

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 55 of 2016

BETWEEN:

EGBERT FRANCIS

Employee

And

SHELDON GOMES
t/a
S.O.G IDEAL SECURITY SERVICES

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Judith Dublin

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

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

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

2017: July 26
2017: October 24
2020: October 09

JUDGMENT

Brown, P;

Background

1. At all material times the Employee was a member of the Royal Police Force of Antigua & Barbuda. As such, he was a public officer as defined by the constitution of Antigua & Barbuda. As a police officer, his employment was largely governed by the Police Act Cap 330 of the Laws of Antigua and Barbuda.



Section A6 of the Antigua & Barbuda Labour Code expressly excludes the ``Police Force`` from the application of its provisions including those in respect of unfair dismissal.

2. The Employer is engaged in the business of providing security services to various hotel establishments in Antigua & Barbuda including the Galley Bay Hotel situated at Five Islands in Antigua.
3. Following discussions with the Employer in or about September 2009, the Employee engaged in the provision of armed security services to the Galley Bay Hotel. He continued to provide those services until February 26, 2016 but never received an employment letter or a contract of employment. Further, the Employee received and made no request for vacation or pay in lieu thereof. Further no statutory deductions were made from his monthly pay and he received no letter terminating his engagement.

The Proceedings

4. In his Reference of Complaint filed on September 19, 2016, the Employee identified the issue in dispute between the parties as ``unfair dismissal``. In his Memorandum of Claim filed on October 17, 2016 he contended that he was unfairly dismissed. He stated that to the best of his knowledge he was an employee of the Employer and cited his ``Long Service`` award plaque granted to him by the Employer on the 7th anniversary of his engagement in 2015. Further, the Employee contended that the Employer was the recipient of all written expressions of concerns which the Hotel had in relation to his performance.
5. In disputing the Employee's claim the Employer relied on the following grounds:
 - (a) At all material times the Employee was a police officer employed by the Government of Antigua & Barbuda.
 - (b) The Employee was contracted by the Hotel to provide armed security services for which purpose the Employer, in the capacity as agent, facilitated his engagement.
 - (c) The Employer did not and never provided armed security services to any establishment as there was no armed security component in the services it provides.
 - (d) From time to time, the Employee had others provide the armed security services on his behalf without the approval of the Employer or the Hotel.

The Main Issues

6. The main issues arising in this Reference are:
 - (a) Whether the Employee was employed by the Employer
 - (b) Whether the Employee was unfairly dismissed.

Issue 1: Whether the Employee was Employed by the Employer

7. In his closing submissions, learned Counsel, Justin Simon QC, noted that the Employee was, at all material times, a police officer appointed by the Police Service Commission, and that as such he was a “public officer” holding or acting in a public office. Further, Learned Counsel pointed out that in accordance with the Constitution, the power “to remove or exercise disciplinary control” over the Employee vested in the Police Service Commission.
8. In that context, Learned Counsel submitted that “... the Employee given his position as a full time police officer in the public service cannot maintain that he could enter into and hold another employment contract with a private security service firm, or with any third party.”
9. In support of that Submission Mr. Simon also referred to section 80 of the Police Act Cap 330 which empowers the Commissioner of Police, on the application of any person, to deploy police officers on special duty exclusively under his orders at the expense of the requesting person.
10. There is no evidence before us that either the Employer or the Hotel made any application for the deployment of the Employee on special duty at the Hotel. Further, there is no evidence of the Commissioner assigning the Employee to carry out special duties at the Hotel’s premises.
11. Moreover, going outside the statutory provisions, there is no evidence that the Commissioner authorized or permitted the engagement of the Employee as an armed security guard at the Hotel’s premises. More specifically, the Employee gave no evidence that he sought or was granted any such permissions by the Commissioner.
12. In the premises, it is doubtful that the Employee could sustain his contention and claim that he was employed by the Employer and that he was unfairly dismissed. In that regard, we are mindful that the Antigua and Barbuda Labour Code, which introduced an employee’s right not to be unfairly dismissed, expressly excludes members of the police force from the application of its provisions.

