IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 46

Magistrate's Appeal No 9129 of 2019

Between

International Placements (S) Pte Ltd

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 5 of 2020

Between

International Placements (S) Pte Ltd

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

Version No 1: 27 Oct 2020 (22:41 hrs)

[Statutory Interpretation] — [Construction of statute] — [Employment Agencies Act]

[Criminal procedure and sentencing] — [Prospective overruling]

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International Placements (S) Pte Ltd
v
Public Prosecutor and another matter

[2020] SGHC 46

High Court — Magistrate's Appeal No 9129 of 2019 and Criminal Motion No 5 of 2020
Hoo Sheau Peng J
7 February 2020

6 March 2020 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 The appellant, International Placements (S) Pte Ltd ("IPS"), claimed trial to a charge of carrying on an employment agency without a licence in breach of s 6(1) of the Employment Agencies Act (Cap 92, 2012 Rev Ed) ("EAA"). Upon conviction, a fine of $40,000 was imposed.

2 In its appeal against conviction, IPS argued that it did not carry on as an employment agency because it did not perform work in connection with the employment of persons. Central to its case is that within the EAA, "employment" has a *narrow* meaning, *requiring a contract of service between employer and employee*. Arguing for a *broad* meaning of "employment", the Prosecution contended that IPS was in breach of the law.

3 As for its appeal against sentence, IPS contended that the fine is manifestly excessive, whereas the Prosecution submitted to the contrary.

4 Having considered the matter, I dismiss the appeal. I also dismiss IPS's application to introduce as fresh evidence for the appeal a letter from the Ministry of Manpower (the "MOM") dated 3 May 2019 (the "MOM letter"). These are my reasons.

Background

5 The facts are straightforward. At the material time, IPS was not a licensed employment agency. Its sole director was Mr Subra K Chettiar ("Subra").

6 DD Pte Ltd ("DDPL") is a retailer operating a chain of discount stores under the brand name of "Value Dollar". Its director was Mr Anandani Deepak Partab ("Deepak"). DDPL had an on-the-job training ("OJT") programme for foreign students to undergo practical training for a period of six months.

7 Following discussions between Subra and Deepak, IPS and DDPL (through Radha Exports Pte Ltd) entered into a management agreement. Pursuant to this agreement, from August 2016 to April 2017, IPS assisted in arranging for nine foreign students to join DDPL's OJT programme ("the trainees"), and in managing the trainees. Specifically, the acts carried out by IPS, through Subra, included the following:

(a) Sourcing for the trainees, and collecting and forwarding their biodata to DDPL for consideration by DDPL;

(b) Arranging for DDPL to interview the trainees;

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(c) Gathering the necessary documents which had to be submitted to the MOM for the trainees' Training Work Pass ("TWP") applications. In this regard, DDPL made the necessary applications directly to the MOM;

(d) Arranging for the arrival of the trainees in Singapore, accompanying them for thumb-printing and the collection of their work permit cards;

(e) On each trainee's first day of work, bringing the trainee to the place of work;

(f) Providing the trainees with accommodation and upkeep expenses, and bringing them for medical treatment when they were unwell; and

(g) At the end of the OJT programme, arranging for the trainees to return to their home countries, and assisting in cancelling and returning the TWPs to the MOM.

8 During the OJT programme, the trainees worked at DDPL's stores, performing work relating to retail, management and stocking of the stores. None of them had a contract of service with DDPL.

9 From August 2016 to April 2017, IPS collected $19,990 from DDPL as management fees. From the amount collected, IPS paid for the air tickets for the trainees' return to their home countries, and the transportation charges for arranging for their accommodation and for bringing them for medical check-ups.

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10 At the material time, Subra was also a partner of Expert Business Management & Consultancy LLP ("Expert Business"), a licensed employment agency. He knew that by a condition within the Employment Agencies License Conditions ("EA License Conditions") issued pursuant to the EAA by the Commissioner for Employment Agencies (the "Commissioner"), licensed employment agencies are not allowed to carry on work for or in connection with placing a foreigner in a training programme or obtaining a TWP for the foreigner.

11 According to the MOM, the said condition makes it clear that no licensed employment agency can be involved in such work. It is for the hiring company to do so, as the hiring company would need to work out the details of the training programme, and it would be in the best position to liaise directly with the schools or foreign students to do so.

Decision below

12 The trial judge's reasons for her decision are set out in *Public Prosecutor v International Placements (S) Pte Ltd* [2019] SGMC 52 (the "GD"). Essentially, the trial judge found that the trainees worked for DDPL; they were in employer-employee relationships with DDPL. In turn, the work performed by IPS for DDPL in relation to the trainees constituted "specified employment agency work" as defined under s 2 of the EAA. Accordingly, the trial judge found IPS to be carrying on as an employment agency without a licence issued by the Commissioner in breach of s 6(1) of the EAA: see [50]—[52] and [55] of the GD. As for the fine of $40,000, I shall deal with the trial judge's considerations at [64] below.

