witness.
10. Counsel for the Defendant conceded at the outset, that neither his client personally, nor any entity that he had been involved with, were authorised to enlist and recruit persons for the purposes of Section 37(4) of the Promulgation.

### **The Case of the Complainant**

#### *Mr Ponipate Bainivalu*

11. The first witness for the Complainant, was Mr Ponipate Bainivalu, a retired military officer.
12. According to Mr Bainivalu, he made application with the Defendant through the company 'Meridian', for a job overseas. His evidence was that the Defendant "called me to apply for a job and I am still waiting for that purpose".

13. Mr Bainivalu indicated that he knew the Defendant from his time in the military and Mr Lolohea explained to him, what was involved in making application for an overseas role. His evidence was, that “the process was one of individual recruitment”. He indicated that the requirements for the position were that Mr Lolohea “asked me if any police records (and) had I been to hospital”. “Later on he called us and said had to have (an) amount of \$1700.00”. According to the witness, the Defendant said:

*“Pay \$1700.00 and get the job”.*

14. The witness was shown a copy of a receipt contained within the *Labour Officer Bundle of Documents*, dated 29 December 2010.
15. Document 5 within that bundle was a Receipt No 0040, issued under the name of ‘Meridian Service Agency’ for the amount of \$1700.00. The document was identified by the witness as a receipt issued to him by a clerk at the office of the Defendant.<sup>2</sup> According to the witness, there was no guarantee, no written contract. He had paid the money on the basis of a verbal agreement, having already signed a contract for a position of Logistics Officer.
16. Mr Bainivalu’s evidence, was that he had signed a contract 8 months earlier for a “Logistics Officer Job in PNG”. His evidence was, the contract was for five years, to work in logistics and stores.
17. Upon cross examination by Mr Vosarogo, the witness indicated that he filled out the forms at Belo Street at Samabula. He stated, that he didn’t ask for a copy of the

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<sup>2</sup> Marked as Exhibit 1 in proceedings. The witness was of the belief that the location at Samabula was the office of Meridian Service Agency. Whether this was the registered office of that business at that time is of little import. In the absence of any objection from the Defendant, I am satisfied by virtue of the documents sourced from the Companies Office by the Labour Officer, (refer Documents at Tab 3 of the “Labour Officer Bundle of Documents” that at least on 11 January 2011, that the location described by the witness as being the office of the Defendant, was the registered office of Phoenix Logistics Corporation Limited.

contract, nor did he take away a copy of the contract. When asked by Mr Vosarogo, “Was contract for you to ultimately get a job?”, the witness replied, “no”.

18. At the close of the parties examination, I asked the witness exactly what did the Defendant say to him. The witness responded:

*“..I’m doing this recruitment for a job in PNG and need(s) your papers”.*

19. The witness indicated that he was told by the Defendant, that he would get the job “soon”. According to the witness, two days prior to paying the \$1700.00, he was at Belo Street Samabula, where about 40 men were in parade in a shed at the back of the office.
20. According to the witness he was not told what the \$1700.00 was for and when asked if he understood what the letters MNGT meant in the words “ADMIN & MNG’T FEES” as written within the description of the receipt, he replied, “had no idea”.
21. He recalls that at the time he received the receipt, he was “really happy”. He said that he “looked at it and put it in (his) wallet”.

*Mr Marika Nasegai*

22. The second witness for the Complainant, was Mr Marika Nasegai, a retired police officer.
23. According to Mr Nasegai, he heard of the recruitment exercise through friends who told him about ‘Meridian’. Mr Nasegai said that the Defendant, “was going to send us overseas for a job as security”. He said that “initially (this was) done at (the Defendant’s home) Nadonumai (Road)<sup>3</sup>”.

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<sup>3</sup> The witness gave evidence that his home address was Nadonumai Road, Delainavesi, Lami

24. When asked by Ms Raitivi how the witness was recruited, he said:

*“have to bring our CV, fill in a form and then pay \$1700.00...after, bring passport, drivers licence”.*

25. According to Mr Nasegai, he paid the money at the Belo Street premises to a person whose name he could not recall. Mr Nasegai’s understanding was that the office was occupied by the Defendant and the persons in the office, “working for him”.

26. Mr Nasegai was shown document 6 of the Labour Officer Bundle of Documents. This document he identified as a receipt he received, following the payment of his money. (Marked as “Exhibit 2”)

27. It was Mr Nasegai’s evidence that he had signed some documents, in particular a contract. He claims not to have understood the contents of the contract. When asked did he get the job promised, he replied, “No”.

28. Ms Raitivi asked the witness, Do you know why? Mr Nasegai replied, “The company does not exist. The contract does not exist”.

29. On cross examination, the witness indicated that he had known the Defendant for 38 years and that despite his 25 years services as a crime detective, had not come across contracts before. According to the witness, he was not given an opportunity to read the contract and didn’t ask for a copy of the document. He stated that two to three weeks after signing the contract and paying his money, he went back to get his money.

30. Counsel for the Defendant asked, “(the) reason didn’t get a job is because you withdrew your money? The witness replied, “Yes”.

31. Upon the close of re-examination, I asked the witness the following questions:

*Mr See: Who told you (to pay the \$1700.00)?*

*Witness: Mr Lolohea*

*Mr See: Did he say what the money was for?*

*Witness: We were told if you pay the money we would get the job.*

*Mr See: What job?*

*Witness: Overseas jobs, security and drivers.*

*Mr See: Where about?*

*Witness: Told in Dubai*

*Mr See: Who told you that?*

*Witness: Mr Lolohea..... and the Suez Canal*

*Mr See: How was he going to do that?*

*Witness: Through the company?*

*Mr See: Which company?*

*Witness: Meridian. Mr Lolohea said he had a contract with Meridian to get jobs.*

*Mr See: When did he say that?*

*Witness: During that time..when we were at Belo Street... in front of office to more than 100 people. First people to pay \$1700.00 would get jobs.*

*Mr See: Who was money going to?*

*Witness: The office*

*Mr See: Did he tell you to pay the office money?*

*Witness: Yes...for us to get the job we had to pay the money*

32. I then asked the witness to look at Exhibit 2 and explain what was meant by the "words "INITIAL FEE ADMIN & MNG'T" as written on the receipt. The witness was unable to explain what was meant by the words.

