

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 49 OF 2014

BETWEEN

D. GISELE ISAAC

Employee

and

BOARD OF EDUCATION

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Samuel R. Aymer

The Hon. Dr Hayden Thomas

President

Member

Member

Appearances:

Mr Justin L. Simon QC of Simon Rogers Murdoch, Attorney-at-Law for the Employee

Dr David Dorsett of Watt, Dorsett & Company, Attorney-at-Law for the Employer

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2015: February 24

2018: September 19

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### JUDGMENT

Brown, P

#### Introduction

1. This is the decision determining the Employer's application filed on January 09 and heard on February 24, 2015 for an order striking out the Reference "on account of want of jurisdiction."

#### Background

2. The Employer is a body corporate established by the Board of Education Act 1994 for the express purposes of executing certain education policies of the Government



of Antigua and Barbuda; raising money required for the execution of those policies; and making provisions for related matters.

3. The Employee was appointed by Cabinet to her position of Executive Secretary by letter dated December 27, 2000, the substantial part of which we reproduce as follows:

“

December 27 2000

Ms Giselle Isaac

....

Dear Ms. Isaac:

Cabinet by its decision dated December 6, 2000, endorsed the Board of Education's recommendation to offer you the position of the Executive Secretary for the Board of Education.

If this is acceptable to you, your appointment will take effect from February 1, 2001.

On receipt of this letter, kindly contact the Chairman of the Board of Education, Mr Wilbur Harrigan, for information pertaining to your salary and the terms and conditions of your contract.

Yours truly,

.....

Dr The Hon. Rodney Williams  
Minister of Education, Culture & Technology

Cc: Mr Wilbur Harrigan  
Chairman, Board of Education”  
**(our emphases)**

4. The Reference commencing these proceedings was filed on October 16, 2014. In it the issues were identified as the “constructive dismissal (of the Employee) on or about 19<sup>th</sup> August, 2014” and “her entitlement to compensation and contractual fringe benefits.”
5. In her Memorandum of Claim the Employee asserted:

“The Employee was never given any document with her specific duties, but had responsibility for administration, staff, and the management of

the Board, subject to the general directions of the Board as provided by section 11 of the (Board of Education) Act.”

6. The Employee’s prayer for relief is formulated as follows:

“The Employee claims compensation and exemplary damages for her constructive dismissal by the Employer, and prays the Court so finds and awards an amount that is fair and just in all the circumstances given the Employee’s tenure, the treatment of the Employee which was politically motivated, and the difficulty faced by the Employee in finding commensurate alternative employment.”

7. By High Court Claim No. ANUHCV 2014/0490 filed on September 11, 2014 the Employee (as claimant) sought declarations against the Attorney General and the Minister of Education (as defendants), including the following:

“1. A declaration that the decision of the Cabinet to suspend the Claimant from her duties as Executive Secretary of the Board of Education:

- (a) Was arbitrary, wrong in law, and without legal basis; and
- (b) Is void and of no effect.

2. A declaration that the 2<sup>nd</sup> Defendant had no legal authority to issue directives or instructions to the Claimant in her role as Executive Secretary of Board of Education.

3. A declaration that the 2<sup>nd</sup> Defendant’s action in instituting an investigation against the Claimant in respect of her duties as Executive Secretary of the Board of Education and for the reasons contained in her letter of suspension dated 18 July, was without legal basis.”

8. A preliminary issue arose in the High Court proceedings as to whether those Proceedings were, in effect, an application for judicial review and therefore required the prior leave of the High Court. The Attorney General and the Minister appealed to the Board of the Privy Council (the Privy Council) against the decision of the Court of Appeal, which confirmed the ruling of the High Court, that no leave was required.
9. In her Judgment given on May 14, 2018 in Privy Council Appeal No.0077 of 2016, Lady Black summarized the “factual background” to the matter before the Privy Council. The following selected excerpts, which we adopt, are instructive:

"2. In 2000, Ms Isaac was appointed to be the Executive Secretary of the Board of Education, which is a statutory body established by the Board of Education Act 1994 ("the Act"). Her appointment was by Cabinet and took effect from 1 February 2001.

