

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: 15/2023

SETTLEMENT OF DISPUTE
BETWEEN
ISLAND OUTSOURCERS LIMITED
AND
MR. HENDRY SHAI
AND THE
AWARD



I.D.T. DIVISION

MS. SADEERA SHAW	-	CHAIRMAN
MR. RODCLIFFE ROBERTSON, JP.	-	MEMBER
MR. KEITH FAGAN	-	MEMBER

AUGUST 15, 2024

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT OF AN INDUSTRIAL DISPUTE
BETWEEN
ISLAND OUTSOURCERS LIMITED
(THE COMPANY)
AND
MR. HENDRY SHAI
(THE AGGRIEVED WORKER)



REFERENCE:

By letter dated April 19, 2023, the Honourable Minister of Labour and Social Security pursuant to Section 11A (1) (a) (i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the Act"), referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute describe therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between Itelbpo Smart Solutions on the one hand, and Hendry Shai on the other hand, over the termination of his employment".

By letter dated January 31, 2024, the Honourable Minister of Labour and Social Security amended the Terms of Reference to read as follows:

"To determine and settle the dispute between Island Outsourcers Limited, on the one hand, and Hendry Shai on the other hand, over the termination of his employment".

DIVISION

The Division of the Tribunal which was selected in accordance with section 8(2)(c) of the Act and which dealt with the matter comprised:

Ms. Sadeera Shaw	-	Chairman
Mr. Rodcliffe Robertson,JP.	-	Member, Section 8(2)(c)(ii)
Mr. Keith Fagan	-	Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

Mr. Emile G.R Leiba	-	Attorney-at-Law
Ms. Paulette Neil	-	Attorney-at-Law



The **Aggrieved Worker** was represented by:

Mr. Khurt Fletcher	-	Industrial Relations Consultant
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In attendance:

Mr. Hendry Shai	-	Aggrieved Worker
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SUBMISSIONS AND SITTINGS

Briefs were submitted by both parties who made written and oral submissions during five (5) sittings from September 21, 2023, and December 12, 2023.

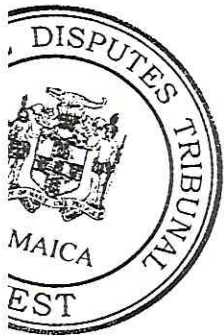
BACKGROUND TO THE DISPUTE:

1. Island Outsourcers Limited, *herein referred to as the "Company"*, is a business process outsourcing firm which offers an integrated suite of BPO operations, including inbound and outbound customer engagement, sales, online booking services and quality assurance services to its clients.

2. Mr. Hendry Shai, *herein referred to as the "Aggrieved Worker"*, is a foreign national and was employed on or about August 25, 2018, as Head of Operations subject to the terms and conditions set out in the Work Permit No. 49/2020 valid for the period December 23, 2019 to December 22, 2020. By way of letter dated March 15, 2021, the Company parted ways with the Aggrieved Worker on the basis of non-renewal of work permit.
3. The Aggrieved Worker engaged the services of Mr. Khurt Fletcher, Industrial Relations Consultant, who contested his termination and sought the intervention of the Ministry of Labour and Social Security. No resolution was reached and the dispute was referred to the Industrial Disputes Tribunal for determination and settlement.

THE COMPANY'S CASE

4. The Company made oral submissions and called its sole witness, Mrs. Michelle Yeo in support of its case. Mrs. Yeo testified that she first began working for the Company in 2014 where she held the position of Group Director of Human Resources. She also testified that she separated with the Company in February 2020 and at the time of her separation with the Company, she held the position of People's Officer. She gave evidence that she returned to the Company in February 2023 where her current position is Executive Vice President for People's Resources and Culture.
5. She stated that she knew the Aggrieved Worker when she worked for the Company between the period 2014-2020. It is her evidence that the Aggrieved Worker was the Operations Consultant. It is also her evidence that he became a full-time employee in 2018 in the position, Head of Operations where he based in Montego Bay. She testified that at the time when he was employed to the Company full-time, he had an existing work permit with his previous employment. She gave evidence that the Aggrieved Worker continued working on the existing work permit until his new work permit with the Company was approved. She also gave evidence that the work permit with the Company was granted for a one (1) year period ending December 22, 2020.
6. It is her evidence that the Aggrieved Worker was employed on a fixed term arrangement but it was not stated in his offer letter dated August 18, 2018. She testified that she didn't



consider the Aggrieved Worker's employment as indefinite because an end date was excluded from the offer letter as she was of the view that there were terms and conditions to his employment.