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The appeal against conviction

13 For the appeal against conviction, IPS's primary position was that IPS did not carry on as an employment agency, as it did not perform work in connection with the *employment* of persons. IPS contended that for the purposes of the EAA, an employment relationship arises only when *there is a contract of service between employer and employee*. The trainees did not have contracts of service with DDPL. Adopting this *narrow* interpretation of "employment", IPS did not breach s 6(1) of the EAA.

14 In response, the Prosecution argued for a *broad* interpretation of "employment", to mean "*an engagement or use to do something whether or not there is a contract of service*". Under the OJT programme, DDPL engaged or used the trainees to do work at its stores. Thus, IPS was guilty of the charge against it because it had performed work for or in connection with the employment of the trainees.

15 IPS's alternative position was that the court should not penalise IPS for conducting its affairs based on a reasonable and legitimate interpretation of the law, even if this interpretation was later established to be wrong by the court. Accordingly, the court should exercise its discretion to set aside IPS' conviction. The Prosecution submitted that there was no merit to this position.

The primary case: Whether IPS carried on as an employment agency

The statutory provisions

16 I begin by setting out the relevant provisions of the EAA. Section 6(1) states:

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> No person shall carry on *an employment agency* unless the person is the holder of a licence from the Commissioner authorising the person to carry on such an agency.
>
> [emphasis added]

17 An "employment agency" is defined in s 2 of the EAA to mean:

> … any agency or registry carried on or represented as being or intended to be carried on (whether for the purpose of gain or reward or not) *for or in connection with the employment of persons in any capacity*, but does not include any registry set up by an employer for the sole purpose of recruiting persons for employment on his own behalf;
>
> [emphasis added]

18 Further, s 2 sets out four categories of work which fall within the scope of work to be performed by an employment agency as follows:

> "specified employment agency work" means any of the following work:
>
> > (*a*) communication with any *applicant for employment* for the purpose of processing any application by such *applicant for employment*;
> >
> > (*b*) collation of the biodata or resume of any *applicant for employment* for the purpose of helping the applicant establish an employer-employee relationship;
> >
> > (*c*) submission of any application on behalf of any employer or *applicant for employment* to the Controller of Work Passes appointed under section 3 of the Employment of Foreign Manpower Act (Cap. 91A), which application is required under that Act;
> >
> > (*d*) facilitation of the placement of any *applicant for employment* with an employer.
>
> [emphasis added]

For convenience, I will refer to each of these four categories of work as "limb (*a*) work", "limb (*b*) work" *etc*.

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19 By the above, an employment agency is characterised by the work it does in connection with the *employment* of persons. Where an entity performs work falling within the four categories of work, *ie,* work in respect of any applicant for *employment*, this would point to the entity operating as an employment agency. Therefore, to determine whether IPS operated as an employment agency, the meaning of "employment" is important. However, the EAA does not define "employment" or its related words, *ie,* "employ", "employee" or "employer". It is therefore necessary to arrive at the meaning of "employment" in accordance with established principles of statutory interpretation.

The law on statutory interpretation

20 Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA") requires statutory provisions to be interpreted purposively. An interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object. To that end, extraneous materials may be considered to confirm or to ascertain the meaning given to a statutory provision: ss 9A(2) and (3) of the IA.

21 The process of purposive statutory interpretation consists of three steps, as set out by the Court of Appeal in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [59]:

> (a) First, *ascertaining the possible interpretations of the text, as it has been enacted.* This however should never be done by examining the provision in question in isolation. Rather, *it should be undertaken having due regard to the context of that text within the written law as a whole.*
>
> (b) Second, *ascertaining the legislative purpose of the object of the statute. This may be discerned from the language used in*

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> *the enactment; but as I demonstrate below, it can also be discerned by resorting to extraneous material in certain circumstances.* In this regard, the court should principally consider the *general legislative purpose of the enactment by reference to any mischief that Parliament was seeking to address by it.* In addition, the court should be mindful of the possibility that the specific provision that is being interpreted may have been enacted by reason of some specific mischief or object that may be distinct from, but not inconsistent with, the general legislative purpose underlying the written law as a whole…
>
> (c) Third, comparing the possible interpretations of the text against the purposes or objects of the statute. *Where the purpose of the provision in question as discerned from the language used in the enactment clearly supports one interpretation, reference to extraneous materials may be had for a limited function – to confirm but not to alter the ordinary meaning of the provision as purposively ascertained*; …
>
> [emphasis added]

Possible interpretations of "employment"

