IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2017-009-9537
[2018] NZDC 10376

MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT
Prosecutor

v

INDERJIT SINGH
First Defendant

AND

SATYA ENTERPRISES LIMITED
Second Defendant

Hearing:	25 May 2018
Appearances:	Ms J Ellison for the Prosecutor Mr S C Clay for the Defendants
Judgment:	11 June 2018

JUDGEMENT OF JUDGE S J O'DRISCOLL

INTRODUCTION:

[1] The defendants have been charged with the following offences:

(a) Satya Enterprises Limited is charged with committing an offence under s 350(1)(b) of the Immigration Act 2009 by allowing a person who was not entitled under the Immigration Act 2009 to work in its service.

(b) Inderjit Singh is charged with aiding and abetting Satya Enterprises in the above offence. He is the director and manager of Satya Enterprises Limited.

[2] The maximum penalty is a $10,000.00 fine for each offence.

[3] The defendants have pleaded guilty.

[4] Both defendants have applied for a discharge without conviction pursuant to s 106 of the Sentencing Act 2002.

[5] The Ministry oppose the granting of a s 106 discharge and argue that both defendants should be convicted and fined.

THE FACTS SURROUNDING THE OFFENDING:

[6] Bhupinder Singh, an Indian citizen, entered New Zealand on 02 August 2009 in possession of a student visa issued by Immigration New Zealand (INZ). Bhupinder Singh was issued a student visa on 24 July 2009 by the New Delhi office of INZ. This allowed him to study a Diploma of Engineering at the Christchurch Polytechnic Institute of Technology. He was granted a further four permits or visas while in New Zealand to continue his studies.

[7] While student visas are issued specifically to undertake study, INZ recognises that students may need to earn practical experience in their chosen field, as well as obtain financial return to support themselves whilst in New Zealand. Bhupinder Singh's visa conditions entitled him to work up to 20 hours per week for any employer in New Zealand provided he retained a valid student visa.

[8] On 27 September 2012, the visa renewal process was declined, due to declining rates of attendance at his studies. As of 28 September 2012, Bhupinder Singh did not hold a valid visa.

[9] Bhupinder Singh recently left New Zealand and is deemed to have self-deported.

[10] As a result of investigations by INZ, Bhupinder Singh was identified to have worked for Satya Enterprises Limited, the company owned and operated by the defendant, during the period of 28 September 2012 until 01 June 2016 while he was not entitled to work in New Zealand.

[11] It has been ascertained that Bhupinder Singh worked for the defendant's company whilst not holding any authority to do that work under the Immigration Act.

[12] The defendant Inderjit Singh is charged with aiding and abetting Satya Enterprises Limited by being responsible for the recruitment and employment of Bhupinder Singh to work as a crew worker. The defendant was aware that Bhupinder Singh had originally been granted a student visa and those visas were limited in time and thus would expire.

[13] It is unclear on the material before me whether Inderjit Singh did in fact ever sight Bhupinder Singh's visa. On the one hand Inderjit Singh deposed in his affidavit he checked Bhupinder Singh's visa following an interview with him on 10 October 2014. He also told the INZ interviewers on 10 October 2016 he had sighted the visa but didn't notice the expiry date.

[14] On the other hand the clear inference from Bhupinder Singh's affidavit is that while Inderjit Singh had made numerous attempts to sight the visa Bhupinder Singh said he was too busy and always made excuses why he could not show Inderit Singh his visa.

[15] Whatever the true status of the defendant's knowledge was regarding the visa the defendant's actions or inactions therefore aided and abetted Satya Enterprises Limited in its offending under s 350(1)(b) of the Immigration Act.

THE LEGISLATION:

[16] Section 107 provides guidance to the Court as to when a discharge under a s 106 should be granted.

107 Guidance for discharge without conviction:

> The Court must not discharge an offender without conviction unless the Court is satisfied that the direct or indirect consequences of a conviction would be out of all proportion to be gravity of the offence.

[17] Section 107 requires a balancing exercise when considering whether or not to exercise the direction under s 106. Clearly, s 107 considerations are a prerequisite or a "gateway" to deciding whether or not to discharge under s 106.

