

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 9 OF 2008

BETWEEN

HYACINTH PESTAINA
Employee

and

DICKENSON BAY MANAGEMENT LTD
(DBA SANDALS ANTIGUA)
Employer

Before:

The Hon. Philip A. Pilgrim
The Hon. Genevieve L. I. Benjamin
The Hon. Samuel R. Aymer
President
Member
Member

Appearances:
Dr. David Dorsett of Watt & Associates -Attorneys-at-Law for the
Employee
Mr. Roger Forde Q.C. and Ms. Arianne S. Hill of Hill & Hill -
Attorneys-at-Law for the Employer

2009: November 23
December 18
2010: March 25

JUDGMENT

PILGRIM, P:

INTRODUCTION

[1] Dickenson Bay Hotel Management Limited trades under the name DBA Sandals Antigua. It may be conveniently referred to in this judgment as "*Sandals*." It is the Employer in this Reference. It is a

company which was established pursuant to the Companies Act Cap. 94 of the Laws of Antigua and Barbuda.

[2] Sandals is engaged in the business of hotel management. It provides employment for persons in Antigua and Barbuda and other Caribbean islands.

[3] Hyacinth Pestaina resides at Cedar Valley Springs, St Johns in Antigua and Barbuda. She is sometimes referred to as *"the Employee" or "Mrs. Pestaina"* in this Reference.

[4] Mrs Pestaina and Sandals entered into an agreement or contract in writing (afterwards referred to as *"the first contract"*) dated December 16, 1999. In the first contract Mrs Pestaina agreed to be employed as Sandals Shop Manager. Either party was at liberty to terminate the first contract by giving to each other thirty (30) days notice in writing. (The first contract was admitted into evidence as *"HP1-1."*)

[5] Mrs. Pestaina trading as VISAGE, entered into a contract with Pinebrook Management Co. Ltd. Pinebrook is owned by Sandals. This agreement shall be referred to as *"the second contract."*

[6] The second contract between the two parties is dated January 16, 2007. It is entitled *"Gift Shop Contract"* and was *"valid for a period of three months commencing the 1st day of December 2006 and expiring the 28th day of February 2007."*

[7] The terms of the second contract were similar to those which were

contained in the first contract. Such terms included (a) payment of a commission of 25% of sales after a deduction for certain expenses; (b) her status was that of *"independent contractor."* and (c) Clause 3(h) of the second contract provided that Mrs Pestaina trading as VISAGE **"employ at its sole expense, such personnel as are required to conduct the business of the Gift Shop."**

[8] When Mrs. Pestaina entered into the second contract with Pinebrook, it was engaged in the operation of a hotel. It is named Grand Pineapple Beach Resort. It is located at Long Bay in the parish of St. Philip in Antigua and Barbuda. In the Witness Statement of Franklyn Eaton for the Employer, he described Pinebrook as *"a competitor of the Employer."*

[9] In her answer to Dr. Dorsett, Mrs. Pestaina stated that there is no relationship between the customers at Sandals Dickenson Bay and Pineapple. Pineapple is located at the other end of the island 16 miles away. She could not decide to appoint someone else to perform her duties at Sandals.

[10] In her answer to Mr. Forde Q.C. for the Employer, Mrs. Pestaina stated as follows:

"I was told that it was Sandals' policy to take back the Gift Shop. I was then invited by the Employer to apply for the

position of Shop Manager. I gave the application to Mr. Eaton, the then General Manager. All of this took place prior

to my termination. I did not get the job as Gift Shop Manager."

[11] The first contract was terminated by Sandals in a letter to Mrs. Pestaina dated June 05, 2007. Upon termination of this contract, Sandals paid Mrs. Pestaina \$27,369.99 which according to Sandals was one (1) month's pay in lieu of notice. The notice of termination was admitted as "HP-2."

[12] In her Witness Statement, Mrs. Pestaina stated that her "*last earnings with Sandals was \$17,610.00 per month.*" No evidence was led with regard to whether or not this represented an average monthly commission payment for the period of her employment.

[13] Since the termination of the first contract Mrs. Pestaina at paragraph [22] of her Witness Statement stated that she was "*self employed doing work in interior designing and decorating, corporate grooming, uniform design and construction.*" According to Mrs. Pestaina "*her earnings average \$4,500.00 per month.*" No other evidence was led with regard to mitigation.

[14] Dr. Dorsett Counsel for Mrs Pestaina filed a Reference dated October 09, 2008. Her Employee's Memorandum and Witness Statement were filed on July 02, 2009.

[15] The Employer's Memorandum and Witness Statement were both filed on September 30, 2009.

THE ISSUES

[16] The issues for determination are as follows:

- (i) Whether or not Hyacinth Pestaina was employed by Sandals from December 16, 1999 to June 05, 2007 as an employee under a contract of service or a contract for services in accordance with the first contract.
- (ii) If Mrs. Pestaina was employed as an employee under a contract of service was she unfairly dismissed having regard to a letter from Sandals to her dated June 05, 2007.
- (iii) If there is a finding of unfair dismissal, what is the measure of damages to which she may be entitled.

Some preliminary legal matters

[17] The Labour Code defines the term “employee” in Section A5 in the following manner:

“employee” means any person who enters into or works under or stands ready to enter into or work under, a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied; and the term includes a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporary layoff, strike or lockout, as well as an apprentice whose services or labour may be designed primarily to train such apprentice; but the term does not include established employees of the Government;”

[18] Dr. Dorsett Attorney-at-Law for the Employee filed Written

Submissions on December 04, 2009. Dr. Dorsett raised certain matters at paragraphs [6] to [38] of his submissions.

[19] Dr. Dorsett provided this Court with “A brief survey from the legal landscape of the Commonwealth Caribbean” which according to him “indicates that the statutory definition of “employee” (sometimes termed “worker” or “workman”) is far from uniform.”

[20] Counsel provided this Court with references to the Holidays with Pay Act Cap.348 of the Laws of Barbados, the Labour Act Cap.297 of the Laws of Belize, the Labour Ordinance 1966 of St Kitts Nevis and Anguilla (as it then was), and the Industrial Relations Act Cap. 88:01 of the Laws of Trinidad and Tobago.

[21] It may be of some interest to academic writers to compare the definition of “employee” which is contained in the laws of different jurisdictions. Such an analysis however does not assist me to determine the real meaning of the term “employee” referred to at Section A 5 of the Antigua and Barbuda Labour Code. (afterwards referred to as “the Labour Code”).

[22] Lord Denning MR in Ministry of Housing v Sharp [1970] 1 ALL ER 1009 (CA) at page 1015 Letter’d’ stated as follows:
“I find no help from this analysis of other Acts of Parliament.
I go simply by this 1954 Act.”

[23] Dr. Dorsett submits at paragraph [15] of his Written Submissions

and elsewhere that “The employee” under the Labour Code is one working under a contract “personally to perform any services or labour....”

[24] Dr. Dorsett submits at paragraph [17] as follows:

“However, the draftsman of the Labour Code chose to define the contract entered into by an employee not in terms of a “contract of service” but in terms of a contract “personally to perform any services or labour,” a type of contract that from a reading of other labour legislation is akin to “a contract personally to execute any work or labour” and which may be distinguished from a “contract of service” or a contract of apprenticeship. The decision not to describe an employee in terms of “contract of service” was perhaps deliberate and not accidental as the Labour Code has been described in *Universal Caribbean Establishment v Harrison* [1997] ECLR 350 at 352B by Bryon CJ (Ag.) as “an innovative and important enactment, which made substantial changes to the industrial law.”

[25] (i) At paragraph [21] of Dr Dorsett’s Written Submissions

Counsel states as follows.

“It is respectfully submitted that the definition of “employment” under (Section A5) of the Antigua and Barbuda Labour Code is *pari mater* with the definition of

“employment” under (Section) 82(1) of the United Kingdom’s Sex Discrimination Act.”

(ii) In support of Dr Dorsett’s submission he cites *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, *Kelly v Northern Ireland Housing Executive* [1999] 1 AC 428 and *Mirror Group Newspapers Ltd v Gunning* [1986] 1 WLR 546.

[26] At paragraph [1] of Dr. Dorsett’s Written Submissions Counsel states *inter alia* as follows:

“The instant case is one where Mrs Hyacinth Pestaina, has brought a claim of unfair dismissal against Sandals Antigua.”
(The emphasis is the Court’s)

[27] Counsel who appear before this Court and cite English case law which is based on **English discrimination legislation** in support of arguments which are adumbrated by Dr. Dorsett at **paragraphs [23] to [25]** of this judgment should actually read those cases. This will allow them to determine whether or not those cases are in harmony with or collide with the Labour Code.

[28] Another reason why this Court urges Counsel to study the English legislation and the cases cited is for Counsel to feel sure whether or not those authorities really assist or harm their clients’ claims of unfair dismissal.

[29] Two quotations from the headnote in Percy's case cited by Dr. Dorsett

read as follows:

(a) "In 1994 the applicant, a single woman and an ordained Minister of the Church of Scotland, was appointed by the Church Board of National Mission to the position of associate minister in a Church of Scotland parish for a period of five years on terms which included the provision of a stipend and a manse. In June 1997 an allegation of misconduct was made against her in that she was said to have had an improper relationship with a married elder in the parish."

(b) "The applicant commenced proceedings in an employment tribunal alleging, *inter alia*, sex discrimination in that the Church had not taken similar action against male ministers known to have had extra-marital sexual relationships."

[30] The House of Lords held that the applicant's terms and conditions of employment allowed her to proceed with her matter before an employment tribunal to determine whether or not she was discriminated against by the Church of Scotland.

[31] (a) Dr. Dorsett quotes extensively from Percy's case. He quoted Lord Hope of Craig-head at paragraph [113] of the judgment. I would urge him to read what Lord Hope stated at paragraph [88] of the judgment under the heading entitled "*The issues*." This is what Lord Hope stated.

“For these reasons I would hold that the employment tribunal has jurisdiction to determine the appellant’s claim that she had been unlawfully discriminated against.”