33. The witness was then asked to clarify the nature of the discussions that took place, whereby he sought the refund of his monies. The evidence was recorded as follows:

*Witness: I went to Mr Lolohea first and he said you can't get your money back.*

*Mr See: Did (you) ask why?*

*Witness: Because of that ..because of paper that you signed.*

*Mr See: What did you say?*

*Witness: I will see you in Court... I went to his home. (I then) went to see Mr Vosarogo. I called him first. Wanted to come and see him. Could I refund my money back. (He said) you want to get your money from office or come to office*

*Mr See: Why did you contact Mr Vosarogo?*

*Witness: Somebody told me to contact. I got information that Mr Vosarogo was Mr Lolohea's lawyer. I saw if I could refund my money back. (He said) call me later.*

*Mr See: Did you say why ?*

*Witness: I think I just told him I wanted my money back.*

*Mr See: Did he ask why?*

*Witness: Cant remember Sir.*

*Ms Rasalatagane Malani*

34. The final witness for the complainant was Ms Malani, who was a Labour Officer at the relevant time and now works as a Solicitor with the Fiji Revenue and Customs Authority.

35. The evidence in chief of this witness, was that the department had received a complaint that recruitment was being done at 16 Belo Street. She was told to get to the premises and attended as part of a group of six officers.

36. Ms Malani's evidence was:

*When we arrived.. gate was closed .. a lot of men in precinct. Mr Shane Pickering (a Labour Officer) asked gatekeeper that we were from Ministry of Labour to allow in.*



37. Ms Malani said that the group were seated in a room in the house and met with three persons, including Mr Kaloumaira and Mr Qalilawa.<sup>4</sup>

38. According to Ms Malani, the men asked what was the purpose of the visit and were advised:

*“they said no recruitment done at 16 Belo Street. ...they said they were volunteers renovating (the) house..*

39. Her evidence is that Mr Qalilawa indicated that (there was no recruitment being done) “until they had all their ..met all requirements for enlisting of foreign employment”.

40. Ms Malani told the tribunal that “outside of (the) compound (there were) a lot of men. Inside (the) house, a lot of boxes...applications”.

*“They were from Mr Lolohea. Applications done prior and carried over to 16 Belo Street.”*

41. Her evidence was that she was advised that “in time they would be approved”.

42. Ms Raitivi asked the witness the name of the company that she had been inspecting at the premises. She replied, “Phoenix Logistics Corporation Limited”.

43. Ms Malani’s evidence was that she asked Mr Qalilawa, could she take pictures outside. She says, she was advised, “yes”. According to Ms Malani, just before the officers left, she asked could she go and inspect rooms. Her evidence was that Mr Qalilawa accompanied her to Mr Lolohea’s room, where there was a man sitting

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<sup>4</sup> Ms Malani’s later evidence, is that these persons were known to her as Directors of Phoenix Logistics Corporation Limited.

outside the room. Mr Lolohea came out and “I asked him could I examine the room and then he told me to leave the house”.

44. She said, “I was embarrassed in the manner he told me to go” ..”Dou Lako”.<sup>5</sup>
45. On cross examination by Mr Vosarogo, Ms Malani conceded that she had not explained to Mr Lolohea why she was there, nor had she shown any form of identification to him.
46. I then sought to ask some clarifying questions of the witness. Firstly, I sought to understand the identity of the boxes, the witness indicated were located at the premise. Ms Malani indicated that the boxes were for Meridian Services and not Phoenix. She indicated that the boxes contained, offer letters from Meridian Agency Limited, “cv’s of the applicants and qualifications and contract itself”.
47. Ms Ramami was asked how could she identify the Directors of Phoenix. She explained that the Directors had been coming over to the Ministry of Labour. “We knew each other; Mr Qalilawa, Mr Kaloumaira and Mr Bilo.”
48. I asked, why were they coming to the Ministry and she replied, “looking for information as to how to get approval for requirements of foreign enlisting”. She said, “Mr Lolohea was a Director of Phoenix and I knew him to be a Director at the time”. It was Ms Malani’s evidence that Mr Qalilawa had shifted the boxes from Lami to Belo Street. According to Ms Malani, he had advised her that, “when approval (for foreign enlisting and recruiting) be given, would call those applicants”.
49. Prior to an adjournment, I asked Counsel to provide me with proof of Ms Malani’s appointment as a Labour Officer or Inspector and better details in relation to the

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<sup>5</sup> I sought clarification of this expression, given that the words used were not “iko lako”, meaning you go. The witness interpreted the phrase “dou lako” to be the plural form of that expression, that is when it refers to several people.

appointment date in which Mr Lolohea assumed his directorship with Phoenix Logistics.<sup>6</sup>

50. Counsel Vosarogo submitted that relevant minutes of meetings that may support such an enquiry were at the residence of Mr Qalilawa at 16 Belo Street and his client no longer had access to this premise.<sup>7</sup>

### **The Case of the Defendant**

51. The defendant, Timoci Tupou Lolohea gave evidence in his capacity as a 52 year old businessman.

52. According to Mr Lolohea, he had known Mr Bainivalu in the military when he served between 1980 and 2002.

53. He says that he met Mr Bainivalu again in 2012, when he came to his house at Lami inquiring about overseas security contracts.

*“He asked is there another contract available. I said yes..... I agreed would use him as Logistics Instructor”.*

54. Mr Lolohea indicated that he met Mr Bainivalu on 29 December 2010, at Belo Street, where Mr Qalilawa was renovating a house. He gave evidence that there was a recruitment drive for security contracts for Dubai and Papua New Guinea that was being conducted by Board Members for Phoenix Logistics.

55. Mr Vosarogo asked, *“What were you doing in Belo Street?”* and Mr Lolohea replied,

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<sup>6</sup> This was ultimately done so without opposition. (See Gazette Notice dated 6 August 2010, signed by T Waqa, Permanent Secretary for Labour, Industrial Relations and Employment. .

<sup>7</sup> AS it transpired the following day, Mr Lolohea indicated that these documents had been seized by police.

