

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 51 of 2015

BETWEEN:

RUTH JOHN

Employee

And

THOMAS, JOHN and COMPANY

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Dr Hayden Thomas

Member

The Hon Judith Dublin

Member

Appearances:

Mr Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation,
Representative for the Employee

Mr Loy L. A Weste and Mrs Lisa Weste of Thomas, John & Co., Attorneys-at-Law for
the Employer

2016: November 16

2018: August 8

JUDGMENT

AYMER, C:

Background

1. By Reference dated 17th September 2015, the Employee Ms Ruth John (hereinafter referred to as Ruth John or the Employee) who resides at Hatton in St. Johns, Antigua, filed a complaint with the Court, that she was unfairly dismissed by her Employer, Messrs Thomas, John and Company (hereinafter referred to as the Employer) and was entitled to compensation.
2. Messrs Thomas, John and Company is a firm of Attorneys with Law Chambers on Lower Factory Road, St. Johns, Antigua.



Procedure

3. The Employee filed her Employee's Memorandum on 16th November 2015. In her Memorandum she submits that she was unfairly dismissed "having regard to the employment contract, the Labour Code, Judicial precedents, good industrial relations and the Industrial Court Act".
4. The Employer filed its Memorandum on 7th December 2015. In its Memorandum, it claimed that the Employee was contracted by the Employer to provide cleaning services at their Law Offices in the evenings, after the office is closed for business, as an independent contractor. In effect, the Employer contended that the arrangement between itself and the Employee was that of a **contract for services** and not a **contract of service**.

The Evidence

5. In her Employee's Witness Statement, filed on 19th January 2016, Ms John states that she was employed by the Employer in June, 2016 as a cleaner and worked "part-time hours on a daily basis". "I was paid a weekly wage of \$250 for working three hours daily over five days each week". She stated further: "My employer did not issue me with a written statement of employment at any time during the term of employment".
6. Still further in her Witness Statement, the Employee stated that: "On April 7th, 2015 whilst I was carrying out my duties at the law firm, Mr John called me into his office and told me that they (he and Mrs John) were going on vacation for six weeks and the lady that he entrusted to ensure that I was paid my wages - whenever they go on vacation - was sick and so he was paying me four weeks wages (or \$1000), to take up to the anticipated date of my maternity leave". At the end of that meeting, the Employee stated that she was asked to hand over the keys to the office. After that, she never provided any further cleaning services.
7. The Employee relates in her Witness Statement that on Tuesday July 28th, 2015, a meeting was arranged at which time she was informed by the Employer, that her employment was terminated from the Firm. Further she was not issued with a letter of termination.
8. Under cross examination the Employee agreed that there were no set hours for her cleaning which could start any time after four 4 pm. The duration of her cleaning was sometimes 3 hours "more or less" and that there were occasions when if the cleaning did not take place in the evening, she would clean the office in the early morning. She agreed that at times her daughter would assist with the cleaning duties. She further agreed under cross examination, that during her pregnancy and absences arising out of at least two visits to Dominica that

the cleaning of the office continued during her absence, by persons she assigned to do the cleaning.

9. The Employee admitted that in addition, she received assistance from her sister to clean the office, and she also received help from her "companion" and from someone called Wills, who would vacuum, wipe the tables and "help me in general". While still under cross examination, the Employee admitted to a number of other persons, including family and close friends who had helped her at various times with the cleaning of the office. And she agreed that whoever and however the office got cleaned, provided that the cleaning was satisfactory, the Employee still got the \$250 which was sometimes collected by Ralsia or Wills. And when asked if any deductions were made from the payments for the cleaning services, she replied "No I got the full amount".
10. Evidence for the Employer was given by Kelvin John and Arthur Thomas Attorneys-at-Law, in the Law firm of the Employer, and by Mrs Honora John, the Office Manager of the aforesaid Firm.
11. The joint evidence of the Law Partners was that the Employee was contracted as an independent contractor to provide cleaning services at the Law Office in the evenings after the Office had been closed to the public. There were no set times for her to clean. According to the Employer's Witness Statements, and contrary to what was alleged in the Employee's Memorandum, the Employee was not "employed to work part-time hours".
12. The Office was closed to the public at 4.30pm and a Security Guard would then arrive on the premises and remain until 11.00pm. The Employee or her workers would "spend no more than 1.5 hours, sometimes 2 hours, cleaning the Office. There was no set time as such for the cleaning services, and these were done any time in the evening, or even in the early morning before the office was open to the staff and the public. And for this service, the Employee was "simply paid a contractual sum of \$250.00 per week".
13. The Employer further submitted that, since the Employee was contracted as an independent contractor, there was no legal requirement for the Employer to furnish her with any written statement of employment at or during the term of her employment. Moreover the terms of the contractual arrangement were clearly set out between the parties from the initial discussion with the Employer at the inception of the contract on or around June, 2006 and there was never any issue or dispute regarding the said contractual terms.
14. The Employer stated further that from the inception of the contract, the Employee "hardly ever completed or undertook the cleaning services herself", as several different persons were directed by the Employee (solely), to complete the cleaning services. A list of some of these persons included Officer Telemacque, Mr Wills, another male companion, the Employee's eldest