3. By a letter dated 18 July 2014 from the Secretary of Cabinet, Ms Isaac was informed that she was suspended from her position for 28 days. Ms Isaac returned to her office on 18 August 2014. She found the locks changed and she was denied entry, apparently on the basis that the suspension was not yet at an end because it was to last for 28 working days.

4. The Board of Education issued a press notice that day about the suspension. Ms Isaac considered herself to have been constructively dismissed ... On 11 September 2014, she filed a fixed date claim form and supporting affidavit, the respondents to the claim being the Attorney General, as the nominal representative of Cabinet, and the Minister of Education...

5. By the claim, Ms Isaac ... asserts that the reason for her suspension related to her having declined to follow a directive and a request from the Minister whereas, she says, the Act does not provide for the Minister to exercise any authority over her. In addition, she says that in the absence of a report from the Board of Education, the Minister could not institute the investigation that he did... "

...

10. In outlining the scope of the appeal, at paragraphs 10, 11 and 12 of her judgment, Lady Black stated :

"10. The two issues identified by the parties for the determination of the Board are as follows:

- (i) Whether the fixed date claim filed by Ms Isaac was an application for judicial review?
- (ii) Whether the nature of the controversy disclosed in Ms Isaac's claim was a private law claim involving an employment dispute, for which the appropriate forum was the Industrial Court, notwithstanding that Ms Isaac was employed by a public authority?

11. The second of the two issues has no doubt been formulated with an eye to the request made by the Board (of the Privy Council), when granting permission to appeal, that it be addressed on the nature of Ms

Isaac's employment and whether her claim should properly be regarded as a private law claim for wrongful or unfair dismissal which should be transferred to the Industrial Court for determination. However, as will be seen, in advancing their appeal to the Board, the appellants themselves rely upon what they say is the private nature of the dispute, falling within the remit of the Industrial Court, rather than the High Court...

12. It is undesirable that the Board (of the Privy Council) should become too involved with this second issue at this stage. There are, in fact, ongoing proceedings in the Industrial Court,... The Board of Education applied to have the Reference struck out on the basis that it was not the respondent's employer and that she was employed by Cabinet..."

11. By an application filed on December 5, 2014 in this Reference (before the Employer's application to strike out) the Employee applied for "an interim payment in respect of vacation pay due, and her Thrift Fund entitlement from the Employer..."
12. At the hearing of the application for interim payment, Dr Dorsett, Counsel for the Employer, acknowledged that that application raised matters of contractual obligation which were not denied. Further, in compliance with the Court's directive, the Employer paid the Employee's entitlement to a portion of its Thrift Fund and gave its undertaking, through Counsel, "to pay to the Employee a sum equivalent to 38 days' vacation by Thursday 26<sup>th</sup> February, 2015." That undertaking was dated and filed on February 25, 2015. That amount was paid in full by the Employer in accordance with the undertaking.

### The Application to strike out

13. The grounds of the application to strike out this Reference are stated as follows:

- "1. The jurisdiction of the Industrial Court is limited by section 7 of the Industrial Court Act.
2. The Board of Education is not the employer of the party who has brought the instant Reference.
3. The instant Reference constitutes an abuse of the process of the court."

14. The Application was filed with a short supporting affidavit sworn by Leslie-Ann Yearwood, Chairman of the Employer. In it, she underscored grounds 1 and 2 stating that, in the Employer's view, the instant Reference did not qualify under the said section 7 of the Industrial Court Act.