*“I was being asked to help because of our previous experience with private security contracts”.*

56. According to the witness, he had been involved in security contracts in Lebanon, Sinai and Africa.

57. The following evidence was adduced by Mr Vosarogo.

*Mr Vosarogo: What would be the requirements?*

*Mr Lolohea: Need to be physically fit. Look through qualifications, whether they are cleared through police clearance.*

*Mr Vosarogo: Is that what they did or now would do?*

*Mr Lolohea: This is what they would ask me to consult on.*

*Mr Vosarogo: Did you provide this service to Phoenix Logistics.*

*Mr Lolohea: I provided them with criteria.*

58. Mr Vosarogo then asked the witness where were the files relating to these activities and was advised that they with still with the former Directors.<sup>8</sup>

59. In relation to Mr Bainivalu, the witness denied that he had provided him a contract of service.

60. The witness was then shown Exhibit 1, the receipt issued to Mr Bainivalu. While Mr Lolohea agreed that the receipt “looked familiar” and that it was a receipt of Meridian Services Agency, he further indicated that he had not issued it, nor was it in his handwriting. Mr Lolohea’s evidence was that when he was engaged by Phoenix that Meridian Services Agency was closed. His evidence was that the company was dissolved in 2007 and had not been trading since 2007 at all.

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<sup>8</sup> Later in evidence he changed this position and indicated to the Tribunal that the documents had been seized by the police.

61. The witness was asked did he remember Marika Nasegai. He replied. "I do not know this person well, only met at Belo Street."

*Mr Vosarogo: Did you ever speak to him at Belo Street?*

*Mr Lolohea: Personally, no Sir.*

*Mr Vosarogo: Did you speak with Mr Nasegai any time?*

*Mr Lolohea: As a group yes. To him personally, no...*

*Mr Vosarogo: Offer him any work overseas?*

*Mr Lolohea: No*

*Mr Vosarogo: Did you take any money from his hand.*

*Mr Lolohea: No.*

62. The witness was referred to Exhibit 2, the receipt issued to Mr Nasegai and I asked him about the telephone numbers on that receipt. He indicated that the mobile number was an old number, but that the other number was for his residence.

63. In relation to the day of the labour inspection, Mr Lolohea did recall that on 11 January 2011, there were .."people outside..they had been asking about recruitment and former Directors of Phoenix."

64. Mr Vosarogo continued:

*Mr Vosarogo: Do you recall seeing Ms Malani?*

*Mr Lolohea: No. I was inside one of the rooms....I was in room ..knock on the door..they asked me could we move out of that room so they could lay carpet... When I came out I saw this lady. She was asking could I talk to her. She told me from Ministry of Labour. I told her building was under renovation and could she come back at a later date when renovations finished.*

*Mr Vosarogo: Did you at any time yell at her?*

*Mr Lolohea: Not my principle to yell at people. I said words to the effect .....you people go, the building is being repaired, when it is finished you can come back .*

*Mr Vosarogo: Any other officers?*

*Mr Lolohea: I only saw her. She said she wanted to have discussion with me.*

*Mr Vosarogo: Showed you any ID?*

*Mr Lolohea: No*

65. Following cross examination of the witness by Ms Raitivi, the witness admitted to the Tribunal that he let Phoenix use the receipt book of Meridian.<sup>9</sup> Further, the witness recanted from the earlier position where he had said that he had not personally spoken to Mr Nasegai and conceded to having received a phone call from him. According to Mr Lolohea, when approached by Mr Nasegai, he referred him to his lawyer Mr Vosarogo and he also spoke to Mr Bilo and Mr Qalilawa.
66. In relation to the receipt books, that were used to issue receipts for the payments made by Mr Bainivalu and Mr Nasegai, Mr Lolohea stated that the books had been used in the period 2005 to 2007. He said that he had given permission for Phoenix to use these books in December 2010.
67. His further evidence was that these receipts were used for Meridian's administrative and management fee and that a further fee of \$5000.00 was taken out by Phoenix for the advanced salary of the contractors when they commenced work.
68. In response to my questioning, Mr Lolohea indicated that this initial deposit was split two ways between Meridian and Phoenix. I asked Mr Lolohea, why his co-

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<sup>9</sup> This was a significant shift in evidence. When the witness first gave the impression in his evidence in chief that he had no knowledge of how the receipt book was being used at all.

Directors<sup>10</sup>, of Meridian, Mr Hundley and Cameron were also receiving monies from this arrangement.

69. He initially opined, because it was their contract, that they would receive 10% of the \$5,000.00 from the initial salary advance of the contract.
70. When I said to him that I was not speaking of the later stage of contract, but only in relation to the admin and management fee, Mr Lolohea could give no explanation.
71. I asked Mr Lolohea who was responsible for the accounting records of the companies and he indicated a Mr Ravai. At this point, Mr Lolohea indicated that all company records had been seized by the Criminal Investigation Division of the Fiji Police Service on 30 December 2011.
72. I then asked Mr Lolohea to clarify what the \$1700.00 was for. He replied,
  - Medical check ups
  - Police Clearance
  - Passport applications
  - Administration
73. It was Mr Lolohea's evidence that he and the other two Directors of Meridian would receive approximately \$170.00 out of each \$1700.00 collected and that they would split the proceeds in one third portions.
74. He claimed to have been sending the two foreign residents their share of these funds by Western Union transfer on a quarterly basis, from the main Suva Branch.
75. According to Mr Lolohea, he would be paid for his portion by way of a cheque that he would sign on behalf of Phoenix.

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<sup>10</sup> As they were identified within Document 2 of the Labour Officer Bundle of Documents.

76. In relation to Exhibit 1, I asked Mr Lolohea to explain, how soon after that money was received, would he draw a cheque for his own share. His evidence was that he wrote a cheque for this, one week after that date.
77. He restated that banking was done every week and reiterated that he was signing cheques for Phoenix at that time.
78. At that stage, I indicated that the matter should be adjourned and that the parties would be called to make closing submissions later that day. Following a request from Mr Vosarogo that was supported by Ms Raitivi, it was agreed to allow the parties 14 days in order to file and serve closing submissions.
79. A further extension was granted to allow the Defendant time to lodge submissions.