THE GROUNDS IN SUPPORT OF THE APPLICATION:

[18] In this case, it is submitted on behalf of the defendants that a s 106 discharge should be granted, due to two factors. This is supported by affidavits from Inderjit Singh, Robert Davidson and David Ward. Bhupinder Singh has also sworn an affivadit but the content of his affidavit relates to his interaction with Inderjit Singh.

Business and employment

[19] Satya Enterprises is a Christchurch based business operating multiple alcohol bottle stores. The defendant relies upon migrant workers on visas to conduct the company's business. It is argued that if convicted then it will be significantly less likely that visas will be granted by INZ to prospective employees or renewed for existing employees.

[20] Robert Davidson's affidavit outlines the consequences upon the defendant. The defendant employs nine total staff, with five holding temporary work visas. If the defendants are convicted it is argued there will be a significant impact upon the business' ability to support future temporary visa and residence applications.

[21] Without migrant workers on visas the business will incur significantly higher wage costs and may be unable to find available local workers.

Financial

[22] David Ward's affidavit repeats that many employees, past and present, have been migrants on working or temporary visas. He further states that Satya Enterprises Limited is below the average for net profit margins, but remains profitable.

[23] He states that further costs will be incurred if current visas are unable to be renewed or new visa applications can no longer be supported. There will be high costs involved in recruiting and training new staff, as well as potential loss of sales. These costs may ultimately be too much for a business that is already operating on thin margins and may result in failure for the business.

THE PROSECUTION STANCE:

[24] The prosecution oppose the application for discharge without conviction. Their submissions address the matters I must consider when deciding whether to exercise my discretion and discharge a defendant.

Gravity of the offending

[25] The prosecution opposes the application on the basis that the offending is serious, and the consequences of offending will result regardless of whether a conviction is entered or not, therefore the consequences of a conviction cannot be out of all proportion to the gravity of the offending.

[26] The prosecution submit that the seriousness of the offending is high as there is a public interest in deterring employers from employing unlawful workers. These workers are inherently vulnerable to exploitation as their unlawful status may make them reluctant to approach authorities regarding, for example, violations of their minimum entitlements of employees. These employees are vulnerable and may be subject to threats and demands of their employers' due to their unlawful status.

[27] Employers who seek to legitimately employ migrants must go through the various formal processes such as becoming accredited to employ migrants,

establishing that employment of migrants is necessary, and that no resident workers are available to fill the position.

[28] One critical objective of work visas as defined by INZ operational instructions is to ensure that the employment in New Zealand of non-New Zealand citizens and residence class visa holders does not undermine the wages and conditions of New Zealand workers. Therefore, this type of offending affects both migrant and local workers.

[29] Further, the prosecution have highlighted the offending took place over three and a half years, by an employer who employed a number of workers on visas. There was clear knowledge of the employer's obligations, which were either intentionally disregarded or recklessly ignored.

Consequences of conviction

[30] Gareth Rodda, a warranted immigration officer states that INZ does not require a conviction to be entered to decline applications for visas where the employer is known to have failed to meet its obligations under the Act.

[31] Satya Enterprises Limited has already been electronically "flagged" internally, which will bring the non-compliance to the attention of any other immigration officers, regardless of whether a conviction is ultimately entered. The non-compliance is not a definitive factor that prevents any future applications from succeeding, but it remains a strong factor to be considered.

[32] Further Mr Rodda adds that Satya Enterprises Limited is not restricted from migrant employment altogether, instead it is restricted under the "Essential Skills Work" visa category. This leaves open a range of visa types such as post-study work visa, working holiday visa, and open working visa that the defendants could employ.

[33] Lastly, INZ has already declined two applications for visas and can continue to decline applications due to non-compliance with immigration law.

THE LAW:

[34] There are three Court of Appeal decisions that I have considered in my decision. These cases provide guidance on the approach and factors I need to consider in the application. The three cases are *R v Hughes* [2008] NZCA 546 (CA), *Blyth v R* [2011] NZCA 190 and *Z v R* [2012] NZCA 599. Although there were differences in what factors were taken into account and at what stage, all cases upheld a three step approach when considering the disproportionality test set out in s 107 before considering whether to exercise the discretion to discharge.

[35] I adopt the approach taken by the Court of Appeal in *Z v R* at para [27] where the Court held:

> [27] For our part, we consider that there is much to be said for the approach adopted by the Divisional Court in A (CA747/2010). That is: when considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in Blythe, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

[36] I now address the three steps:

Step 1 Identify the gravity of the offending in its particular factual context.