22 Applying the framework above, I begin by identifying the possible interpretations of the word "employment".

23 In *Public Prosecutor v Soil Investigation Pte Ltd* [2019] 2 SLR 472 ("*Soil Investigation*"), a case relied on by the Prosecution, the Court of Appeal observed that there were two possible ordinary dictionary meanings of the word "employment", one technical and one broad. The technical definition of employment refers to a "legal relationship in the sense of employment pursuant to a contract of service", while the broad meaning of employment refers to "an engagement or use to do something whether or not there is a contract of service": at [31]. As there is no serious dispute from IPS on this, I adopt these two possible ordinary dictionary meanings of "employment". Indeed, the narrow meaning of "employment" advocated by IPS is the technical meaning ascribed to the word in *Soil Investigation.*

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24 Before I analyse the provisions of the EAA, I note that in *YCH Distripark Pte Ltd v Collector of Land Revenue* [2019] 2 SLR 695 at [21], the Court of Appeal stated that:

> [W]hen ascertaining the possible interpretations of the text, the court will endeavour – as far as it is possible – to give due consideration to the other legislative provisions to which the provision in question is related with and with which it ought to be read as well as interpreted harmoniously because this would be a prerequisite to giving effect to the legislative scheme of the statute itself.

In my view, this harmonious reading must, logically, also include other statutory provisions which are expressly referred to by the provisions in question.

25 In this connection, I begin with the definition of limb (*c*) work which contains an express reference to the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA"): see [18] above. To reiterate, limb (*c*) work concerns the submission of any application for a work pass, as required under the EFMA, on behalf of any employer or applicant for employment.

26 Turning to the EFMA, under ss 5(1) and (2), no person shall "employ a foreign employee unless the foreign employee has a valid work pass", and no foreign employee shall "be in the employment of an employer without a valid work pass". In other words, an applicant for employment must apply for a work pass if he is a "foreign employee". Meanwhile, a "foreign employee" is defined by s 2 as "any foreigner other than a self-employed foreigner, who seeks or is offered employment in Singapore". Thus, in the EFMA, like in the EAA, the meaning of employment (and its related words) is key in order to invoke its regulatory provisions.

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27 Unlike the EAA, however, the term "employ" is defined in the EFMA. Section 2 of the EFMA states as follows:

> "employ" means to engage or use the service of any person for the purpose –
>
> (a) of any work; or
>
> (b) or of providing any training for that person,
>
> whether under a contract of service or otherwise, and with or without salary;

Given this wide definition of "employ", it is apparent, therefore, that the meaning of "employment" within the EFMA accords with the broad meaning of the word in *Soil Investigation*.

28 Reading the definition of limb (*c*) work together with the EFMA, the submission of a work pass application for either an employer who intends to engage or use the services of any foreigner in Singapore (with or without a contract of service), or a foreigner who intends to be employed in Singapore (*ie,* an applicant for employment) falls within work of an employment agency. To accommodate the wide definition of "employ" in the EFMA, the broad meaning of "employment" must necessarily prevail within the definition of limb (*c*) work in s 2 of the EAA. Therefore, I conclude that the express language used to define limb (*c*) work requires the adoption of the broad, and not the narrow, meaning of the term "employment".

29 Having determined the meaning of "employment" in the context of limb (*c*) work, there is a presumption that this meaning applies to the entire EAA. In *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850, the Court of Appeal held (at [58(c)(i)]) that identical expressions used in a statute would all presumptively carry the same meaning:

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> … *Where the identical expression is used in a statute, and all the more so, where it is used in the same sub-clause of a section in a statute, it should presumptively have the same meaning.* This is a rule of interpretation rooted in simple logic. *However, this is not an inflexible rule and the court may, on construing the provision in context, conclude that the identical expressions means different things*: see *Madras Electric Supply Corp Ltd v Boarland (Inspector of Taxes)* [1955] AC 667 at 685. …
>
> [emphasis added]

30 As the above makes clear, this is not an inflexible rule. Indeed, in *Soil Investigation,* the Court of Appeal concluded that the word "employment" in the third limb of s 56A of the Public Utilities Act (Cap 261, 2002 Rev Ed) bore the broad meaning because it was intended to have a broad scope while the word "employee", when used in the second limb, bore the technical meaning because it was intended to apply to technical legal relationships: at [32]—[34].

31 Before me, neither the Prosecution nor IPS contended that the word "employment" should take on different meanings within the EAA itself. In any event, I do not think that the presumption has been displaced in relation to the provisions in question. It seems to me that for consistency, the broad reading must apply to the other three limbs of specified employment agency work. All four limbs relate to work done for "any employer" or "any applicant for employment". It would be illogical to treat only one aspect of work in relation to an applicant for employment without a contract of service as specified employment agency work *ie,* limb (*c*) work, whereas the other closely related aspects of work in relation to the very same applicant for employment are not.