[33] At paragraph [136] of the judgment under the heading “Conclusion” Lord Hope stated *inter alia* as follows:

“Then there is the question whether the position which the appellant was to enjoy under it was “employment” within the meaning of section 82 (i) of the 1975 Act. This is, of course, a different question than that which has to be answered in unfair dismissal cases. We are not looking to see whether there was a contract of services here, but whether this was a contract under which the appellant undertook personally to execute any work or labour.” (The emphasis is the Court’s)

[32] Again Lord Hope stated at paragraph [113] *inter alia* as follows:

“This case, however, is not a case about unfair dismissal. It is a case about discrimination on the ground of sex. It is a fundamental rule of sex discrimination law that it is not possible to contract out of it.” (The emphasis is the Court’s)

(b) Lord Hope also stated at paragraph [106] *inter alia* as follows:

“Miss O’Brien Q.C for the applicant[accepted that the Employment Rights Act 1996.” (The emphasis is the Court’s)

in her case within the meaning of Section 230 (2) of the
because there was no contract of service or apprenticeship
appellant could not claim compensation for unfair dismissal

[34] I derive no assistance whatsoever from the facts or the reasoning in the **Percy case** which would assist me to deal with the facts which are presently before this Court.

[35] (a) The cases cited by Dr Dorsett in support of his argument that the definition of “employee” contained at Section A 5 of the Labour Code should be read *pari materi* with Section 82 (1) of the Sex Discrimination Act (UK) 1975 in the words of Lord Hope “*[are] not [cases] about unfair dismissal.*”
-See Lord Hope at paragraph [106] *op cit*.

(b) The conclusion which emanates from Lord Hope’s comments is that a claim of unfair dismissal can only arise in circumstances where a “*contract of service or apprenticeship*” exists in accordance with Section 230 (2) of the Employment Rights Act (UK) 1996.
– See paragraph [88] of the judgment.

[36] The relevant section of the Labour Code which may approximate with the English discrimination legislation is Section C4.

[37] This case has absolutely nothing to do with sexual discrimination against **Sandals**. It is simply a case which has been brought to determine whether or not the lady was an employee or an independent contractor.

History of the Discrimination Legislation (U.K)

[38] A brief history of the Sex Discrimination Act 1975 (UK) was rendered by Lord Hope of Craighead in *Rhys-Harper v Relaxion Group plc* [2003] ICR 867 (HL) at pages 889 to 893. At page 890 paragraph [79] Lord Hope stated as follows:

“The Sex Discrimination Act 1975 was designed to give effect to the principles contained in the White Paper: Equality for Women (Cmnd 5724) of September 1974.

The White Paper stated that the Government’s ultimate aim was to harmonise the powers and provisions for sex and race discrimination so as to secure genuine equality of opportunity in both fields. It made unlawful discrimination across a wide range of activities in the employment and social fields on the ground of sex and marital status. It drew on workings of the Race Relations Act 1968 and the Equal Pay Act 1970. In the field of employment it prohibited discrimination in the offering of and other acts preparatory to entering into a contract of employment.”

Statistical background

[39] A general indication of the level of discrimination complaints which fell to be determined in England for the period 2003-2004 was referred to in *Igen Ltd v Wong* [2005] ICR 93 (CA). At page 935 Peter Gibson L J stated at paragraph [4] as follows:

“From the statistics provided to us by Mr. Allen it is apparent

that a significant proportion of the originating applications presented to an employment tribunal each year raise discrimination complaints. In just under 20, 000 cases (17% of all cases), commencing in 2003-2004 the main complaint was discrimination and ...it is likely that the majority would have been cases of alleged direct discrimination."

The burden of proof in discrimination cases

[40] (a) The burden of proof in discrimination cases (inclusive of sex) has been admirably set out in **Barton Investec Securities Ltd [2003] ICR 1005** by the Employment Appeal Tribunal Judge Ansell at paragraph [25]. It is commonly referred to as "*the Barton Guidance*."

(b) This has been applied in many cases of sex, race and disability discrimination. In practice "*the guidance appears to be offering practical help in a way which most employment tribunals and appeal tribunals find acceptable.*"

-See **Ignen Ltd v Wong [2005] ICR 93** at page 956 per Peter Gibson L J

[41] Minor corrections were made to the Barton guidance by Peter Gibson L J in the Wong case (op cit). The guidance is now referred to as "The revised Barton guidance" at paragraphs [956] and [957] of the Wong case. Parts 1 to 4 of the revised guidance state as follows:

"(i) Pursuant to section 63A of the 1975 Act, it is for the

claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could

conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts."

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in."

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal."

[42] It is very clear that for Dr. Dorsett to assert that the definition of "employee" which appears at Section A5 of the Labour Code should be read *pari materi* with the definition of "employment" at Section 82 (1) of the Sex Discrimination Act 1975 (UK) a claim of sex discrimination on the ground of sex or race must arise.

[43] No evidence was led in this case of the number of complaints which

are filed by applicants in the Industrial Court which allege discrimination by employers against employees. Such cases must however be extremely rare.

[44] For such a discrimination case to arise “it is for the claimant who complains of sex discrimination to prove on the balance of probabilities that the employer committed an act of discrimination in accordance with paragraph [1] of the revised Barton guidance.”

[45] No evidence whatsoever was led in this case of any act of discrimination by the Employer against the Employee.

Nature of awards

[46] The law in Antigua and Barbuda presently provides that an employee who has been held to be unfairly dismissed may be entitled to awards in accordance with certain established headings. These include (a) loss of protection; (b) immediate loss; (c) manner of dismissal and (d) future loss.

[47] No cases were cited by Dr. Dorsett to show what remedy or awards an employee who has been held to be discriminated against may be entitled to pursuant to **Section 63 (a) of the Sex Discrimination Act, 1975 (UK).**

[48] However in accordance with Sections 65 and 66 of the Sex Discrimination Act, 1975 (UK) an applicant may be awarded

“compensation for injury to feelings whether or not they include compensation under any other head.” The Labour Code provides no such remedy. An employee who claims to be unfairly dismissed is not entitled to this remedy.

[49] In the Kelly case the House of Lords ruled that the Industrial Tribunal had jurisdiction to hear the sex discrimination complaints of both applicants. A similar conclusion was reached by the House of Lords with regard to discrimination on the grounds of religion and political opinion in the Percy case.

[50] It is therefore impossible for Dr. Dorsett to cite Section 82(1) of the Sex Discrimination Act (UK) 1975 and simultaneously put forward a claim for unfair dismissal. The two claims just do not co-exist.

[51] (a) If this Court was therefore mindful to accept Dr. Dorsett's submissions at paragraphs [23] to [25] of this judgment, then Hyacinth Pestaina's Reference brought before this Court for “*unfair dismissal*” would automatically fail.

[52] In *Dixon v BBC* [1979] 2 ALL ER 112,(CA) the Court was required to interpret the expression ‘**fixed term**’ where it appeared in paragraph [5] of Schedule 1 to the Trade Union and Labour Relations Act 1974 (UK). Shaw L J expressed the view at page 116 that “*it is requisite to look at the heading to Part II of the Schedule. It refers to “Unfair Dismissal” and it is followed by the rubric ‘Right of employee not to be unfairly dismissed.’ Beginning with that*

emphasis, it seems to me that the language which follows must be understood in the light of the protection of the employee against unfair dismissal."

[53] (a) I therefore reject Dr. Dorsett's submissions referred to at paragraphs [23] to [25] of this judgment. They cannot be right. They "would not be consonant with the objectives of the (Labour Code)".

- See Shaw LJ in the Dixon case op cit at page 116.
Whether or not she was unfairly dismissed remains the subject of this judgment.

(b) To hold otherwise in the words of Simon Deakin and Gillian Morris in the book "Labour Law"^{4th} edition 2005 at paragraph [3.45] would cause "widespread and damaging repercussions throughout the whole industry" of the practice of Labour Law and in particular unfair dismissal matters in Antigua and Barbuda. (The emphasis is the Court's)

Principles of Interpretation

[54] Dr. Dorsett advanced certain submissions with regard to the meaning of the term "employee" which appears at Section A5 of the Labour Code. At paragraph [6] of his Written Submissions he asserts that "Parliament does not act in vain and Parliament has dictated how "employee" and "employer", as a matter of law in the field of industrial relations in the private sector, is to be construed and interpreted."

[55] Dr. Dorsett submits further “that the statutory definition of

“employee” is clear and to the extent that there is any conflict between it and other definitions.....they must yield to the statutory definition, the court being bound by the statutory definition promulgated by Parliament which cannot be ignored or rewritten in favour of another definition.”

[56] In support of these submissions Dr. Dorsett cites *R (Heffernan) v Rent Service* [2008] UKHL 58. He points the Court in particular to paragraph [74] of the judgment. Lord Neuberger stated *inter alia* as follows:

“It is obviously dangerous to reformulate, or to put a gloss on, a legislative definition, however vague and unsatisfactory it is.”

[57] The Court in the *Rent Service* case was required to interpret the definition of the term ‘locality’ as it appeared at paragraph 4 [6] of the *Rent Officers (Housing Benefit Functions)* Order 1997 as amended by the *Rent Officers (Housing Benefit Functions)* (Amendment) Order 2001. This Order required rent officers on request to determine and where appropriate to redetermine, the maximum amount of housing benefit that a particular tenant should receive.

[58] At paragraph [55] of the *Rent Service* case Lord Neuberger opined that “the language of paragraph 4 (6) appears to be open to three possible interpretations.”

[59] At paragraph [56] Lord Neuberger stated as follows:

“All three interpretations could be justified in the light of the rather loose language of paragraph 4 (6), but I have reached the conclusion that the first is to be preferred. It is the interpretation which best fits the purpose of the Schedule, leads to the least unpredictability and is the most easy to operate.”

(The emphasis is the Court's)

[60] (a) Lord Neuberger at paragraph [59] stated as follows:

“The notion that the identification involves less subjectivity than the rent officers in these two redeterminations seem to have assumed is consistent with the need for consistency and certainty.”

(b) At paragraph [77] Lord Neuberger refers to *“Having*

analysed the meaning and operation of the Schedule...”

[61] Dr. Dorsett refers to a part of paragraph [74] of the judgment in the

Rent Service case. That segment of paragraph [74] reads as

follows:

“It is obviously dangerous to reformulate, or to put a gloss on, a legislative definition, however vague and unsatisfactory it is.”

[62] The citation of a part of a paragraph of a judgment may be

inappropriate and wrong. Such action may mislead the Court if the

entire paragraph is not read. The entire paragraph [74] of the judgment reads as follows:

“The final issue concerns the meaning of the word “locality.” It is obviously dangerous to reformulate, or to put a gloss on, a legislative definition, however vague and unsatisfactory it is. However, when interpreting “locality” in paragraph [4], it is legitimate to bear in mind its ordinary English meaning, especially given that there is nothing in paragraph 4 (6) which conflicts with that meaning.”