[37] The Court of Appeal in *Z v R* endorsed that aggravating and mitigating factors in ss 9 and 9A of the Sentencing Act 2002 are obviously relevant to the gravity of the offence, and the content of ss 7, 8 and 9 are also. Therefore, factors including guilty pleas, expressions of remorse, the victims' perspective and the Court's assessment of how likely it is that the offender will re-offend will also be considered. The task is to look at the gravity of the offence in light of the disproportionality test under s 107 of the Act.

[38] Factors to be considered are those identifying the gravity of the offence, and those surrounding the nature of the offence, the circumstances of the commission of the offence, and the aggravating and mitigating factors of the offender and the offence and matters occurring after the offence.

[39] I address first the factors surrounding the gravity of the offence and the inherent seriousness of the offence. These are:

- The maximum penalty is a fine not exceeding $10,000.
- The legislation is designed, inter alia., to protect the inherent vulnerability of migrant and unlawful workers
- There is a flow on effect to New Zealand workers from these breaches whereby illegal workers can be employed over lawful local workers

[40] In addition I have considered specific factors that I regard increase the gravity of the offence:

- The defendant company employs and has employed a number of migrant workers on a range of visas. The employer would have clearly understood its obligations. The employer therefore either intentionally breached its obligations or was reckless as to compliance.
- The period of time which Bhupinder Singh was employed as an illegal worker is significant. He was employed from September 2012 to June 2016.

[41] And I have also considered specific factors that decrease the gravity:

- Both defendants pleaded guilty to the charge.
- The offending does not appear to be sophisticated as payments for wages were made openly into Bhupinder Singh's bank account.

[42] I have considered aggravating factors relating to the offender:

- There are none

[43] I have considered mitigating factors relating to the offender:

- The defendants have no previous convictions.

[44] I assess the gravity of the offending as high. This is due to the length of time Bhupinder was employed illegally by the defendant(s) and the knowledge the defendant(s) has in relation to the need to only employ those with appropriate immigration status.

Step 2 Identify the direct and indirect consequences of a conviction.

[45] It is not necessary that the identified consequences would inevitably or probably occur. It is sufficient that the Court come to a judicial decision that there is a real and appreciable risk that such consequences would occur: see *Iosefa v Police* (HC Christchurch CIV-2005-409-64 21 April 2005 Randerson J) at [34]. In *Cook v Police* [[2014] NZHC 282 Wylie said at [26]:

> [26] The words "is satisfied" in s 107 mean that the Court is required to make up its mind on reasonable grounds. It does not require proof beyond reasonable doubt. Further, the Court does not need to be satisfied that "the identified directions and consequences would inevitably or probably occur". It is sufficient if the Court is satisfied that there is "real and appreciable risk that such consequences will occur". Having considered the circumstances and the affidavit filed by Mr Cook, I accept that there is a real and appreciable risk that his employment prospects are likely to be adversely affected if the conviction remains on his record.

[46] In *Barker v R* [2014] NZHC 435 Wylie J said at [41] that the words "real" and "appreciable" connote something of substance and not something fanciful or something which may never happen.

[47] In *Police v M* [2013] NZAR 861 (HC) Allan J made the following observations about evidence to support the consequences of a conviction:

> [60] Ms M's case for a discharge was that she had an offer for employment in England (which by inference she wished to accept), and that if she did not get a discharge, then her prospects of obtaining the position would be ruined. But there was absolutely nothing to support that contention. There was no website information as to United Kingdom entry requirements, no evidence as to the applicable English law regarding entry, no affidavit evidence of any description. As Fogarty J has pointed out in *Gasson*, affidavit evidence is not imperative, but it is routine. In my view, there ought to have been some documentary material confirming the employment offer and Ms M's need to go to the United Kingdom, and also providing detail of UK entry requirements in respect of persons who have a drink-driving conviction.
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> [61] Judges sitting in busy list or sentencing Courts in the District Court have an unenviable task. The sheer volume of work renders it impracticable to require or consider copious written material. But in a case like this, some evidence or supporting information is to be expected in order that the Judge may exercise his or her jurisdiction under s 106 properly.