32 More importantly, I am also of the view that the broad meaning must apply to the word "employment" within the definition of "employment agency" in s 2 of the EAA. As set out above at [17] above, an employment agency is an entity that is carried on "for or in connection with the employment of persons

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in any capacity." A broad reading of "employment" is required to encompass limb (*c*) work, as well as the other three limbs of work, done in relation to the employment of such persons.

The legislative purpose

33 I now turn to consider the legislative purpose of the EAA, and whether my conclusion in favour of the broad meaning of "employment" is consistent with the Parliamentary intention undergirding the EAA. Pursuant to the approach set out in *Ting Choon Meng*, extraneous materials such as records of Parliamentary debates may be used to shed light on the objects and purposes of the EAA.

34 The EAA is of considerable vintage, being originally enacted in 1959. Unsurprisingly, the legislative intentions underpinning it have gone through a process of evolution to fit the changing needs of Singapore's employment landscape.

35 IPS drew my attention to the Second Reading in Parliament for the Employment Agency Bill, where the legislative intention for what would become the 1959 EAA was articulated by the Minister for Labour and Welfare Lim Yew Hock as follows (*Singapore Parliamentary Debates, Official Report* (4 December 1958) vol 8 at cols 1151–1152 (Tun Lim Yew Hock, Minister for Labour and Welfare)):

> Not so long ago reports appeared in the Press of *exploitation by employment agencies of job seekers*. Some of these bogus employment agencies have closed down as a result of Police investigations. It has been found that in the absence of legislation it is extremely difficult to investigate the activities of these bogus agencies and *bring to book those responsible for exploiting job seekers*. Hence, the introduction of this Bill for the regulation of employment agencies.

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> Under this Bill, Sir, every employment agency must obtain a licence; *charge only prescribed fees for registering a worker for employment*; keep proper registers, and submit monthly returns. Appropriate penalties are provided for; in particular, it is sought to prevent such agencies being used for trafficking in women and girls. …
>
> [emphasis added]

36 This cited passage makes it clear that the 1959 EAA was originally introduced to combat the evil of "bogus employment agencies" which exploited job seekers and engaged in human trafficking. In my view, the 1959 EAA, as originally conceived, must have been intended to apply broadly in order for this objective to be given effect. I do not think it is likely that Parliament, having intended to cast a wide net to catch harmful activity, would then have intended to circumscribe the ambit of the legislation by excluding harmful acts against job seekers and workers who were not under contracts of service.

37 IPS argued that the licensing requirements for employment agencies under the 1959 EAA were imposed to ensure that employees would not be exploited, and that the legislation had nothing to do with students or trainees. I do not agree with that argument, because it supposes *a priori* that, firstly, the 1959 EAA is confined in operation to "employees" and, secondly, that "employees" do not include students or trainees. The extract from the Parliamentary record cited above, however, makes clear that the legislation was intended to protect "job seekers" and "worker(s)" – terms which are broad enough to extend to students or trainees seeking work in Singapore. I do not think it is an acceptable reading of the passage cited above that Parliament only directed its mind to the potential harm caused to "employees" as narrowly defined.

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38 Circumstances had changed in 1984 – a time of full employment – and the EAA was expanded to protect foreign workers brought in to supplement the local workforce from unscrupulous illegal employment agents. In debating the 1984 amendments, it was clear that the policy impetus behind the amendment was to protect foreign workers in general – which lends itself to an inference that Parliament intended the amended EAA to operate expansively. This is particularly so since the term "foreign workers" cannot be purposively interpreted to exclude foreign persons who were students, trainees or otherwise not under any contract of service. Indeed, Acting Minister for Labour Professor S Jayakumar referred to instances where foreign workers were cheated by illegal employment agents and who were consequently stranded in Singapore without any employment, as an example of the evil that the EAA was amended to counteract: *Singapore Parliamentary Debates, Official Report* (2 March 1984) vol 43 at cols 417–418 (Prof S Jayakumar, Acting Minister for Labour). It is difficult to see how this evil could be effectively dealt with if Parliament had intended to limit the operation of the amended EAA to protect only foreign workers under contracts of service.

39 A further evolution in the underlying legislative intent occurred in 2011, when Parliament amended the 1984 EAA to introduce stricter licensing, registration and certification requirements. The Parliamentary record in *Singapore Parliamentary Debates, Official Report* (11 January 2011) vol 87 at cols 2287–2289 (Lee Yi Shyan, Minister of State for Manpower), is worth quoting at length:

> Sir, the Employment Agencies (Amendment) Bill seeks to strengthen the regulatory framework of the employment agency (EA) industry. The outcome will be an EA industry that is better qualified, more professional and effective in matching employers and workers.
>
> …

