

No. 6

Notice of Originating Motion (0.8, r.3)



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 5 OF 2019

In the matter of The Labour Law (2011 Revision), (the “Law”), section 79.

And in the matter of an award in favour of the complainants by a decision of the Labour Appeal Tribunal made on 3 May 2016.



Saoirse Holdings Ltd



Applicant

Labour Board/Labour Appeals Tribunal

Respondent

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on 2019 at or as soon thereafter as counsel can be heard, by counsel on behalf of Saoirse Holding Ltd (the Applicant) for an order that the decision of the Chairman of the Labour Appeal Tribunal (“LAT”), made in a letter dated 3 May 2016 upholding the decision of the Labour Tribunal made on 19 January 2015 to make an award in favour of the complainants is wrong as a matter of Law and fact and that such decisions against the Applicant be set aside or alternatively that the matter be remitted to the Labour Board or the LAT to reconsider the case pursuant to applicable law in place at that time.

And for an Order that the Applicant be permitted an extension of time pursuant to GCR Order 3, r.5.

And for an Order that the any Order of the LAT be stayed pending the resolution of this matter before the Grand Court as per section 79(3) of the Law.

And for an order that the costs of and incidental to this appeal may be paid by Labour Department or the Labour Appeal Tribunal.

AND FURTHER TAKE NOTICE that the grounds of this appeal are as follows:

1. The Labour Board and LAT have failed to properly consider the evidence, the facts and the Law. They have together made findings of fact when there is no evidence to support their finding. The LAT and the Labour Board having failed to consider the applicable law erred in that it failed to consider the application of the evidence and thus facts in its entirety with the applicable law.
2. The Labour Board and the LAT’s decision viewed broadly and fairly is one that no reasonable tribunal, properly directing themselves in Law could have reached on the material before them. Their findings are irrational, unlawful, unreasonable, in breach of the rules of natural justice and thus irregular. I sought from the outset to have the complainants

called to give evidence but at no time before any decision was reached was I notified that they would attend any hearing.

3. The Labour Board and the LAT erred in that it failed to properly apply the procedures that were in place. When this matter first came before the Labour Board a number of objections were raised at that meeting, which meeting was recorded, including the fact that the Applicant requested that the complainants appear in person so that they could be cross-examined on their evidence in compliance with the rules of natural justice in that a party should be permitted and thus have a fair hearing. It was also to be noted that neither complainant was in the jurisdiction at the time of the hearing and it was not clear if they were even notified of the date of the hearing. Failure to call the complainants prevented the Applicant from establishing by way of evidence that at the material time the business had been taken over, was being operated by another entity or employer as a going concern, which entity was also paying the complainants' salary, their healthcare and their pension contribution. The evidence that they would be called to give would have identified the source of their salary, which at the material time was not by the Applicant.
4. The facts are that the Applicant operated the business but as of 31 October 2012 was removed from the business premises by the Landlord who proceeded to lock out Mr. Harry Lalli, a director/shareholder of the Applicant. A new company owned by Mr Mario Rankine took over the business and continued to employ the employees in the same employment capacity. It was Mr. Rankine's company that then continued to pay their salaries and all other benefits until sometime in 2013 he terminated the contract of the two employees. The two employees thus lodged a complaint with the Labour Board.
5. If it is right that the employees were still working for the Applicant after 31 October 2012 when he was supposed to have handed over the business as a going concern to Mr. Mario Rankine then these employees would be working outside of the terms of their work permit and for the reasons as set out under section 51(1) (e) and (f) in contravention of the Labour Law. As it stands events were overtaken by the fact that instead Mr Rankine paying the Applicant the purchase price for the business, the landlord terminated the Applicant's Lease and locked him out of the business. Mr. Rankine did not therefore pay the Applicant the agreed purchase price but still took over the Applicant's business including the use of the staff.
6. The Immigration Law specifically prohibits an employee during the currency of a work permit from changing his employer without the permission of the Immigration Board.
7. If it is right that the employees were working for another employer, then it would be clear on the face of the evidence and the Law that these employees would have been working in contravention of the extant Law as of 31 October 2012. This would have been evidenced by proof of who was paying their salaries at that time. Otherwise, and to avoid such breach, Mario Rankine would have notified the Immigration Department that he had taken over the business as a going concern and that these employees worked for him.
8. When the Appeal was heard before the LAT it does not appear that the electronic or written record of the hearing before the Labour Tribunal was provided to the LAT. A request was made for that recording or a transcript of the recording made at the time of that hearing before the Labour Tribunal, but none has been provided. This transcript is fundamental as it sets out the Applicant's position from the outset. The initial hearing was adjourned so that further inquiries could be carried out by the Labour Tribunal but they, in short, simply proceeded to rule against the Applicant and make an award in favour of the complainants. It is for that reason that that transcript is important.