Ground 1: The Jurisdiction of the Court

15. In his submissions, filed on February 17, 2015, Dr Dorsett correctly stated that the Court's jurisdiction is circumscribed by Section 7 (1) of the Industrial Court Act. He then submitted that the "only relevant limb under which the Reference may have been brought is 7 (1) (a) of the Industrial Court Act" which establishes the Court's jurisdiction to deal with trade disputes.
16. In his opposing submissions filed on February 15, 2015, Mr Simon QC, relied on the leading landmark judgment of the Court of Appeal in **Suit No. 21 of 1993: Universal Caribbean Establishment v James Harrison**, which arose from the decision of this Court. That judgment marked a watershed as it effectively reversed 2 earlier decisions of the High Court and contradicted obiter expressions in another case in the Court of Appeal.
17. In that judgment, notwithstanding the amorphous nature of the Industrial Court Act, the learned Chief Justice masterfully construed it "on the basis of its internal language". In the end, he concluded that this Court has jurisdiction to hear complaints of unfair dismissal in cases other than those involving trade disputes. That position is now well settled to the extent that, since its delivery in 1997, that judgment has always been the lodestar to this Court whenever its jurisdiction is challenged.
18. In the circumstances, we agree unreservedly with Mr Simon's submission that ground 1 of the Employer's application has no legal basis. We hasten to add that, Dr Dorsett conceded this ground of the application as common ground emerged that this Reference does not involve a trade dispute.
19. For completeness, we repeat the words of the learned Chief Justice that complaints by an individual employee "gives effect to the concept of access (to the Court) to enforce individual rights to protect the workers equity in his employment which the Labour Code introduced."
20. In the final analysis, it should be noted that this Court has been adjudicating individual unfair dismissal cases, not involving trade disputes, for over 4 decades. As a result, as noted by the learned Chief Justice since 1997, "The

Industrial Court adjudicates the largest cluster of legal rights for which redress is most vigorously pursued before any court in Antigua and Barbuda.” In the circumstances, subject to our consideration of the grounds 2 and 3, we embrace this Reference as it falls squarely within that cluster.

21. In passing, we note that the Reference herein utilized the obsolete opening phrase under the 1976 Rules “In accordance with the provisions of Section 19 of the Industrial Court Act...”. The correct term as prescribed in the 2015 Rules is: “the Court is asked to exercise its jurisdiction under Section 7(1) (c) of the Industrial Court Act.” However, that error in the heading is not fatal to the Reference.

#### Ground 2: Who is the Employee’s employer?

22. As we understand it, ground 2 is the nub of the Employer’s application. In that regard, Dr Dorsett submits that **“The Board was not vested with the power to appoint the Former Executive Secretary to her office. The Board is not vested with the power to dismiss her from office. The Board having neither the power to hire or fire the former Executive Secretary – with neither the power to appoint or disappoint the former Executive Secretary – cannot be said to be her employer.”**
23. In answer, Mr Simon QC submits that **“The Employee maintains that she was employed by the Board of Education, a statutory corporation created by the Board of Education Act, 1994 [No 11 of 1994], notwithstanding the fact that she was not appointed by the Board to her former position of Executive Secretary”**
24. Our approach to resolving this ground starts with a reminder to ourselves about the historical devolution of public corporations. Secondly, we will carefully consider the provisions of the Board of Education Act 1994. In particular, we will set out our understanding of the general roles of the Cabinet, the Board and the Employee respectively. Thirdly, we will consider the evidence before us to better understand the actual circumstances under which the Employee performed her duties. And fourthly, we will consider selected relevant case law.

#### The Devolution of Powers to Public Corporations

25. Our understanding of one of the bases for the establishment of public corporations, such as the Employer, is that they were required to facilitate the

process of devolution under the Westminster system of government as practised in Commonwealth countries, including Antigua and Barbuda. The process is well grounded on sound fundamental principles with the result that certain responsibilities, functions, duties and powers of the central government devolved to certain statutory corporations.

26. Our stated understanding is consistent with Black's Law Dictionary, 10<sup>th</sup> Ed, which defines devolution in the following terms at page 548:

"Devolution...1. The act or an instance of transferring one's rights, duties, or powers to another, as when a national government gives power to a group or organization at a lower or more local level.."

27. For clarity, we distinguish the process of devolution from deconcentration. In instances of the latter, aspects of the authority of the central government are divided up and transferred to smaller units while the respective ministries of central government retain overall authoritative control on a day to day basis.

28. In instances of devolution, the whole of the authority of central government is transferred undivided to the autonomous public corporation while the government deliberately limits its role to the provision of broad policies and the assessment of the efficacy of their implementation. To the desired end, the central government would take a hands-off approach and carry out its assessments on the basis of annual or other periodic reports.

