

Decision

Section 256 Employment Relations Promulgation 2007

Title of Matter:	LABOUR OFFICER v BRIAN NITIN NAIDU REUBEN T/A CYBER CITY	(Complainant) (Defendant)
Section:	Sections 97 (1)(a),(b); 97(4); and 99(1)(a) <i>Employment Relations Promulgation 2007</i>	
Subject:	Hours of Work for Children; Paid Rest Breaks; Register of Children Employed.	
Matter Number(s):	ERT Criminal Case 14/2014	
Appearances:	Mr A Kumar, for the Complainant Defendant In Person	
Dates of Hearing:	28 October 2014; 30 October 2014.	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	26 November 2014	

OFFENCES – Sections 97; 99; 256 Employment Relations Promulgation 2007;

Background

1. The Labour Officer in these proceedings, has brought two complaints against the Defendant under the *Employment Relations Promulgation 2007* as follows:-

Count 1
Statement of Offence (a)

Employing a child contrary to Employment Relations Promulgation 2007, Section 97 (1) (a) (b) & (4).

Particulars of Offence (b)

Brian Nitin Naidu Reuben T/C Cyber City of 28 Howell Road, Samabula, Suva being an employer in the Central Division employed a child named Ashneel Saroop for the period from July 2012 till 7th August 2012. Therein, employing a child for 12 hours per day for 7 days in a week contrary to Section 97 (1) (a) (b) & (4) of the Employment Relations Promulgation 2007.

Count 2
Statement of Offence (a)

Employing a child contrary to Section 99 (1) (a) and subsection (2) & (3) of the Employment Relations Promulgation 2007.

Particulars of Offence (b)

Brian Nitin Naidu Reuben T/A Cyber City of 28 Howell Road, Samabula, Suva being an employer in the Central Division employed a child named Ashneel Saroop for the period from July 2012 till 7th August 2012. Therein, employing a child contrary to the Employment Relations Promulgation 2007 thus committing an offence.

2. The Defendant, Mr Reuben is the former owner of a video games/internet shop business, trading under the name Cyber City. On 25 August 2014, the Defendant pleaded not guilty to both counts. In relation to the second count of not keeping a register of all the children employed in the workplace, the Defendant nonetheless concedes that no such register was able to be produced to the Labour Officer, nor was a register separately maintained. That case proceeded on the basis that if it was established that an employment relationship did exist between the Defendant and the child the subject of the complaint, then an employment register needed to be kept and produced. If not, then no such requirement exists.
3. The contested proceedings relate to the first count, that in effect has two limbs. The first is that the Defendant had engaged a child Ashneel Saroop to work at the Defendant's internet cafe for more than 8 hours in any day¹; the second is that having done so, the child was not provided with appropriate rest breaks after every four hour period.

¹ It is noted that the particulars to this count, claim that the child had been working 12 hours per day.

Evidence of the Complainant

4. Exhibit 1 produced by the Complainant, was an extract of the child's birth details from the Birth Register, as maintained by the Registrar of Births. The then child worker Ashneel Saroop was born on 17 August 1996. At the relevant time of the alleged offences he was 15 years of age. Section 4 of the *Employment Relations Promulgation 2007* defines child to mean, "a person who is under the age of 18 years".
5. The Complainant has relied on three witnesses in the prosecution of its case. The first witness was that of Ashneel Saroop, the then child. According to the statement provided to the Labour Officer who investigated this matter (Exhibit 2), Mr Saroop stated:-
 - He had worked as a sales assistant for a month;
 - He had worked for 7 days from 10 am to 10 pm and paid a rate of \$10 per day;
 - He was mistreated (punched) on his last day of work by the Employer for reasons that he had given credit to his father which was suppose to be deducted from his own wages;
 - That there was no wages and times record and no payslip;
6. The effect of the oral evidence provided by Mr Saroop, was in essence a restatement of these issues. His evidence was that he and his father were providing for family and that he was given a job by the Defendant "checking (that) computers (were) up²" and serving customers. According to the witness the shop would sell internet access time, 'rolls'³ and 'grog'⁴. Under cross examination, the witness was asked how he could claim to work 7 days per week, when he would on occasions play in a local soccer competition on Sundays. The witness stated in reply, that he had only gone to the grounds for competition on a Sunday on one occasion only. On re-examination, Mr Saroop stated that while he was promised to be paid \$10 per day, in effect he never received \$70 per week.⁵
7. The second witness to be called for the Complainant was Mr Joeli Pulu, who was the Labour Officer charged with the investigation of the complaints. At the outset of the Labour Officer's evidence, he explained what was required when an investigation takes place into alleged breaches of the child labour laws. Mr Pulu identified for the Tribunal a Statement he had taken from the Defendant employer, (Exhibit 3), during the course of that process.
8. On cross examination the following exchange took place:

Mr Reuben : Where was the interview conducted?

