

IN THE INDUSTRIAL COURT
ANTIGUA AND BARBUDA



REFERENCE NO. 8 of 2014

BETWEEN:

CASSANDRA GOODLUCK

Employee

AND

CARLISLE BAY ANTIGUA t/a Carlisle Bay Resort

Employer

BEFORE:

The Hon. St. Lawrence de Freitas

Chairman

The Hon. Samuel Aymer

Member

The Hon. Megan Samuel-Fields

Member

APPEARANCES:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Worker's Federation for the Employee

Mr. Hugh C Marshall of Marshall & Co. Attorneys-at-Law for the Employer

2016: September 22

2017: December 1

JUDGMENT

De Freitas. – Chairman

Background

1. By reference dated 7th day of March 2014 The Employee Ms. Cassandra Goodluck (hereinafter referred to as **Ms. Goodluck** or **the Employee**) who lives at Herbert's Estate, St. John's Antigua has filed a complaint with the Court that she was Unfairly dismissed by Carlisle Bay Antigua t/a Carlisle Bay Hotel, her Employer, and that she is entitled to compensation.

2. Carlisle Bay Hotel is an all-inclusive luxury Resort in Carlisle Bay, Old Road, Antigua. (hereinafter referred to as **the Resort or the Employer**). It provides accommodation, food and beverage services for its guests.

Procedures

3. The Employee filed her Employee's Memorandum on the 4th May 2014. In her Memorandum she complains *inter alia* that the action of the Employer was extremely harsh, oppressive and grossly unfair and consequently, she was unfairly dismissed. She is asking the Court to award compensation under the appropriate headings, and any other relief that the Court may see fit to grant.
4. The Employer filed their Memorandum on the 17th day of April 2015. In their Memorandum they contend that Ms. Goodluck was originally employed in **February 2004** as a Spa Technician. They further contend that by letter dated **10 December 2008** the employment relationship ended on the 17th **December 2008** and that thereafter, Ms. Goodluck supplied her services as a Spa Therapist, as an independent contractor and not as an employee.
5. The Employer further accepts that on 22nd December 2011 there was an altercation at the Resort involving several individuals including Ms. Goodluck and that as a result of the said altercation the Resort severed its relationship with her. The Resort however asserts that at all material times she was not an employee within the meaning of the Industrial Court Act of Antigua and Barbuda, but was an independent contractor with a contract for service.

The Evidence

6. In the Employee's witness summary filed with the court on May 6th 2015, Ms. Goodluck states that she was initially employed by the Resort on February 2nd 2004 as a Spa Therapist. Her evidence is that on December 10th 2008 she attended a meeting where she received a letter from her Employer informing her of certain restructuring within the Resort that would result in the reduction of the total number of employees and as she understood it, she was advised that her employment would be terminated on December 17th 2008, and that her position as Spa Therapist would be made redundant, but that the "Hotel would be engaging the services of Spa Therapists on a contractual basis".
7. She also told the Court that at the said meeting on the 10th December 2008 she was told that she would be severed, but that (as a result of the new arrangement) she would continue at the Resort moving from salary to commission.
8. On Cross Examination she admitted that she received a letter on the same day of the

meeting, 10th December 2008. This letter informed her that her employment contract with Carlisle Bay would have been terminated on December 17th 2008.

9. In the said letter of 10 December 2008 Ms. Goodluck was informed that *"your full and Final payment "* in the sum of \$11,293.72 was enclosed. On the face of the document, under the heading *"Cheque received by"*, Ms. Goodluck's signature appears, with the date 17th December 2008.
10. In her witness summary, Ms. Goodluck stated that she was informed that the receipt of the monetary package was, *"based on the circumstances of my termination."*
11. There is no evidence that there was any misunderstanding, misinterpretation or question raised with regards to the letter of 10 December 2008, nor was there any dissatisfaction with the terms of her termination or with the monetary amount received as severance payment, prior to the filing of this reference in the Industrial Court.
12. Ms. Goodluck told the Court that she returned to the Resort the next day and continued working.
13. On cross examination, she admitted that there were changes in the way she was paid, that payments were now on commission, and that no statutory deductions were made. She further admitted that she was no longer required to conform to the 5 days a week, 10 am to 6 pm work day and that she was no longer required to "clock in". She however maintained that she was an employee of the Resort.
14. On further cross examination, when asked if she would be willing to repay the amounts she received that would otherwise be deducted in relation to statutory payments, there was no answer.
15. It should however be noted that the Employee's Memorandum states that *"-----the Employer, at some stage during the employment relationship, unilaterally altered the method of wage payment to the employee. She was not of the opinion that the said alteration had any material effect on her employment with the employer, as it resulted in an increase in gross pay."*
16. **Ms. Randy Isaac** gave evidence on behalf of the Employee, by her witness statement filed with the Court she said that she was employed by the Resort on December 22nd, 2003 as Spa Attendant. Further she stated that *"I was advised that all spa therapists would continue to perform the same duties but that they would be **on call, as per bookings made by the guests of the hotel**".* (Emphasis by the Court).
17. Ms. Isaac's verbal evidence on cross examination was that, she continued to be attached to the Spa at the Resort in December 2008. Her job functions, among other things, were answering the phone and filing etc.