29. One of the inherent pillars of the devolution process is that the locus of decision- making in relation to a particular type of activity is placed at or as near as possible to the locus of the day-to-day discharge of the functions and operations of the public corporation.

30. In the premises, unless convinced to the contrary by express provisions of the Board of Education Act, we would be inclined to the view that certain responsibilities, functions, duties and powers of the national government in relation to education devolved to the Employer as a body corporate.

#### The Board of Education Act

31. Firstly, we note that the preamble states the purpose of the Act as follows:

"An act to establish a Board of Education for the execution of certain education policies of the Government provided in the Act; to raise moneys

required for the execution of such policies and to make provisions for other matters connected therewith.” **(our emphasis)**

32. Secondly, we note the provisions of Section 3 as to the Establishment of the Board:

“3 (1) For the purposes of this Act there is established a Board to be known as the Board of Education in which the Funds established under this Act shall be vested and which shall subject to the provisions of this Act be responsible for administering the Fund.

(2) The Board shall be a body corporate with perpetual succession and common seal and shall, in its corporate name, be capable of suing and being sued, and subject to the provisions of this Act, of purchasing or otherwise acquiring, holding, charging and alienating real or personal property and of doing or performing such acts as bodies corporate may by law do or perform.

(3) The seal of the Board shall be kept in the custody of the Executive Secretary and shall not be affixed to any instrument except by authority of a resolution of the Board, and sealing of any instrument shall be authenticated by the signature of the chairman and of such other person as the Board may appoint for the purpose.” **(our emphases).**

33. Some of the powers of the Cabinet and the Minister in relation to the Board are prescribed by Section 4:

“4 (1) The Board shall consist of such number of persons, not being less than seven, as the Cabinet may from time to time determine.

(2) The members of the Board shall, subject to the approval of the Cabinet, be appointed by the Minister by instrument in writing and shall hold office for a period of three years.

(3) The Minister shall appoint one of the members of the Board to be chairman and another to be deputy chairman.

(4) If the chairman, deputy chairman or any other member is unable to act, the Minister may appoint any person to act in the place of such chairman, deputy chairman or other member.”

**(our emphases)**

34. Further, under section 11 of the Act, Cabinet is empowered to appoint the Executive Secretary. In addition, that section together with section 12 provides for her functions as follows:

11. " (1) There shall be an Executive Secretary of the Board who shall be appointed by the Cabinet.

(2) The Executive Secretary shall be the Chief Administrative Officer of the Board and shall, subject to the provisions of this Act and the general directions of the Board, be responsible for the direction of the staff and for the management of the Board."

12. (1) The Executive Secretary may from time to time, acting upon the advice of the Board, appoint persons to be officers and employees of the Board"

**(our emphases)**

35. In accordance with our emphases above and upon reading other relevant sections of the Act, we summarize our understanding of the more instructive statutory functions of the Minister, Cabinet, the Board and the Executive Secretary respectively, as follows:

The Functions of the Minister, subject to Cabinet's approval, are to:

- Appoint members of the Board
- Appoint the Chairman and Deputy Chairman
- Forward government policies to the Board in respect of:
  - the priorities for utilizing the Fund
  - areas of studies and training for the award of bursaries ...
- Guidelines for the textbook scheme
- Directions on any other matters
- Prescribe the terms and conditions of employment of officers and employees. [section 12 (2)]

The Functions of Cabinet are to:

- Formulate the education policies of the government
- Designate the members of the Board
- Approve the appointments of members of the Board:
- Appoint the Executive Secretary: [section 11 (1)]

- suspend or dismiss the Executive Secretary (Interpretation Act)

The Functions of the Board are to:

- Execute the government's Education policies
- Raise monies for the execution of the government's policies
- Make provisions for related matters
- Administer the Fund. [sections 3 (1) and 22 (1)]
- Purchase, acquire and hold property
- Perform acts consistent with its existence as a body corporate
- Convene meetings at least once per month
- Keep minutes of meetings. [section 7 (1)]
- Prepare comprehensive annual reports. [section 10 (1)]
- Prepare estimates of available resources in Fund for expenditure in the financial year.

