

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 7 of 2009

BETWEEN:

EDWIN BROWN

Employee

and

KINGS CASINO LIMITED

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Glendina McKay

Member

The Hon. Jessie F. Kentish

Member

Appearances:

**Laurence Daniels of Daniels, Phillips & Associates –
Attorneys-at-Law for the Employee**

**D. Raymond Hamilton of Dane Hamilton & Associates –
Attorneys-at-Law for the Employer**

2010: December 01

2011: February 17

JUDGMENT

PILGRIM, P:

INTRODUCTION

Background

- [1] Edwin Brown was born on October 22, 1964. He is 46 years of age. He resides at Jennings Village in Antigua and Barbuda.

- [2] Mr. Brown commenced employment with the Royal Antigua and Barbuda Police Force in 1990. He holds full time employment in that organisation. He is a Corporal.
- [3] Kings Casino Limited operates a casino. It is called Kings Casino. It conducts its business at the Heritage Quay Shopping Centre. This is located in St. John's in the capital of Antigua and Barbuda.
- [4] Mr. Brown states that he obtained employment with Kings Casino as a security officer in or about March 1995. Mr. Emilio Fagalde the General Manager of the casino produced to the court a copy of an agreement dated March 09, 1996. This agreement was admitted with the consent of both parties. I shall make reference to this agreement at **paragraphs [25] (ii), [39] and [51]** below. It was marked "**E F – 1**".
- [5] Effective from March 09, 1996 Mr. Brown continued to be employed with Kings Casino. He performed certain security services.
- [6] Mr. Brown's hours of work with the casino were on weekdays from 8.00 pm to 1.00 am. On weekends sometimes from Friday to Sunday he worked from 8.00 pm to 4.30 am. In his evidence Mr. Brown stated that he worked sometimes three (3) or four (4) days or nights per week.
- [7] Mr. Brown's employment with the casino was also subject to an agreement between himself and the casino. This agreement is dated June 14, 2008. In summary that agreement portended that should Mr. Brown be '**caught gambling**' while he was executing his duty as a security officer, he would be '**terminated immediately**'. A copy of this agreement was admitted by

consent of both parties. It was marked “E F – 4”. I shall refer later on at **paragraph [65]** below to this agreement.

- [8] Kings Casino is of the view that due to certain circumstances which it states took place on August 22, 2008, it was its duty to suspend Mr. Brown from his position as security officer “*until the matter and any concerns can be addressed by the owner...*” It is Mr. Brown’s evidence that he had a conversation with Mr. Fagalde. Based on this conversation and as the casino never called him after August 22, 2008 to provide any security service, he interpreted the ‘**suspension**’ contained in a letter dated August 23, 2008 by the casino to him as a letter of dismissal.

LEGAL PROCEEDINGS

- [9] Mr. Brown commenced proceedings against Kings Casino Ltd. by filing a Reference in this Court dated March 31, 2009. In that Reference he claims that he was unfairly dismissed.
- [10] Mr. Brown’s Employee’s Memorandum was filed on March 31, 2010. His Witness Statement was filed on April 29, 2010.
- [11] The Employer’s Memorandum was filed on May 01, 2009. The statements of its witnesses, Messrs Emilio Fagalde, Reyden Smithen and Ms. Sherry Anne Peters were filed on May 20, 2010.

THE ISSUES

[12] The issues to be decided are as follows:

- (i) Whether or not Edwin Brown was employed by Kings Casino Ltd. from in or about March 1995 to August 23, 2008 as an employee under a contract of service or pursuant to a contract for services.
- (ii) In any event if Mr. Brown was employed as an employee under a contract of service was he unfairly dismissed having regard to (a) the contents of a letter dated August 23, 2008 written by Kings Casino Ltd. to him and (b) a conversation between himself and Mr. Fagalde of Kings Casino Ltd.
- (iii) If the Court finds that Mr. Brown was unfairly dismissed what is the measure of damages which are due to him?

THE FIRST ISSUE

Whether or not Edwin Brown was employed by Kings Casino Ltd. from in or about March 1995 to August 23, 2008 as an employee under a contract of service or pursuant to a contract for services.

THE LAW

[13] The term “**employee**” is defined at Section A5 of the Antigua and Barbuda Labour Code as follows:

“employee” means any person who enters into or works under.....a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied;....”

[14] The Labour Code of Antigua and Barbuda grants to employees only certain statutory rights. Such rights are not limited to but include holiday with pay, maternity rights, a safe system of work, and statutory sick pay.