daughter, the Employee's sister and cousins and several female friends and other miscellaneous persons. Furthermore, the cleaning continued even when she was absent out of State. This evidence was largely uncontroverted under cross examination.

15. The evidence of Mrs Honora John largely corroborated that given by the Employer.

The Law

16. 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".

17. The Antigua and Barbuda Labour Code, Section A 5 states, *inter alia*: **"In this Code unless the context otherwise requires, or the particular Division otherwise specifies:**

Employee means any person who enters into or works under, a contract with an employer, personally to provide any services or labour, whether the contract be oral or written, expressed or implied....."

Matters to be Determined

18. The matters to be determined are:

- a. Whether the arrangement between the Employer and the Employee was for a **contract of service** within the meaning of the Act or a **contract for services**.
- b. If the Employee was unfairly dismissed, what compensation should be paid to her, if any?

Employee's Submissions

19. Representative for the Employee, Mr Anderson Carty, made brief oral submissions. He submitted that a relationship existed between the parties and one about which there "may have been some doubt". He argued that while a verbal agreement can be valid, because of the nature of the agreement in this case, a written agreement would have been preferable.

20. The Employee's Representative submitted further, that the Employee was not in business for herself and that she entered the relationship as an employee with a contract of service; that she was never given an employment contract. He alluded to her modest level of education and suggested that she depended on "this man of the law to explain the issues to her". Consequently, taking these into account, the Court should find in her favour.

Employer's Submission

21. Attorney for the Employer, Mr Loy Weste, submitted that the question to be decided is whether Ms John was an independent contractor or an employee as defined by Statute, and in this regard invited the Court to examine the questions of **control, independence and the manner of remuneration**. The Employee did not have a fixed time for work and that the uncontroverted evidence is that she did not always clean the office herself but had other persons do the cleaning on her behalf from time to time.
22. The Employer, the Attorney continues, gave evidence that it did not exercise control over who Ms John employed to clean the office. Ms John was paid at the end of the week, provided that the office was cleaned, irrespective of who cleaned the office and irrespective of how many persons cleaned the office. Moreover, she was paid the entire sum of \$250 per week at all times, provided that the office was cleaned; and that Ms John was acting as a person in business on her own account and was therefore not an employee.
23. In support of its submission the Employer cited a number of cases consonant with the instant case. Among these was one decided in this Court in **Pestaina v Dickenson Bay Management Ltd. (Ref. No. 9 of 2008)** where Pilgrim P as he then was, held as follows:

*"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. the 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 this question is 'yes' then the contract is a contract for services".*

*"In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. A **contract for services may exist even though a substantial measure of control is evident**".*

*Webster J, in the case **WHPT Housing Association Ltd. V Secretary for Social Services [1981] ICR**, opined that "the difference between contract of service and one for services must reside essentially in the terms of the principal obligation agreed to be undertaken by the employee". He said ..."(It) seems to me that the principal obligation is not to provide himself to serve the employer but his services for use of the employer."*

"The distinction between the contract of service and the contract for services has been deemed to be one of fact, not law."

Analysis of the Facts and the Law.