18. She told the Court that she did not know that the Spa employees were severed. She however confirmed that from January 2009 she got instructions to call the Therapists when they were required. She also confirmed, it was correct that prior to December 2008 they came in every day. On Re-Examination she said that she took bookings (Spa) everyday, that there had to be a therapist every day.
19. The evidence for the Employer was given by **Charmaine Gore Biesheuvel**, the Resort's Human Resource Manager. She told the Court that in December 2008 the Resort carried out a reorganization exercise and as a result they terminated the employment relationship with all Spa Technicians including the Employee. She further told the Court that at the time it was explained to the Spa Technicians that following their termination, the Company would engage them to operate as independent contractors using the Resort's facilities to perform the services to its guests. That they would no longer be paid a salary, but be paid per job, depending on the services rendered; that no statutory deduction or income reporting, on their behalf, would be undertaken by the Employer.
20. The Employer's Memorandum was filed on the 17th April 2015. It admits that Ms. Goodluck was employed in February 2004 as a Spa Technician but that on the 10th December 2008 her employment relationship ended. To substantiate their claim they exhibited a copy of the letter of 10th December 2008 (marked '1') and addressed to Ms. Goodluck, the letter states in part,

"In regards to the Spa, we have decided to restructure the entire Spa operations, which would include the severing of all full-time Spa Therapists and engage the services of Therapists on a contractual or on call basis.

In the circumstances, this letter serves to inform you that, regrettably, your employment contract with Carlisle Bay will be terminated on December 17th, 2008, Your full and final severance payment is calculated as follows:"

21. The letter listed the details of the calculation and continued in part,

"The full and final payment of the above funds will be made to you in the form of a cheque. Please sign below to confirm receipt of the cheque."

At the ending of the letter, and under the heading "Cheque received by" the signature of Ms. Goodluck appears and dated 17th December 2008. The total amount received was \$11,293.72.

22. The Employer further pleaded in its Memorandum that "the employee at the material

time was not an employee within the meaning of the Industrial Court Act or the Antigua and Barbuda Labour Code. Accordingly the remedy sought by the employee is not attainable in this Court.

The Law

23. The Industrial Court Act (Cap 214), Sec. 10 (3) states:

- “(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-
- (a) *Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interest of the persons immediately concerned and the community as a whole;*
 - (b) *act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.”*

24. The Antigua and Barbuda Labour Code Section A5 states:

“In this Code unless the context otherwise requires, or the particular Division otherwise specifies
‘Employee’ means any person who enters into or works under or stand ready to enter into or work under, a contract with an employer, personally to perform any service or labour, whether the contract be oral or written, expressed or implied:
_____”.

Matters to be Determined

25. The matters to be determined are:

- a. When Ms. Goodluck was advised by letter dated 31st December 2011 that *“Accordingly, we are officially advising you that Carlisle Bay is terminating your service with immediate effect”*; was she at that material time (From and after 18th December, 2008 the day after the effective date of her proposed dismissal by letter dated 10th December 2008) was Ms. Goodluck providing her services as a Spa Technician at the Resort on a contract of service, (ie: an employee) or was she on a contract for service, (ie: an independent contractor)?
- b. If Ms. Goodluck was on a contract of service, within the meaning of the act, did the Resort act reasonably in summarily dismissing her?
- c. If Ms. Goodluck was unfairly dismissed, what compensation should be paid to her, if any?