Mr Pulu: At the shop

Mr Reuben: Interviewed at shop on 17 January 2013?

² I presume this means operational and working for customers.

³ A reference to single cigarettes that are sold to customers.

⁴ "Grog" is the colloquial expression that refers to yaqona.

⁵ In his evidence in chief he had suggested that he had received around \$30 or \$40 a week for the month period.

Mr Pulu: Yes

9. Mr Reuben stated to the witness, that the internet shop had closed at that stage.⁶
10. The final witness called by the Prosecutor was Mr Richard Shaneem Prasad, who was assisted in the giving of his evidence by a Court Translator. Mr Prasad's evidence was that he was a local resident of the Howell Road precinct and that he had also provided the Labour Officer a statement that he had signed. (Exhibit 4). Within that Statement, he had stated that:
- Mr Saroop had witnessed the child working for Cyber City
 - Mr Saroop had worked from 10 am to 10pm; seven days per week.⁷
11. Under cross examination the witness was asked to be clear about the store opening times and when he was actually present to observe Mr Saroop working there. His evidence was that he was sometimes at the store at 11 am or 3pm. He moderated that view slightly further, by saying that he was often at the store in the afternoons. The witness indicated that he would play soccer on Sundays, but still claimed to come to the store every day and would see Mr Saroop working there.

The Case of the Defense

12. The Defendant's case was supported by his own submissions to the Tribunal, as well as that of Mr Rahul Prashant and Mr Seru Colavanua.
13. Mr Prashant gave evidence that he was a former employee of the store. According to him, the store was opened around 3.00pm or 3.30pm each day. He stated he was paid \$100 a week to work in the store. He was provided with pay slips and was paid FNPF contributions.⁸ Mr Prashant's evidence was that while Mr Saroop did "help out" at the store, he did so, only to be able to access free internet time, so he could play games. Mr Prashant indicated that he himself worked at the store for approximately eight months. He could not clarify the precise time period in which he was employed and also conceded that Mr Saroop would "sweep" at the store, for approximately 1 hour periods. Mr Prashant indicated to the Tribunal that he did not work on Sundays, nor could he confirm to the Tribunal if Mr Saroop was in fact working on those days.

⁶ The witness neither accepted or rejected this proposition from the Bar Table.

⁷ I am not satisfied in relation to the manner in which this statement was taken. The witness could not speak English and could not be expected to sign a statement given to him, without the assistance of a translator as to its accuracy. No such translator was apparently made available at that time, despite the witness appearing satisfied that the contents of his statement were still true. I have not relied on that Statement when evaluating the reliability of this witness's total evidence.

⁸ Superannuation contributions made on behalf of employer. This would be a relatively easy matter to verify for dates, should the Labour Officer had needed to do so.

14. The next Defendant witness was Mr Seru Colavanua, a self employed Tertiary Student, who too was a resident of the local Howell Road area. Mr Colavanua's evidence was that he would frequent the store on a regular basis. According to Mr Colavanua, Mr Saroop was not an employee of the store. He too indicated that the store was not open for 12 hours a day. Mr Colavanua gave evidence as to when he believed the store originally opened (February/March 2010) and when it closed (November 2012); and told the Tribunal that he was a witness to a rental agreement that was entered into between the Defendant and the owner of the premises at Howell Road. (See Exhibit D1). Mr Colavanua conceded that Mr Saroop was "at the shop most of the time", that he was involved in "doing clean up of the shop" and that the "owner would give him some games to play". Upon cross-examination, Mr Colavanua conceded that he was a university student who for 3 days a week would be attending university lectures and undertaking assignments. His classes were ordinarily undertaken between the period 10am to 2pm and that he would leave for university at around 9am. Mr Colavanua seemed adamant that there was no employment relationship between the Defendant and the then child. His position changed though, when shown the Statement produced by the Labour Officer (Exhibit 3) in which the Defendant had admitted to having employed the child. In fact, he thereafter distanced himself from his earlier evidence by stating that during the period 7 July to 7 August, he would not have been at the store, while preparing for exams. Mr Colavanua also admitted to conducting a consultancy business that would operate from various mobile locations and to that end, could not have known when the business was operating with any precision.
15. In summarising his case, Mr Reuben stated that the child was not an employee of the business and that even if he was, he only worked a few hours as an exchange for being able to use the computers within the store. Mr Reuben denied having given a statement to Mr Pulu, even though during the giving of the Labour Officer's evidence he did not challenge the admission of the statement (Exhibit 3), through his right to cross examine the witness. Mr Reuben claimed that the store had closed by November 2012.