The Functions of the Executive Secretary are to:

- Execute duties as Chief Administrative Officer
- Take the directions of the Board
- Manage the staff
- Appoint officers or employees of the Board, acting on the advice of the Board. [section 12 (1)]

36. We agree with Learned Queen's Counsel's characterization of Cabinet as "an amorphous body". We accept that Cabinet, being comprised of ministers appointed by the Prime Minister from time to time, has no legal personality per se. As established under the Constitution of Antigua and Barbuda, Cabinet is responsible for the "general direction and control of the Government".
37. In addition to the provisions of sections 70 to 73, we have also noted section 69 (3) of the Constitution. We are satisfied that, unless the Act or any other law provides for specific functions of the Minister in relation to the Board, his role is limited to being a member of Cabinet and thereby participating in the "general direction and control of the Government".
38. In our opinion, apart from the power of the Minister to appoint, suspend and dismiss the Employee, his functions and those of Cabinet are largely limited in scope to those identified and summarized in paragraph 35 above.
39. Accordingly, subject to our consideration of the evidence and selected case law below, we are inclined to agree with Mr Simon's submission that,

notwithstanding its statutory power to appoint, suspend and dismiss the Employee to and from her position of Executive Secretary, the Board of Education Act did not render Cabinet to be her employer.

#### The Documentary Evidence

40. The letter of appointment dated December 27, 2000, signed by the Minister of Education and reproduced at paragraph 3 above, is instructive for at least 2 reasons: Firstly, it shows that the decision to appoint the Employee was based on the "recommendation" of the Board which Cabinet "endorsed".
41. Secondly, the letter of appointment directs the Employee to contact the Chairman of the Board "for information pertaining to your salary and the terms and conditions of your contract."
42. In the circumstances, as we understand the letter of appointment, Cabinet had subjected itself to the recommendation of the Board and never hinted at any exclusive right to determine the Employee's salary and / or the other terms and conditions of her employment contract. All such matters were clearly left to the Board's discretion.
43. At first blush and by logical extension of the letter of appointment, we would reckon that matters regarding the suspension and dismissal of the Employee and /or any variation to the terms and conditions of her employment would reasonably require some input or recommendation from and /or consultation with the Board. We emphasize that this is our understanding at first blush.
44. The foregoing conclusion, based on the documentary evidence and inferences therefrom, is consistent with the Employee's position and serves to further incline us towards the conclusion that the Board was her employer.

#### The Chairman's Testimony

45. The uncontroverted testimony of the Chairman of the Board, given at the hearing on February 24, 2015 tends to support the Employee's case. It is important to note that prior to her appointment as Chairman of the Board with effect from July 29, 2015, she had been previously employed by the Board for 14 years between 1997 and 2011 as its Financial Administrator. As a result, we consider her evidence to be weighty.
46. The Chairman's sworn testimony under cross examination provided specific answers to the effect that:

- The Employee's salary was paid by the Board;
- The Board established a Thrift Fund for the benefit of its employees including the Employee;
- The employer's contribution to the Thrift Fund in respect of the Employee was paid by the Board;
- Statutory salary deductions for payments of Medical Benefits, Social Security and Education Levy contributions on behalf of the Employee were made by the Board;
- Statutory contributions payable by the employer of the Employee were paid by the Board;
- The Board received no monies from the Cabinet in respect of the amounts that were required to be paid on behalf of the Employee;
- The Employee's vacation was determined by mutual agreement between the Board and the Employee;
- No representative of Cabinet attend the meetings of the Board;
- The Employee reported to the Board in respect of the performance of her duties;
- The Board directed and instructed the Employee in the performance of her duties;
- The performance of the duties of the Employee fell under the scrutiny of the Board;
- The Executive Secretary could have been called to report to Cabinet;
- The Executive Secretary did not ordinarily report to Cabinet on a day to day basis;
- There is a provision in the Act which required an annual report to be prepared and submitted to the Minister;
- Apart from the annual report, there were no other reports to the Minister.
- Any report in respect of the performance of the duties of the Employee would have been prepared by the Board;
- As at the date when the Employee was suspended the Board under her chairmanship had not yet met.