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> The enhanced regulatory framework achieves four objectives. Firstly, to weed out unlicensed and errant EAs that give a bad name to the industry.
>
> Secondly, the new framework will *hold all stakeholders involved in conducting EA-related work to higher professional standards and accountability*.
>
> Thirdly, we will update the provisions and processes to ensure their relevance.
>
> Finally, we will enhance the flexibility of the EA regulatory framework.
>
> I will first explain who the Employment Agencies Act is intended to cover.
>
> Clause 5 clarifies *that we wish to regulate all EA-related activities conducted in Singapore*, regardless of whether they are for job placements in Singapore or outside Singapore, whether the activity is conducted by locals or foreigners, or on a long-term or short-term basis, or whether for gain or otherwise.
>
> I would like to assure the House that it is not the intention of my Ministry to penalize persons who make casual recommendations to link job seekers to employers. The new provisions are *deliberately kept broad to ensure that all types of EA-related activities that may give rise to malpractices are covered …*
>
> Clause 4 empowers the Minister to exempt individual entities, certain classes of persons or EAs from the provisions of the Act. *This exemption list will include activities or entities which we clearly do not intend to regulate*, such as web-based job portals and job bulletin boards as they are not usually actively involved in the actual placement work.
>
> [emphasis added]

40 The Minister of State then went on to say the following, which is recorded in *Singapore Parliamentary Debates, Official Report* (11 January 2011) vol 87 at col 2295 (Lee Yi Shyan, Minister of State for Manpower):

> Sir, this new regulatory framework is an opportunity to improve the experience and labour market outcomes for all stakeholders – employers, workers and the EAs. *Vulnerable rank-and-file workers, including foreign workers, will enjoy greater protection against the unethical practices of unlicensed and errant players.* They will also benefit from measures such as the updated fee caps and the new fee refund mechanism. Employers will benefit

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> from the greater certainty and transparency in the recruitment process. The new regulatory recruitment framework will facilitate labour market efficiency and raise the standard of recruitment practices in Singapore. …
>
> [emphasis added]

41 Thus, in my view, as of 2011, Parliament intended the EAA to serve two main functions: firstly, as a mechanism to enforce standards of practice in respect of all employment-agency related work, so as to ensure high standards and accountability in the industry; and secondly, to protect workers (both local and foreign) from unlicensed and unethical employment agency practices.

42 In my judgment, the legislative purpose of the EAA is entirely consonant with, and points to, the broad interpretation of "employment". The Parliamentary debates referred to above show that from its inception, the EAA had always been intended by Parliament to protect workers in Singapore from exploitation by unethical employment agencies. "Workers" is a broad and general term, and the scope of the term "employment" must necessarily be broad for the EAA to serve its intended protective purpose. Adopting the narrow meaning of "employment" would have the effect of confining the protection conferred by the EAA to workers who already have the benefit of legal protection in the form of their contracts of service, while depriving those workers bereft of contractual rights of the EAA's protection. To my mind, this cannot be Parliament's intention.

Other extraneous materials

43 I now turn to the other extraneous materials which IPS had relied on, in support of its case that Parliament intended for "employment" to be given its narrow rather than broad meaning for the purposes of the EAA.

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(1) The Employment Agencies License Conditions

44 IPS pointed out that within the EA License Conditions, "employer" is narrowly defined as "any person who engages the services of another person under a contract of service". Further, the EA License Conditions specifically state that the license does not "cover any work or activity for or in connection with placing a foreigner in a training program, or obtaining a training employment pass, or a training work permit for the foreigner." IPS argued that:

> (a) The fact that the EA License Conditions contemplates "employment" as requiring the presence of a contract of service must indicate that the parent legislation EAA defines "employment" the same way; and
>
> (b) Since the emplacement of foreigners in training was clearly excluded from the license, it appeared permissible to carry out such emplacement without a license.

45 I am unable to agree with the first argument. The purpose of introducing extraneous evidence such as the EA License Conditions as an aid to statutory interpretation is to ascertain the legislative purpose undergirding the EAA. I am not persuaded that the EA License Conditions are capable of elucidating what that legislative purpose is. The EA License Conditions are a set of standard conditions made by the Commissioner, not Parliament, and the meaning of "employment" within the conditions only reflects what the Commissioner intended to cover by the imposition of those conditions, and not what Parliament intended with regard to the entire EAA.

46 I am also unable to accept the second argument. The mere fact that the Commissioner may carve out specific employment agency activities that may

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not be undertaken by licensed employment agencies does not mean that these same activities may then be performed by unlicensed entities. It is common sense that harmful employment agency practices will not be sanctioned under the license. Taking the second argument to its natural conclusion, IPS is urging me to accept that it is reasonable to think that such harmful practices which cannot be carried out by licensed employment agencies can instead be carried out by unlicensed entities. In my view, this is an untenable argument. The logical conclusion, when faced with practices that cannot be carried out by licensed employment agencies, is that unlicensed entities are equally prohibited from carrying out the said practices. Indeed, as I set out at [11], the MOM's policy for the prohibition is based on the view that the employer should perform such work, and directly liaise with the schools and the foreign students on the scope of the training programme.

