

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.44 OF 2014

BETWEEN

RONDELL STEWART

Employee

And

COCO'S HOTEL AND RESTAURANT

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Samuel A. James of Antigua & Barbuda Free Trade Union, Representative for the Employee

Mrs. Andrea Roberts-Nicholas of Roberts & Co., Attorney-at-Law for the Employer

2016: October 13

2019: July 05

JUDGMENT

Brown, P;

Background

1. The Employer, named in this Reference by its trade name Cocos Hotel & Restaurant, is Caribbean International Resorts Services Limited a company incorporated in Antigua & Barbuda. Its sole director and shareholder is Mr. Andrew Michelin.

2. The Employee was first engaged by the Employer in July 2010 as a Painter/Maintenance worker. He earned \$700.00 per week for his services which he provided up on or about 13th May, 2013.
3. During the period of the Employee's engagement the Employer made statutory contributions from his wages and paid them to the Antigua & Barbuda Social Security Board from 31st July, 2010 to 30th June, 2013. During that period the Employee received weekly pay slips itemizing his gross pay, as well as statutory deductions for Social Security, Medical Benefits and Education Levy.
4. On 18th April, 2013 the Employee fell ill at work and was hospitalized for 2 days after which he was placed on certified sick leave for 2 weeks or 10 work days. The Employer paid the Employee for 7 of the 10 days for which he was on certified sick leave.
5. Being dissatisfied with the Employer's decision to limit payment to 7 of the 10 days while he was on sick leave. The Employee made enquiries at the Social Security Office and the Labour Department in the Ministry of Labour about his entitlements but the dispute remained unresolved.
6. After the period of certified sick leave the Employee returned to work on 13th May, 2013 and was told that there was no work for him to do. Subsequently, the Employee made several attempts to obtain a written statement regarding his employment status but the Employer failed or refused to respond to his requests.
7. The Employee commenced these proceedings by his Reference filed on 22nd September, 2014 in which he identified the main issue to be whether he was unfairly dismissed.

The Memoranda

8. In his Memorandum of Claim the Employee set out the chronological background to his claim. In particular, at paragraphs 14 and 15, he averred:

"14. It is clear that the action taken by the Employer runs contrary to Law and appears to have been taken in response to the Employee going to the Social Security Scheme and the Labour Department.

15. We believe that the Employee's right not to be unfairly dismissed was infringed"
9. In its Memorandum of Defence, the Employer asserted that the Employee was not an employee at the hotel. Paragraph 12 reads:

“12. In looking at the totality of the circumstances, it is clear that Rondell Stewart and the Hotel did not enter into an Employer/Employee relationship. Rondell Stewart was not an Employee of the Hotel but an independent contractor. Consequently, there is no case for unfair dismissal as the provisions of the Antigua and Barbuda Labour Code Cap 27 of the Laws of Antigua and Barbuda do not apply. Further, Mr Stewart was not terminated from his contractual duties at the Hotel but communicated to Mr Michelin on several occasions that he could no longer work in the capacity as a contract labourer. Rondell Stewart is therefore not entitled to the compensation as claimed in the Employee’s Memorandum or any compensation at all from the Hotel.”

10. The grounds of the Employer’s position include the following:

- (a) The Employee’s first engagement with the Employer was as part of a construction team managed by one Mr. Mervin Downer. Thereafter, the Employee “was chosen periodically to work on his own, as a construction worker to do various small jobs for the hotel and for Mr. Michelin personally, as needed.”
- (b) Unlike all the other employee’s at the Hotel, the Employee was paid from the Employer’s capital expenditure account and not the operational expenditure account from which all the employees of the Hotel were paid. The Employee did not participate in the Employer’s thrift fund arrangement.
- (c) Unlike all the employees of the Employer the Employee was not paying Union dues and was not part of the Union representing the employees of the Employer.
- (d) The Employee received no annual paid vacation leave.
- (e) Unlike the Employer’s employees, the Employee was not given set hours of work throughout the year. He was allowed the flexibility to choose and refuse jobs.
- (f) The Employee was paid a “flat fee” whenever he worked on public holidays.
- (g) The Employee’s rate of pay for his services was fixed but his hours of work were not.

The Main Issues

11. The main issues for determination are:

- (1) Whether the Employee was engaged as an employee under a contract of service or as an independent contractor under a contract for services?
- (2) Whether the Employee was unfairly dismissed?

The Evidence

12. Three witnesses testified at the trial: Mr. Michelin, the Employee and Mr. Downer who was summoned by the Court at the request of the Employee. Naturally, we considered the credibility of each witness and make findings of fact on the balance of probabilities. Some salient parts of the evidence are as follows;
13. The Employee testified that he was supervised by Ms. Peters, the Employer's Housekeeping Manager. Under cross examination, he said that he was told by Mr. Downer to go to the Employer's premises because the hotel was hiring workers. He testified that when he got there he spoke to Ms. Peters who required him to bring in his passport and proof of his registration in the Medical Benefits and the Social Security Schemes. Further, the Employee testified that before starting to work, Ms. Peters also required him to fill out a form. She also gave him instructions as to what she wanted him to do. He said that his first assignment was to do a paint job on the instructions of Ms. Peters.
14. Further, the Employee testified that apart from painting he was also required to do maintenance work at the hotel. He also said that on one occasion he was laid off from work for about 2 weeks but he never received any annual vacation. Moreover, the Employee said that when he arrived at work he was required to sign in on the "the time paper".
15. As to working for Mr. Downer, the Employee agreed that he did "outside work" with him which was different to his employment at the hotel. He testified that he never did outside work during his regular hours at work in the hotel. The Employee also testified that Mr. Downer never kept track of his work, it was always Ms. Peters who did so. The Employee also maintained that he was paid at the rate of \$140.00 per day.
16. As to Mr. Downer, he testified that separate and apart from his private work which he did on his own time, he was employed in the Employer's Maintenance Department. He maintained that the Employee did not work for him on his