47. As assessed by us, the cogency and weight of the Chairman's oral testimony render it supportive of the Employee's position that she was employed by the Board. Further, we note that the Employee's application for an interim payment resulted in the payment of the Employee's undisputed portion of the Thrift Fund, which payment was effected on the instructions of the Employer. Moreover, it is also noteworthy that pursuant to the Employee's application, the Employer made a payment to the Employee in lieu of her accrued vacation. All of the foregoing evidence point to a resolution of this issue in favour of the Employee. However, we will refrain from making our final determination until after consideration of the case law which follows.

## Case Law

48. As to case law, we considered the 2001 judgment of the UK Court of Appeal in **Montgomery v Johnson Underwood Ltd and another [2001] ICR 819**. In that case, the employee entered into a contract with an employment agency for her to do work for a company. In the contract between them, the agency reserved the right to terminate the employee's services. After the company became dissatisfied with the employee's performance, she was dismissed by the agency at the request of the company.
49. At the hearing of the complaint of unfair dismissal, notwithstanding the agency's contractual right to terminate the employee's services, the industrial tribunal made a clear finding of fact that the agency lacked "sufficient control" to be the employer. However, taking into consideration other relevant factors, the tribunal found that the agency was the employer.
50. The appeal of the agency against the decision of the tribunal was allowed by the Court of Appeal which reasoned that "mutuality of obligation and the requirement of control" constituted the "irreducible minimum" requirement for the existence of a contract of employment. And since the agency had little or no control over the employee, a part of the irreducible minimum, in the form of sufficient control was absent. As a result, the employee was not an employee of the agency.
51. Given the outcome of that appeal, we bear in mind Mr Simon's reliance on the assertion in Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 16 at paragraph 502 that "...a person may be the employee of another even if a third party has the power of appointing or dismissing him, or of requiring his dismissal, ..." That assertion is consistent with the above decision of the Court of Appeal.
52. When we apply the underlying principles from the Montgomery case to the instant Reference, the determining question becomes: was there in existence the required "irreducible minimum" of sufficient control and mutuality of obligation as between the Employee and the Board, on the one hand, or the Employee and Cabinet on the other hand?
53. We will answer that question, directly or indirectly below but before doing so we are of the opinion that it will be useful to also consider the 2007 judgment in the West Indian (Barbados) case of **Sagicor Insurance Co. v Carter and others 71 WIR 74**.

54. In that **Sagicor case**, Sir David Simmons CJ delivered the judgment of the High Court of Barbados in which it considered the principal issue of whether the respondents were engaged under contracts of service or contracts for services. He considered several tests judicially formulated over time to determine that issue.
55. The learned Chief Justice first considered the “control test” which is to the effect that a worker is an employee if the employer “can control or has the right to control not only what the worker does but also the manner in which he does it”. After considering that test, he concluded at paragraph 8 of his judgment that although that test is still of importance, it is no longer decisive in itself.
56. In the instant case, on the application of the control test, the question for us is: Whether the Cabinet or the Board had the requisite control over the Employee?
57. According to Simmons CJ at para. 9 of his judgment, the limitations of the control test led to the development of the “organization/integration test”. Under that test, if satisfied “... a man is employed as part of a business, and his work is done as an integral part of the business,...”
58. Under this test, the pertinent question is: Whether the Employee was employed as part of the business of Cabinet or the business of the Board?
59. Having noted that the “organization/integration test” ...like the control test, may still be of relevance in some cases”, Simmons CJ also considered the “economic reality test” and noted at para 13 that “the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties”.
60. In terms of the “economic reality test”, the question is: Whether the Employee was in business on the account of the Board or on the account of Cabinet? In that regard, the crucial question becomes: whose business was it, that of Cabinet or the Board?
61. Simmons CJ also referred to the “mutuality of obligations test”, which considers whether the employer had a continuing obligation to provide work for the employee and whether there was a continuing obligation on the part of the employee to do the work provided.

