

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2023

IN THE MATTER OF SECTION 23 (2) OF THE IMMIGRATION (TRANSITION) ACT (2022 REVISION)

IN THE MATTER OF ORDER 55 OF THE GRAND COURT RULES



MATTER OF AN APPLICATION FOR A WORK PERMIT PURSUANT TO SECTION 56 (TRANSITION) ACT (2022 REVISION).

SUN KHI LI

1st Appellant

-and-

DART ENTERPRISES LTD.

2nd Appellant

-v-

BUSINESS STAFFING PLAN BOARD

1st Respondent

-and-

IMMIGRATION APPEALS TRIBUNAL

2nd Respondent

NOTICE OF
ORIGINATING MOTION

TAKE NOTICE that the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on the _____ day of _____ 2023 at _____ a.m./p.m. or as soon thereafter as counsel can be heard, by counsel on behalf of the Appellants for an order in the following terms:

- i. The decisions of the 1st Respondent dated 27 January 2022, is wrong in Law and is set aside.
- ii. The decision of the 2nd Respondent dated 9 March 2023 is wrong in Law and is set aside.
- iii. The matter be remitted to the 2nd Respondent for them to carry out a *de novo* hearing in accordance with Section 22(5) of the Immigration (Transition) Act (2022 Revision).

And for an order that the costs, of and incidental, to this Application be paid by the 1st Respondent and 2nd Respondent.

AND FURTHER TAKE NOTICE that the grounds of this Application are:

1. The 1st Respondent erred in Law and acted unreasonably in rejecting the application dated 19 July 2021 (but submitted on 20 July 2021).
2. The decision of the 2nd Respondent not to grant the appeal amounts to an error of Law and was unreasonable.
3. The decisions of the Respondents amount to a breach of Natural Justice.

Background

4. The 1st Appellant is a Canadian National (DOB 3 February 1964). When the 1st Appellant commenced her employment with the 2nd Appellant she had over 15 years' experience as a Corporate Paralegal.
5. The 2nd Appellant has its headquarters in the Cayman Islands. The 2nd Appellant has strong ties to the Cayman Islands and has had offices in the Cayman Islands for 30 years. As of 19 July 2021, the 2nd Appellant employed 342 employees in the Cayman Islands, of which over 60% were Caymanian.

6. In early 2021, the 2nd Appellant concluded, that due to a vacancy which had occurred in their Corporate Department, they required the services of a Corporate Paralegal. As a result of this vacancy, a recruitment process commenced. The role of Corporate Paralegal was advertised on the JobsCayman Portal, in the Cayman Compass and outside the Cayman Islands. The requirements of the role were as follows:

- i. An ICSA qualification, at a minimum of diploma level, or a recognised paralegal qualification (full time course with a minimum of one year in duration).
- ii. 8+ years' of relevant experience in the field of Corporate Law.
- iii. Excellent knowledge of local Laws, Regulations and AML guidance notes.
- iv. Excellent attention to detail and complete accuracy.
- v. Excellent time management/organisational skills, ability to prioritise effectively and work to tight deadlines and under pressure with limited supervision.
- vi. Ability to multi-task in a time critical environment and be able to respond quickly to changing priorities.
- vii. Excellent verbal and written communication skills and ability to successfully liaise with people at all levels, whilst working effectively as part of a team.
- viii. Proficiency in the use of Microsoft applications, Visio and Viewpoint (preferred).

7. For a role to be posted on the JobsCayman Portal, it has to be reviewed by the Department of WORC and if they do not agree that the requirements are suitable, the posting does not go live. The posting will only go live once the Department of WORC approves the posting. On 11 January 2021, the proposed JobsCayman posting was accepted by the Department of WORC and posted on the JobsCayman site.

8. Nine Caymanians applied for the role, as did the 1st Appellant, and a number of other expatriates. The 1st Appellant and four Caymanians who had been selected from the original nine underwent three tests which were set by the Senior Corporate and Regulatory Counsel, with the input of the Senior Corporate Manager and the Corporate Team.
9. Of the individuals who sat the three tests, the 1st Appellant and a Caymanian (hereafter "AD") were interviewed. AD achieved the best scores in total from the Caymanian applicants and the 1st Appellant achieved the best score overall. All tests were provide to the Senior Corporate and Regulatory Counsel on an anonymous basis.
10. When assessed by the Senior Corporate and Regulatory Counsel, the 1st Appellant was scored as follows:

Drafting	80%
Technical Knowledge	80%
Fit/Work Environment	79%

11. AD achieved the following scores when assessed by the Senior Corporate and Regulatory Counsel:

Drafting	30%
Technical Knowledge	47%
Fit/ Work Environment	83%

12. AD achieved a score of 30% for the Drafting exercise. It appeared that AD made a basic mistake which resulted in him submitting an incomplete test thus scoring only 30%.
13. Upon interviewing AD, the 2nd Appellant had the following concerns with AD and his suitability and ability to carry out the role:
- i. AD accepted that he did not have any experience in the administration of Companies.
 - ii. As a newly qualified Attorney, had little practical experience in Corporate Law.