[63] (a) At first blush a reading of that part of paragraph [74] of the judgment cited by Dr. Dorsett would have lead this Court to conclude that it was a principal of general application. It is not. It referred to the word *“locality”* in the Rent Service case.

(b) Moreover, Lord Neuberger was of the view that the *“ordinary English meaning”*, of the word ‘locality’ was a fit and proper tool to use in **that case**. No such analysis however is applicable or relevant to an analysis of the definition of the term *“employee”* in this case.

[64] Under the heading entitled *“The correct interpretation of paragraph 4 [6]”* in the Rent Service case Lord Neuberger stated at paragraph [52] *inter alia* as follows:

“A number of questions concerning the interpretation of paragraph 4 [6], and in particular sub-paragraph (b), require to be resolved. The interpretation of the Schedule presents

difficulties, which is not surprising as the draftsman was faced with the task of laying down a formula which not only had to give effect to two competing and very different concerns, but which also could be applied to every dwelling in Great Britain."

[65] (a) At paragraph [53] of the judgment Lord Neuberger stated *inter alia* as follows:

"The definition of "locality" in paragraph 4 [6] must have presented real problems, and, as Pill L J said, [2008] H L R 34, paragraph [34], sub-paragraph[b] in particular is "unclear and difficult to construe."

It is therefore particularly important to approach its interpretation bearing in mind not only its overall purpose, but also its immediate context.

As to its purpose, it is an integral ingredient of the final of the four stages of a regime whose purpose was summarised by Sir John Bingham M R in R v Housing Benefit Review Board for East Devon District Council, Ex p Gibson 25 HLR 487, 493."^(The emphasis is the Court's)

(b) *"As to its context, paragraph [4] (2) makes it clear that the rent officer has to consider levels of rent over a wide range of types of dwelling and letting."*^(The emphasis is the Court's)

[66] I derive some helpful conclusions from an entire reading of the Rent Service case. Firstly, the definition of the word 'locality' was

The Purpose of the Labour Code

[69] I can do no better than to describe the Labour Code by adopting the language of Byron, C.J. (ag) (as he then was) in **Civil Appeal No. 21 of 1993 Universal Caribbean Establishment and James Harrison**

- [68] (a) The **Rent Service case** is not an authority for the submission that “*a clear statutory definition*” of the meaning of the term “*employee*” is derived from a reading of Section A5 of the Labour Code.
- (b) Contrary to Dr. Dorsett’s submission, the Court after examining sections of the legislation, gave an interpretation of the term ‘locality’ which “*best fits the purpose of the Schedule.*”
- [67] At paragraph [6] of his Written Submissions, Dr. Dorsett asserts that “*in the presence of a clear statutory definition there is no need to resort to or rely on common law definitions that do not define that which is expressly declared by statute.*”
- In support of this submission, he cites the **Rent Service case** (op cit).

“*unclear and difficult to construe*”. Secondly, the Court was required to consider “*its overall purpose and its immediate context.*”

Thirdly, the Court was required to examine Part 1 of Schedule 1 to the 1997 Order “*the Schedule*”. Fourthly, the language of paragraph [4] (6) which included the term ‘locality’ was given an interpretation which “*best fits the purpose of the Schedule, leads to the least unpredictability, and is the most easy to operate.*”

1997. At page 3 of the judgment, Byron, C.J. (ag) stated *inter alia* as follows:

“The Labour Code was an innovative and important enactment, which made substantial changes to the industrial law of Antigua. It declared a national policy underlining the legislation and which included the proposition that as an individual works he gradually earns equity in his job above and beyond his wages, an equity that requires protection. In particular it created a new right to be unfairly dismissed. This right had not been known to the common law. The code created new and comprehensive machinery for dispute resolution. This involved a network including the Minister of Labour, the Labour Commissioner, decisional officers, an Arbitration tribunal, a National Labour Board, Hearing Officers, the Board of Review.”

[70] *“It is only where the words of the Statute are not clear and unambiguous that it is necessary to enlist aids for interpretation.”*

- See Byron C.J. (Ag) in the Universal Caribbean case (op cit) at page 2.

An examination of the term “*employee*” at Section A5 of the Labour Code.

[71] The term “*contract with an employer*” which appears in the definition of the term “*employee*” at Section A5 of the Labour Code is not defined specifically in that Section.

[72] The term “*employee*” at Section A5 of the Labour Code does not describe the nature of the “*contract with an employer*” which explains the working relationship between the two parties.

[73] “*This, however, does not mean that the statute cannot be construed on the basis of its internal language because where the main object and intention of the statute is clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of the draftsman, unless such language is intractable.*”

-See Byron C.J. (ag) in the Universal Caribbean case (op cit) at page 3.

[74] At paragraph [1442] of Halsbury’s Laws of England, Fourth Edition Reissue Volume 44 (1) the learned authors opine that “*the literal meaning of an enactment may be disregarded if it produces an unjust result.*”

[75] In *De Vesce v O’Connell* [1908] A.C. 298 at page 308 Lord Ashbourne stated *inter alia* as follows:

“.....before adopting a literal construction which would do obvious injustice it was essential to consider what is the object of the provision, and to see what its purpose is. Lord Cairns in his judgment said that to take the section literally “would be to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons.”

[76] In *Ministry of Housing v Sharp* (op cit) Lord Denning MR stated *inter alia* at page 1015 letter dated as follows:

"If s 28 (5) is construed literally it would justify the judge's view. But we do not now in this court stick to the letter of a statute. We go by its true intent. We fill in the gaps."

A linguistic canon

[77] (a) It is a linguistic canon of construction of a legislative enactment (inclusive of the Labour Code) that the enactment should be read as a whole. It is explained in Halsbury's op cit at paragraph [1484]. The learned authors state as follows:

"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole.... The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act. Construction as a whole requires that, unless the contrary appears, every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings."

(b) In the *Universal Caribbean case* (op cit) Byron C.J. (ag) put the matter this way at page 2:

- “The dominant purpose in construing a Statute is to ascertain the intention of the legislature as expressed in the Statute, considering it as a whole and in its context.”
- (c) Lord Herschell explained the canon in *Colquhoun v Brooks* (1889) 14 App Cas 493 at 506 in the following manner:
- “It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.”
- (d) See too *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, per Lord Blackburn at pages 764 and 765.
- (a) [78] At page 433 of the Kelly case the term “employment” which appeared at Section 57 (1) of the Fair Employment (Northern Ireland) Act, 1976 is defined as follows:
- “employment” means employment under a contract of service or apprenticeship or a contract personally to execute any work or labour,...

(b) Lord Clyde at page 447 of the Kelly case stated *inter alia* as follows:

“The word (employment) is defined in Section 57. Clearly from that section employment involves a contract. The contract may be of service or it may be a contract of apprenticeship or it may be a contract “personally to execute any work or labour…….”

(c) At page 447 of the Kelly judgment, Lord Clyde stated as follows:

“The language used to describe the third case is language which has been used elsewhere in legislation and should presumably be taken to carry with it the interpretation which it receives in the other contexts in which it appears.”

[79] Section 82 (1) of the Sex Discrimination Act (UK) defines the term ‘employment’ in the following manner:

‘employment’ means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;..”

[80] In *Quinnen v Hovels* [1984] ICR 525, E.A.T. Waite J. in delivering the judgment of the Court at page 528 stated *inter alia* as follows:

“The contract of service is one of the three constituents in

the statutory definition of employment for the purposes of the two Acts."

[81] At page 529 of the judgment in *Quinnen Waite J.* stated as follows:
"There is no reference anywhere in their decision to the other two alternative elements in the Act's definition of "employment" – that is to say "a contract of apprenticeship" and a "contract personally to execute any work or labour."

[82] There are three types of contracts of employment which are referred to in the English discrimination legislation. It is therefore wrong for Dr Dorsett to make mention of one type of contract and then seek to apply that section of the English legislation to the Labour Code.

[83] Moreover the definition of "employee" in Section A5 of the Labour Code refers to one contract. It is "a contract with an employer", personally to perform any services or labour." This type of contract is not the same as "a contract personally to execute any work or labour" which appears in the English discrimination legislation.

[84] In my view, the definition of the term "a contract with an employer" which appears in the definition of "employee" at Section A5 of the Labour Code must refer to a "contract of employment or "a contract of service." It is the nature of the contract that needs definition rather than the term "personally to perform any services or labour."

[85] The existence of a contract of employment or a contract of service or

apprenticeship is a necessary and vital ingredient of a contract with an employer. It is the basis for the initiation of all References which deal with matters of unfair dismissal in this Court.

[86] (a) Several sections of the Labour Code make reference to a *“contract of employment”* or a *“term of employment.”* Some of these references are as follows:

(b) (i) Section C7

“It shall be lawful for an employer and employee to enter into an individual contract of employment, covering terms of employment,...”
(The emphasis is the Court’s)

(ii) C 16 (iii)

“in the event that the illness of an employee or his incapacity is such that he is unable to continue to exercise his duties under his contract of employment, then he may apply to be examined by a medical board...”
(The emphasis is the Court)

(iii) C30

“An employer may deduct from wages payable to a workman under any contract of employment the following:

.....”
(The emphasis is the Court’s)

(iv) ***DIVISION F – WORK PERMITS***

“self employment” means employment on one’s own behalf and not under a contract of employment, express or implied....”

(The emphasis is the Court’s)

(v) ***G 9***

“An act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment.”

(The emphasis is the Court’s)

[87] (a) Dr. Dorsett submits at paragraph [16] of his Written Submissions as follows:

“In the case of Antigua and Barbuda however, the term “contract of service” never appears in the Labour Code or in the definition of “employee.”

(b) Dr. Dorsett also submits that if the draftsman wanted to

incorporate the term *“contract of service”* into labour

legislation in Antigua and Barbuda he could have done so.

That the draftsman failed to do so, Dr. Dorsett submits that

the term *“personally to perform any services or labour”* is

“the subject of the contract with the employer.”

- See paragraphs [17] and [19] of his Written Submissions.

[88] The term “*contract of service*” is synonymous with the term “*contract of employment*.” As the latter term “*contract of employment*” does appear in several occasions in the Labour Code, I do not accept Dr. Dorsett’s submissions at **paragraph [87 b]** of this judgment.