7. She gave evidence that based on the Aggrieved Worker's records, the Company separated with the Aggrieved Worker due to non-renewal of his work permit which was communicated to him by way of letter dated March 15, 2021. It is her evidence that she was unable to state what the Aggrieved Worker's employment status was between the period when his work permit expired and the date of his separation with the Company as she was not employed to the Company at that time. She later testified that his status was considered 'pending renewal of work permit'.
8. She gave evidence that the records showed that there was a disciplinary hearing during the period of December 2020 and March 2021 where the Aggrieved Worker was charged with fraud and dishonesty. She went on to state that the Aggrieved Worker was freed of all charges and required to return to work but she didn't recall whether he did. She noted that during the said period, the Aggrieved Worker continued receiving his salary.

It is her evidence that there was an unsigned mutual agreement of separation document dated February 3, 2021 in the Aggrieved Worker's file. She testified that the letter stated that there was an acceptance of the Aggrieved Worker's resignation but she didn't recall seeing a resignation letter in his file.

10. She gave evidence that there was an attempt on the Company's part to renew the Aggrieved Worker's work permit where documents were requested from him via email. She stated that she didn't see in his file any letter addressed to the relevant Ministry concerning the renewal of the Aggrieved Worker's work permit. She also indicated that she wasn't aware of any request for an extension of the Aggrieved Worker's work permit which would normally occur when the renewal was pending.
11. It is her evidence that the Company made a decision not to renew the Aggrieved Worker's work permit for economic reasons, specifically, financial constraints during COVID and



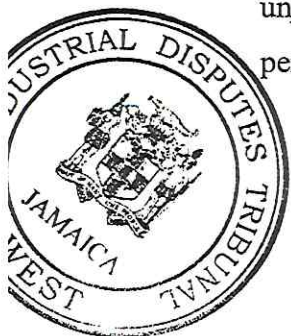
restructuring. She testified that without a work permit, the Aggrieved Worker was not eligible to work in Jamaica.

12. She gave evidence that after the separation, the Aggrieved Worker's responsibilities were carried out by the Head of Operations from the Kingston office so that person took on the responsibilities for both accounts in Jamaica. She then indicated that the Head of Operations (Kingston) was Jamaican and that the person who held the position prior to the Aggrieved Worker was Jamaican.

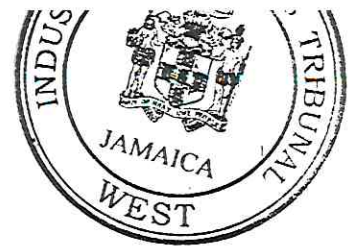
THE COMPANY'S CONTENTIONS

The Company contends that:

- a. A valid work permit is required for the Aggrieved Worker to be legally and gainfully employed in Jamaica;
- b. It is implicit in any contract of employment with a foreign national, such as the Aggrieved Worker, that his/her employment is at all times subject to the issuance of a valid work permit;
- c. Without a valid work permit, it is illegal for a Company to have in its employ a foreign national;
- d. The discontinuance or termination of the Aggrieved Worker's employment due to the absence of a valid work permit cannot be considered unjustifiable termination;
- e. The Company is not under an obligation to apply for a work permit nor to apply for the renewal and/or extension of a work permit; and
- f. The Company asks the Tribunal to find that the Aggrieved Worker was not unjustifiably terminated. Alternatively, if the Tribunal were to be of the view that the dismissal was unjustifiable, that no sum be awarded to the Aggrieved Worker as he was not lawfully permitted to work after the expiration of his work permit.