**Count 1 – Section 37(4) – Unauthorised Enlistment and Recruitment**

80. Section 37(4) of Division 2 of Part 5 of the *Employment Relations Promulgation 2007* provides:

*No person shall enlist or recruit any person for employment under any foreign contract of service unless the person is authorised in writing by the Permanent Secretary.*
81. As mentioned earlier, Mr Vosarogo conceded that neither his client nor any of his business entities, in any capacity whatsoever, were authorized by the Permanent Secretary to enlist or recruit any person for employment under any foreign contract of service.
82. It is noted that the particulars of the offence of Count 1, describe Mr Lolohea as a Director of Meridian Services Agency Limited. Whether at the time of the alleged offence he was in fact a Director of that company or another, or if in fact he was acting in his individual capacity, is in my view not that important. The charge identified within the first count remains what it is. The allegation is particularized



against the specific conduct of Mr Lolohea. There has been no suggestion that the consolidated charge has been brought against him, holding him liable as a Company Director for the conduct of another. That certainly was not the case of the public officer that has brought this complaint.

83. In my view the requirements of Part VII of the *Criminal Procedure Decree* 2009 have been complied with in all relevant respects.<sup>11</sup>

84. It particularises the conduct of Mr Lolohea. The prohibition applies to the individual as well as a company or partnership. If he in fact was no longer a Company Director at that time, but for whatever reason and in whatever capacity still otherwise is alleged to have engaged in the conduct as mentioned within the first count, the charge remains.

Did the Defendant Enlist or Recruit Any Person For Employment Under a Foreign Contract of Service?

85. Section 37(4) contains several elements. To be satisfied that the charge is made out, requires the following elements to be satisfied:

- (i) No person
- (ii) shall enlist or recruit
- (iii) any person
- (iv) for employment
- (iii) under any foreign contract of service;

unless the person is authorised in writing by the Permanent Secretary.

Issues for Determination

*Person*

86. Section 2 of the Interpretation Act (Cap 7) defines the word “person”, to include:  
*any company or association or body of persons, corporate or unincorporate*

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<sup>11</sup> See specifically Section 58 of the Decree.

87. The Defendant is caught within this definition in his capacity as an individual. The charge has not been brought against an entity.<sup>12</sup>

#### *Enlist*

88. There is no definition contained within the Promulgation that sets out the meaning of the word enlist.

89. Relevantly, the Concise Oxford Dictionary<sup>13</sup> defines “enlist” to mean *secure as a means of help or support*

90. In *Joseph v Repatriation Commission*<sup>14</sup>, Spender J found the concept of enlistment, as typically confined to engagement in regular naval, military or air forces, where there existed an absence of choice regarding crucial aspects of employment such as military discipline and pay.

#### *Recruit*

91. The word “recruit” when used as a verb, has been defined elsewhere to include procuring, inducing, urging, aiding and encouraging.<sup>15</sup>

92. In the context of employment, the term “recruiting” has been defined as:

*The process of attracting individuals to apply for jobs that are open*<sup>16</sup>

93. The activity of recruiting would capture all such steps such as, advertising job opportunities, receiving enquiries and applications from such persons,

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<sup>12</sup> Even if it had and that Mr Lolohea was being prosecuted having regard to his liability as a Company Director, I am satisfied in either case, the element has been satisfied.

<sup>13</sup> See Australian Concise Oxford Dictionary, Oxford University Press 1987, Seventh Edition.

<sup>14</sup> (1990)100 ALR 549 at 554

<sup>15</sup> See Section 3 of the *Crimes (Foreign Incursions and Recruitments) Act 1978* (Aust.)

<sup>16</sup> See Griffin.RW, *Management 3<sup>rd</sup> Edition*, Houghton Mifflin Company, New York 1990.

competency screening, pre-employment medical testing, interviewing and shorting listing candidates

*For Employment*

94. The *Employment Relations Decree 2007* defines the term “employment” to mean:  
*the performance by a worker of a contract of service*

*Foreign Contract of Service*

95. It is noted that within the repealed Employment Act (Cap92) the expression “foreign contract of service” was defined as follows:

*"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;*

96. Though no such definition exists within the Promulgation, the former provision would appear to be the most sensible reference point for the purposes of interpreting the Decree.

What is the Discernible Purpose of Section 37(4)

97. Section 37(4) of the Promulgation must be considered within the broader purpose of the Decree, that is in:

*(A) CREATING MINIMUM LABOUR STANDARDS THAT ARE FAIR TO WORKERS AND EMPLOYERS ALIKE, AND TO BUILD PRODUCTIVE EMPLOYMENT RELATIONSHIPS.....*

*(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.....*

*(E) ENCOURAGING CONSULTATION BETWEEN LABOUR AND MANAGEMENT IN THE WORKPLACE FOR BETTER EMPLOYMENT RELATIONS AND PRODUCTIVITY IMPROVEMENT;.....*

*AND*

*(G) FOR RELATED MATTERS.*

98. A significant purpose of the Decree is certainly to safeguard the rights and interests of Fijian workers.
99. From a historical point of view, it is also worthwhile considering the former related provisions set out within Sections 47 to 49 of the Employment Act (Cap 92), as follows:

*Foreign contracts of service and contracts made abroad*

*47.-(1) When a contract made within Fiji relates to employment in another territory (in this section referred to as the "territory of employment") and is a "foreign contract of service" as defined in section 2, then the provisions of this Part shall apply in the following manner, that is to say:*

- (a) the attestation of the contract required by section 35 shall take place before an attesting officer before the employee leaves Fiji;*
- (b) the provisions of subsection (5) of section 35 shall apply as if the copy of the contract required thereunder to be delivered to the Permanent Secretary were required to be sent to the Government of the territory of employment for transmission to the appropriate officers in that territory;*
- (c) the medical examination required by section 36 shall take place at the latest at the time and place of the departure of the employee from Fiji;*
- (d) a person whose apparent age is less than either sixteen years or the minimum age of capacity for entering into contracts prescribed by the law of the territory of employment, if such minimum age is higher than sixteen years, shall not be capable of entering into such a contract;*
- (e) the period of service stipulated in the contract shall not exceed either two years in the case of an employee accompanied by his family, or, in other cases, one year; or the maximum period prescribed by the law of the such maximum period is less than two years, or, one year, as the case may be;*
- (f) the conditions under which the contract is subject to termination shall be determined by the law of the territory of employment;*
- (g) the Permanent Secretary shall co-operate with the appropriate authority of the territory of employment to ensure the application of subsection (2) of section 44;*
- (h) the period of service stipulated in any re-engagement contract shall not exceed the maximum period allowed by the law of the territory of employment, if the latter maximum period be less than the former.*