Employers Submissions

26. Learned Counsel for the Employer in their written submissions made reference to the matter of **Carmichael and Another vs National Power PLC. {1999} UKHL 47**. This matter raised the question of whether there is a contract of employment where a person works for an employer but only on a casual or intermittent basis. The issue was, whether an outreaching contract of employment exists between the gaps of actual employment. In that case the House of Lords held an employment situation did not exist due in large part to the absence of mutuality of obligations between the parties.
27. **The House of Lords** held that for such a contract to exist, there must be an ongoing mutuality of obligation between the parties. What the Courts specifically looked for in that situation is for a positive obligation on the employer to provide the employee with work (or at least to offer work to the employee as and when it becomes available) and a positive obligation on the employee to accept work when offered.
28. In our opinion the question of mutuality of obligation must be considered within the context of the facts of this matter before the Court.
29. Counsel for the Employer further made reference to the case of **Jupiter General Insurance Co. Ltd vs Redshirt Omni Shroff. (1937) 39 BOMLR 997**. A matter addressing primarily the question of summary dismissal.

Employees Submissions

30. The representative for the Employee made several written arguments in support of the Employee's case and referred the Court to a document entitled "H & E Handbook Series" published by Macdonald and Evans with an article on LABOUR LAW by M. Wright LL.M (Brim) FBIM and C.J. Carr MA (Oxon), BLC.
31. The article discussed *inter alia* several tests that the Courts have developed for distinguishing between employees and independent contractors. This court is of the view that the test described as "*The integration test*" is most helpful in the circumstances of this matter. Denning LJ., in **Stevenson, Jordan & Harrison Ltd vs MacDonald & Evans [1952] 1 TLR 101**, said "*One feature which seems to me 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.*"
32. Among the other arguments raised, the representative on behalf of the Employee, *inter alia* asked the Court to consider that "*the Employee without any break in service, continued to work for the Employer in the very same position as a Spa Therapist, under the very same terms and condition of employment (save one) from December 18th 2008*". They however

conceded that there was a change in the manner of payment and that the employee was now paid on a commission basis.

33. The Employee through her representative further contend that the Employer, *"at or thereafter, never issued the Employee with an amended document that expressed that the parties had agreed to change the nature of the employment relationship from a contract of service (employee) to a contract for service (independent contractor)."*

34. **Analysis of the Facts & the Law**

- a. There is no dispute that Ms. Goodluck was originally employed by the Resort as an Employee on the 17th December 2007.
- b. The letter dated 10th December 2008 and the accompanying service cheque are consistent with the original employment being brought to an end as of 17th December, 2008. There is no evidence of a challenge raised, or of any objection made to the termination. The cheque representing the value of her monetary entitlement was received and negotiated.
- c. The letter further required Ms. Goodluck to return all items of uniform to include her name badge. The letter, further expressed appreciation for her service to the Resort during her employment, and then continued to invite her to be an "on-call therapist."
- d. By the said letter of December 2008, the Resort further told Ms. Goodluck that they had decided to reconstruct the entire Spa operation, which include the severing of all full time Spa Therapists and that they would engage the services of the Therapists on a **contractual or on-call basis. (Emphasis is the Court's).**
- e. There is again, no dispute that as a part of the new arrangement, the Spa Therapists were to use the Resort's facilities to perform their services to the Resort's guests (Para 20 above)
- f. The Employee submitted that she returned to the Resort to work the very next day performing the very same position as Spa Therapist. The fact that she turned up to work the next day does not appear to be the issue, but rather, what the new working arrangement in place were, when she returned. Was she returning under a new contract of employment or as an independent contractor?
- g. By the evidence of Ms. Goodluck herself (Para 13 above) and that of her witness Ms. Randy Isaac (Para. 16 above) established that there were several changes as a consequence of the new arrangement.
 - Payments were now made on commission basis.
 - Statuary deductions were no longer made.
 - She was no longer required to conform to a 5 day work week.
 - She was no longer required to conform to a 10 AM to 6 PM work day.

- She was no longer required to “clock in”.
- Ms. Isaac as a part of her duties, was instructed by the management of the Resort that the therapist were to be “on call” as per bookings made by the guest of the hotel
- Ms. Isaac was further instructed to call the therapist when they were required.