(2) The Employment Act and Work Injuries Compensation Act

47 IPS also argued that as "employment" is defined narrowly in the Employment Act (Cap 91, 2009 Rev Ed) ("EA") and Work Injuries Compensation Act (Cap 354, 2009 Rev Ed) ("WICA"), Parliament must have intended the EAA to carry the same definition.

48 I am unable to agree with the proposition that the definitions of "employment" in the EA and WICA are in any way relevant to the present inquiry, particularly when the EAA does not refer to either of those statutes and the legislative objectives of the two statutes are clearly distinguishable from those of the EAA. Both the EA and WICA regulate the employee-employer relationship, while the EAA regulates the work done by employment agencies.

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49 As made clear in *Soil Investigation*, the meaning of "employment" is context-dependent even within the statute and its determination would depend on the construction of the relevant statutory provision in context: at [32] of *Soil Investigation*, and [30] above. The same reasoning applies with equal if not greater force where the same words, or derivatives of the same word, are used in different statutes. Therefore, I do not consider the statutory definitions of "employment" in the EA and the WICA helpful in determining the meaning of the same term in the EAA.

50 At this juncture, I deal with IPS's application to introduce the MOM letter as fresh evidence for the appeal. The three requirements for determining if fresh evidence should be admitted are the non-availability of the evidence for use at trial, the relevancy and the reliability of the evidence: *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [14]. The MOM letter sets out the MOM's position that students who are under an industrial attachment programme are not regarded as employees of the company for the purposes of the WICA. That position is entirely consonant with the definition of employment in the WICA. As I have found that the WICA is unhelpful in defining "employment" for the purposes of the EAA, I do not consider such evidence relevant for the appeal.

Conclusion

51 By the foregoing, I conclude that the broad meaning of the word "employment" *ie,* "an engagement or use to do something whether or not there is a contract of service" applies in the EAA, particularly in the definitions of "employment agency" and "specified employment agency work" within s 2.

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52 Having determined this, I agree with the trial judge that the trainees were in the employment of DDPL, as they worked at DDPL's stores: see [8] above. IPS's acts in collating and forwarding the biodata of the trainees to DDPL (as described in [7(a)] above) clearly fell within limb (*b*) work. The trainees sought employment with DDPL, and the acts were for the purpose of helping them establish employer-employee relationships with DDPL. Based on the other aspects of the work IPS did, especially as described in [7(b)—7(d)] above, I also agree with the trial judge that IPS facilitated the placement of the trainees with DDPL for work, thereby performing limb (*d*) work.

53 Further, I note that pursuant to the management agreement, IPS had invoiced DDPL on a monthly basis from August 2016 to April 2017 for its services and was paid its management fees. For that period of time, IPS was an unlicensed employment agency in breach of s 6(1) of the EAA.

The alternative case: Whether IPS should be penalised for its wrong interpretation of the law

54 As set out above at [15], IPS's alternative position was that it had relied on a reasonable and legitimate interpretation of the EAA, and that it believed that what it was doing was legal. Thus, even if this court were to establish that its interpretation was wrong, it should not be penalised.

The law on prospective overruling

55 IPS relied on *Abdul Nasir bin Amer Hamsah v PP* [1997] 2 SLR(R) 842 ("*Abdul Nasir*") at [51] as authority for this proposition of prospective overruling. In *Abdul Nasir*, the Court of Appeal interpreted, for the first time, the phrase "imprisonment for life" in the Kidnapping Act (Cap 151, 1985 Rev Ed) to mean imprisonment for the remaining natural life of the prisoner. Prior

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to the decision, that phrase had been consistently given a technical meaning of 20 years' imprisonment, excluding remission. It was recognised that that was a clear example of a legitimate expectation engendered by a practice of many years. Therefore, the courts ought to protect individuals who arranged their affairs according to this expectation, bearing in mind that the fundamental matter of a person's liberty for the rest of his life was at stake: at [56]. On that basis, the Court of Appeal held that the old practice of 20 years' imprisonment for kidnapping applied to the offender: at [66].