62. Did the Cabinet or the Board have a continuing obligation to provide work for the Employee? And, was the Employee obliged to do work provided by the Board or work provided by Cabinet?
63. In advancing our analysis, we respectfully adapt the Chief Justice's approach to the issue before him as stated at paras. 38 and 39 of his judgment. Accordingly, a proper comprehensive approach to the issue before this Court requires a thorough consideration of all aspects of the Employee's employment. What are our conclusions based on the relevant provisions of the Act set out above? What is the effect of the letter of appointment? Was there a nexus or stronger nexus between the Employee and the Board or between the Employee and Cabinet during the course of performance of her duties?
64. Bearing in mind that many factors or features may be pertinent, we remind ourselves that "no single one of them is likely to be decisive in itself". We are mindful of the "underlying principles in our approach to the question" before us: "The first is that the issue must be judged in the context in which the question arises". Secondly, we must identify the relevant factors and carry out a balancing exercise to evaluate the weight of each one. Finally, subject to the evidence before us and the various weights or directions of the foregoing individual factors, the determination will be made whether the Board or Cabinet was the employer of the Employee.
65. In the premises, as we understand it, the question as to who is the employer of the Employee is necessarily a mixed question of fact and law. Apart from the Act we also considered the principles established by the cases considered, the manner in which the Employee commenced her employment and the factual circumstances under which she discharged her duties. Having identified the competing factors, carried out a balancing exercise, and considered the submissions of Counsel, we have come to the following conclusion.

### Conclusion

66. In the context of the devolution process, it is our opinion that the responsibilities, functions, duties and powers of the national government devolved to the Board of Education. Upon perusal of the relevant statutory provisions, we are fortified in holding that opinion.
67. From the perspective of the statutory provisions, we agree with the Employee's position that apart from the statutory power to appoint, suspend and dismiss her, Cabinet had no statutory functions in relation to the

Employee in the daily performance of her duties as Executive Secretary of the Employer.

68. Although we accept Dr Dorsett's assertion that the law has moved on since the early days when the control test prevailed, we emphasize that none of the several tests for the existence of a contract of service has become obsolete. They all remain very relevant. Although no single test is decisive, the underlying principles are most useful when applied in addition to the provisions of the Act and the evidence before us. As a result, we are of the opinion that, as a matter of fact, Cabinet exercised no control over the Employee in the day-to-day performance of her duties.
69. In our analysis, we ask the question: Whose business was being carried out by the Employee? Was it the business of the Board or the business of Cabinet? In our analysis of all the relevant factors, we arrived at the simple answer: It is our considered opinion that it was the business of the Board.
70. Further, from a different perspective, we formed the opinion that there were continuing obligations on the part of the Employee, on the one hand, to do the work provided by the Board. On the other hand, there was a corresponding obligation on the Board to provide work for the Employee. Notwithstanding its statutory power to appoint and dismiss, we found no continuing obligations on or to Cabinet.
71. In the circumstances, the "irreducible minimum" requirement was met in terms of mutuality of obligations between the parties and the sufficiency of control by the Board. From this angle as well, we find that there was a contract of service between the Employee and the Board. By logical extension, we find that there was no contract of service between the Employee and Cabinet.
72. In the final analysis, we find Mr Simon's submissions, jointly and severally, more persuasive than those of Dr Dorsett. As a result, for the reasons stated above, we reiterate our opinion that the Employee was an employee of the Board although Cabinet had the statutory power to appoint and dismiss her.
73. In the premises, the application fails on grounds 1 and 2, as a result of which, the third ground falls away. Needless to say in closing, we are of the firm opinion that this Court has jurisdiction to hear and determine this Reference.
74. And we order that:
  - (1) the Employer's application be and is hereby dismissed.

(2) This Reference do proceed in accordance with the Industrial Court Procedure Rules 2015 with time beginning to run afresh from the date of delivery of this decision.

75. We make no order for costs at this time. Subject to any agreement between Counsel, we will give that matter our further consideration, if necessary, at the trial.

Dated the 19<sup>th</sup> day of September, 2018



.....  
**Hon. Charlesworth O.D. Brown**  
**President**



.....  
**Hon. Samuel R. Aymer**  
**Member**



.....  
**Hon. Dr. Hayden Thomas**  
**Member**



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