- iii. He failed to provide sufficient and correct answers to technical questions.
 - iv. His answers were imprecise and inaccurate in regard to certain questions asked by the interview panel.
 - v. He confirmed that he did not keep up to date with the Laws and Regulations of the Cayman Islands.
14. After considering all matters, in particular the requirements for the role (which AD did not satisfy) and the performance of both the 1st Appellant and AD it was concluded, based upon objective evidence, that AD could not carry out the role and that the 1st Appellant would be offered the role of Corporate Paralegal, pending the successful grant of a work permit.
15. On 20 April 2021, the 2nd Appellant applied for a Temporary Work Permit (“TWP”) for the 1st Appellant. As required, the 2nd Appellant disclosed the nine Caymanians who applied for the role, including AD, and set out why it was that they were not able to carry out the role.
16. In considering whether or not to grant a TWP, the Director of WORC has to consider and be satisfied of a variety of factors including:
- i. The protection of local interests and in particular of Caymanians.
 - ii. The availability of the services of a suitable person already legally and ordinarily in the Islands.
17. After considering the necessary requirements as set out in Regulation 4 (3) of the Immigration (Transition) (Temporary Work Permits and Business Visitors Permits) Regulations (“the TWP Regulations”) on 26 April 2021, the Director of WORC granted the TWP. It is therefore contended that the Director of WORC concluded that AD was not suitable for the role. If it was the case that the Director of WORC concluded that AD was suitable for the role, it is not believed that the TWP would have been granted.

18. The 1st Appellant arrived on the Cayman Islands on 29 May 2021.
19. On 20 July 2021, the 2nd Appellant applied for a Work Permit Grant (“WPG”) so as to be able to continue to employ the 1st Appellant as a Corporate Paralegal past the expiry of her TWP. The Law that was in place at the date of application was the Immigration (Transition) Act (2021 Revision). As part of the application, the 2nd Appellant disclosed that nine Caymanians had applied for the role and set out why it was that they were not suitable for the position.
20. On 25 November 2021, the 1st Respondent deferred the application requesting further information. A response and further information was provided to the 1st Respondent in a letter dated 8 December 2021. In particular the 2nd Appellant confirmed:
- i. The 1st Appellant’s scores.
 - ii. The tests questions.
 - iii. Information in regard to the organisational structure of the 2nd Appellant.
 - iv. Why it was that the 2nd Appellant did not believe that the Caymanians selected for the tests were suitable.
21. On 26 January 2022, the 1st Respondent rejected the application stating that:
- “1) When considering an application it is required by Section 58(4)(a) of the Immigration (Transition) Law (2018 Revision), to take into account the protection of local interests and in particular that of Caymanians. In this case, the Board is not satisfied that Caymanian applicants were properly given the opportunity to onboard, even in the restructured environment.”*
22. The Law which was in place as of the date of decision was the Immigration (Transition) Act (2022 Revision) (“the Act”).

23. On 31 January 2022, a Notice of Appeal was submitted on behalf of the Appellants. The Notice of Appeal requested confirmation on a variety of issues and in particular whether or not the 1st Respondent had any policies in place which helped them consider and grant WPG applications.
24. On 3 March 2022, an Appeal Statement was provided to HSM Chambers authored by the 1st Respondent. This document set out how it was that the Board reached their decision. In particular, the 1st Respondent stated:
- i. AD “performed suitably well in the interview process”.
 - ii. The 2nd Appellant’s submissions were superficial.
 - iii. AD was a “suitable” Caymanian.
 - iv. AD “by all accounts, meets the qualifications” for the role.
25. Grounds of Appeal were submitted, on behalf of the Appellants, on 30 March 2023 and it was averred that the appeal should be granted on the basis that:
- i. The 1st Respondent had failed to consider Section 58 of the Act correctly.
 - ii. The 1st Respondent had failed to consider the approved requirements of the role as set out in the JobsCayman posting.
 - iii. The 1st Respondent had failed to place sufficient weight on the concerns of the 2nd Appellant.
 - iv. The 1st Respondent assessed the application in a subjective manner, whereas they should have assessed the application on an objective basis.
 - v. The decision of the 1st Respondent was unreasonable, in particular the conclusions that:
 - a. AD performed suitably well in the interview process.