[15] In **Charles Hunte and Life of Barbados (Civil Appeal No. 23 of 1990,)** **Byron, J. A.** (as he then was) at **page 3** of the Court of Appeal judgment stated *inter alia* as follows:

“The wording of the (definition) do not highlight the distinction between contracts of service and contracts for services. But as a general principle contracts for service are not contracts of employment...”

[16] At **page 5** of the said judgment **Byron J. A.** (as he then was) stated *inter alia* as follows:

“A perusal of the Labour Code shows that the minimum standards with which it requires contracts of employment to conform include provisions relating to probation, leave privileges, minimum remuneration and hours of work. It is obvious that these provisions cannot apply to the relationship between an employee and an independent contractor. In my judgment the Antigua Labour Code is limited to contracts to perform services under contracts of employment, that is contracts of service, and does not provide any protection for independent contractors employed under contracts for service”.

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

[18] The case of **Charles Hunte** (op cit) was not cited to this Court in **Hyacinth Pestaina and Dickenson Bay Management Ltd. (DBA Sandals Antigua)** Ref. No. 9 of 2008. At paragraph [85] of that judgment I stated as follows:

“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.”

[19] There are two initial matters which must be present in the relationship between Mr. Brown and Kings Casino Ltd. for this Court to hold that a contract of employment existed between the two parties. In **Pestaina** (op cit) as follows:

“[94] (a) The learned authors of the text *“Harvey on Industrial Relations and Employment Law”* (2008) articulate two preliminary factors of importance. The first relates to personal service.

(b) 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”.

[20] In **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 Q.B. 497 at page 515 Mac Kenna J. identified three conditions which are required to be present in a contract of service. He stated as follows:

“A contract of service exists if these 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 with its being a contract of service...

"As to (i). There must be a wage or other remuneration.

Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967), pp. 59-61 and the cases cited by him."

[21] In **Nethermere (St. Neots) Ltd. v Gardiner** [1984] I.C.R. 612 Stephenson L. J., having quoted what **MacKenna J.** stated in the **Ready Mixed Concrete** case (op cit) at page 515 (in the passage which I cited at paragraph [20] above stated at page 623 *inter alia* as follows:

"There must, in my judgment; be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted....."

- making reference to the dicta of **MacKenna J.**

[22] The matter of the irreducible minimum was clearly spelt out by **Peter Gibson L. J.** in **Express & Echo Ltd v. Tanton** [1999] I.C.R. 693, at 699. The judge stated as follows:

*“...it is necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an irreducible minimum of obligation, it cannot be said that the contract is one of service.
.....where, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer. The applicant has submitted to us that, though the personal service to the company was a highly material consideration, it was not conclusive. I am afraid that this proposition cannot stand in the light of the authorities.”*

APPLICATION OF THE LAW TO THE FACTS

(a) The requirement of personal service

[23] Mr. Brown in his evidence to this Court stated as follows:

“Initially, Mr. Fagalde asked some police officers if we could provide security at the Kings Casino. We accepted in 1995.”

[24](i) His evidence was confirmed in substance at **paragraph [2]** of his Witness Statement. It stated as follows:

“In or about March of 1996 Mr. Brown along with three other police officers entered into an agreement with Kings Casino to provide outside security to Kings Casino Limited.”

(ii) Mr. Fagalde stated in his Witness Statement at **paragraph [2]** as follows:

“They were not employees of the Casino they were simply contracted to perform security related services and assist our full time security providers Samuel Security when and wherever additional security was needed. In effect they provided a sort of “police presence” in the Casino.”

[25] (i) The security contract between Kings Casino Limited was entered into by that company with Mr. Edwin Brown and three other persons. Mr. Fagalde described these three other persons as policemen. His description of them was agreed to by Mr. Brown.

(ii) The terms of the contract which is entitled **“Outside Security”** are as follows:

“You were hired to do special assignment given by the General Manager, therefore any order given should be carried out immediately without fair or favour of anyone. You are not entitled to any benefits, sick, vacation, severance or holiday pay. Punctuality is a must, any officer (who reports) to work late or absent should call at least (an) hour early to notify the General Manager. Your services can be terminated by Kings Casino without any written notice and you on the other hand can do likewise, quit at any time.”

[26] Mr. Brown gave evidence how he and the other three policemen provided security for Kings Casino for the duration of their employment. In his evidence Mr. Brown stated as follows:

“My schedule of work with Kings Casino was determined by my schedule of work as a police officer. So my schedule of work as a police officer had to be determined firstly before I knew the days and times I could work for the Casino.”