*(2) When a contract made within another territory (in this section referred to as "the territory of origin") employment in Fiji, the provisions of this Act shall apply in the following manner:-*

- (a) the endorsement of a transfer as required by section 39 shall be made by an attesting officer of Fiji;*
- (b) the conditions under which the contract is subject to termination shall be determined by the provisions of this Act;*
- (c) if the employer fails to fulfil his obligations in respect of repatriation, the said obligations shall be discharged by the Permanent Secretary, who may recover the amount so expended by civil suit;*
- (d) the authority which may exempt the employer from liability for repatriation expenses shall be the Permanent Secretary;*

*(e) the Permanent Secretary shall co-operate with the appropriate authority of the territory of origin to ensure the application of subsection (2) of section 44.*

*(3) When the Convention is not in force for the territory of employment the provisions set forth in subsection (1) shall apply:*

*Provided that the attesting officer of Fiji shall not attest the contract unless he is satisfied that the employee will be entitled in the territory of employment, either in virtue of the law of that territory or in virtue of the terms of the contract, to the rights and protection specified in sections 39 to 45.*

#### *Security by employer*

*48.-(1) When the employer in a foreign contract of service does not reside or carry on business within Fiji, the employer or his agent if so required by the district officer or labour officer attesting the contract shall give security by bond in the form prescribed or to the like effect with one or more sureties to be approved of by the said district officer or labour officer conditional for the due performance of the contract, in such sums as the district officer or labour officer, subject to the provisions of subsection (2), may consider reasonable.*

*(2) A bond entered into for the purpose of this section shall be enforceable to any district officer or labour officer according to its purpose without any assignment and shall be binding as a deed without being sealed.*

*(3) Any money recovered under the bond shall be applied by such district officer or labour officer in or towards satisfaction of the claims of the employee employed under the contract, in such proportions as the district officer or labour officer in his absolute discretion shall think just. Any balance remaining after satisfaction of such claims shall be returned to the employer.*

#### *Penalty for inducing persons to proceed abroad under informal contract*

**49. Whoever-**

*(a) induces or attempts to induce any person to proceed beyond Fiji with a view to being employed or continuing his employment outside Fiji without a foreign contract of service and otherwise than in accordance with the provisions of this Part; or*

*(b) knowingly aids in the engagement or transfer of any such person induced by forwarding or conveying him or by advancing money or by any other means whatsoever, shall commit an offence against this Act and be liable upon conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding ..... months or to both such fine and imprisonment*

100. Clearly the former Act, set out quite prescriptive obligations and criteria for those seeking to recruit or enlist workers under foreign contracts of service.<sup>17</sup>

<sup>17</sup>

It is also observed that the former provision created penalties for those who induced or attempted to induce such persons.

101. The language of Section 37(4) is far more efficient. In contrast to the former provisions, Section 37(4) provides a blanket prohibition on any such conduct that can be characterised as enlisting or recruiting any person for employment under foreign contracts of service, without first having the approval to do such from the Permanent Secretary.

102. The provision does not only place a prohibition on the formation of such contracts. The prohibition applies to all of the processes that give rise to the entering into such arrangements. So much is clear from the use of the words

*enlist or recruit any person **for** employment (my emphasis)*

103. The word “for” implies a future state of events. If that were not the case, the language of the provision would simply disallow anyone from **entering into** a foreign contract of service.

104. Consistent with the manner in which the former Employment Act was couched, my view is that the provision seeks to provide the same statutory protection. This comes about by ensuring that all such persons engaged in the activities of enlisting and recruiting, are approved persons for the purpose of the Promulgation. The public policy reasons for ensuring that only authorised persons engage in these activities is obvious enough.

### **The Evidence Before the Tribunal**

105. As mentioned earlier, Counsel for the Defendant has conceded that his client was not an authorised person at the relevant time.

106. The enquiry thereafter is reduced to, Did the Defendant, enlist or recruit any person with a view to securing that person employment under a foreign contract of

service? I do not believe the notion of enlistment needs to be explored in relation to the evidence before me.

107. The inquiry can easily be addressed by considering the conduct of the Defendant, in the context of whether he has been engaged in 'foreign contract of service' recruiting activities.

108. So much was admitted by the Defendant in his evidence. While he claims to have done so, more in his capacity as a consultant in preparation for some anticipated approval to be granted to Phoenix Logistics Corporation Limited, that activity in itself, is sufficient.

#### The Case of Mr Bainivalu

109. I also accept and where divergent, prefer the specific evidence of both Messrs Bainivalu and Nasegai over that of Mr Lolohea. They say they were contacted and encouraged to apply for work overseas by Mr Lolohea. They both give evidence of attending Mr Lolohea's Lami home. Mr Lolohea agreed that he "would use (Mr Bainivalu) as a Logistics Officer".

110. Further to that, Mr Bainivalu advised that the Defendant later called him and said "had to have amount of \$1700". According to the witness, he said:

*"Pay \$1700.00 and get the job".*

111. In his evidence, Mr Lolohea admitted meeting Mr Bainivalu at Belo Street on 29 December 2010, where he said a recruitment drive for security contracts for Dubai and Papua New Guinea was being conducted by Phoenix Logistics Board members.

112. Mr Lolohea's evidence was that he was asked to be a consultant to Phoenix, to be part of the Security Department. He said:

*“I was being asked to help because of our previous experience with private security contracts...”*

113. His evidence was that he was being asked to consult on the criteria that would be used for applicants, in relation to physical fitness, qualifications and police clearances.

114. When shown a copy of a receipt contained within the *Labour Officer Bundle of Documents*, dated 29 December 2010, Mr Bainivalu’s evidence was that he had paid the money on the basis of a verbal agreement, having already signed a contract for a position of Logistics Officer. According to the witness, he had signed a contract 8 months earlier for a “Logistics Officer Job in PNG”. According to the witness, the contract was for five years, to work in logistics and stores.