[48] I find the direct and indirect consequences of a conviction in this case are:

- Immigration New Zealand has already flagged the defendant company as a company that has breached the immigration legislation. Irrespective of whether a conviction is entered on the charges there are likely to be consequences for the company. These consequences may flow not because any conviction will have been entered, but because of the defendant's actions.

- I accept that there may be financial consequences to the defendants but again point out that this is not because a conviction will have been entered against the defendants.

Step 3 Would those consequences be out of all proportion to the gravity of the offending?

[49] Having assessed the gravity of the offence, I need to then consider whether the direct and indirect consequences of a conviction would be out of all proportion to that gravity. This third step is a question of comparison (*Blythe* at [32]).

[50] I refer to *R v Smyth* [2017] NZCA 530 where the Court of Appeal said at [12] "…it is not enough that the consequences of a conviction outweigh the gravity of the offending. Significantly more is required. The consequences must be out of all proportion to the gravity of the offending before the court has jurisdiction to grant a discharge without conviction".

[51] The Court must not grant a discharge unless it is "satisfied" (makes up its mind) that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[52] There is no onus on the defendant to establish the disproportionality test has been met. It is a matter that the Court needs to exercise judgment and when exercising that judgment, I have taken into account all relevant information and the written and oral submissions of the prosecution and defence.

[53] The consequences of conviction will not outweigh the gravity of the offence. INZ have made it clear that even without a conviction being entered, the defendants are already flagged internally for their non-compliance with immigration law. Even if a discharge without conviction was granted, this will have no effect on INZ when considering future temporary visa and residence applications. I find that while the effect of non-compliance may be significant, INZ have made it clear that it is not a consequence of conviction.

[54] While the defendant company may incur additional costs and expenditure to employ other types of workers I cannot say the additional expenditure is such that it is out of all proportion to the gravity of the offending.

[55] I find that the consequences of conviction are therefore not out of all proportion to the gravity of the offending. I do not believe the disproportionality test has been met.

Finally-whether the discretion under s 106 should be exercised

[56] The Court of Appeal in *Blythe v R* held at [12] that only if the disproportionality test in s 107 has been met can the Court proceed to consider exercising its discretion to discharge without conviction under s 106.[1]

[57] Later at [13] the Court held:

> Our description of the discretion under s 106(1) as residual is deliberate. That is because it will be a rare case where an offender has passed through the s 107 "gateway", but then is not discharged under s 106(1). Nevertheless, there is a discretion in those rare cases in light of the statutory wording. Section 106(1) does not say that the Court must discharge the offender without conviction where s 107 is satisfied. Nor does s 107 say that. What s 107 does make clear is that an offender must not be discharged unless the disproportionality test in that section is met.

[58] I have found the disproportionality test has not been met, however, even if it had been meet I would have been inclined to exercise my discretion and not discharge the defendants. This is one of those rare cases referred to above.

[59] The need to protect migrants and deter employers from using inappropriate workers are paramount purposes of sentencing. A discharge without conviction would not achieve those purposes.

[60] I intend to enter convictions against both defendants.

[61] I have been provided with a schedule showing the outcomes of previous prosecutions under s 350 and in particularly s 350(1)(b).

[62] I do regard this offending as serious particularly taking into account the length of time the defendant(s) continued to employ the employee either knowing the employee did not have a current visa or went without checking the validity of the visa.

[63] The defendant's actions have undermined the foundation and integrity of New Zealand's immigration system.

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[1] *Blythe v R* [2011] NZCA 190.

[64] I am conscious of the submission that has been made that Inderjit Singh is the sole director and shareholder of Satya Enterprises Limited. In my view while the two defendants are separate and distinct legal entities, I think I need to take a practical and common sense approach to the imposition of fines so that sentencing is not seen to double the size of the fines.

[65] I also need to take into account in imposing a fine the need to hold the defendants accountable, the need to uphold the integrity of New Zealand's immigration regime and the need for both specific and general deterrence.

[66] I take a starting point of $8000.

[67] I am not prepared to give any credit for lack of previous convictions due to the length of time of the offending.

[68] I reduce that by 25% to take into account the plea of guilty meaning there is a fine of $6000

[69] Each defendant will be convicted and ordered to pay a fine of $3000.

[70] I will release this decision before I give my decision in open court on Tuesday 12 June 2018 at 9.30am.

S J O'Driscoll
District Court Judge