

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 0046 OF 2016

BETWEEN

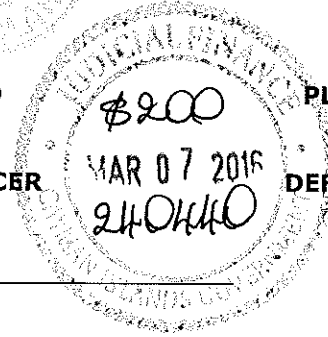
APPLEBY (CAYMAN) LIMITED

PLAINTIFF

AND

THE CHIEF IMMIGRATION OFFICER

DEFENDANT



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To: the Clerk of the Court, Law Courts, George Town, Grand Cayman

<p>Name, address and description of applicant(s):</p>	<p>Appleby (Cayman) Limited, Clifton House, 75 Fort Street, George Town, Grand Cayman, Cayman Islands.</p>
<p>Judgment, order, decision or other proceeding in respect of which relief is sought:</p>	<p>Decision of Defendant dated 7 December 2015 (received by Plaintiff on 14 December 2015) refusing to exercise its statutory powers under section 48(10) of the Immigration Law (2015 revision) to revoke the work permit of Jonathan Bernstein. Mr Bernstein is a former employee of the Plaintiff and was granted a Temporary Work Permit with Harneys, Westwood & Riegels during the currency of his work permit with the Plaintiff.</p> <p>Subsequent decision of the Defendant (communicated to the Plaintiff by the Defendant on 21 February 2016) to grant a Temporary Work Permit with Harneys, Westwood & Riegels to Ian Gobin, also a former employee of the Plaintiff, during the currency of his work permit with the Plaintiff.</p>
<p>Relief sought:</p> <ol style="list-style-type: none"> 1. A Declaration pursuant to O.53 2.1(2) that a notification under Regulation 9 of the Immigration Regulations (2015 Revision) (Regulations) does not result in a termination of the currency of the work permit for the purpose of section 50 of the Immigration Law (2015 Revision) (Law). 2. An Order of Mandamus pursuant to O.53 r. 1(1)(a) that the Defendant reconsider its decision dated 7 December 2015 refusing to revoke the work permit of Jonathan Bernstein in light of the Declaration sought at 1. above. 3. An Order of Certiorari pursuant to O.53 r. 1(1)(a) to quash the decision of the Defendant 	

communicated on 21 February 2016 to grant a Temporary Work Permit with Harneys, Westwood & Riegels to Ian Gobin during the currency of his work permit with the Plaintiff, in light of the Declaration sought at 1. above.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant

Appleby (Cayman) Limited, Clifton House, 75 Fort Street, George Town, Grand Cayman, Cayman Islands.

Dated this 7th day of March 2016



Appleby (Cayman) Limited

GROUND ON WHICH RELIEF IS SOUGHT

1. Whilst further detail will be included in the Application for Judicial Review (**Application**) in the event that leave is granted, the grounds for such Application are as follows:
 - a. Illegality:
 - i. the Defendant has misdirected itself in law with respect to its decision made on 7 December 2015 (**Decision**).
 - ii. the Decision frustrates the purpose of the empowering legislation.
 - b. Irrationality: the Defendant failed to consider relevant matters in reaching the Decision.
 - c. Ultra Vires: in the circumstances, the Decision is ultra vires given the reliance of the Defendant on an ineffective and invalid subordinate regulation.

LAW

2. This Application concerns a single issue – namely whether the Defendant has correctly applied section 50 of the Law in reaching the Decision.
3. Section 50 of the Law provides that:

"During the currency of a work permit, the holder of a permit may not change his employer unless the Board ... or the Chief Immigration Officer believes there are special circumstances."
4. "Special circumstances" are defined at section 2 of the Law to include a situation where:
 - (a) *the position has become redundant;*
 - (b) *the worker is being victimized by the employer or employees of that employer;*
 - (c) *the employer has changed due to corporate action such as merger or amalgamation; or*
 - (d) *the worker has been given written consent by his present employer.*
5. At the time the Law was passing through the Legislative Assembly it was made clear that section 50 was specifically intended to protect employers:

"Whereas it is not the Government's intention to restrict the movement of labour unnecessarily, or to create a system of indentured work permit holders, it must be acknowledged that employers often go to great expense recruiting and then training new employees. This will become even more so, with the fixed-term system. Therefore, it would be unfair to employers to permit such workers to change employers during the term of the work permit, unless there were special circumstances so to do. Therefore, changes of employment during the term of a work permit will only be permitted if:

- a) the position has become redundant;*
- b) the position has been filled by a Caymanian [this was not eventually enacted as part of the Law];*
- c) the employer has changed due to corporate action (for example, a buy-out, take-over, merger, amalgamation, etc.);*
- d) the worker has been victimised by his employer, or by other employees of that employer; or*
- e) the worker has been given consent in writing by his present employer, who has no objection to the change of employment.*

Once a worker has completed the term of his work permit, he will be free to change employment without the consent of his former employer, within the seven-year timeframe provided for the consideration and grant of work permits."

6. This authoritative statement on the intention of section 50 is taken from the Official Hansard Report (Monday 15 December 2003, at p. 1200).
7. Section 50 therefore clearly provides, and was always intended to provide, that on the grant of a work permit to an employee for a specific period of time in respect of employment by a particular employer, the employee could not, before the expiry of that period, be permitted to change employers, unless there were special circumstances, as defined.
8. The Law was expressly intended to provide appropriate protection to Cayman Islands employers in light of the great expense they incur in the recruitment and training of employees.
9. There appear to be two bases on which the Decision is tainted by error of law. The first relates to section 50 alone and in particular whether the phrase "may not change his employer" confers on the immigration authorities a discretion in the absence of "special circumstances." The second relates to the meaning of "currency of a work permit" and

whether that concept is governed by the provisions of Regulation 9 of the Immigration Regulations (2015 Revision) (**Regulations**).

Special circumstances

10. The Plaintiff understands that the Defendant has received advice from the Attorney-General's Chambers on section 50, which apparently suggests that where section 50 provides, "*During the currency of a work permit, the holder of a permit may not change his employer ...*" the use of the word "may" means that this is a discretionary rather than mandatory provision.
10. This legal advice is clearly incorrect. On any proper construction, whereas "may" indicates the granting of permission; "may not" indicates its refusal. As such, section 50's "may not" means a person is prohibited from changing his employer during the currency of a work permit. The effect of this incorrect advice is therefore to turn section 50 on its head, i.e. to treat section 50 as if it meant "*During the currency of a work permit, the holder of a permit may change his employer*". The part of the section referring to special circumstances would then be redundant.
11. Interpreting "may not" to mean "may" is clearly nonsensical. The advice which has been provided to the Defendant, and followed by the Defendant, requires urgent correction. Any decision based upon it is a decision made under an error of law, and should be quashed.

The Regulation 9 issue

12. Regulation 9 is in the following terms:

"Employer to notify cessation of employment

Where a person whose employment in these Islands is authorized under a work permit, the grant of which is conditional upon his remaining in the employment of a particular employer ceases to be employed by that employer:

- (a) the work permit ceases to be valid; and*
- (b) the employer shall forthwith give written notice of the termination of the employment to the Chief Immigration Officer, and if he fails to do so commits an offence and is liable on conviction to a fine of five thousand dollars."*

13. The Decision is expressly made on the basis that by reason of regulation 9 the "currency of the work permit" of the relevant employees for the purposes of section 50 came to an end as soon as they ceased to be employed by the Plaintiff.