56 Subsequently, in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 ("*Hue An Li*") at [124], the High Court set out four independent factors that would guide the exercise of the court's discretion, which was only to be exercised in exceptional circumstances:

> (a) The extent to which the law or legal principle concerned is entrenched: The more entrenched a law or legal principle is, the greater the need for any overruling of that law or legal principle to be prospective. This will be measured by, amongst other things, the position of the courts in the hierarchy that have adopted the law or legal principle that is to be overruled and the number of cases which have followed it. …
>
> (b) The extent of the change to the law: The greater the change to the law, the greater the need for prospective overruling. A wholesale revolutionary abandonment of a legal position (as was done in, for instance, *Manogaran* ([110] *supra*)) is a greater change than an evolutionary reframing of the law (see, for instance, *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, which re-examined the distinction between interpretation and implication in contract law, but by and large built on the foundations laid down by prior cases).
>
> (c) The extent to which the change to the law is foreseeable: The less foreseeable the change to the law, the greater the need for prospective overruling. In *SW v UK* ([113] *supra*), for example, the abolition of the doctrine of marital immunity was eminently foreseeable because of past judicial pronouncements which had expressed distaste for the doctrine and progressively expanded the exceptions to it. There was therefore no need to curtail the retroactive application of the change in the legal position.

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> (d) The extent of reliance on the law or legal principle concerned: The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling. This factor is particularly compelling in the criminal law context, where a person's physical liberty is potentially at stake. Quite apart from Art 11(1) of the Singapore Constitution, a person who conducts his affairs in reliance on the ostensible legality of his actions would be unfairly taken by surprise if a retrospective change to the law were to expose him to criminal liability.
>
> [emphasis in original]

57 The Court of Appeal in *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 endorsed the four *Hue An Li* factors, and emphasised the following four caveats: (a) the court should only exercise its discretion to invoke the doctrine of prospective overruling in an exceptional case: at [39]; (b) prospective overruling must be necessary to avoid serious and demonstrable injustice to the parties or to the administration of justice: at [40]; (c) judicial pronouncements are by default retroactive in nature: at [43]; and (d) the burden of proof in establishing that prospective overruling is warranted lies on whoever seeks to do so: at [44].

Application to the facts

58 I am not convinced at all that prospective overruling is warranted on the facts of this case.

59 I do not consider this a case in which the court has changed the law. The broad definition of "employment" which I have found applicable to the provisions in question within the EAA is one that is to be read from the statutory language and clear pronouncements by Parliament as to the broad scope of the EAA. This decision has only brought that interpretation to the fore; it does not change the existing legal position in any way. In fact, it cannot be said that the narrow definition of "employment" in the EAA had been entrenched in

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Singapore law, given that there did not appear to be any clear prior judicial pronouncement to that effect. That also dispenses with the issue of whether there could have been any reliance on such a position by IPS.

60 I should add that, in my view, IPS could not have had any reasonable and legitimate expectation of non-liability. At trial, Subra testified that he was familiar with the EA License Conditions and cognisant of the prohibition of licensed employment agencies from being involved in the placement of foreigners in training. Having known that, it was not reasonable that he could have come to the odd conclusion that an activity that licensed entities were expressly forbidden to carry out could be carried out by unlicensed entities. Further, Subra could have clarified the position with the MOM as to whether IPS's actions were permissible. The fact that he did not do so is, in my judgment, telling. In failing to make reasonable enquiries, Subra, and by extension IPS, cannot be said to have any legitimate expectation that its conduct was sanctioned.

Conclusion

61 To sum up, I consider that the factors within *Hue An Li* have not been made out. IPS was rightly convicted for its breach of s 6(1) of the EAA.

The appeal against sentence

62 I turn to the question of whether the fine of $40,000 imposed by the trial judge was manifestly excessive. By s 6(4) of the EAA, the offence is punishable with a fine not exceeding $80,000 or to imprisonment for a term not exceeding two years or to both in the case of a first conviction.

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63 The trial judge took into account the following factors in arriving at the eventual sentence:

(a) That Subra had deliberately and knowingly sought to circumvent and undermine the regulatory framework prohibiting licensed employment agencies performing placements of training work pass holders by sourcing and placing the foreign students through IPS for profit: GD at [85];

(b) That both the total agency fees collected by IPS and the number of trainees were significant, putting its culpability at the medium range: GD at [86];

(c) That the harm caused by IPS's actions fell within the low range as all the trainees had been emplaced and there was no evidence of exploitation or that the trainees or DDPL had been compromised by the unlicensed activity. Neither was there any evidence that the trainees had found themselves in dire straits in Singapore and failed to get the promised jobs: GD at [87];

(d) That a stronger sentence was justified in view of the difficulty of detecting unlicensed employment agency activity: GD at [88];

(e) That IPS was not entitled to any discount in sentencing since it had claimed trial to the charge: GD at [89]; and

(f) That IPS was a first offender: GD at [95].

64 Before addressing the points raised by IPS, it is not disputed that an appellate court should interfere with a sentence meted out by a trial judge only if it is satisfied that (a) the trial judge had made the wrong decision as to the

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proper factual matrix for sentence; (b) the trial judge had erred in appreciating the material before him; (c) the sentence was wrong in principle; or (d) the sentence imposed was manifestly excessive, or manifestly inadequate: see *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [14].