[27] Mr. Brown also stated in his evidence as follows:

“The days and hours of work at Kings Casino would have to be discussed and approved by Kings Casino along with the four police officers. I provided security for Kings Casino along with a team of three other police officers. So really my days and hours of work were determined for Kings Casino along with how the other three police officers worked.”

[28] With regard to whether or not Kings Casino provided a roster of work for the policemen, Mr. Brown stated as follows:

“The hours and days of work were not rostered by Kings Casino but were arranged by the four police officers.”

[29] (i) Mr. Brown’s evidence on this matter was summarised by Mr. Fagalde in answer to Mr. Hamilton. He stated as follows:

“There were four police officers. I did not know which police officer would work on which night. We took no part in organising the police work roster.”

(ii) The identity of the police officer in the group of four who worked at the casino was only known after that officer commenced his duties at the casino.

[30] Mr. Fagalde in his Witness Statement at **paragraph [3]** stated as follows at **sub-paragraph (a) and (b)**:

- (a) *"....Further when these four officers could not make it to the Casino they sent other off duty officers to provide the security service."*
- (b) *"Even when off duty, and working in the Casino the officers were always subject to be called out by the police department."*

[31] Mr. Fagalde's evidence at **paragraph [30] (a)** was the same as Mr. Brown's. In Mr. Brown's evidence he stated that if he or any other of the police officers were unable to perform his or their duties at the casino, he or they would ask or *"would get somebody else to sit in for us"*.

(b) The matter of a wage and continued employment

[32] (i) Mr. Brown stated that he *"earned a monthly income of approximately \$2,500.00 as a security officer."*

- see his **Witness Statement at paragraph [3]**

(ii) Mr. Brown evidenced a copy of his *"job letter dated 15th September, 2004 addressed to First Caribbean International Bank..."* This letter was admitted as **"EB-1"**.

[33] Mr. Fagalde for the Employer stated that the casino paid Mr. Brown a cheque every other week which represented payment for the number of hours which he worked.

[34] (i) Mr. Brown presented the casino with certain invoices for payment for the hours which he worked. One of these invoices was dated April 30, 2008. Mr. Brown requested payment of \$1,040.00 for eight nights at the rate of \$130.00 per night. (This was admitted as **"EF-2"**.)

(ii) In accordance with Mr. Brown's invoice the casino paid him a cheque dated April 30, 2008 in the sum of \$1,040.00 (This was admitted as "EF-3".)

[35] Mr. Brown in his evidence stated that when he was obliged to work as a policeman he could not accept work from Kings Casino. On these occasions when he did not work for Kings Casino he was not paid.

THE EMPLOYEE'S SUBMISSIONS

[36] Mr. Daniels Attorney-at-Law for the Employee made the following submissions:

(i) The Employee provided personal service being that of labour to his Employer for wages.

(ii) There is no evidence that Mr. Brown employed any helpers or profited from sound management in the performance of his duties.

THE EMPLOYER'S SUBMISSIONS

[37] Mr. Hamilton Attorney-at-Law for the Employer made the following submissions:

(i) There was no obligation for Mr. Brown to personally perform the security duties at Kings Casino.

(ii) When Mr. Brown was unable to discharge his duties as a security officer at Kings Casino, he would assign another police officer to perform those duties.

(iii) Mr. Brown's hours of work at Kings Casino were determined by his duties as a police officer.

(iv) Mr. Brown was not entitled to any statutory benefits.

(v) In light of the above submissions Mr. Hamilton submits that Mr. Brown was employed *“under a contract for services”*.

[38] (i) Was there an irreducible minimum of obligation on each side to create a contract of service? In this regard (a) was Mr. Brown required to provide his services as a security officer to Kings Casino personally and (b) was Kings Casino obliged to pay to Mr. Brown a set wage and continued employment?

THE APPROACH OF THE COURT

(ii) The approach of the Court to determine this matter at **paragraph [38] (1)** above is to have regard not only to the Agreement between the two parties dated March 09, 1996 but it shall also examine how Mr. Brown and Kings Casino *“discharged their respective functions over the years that the relationship lasted.”*

- see the Hunte case (op cit) at page 7, per Byron J. A. (as he then was).

Characteristics of the relationship between the two parties

[39] The contract between the two parties referred to *“Outside Security”* and *“special assignment given by the General Manager...”*

The evidence of Mr. Fagalde was that Mr. Brown and the other policemen would augment the casino’s full time security providers *“when and wherever additional security was needed”*.