14. If that is correct, it means that any employee is always free of constraint under the work permit as soon as the employment has ceased, regardless of whether there are special circumstances. This is directly contrary to the terms and intention of section 50 and makes that section entirely ineffective: during the employment the question of changing employer has, by definition, not yet arisen. If Regulation 9 has the effect suggested, then section 50 would in effect mean "An employee on a work permit may not change his employer until he changes his employer."
15. There would be no protection of employers whatsoever under section 50 if Regulation 9 was capable of validly and effectively providing that on the cessation of employment the employee was free of any restrictions.
16. As interpreted by the Defendant, Regulation 9 is directly inconsistent with the very Law which authorized that Regulation to be made and would, if it were valid, completely undermine the clear legislative intention behind section 50.
17. The Regulations are secondary legislation authorized by and promulgated pursuant to primary legislation, viz. the Law.
18. Section 99(1) of the Law provides that:

"The Cabinet may make regulations generally for administering this Law and for giving effect to its objects, purposes and intentions..."
19. Accordingly, the Regulations adopted under the Law cannot validly include provisions which are directly inconsistent with both the terms of, and the intention behind, the relevant primary legislation. The Law expressly states that the Regulations are to be for (a) administering the Law and (b) giving effect to its objects, purposes and intentions.
20. If, as the Plaintiff contends, Regulation 9 is inconsistent with the very legislation enabling that Regulation to be made (i.e. the Law), it cannot validly have the effect given to it by the Defendant in reaching the Decision. Either it must be differently interpreted (for example to confine 'ceases to be valid' so as only to relate to the permit's authorisation of further gainful employment, without affecting its status for the purpose of section 50), or it must be struck down as invalid.
21. Accordingly, the grounds of the Application are that by reason of the interpretation of the Law adopted by the Defendant, the Decision:

- (a) was unlawful in that it was based on an error of law;
- (b) was irrational, in that entails an interpretation of s.50 that does not make sense and as a result failed to take into account the absence of any special circumstances as defined in the Law;
- (c) was ultra vires in that it relied upon subordinate legislation that, to the extent it was correctly interpreted as the Defendants contend, was invalid as being in contradiction of or overturning primary legislation;
- (d) frustrated the purpose of the legislation conferring the power to make the decision.

TIMING OF THE PRESENT APPLICATION

- 22. The Decision, whilst dated 7 December 2015, was emailed to the Plaintiff on 14 December 2015. The Plaintiff responded to the Defendant, without delay, by email of 15 December 2015, requesting further information in order to better understand the reasons for the decision. No response to this email has been received.
- 23. On 21 January 2016 the Plaintiff therefore wrote to the Defendant confirming that the Decision had yet to be properly explained, but also seeking agreement that, as per the case of *Aiken v IAT* (Unreported, Chief Justice; 9 February 2015 – FSD 471 of 2012), in light of the urgency of this matter (due to the ongoing damage being done to the Plaintiff), any application for review of the Decision be made directly to the Grand Court as opposed the Immigration Appeals Tribunal (**IAT**). It was explained that an appeal to the IAT (even if such a course is legally open to the Plaintiff as former employer, which is questionable) would, in the Plaintiff's view, result in further delay and duplication of this dispute, with ongoing damage to the Plaintiff.
- 24. It was further clarified that in light of the clear public importance of this matter, as shown in a recent debate in the Legislative Assembly on the very issue, there were exceptional circumstances in which we were justified in seeking urgent judicial review of the Decision.
- 25. No response to the letter of 21 January 2016 was received other than a confirmation on 5 February that the Defendant would revert to the Plaintiff without delay having taken legal advice. No response was received.
- 26. The Plaintiff therefore wrote again to the Defendant on 23 February 2016, aware that the deadline for this Application for Leave was pending, again seeking agreement from the Defendant to the approach set out in paragraph 26 above, in the interest of reducing costs and time for both parties and the Court.
- 27. A response dated 21 February 2016 from the Defendant was then received by the Plaintiff on 24 February 2016 which, whilst not disagreeing with the Plaintiff's reasoning, confirmed that the Defendant was not prepared to endorse our proposed course of action due to this being

"inappropriate". Based on that indication, and in light of the time scale within which such Application for Leave must be made, the Plaintiff has proceeded with this Application for Leave.

28. The application is made within three months of the decision complained of. In the above circumstances, it is also made promptly.