A handwritten signature in dark ink, appearing to read "A. James", is located in the bottom right corner of the page.



THE AGGRIEVED WORKER'S CASE

13. In presenting its case, Mr. Fletcher called the Aggrieved Worker as his only witness. Mr. Shai testified that he was employed to the Company as Head of Operations (Montego Bay) and that he was responsible for two (2) accounts, namely Hyatt and Hylton. In being responsible for those accounts, he gave evidence that he was tasked to ensure that the Company performed to the clients' expectation and managed their budgets. He stated that he met the Company's target and was given additional accounts to manage. However, it is his evidence that no performance evaluation was conducted for him during his tenure with the Company.
14. He went on to give evidence that his employment was permanent because his contract didn't have an end date. He stated that he is of South African descent and that a work permit was required for him to work in Jamaica. He continued to state that it was the Company's responsibility to apply and pay the associated costs for the said work permit which the Company did. It is his evidence that his work permit was approved for one (1) year- December 23, 2019 to December 22, 2020.
15. He testified that in November 2020 when he returned from vacation and on his first day back at work he was sent an email which advised him of a disciplinary hearing to be held and that he was to remain at home until the date of the said disciplinary hearing. He explained that two (2) charges were laid against him, namely, fraud of any nature including falsification of records and reports as well as dishonesty. He gave evidence that his email was also suspended at the end of the work day. He stated that in anticipation of the disciplinary hearing, he retained a representative to accompany him to the said disciplinary hearing.
16. It is his evidence that the outcome of the disciplinary hearing was that he was found not guilty of the charges and was expected to return to work on January 25, 2021. He testified that he returned to work on the required date and was issued a document of new expectations. He gave evidence that the document required him to report within seven (7) days if he had any knowledge presently, historically or previously of a list of offences and



if he didn't make such a report it could lead to his termination. He stated that he was not in agreement with the document and refused to sign it as he felt that the fine print at the bottom of the document was the Company's way of putting him in a corner.

17. He indicated that he shared the letter with his representative who then wrote to the Company requesting for the document to be withdrawn as the list of offences were already mentioned in the Company's handbook. It is his evidence that due to his refusal to sign the document, he was asked to return home and didn't resume duties up to the date of his separation with the Company. It is also his evidence that he continued to receive his salary during the period December 23, 2020 to March 15, 2021.

18. He testified that on February 3, 2021, he was called to a meeting where he was presented with an offer of separation. He gave evidence that he shared the said offer with his representative who then wrote to the Company on February 4, 2021 requesting a meeting on February 8, 2021 to discuss same. He stated that the meeting was held in which he (the Aggrieved Worker) and his representative formally rejected the offer and presented a counter-offer for consideration. It is his evidence that on February 13, 2021, he made contact with the Company for an update on the counter-offer in which he was told that it was still being reviewed.

19. He explained that he didn't resign from his job and that an agreement was not reached between himself and the Company. He further explained that because of the aforementioned, he expected to return to work but instead, on March 15, 2021, he received a termination letter. He indicated that the said termination letter stated that the Company made the decision not to renew his work permit on the basis of economic challenges and implications of COVID. He noted that in his capacity, he was not aware of any economic challenges of the Company. He testified that prior to March 15, 2021, there was no discussion with him regarding non-renewal of his work permit.

20. It is his evidence that he was advised on March 19, 2021 to collect his passport at the same location in which he submitted it in anticipation of renewal of his work permit. He testified that he collected his passport on March 20, 2021 after returning the Company's car, cell

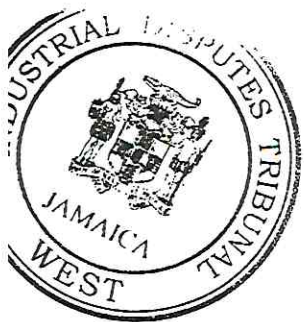
phone and laptop. He gave evidence that he was not given an opportunity to appeal his termination.