24. The abundance of the evidence adduced in court suggests that Ms John was employed as a labour-only subcontractor. The Court took notice of the sporadic attempts to co-mingle her employment with Thomas, John and Company with that of her employment, as a domestic worker, with the family of Kelvin and Honora John at their private home. However the Court regarded these as two discrete contractual arrangements.
25. Moreover these attempts resulted, unfortunately, in presenting the Employee, through her conflicting evidence, as a vacillating and unreliable witness and simply untruthful at times.
26. In his Book: *The Law of Unfair dismissal*, Steven D Anderman states *inter alia*,
"Whether a contract is one of employment as opposed to one for services must be decided with resort to a fairly extended body of case law expounding several different tests, including the extent to which the manner of work is under the control of the employer, whether the work is an integral part of the business or merely accessory to it, or whether there is an entrepreneurial element in the relationship".
Anderman's statement is consistent with the dictum of **Pilgrim P**, in the **Pestaina Case** mentioned at paragraph 23 above. We will now examine the various elements set out as determinants to deciding the nature of the contract between the Employee and the Employer in this matter.
27. **The degree of control.** Based on the evidence provided to the Court, it is largely uncontroverted that Ms John was contracted to provide cleaning services to the Employer at its Law Office after working hours. There were no set times for her to clean. The arrangements were very fluid. The Employer claimed that Ms John would spend no more than "1.5 sometimes 2 hours, cleaning the office". The Employee in her evidence stated that she would spend "sometimes 3 hours more or less". The Employee also admitted that sometimes she cleaned the office in the early morning if the cleaning could not take place in the evening.
28. The Employee agreed under cross examination that during periods of illnesses or absences from the State, she arranged for the office to be cleaned by other persons. These persons included, among others, her daughter, her sister, one Sabrina Magloire and various male "companions": a person known as Wills who "would help me clean sometimes and would do the vacuuming and wipe the tables and would help me in general".
29. In all of this, the Employer did not specify how the work was to be undertaken and who would actually carry out the work. To her credit the

Employee stated that as she added others to assist with the cleaning she always introduced them to the Employer initially. However the work was done and by whom, provided the work was satisfactorily completed, the Employee received her \$250.00 per week.

30. **Independence.** From the account given in paragraphs 27 to 29 above, there was significant latitude provided to the Employee with very little detailed control as to how the Employer carried out her cleaning duties, save and except that the offices should be properly cleaned in preparation for the next working day's activity at the Employer's Law Offices.
31. **Manner of remuneration.** The Employee confirmed, in giving her evidence that no statutory deductions were made by the Employer from her pay of \$250.00. On some occasions her pay was collected on her behalf by Ralsia or Mr. Wills. In effect therefore, payment of such statutory deductions was the responsibility of the Employee. And this is consistent with the obligation of an independent contractor.

Decision

32. We are satisfied that this matter has to do with the employment relationship between Ruth John and Thomas, John and Co and were not minded to allow a co-mingling between this contract and one for the Employment between Ruth John and Kelvin and Honora John. We determined that these were two discrete arrangements.
33. Accordingly we are satisfied that the Employee was engaged to provide cleaning services to the Law Firm of the Employer in a manner which provided her with significant latitude for providing her services in an entrepreneurial way, either by herself or through the services of others within her control.
34. Provided the work was done to the satisfaction of the Employer, whether in 1.5 or three hours, whether in the evening or at times in the early morning, the Employee was paid the agreed fixed amount of \$250.00 per week without any statutory deductions. There was very little control by the Employer and correspondingly a great deal of independence was exercised by the Employee as to how the work was executed. Finally the manner of payment had all the hallmarks of payments to an independent contractor.
35. In arriving at a decision in this matter careful consideration has been given to the evidence of all the parties and the demeanour of the witnesses concerned. Consideration, too, has been given to the Antigua and Barbuda Labour Code Cap 27, and to the Industrial Court Act, Cap 214 and other authorities including settled cases.

36. We find that at all material times Ms Ruth John was not an employee of service but was an employee for services and therefore an independent contractor.
37. We therefore 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 another person or entity. The Reference is therefore dismissed.
38. There shall be no order as to costs.

Dated the 8th day of August 2018



Samuel R. Aymer
Chairman



Dr. Hayden Thomas
Member



Judith Dublin
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 51 OF 2015

BETWEEN:

RUTH JOHN

Employee

And

THOMAS, JOHN and COMPANY

Employer

JUDGMENT

Hon. Samuel Aymer, Chairman
Hon. Dr. Hayden Thomas, Member
Hon. Judith Dublin, Member