- b. The 2nd Appellant's submissions pertaining to reasons for the non-hire of AD were superficial.
 - c. The 2nd Appellant concluded that AD was overqualified for the role.
 - d. AD by all accounts, meet the qualifications for the role.
- vi. The decision of the 1st Respondent was unreasonable in that it was contrary to the decisions of the Director of WORC.
 - vii. The decision of the 1st Respondent was unreasonable in that it was made without the aid of policies.
26. Following the submission of the Grounds of Appeal, the 1st Respondent had 28 days to respond to the Grounds. The 1st Respondent did not take up this opportunity and therefore the 2nd Respondent had only the Grounds of Appeal and the documents provided by the 1st Respondent on 3 March 2022 before them when considering the Appeal.
27. In a decision dated 9 March 2023, the 2nd Respondent rejected the Appeal. In particular the Tribunal concluded that:
- "The Tribunal determined that there was no error in law. The Business Staffing Plan Board was not unreasonable in its decision to refuse the Work Permit Grant to the Appellant given the Board's statutory requirement of section 58 (4)(a) of the Immigration (Transition) Act (2022) in considering the protection of local interests and in particular that of a Caymanian.*
28. At the date of decision of the 1st Respondent it is not believed there were any policies (authored by the Department of WORC or the Respondents) in place which provide guidance to the 1st Respondent or any Board as to how to consider a WPG application.

Error of Law

29. It is averred that both of the Respondents have erred in Law in that:

- i. They have subjectively assessed the application without reference to the approved requirements of the role.
- ii. They have failed to place sufficient weight on the decision of the Director of WORC, who not only approved the requirements for the role but also concluded, presumably, that AD was not suitable for the role in question.
- iii. They have failed to apply Section 58 (4) of the Act correctly, in that they failed to take into account the needs of a Caymanian business and whether or not AD was able to carry out the entirety of the role, in light of his performance in the tests and interviews.

Unreasonable

30. It is further averred that the decisions of the Respondents are unreasonable in that:

- i. They failed to give sufficient weight to the concerns of the 2nd Appellant in regard to AD's suitability in particular those concerns which were reached in an objective manner applying an approved criteria (i.e. the requirements for the role).
- ii. They concluded that AD was suitable for the role.
- iii. They failed to consider the entirety of requirements for the role, rather they focused on specific parts of the role and did not consider the matter in a holistic way.

31. It is respectfully averred that because both the decisions of the 1st Respondent and 2nd Respondent amount to errors of Law and are unreasonable, the decisions should be quashed and remitted back to the 2nd Respondent with a direction to consider the matter *de novo*.

Breach of Natural Justice

32. While it is accepted that neither the 1st Respondent nor the 2nd Respondent were required to set out and respond to every point raised in support of the application or in regard to the appeal, it is contended that the Respondents are required to provide adequate decisions which must not give rise to a substantial doubt as to whether the decision-maker erred in Law. In particular, it is contended that the Appellants are entitled to know the reasoning and primary findings of fact that led the Respondents to:

- i. Disregard the approved requirements for the role.
- ii. Conclude that despite AD performing poorly in the tests and the interviews, with the exception of the "Fit/ Work Environment" test, he was suitable for the role.

33. By failing to address the above issues, it is contended that the decision of the Respondents amounts to a breach of natural justice.

34. It is further averred that the 2nd Respondent's decision amounts to a breach of natural justice in that they:

- i. Failed to set out whether or not the 1st Respondent can assess matters in a subjective manner.
- ii. Failed to set out whether or not considering matters on the basis of a subjective assessment, as opposed to reviewing the application in light of the approved requirements for the role, is reasonable / fair.

- iii. Failed to distinguish the case of *Hutchinson Green and Racz* and in particular Smellie CJ concerns set out at paragraph 98 of the Judgment.
- iv. Failed to address the concerns that Walters J raised at paragraph 110 of his Judgment in regard to a decision of the 2nd Respondent in the case of *Dominguez v IAT*.
- v. Failed to set out why it was that the decision of the 1st Respondent was not unreasonable in light of the submissions made in the Grounds of Appeal and in particular the inconsistent decisions between the Director of WORC and the 1st Respondent.

35. Because both Respondents failed to adequately set out their findings in regard to the principal important controversial issues and because the decisions of both Respondents gives substantial doubt as to whether they erred in Law, it is contended that the decisions are contrary to the rules of natural justice and should be quashed and remitted back to the 2nd Respondent.

Conclusion

36. Accordingly, the decision of the Respondents should be set aside so that the Appellants' application can be reheard by the 2nd Respondent in accordance with the Law.

DATED: 22 March 2023

HSM CHAMBERS

HSM CHAMBERS

Attorneys for the Appellants

TO: The Clerk of the Court

AND TO: The Chairman
Business Staffing Plan Board
Department of WORC

P.O. Box 1098
Grand Cayman KY1-1102

AND TO: The Chairman
Immigration Appeals Tribunal
Government Administration Building
Elgin Ave,
George Town
Grand Cayman

And to: Attorney General of the Cayman Islands.