[40] It was not King’s Casino’s intention to offer Mr. Brown continued employment as a security officer. In any event however, the casino had no right whatsoever to compel Mr. Brown to accept work under any circumstance.

[41] Correspondingly, Mr. Brown was free to refuse employment from Kings Casino if he was otherwise engaged by working for the Police Force or for any reason whatsoever. If he could not perform his security duties at Kings Casino he asked another police officer to work for him. This arrangement was always acceptable to the casino. On occasions it did occur.

[42] This flexibility suited both parties. The casino was free to arrange with Mr. Brown the performance of his duties with the casino. His availability to discharge these duties however depended on whether or not he was required to work for the Royal Antigua and Barbuda Police Force.

SOME INITIAL FINDINGS

[43] The contract between the two parties does not contain an express provision that Mr. Brown was required to perform his services personally at Kings Casino. However, having regard to the relationship which developed between March 1995 and August 2008, it is clear that Mr. Brown was under no obligation to perform his services for Kings Casino personally.

[44] **In these circumstances it is my judgment that the contract and the relationship between Mr. Brown and Kings Casino lacked the irreducible minimum of obligations namely (a) on the part of Kings Casino to provide Mr. Brown with continued employment; and (b) an obligation by Mr. Brown to provide his security services personally to Kings Casino Ltd.**

Examination of other factors

[45] In any event if there was a finding of mutuality of obligation – **and in my judgment none existed** – I shall now consider other elements of the relationship between the two parties to determine the first issue. It is all a question of fact and degree.

(i) Deduction of Social Security, Medical Benefits, Education Levy, or Income Tax

[46] The contract between the two parties does not contain a provision for deductibility of any statutory payments. In Mr. Brown's evidence he stated that when he commenced employment with Kings Casino Ltd., the company never paid his Social Security, Medical Benefits, Education Levy or Income Tax. In any event the evidence is that the entire relationship between the two parties was characterised by a non-deductibility of any statutory payments by either party. This is evidenced by an invoice from Mr. Brown ("EF-2") and a cheque from Kings Casino Ltd. ("EF-3").

[47] If Kings Casino Ltd. had made any deductions of these statutory payments, this would have been but a rebuttable indication, but no more, that a contract of service existed between the two parties. In effect, non-deduction does not determine the issue.

- see Pestiana (op cit) at paragraph [144]

(ii) Tools of the trade

[48] Mr. Brown gave evidence that he was provided with a radio "**and nothing else**" by Kings Casino. There is no evidence that he was provided with any training, uniform equipment or any other assistance necessary to execute his

functions. Mr. Fagalde gave evidence that other security officers (not inclusive of Mr. Brown) are dressed in uniform. The absence of these items is a strong factor which points in favour of a contract for services.

(iii) Hours of work

[49] The hours of work were set out at **paragraph [6]** above. The ability to work flexible hours is a neutral factor.

- see the **Pestiana judgment (op cit) at paragraph [147]**

(iv) Absence of sick, vacation or holiday pay

[50] The contract between the two parties contains the following provision:

“You are not entitled to any benefits, sick, vacation, severance or holiday pay.”

In **Express and Echo Ltd. v Tanton** (op cit) the terms of the contract between the two parties made no provision for the payment of holiday pay and sickness pay. The absence of these benefits was one factor which the Court took into consideration to hold that there was in existence a contract for services. The absence of the totality of these benefits leans in favour of a contract for services.

THE EMPLOYEE’S SUBMISSIONS

[51] Mr. Daniels Attorney-at-Law for the Employee made the following submissions:

(i) That once Mr. Brown arrived at the workplace, he ***“clocked in and clocked out.”*** If he arrived at work late some money was deducted from his salary.

(ii) Mr. Brown fell under the control of the management of the casino.

(iii) The Court should have regard to **Performing Right Society Ltd. v Mitchell and Booker Ltd. [1924] 1 K.B. 762**. In this case Mr. Daniels cited what **McCardie J** stated at **page 768** to the effect that a master is one who *“retains the power of controlling the work.”* I have addressed this matter of control at **paragraphs [55] and [56]** below. Mr. Daniels also cited **Market Investigations Ltd. v Minister of Social Security [1969] 2 W L R 1** to state that no evidence existed that Mr. Brown employed any helpers or had the opportunity of profiting from sound management in the performance of his duties. I have addressed this matter at **paragraph [57]** below.