21. He stated that it was his belief that the process for the renewal of his work permit had commenced. He gave evidence that on December 18, 2020, documents were requested of him, namely, his passport and police record which he submitted to the office which dealt with the work permit applications on behalf of the Company. He explained that he was of the view that he still had a work permit between the period December 2020 to March 2021 and that another work permit was issued in respect of his employment with the Company.
22. He stated that in the absence of a valid work permit, the Company could have continued his employment. He went on to explain that there wasn't a clause in his contract to the effect that the expiration of his work permit meant the termination of his employment. He further stated that he wasn't aware that it was unlawful for an employer to engage a foreign national as an employee without a work permit. He then aired his disagreement with the suggestion that an employer had no obligation to apply for a work permit if it doesn't wish to do so.
23. It is his evidence that he is currently employed since October 2022 in which he is earning less without benefits. He testified that his current employer had to secure a work permit in order to employ him and that if his current work permit were to be withdrawn, revoked or expired then he couldn't continue his employment with them.

THE AGGRIEVED WORKER'S CONTENTIONS

The Aggrieved Worker contends that:

- a. He was employed for an indefinite period and there wasn't a clause in his employment contract that stipulated that without a valid work permit, his employment would be terminated;
- b. The Company had an obligation to renew his work permit and to continue his employment while the renewal process was ongoing;



- c. The renewal of his work permit was a tool of work and the Company's withdrawal of it amounted to summary dismissal. It was without due process, a departure from natural justice and a breach of the provisions of the Labour Relations Code;
- d. He was not given an opportunity to appeal his termination; and
- e. The Aggrieved Worker asks that the Tribunal makes an award in his favour as his termination was not only malicious but unfair and unjustified. He wishes to be awarded compensation owed since his termination with interest.

THE TRIBUNAL'S RESPONSE AND FINDINGS

24. The Tribunal, in its deliberation, gave careful consideration to the evidence submitted by both parties to determine whether the termination of Mr. Shai's employment was justifiable or not.

25. The Tribunal accepts that the Aggrieved Worker, being of South African descent, is considered a foreign national under the Foreign Nationals and Commonwealth Citizens (Employment) Act which requires him to obtain a work permit in order to work in Jamaica. Section 3(1) of the said Act states:



"Subject to the provisions of this Act, a foreign national or a Commonwealth citizen other than a CARICOM national falling within the category specified in the Schedule shall not:

- a) engage in any occupation in Jamaica for reward or profit; or*
- b) be employed in Jamaica,*

unless there is in force in relation to him a valid work permit and he so engages or is so employed in accordance with the terms and conditions which may be specified in the permit."

It is undisputed evidence of both parties that a work permit was secured by the Company for the Aggrieved Worker which was valid for a one (1) year period, namely, December 23, 2019 to December 22, 2020.

26. It is the Aggrieved Worker's argument that his employment contract was for an indefinite period and because of that his employment could continue without a valid work permit. The Tribunal does not agree with said argument as what was presented to the Tribunal in support of his argument was not an employment contract but rather an offer letter (*exhibit 3*) which clearly stated that *"This offer letter is merely a statement of benefits and does not create a contract for employment on any definitive time. Your employment is considered at will."* Further, the Tribunal finds that it is implicit in all employment contracts and offers concerning foreign nationals that such an employment is dependent on the terms and conditions of a valid work permit as it is the foundation on which such an employment stands.
27. The Tribunal accepts the evidence from both parties that the Company initiated disciplinary proceedings against the Aggrieved Worker in November 2020 where the Aggrieved Worker was placed on administrative leave. The Tribunal also accepts the Aggrieved Worker's evidence that during the proceedings, on December 18, 2020, he (the Aggrieved Worker) was asked by the Company to submit documents for the renewal of his work permit. It was argued by the Aggrieved Worker that he had a legitimate expectation that his work permit would be renewed based on the Company's collections of documents in an effort to commence the renewal process. The Tribunal finds that the collection of documents is not sufficient to prove legitimate expectation as the renewal of the work permit is not within the power nor the discretion of the Company but that of the Ministry of Labour and Social Security (*hereinafter referred to as "the Ministry"*) where the renewal isn't guaranteed.
28. The Tribunal accepts that the outcome of the above-mentioned disciplinary proceedings was that the Aggrieved Worker was found not guilty of the charges against him and was required to return to work on January 25, 2021. The Tribunal finds it noteworthy to state that the resumption of work was after the expiration of the Aggrieved Worker's work permit. It is also noted that the Aggrieved Worker returned to work on the required date but was asked to return home where he continued to receive a salary due to his refusal to sign a document.