[89] If any authority is required in support of my construction of the term “*contract with an employer*” as it appears at Section A5 of the Labour Code, I make reference to the following four cases:

(a) In *Antigua Village Condo Corporation and Jennifer Watt* Civil Appeal No. 6 of 1992, per Sir Vincent Floissac CJ at page 5. At page 5 the Chief Justice incorporates the words “*contract of employment*” to describe “*An unfairly dismissed employee...*”

(b) In *Universal Caribbean Establishment and James Harrison Civil Appeal No. 21 of 1993* Byron, C.J (ag) at page 19 of the judgment referred to “*the employee’s contract of employment*” which allows the Industrial Court “*to determine matters of unfair dismissal brought by an individual employee....*”

(c) (i) In *LIAT (1974) Limited and Tomlinson Civil Appeal No.20 of 1990* Byron JA at page 7 of the

judgment stated *inter alia* as follows:

“*I think that the legislature intended to be concise in ensuring that the Industrial Court had all the powers, rights, and privileges which would*

guarantee its ability to be effective in discharging the functions for which it was established."

- (iii) At page 8 of the judgment *Byron J A* referred to some examples of the exercise of this power. The learned judge cited and adopted the dicta of Lord Denning in *Hill v C.A. Parsons & Co Ltd* [1976] 3 All E.R. 1345 at page 1350. Lord Denning *M R* stated *inter alia* as follows:

"The Court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end...." in the words of Lord Morris of Borth-y-Gest in *Francis v Municipal Councillors of Kuala Lumpur* [1962] 3 All E.R. 633, at 637, *".....when there has been a purported termination of a contract of service...."*

- (i) (d) The Labour Code came into effect on September 19, 1975. There has been some amendments to it. However, the definition of the term *"employee"*, *"employer"* or *"employment contract"* for which provision is made at A5 of the Labour Code has never been amended.

- (ii) In *Palhorries and Hodges Bay Club, Reference No. 13 of 1995*, a decision of this Court, the Court was required to decide the substantive issue at paragraph [16] (1) of this judgment.

(iii) **Hill P** at **page 1** of the judgment stated the issue in the following manner:

“The main issue for the Court in this matter is whether the Applicant was an employee of the Employer or whether he was on business of his own, put another way, whether he was on a contract for services or a contract of services.”

(iv) At **page 2** of the judgment; **Hill P**, stated as follows:

“It has been held that in determining whether a person was employed under a contract of service or a contract for services no single factor was of itself decisive and the Court must have regard to the totality of the facts found in the particular case.”

THE LAW

[90] In many areas of the law it is of fundamental importance to determine whether a worker is an employee or an independent contractor. In the fields of taxation and tort, this determination is important for a view to be formed of (a) vicarious liability and (b) assessment of income, respectively.

[91] In the area of employment law the Labour Code of Antigua and Barbuda confers upon employees only a number of statutory rights.

[92] These include a guaranteed pay, employment in conformity with the Labour Code, a statement of working conditions, a statement upon termination, certain leave privileges, maternity rights, holiday with pay, the right not to be refused employment because of membership or non-membership of a trade union, a safe system of work, statutory sick pay, and redundancy payment. It is only employees who are entitled to commence claims of unfair dismissal.

[93] Several courts in various jurisdictions have been required to determine the vexing issue of whether a worker was employed under a contract of service or a contract for services..

[94] Under a contract of service, the worker agrees to serve another. Under a contract for services the worker agrees to provide certain services to another.

(a) The learned authors of the text "*Harvey on Industrial Relations and Employment*" (2008) articulate two preliminary factors of importance. The first relates to personal service. At paragraph [18] page A/6 they state as follows:

"Traditionally it has been of the essence of a contract of employment that the employee undertakes to provide personal service to his employer."

(c) At page A/7 paragraph [20] the authors also state as follows:

"The obligation to render personal service is therefore of crucial importance. It is however far from conclusive; for there is nothing to prevent an

independent contractor from undertaking to perform the relevant tasks personally. If the obligation is merely to get the job done, then the individual is an independent contractor and not an employee; if the obligation is to do the job himself, then he could be either."

[95] The second matter relates to the question of 'mutuality of obligations.' A contract of employment incorporates a finding of mutuality of obligations if two essential ingredients are satisfied. Firstly the employer must provide the employee with work. In consideration the employer pays the employee wages. Secondly, the employer promises the employee continued employment and the employee undertakes to be so employed.

- See paragraph [21] of Harvey op cit

[96] The learned authors of Harvey op cit at paragraphs [22] to [27] opine that 'mutuality of obligations' is of particular relevance in the area of casual work..... "However, the modern tendency seems to be to treat mutuality as, conceptually, a pre-requisite for any contract to exist, and therefore necessary for both the 'employee' and 'worker' definitions".

[97] Whether or not the concept of 'mutuality of obligations' does exist in a particular case "it will usually be necessary to go on to the following 'tests for service' (i.e. employment status) which have

"A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, retains the power of controlling the work: see per Crompton J in Sadler v Henlock (1) 4 E & B, 570, 578."

used as follows:

at page 768 *McCardie J* defined how the control test is to be *Right Society v Mitchell and Booker Ltd* [1924] 1 KB 762, did but the manner in which it was performed. In *Performing* in a position not only to control the work which the employee agricultural, manual and domestic workers. The employer was in an era when it was fashionable for employers to employ the nineteenth century. At that time the control test was utilised **test**. This became quite useful especially in the last quarter of

[99] (a) One test which has been applied by the courts is **the control**

(a) **The control test**

test.

[98] Different approaches or tests have been utilised by the courts to determine the difference between the employee and the independent contractor. These tests are (a) **the control test**, (b) **the integration test**, (c) **the economic or business reality test**, (d) **the multi-factor**

- See Harvey op cit at paragraphs [22] to [27].

evolved over many years, though with the obvious caveat that it is unlikely in most cases that any one will constitute 'a test' as such."

(b) Ms. Hill in her Written Submissions dated and filed on

December 10, 2009 referred the Court to **Yewens v Noakes**

(1880) 6 Q.B.D. 530, at p 532 (per Bramwell L.J)

[100] As the society became modernised, a greater number and variety of persons became employed. These ranged from nurses, doctors, lawyers, accountants, engineers, pilots, and other professional employees. In this era of sophistication and industrialisation, this degree of control is hardly necessary for the employment functions to be executed.

[101] A modern society no longer envisages that many workers require to be monitored or controlled in the execution of their duties. It is for this reason that as a general rule, the use of the control test is not the sole device which the courts utilise to make a determination of the central issue.

(b) The integration test

[102] As the society grew expanded and employed different categories of workers with varying degrees of skill, the courts have been forced to make use of other approaches. One such approach is **the integration test**.

[103] (a) **Denning L.J.** (as he then was) articulated a description of the integration test in **Stevenson Jordan and Harrison Ltd v**

M MacDonald and Evans [1952] 1 T.L.R. 101, at 111 in the following

manner:

"But in Cassidy v Ministry of Health, Lord Justice Somervell pointed out that that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. Lord Justice Somervell went on to say. 'One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words?' I respectfully agree. As my Lord has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

(b) Ms. Hill cited Lee Ting Sang v Chung Chi-Keung [1990] 2A.C. 374; It is also reported at [1990] ICR 409.

[104] The authors of **Harvey** op cit have posited at paragraph [50] that the integration test:

“might be a significant factor where the individual started off as an independent contractor but ended up working full-time for one ‘client’, so that over the passage of time he has become indistinguishable from direct employees doing similar work.”

(c) **Economic or business reality**

[105] An explanation of the term “*economic or business reality*” has been articulated by **Deakin and Morris** op cit at page 152. The learned authors described the test as follows:

“The test of business or ‘economic’ reality essentially asks whether the worker is in business on his or her own account, as an entrepreneur, or works for another whom takes the ultimate risk of loss of chance or profit.”

[106] **Harvey** op cit articulates certain factors which a Court may consider in its utilisation of this test. At paragraph [62] the authors of **Harvey** state *inter alia* as follows:

“The test suggests that you consider – in addition to the degree of control – the opportunities of profit or loss, the degree to which the worker was required to invest in the job in the way of provision of tools or equipment, the skill required for the allegedly independent work, and the permanency of the relationship. The question to be answered may be put in

various ways, but there is a common theme: was the worker really a small businessman rather than an employee?..."

[107] The economic or business reality test is the converse of the integration test. Whilst the integration test requires that the employee be a part of the business for whom he works, the economic or business reality test postulates that the employee is truly independent of the organisation.

[108] (a) In *Market Investigations Ltd v Minister of Social Security* [1969] 2 W.L.R. 1 Cooke J. at page 9 stated the test to be applied in the following manner:

[T]he fundamental test to be applied is this "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service."

(b) At page 10 of the judgment Cooke J. stated some matters which the court should consider to determine the issue.

"[F]actors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far

... of at page 450 paragraph [H] stated *inter alia* as follows:

"Each of the three entertainers was binding himself to an engagement which, from the totality of the relevant consideration, was confined to that of service to a master. To Cooke J's question in respect of each of them of, is he performing his service as a person in business on his own account? , my answer is "no."

[110] The *ratio decidendi* in the Market Investigations case was approved by the Privy Council in the Lee Ting Sang case (op cit) - See the observations of Lord Griffiths at page 412 letters [B to F]

(d) The multi-factor test

[111] No one test on its own may be utilised to determine whether a worker has been employed as an employee or an independent contractor. The tests assist as useful general guides, but the modern approach is to examine the totality of the various elements which constitute the relationship between the parties.

[112] The best illustration of this test is the full judgment of McKenna J in

and National Insurance [1968] 2 Q.B 497.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions

all reasonable orders; wear the company's uniforms, and have the truck painted with the company's colours. He was described as self-employed. The court was called upon to decide whether the company was liable to pay social security contributions. If the worker was employed under a contract of service then these payments fell to be paid by the company.

(b) McKenna J identified three conditions which are required to be met for a contract of service. He stated at page 515 of the judgment as follows:

"I must now consider what is meant by a contract of service. A contract of service exists if three conditions are fulfilled.

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the

other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent being a contract of service.”

(c) The third criteria outlined by McKenna J was described by him at page 515 Letter [B] as ‘the important one’ which he would try with the help of five examples to explain what he meant by “provisions inconsistent with the nature of a contract of service.”

They are as follows:

“(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his recognised own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: Amalgamated Engineering Union v Minister of Pensions and National Insurance [1963] 1 W.L.R. 441, 451, 452, [1963] 1 ALL E.R. 864.

I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it

will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

(d) **McKenna J.** held that in accordance with the facts the worker was an independent contractor. The reason was that most of the terms of the contracts were consistent with contracts for services. In essence the test adumbrated at (c) was not satisfied.

