In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 192

BETWEEN:-

KENNETH DILL JR

Appellant

-and-

THE CHIEF IMMIGRATION OFFICER

Respondent

JUDGMENT
(In Court)

Whether work permit violations – ss 57 and 71A Bermuda Immigration and Protection Act 1956 – whether Appellant employed persons to engage in gainful occupation when they did not have a work permit – whether, if they were employed, Appellant was culpable – whether person was employed when not remunerated – meaning of "person's first violation" within s 71A(3)

Date of hearing: 18th October 2016
Date of judgment: 18th November 2016

Mr Shawn G Crockwell, Chancery Legal, for the Appellant
Mr Philip Perinchief, Attorney General's Chambers, for the Respondent

Introduction

1. This is an appeal against a Decision Notice issued on 20th April 2016 by the Respondent against the Appellant pursuant to section 71B(3) of the Bermuda Immigration and Protection Act 1956 ("the Act"). The Decision Notice imposed a civil penalty of $35,000 upon the Respondent for four violations of section 71A(1)(c) of the Act. The violations consisted in employing persons, namely Nadine James ("Ms James") and Donovan James ("Mr James"), to engage in gainful occupation when they did not have a work permit. The appeal is by way of Notice of Originating Motion dated 11th May 2016. It is brought pursuant to section 71C of the Act.

Background

2. The Appellant was the proprietor of Changes Beauty Salon ("Changes"), which he had successfully managed for more than 15 years. In 2012 he employed Ms James as a nail technician to develop the nail care section of Changes. She was a Jamaican national who was employed on a work permit. The Appellant stated that Ms James was constantly advising him to be careful of immigration laws and would not even answer the phone at Changes because this did not form part of the job description on her work permit.

3. The nail care section flourished, and in 2015 the Appellant and Ms James decided to spin it off into a separate business at separate premises, to be called Bella Bella Nail Salon ("Bella"). They entered into a written partnership agreement dated 19th September 2015 to operate the business, and by a contract of employment dated 1st October 2015 the partnership hired Ms James to manage Bella.

4. Also on 1st October 2015, the Appellant wrote to the Respondent requesting that the company name on Ms James' work permit be changed to Bella, and that her new position as partner with managerial duties be added to her job description. The work permit application, together with a couple of others

which he had submitted for Bella, was returned as incomplete. He instructed one Barbara Tannock at Catalyst Consulting (Bermuda) to resubmit the completed applications, which she did. He assumed that their grant would be a formality.

5. Subject to the grant of work permits, Bella was due to open for business on 1st February 2016. The Appellant understood that until a work permit was granted for Ms James she would continue to work at Changes.

6. Meanwhile the Appellant became unwell. He was in hospital intermittently from September through November 2015 and was readmitted to hospital in December 2015. In January and February 2016 he was at home convalescing, although he did visit his business premises from time to time.

7. Ms James was also in ill health. In January 2016 she advised the Appellant that she had to travel overseas for medical treatment. She provided him with a letter from her doctor dated 18th January 2016 which stated:

> "*This is to certify that the above-named patient is being referred abroad for medical assessment and treatment not available in Bermuda. Mrs James will be off island from January 20th, 2016.*
>
> *She will be required to remain off work for a period of up to six weeks postoperatively*."

8. Bella opened for business on 4th February 2016. The Appellant appears to have understood that in the absence of Ms James and himself the sole person working there during that time would be a senior nail technician/supervisor named Marsha Finegan. She had been employed at Changes and the Appellant had obtained a work permit for her to work at Bella. Her job description included supervising daily operations in the absence of Ms James.

9. On 3rd February 2016 Immigration Officers, acting on information received, had visited the premises of Bella and questioned Ms James about her presence there. Mr James was also present. When questioned by Immigration Officers, Ms James stated that she and her husband were preparing the salon in order for Bella to open for business, and that on the

previous day she had trained a potential employee regarding acrylics and tools, and watched how she set up a nail station. Ms James stated that she believed that she was able to continue to work as manager of the business as Ms Tannock had submitted her application for a work permit. The Immigration Officers told Ms James that she should not be on the premises and should not be working there.