115. The Defendant’s initial evidence was that he was engaged as a consultant to Phoenix Logistics Corporation Limited at the relevant time. During proceedings, Mr Vosarogo drew my attention to Document No 1 of the “Labour Officer Bundle of Documents” where a letter from the Permanent Secretary to the Defendant, identified Mr Lolohea as Managing Director, Phoenix Logistics Corporation Limited. Mr Vosarogo submitted that the evidence would show, that Mr Lolohea was not that Managing Director of that company at that time.<sup>18</sup>

116. Mr Lolohea subsequently admitted to the Tribunal that he received, then distributed portions of those monies collected and paid by Messrs Bainivalu and Nasegai, through cheques he issued on behalf of Phoenix.

117. His evidence was that he himself had been signing cheques at that time, on behalf of Phoenix Logistics Corporation Limited.

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<sup>18</sup> Despite my request of the parties to provide me with current Companies Office records in relation to this point, no such records were provided.



The Case of Mr Nasegai

118. In the case of Mr Nasegai, Mr Lolohea admitted that he had been speaking to him as part of a group in Belo Street. It is logical to assume that this date must have been on or before 5 January 2011.<sup>19</sup> Mr Lolohea's evidence, was that Mr Nasegai, "had come to listen to criteria that were going to be used".

119. Mr Nasegai's evidence is repeated as follows:

*Mr See: Who told you (to pay the \$1700.00)?*

*Witness: Mr Lolohea*

*Mr See: Did he say what he money was for?*

*Witness: We were told if you pay the money we would get the job.*

*Mr See: What job?*

*Witness: Overseas jobs, security and drivers.*

*Mr See: Where about?*

*Witness: Told in Dubai*

*Mr See: Who told you that?*

*Witness: Mr Lolohea..... and the Suez Canal*

*Mr See: How was he going to do that?*

*Witness: Through the company?*

*Mr See: Which company?*

*Witness: Meridian. Mr Lolohea said he had a contract with Meridian to get jobs.*

*Mr See: When did he say that?*

*Witness: During that time..when we were at Belo Street... in front of office to more than 100 people. First people to pay \$1700.00 would get jobs.*

*Mr See: Who was money going to?*

*Witness: The office*

*Mr See: Did he tell you to pay the office money?*

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<sup>19</sup> The date that the receipt for \$1700.00 was issued.

*Witness: Yes...for us to get the job we had to pay the money*

120. Mr Lolohea does not dispute that Mr Nasegai paid the \$1700.00. It was Counsel for the Defendant who secured the return of those monies.

121. The Defendant freely admits to having allowed for the receipt books of Meridian Services Agency Limited to be used for the purposes of receipting money received for that purpose. He also freely admits to having distributed money to the Directors of that company, supposedly as their share of the income derived from that activity.<sup>20</sup>

122. The fact that the witness concedes that he was signing cheques on behalf of Phoenix Logistics Corporation Limited at that time, is suggestive to me, that the Defendant also assumed a position within that company. But even if the Company records do not show such a state of affairs, the admissions of the witness in my mind are sufficient to determine that he had been involved in the recruiting of persons for employment under foreign contracts of service without authorisation.

#### Pre-emptory Conduct No Defence

123. Paragraph 2.6 (iii) of the Defendant's Closing Submissions dated 11 May 2012, states:

*Timoci Lolohea's involvement to announce recruitment to a group of men at 16 Belo Street was anticipatory of the issuance of authorisation by the Ministry of Labour and not a recruitment or enlistment with the knowledge that there exists no authorization.*

124. Counsel for the Defendant seems indifferent to the fact that such preemptory conduct may still have been highly unlawful in any event. The authorisation by the

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<sup>20</sup> It makes no difference whatsoever that he himself did not personally receive or receipt these monies.

Ministry may never had taken place.<sup>21</sup> Yet Mr Lolohea was content to have members of the community pay their money for “Admin & Mng’t (sic) Fees”, without any guarantee that they would ever obtain a foreign contract of service.<sup>22</sup>

125. According to the Defendant’s own evidence, he was dispersing monies received from this purpose to his partners from the Meridian venture, on a weekly basis.

126. In the Closing Submissions of the Defendant at Paragraph 3.2, it has been submitted:

*That no shred of evidence was shown to the court of proof of offer for employment outside Fiji on the 29<sup>th</sup> of December 2010 and the 5<sup>th</sup> of December(sic)<sup>23</sup> 2011 (note the particulars of the charge)*

127. The focus of that argument seems misplaced.

128. Firstly the particulars do not speak of offers of employment being made on those dates. They do though speak of the enlisting and recruiting of persons for foreign contracts of service without authorisation, a far wider set of activities, than the sole act of offering employment, as Counsel is suggesting.

129. Secondly, Exhibits 1 and 2 as contained within the ‘Labour Officer Bundle of Documents’, clearly identify that receipts for monies were issued on those dates. It is clear from the evidence as earlier identified of the Defendant, that such payments form part of the recruitment exercise. Mr Lolohea concedes that Mr Bainivalu was at the Belo Street premises on 29 December 2010. The evidence suggests, that Mr Nasegai was also at that location on 5 January 2011.

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<sup>21</sup> A letter to the effect addressed to Mr Lolohea dated 13 January 2011, while not admitted as evidence, was included within the Labour Officer’s Bundle of Documents.

<sup>22</sup> In this regard, Mr Lolohea acknowledged as the receipts of Messrs Bainivalu and Nasegai seemed to suggest by their numbering, that between the period 29 December 2010 to 5 January 2011, at least 40 receipts had been issued to prospective workers, along similar lines.

<sup>23</sup> I presume that the date should be January.

130. The focus of the analysis must remain on the offence, not on the language of the particulars. In any event, I would have thought that the payment of such monies, would have been adequate in the eyes of the Defendant, to assume that Messrs Bainivalu and Nasegai were prepared to be recruited at that point.<sup>24</sup>

131. Yes, it may be the case as the Defendant's Closing submissions suggest, that the inspectors appear not to have "uplifted copies of the documents for proof of prosecution"<sup>25</sup>, but for the reasons that I have advanced earlier, I do not believe that it is the intention of the Promulgation, to await for the formation of a formal contract, before the relevant force of Section 37(4) can be relied upon.<sup>26</sup> It is the act of enlisting or recruiting where it is unauthorised, that gives rise to the offence. Mr Lolohea again admitted in his own evidence, that in relation to Mr Bainivalu, he "agreed would use him as (a) logistics instructor".

132. The Defendant has conceded in its submissions of *Mr Lolohea's involvement to announc(e) recruitment to a group of men at 16 Belo Street*.