35. In his written submission the representative for Ms. Goodluck raised the question of the Resorts’ control and supervision of his client. He pointed out that she remained accountable for all equipment and tools that she used in the performance of her duties. In the matter of **Pestaina vs Dickenson Bay Management Ltd (Ref No. 9 of 2008)** a matter decided in this court, Pilgrim P (as he was then) commented at Para. 93 of the judgment that, *“Under a contract of service, the worker agrees to serve another. Under a contract for service the worker agrees to provide certain services to another”*. He continued at Para. 229 (a) of the said judgement that *“A contract for service may exist even though a substantial measure of control is evident”*
36. According to the Human Resource Manager’s evidence it should be noted that as a part of the new arrangement Ms. Goodluck was not only invited to operate as an Independent contractor but also to the use of the Hotel’s facilities that obviously included equipment and tools. It would therefore follow that Ms. Goodluck would be expected to be reasonably accountable while using these facilities.
37. In the case of **Pestaina vs Dickenson Bay. No. 9 of 2008**, Pilgrim P at Para. 96 of his judgment said: The learned authors of **Harvey on Industrial Relations and Employment** (2008 Edition) 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”*.
38. Denning L.J. in his dicta in [Stevenson, Jordan & Harrison vs MacDonald & Evans 1992) 1 TLR 101 pointed out that in distinguishing between an employee and an independent contractor *“the test usually applied is whether the employer has the right to control the manner of doing the work. Thus in Collins v Herts Country Council, Mr. Justice Hilbert said: The distinction between a contract for service and a contract of service can be summarized in this way: in one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done”* (emphasis is the Court’s)
39. There was no evidence offered by Ms. Goodluck to indicate that the Resort ever required how the therapist job was or shall be done.

Decision

40. In arriving at a decision in this matter careful consideration was given, *inter alia* to the evidence of all parties concerned and the demeanor on the witnesses concerned. Consideration was given to the relevant sections of the Antigua and Barbuda Labour code, Cap 27 and the Industrial Court Act, Cap 214 and other authorities.
41. The Court is satisfied that Ms. Goodluck's original employment was brought to an end by the letter dated 10th August 2008, issued by the Resort. The letter indicated that her job was made redundant. Further she was paid a severance package. She acknowledged receipt of the package. She did not complain that a redundancy condition did not exist, nor that she was otherwise unfairly dismissed. Indeed if Ms. Goodluck had been concerned at the time, she could have complained of the manner in which her employment was terminated in 2008 because even in a redundancy situation employees must be treated fairly with reasonable notice and such. However there is no evidence that Ms. Goodluck considered the termination of her employment by her then employer in 2008 to be unreasonable. Rather she appears to have been satisfied with the new arrangement that followed. Moreover, the matter before this Court is not whether her termination in 2008 was reasonable or unreasonable but rather whether her new relationship with the Resort thereafter was as an employee and whether the Resort's decision to end their relationship with her in 2011 constitutes unfair dismissal.
42. This Court finds that in December 2008 the Resort made an offer to Ms. Goodluck for her to enter into a new arrangement as an Independent Contractor (Employee for Service) as a Spa Therapist from and after 18th December 2008. We also find that she accepted that offer when she returned to the Resort the day following her termination and continued to work under the new work paradigm as described in Paragraph 34 above.
43. There were several changes made to the working conditions and Ms. Goodluck's obligation as outlined in Paragraph 34 (g) above that would clearly establish that this arrangement was not a continuation of the previous employment. The Resort was free to offer work only when it was available, or not at all. On the other hand Ms. Goodluck was free to accept or refuse the work when it was offered. Under the new arrangement there was no mutuality of obligation between the Resort and Ms. Goodluck (see **Carmichael v National Power plc [1999] UKHL 47**)
44. This Court finds that at the material time (31st December 2011), Ms. Goodluck was not an employee of Service but was an employee for service and therefore an Independent Contractor.
45. We therefore further find that the remedy for unfair dismissal is not available to her since such remedy is only available to an employee. This court has no jurisdiction under

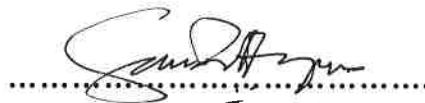
the Industrial Court Act in respect of a dispute between an independent contractor and the person or entity. If there is a remedy available to Ms. Goodluck it is not one attainable in this Court.

46. There shall be no order as to cost.

Dated the 01st day of December, 2017

A handwritten signature in black ink, appearing to read 'St. Lawrence de Freitas', written over a dotted line.

St. Lawrence de Freitas
Chairman

A handwritten signature in black ink, appearing to read 'Samuel Aymer', written over a dotted line.

Samuel Aymer
Member

A handwritten signature in blue ink, appearing to read 'Megan Samuel-Fields', written over a dotted line.

Megan Samuel-Fields
Member

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