[113] **Lord Wright in Montreal v Montreal Locomotive Works [1947] 1 D.L.R. 161**, at 169 described the multifactor test in the following manner:

"In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties."

[114] The multifactor test was applied in **Hall v Lorimer [1994] IRLR 171(CA)**. The Court of Appeal upheld **Mummery J.** who at first instance was required to consider how the multi-factor test should be applied. The judge held that many facets of the person's work activity should be examined.

[115] The case law has established an approach which the courts have used to determine the substantive issue. In *Hall v Lorimer* op cit

Nolan L J at pages 174 and 175 stated as follows:

*"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the evaluation of the overall effect of the detail, which is not necessarily the same total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v Sinnott* [1986] 60 T C 150, 164:*

"It is in my judgment, quite impossible in a field where a large number of factors have to be weighed, to gain any real assistance by looking at the facts of another case and comparing them one by one to see what are different and what

particular weight is given by another Tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.”

[1116] “The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are identifiable in the abstract, those findings and that assessment will dictate the correct legal answer. In the familiar phrase it is all a question of fact and degree.”

- See O’Kelly v Trusthouse P.L.C. [1983] I.C.R. 728 per Sir John Donaldson M R at page 762

[1117] The case law has given some guidance as to how the Court should regard certain terms which are stipulated in the first contract. These terms shall be referred to at [1] to [viii] located at paragraphs [118] to [159] of this judgment. Where the evidence of either party assists in an examination of the headings, this evidence shall be referred to under those headings.

(i) The parties label

[1118] John Bowers in the text entitled “A Practical Approach to Employment Law” Seventh edition, 2005 at page 21 paragraph 2.19 states *inter alia* as follows under the heading ‘Self-description’:

[120] Dr. Dorsett also cited *Autoclenz Ltd and Belcher* [2009] EWCAl046 - in support of his submission that the court should examine the substance of the relationship between the two

contractor...."

employee and so the lecturer was not an independent company and the lecturer the relationship of employer and of the lecturer's contract as a whole was to create between the performed, despite the express clause to the contrary the effect lecturer but also the precise manner in which it was not only the nature and scope of the task allotted to the "[T]hat since the company was entitled to control and direct

(b) The ruling of the Court is summarised in the head note as follows:

independent contractor."

lecturer was not an employee of the company but an

"It was expressly stated in the lecturer's contract that the

head note states *inter alia* as follows:

Commissioner of Pay-Roll Tax [1984] ICR 286. In that case the

[119] (a) Dr. Dorsett in his Written Submissions cites *Narich Pty. Ltd v*

England College of Arundel [1977] ICR 6)."

substance of the relationship and not its form (Davis v New

characterisation in law, since the courts consider the

is, however, in no way decisive in determining the true

and independent contractor or employer and employee. This

"Often the parties to a contract describe themselves as hirer

parties. In so doing the court should take into consideration

“that the label that the parties to an agreement choose to attach to their relationship is not determinative or conclusive of what the relationship is ...”

-See paragraph [45] of Dr Dorsett’s Written Submissions.

[121] The Autoclenz case was concerned with the legal status of a group of 20 car valeters who worked for Autoclenz Ltd at the company’s business location in Derbyshire. The valeters commenced legal proceedings to determine whether they were independent contractors or employees.

[122] Autoclenz contended that they were self – employed pursuant to the agreement which stated *inter alia* that “any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not of employer and employee....”

[123] At paragraph [14] of the judgment in Autoclenz, Lady Justice Smith stated *inter alia* as follows:

“Where contractual terms are in writing, they will usually be taken as representing the agreement between the parties, but, if one party to the agreement claims that the written agreement do not represent the true agreement, the court will have to decide what the true agreement was.”

[124] In the course of the judgment Lady Justice Smith who delivered the Court’s judgment was prepared to find at paragraph [67] that she

“was satisfied that the control test as set out in Ready Mixed

Concrete was satisfied.”

[125] The Court held in this case that the valeters were employees and not independent contractors. The reasoning was (a) that the control test was satisfied (b) that the valeters agreed to perform the work for Autoclenz within a reasonable time and in a good and workman like manner, and (c) the valeters must personally do the work and could not provide a substitute to do so. These clauses were held by Lord Justice Sedley at paragraph [105] to be “an obligation entirely consistent with employment.”

[126] Lady Justice Smith at paragraph [53] of the judgment stated *inter alia* as follows:

“In my judgment the true position is that when there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to consider the actual legal obligations of the parties to carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does

not of itself mean that that conduct accurately reflects the legal rights and obligations.”

[127] Ms Hill Counsel for the Employer submits that “*The Courts give effect to the intention of the parties. In cases where there is doubt as to the nature of the contract the Courts consider the name or label which the parties attach to the relationship.*”

Ms. Hill cited BSM (1257) Ltd v Secretary of State for Social Services [1978] ICR 894 and Smith v Reliance [2003] EWCA 1153

[128] The first contract provides inter alia at paragraph [13] (1) as follows:
“*In consideration of the above terms, it is further agreed that:- (1) The Shop Manager will be engaged on the basis of*

an Independent Contractor...”

[129] Mrs Pestaina in her Witness Statement at paragraph [7] stated that
“*Mr Eaton at the heads of department meetings regularly referred to me as an employee of Sandals.*”

[130] At paragraph [8] of Mr Eaton’s Witness Statement Mr Eaton recalled that he invited Mrs Pestaina to heads of department meetings. He
“*never referred to her as an employee.*”

[131] Dr. Dorsett Counsel for Mrs Pestaina in his examination-in-chief of the Employee referred her to examine paragraph [8] and especially line 3 of the Witness Statement of Mr. Franklyn Eaton for the Employer. Paragraph [8] was in response to paragraph 7 of Mrs.

Pestaina's Witness Statement. Paragraph [7] of her Witness

Statement reads as follows:

"7. I had to report on a daily basis and had to attend shift line up meetings everyday, Monday to Friday, at 9:00am. I also had to attend heads of department meetings every Wednesday with the General Manager, Franklyn Eaton. All the heads of departments who attend the meetings were all employees of Sandals. Mr Eaton at the heads of department meetings regularly referred to me as an employee of Sandals. I also had to attend the Manager's Cocktail Party held every Monday at 6:00 pm and was introduced to the guests as one of the employees, as the Store Manager. The General Manager would call out the name of each department head individually and each one would step forward to identify themselves. Also I was directed by the General Manager and did attend the Returning Guests dinner. This was all done as an employee."

[132]

Paragraph [8] of Mr Eaton's Witness Statement reads as follows:

"8. In respect of paragraph 7 of the Statement, I do not recall that the Employee reported on a daily basis and attended shift line meetings. I recall that I invited her to head department meetings in order to share information about the operations of the Resort. I am also never referred to her as an employee. I am also aware that I implemented a system whereby all managers were required to clock in and out and the

Employee was not included in this system. She never had to clock in or out. I also recall from time to time, I invited her to the Managers Cocktail Party in order to meet guests. It was intended in return that she would encourage them to make purchases at the gift shop and as such increase sales.”

[133] Mrs Pestaina in response to Dr. Dorsett stated *inter alia* as follows:

“I see Mr Franklyn Eaton’s statement. I have read it. I see paragraph 8 of his statement. I see line 3. These are head of department meetings. I recall Mr Eaton asking me who I work for and when I said VISAGE the company which signed the contract to work with Sandals. I own VISAGE. He looked amazed.”

[134] The evidence is that Mrs Pestaina and not VISAGE was the person who signed the first contract with Sandals. If this evidence at paragraphs [131 and 133] of this judgment was introduced to show that Mr Eaton regarded Mrs Pestaina as an employee of Sandals, it flatly contradicts her own response to Dr Dorsett that she works for VISAGE. In the circumstances, this Court holds that Mrs Pestaina’s statement that Mr Eaton regarded her as an employee of Sandals is quite naturally subject to two interpretations. The first is that she may have been employed under a contract of service. The second is that she could have been employed under a contract for service. Which interpretation is correct continues to be the subject of this Reference.

[135] In answer to Mr Forde Q.C. Counsel for Sandals, Mrs. Pestaina stated

inter alia as follows:

“When I signed the contract I was an Independent Contractor in the beginning of the relationship.”

[136] In *Massey v Crown Life Insurance* [1978] IRLR page 31, at page 33 Lord Denning MR stated as follows:

“[T]he way in which they draw up their agreement and express it may be a very important factor in defining what the true relation was between them. If they declare that he is self-employed, that may be decisive.”

[137] The label which a party uses to describe the nature of his relationship with another party is not conclusive “but may be a factor pointing in favour of the relationship so characterised if the court finds an ambiguity upon a construction of the agreement between the parties.”

- See Sir David Simmons CJ in *Sagicor Insurance Co. v Carter* 71 WIR, 74 at page 102.

[138] (i) The insertion of the term ‘Independent Contractor’ at Clause 13 (1) of the first contract does not appear to be a sham. No evidence was presented to this Court which leads me to conclude other than that the first contract was one which both parties entered into of their free and voluntary will.

(ii) The first contract does not contain any ambiguities. In order to decide what is the true nature of the relationship between the two parties, I shall examine all of the relevant evidence.

(ii) Payment on a commission basis

[139] Clause 13 (2) of the first contract provides as follows:

13(2) "Commission Calculation

(1) The Shop Manager will be paid a sum monthly in arrears, which is calculated as follows:-

.....
.....

25% of GROSS PROFIT."

Mrs Pestaina was paid a commission by Sandals. She makes reference to this at **paragraph [12]** of her Witness Statement. She was not paid a monthly salary.

[140] In the Sagicor case (op cit) at page 92 Chief Justice Simmons stated at **paragraph [49]** as follows:

"Payment to a worker on a commission basis does not lead inexorably to the conclusion that the worker is an independent contractor. I think that even though a worker may have liberal freedom of action in his working arrangements, he may yet be an employee in law if he is financially dependent on one principal employer..."

It is but one factor which the Court takes into consideration to determine the ultimate issue.

(iii) **Payment of Social Security, Medical Benefits, Education Levy, and Income Tax for Mrs Pestaina's three members of staff.**

[141] Mrs Pestaina employed three staff members. They assisted her in the operation of the Gift Shop. Clause 9 of the first contract provides *inter alia* as follows.

"All employment of personnel to sell, stock and clean the shop is the responsibility of the Shop Manager. Furthermore, all payroll and related expenses of these personnel are the full and sole responsibility of the Shop Manager."