10. On 5th February 2016 Immigration Officers returned to the premises and found that Ms James was working there again, servicing a client's nails.

11. Ms James and Mr James were both interviewed by Immigration Officers under caution. Mr James explained that for two years he had ordered and imported products for use at Changes, for which the Appellant had reimbursed him. He did so using the Appellant's CAPS Trader ID number, which is an identification number which the Customs Department allots to a trader. When Bella was formed, he applied for and obtained a separate CAPS Trader ID number for the new business, as Customs had advised that this was necessary.

12. Ms James admitted in interview that she did not have a work permit to work at Bella although she stated that she was aware that a work permit application authorising her to do so had been submitted.

13. Mr James stated in interview that he helped and advised his wife generally on business matters related to Bella. He had set up an email account for the business, and provided the password to the Appellant and Ms James so that all three of them would have access to the account. He had drafted at least one email on behalf of the Appellant and signed it in the Appellant's name. This was most likely an email to the Department of Immigration regarding Ms James' work permit application. Mr James also emailed the Department about her application in his own name. It emerged at trial that while the Appellant was unwell Mr James did various odd jobs for his businesses on an ad hoc basis such as putting up shelves.

14. Although still not fully recovered, the Appellant visited the premises of Bella on 6th February 2016. He was surprised to learn from Ms Finegan that Ms James had been working at the premises on several occasions during the past week. On 12th February 2016 Immigration Officers interviewed the Appellant under caution.

15. The Appellant and Ms James fell out. In March 2016 she left Changes – whether of her own volition or because she was dismissed is not clear. On 16th March 2016 her work permit application in relation to Bella was refused and the Department of Immigration directed her to settle her affairs and leave Bermuda on or before 29th April 2016.

16. Meanwhile, on 13th April 2016 the Respondent issued a Warning Notice to the Appellant pursuant to section 71B(1) of the Act. The Notice stated that pursuant to section 71A(1)(c) of the Act the Respondent proposed to impose on him one civil penalty of $5,000 in relation to his first violation of the Act and three civil penalties of $10,000 each in relation to three subsequent violations. The Appellant had seven days within which to make representations to the Respondent.

17. Under section 71B(1)(b) the Warning Notice was required to give the Appellant notice of the reasons for imposing the penalty. The reasons given in the Notice were that on two separate occasions he had employed Ms James to engage in gainful occupation when she did not have a work permit, and that on two separate occasions he had employed Mr James to engage in gainful occupation when he did not have a work permit. Although this point was not taken by the Appellant, in my judgment the statement of reasons did not adequately inform the Respondent of the case he had to meet. It should have specified the date and type of work allegedly undertaken on each occasion.

18. The Appellant made representations to the Respondents by emails dated 13th April 2016 and 18th April 2018. He sought a meeting with the Respondent. She declined his request, but agreed to speak to him by telephone. He did not take up her offer.

19. By a Decision Notice dated 20th April 2016, which was issued pursuant to section 71B(3)(b) of the Act, the Respondent informed the Appellant that his representations had no merit:

"*In respect of Nadine James, your representations have no merit for the following reasons:*

- *that you carelessly entered into a partnership arrangement with Ms. James for the establishment of Bella Bella Nail Salon but this is no excuse for your lack of awareness of the set-up of the business, including submissions of work permit applications to the Department of Immigration;*
- *that as a partner of Bella Bella Nail Salon, you had a duty to ensure that Ms. James obtained a work permit before she undertook work functions at Bella Bella Nail Salon on February 3, 2016 and February 5, 2016; and*
- *that as partners of Bella Bella Nail Salon, you are fixed by the activities/happenings in relation to Bella Bella Nail Salon.*

In respect of Donovan James, your representations have no merit for the following reasons:

- *that for approximately 2 years (dating back to 2014) you entered into an agreement with Mr. James that permitted him to undertake work duties for Changes Beauty Salon, the establishment where you are the sole licensed operator, for example Mr. James ordered and imported products for Changes, via his credit card and you reimbursed Mr. James for same;*
- *that when Bella Bella Nail Salon was established, Mr. James acted on your behalf by communicating with the Department of Immigration, by setting up the new email account, and by arranging for a new CAPS Trader ID with HM Customs so that products could be ordered and imported;*
- *that section 57(6) as read with section 57(2) of the Bermuda Immigration and Protection Act 1956 qualifies that a person may be 'engaged in gainful occupation' without obtaining 'reward, profit or gain;' the fact that Mr. James was not paid for the work functions performed at Changes, does not mean that he was not employed by you; and*
- *that as sole licensed operator of Changes Beauty Salon and partner of Bella Bella Nail Salon, you are fixed by the activities/happenings in relation to Changes Beauty Salon and Bella Bella Nail Salon.*"

20. The Respondent, who gave evidence, clarified that in relation to Ms James the first contravention was the training which took place on 2nd February, which Ms James mentioned to Immigration Officers when they visited the premises on 3rd February. Thus the date of the first contravention in the Decision Notice should have been 2nd February and not 3rd February. However, by analogy with a criminal indictment, although the date of an alleged contravention should be stated correctly in a decision notice, an error as to date will not generally render the decision notice defective.

21. The Decision Notice confirmed the penalty of $35,000 for four violations of section 71A(1)(c) of the Act which was foreshadowed in the Warning Notice. It is against the decision contained in that Decision Notice that the Appellant now appeals.

Statutory scheme

22. Part V of the Act is headed "*Regulation of Engagement in Gainful Occupation*". The following sections within that Part are relevant when considering whether the Appellant has contravened Part V and, if he has, the appropriate financial penalty.

23. Section 57 governs the construction of expressions relating to the engagement of persons in gainful occupation. It provides in material part:

> *"(2) 'engage in gainful occupation' means, for the purposes of this Part –*
>
> *(a) to take or continue in any employment; or*
>
> *(b) to practise any profession; or*
>
> *(c) to carry on any trade; or*
>
> *(d) to engage in local business,*
>
> *where such employment, profession, trade or local business is taken or continued, or is practised, carried on or engaged in, for reward, profit or gain; and cognate expressions shall be construed accordingly.*

. . . . .

(6) For the purposes of subsection (2) any employment profession, trade or local business shall be deemed to be taken or continued, practised, carried on or engaged in, (as the case may be) for reward, profit or gain if such employment, profession, trade or local business is ordinarily in Bermuda continued, practised carried on or engaged in for reward, profit or gain, notwithstanding that no reward, profit or gain may be obtained or obtainable in the circumstances of the particular case."

24. Section 65 makes it an offence to employ a person in contravention of Part V. However it contains a proviso:

"*Provided that it shall be a good defence for a person charged with an offence under this section to prove that he had made reasonable enquiries to determine whether such employment was in contravention of any earlier provision of this Part, and had no reasonable grounds for believing, and did not in fact believe, that such employment was in contravention of such provision.*"

25. Section 71A confers a power to impose civil penalties for work permit violations. It provides:

"*(1) The Chief Immigration Officer may impose a civil penalty on a person who, in contravention of this Part—*

(a) engages in gainful occupation without a work permit;

(b) engages in gainful occupation which is outside the scope of his work permit;

(c) employs a person to engage in gainful occupation when that person does not have a work permit; or

(d) employs a person to engage in gainful occupation which is outside the scope of that person's work permit.

(2) The Chief Immigration Officer may also impose a civil penalty on a person if the person has been given—

(a) written notice of an investigation for a suspected contravention of this Part; and

(b) a request to submit specified documents to the Chief Immigration Officer within a 24 hour period,

but fails without reasonable excuse to do so.