133. The fact that there is no evidence before the tribunal of the date in which Mr Lolohea made his announcement to Mr Nasegai, is not that critical.

134. Section 58(b) of the *Criminal Procedure Decree 2009* requires that the charge or information contains such particulars as are necessary for giving reasonable information as to the nature of the offence charged. In *Koro v The State*<sup>27</sup>, Shameem J considered this question of the importance and preciseness of specific particulars, where an offender may have committed multiple offences and concludes that there is a need to balance two possibly competing principles, "one is

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<sup>24</sup> And maybe even enlisted.

<sup>25</sup> See Paragraph 2.3

<sup>26</sup> I nonetheless accept the evidence of Mr Bainivalu that he had applied for a five year contract as offered by Mr Lolohea.

<sup>27</sup> [2002] FJHC161

that the prosecution should not be prevented from prosecuting repeat offenders simply because witnesses (understandably) cannot particularize specific incidents...the other principle is that an accused person must not be tried on the basis of charges which are ambiguous and render the preparation of a defence difficult or even impossible because of lack of particularity.”

135. The case against the Defendant was well known. Counsel for the Defendant never at any point, suggested that the Defendant did not know the nature of the allegations that were being levelled against him.

136. I am satisfied that the Defendant was actively involved in the process of recruiting persons for employment under foreign contracts of service.

137. For the above reasons, I am satisfied that the case of the labour officer has been made out. I find the Defendant guilty of the offence.

### **Count 2 – Wilful Obstruction of a Labour Inspector**

138. Count 2 is the Wilful Obstruction of a Labour Inspector contrary to Section 246(1)(a) of the Promulgation.

139. The particulars of that offence are that:

*Timoci Tupou Lolohea, on the 11<sup>th</sup> of January 2011 at the registered office of Phoenix Corporation Limited situated at 16 Belo Street, Samabula, wilfully obstructed a Labour Inspector in exercising power or performing her duty conferred by the Employment Relations Promulgation 2007.*

140. For the elements of this offence to be made out requires proof of an intention to commit the act.<sup>28</sup>

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<sup>28</sup> See *R v Webb* [1990] 2 Qd R275

*Evidence of the Labour Officer*

141. Ms Malani was the only prosecution witness to give evidence in relation to this second count. Her evidence was quite clear.

142. She indicated that just before the inspectors were leaving the location, she asked could she go and inspect the rooms. She was accompanied by Mr Qalilawa. When she approached Mr Lolohea's Office, she waited outside, while Mr Lolohea was spoken to by one of the men. She said that when Mr Lolohea came out of the office:

*"I asked him could I examine the room and then he told me to leave the house"*

143. During proceedings the labour officer gave a demonstration of the way in which the defendant shouted at her. The account of that demonstration was not challenged by the Defendant and can only be described as a loud shouting voice. On the other hand, Mr Lolohea offered an explanation for why his voice was raised. He stated, because "there was a lot of hammering and repairs". I do not accept Mr Lolohea's version of events in this regard.<sup>29</sup>

*Powers and Duties of a Labour Officer*

144. Ms Malani was appointed to be a Labour Officer or Labour Inspector on 6 August 2010. The powers and functions of such officers are set out, within Section 19 of the Promulgation as follows:

*Powers and functions of officers*

19. — (1) The Permanent Secretary, a labour officer or labour inspector may at all reasonable times—

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<sup>29</sup> Based on the earlier illustrations of the witness's unreliable, contradictory and apparently untruthful evidence.

- (a) enter, inspect and examine a workplace where or about which a worker is employed or where there is reason to believe that a worker is employed;
- (b) require an employer to produce any worker employed by the employer and any documents or records which the employer is required to keep under this Promulgation or any other documents or records relating to the employment of the worker;
- (c) interview the employer or a worker on a matter connected with employment or this Promulgation, and may seek information from any other person whose evidence is considered to be necessary; or
- (d) inquire from an employer or a person acting on the employer's behalf regarding matters connected with the carrying out of this Promulgation.

(2) The Permanent Secretary, labour officer or labour inspector,

- (a) must not enter a private dwelling house without the consent of the occupier; or
- (b) on the occasion of a visit or inspection, must notify the employer or the employer's representatives of his or her presence, unless there are reasonable grounds for believing that such notification may be prejudicial to the performance of his or her duties.

(3) In the exercise of powers and functions under this Promulgation for the purpose of ensuring compliance with a provision of this Promulgation, the Permanent Secretary, a labour officer or labour inspector may copy or make extracts from a document or records in the possession of an employer which relate to a worker.

(4) In the exercise of powers and functions under this Promulgation for the purpose of ensuring compliance with a provision of this Promulgation, a labour officer or labour inspector may, in the prescribed form, issue a demand notice or fixed penalty notice requiring compliance with the provision.

(5) The Permanent Secretary, a labour officer or a labour inspector may—

- (a) advise and assist employers and workers on particular or general employment relations matters under this Promulgation;
- (b) provide information, advice, awareness or training to employers and workers or their organizations on matters under this Promulgation; or
- (c) formulate enterprise or national policies, codes and strategies on employment relations matters.

145. Based on the evidence of the labour officer, I am satisfied that Ms Malani entered a workplace for the purposes of Section 19 (1)(a) of the Promulgation and that at the outset, the six departmental officers who attended the premises at Belo Street, had notified the employer or the employer's representatives of their presence in accordance with Section 19(2)(b).<sup>30</sup>

<sup>30</sup>

There was certainly no statutory obligation to specifically notify the Defendant personally.

146. According to Mr Lolohea's evidence, he was acting in his capacity as a consultant at that time to Phoenix Logistics Corporation Limited.<sup>31</sup> Counsel for the Defendant sought to rely on the fact at various times, that his client was not appointed as a Director to that entity until 15 June 2011.
147. I do not think much turns on that fact, regardless of whether or not that was the case.
148. The uncontroverted evidence of Ms Malani is that she been involved in discussions with Directors of that company on that day who were aware of the purpose of the officers' visit. As Phoenix Logistics Corporation Limited was the focus of the inspection on that day, the officers had discharged their obligation under Section 19(2)(b) of the Promulgation, probably at that time when they notified the gatekeeper of their intention to come inside, but if not then, at least by the time that the initial discussions took place with Mr Qalilawa and others.
149. Nothing within the Promulgation required Ms Malani to 'renotify' the Defendant as to the purpose of the visit.
150. The officers had discharged that obligation and this would have most likely been known to Mr Lolohea, when according to the witness, Mr Qalilawa had escorted her to Mr Lolohea's office.
151. According to Mr Lolohea and his Counsel, this premise was under the control of Mr Qalilawa.
152. According to Mr Lolohea's evidence, he says he came out of the room because it was to be carpeted and he did not wish Ms Malani to enter the office, because of what he believed to be workplace health and safety considerations.