[142] In answer to Mr Roger Forde Q.C. Counsel for the Employer Mrs. Pestaina stated *inter alia* as follows:

"I paid Social Security, Medical Benefits and Education Levy for my staff. I never requested Sandals to pay the statutory benefits on the employees behalf."

[143] The fact that Mrs Pestaina paid the statutory deductions on the employees behalf does not, *ipso facto* lead to the conclusion that the relationship of employer and employee did exist between herself and these three employees. It is an indication however, but no more, that a contract of service did exist between Mrs. Pestaina and these three employees.

(iv) **Payment of Social Security, Medical Benefits,
Education Levy, and Income Tax for Mrs Pestaina**

[144] At Clause 13 (2) of the first contract it provides for Commission calculation. No provision was made for Sandals to deduct from that commission any statutory deductions. None was in fact made. Had Sandals deducted any of these payments, this would have been an indication, but no more, that a contract of service existed between Mrs. Pestaina and Sandals. That none were deducted would suggest a rebuttable possibility, but no more, that there existed a relationship of a contract for services. In essence, non-deduction is not conclusive of the issue.

-See Davis v New England College of Arundel [1977] ICR 6 O'Kelly v Trusthouse Forte P.L.C. [1983] ICR 728
- See the Sagcor case

(v) **Hours of work**

[145] The first contract contained a provision which dealt with a minimum amount of hours which the Gift Shop should remain open. At clause 7 it provided as follows:

“The Shop Manager is responsible for establishing opening hours of the shop. The Hotel specifies that the minimum hours of the shop shall be 8:00 am to 8:00 pm, Monday to Saturday and 9:00 am to 5:00 pm on Sundays and Public Holidays.”

[146] In her evidence in answer to Mr Forde Q.C. Mrs Pestaina state *inter*

alia as follows:

"I managed the shop. I was at the shop for irregular hours."

[147] Mrs Pestaina was responsible primarily for the sale of goods in the Gift Shop. This was located on the hotel's property. The ability to work flexible hours is a neutral factor.

(vi) Holiday with pay

[148] Mrs Pestaina gave evidence that she *"would send an e-mail saying (she) was going on holiday. (She) would take reasonable holiday. (she) did not have to get permission before going on holiday."*

[149] Her evidence was confirmed by Mr Franklyn Eaton who indicated that *"she would send (him) e-mails advising of her departure."*

- See paragraph [16] of his Witness Statement.

[150] That Sandals did not make any holiday payments to Mrs. Pestaina is not indicative of the status of her employment. It is a neutral factor.

- See O'Kelly v Trusthouse Forte P.L.C. [1983] I.C.R. 728.

(vii) Pension Plan

[151] (i) The first contract did not contain a clause which made

provision for Mrs. Pestaina to participate in a pension plan. Mrs. Pestaina in answer to Mr. Forde, Q.C. for Sandals stated

that she was not aware that Managers who were employed by Sandals contributed to a pension plan. She did not participate in a pension plan.

- (ii) In the *Sagicor* case, *Simmons C J* held that “*Joining the pension plan and the Group Life and Group Health plans are requirements of neutral effect in so far as these plans offer significant benefits to a worker, whether an employee or an independent contractor. But in Hanna’s case [2007] UKPC [29] Lord Hope found that the agents access to retirement benefits that were available under the company’s pension plan was an aspect of the ‘ample material before Thompson J to entitle her to hold that [Hanna] was an employee of that company.’ [2007] UKPC 29 at [19].*”

-See paragraph [60] of *Sagicor* at page 94

- (iii) On balance, the absence of any evidence in this case to show that Mrs. Pestaina was a part of, or that she contributed to a pension plan leans in favour of a contract for services.

(viii) **Tools of trade**

[152] In the Witness Statement of Hyacinth Pestaina she indicated at **paragraph [3]** that Sandals provided store space for the operation of the Gift Shop. It was maintained by the company. Sandals also provided accounting assistance and settlement of vendor accounts. Assistance was also rendered by the company with respect to the

counting of inventory and cash and the determination of sale items and mark ups. The company paid the utility bills and maintained proper insurance.

[153] In the **Sagikor** case, the defendants were provided with office space, secretarial assistance, stationery supplies and subsidised promotional materials. Chief Justice Simons opined at paragraph [56] as follows:

“If these workers were carrying on their business on their own account, I hardly think that they would require provision of office space and secretarial assistance from the company. Professionals, as they undoubtedly are, would find and pay for their own office space and secretarial assistance. If that were the case, it would be a strong factor pointing in favour of a finding that they were independent contractors.”

[154] The workers in **Sagikor** were held to be employees. There are some features of the **Sagikor** case which are markedly different from the facts of the instant case.

[155] (a) Firstly, the workers required “specialist training constantly to update their knowledge base and make them proficient in the insurance business. All this redounds to the benefit of **Sagikor** whose profitability..... is directly linked to the skill, resourcefulness and expertise of the worker in this case.”

-See Simons Chief Justice at paragraph [121] of the **Sagikor**

judgment.

(b) No evidence was led in the case which indicated that Mrs. Pestaina required any training and an update of that training for the performance of her functions.

[156] Secondly, the sale of insurance products in the Sagicor case did not necessitate that the defendants should pay for the wages, salaries and statutory expenses of any member of the secretarial staff who were all provided by Sagicor. Unlike Sagicor, the employees of the Gift Shop were provided by Mrs. Pestaina who paid their wages, salaries and statutory expenses.

[157] The means of discharging the obligations of the Shop Manager involve not only the provision of office space and the other items referred to at **paragraph [152]** of this judgment. The provision of office space may be categorised as real estate.

[158] The provision of workers in the Gift Shop was the responsibility of Mrs. Pestaina. Their existence makes the real estate operational, functional and meaningful. The hotel owned the physical assets, but without the provision of Mrs. Pestaina's employees, no meaningful sales could materialise.

[159] I hold that the provision of office space and the other items referred to in **paragraph [152]** does not lead me to inexorably conclude that Mrs. Pestaina was employed as an employee under a contract of service. It is one factor which the Court takes into consideration to determine the issue.

THE FIRST ISSUE:

Whether or not Hyacinth Pestaina was employed by Sandals
commencing December 16, 1999 to June 05, 2007 as an employee
under a contract of service or a contract for services in accordance with
the first contract.

(a) The area of control – is it sufficient to determine the issue.

[160] The general thrust of Mrs. Pestaina's evidence can best be described
by a reading of paragraphs [1] and a part of paragraph [3] of her
Witness Statement. Those paragraphs state as follows:

*"[1] Whilst serving as the Shop Manager, I had little or no
control with respect to the operation of the Gift Shop. More
particularly, in the last two years of my employment, the
degree of control exercised by Sandals was to the extent that I
had virtually no control with respect to the initiation and
execution of operating procedures as it related to the Gift
Shop."*

Paragraph [3] in part states:

"[3] The degree of control by Sandals was extensive...."

[161] In answer to Dr. Dorsett in re-examination, Mrs. Pestaina stated *inter
alia* as follows:

*"It would be difficult for me to determine the actual time
when Sandals took total control of the running of the Gift
Shop, so I used 2005 because this is when Sandals connected
the inventory electronically from Jamaica. But at all times my*

system was connected electronically with the accounting

department in Antigua.”

[162] Mrs. Pestaina detailed in her Witness Statement the level of control which Sandals exercised over the management of the Gift Shop. Such matters included (a) not to source supplies from family or from any related party or company in which she had an interest; (b) the connection of the inventory system in the Gift Shop to that of the head office in Jamaica; (c) purchase of inventory by the Sandals Jamaican office for the Gift Shop; (d) reporting cash float and drop daily sales to Sandals front desk; (e) receiving memoranda from the head office in Jamaica which indicated the type of sales promotions which she would conduct; (none were produced to this Court); (f) attendance at heads of department meetings; (g) reporting on a daily basis to attend “*shift line up meetings*.”

[163] As a consequence of the number of ways in which Mrs. Pestaina stated that Sandals was in control of the Gift Shop she made the following conclusion at **paragraph [20]** of her Witness Statement.

“[20] In light of the level of control Sandals exercised over me and how I managed the store I consider myself an employee and not an independent contractor. I enjoyed very little independence.”

[166] The nature of the control test has already been outlined at **paragraph [99]** of this judgment. Dr. Dorsett seems to suggest that the court should apply the common law control test. It is trite law that the courts should have at its disposal more than one test in order to determine the issue.

(b) No case was cited by Dr. Dorsett in support of his submission. It is the duty of the Court however to examine it with regard to (a) the development of the case law and (b) the facts of this case.

“At all material times, it is respectfully submitted, the extent of control was sufficient to make Mrs. Pestaina an employee of Sandals Antigua. In the circumstances, Mrs. Pestaina was always an employee of Sandals Antigua over the course of their contractual relationship.”

[165] (a) Dr. Dorsett made one submission with regard to a determination of the issue. It is contained in **paragraph [47]** of his Written Submissions. The gravamen of his submission is stated by him as follows:

“I managed the shop. I was at the shop for irregular hours. I was at liberty to work elsewhere.”

[164] During her evidence in answer to Mr. Forde Q.C. Mrs. Pestaina stated *inter alia* as follows:

[167] The control test may still be relevant. However, this test may not be

appropriate to be utilized in certain circumstances. I respectfully suggest that the facts of this case do support the need to examine other

tests.

[168] In addition “the common law test is not to be restricted to the power of control, “over the manner of performing service.”

— See the Ready Mixed Concrete case op cit per MacKenna J. at page 522 paragraph [G].

[169] In United States v Silk 331 US 704 at page 721 Rutledge J stated *inter alia* as follows:

“Here the District Court and the Circuit Court of Appeals determined the cases largely if not indeed exclusively by applying to so-called “common law control” test as the criterion. This was clearly wrong in view of the Court’s present ruling.”

[170] In Argent v Ministry of Social Security [1968] 3 All E.R. 208 Roskill J. stated the matter at page 215 paragraphs E to F.

“If one studies the cases to which I have been referred, a number of tests have been propounded over the years for resolving the problem which I have to solve. For example, in the earlier cases it seems to have been suggested that the most important test, if not the all important test, was the extent of the control exercised by the employer over the servant. If one goes back to some of the cases in the first decade of this century, one sees that that was regarded almost as the

[173] What is the level of control which makes the relationship between the two parties a contract of service? In answer to Mr. Forde Q.C. Counsel for Sandals, Mrs. Pestaina stated that when she signed the

[172] MacKenna J. in the Ready Mixed Concrete case at page 522 Letter (G) after a perusal of Dixon J's judgment in *Humberston v Northern Timber Mills* (1949) 79 C.L.R. 389 and the opinion of Lord Wright in the *Montreal* case stated that the common law test of control "is wide enough to take account of investment and risk."