(3) The amount of a civil penalty imposed under this section shall be—

(a) $5000, for a person's first violation; or

(b) $10,000, for a person's second or subsequent violation within a period of seven years beginning with the date of the first violation.

(4) Where a civil penalty is imposed on a person under this section for a contravention of this Part, the person shall not also be prosecuted for an offence under section 64, 65, 133 or 134 relating to that same contravention."

26. Section 71B deals with the procedure for imposing civil penalties. It does not provide for a defence analogous to the defence to criminal liability in section 65. However at section 71B(3), whether or not to impose a penalty is expressed to be a matter for the decision of the Respondent. This implies that the Respondent has a discretion in the matter. This implication is supported by the wording of section 71A(1), which provides that the Respondent "*may*" impose a civil penalty. When she is deciding whether to do so, a relevant consideration is in my judgment whether, if the contravention had been dealt with by way of a criminal charge, there would have been a defence under section 65.

Grounds of appeal

27. The Appellant appeals on the grounds that there was no work permit violation by him because:

(1) On the dates of the alleged work permit violations relating to Ms James, she was working at Bella without his knowledge or consent.

(2) Ms James' employment at Bella was in any event covered by the work permit relating to her employment at Changes.

(3) He did not employ Mr James to engage in gainful occupation. Not ever.

(4) The Respondent's refusal to meet with him prior to issuing the Decision Notice was a breach of natural justice.

28. Further or alternatively, the Appellant submits that the penalty of $35,000 was manifestly excessive and wrong in law.

29. I shall consider each ground of appeal in turn. The appeal is governed by Order 55 of the Rules of the Supreme Court 1985. Thus, under Order 55 rule 3 it is by way of rehearing, although the Court will treat with respect any findings made by the Respondent.

Ground 1: Ms James was working without the Appellant's knowledge or consent

30. There is no evidence that the partners of Bella elected that the partnership should have legal personality. Accordingly, Ms James was employed jointly by the Appellant and herself.

31. It is not disputed that on the dates in question, 2nd and 5th February 2016, she was engaged in gainful occupation during the course of such employment when she did not have a work permit. As the imposition of a civil penalty is discretionary, the question for the Court is whether in relation to both contraventions the Appellant behaved culpably, so as to merit such penalty. It would be unjust to impose a penalty for a work permit violation upon a person who was not really to blame.

32. The Appellant submitted that as he was convalescing at home during the dates in question, 3rd and 5th February 2016, he was therefore in no position actively to monitor what was happening at Bella. He had understood from the doctor's letter supplied by Ms James that during that time Ms James would be off work and quite possibly off island. Moreover, it was reasonable for him to assume that – as she admitted in interview – Ms James knew that she should not be working at Bella until the work permit application relating to her was granted, particularly as she had demonstrated in relation to her employment at Changes that she knew that she should not

carry out any work that was not covered by a valid permit. Even if she did not know prior to the first alleged contravention, she could have been in no doubt whatsoever after her initial interaction with Immigration Officers on 3rd February 2016. It followed from the Appellant's submissions that it was in his view reasonable to leave the day to day running of the business to Ms Finegan until Ms James was both fully recovered and in possession of a valid work permit in relation to Bella.

33. The Respondent accepted the Appellant's evidence as to his state of knowledge, but submitted that as a partner he should have known what was going on: "*with partnership, comes responsibility*".

34. There is force in the Appellant's submissions. I am satisfied that in the circumstances it would be unduly harsh to impose a civil penalty in relation to the work permit violations involving Ms James. Even had I been satisfied that a penalty was appropriate in relation to the first violation, I should not have imposed a penalty in relation to the second. This is because the immigration authorities did not bring the first violation to the attention of the Appellant until after the second violation had taken place. He was therefore not given a reasonable opportunity to correct it.

Ground 2: Ms James' employment at Bella was covered by the work permit relating to her employment at Changes

35. Ms James had a different employer and job description at Bella than she had at Changes. Therefore, as the Appellant well knew, she needed a different work permit. That is no doubt why he applied for one. There is no merit in this ground.