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<sup>31</sup> Despite the fact that he also gave evidence to be signing cheques on behalf of that company at that time.



153. In his evidence in chief, he stated

*I said words to the effect .....you people go, the building is being repaired, when it is finished you can come back.*<sup>32</sup>

154. In response to Mr Vosarogo's question "any other officers?", he replied,

*I only saw her. She said she wanted to have discussion with me.*

155. There are several issues that emerge from this evidence. Note the words used by the Witness, "you people go". Mr Lolohea claims that he only saw Ms Malani, yet is apparently giving a direction that several people rather than just one, should leave the premises.

156. I am prepared to take the further step in concluding, that if he was aware of the presence of more than just Ms Malani, he had more likely than not been told of the reason why they were present that day.<sup>33</sup> In any event, the witness conceded that Ms Malani had advised him that she was from the Ministry of Labour.

157. Once armed with the knowledge of why the inspectors were on the site, for whatever reason he did not want them to remain. He refused Ms Malani to access and inspect his room, for reasons which I simply do not accept.

### **What is Obstruction ?**

158. Shameem J in *State v Kim*,<sup>34</sup> relied on the English case of *Hinchcliffe v Sheldon*<sup>35</sup> when considering this question. In that case, in the context of obstructing

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<sup>32</sup> It should be noted here that when the witness gave his evidence speaking those words as he initially did in his native Fijian language, he also used the expression "Dou Lako".

<sup>33</sup> Though I am not relying on that impression in determining this matter.

<sup>34</sup> [2003] FJHC 115

police, it is noted the court defined obstruction as “the doing of any act which makes it more difficult for police to carry out their duty.” Yet it was recognized that for an obstruction to be willful meant that there should be no lawful excuse for the obstruction.<sup>36</sup>

159. The Defendant’s case appears to be in part, that the direction given to the Labour Officer to leave, was done for workplace health and safety reasons. Yet there is no evidence whatsoever before me, that there was any risk to Ms Malani’s health and safety at the time of the inspection.

160. The Closing Submissions of the Defendant at Paragraph 2.10, sets out a chronology of events that is relied on to justify the position that the elements of the offence have not been made out. That chronology makes no mention of any interaction between Mr Lolohea and the Directors.

161. Ms Malani said that at this time, the Defendant was standing in front of her with Mr Kaloumaira (a Director of Phoenix) and another person. I prefer the evidence of Ms Malani to that of Mr Lolohea.

162. I have no doubt whatsoever in those circumstances, that Mr Lolohea knew exactly what he was doing. His intention was clear. If Mr Lolohea was in fact only a consultant to Phoenix, he was not the person in control of the workplace in any event. I simply do not accept Mr Lolohea’s argument that he was concerned for the health and safety of Ms Malani at that time. If his office was safe enough as he says for workmen to enter for the purposes of laying carpet, it would have been safe enough for Ms Malani to inspect as a Labour Officer.

163. The Defendant’s Counsel has not referred me to any obligation or duty he relies on under the *Health and Safety at Work Act 1996* and in any event, for the reasons

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<sup>35</sup> (1955) 1 WLR 1207

<sup>36</sup> See for example *Rice v Connolly* (1966) 2 QB 414

addressed before in relation to Mr Qalilawa's ostensible control of the workplace, I would regard any such submissions as disingenuous.

164. Mr Lolohea's conduct was wilful and designed to obstruct Ms Malani undertaking her role as a Labour Officer or Labour Inspector. She could not carry out her duties when she had been shouted at to leave the premises. Why in these circumstances, if she did wish to inspect the room, she did not return to the group of inspectors and find the Team Leader Mr Pickering and issue Mr Lolohea a warning, remains a little baffling. In any event, she was not required to do so. Having gained permission from Mr Qalilawa to be on the premises, she needed no authority from Mr Lolohea to inspect the room.

165. I find that the Defendant is guilty of the second offence.

#### **DECISION OF THE TRIBUNAL**

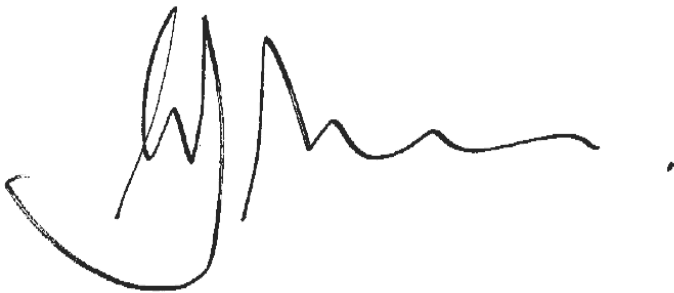
166. In relation to the first count of Enlisting Or Recruiting Any Person For Employment Under A Foreign Contract Of Service With No Authorisation, contrary to Section 37(4) of the Promulgation, I find the Defendant guilty of the offence.

167. In relation to the second count of the Wilful Obstruction of a Labour Officer, contrary to Section 246(1) of the Promulgation, I find the Defendant guilty of the offence.

168. While the ordinary powers of a Magistrate in criminal cases are set out within Section 7 of the Criminal Procedure Decree 2009, I also note the requirement set out within Section 61B (2) of the Magistrates Court Act (Cap 14).

169. Section 61B(2) of the Act, requires that sentences must be passed, in accordance with the written law that established the tribunal. In that case, the relevant provision is Section 211(3) of the *Employee Relations Promulgation* 2007.

170. In view of the above, I now remit this matter to the Employment Relations Court for sentencing.

A handwritten signature in black ink, appearing to read 'A. J. See', with a large, sweeping initial 'A' and a long, horizontal tail.

**Mr Andrew J See**  
**Resident Magistrate**