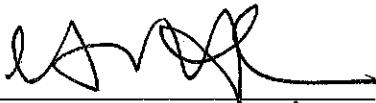
9. There was a singular failure by the Labour Board to determine the employment status of the employees and thus the issue of jurisdiction before endeavouring to address this matter. If they were, either voluntarily or pursuant to a contract, working for another employer at the material time, then it cannot be found and therefore said that they were working for Saoirse Holdings Ltd. Mr. Anderson and Ms Munn were in receipt of a salary from Mr Rankine's company, which it is said will confirm that they were employed by another company at the material time.
10. It was later learnt – November/December 2012 - by the Applicant that Mr Rankine's company was using the applicant's company name to apply for work permits. Mr Lalli of the Applicant had a meeting with the Immigration Department on or about 6 December 2012 where he informed them what was taking place and that he did not agree to such action by Mr. Rankine or his company. This was compounded by the fact that he had not been paid by Mr Rankine or his company the agreed purchase price to take over the business as a going concern. Mr Lalli's attendance at the Immigration Department can and will be verified by the Immigration Department following full disclosure of their documents.
11. The Immigration Department stated that the applicant was in breach of regulation 9 of the Immigration Regulations 2010 as it was stated, notwithstanding the facts, that if an employee's employment ceases with one employer then there is a duty to notify the Immigration Department forthwith. If it is right that the Immigration Department knew that the employees were not working for the applicant 11 December 2012 then it is difficult to comprehend how it could be found by the Labour Board that the applicant was employing them as at 31 January 2013 or beyond November 2012.
12. Mr. Lalli in order to avoid legal proceedings under the Immigration Law completed various documents and settled all matters administratively. He paid a fine of C\$2,400.00 for failing as of 11 December 2012 to notify the CIO that these employees were no longer working for him.
13. The Applicant later discovered a newspaper article dated 24 March 2015, a copy of which will be disclosed in due course, and as a result of its contents wrote to the Director of Public Prosecutions as follows:

“We have secured a copy of an article from the newspaper which suggest at paragraph 3 that Mr. Rankine provided the court with new information that showed that he employed the two virtual complainants at the time that my client is alleged to have them in his employment. Mr. Rankine apparently provided “relevant paperwork and fees” to show that that “...had been completed and paid in December 2012.”. As a result all charges against Mr. Rankine had been dropped. I have attached a copy of a letter from the Labour Tribunal dated 14 April 2014 wherein you will see on page 2 that they have made a finding of fact and it states that the Ms Munn's employment with Brickhouse had been terminated on 30 January 2013.

Mr Lalli had been evicted from the premises on 1 November 2012 Mr. Rankine had acquired the business on the same date. If Mr. Rankine had employed Ms Munn from that date then he was as a matter of fact and law her employer. The relevant paperwork that was submitted by him to the Immigration Department was provided in December 2012. That would mean that neither Ms Munn nor any employee were still working for Saoirse Holdings Ltd as of November 2012 and certainly not on 30 January 2013.

I would be grateful if you can provide me with a copy of the documents that were provided by Mr. Rankine to the Immigration Department and that were later relied on by the Crown not to proceed against Mr. Rankine. I will need these documents as I wish to make an application to the Grand Court to overturn the decision of the LAT. Your urgent assistance would be gratefully appreciated.”

14. It is submitted that if Mr. Rankine and/or his company has submitted documents to the Immigration Department in December 2012 to validate that fees had been paid for his then employees then that contradicts the finding of the Labour Board and the LAT. The Immigration Department had to search through their archives as they could not locate the documents that are now exhibited to my affidavit. The Court will see that some of those documents are originals and not copies. I was only able to get those documents in December 2018.
15. The Applicant now seeks leave of the Honourable Court for Leave to appeal the decisions of the various tribunals and an Order to set aside those decisions. At the time of the filing of the Notice of Motion there is still disclosure that has not been made. Such disclosure would be fundamental to this application and explains the Applicants understanding and position throughout. The Applicant will therefore require further disclosure of documents, to include all transcripts and notes made by the Labour Tribunal, all records kept at the Immigration Department concerning this matter and those of the Company of Mario Rankine and in the interim seeks an Order to stay the decision of the tribunal until these matters are determined by the Grand Court.



[Signature of Attorney]

15 January 2019

TO: The Clerk of the Court.

AND TO: The Labour Appeals Tribunal, Government Administration Building, Grand Cayman
KY1-9000, CAYMAN ISLANDS

This **Originating Motion** was filed by Clyde H. Allen, Chambers on behalf of the Defendant whose address for service is P. O Box 31076 SMB, 9 Jack & Jill Bldg., KY1-1205 GT, Grand Cayman, Cayman Islands.