Ground 3: The Appellant did not employ Mr James to engage in gainful occupation

36. For roughly two years Mr James imported products for use by the Appellant's business. This activity was undertaken consistently and over a

sustained period. Importing products for commercial use is a paradigmatic example of a business activity which is usually undertaken for profit. Under section 57(6) of the Act it is irrelevant that the Appellant did not pay Mr James for his importation services. I am satisfied that in utilising Mr James' services in this way the Appellant was employing him in gainful occupation. It is common ground that Mr James did not have a work permit authorising this activity. The Appellant did not, as he should have done, ascertain whether Mr James needed one. I am therefore satisfied that the Appellant committed a work permit violation and that for this he is culpable. There is no good reason why I should vary the Respondent's decision to impose a civil penalty.

37. The activities which Mr James carried out for Bella were more limited. Nonetheless, they were in my judgment sufficient to amount to gainful employment. Mr James did not have a work permit authorising him to undertake them. I am therefore satisfied that that this was a further instance of a work permit violation. I am not inclined to interfere with the Respondent's decision that the violation was culpable and I therefore decline to vary her decision to impose a civil penalty.

Ground 4: The Respondent's refusal to meet with the Appellant prior to issuing the Decision Notice was a breach of natural justice

38. The Appellant was given an opportunity to make written representations before the Decision Notice was issued and to speak with the Respondent by telephone. There was no requirement in the Act that the Respondent should meet him. Her refusal to do so does not amount to a breach of natural justice. I have made some observations earlier in this judgment about the adequacy of the Warning Notice, but that potential ground of appeal was not pursued. In any event, the Appellant has had a full and proper opportunity to state his case before me. I am satisfied that at the end of the day he has had a fair hearing.

Further or alternatively, the penalty was manifestly excessive

39. Section 71A(3) provides that there shall be a $5,000 penalty for a person's first violation and a $10,000 penalty for each subsequent violation within a period of seven years beginning with the date of the first violation. The Respondent concluded, perfectly logically, that in the present case that meant one penalty of $5,000 – because there can only be one first violation – and three penalties of $10,000.

40. The policy behind the provision is that a person on whom a civil penalty is imposed for the first time should be dealt with more leniently than a person on whom a civil penalty is imposed on a subsequent occasion. This is because if someone has been dealt with once for a work permit violation he should know not to do it again. A person being subject to a civil penalty for the first time is therefore analogous to a person of previous good character being sentenced in a criminal court.

41. In my judgment it follows that the reference to a person's first violation in section 71A(3) is to a person being dealt with for a violation for the first time, even if on that occasion he or she is being dealt with for more than one violation. Thus, had I found that the four separate penalties should be imposed upon the Appellant, the appropriate amount would have been $20,000 (ie four x $5,000) rather than $35,000 (ie one x $5,000 and 3 x $10,000). Although this construction does not fit the literal sense of the words in the subsection as well as the Respondent's construction it better gives effect to what I understand to be the underlying legislative intent.

42. A first violation which was dealt with by criminal rather than civil proceedings would nonetheless count as a violation. So a person who was prosecuted for a violation then fined for a subsequent one within a seven year period would receive a fine of $10,000 rather than $5,000, even if he had not been fined previously.

43. If a person is warned by the Department of Immigration that he is in contravention of Part V, but then commits a further violation before being

dealt with for both violations, he will be liable to a fine of $5,000 for the first violation. I reserve for argument in a future case the question whether the second violation should attract a fine of $5,000 or alternatively $10,000.

44. In the present case, I have found that the Appellant should be subjected to a civil penalty for two violations. As they are both first violations the penalty is $10,000 (ie two x $5,000).

Summary

45. The Decision Notice is quashed and in substitution for a penalty of $35,000 for four work permit violations I impose a penalty of $10,000 for two work permit violations.

46. I shall hear the parties as to costs.

Dated this 18th day of November 2016

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Hellman J