Summary and Impact of Evidence

16. The fundamental concern of the Tribunal relates to the last minute attempt by Mr Reuben to somehow suggest that he himself had not provided the Labour Officer with any statement and that further, he did not sign such a document. To make the point clear, Exhibit 3 (the statement of Mr Reuben) provides:
- Ashneel Saroop is no longer working for me from around August 2012;
 - I had employed him for a couple of weeks only to pay off the debt of \$80 I loaned him;
 - He was only sometimes relieving me when I go out somewhere therefore I did not have or keep any wages or employment records.
17. The fact that Mr Reuben sought to reject having given such a statement to Mr Pulu, particularly when it appears to be a signed document, goes to the heart of the respective credibility of the witnesses. Mr Reuben was asked to compare and contrast the signature on Exhibit 3 that was believed to be his, with that appearing on the Rental Agreement (Exhibit D1). He conceded that the first name appeared to be similar on both documents, though made clear that in the case of Exhibit 3, it did not contain his surname, whereas Exhibit D1

was signed in full.⁹ In *Ram v Ram*,¹⁰ Kermode J observed, that on the authority of *Browne v. Dunn* (1894) 6 R.67, the failure by a party to cross-examine a defendant on an allegation (in that case the story that the second defendant was not known to that person) must be deemed to imply acceptance of that evidence.

18. An analogous situation arises here. Mr Reuben was given the opportunity to challenge the admission of Exhibit 3 as being his signed statement when it was produced into evidence by Mr Pulu, however he failed to do so. In the first instance, his case seemed to turn on the fact that the statement provided on 17 January 2013 was a date, after the closure of the games shop. The inference apparently being, that he would not have provided a statement to the officer at that time, given the shop was now closed. In support of that position, Mr Reuben relied on Exhibit D1, the two year fixed rental agreement for the business premises. It is noted that the agreement purports to expire on November 2012.¹¹ When asked by the Tribunal could Mr Reuben explain the similarity within the signatures of Exhibit 3 and D1, he responded words to the effect that it was "a very good effort by someone to forge his signature". Overall, the Tribunal is not persuaded by Mr Reuben's version of events. Mr Pulu presented his evidence in a sincere and earnest fashion. Mr Reuben could have challenged the fact that he had taken a statement. He didn't. His only challenge was to the fact that the business may have not been operating at that time when the statement was taken. The existence of the agreement that is Exhibit D1 does not prove if a subsequent statement was provided by the Defendant. It may have been the case when Mr Pulu took the statement, that a new business was operating within that same location. The critical issue is whether or not a statement attesting to various events on or around July and August 2012, was given by Mr Reuben. The Tribunal is of the view that this statement was given and that the contents of the document, were the true beliefs of Mr Reuben at that time.

Was the Child Employed by the Defendant?

19. The Tribunal is of the view that the child was employed by the Defendant at the store in the relevant period in question. It also seems the case that the child did work at the store for various daily time periods. Mr Saroop states that he worked for 12 hours a day. Mr Richard Prasad gave evidence that he attended the store every day at 11am or 3pm and that the Mr Saroop would have been working there at those times. Mr Rahul Prashant on the other hand sought to provide evidence that during his employment at the store it did not open until around 3.00pm. He initially gave evidence that he had worked at the store in 2010 and later revised that date. His evidence was that he only worked at the store for 8 months. To that end, I do not regard Mr Prashant's recollection of times and dates as being reliable when ascertaining the time periods in which the child was at the store. Mr Prashant also admitted that he was not at the store on 7 August 2012. Mr Colavanua too, also indicated in cross examination that he was not at the store during the relevant period. He nonetheless could recall on occasions where Mr Saroop's brother would come to the store to tell him to

⁹ I am satisfied by examining the signatures on both documents that they have been made by the same person. This view has been assisted to some degree by the manner in which the evidence was received by the Tribunal.

¹⁰ [1985] FJSC 8

¹¹ Mr Colavanua's evidence was that he had helped the Defendant vacate the premises upon expiration of the lease.

come home in the evenings. He also could recall seeing Mr Saroop in the shop sometimes after class when he would get to the store by 8.00pm. Mr Colavanua could not state with any certainty if the shop was in fact open in the early morning or not. Based on the totality of the evidence, it would seem that the child did work in excess of 8 hours a day during the relevant period. There is evidence to suggest that the store opened in the mornings and that it was kept open until the late evening. Mr Colavanua admits to seeing the child there after 8.00pm and Mr Prasad admits to seeing him there as early as 11.00am. Such a period would at least span a nine hour working day. I am satisfied that this complaint has been made out.

20. The child claims he was not provided any paid rest breaks while engaged by the Defendant. There is no record of any paid rest periods being provided to the child during that period and based on the totality of evidence before me and the relative impressions gained through the witnesses, I am satisfied that no such paid breaks were provided.