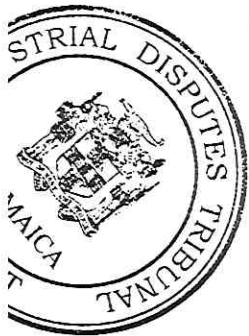
29. It is also accepted that via letter dated March 15, 2021, the Aggrieved Worker was informed that his employment came to an end as the Company made the decision not to renew his work permit. The Tribunal finds that the Aggrieved Worker's employment was not terminated for disciplinary reasons and as such paragraph 22 of the Labour Relations Code doesn't apply. With that said, the Tribunal disagrees with the Aggrieved Worker's argument that the Company breached the Labour Relations Code by not giving him an opportunity to appeal the Company's decision.

30. The Tribunal disagrees with the Aggrieved Worker's argument that the Company had an obligation to renew his work permit. The Tribunal finds that it is unaware of such an obligation on the part of the Company and no evidence was provided to show such. The Aggrieved Worker went on to argue that the Company should have continued his employment during the renewal process. The Tribunal, in response, refers to s.3(2) of the Foreign Nationals and Commonwealth Citizens (Employment) Act which states:

"Subject to the provisions of this Act, no person shall have in his employment in Jamaica a foreign national or a Commonwealth citizen without there being in force a valid work permit in relation to that employment."

31. It was also the Aggrieved Worker's argument that an extension of stay was approved. The Tribunal finds that no evidence was furnished to substantiate this argument. Further, the Tribunal states that if an extension of stay was granted, it does not allow a foreign national to work or be considered a legitimate worker but merely allows a foreign national to remain in the country for a specific period of time without employment after the original permitted period of stay had expired. In this case, the original permitted period would end with the expiration of the Aggrieved Worker's work permit.

32. The Tribunal is not in agreement with the Aggrieved Worker's argument that the Company's withdrawal of his work permit renewal application amounted to summary dismissal. The Tribunal isn't in agreement as no evidence was provided that a renewal work permit application concerning the Aggrieved Worker was made and submitted to the Ministry for the Tribunal to consider the effects of a withdrawal.



33. It is noted that the Company continued to engage the Aggrieved Worker up to his receipt of a termination letter dated March 15, 2021. The Tribunal finds that despite the Company's actions, the Aggrieved Worker was no longer an employee/worker after the expiration of his work permit and could only continue to be considered as such with the renewal of a valid work permit.

34. The Tribunal must also consider Section 12(7) of the Labour Relations and Industrial Disputes Act, which states:

"Where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal-

- a) shall not, if those wages, or hours of work, or conditions of employment are regulated or controlled by or under any enactment, make any award which is inconsistent with that enactment;*
- b) shall not make any award which is inconsistent with the national interest."*

In the absence of a valid work permit, the Tribunal is of the view that the employer/employee relationship came to an end on December 22, 2020 when the Aggrieved Worker's work permit expired and not when he received letter dated March 15, 2021.

35. Thus, the Tribunal concludes that Mr. Shai's employment came to an end with the expiration of his work permit and as such his termination cannot be considered unjustifiable.



AWARD

The Tribunal awards that Mr. Hendry Shai's employment came to an end with the expiration of his work permit.

DATED THIS 15th DAY OF AUGUST 2024



Sadeera Shaw
Chairman

Rodcliffe Robertson
Member

Keith Fagan
Member

Witness

Jody-Ann Lindo (Ms.)
Secretary to the Division