161 page 169 Lord Wright stated *inter alia* as follows:
 "Control in itself is not always conclusive....[I]t is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

[171] In *Montreal v Montreal Locomotive Works Ltd* [1947] 1 D.L.R.

important one."
 the development of the law in the first sixty years of this century and particularly the development of the law in the last fifteen or twenty years in this field, the emphasis has shifted and no longer rests so strongly on the question of control. Control is obviously an important factor, but it is wrong to say that in every case it is the decisive factor. It is now, as I venture to think, no more than a factor, albeit a very important one."

contract in 1999 she “was an *“Independent Contractor.”* According

to Mrs. Pestaina her “status as an *Independent contractor came to an*

end when Sandals took full control of the shop in the last two years

of (her) employment in 2005.”

[174] What are the elements of “*full control*” to which she referred in her

evidence? These features must certainly be much greater than the

specific clauses which are contained in the first contract.

[175] The relevant aspects of her Witness Statement are **paragraphs 3, 4, 5,**

11 and 14. An examination reveals that the complaints of control

which are referred to in these paragraphs merely replicate clauses **1, 2,**

3, 4, 5, 7, 8 and 10 of pages 1 and 2 of the first contract. These deal

with the duties of the hotel. No complaint was made by Mrs. Pestaina

of clause 6 (“the provision of an adequate computerised point-of-sale

system”) or clause 11 (“the provision of free meals for the Shop

Manager.”)

[176] In summary although Mrs. Pestaina states that eight (8) of the eleven

(11) items contained at page 1 of the **first** contract gave rise to her

having “**virtually no control with respect to the initiation and**

execution of operating procedures as it related to the Gift Shop,”

these clauses which are contained in the first contract were freely

entered into by her and were never changed by either party at anytime

during the period of the first contract.

[177] I therefore hold that since a significant majority of the items which

appear at page 1 of the first contract remained constant **throughout**

1997 to 2007, they cannot be used to ground a successful submission that Sandals exercised 'extensive' control over the operation of the Gift Shop since 2005.

[178] Similarly, the evidence in support of 'extensive' control which appear at paragraphs 4, 6, 7, 10, 13 and 14 of Mrs. Pestaina's Witness Statement remained constant at clauses 10, 12, 7 and paragraph [9] and clause 4 of the first contract at pages 2, 3, and 4 respectively.

[179] However, new matters of concern were raised by Mrs. Pestaina at paragraphs 8, 9, 11 and a part of paragraph [14] of her Witness Statement. These include the attendance of shift line up meetings; heads of department meetings, a change in the inventory system, the purchase of inventory for the Gift Shop, the introduction of a cashless system and the reporting of the cash float and drop daily sales to Sandals front desk.

[180] I hold that the matters referred to at paragraph [179] of this judgment are not sufficient for me to conclude that Sandals displayed 'extensive' control over the operation of the Gift Shop. I do however hold that Sandals' activities which are referred to at paragraph [179] of this judgment did reveal that the company exercised elements of control over the management of the Gift Shop.

[181] In any event, I am required to decide whether the control which existed rendered the first contract one of service or one for services. I must examine all of the relevant factors.

[182] In accordance with **paragraph [1]** of the first contract Sandals provided Mrs. Pestaina with *“a suitable secure place for the display, storage and sale of goods.”* In addition to this physical space, furniture and fixtures of the designated **Gift Shop** were maintained by Sandals. Without more, this fact points in the direction of the existence of a contract of service.

[183] In the premises which were supplied by Sandals and in accordance with the first contract Mrs. Pestaina was required to discharge some obligations. These related solely to the operation of a Gift Shop. She **‘could not decide to appoint someone else to do (her) work.’**

[184] It was for Mrs. Pestaina to decide whether she would operate the Gift Shop alone or hire workers. If she chose to employ workers then they were required to be courteous and efficient.

[185] In accordance with the first contract Mrs. Pestaina gave evidence that she employed three workers. I have no doubt that she chose well. She would have given them certain information, outlined what their roles in the Gift Shop were and informed them of her expectations of them.

[186] Mrs. Pestaina would have discussed with the workers (a) their wages (b) the payment of statutory deductions and (c) that she would assume the responsibility to pay their wages.

[187] The tests which I shall use to assist me to determine Mrs. Pestaina’s status are those which have been **adumbrated by Cooke J. in the**

Market Investigations case and MacKenna J. in the Ready Mixed

Concrete case.

- See paragraphs [108] and [112] of this judgment.

[188] In the *Sagior* case, clause 13 of a Defendant's handbook provided as follows:

"No advertisement shall be published or broadcast and no printed matter concerning [Sagior] or any other Life Assurance Company or Society shall be issued or circulated by the Representative unless the Representative is specifically authorised to do so by [Sagior]."

[189] Chief Justice Simmons opined as follows at paragraph [104].

"In the case of a person carrying on business on his/her own account, there would, generally, be full freedom to advertise in such a way as would best promote that person's business interests. On the other hand, an employee, properly so called, would hardly advertise his/her employer's business. Advertisement would be the province of the employer and should be seen as a necessary and normal business expense."

[190] Numerically only, a similar paragraph [13] also appears at

page 3 of the first contract. It provides as follows:

"The Shop Manager is responsible for the promotions and advertising of the goods available for sale. Fashion shows, which are a mandatory feature are the financial responsibility of the Shop Manager."

[191] Mrs. Pestaina gave evidence with respect to advertising. She stated as follows:

"I see paragraph 13 of the contract. I did some promotions and Head Office did some promotions. I advertised the goods for sale."

[192] There was no restriction which Mrs. Pestaina encountered in the performance of her responsibility to advertise the Gift Shop's products. Neither is it surprising that Sandals advertised the products which were sold in the Gift Shop. Frankly, it was to the mutual benefit of Mrs. Pestaina and Sandals that they both advertised the products which were sold in the Gift Shop.

[193] In the circumstances of this case a clear reading of clause 13 would tend to indicate without more, the existence of a contract for services.

[194] This indication is corroborated by Mrs. Pestaina's evidence that between 1999 and sometime in 2005 her *"status as an independent contractor came to an end when Sandals took full control of the shop in the last two years of (her) employment."*

[195] In addition to Mrs. Pestaina's evidence that she was *"an independent contractor"* between 1999 and 2005 I have also examined the Employee's Memorandum and her Witness Statement to obtain greater clarity of her status.

[196] In the Employee's Memorandum which was filed on her behalf Mrs. Pestaina states at paragraph [5] as follows:

"The employee contends that notwithstanding that in the written contract entered into (by) the parties, the course of conduct between the parties, particularly within the last two years of the contractual relationship; clearly indicate that the true nature between the parties was that of employer-employee."

[197] At paragraph [20] of her Witness Statement she states as follows:

"In light of the level of control Sandals exercised over me and how I managed the store I consider myself an employee and not an independent contractor. I enjoyed very little independence."

[198] It is unclear from a reading of the relevant paragraphs of her Employee Memorandum and her Witness Statement (see paragraphs [196] and [197] above), what is the requisite period for which she claims that she was an employee. It is certain that her evidence that she worked as an independent contractor during 1999 to 2005 is in conflict with the assertions which are contained in the Employee's Memorandum at paragraph [5] and her Witness Statement at paragraph [20].

[199] (a) Notwithstanding this conflict however, it is Dr. Dorsett Counsel for Mrs. Pestaina who emphatically states at paragraph [60] of his Written Submissions and paragraph [1] of his

Amended Submissions filed on December 10, 2009 that "the employee worked from 16th December 1999 to 4th June, 2007" a duration of "7 ½ years, that is, for a period of 90 months." (b) In the circumstances Dr. Dorsett submits that Mrs. Pestaina is entitled to a basic award which represents the entire period of 7 ½ years of Mrs. Pestaina's employment with Sandals.

[200] In light of the claim put forward by Dr. Dorsett on behalf of Mrs. Pestaina I will therefore decide the issue for the entire period between 1999 and 2007.

[201] Lord Griffiths in *Lee Ting Sang v. Chung Chi-Keung* [1990] I.C.R. 409 who delivered the judgment of the Privy Council had to decide whether the applicant was working as an employee or an independent contractor. At page 413 Lord Griffiths stated *inter alia* as follows:

"All the tests.....in Market Investigations Ltd ...point towards the status of an employee rather than an independent contractor. The applicant did not provide his own equipment, the equipment was provided by his employer. He did not hire his own helpers" (Emphasis is the Court's)

[202] It would seem that had the employee in *Lee Ting Sang* hired his own helpers this would have been a factor which may have caused the Privy Council to hold that he was working as an independent contractor.

[203] The hiring of workers or workmen to assist in the execution of work for another person has been the subject of judicial interpretation. In the **U.S. Silk** case, both sets of drivers were held to be independent contractors. One of the factors which the Court took into consideration was that the drivers owned their own trucks. In addition to this factor however the major facts which the Court examined were "the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these drivers-owners as independent contractors."

- See page 719 of the judgment.

[204] The case of **Hitchcock v. Post Office** [1980] I.C.R. 100 (E.A.T)

gives some guidance to determine how a Court regard persons who hire their own workers to execute certain functions. The result of this however does not determine the ultimate issue.

[205] (a) The Applicant Mr. Hitchcock owned a shop near Chelmsford in

England. He allowed his premises to be used as a sub-post office. He was appointed as the sub-postmaster. He was sent details of the nature of the appointment. He was told what the hours of attendance were. He was required to pay for and did employ "*assistants necessary to do the work.*"

(b) He was not entitled to annual leave, sick pay or pension. He worked long hours. He resigned the position. He claimed to be unfairly dismissed. The Industrial Tribunal held against him.

[207] **Slynn J.** at page 109 of the judgment stated that Mr. Hitchcock "was obliged to be no more than responsible for the conduct of the office. He may have chosen either to do it himself or to supervise it. It was for him to decide whether to do it himself or whether to employ someone else to do it, as long as he retains the responsibility."

[206] In order to determine whether the control which existed in Hitchcock prevented the contract from being one for services rather than of service, **Slynn J.** took into consideration the fact that "*the applicant provided the premises and a certain amount of the equipment at his own expense.*" Some of the money which he received was to compensate him for the use of his premises and part was for his own services.