Count 1 – Employing Child for More Than 8 Hours and Failure to Provide Paid Rest Break after 4 Continuous Hours Work.

21. Section 97(1) of the *Employment Relations Promulgation 2007* states

A child must –

- (a) Not be employed or permitted to be employed for more than 8 hours in a day;*
- and*
- (b) Be given at least 30 minutes paid rest for every continuous 4 hours worked.*

22. While the Tribunal is not satisfied that Mr Saroop had in fact worked 12 hours per day throughout the month period, based on the evidence of all of the witnesses, it is very likely that on some days assuming the shop even opened at 11am¹², that he could have worked for a period of up to at least 9 hours per day.¹³ I am satisfied that he worked more than 8 hours on at least some of the days in that period. For a breach of Section 97(1)(a) of the Promulgation to be established, only requires that the worker had been employed for more than 8 hours in any one day. I accept that during the relevant period that this in fact happened. The fact that this may have occurred with the ostensible consent of the worker, is immaterial to the obligation of the employer. Insofar as whether or not the worker had been provided with a paid rest break of at least 30 minutes after every continuous 4 hours, in the absence of time and wages records, such a situation is somewhat difficult to determine. The version of events of Mr Saroop though is preferred to that of Mr Reuben for the reasons intimated earlier. It is unlikely that Mr Reuben would have observed this statutory requirement when he appeared oblivious to any other. His Statement given to the Labour Officer appears to concede that Mr Saroop had been employed by him, but outside of that it would seem that Mr Reuben was of the belief that he could determine the arrangements. He clearly did not feel he needed to keep employee time and wages records. I am of the view that there is no reasonable doubt that the Defendant did not observe this condition. The evidence of Mr Saroop is preferred to that of Mr Reuben. And even if it was

¹² Reliant on evidence of Mr Prasad.

¹³ Also based on the fact that Mr Colavanua had observed the child at the store after 8.00pm and was often called home in the evenings by his elder brother.

the case that Mr Reuben did lend Mr Saroop money and thereafter engaged him to work in his store in order to repay the debt, there is no informal relationship that supports such conduct under statutory employment law.¹⁴ As a business owner, the Defendant must assume his statutory responsibilities. The Promulgation sets out a regime for protecting the exploitation of workers. Employers cannot pick and choose as to the occasion in which such arrangements should be called into play. A private contract between two parties that involves money lending needs to be considered in isolation to a statutory employment relationship. The primary reason for this is to ensure that the worker shall not be exploited in the process of repaying any debt owed. If there are loan repayment deductions to be made by a worker to an employer, then Section 47(4) of the Promulgation sets out the manner in which such arrangements need to be carried out. This includes the documentation required, as well as the maximum deduction allowed to be taken out of any weekly amount paid. The evidence before the Tribunal suggests an imbalance between the parties. The then child was vulnerable to this by virtue of the fact that he may have owed the Defendant money. The Defendant took advantage of this situation, by creating his own rules of employment in scant regard for the statutory requirement.

Count 2 – Failing to Maintain and Produce Child Employment Register

23. On the basis that the Tribunal finds that an employment relationship was in place between the parties as evidenced by the initial concession made by the Defendant in his statement provided to the Labour Officer (Exhibit3) and that no register has been produced to this Tribunal in evidence, I find that the second count has been made out. That is, that no register was kept by the Defendant and that he failed to produce same, when asked by the Labour Officer during the conduct of the investigation on 17 January 2013.

Conclusions of the Tribunal

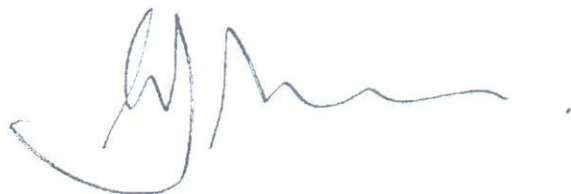
24. I find the Defendant guilty of the following offences under the Promulgation:-

- (i) That he did employ a child for in excess of eight hours per day, in contravention of Section 97(1)(a) of the Promulgation;
- (ii) That the child was not given at least 30 minutes paid rest for every continuous 4 hour period, in contravention of Section 97(1)(b) of the Promulgation;
- (iii) That during the period from July 2012 to 7 August 2012, the Defendant did not keep a register of children employed in his workplace, in contravention of Section 99(1)(a) of the Promulgation; and
- (iv) That on or around 17 January 2013, he was unable to produce a register for inspection, when required by a Labour Officer.

¹⁴

Whether or not there is an intention to create contractual relations under common law is a different matter and one that does not need to be determined given the clear language of the statutory prohibition.

25. The matter will be relisted at 9.00am on Friday 5 December 2014, at which time the parties will be heard in relation to penalties.



Mr Andrew J See
Resident Magistrate
26 November 2014