13. In the circumstances, it appears to us that the employment of the Employee by the Employer or the Hotel would require a special dispensation from the Commission of Police or the Police Service Commission. In the absence of such official dispensation, we are inclined to hold that the Employees claim is untenable and unsustainable.
14. Moreover, we are also mindful of public policy in general, which steers us towards a rejection of the Employee's claim. In our estimation, the avoidance of injury to the general public good is a sound basis on which we should deny the Employee's purported right not to be unfairly dismissed by the Employer under any ostensible employment contract. The alternative result would be inimical to the good administration of the Police Force.
15. In that regard, we reflect on our powers under Section 10 (3) of the Industrial Court Act Subs 10 (3) (a) of that Act, we are required to make such order or award as we consider to be "fair and just, having regard to the interests of the persons immediately concerned and **the community as a whole** (our emphasis). Accordingly, from the public policy perspective, we would be further inclined to reject the Employee's claim, as to uphold it would not be in the best interest of the national community.
16. As to the strict determination as to whether there was an employer/employee relationship between the parties, we have to determine whether a contract of service was agreed between them. In that regard, Learned Counsel submitted that such determination would turn on the application of four (4) tests: the personal service test; the control test; the integration test; and the economic reality test. We endorse his submission that the application of these tests vary with the circumstances. There is no doubt that, based on the totality of the evidence, the application of a particular test may be more instructive than another. As to the Personal Service Test, Counsel submitted that since the Employee could and did from time to time have his son or other persons perform his duties, the application of Personal Service test favors the Employer.
17. In relation to the "Control Test", we agree with Counsel that by reasons of the Employee's peculiar expertise and in the absence of any evidence to the contrary, the Employer had no control over the Employee in the day to day performance of his duties. This result also favors the Employer.
18. As to the Integration Test, we are convinced by the evidence that on a balance of probabilities, the armed guard services were not integrated with the Employer's core business. This finding also militates against the existence of an employer/employee relationship.

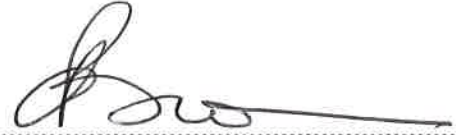
19. Learned Counsel also made convincing submissions in respect of the ``Economic Reality Test''. He highlighted the Employee's full time employment as a public servant, the non-payment of any statutory deductions to the relevant statutory authorities and the absence of any assertion of the right to or claim of vacation entitlement or pay in lieu thereof at any time during the Employee's engagement over the period of six and a half years or before the Commencement of these privileges.
20. In considering Counsel's submissions as to whether a contract of services existed between the parties, we had regard for the 2007 Judgment in the West Indian case of **Sagicor Insurance Co. v Carter and Others** 71 WIR 74, of Sir David Summons CJ. In that case, the High Court of Barbados considered whether the Defendants were engaged under contracts of service or contracts for services. In his comprehensive approval, he applied the 4 tests developed overtime, as referred to by Mr. Simon. In addition he also applied the ``Mutuality of Obligation Test'' to determine whether there existed a continuing obligation employer to provide work to the employee on a day to day basis and whether there was a corresponding continuing obligation on the employee to perform that work. Following the comprehensive approach adopted by Simmons CJ, the application of the various tests led us to the conclusion that there was no contract of employment between the Employer and the Employee.
21. In the final analysis, upon the application of the various tests, and taking into account the persuasive submissions of Counsel, we conclude that there existed no proper contract of services between the Employer and the Employee.

Conclusion

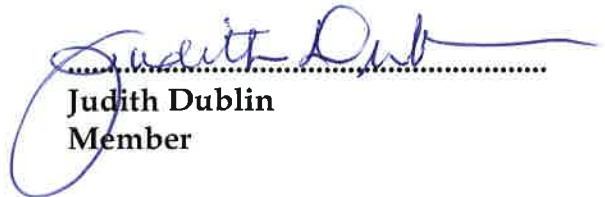
22. In light of our foregoing conclusion and our earlier stated inclination in respect of public policy, we conclude that the Employee's claim was misguided and could not be sustained. In the end, he was in no position to avail himself of the protection against unfair dismissal under Section C 56 of the Labour Code.

23. For the reasons stated above, we are constrained to dismiss the Employee's claim with no order as to costs.

Dated this 09th day of October 2020



Charlesworth O.D. Brown
President



Judith Dublin
Member



Dr. Hayden Thomas
Member

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