THE EMPLOYER’S SUBMISSIONS

[52] Mr. Hamilton Attorney-at-Law for the Employer cited the **Ready Mixed Concrete Ltd. case (op cit) and Sagicor Insurance Co. v Carter (2007) 71 W I R 74**. Unfortunately however, Mr. Hamilton did not itemise any of the appropriate headings which the Courts utilised in those two cases to show how they applied to the facts of this case.

THE TESTS

[53] For several years certain tests have evolved which the Courts utilize to determine whether or not a contract of service does exist. The control test is one of those tests. The matter however does not depend solely upon the existence of the nature and extent of control.

[54] In any event however, according to the facts of this case the extent of control which Kings Casino Ltd. exercised over Mr. Brown was tenuous at best. I am not persuaded by the *“clocking in and out”* argument. Neither am I sufficiently persuaded by the deduction of some money in happenstance circumstances.

- [55] What is of significance is that Kings Casino Ltd. did not have control over Mr. Brown's attendance at its business premises to execute his functions. Kings Casino Ltd. could not command Mr. Brown's full time devotion to his duties.
- [56] A determination of the first issue depends upon the nature of the contract between the two parties and the evidence in this case with regard to how both parties discharged their duties for the duration of their relationship. Whether or not Mr. Brown employed helpers or had the opportunity of profiting from sound management in the performance of his duties is of no assistance in this case to determine the first issue.

SOME FINAL CONCLUSIONS

- [57] In favour of Mr. Brown is the fact that he worked for Kings Casino Ltd. for some period during March 1995 to August 2008. In addition he obtained payment for those hours which he worked. However, the mere fact that certain arrangements *“carry on for a long time may be wholly explicable by considerations of convenience for all the parties. It is not necessary to imply a contract to explain the fact that the relationship has continued perhaps for a very extensive period of time.”*
- see **James v London Borough of Greenwich [2007] IRLR 168**, per Mr. Justice Elias (P) at page 174, paragraph 59.
- [58] Turning to the other factors, there was no general induction training. There was no provision for notice on either side. The contract could be terminated **“without any written notice”** by either party.

- [59] No provision was made for any real meaningful bonus payment except for the annual Christmas voucher of \$150.00 paid by Kings Casino to him.
- [60] The law now recognises that a contract of employment involves mutual trust and confidence.
- see **Mahmud v Bank of Credit and Commerce International S.A. [1997] I.C.R. 606:** and, in particular, **Lord Steyn** at **pages 620-622**. The employee is obliged to use his best endeavours to ensure the efficient running of the employer's business. It connotes a requirement of personal service.
- [61] An examination of the contract between the two parties demonstrates that many of its provisions are inconsistent with a contract of service. Those terms are more indicative of a contract for services.
- [62] Mr. Brown was not required to be loyal to Kings Casino Ltd. He remained a loyal member of the Royal Antigua and Barbuda Police Force to whom he owed mutual trust and confidence.
- [63] In all the circumstances of this case I hold that there existed between the two parties a contract for services. He was not unfairly dismissed.

THE SECOND ISSUE

In any event if Mr. Brown was employed as an employee under a contract of service was he unfairly dismissed having regard to (a) the contents of a letter dated August 23, 2008 written by Kings Casino Ltd. to him and (b) a conversation between himself and Mr. Fagalde of Kings Casino Ltd.

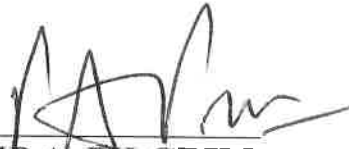
[64] In light of my findings at **paragraphs [61] and [63]** above there is no need to determine this issue in detail. If I had held that Mr. Brown was an employee who worked under a contract of service I would have concluded that his actions at Kings Casino Ltd. on August 23, 2008 amounted to gambling. His actions would have been in breach of the agreement between Kings Casino and Mr. Brown dated June 14, 2008. I would have held this to be misconduct as defined in **Section C 58(1) (a) and C 59(1) (a) of the Labour Code**. The Employer's actions to dismiss him would have been reasonable. It's dismissal of him would have been fair.

THE THIRD ISSUE

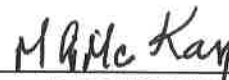
If the Court finds that Mr. Brown was unfairly dismissed what is the measure of damages which are due to him?

[65] In light of the findings at **paragraphs [44], [61] and [63]** above this issue requires no determination. The Employee's Reference is hereby dismissed. There shall be no order as to costs.

Dated the 17th day of February, 2011


PHILIP A. PILGRIM
President

I agree.


M. GLENDINA McKAY
Member

I also agree.


JESSIE F. KENTISH
Member