"We accept as Mr. Carr quite rightly has accepted, that there is a substantial measure of control which relates to the conduct of the Post Office business. It might be if there were no other factors present, that that control would be sufficient to make the contract one of service rather than for services. But there are other factors present."

follows:

(c) The finding was upheld by the Employment Appeal Tribunal. **Slynn J.** delivered the judgment of the Employment Appeal Tribunal. At page 108 of the judgment **Slynn J.** stated as

[212] Ms. Hill, Counsel for the Employer in her Written Submissions stated that to determine the ultimate issue the Court should take into

[211] Mrs. Pestaina gave evidence that she used the year 2005 to indicate that she ceased to be an independent contractor. In 2005 "*Sandals connected the inventory electronically from Jamaica.*"

"The very fact that the applicant was carrying on this business with employees of his own seems to us to indicate very strongly that he was not employed under a contract of service." (The emphasis is the Court's)

employees. He put the matter in this way.

[210] At page 109 of the judgment Slyn J. rendered the Court's opinion with regard to the matter of payment for the services of other

[209] At page 109 of the judgment Slyn J. stated as follows:

"In our view, the essential position was that the applicant, although under control as to the way in which much of the work was done, was carrying on business on his own account...."

[208] At page 109 of the judgment, Slyn J. commented upon the opportunity of Mr. Hitchcock to make a profit. He stated as follows:

"Moreover it seems to us that even though there may be less chance of making profit, or risk of loss than in many businesses, there was still here the chance of profit and the risk of loss."

consideration “the admission of the Employee that she was engaged under a contract for services up to 2005.”

[213] In addition Ms. Hill submitted that “Nothing which would affect the legal relationship changed since 2005. Indeed, after 2005 the Employee continued to hire her own staff, take holiday as she pleased, did not sign in and had no HR number.” According to Ms. Hill “the Employee had the right to choose her own hours...”

[214] Ms. Hill also submitted that Mrs. Pestaina was at liberty “to work for whom she pleased and to employ staff as she pleased.” She drew attention to the fact that Mrs. Pestaina was free to work for Pinebrook Management Co. Ltd which operated Grand Pineapple Beach Resort pursuant to the second contract.

[215] It is Ms.Hill’s submission that “If the Employer had treated the Employee as a person working under a contract of service, then” Mrs. Pestaina’s involvement with Pineapple “would have provided grounds for dismissal.” [That] Sandals renewed the contract after purchasing interest in Pinebrook Management Company Ltd (indicates that Sandals) was engaging the Employee in (2007) under two separate contracts for services.”

[216] Ms. Hill concedes that “There was some control by the Employer in the manner in which the shop was operated but such control was done in order to provide some level of efficiency.” She cited page 526 of the Ready Mixed Concrete case in support of her submission.

[217] The relevant part of the Ready Mixed Concrete case at page 526

Letters E to F state as follows:

"It is true that the company are given special powers to ensure that he runs his business efficiently, keeps proper accounts and pays his bills. I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence."

[218] Ms. Hill's submissions contrast sharply with Dr. Dorsett's submission that "*Mrs. Pestaina was always an employee of Sandals Antigua over the course of their contractual relationship.*"

[219] After 2005 Mrs. Pestaina was still free to advertise the Gift Shop's products. She was free to pay the staff such sums as she saw fit. She was still free to impose such other terms of employment upon her employees. She was free to keep the Gift Shop open for such periods as she saw fit. She was free to use the utilities in such a manner to maximise her earnings.

[220] She was still free to source and purchase items for the Gift Shop once approved by Sandals Resorts International in Jamaica.

[221] (a) Dr. Dorsett in his Written Submissions at paragraph [55] with regard to Mrs. Pestaina's monthly earnings stated *inter alia* as follows:

“The employee was earning \$17,610.00 per month whilst employed by Sandals Antigua.”

(b) Since 2005 according to Dr. Dorsett Mrs. Pestaina

continued to earn the same level of monthly commission as she was earning since 1997. There was therefore absolutely nothing which transpired since 2005 that affected her ability to earn the level of commission which she earned prior to 2005.

Some general conclusions

[222] In arriving at my decision I have been greatly assisted by (a) the relevant documents (b) the two contracts, (c) the evidence of both parties and (d) Counsels' submissions.

[223] I have examined all of the above. In order to understand the business which both parties have entered into I gave a considered, qualitative, appreciation of all of the evidence. This approach allowed me to have an overall effect of the detail which is not necessarily the same as the sum total of the individual details.

-See Nolan L. J. in Hall v. Lorimer op cit at page 174.

[224] The picture which emerged is as follows. In accordance with the

terms of the first contract, and for its duration, Mrs. Pestaina agreed to

accept 25% of the gross profit. Some deductions were subtracted from this sum. Sandals agreed to accept 75% of the gross profit.

[225] It seems to me that this arrangement mirrored that of an opportunity for investment in a business. Elements of this business included (a) that Sandals outlay would be greater than Mrs. Pestaina's; (b) that Mrs. Pestaina's investment in the business would be the supply of labour, the payment for that labour inclusive of all statutory payments, the supply of certain management and basic human resource skills, and an expectation to achieve a fair return upon her investment.

[226] It was also a natural part of this business that both parties were taking a risk. Some months may be plentiful. Other months small sums of money may be derived. This is especially so as I examine the tourism sector. The high tourist season in the Caribbean is for a period from December to April in each year. The returns on investment would be higher during the tourist season. During the summer months, the returns would depend upon Sandals occupancy.

[227] The way how Mrs. Pestaina managed this business with the assistance and contribution from Sandals made a difference whether or not it was successful.

[228] Mrs. Pestaina had a duty and responsibility to execute certain functions in her own interest to maximize the returns of her investment. I would not have expected her to enter into a contract of service simply to work for a monthly salary given her task to "*arrive*

at a maximum cost of sales percentage of 5% overall and an average

sale per guest of US\$34.00 per person, per week."

- See paragraph 6 at page 2 of the first contract.

[229] (a) A contract for services may exist even though "a substantial measure of control" is evident.

-See Slyn J. in the Hitchcock case at page 108.

(b) It is worthy to state however that the control which existed in the Hitchcock case had essentially to do with "the conduct of the Post Office business" as opposed to the investment and risk.

- See page 108 of the judgment.

[230] Similarly, in this case, the nature of the control which was exhibited by Sandals was related to its level of investment in the business between the two parties.

[231] Common features of a hotel's existence from which it usually derives considerable income are (a) the accommodation sector and (b) the food and beverage sector. It has not been shown upon the evidence that the business of the Gift Shop was integrated with the business of Sandal's hotel operation. It was an accessory to its usual business activities.

[232] Mrs Pestaina was still able to maintain her financial position by carrying out her engagements very energetically, competently and successfully for the duration of the first contract. No evidence was

led to show that Mrs. Pestaina earned less commission for any period between 1999 and 2007.

[233] The three (3) employees who Mrs Pestaina hired continued to work in the Gift Shop. Mrs Pestaina continued to pay their wages and statutory expenses. Surely if a contract of service existed between Mrs Pestaina and Sandals then the three (3) employees would have become Sandals employees.

[234] (a) Simply put, Mrs Pestaina cannot successfully assert that she was an employee of Sandals and simultaneously state that she continued to be the employer of the three (3) persons who remained her employees. This would be an incongruous set of circumstances.

(b) I hold that they were not employed by Sandals. They were employed by Mrs. Pestaina for her benefit.

[235] When the first contract is examined as a whole, its provisions are inconsistent with its being a contract of service. Many of the terms of the first contract are indicative of a conclusion that it was a contract for services.

[236] In her evidence Mrs. Pestaina indicated that she "*was at liberty to work elsewhere.*" The first contract contained as well no such

prohibition. She was free to engage her services to a second employer performing similar functions to those which she performed under the first contract. The engagement of her services to a second employer is

a clear indication that the first contract which she entered into was one for services.

[237] Mrs. Pestaina and Sandals were engaged in business for the duration of the first contract as entrepreneurs to serve their respective interests. Mrs. Pestaina entered into this relationship to make a profit. She carefully took into consideration the risk of loss. She was an independent contractor.

[238] The purpose of the Sex Discrimination Act 1975 (UK) is “to render unlawful certain kinds of sex discrimination and discrimination on the ground of marriage, and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally, and for related purposes.”

-See the preamble to the Act.

[239] With the passage of the Labour Code in the Parliament of Antigua and Barbuda, in accordance with Section A 2 of the Code, it was the intention of the legislature,

“to bring together, in so far as is practicable, all legislation applicable to employment; employment standards, and industrial relations in Antigua and Barbuda.”

In order that certain aims could be achieved with regard to the rights and responsibilities of employers and employees, management and labour in respect of labour legislation.

"No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mannaon."

reads as follows:

I quote from the **King James** version of the Bible. The statement which is recorded in the **Book of Luke, Chapter 16, verse 13** is appropriate to the facts of this case. The statement

[242]

"The name given to a thing does not change its substance or character. Shakespeare hinted at this principle in Romeo and Juliet: What's in a name? that which we call a rose, by any other name would smell as sweet."

as follows:

Dr. Dorsett in his Written Submissions at **paragraph [45]** state

[241]

In the circumstances of this case, I find that those submissions b) which were argued by Dr. Dorsett that were based upon Section 82 of the United Kingdom's Sex Discrimination Act of 1975 are clearly unmeritorious, unfounded and very unreliable.

[240] a) These two types of legislation are vastly different with respect to their aims and objectives. The first one deals with sex discrimination and other discrimination between men and women. The second one relates to the establishment of certain standards with regard to labour legislation.

[243] For these reasons, I accept Mr. Forde Q.C. and Ms. Hill's submissions. I hold that Hyacinth Pestaina was employed by Sandals from December 16, 1999 to June 05, 2007 as an employee under a contract for services.

THE SECOND AND THIRD ISSUES

[244] In light of the findings at **paragraphs [235 to 237]** there is no need to determine these issues. The Employee's Reference is dismissed.

COSTS

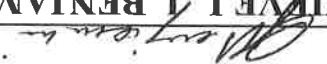
[245] The Court is desirous of receiving submissions from both parties with regard to costs. After this has been done the Court shall make a determination.

I also agree



SAMUEL R. AYMER
Member

I agree



GENEVIEVE L. BENJAMIN
Member



PHILIP A. PILGRIM
President

Dated this the 25th day of March, 2010