Whether there was an intentional circumvention of the law

65 Before me, IPS argued that Subra had no reason to intentionally circumvent the law to facilitate the placement of the trainees, given that he was already involved in a separate business which had been licensed as an employment agency. The trial judge, therefore, should not have taken the circumvention of the law by Subra as an aggravating factor.

66 As I observed at [48] above, the reasonable inference to be drawn from the prohibition of licensed employment agencies emplacing foreigners in training was that no employment agency (whether licensed or unlicensed) could carry out such work. Subra well knew that Expert Business could not carry on such work. He deliberately failed to clarify any doubt with MOM, and instead proceeded to do the same work using IPS as the vehicle. I am of the view that this constituted a deliberate circumvention of the express prohibition of such work in the EA License Conditions vis-à-vis licensed employment agencies (including Expert Business). The trial judge was therefore entitled to consider this an aggravating factor.

Whether IPS's culpability fell within the medium range

67 IPS argued that it was not paid by the trainees, but by DDPL. As such, unlike other errant employment agencies, IPS had not exploited any foreign

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workers. Thus, the trial judge should not have considered that IPS's level of culpability fell within the medium range.

68 This argument, to my mind, conflates the separate and distinct concepts of "harm" and "culpability". The distinction between the two terms were clarified in *Public Prosecutor v Koh Thiam Huat* [2017] 4 SLR 1099 in the context of sentencing for road traffic offences. Harm is the "measure of injury which has been caused to society by the commission of the offence", while culpability is "a measure of the degree of relative blameworthiness disclosed by an offender's actions and is measured chiefly in relation to the extent and manner of the offender's involvement in the criminal act": at [41].

69 The fact that IPS had not exploited any foreign workers only goes to the harm (or lack thereof) caused by its unlicensed activity, but does not affect its culpability, which is determined by the extent and manner of IPS's breach of s 6(1) of the EAA. The trial judge appreciated this and found IPS to have caused a low degree of harm: see [63(c)] above.

70 In my view, the trial judge was entitled to take the number of trainees emplaced and the quantum of fees collected by IPS into account when determining that IPS's culpability fell within the medium range (measured against the sentencing precedents). These precedents range from unlicensed employment agency activities involving two foreigners in *Public Prosecutor v Shahabuddin Shihab Abdul Khaleq* (DAC 11078–2014 & 3 ors (unreported)) to that involving twenty foreigners in *Public Prosecutor v Tay Huat Seng* (DAC 8598–2013 (unreported)). Likewise, the amount collected by IPS, at $19,900, fell approximately in the middle of the range established by *Public Prosecutor v Farhan Chand Bin Feroz Chand @ Rakesh Chand s/o Bahadur Chand* (DAC 924456–2015 (unreported)), where $6,000 was collected by the unlicensed

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employment agent, and *Public Prosecutor v Noor Hayah Binte Gulam* (DAC 911912–2017 (unreported)), where $25,665 was collected.

Whether IPS should be given any sentencing discount

71 IPS argued that the trial judge erred in not affording IPS a sentencing discount because IPS had claimed trial. The crux of this argument is that, given the particularly unclear nature of the law in this area, it was unlikely that any accused person in IPS's position would admit guilt. I note that the trial judge did not treat IPS's conduct of claiming trial as an aggravating factor. Quite properly, it was viewed to be a neutral factor. There was, however, absolutely no basis for IPS to argue for a sentencing discount which is accorded for a plea of guilt.

Whether the sentence is manifestly excessive

72 Finally, IPS argued that the fine of $40,000 is manifestly excessive given that the fines meted out to accused persons in more egregious cases (which were all unreported) were in the range of $30,000 to $40,000.

73 As stated in *Kwong Kok Hing* at [15], a "manifestly inadequate" sentence is one which is unjustly lenient and requires substantial alterations rather than minute corrections to remedy the injustice. The same test applies *mutatis mutandis* to what would be a manifestly excessive sentence. The threshold to be crossed is a high one, given the due deference to be paid to the trial judge's discretion.

74 I am not persuaded that the fine of $40,000 imposed represented such a substantial departure from the sentencing range established by the precedent cases so as to cross the high threshold for appellate intervention. The trial judge

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had applied her mind correctly to the various sentencing factors. Mere assertions that other cases imposed similar sentences involved more severe conduct is unhelpful, particularly when these cases, as the trial judge noted, were all unreported with no written grounds of decisions. The trial judge was entitled to form her views of the gravity of the offence.

75 As the sentence meted out fell within the range established by the sentencing precedents relied on by the parties, I do not think that there is any basis for me to find that it is manifestly excessive.

Conclusion

76 To conclude, the MOM letter is irrelevant to the appeal, and the application to admit it is dismissed. IPS's conviction is correct and the sentence imposed appropriate. The appeal is dismissed.

Hoo Sheau Peng
Judge

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