private jobs during their regular working hours on the Employer's premises. Mr. Downer also corroborated the Employee's testimony that it was Ms. Peters who recruited him to work for the Employer.

17. For his part, Mr. Michelin testified that he was not involved in the day to day operations of the hotel. Interestingly, although he did not deny it, he stated that he was not aware that the Employee was told that there was no work for him to do when he showed up for work after his sick leave. When pressed under cross examination, Mr. Michelin stated: "I can't say if he was told that there was no work".
18. Further, under cross examination, Mr. Michelin said that the Employer had two sets on workers, one set which worked for Mr. Downer and the other set which worked for the hotel. Eventually, he admitted that the Employee was employed by the hotel and was paid in accordance with the rates agreed between the Employer and the trade union.

Issue No. 1: The Terms of Engagement.

19. As to the first issue, it should be noted that this Court's jurisdiction is limited to matters involving employees engaged under contracts of service. In that regard, the term "employee" is defined under section A5 of the Antigua & Barbuda Labour Code as follows:

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

20. The evidence given by Mr. Downer on behalf of the Employee is most instructive. His testimony, which is largely consistent with that of the Employee, is far more cogent and persuasive than that of Mr. Michelin. Moreover, it is noteworthy that neither Ms. Peters nor Mrs. Michelin testified on behalf of the Employer. In the final analysis, taken as a whole, the evidence given on behalf of the Employee is significantly more credible and weighty. Moreover, the most reliable and objective evidence is that contained in the certificate dated 09th April, 2014 issued by the Director of the Social Security which certified that: "According

to our records he (the Employee) has contributions from July 31, 2010 to June 30, 2013 while employed at Coco's Hotel & Restaurant"

21. In Reference No. 49 of 2014: **D. Giselle Isaac v. Board of Education**, this Court considered and applied the settled principles outlined in the judgment of the Barbados High Court in **Sagicor Insurance Company v Livingstone Carter and others 71 WIR 74**. In the latter case, the learned Chief Justice applied various tests, including the "control test" and the "integration test" in order to ascertain whether the respondents were independent contractors engaged under contracts for services or employees engaged under contracts of service. Utilizing the same approach and doing the best we can with the available oral and documentary evidence, we find that on the application of the settled tests or any of them, the Employee was engaged as an employee under a contract of services with the Employer between July 2010 and June 2013.

Issue No. 2: Unfair Dismissal

22. Under Section C10 of the Labour Code, an Employer is obliged to provide the Employee with a statement of the precise reason for his dismissal. A failure to provide the required statement operates to prevent an Employer from introducing testimony as to the fairness of a dismissal. That section provides:

"C 10 (1) Upon termination by an employer of an employee's employment subsequent to the expiration of the latter's probation period, the employer shall, within seven days of termination or notice thereof, furnish to such employee a written statement of the precise reason for termination.

(2) ...

(3) ...

(4) An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate, in any proceeding testing the fairness of the dismissal or his liability for severance pay whichever is applicable."

23. It is not in dispute that the Employer issued no letter of dismissal. In the circumstances, we are constrained to conclude that the Employee was unfairly dismissed and is entitled to compensation, subject to proof of his efforts to mitigate his loss.

Compensation

24. The award of compensation is as follows under the various heads:

Accrued Wages:

The Employee is entitled to and **we award three days wages in the sum of \$420.00** (\$140 x 3) for the unpaid portion of his sick leave

Payment in lieu of vacation:

We award the sum of \$4,760.00 as payment in lieu of 34 days vacation at the rate of \$140.00 per day.

Notice Pay:

Based on the Employee's weekly wages, **we award the sum of \$700.00 under this head.**

Loss of Protection:

As a weekly paid worker, **we award the Employee the sum of \$4,760.00** being the equivalent of severance at the rate of one day's pay for each of the 34 months he worked.

Immediate Loss:

The Employee's evidence of his efforts to mitigate his loss is sketchy. Doing the best we can with the available evidence, **we award the sum of \$13,650**, being the equivalent of one half of his full wages for 9 months.

Order

25. By reason of matters aforesaid, we order that:

- (1) The Employer do pay to the Employee the total sum of \$24,290.00 as compensation for his unfair dismissal.
- (2) The said sum of \$24,290.00 shall be paid no later than August 16, 2019.

Dated this  day of July, 2019



.....
Charlesworth O.D. Brown
President



.....
St. Lawrence de Freitas
Member



.....
Judith Dublin
Member

100