

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 21 of 2017

BETWEEN:

JULIO PAYNE

Employee

And

EDMUND CORNELIUS

t/a

EDMUND CORNELIUS TRANSPORT SERVICES

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John Benjamin

Member

The Hon. Judith Dublin

Member

Appearances:

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

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

2020: October 29

2021: July 13

JUDGMENT

Brown, P:

Background

1. At all material times, the Employer resided at Willikies Village in the Parish of St. Philip. He owned several vehicles and carried on the business of providing transportation services in the private and public sectors. He had a contract with the Verandah Resort & Spa, under which he provided transportation for staff members to and from the Resort's premises also situate in the Parish of St. Philip.



2. At all material times, the Employee resided at Glanvilles Village in the Parish of St. Philip. Under an oral agreement with the Employer, he was engaged as a Bus Driver between February 2008 and January 02, 2015. A bus was assigned to him and he earned a fixed sum of \$800.00 per week for his services.
3. The Parties shared a good working relationship during the early part of the arrangement during which the Employee was allowed to keep the assigned bus in his possession after work hours. Subsequently, differences arose between them as a result of which the relationship became strained. On December 28, 2015, an unfortunate exchange of words occurred between the parties during which colourful language was used and they both became upset.
4. By letter "incorrectly dated December 27, 2015" and delivered to the Employee on December 29, 2015, the Employer accused the Employee of being disrespectful and insolent. He demanded that the Employee return the bus to the Employer's premises and apologize for his misconduct so that they could "set things straight going into 2016".
5. Sometime between Friday January 1, 2016, and Saturday January 2, 2016, the Employee delivered the bus to the Employer's premises and had a conversation with the Employer during which he requested that the Employer allow him some time to get advice in respect of the said letter. On January 2, 2016, the Employee returned to the Employer's premises and had a further conversation with him. At the end of the conversation the Employer orally terminated the arrangement between them.

The Proceedings

6. The Employee commenced these proceedings by his Reference filed on March 6th 2017, in which he identifies the main issues to be unfair dismissal, vacation pay entitlement and premium pay entitlement.
7. In his Memorandum of Claim the Employee asserts that:
 - (a) He was employed by the Employer as a Bus Driver.
 - (b) He was required to transport the Resort's staff mainly to and from the East and West Bus Stations in accordance with the Resort's work shift system.
 - (c) In addition, he was also required to transport members of the general public on a daily basis as regular passengers between Willikies Village and the East Bus Station in St. John's.
 - (d) The \$800.00 which he was paid weekly was for five days work each week but the Employer consistently scheduled him to work on seven days instead.

- (e) The Employer failed or refused to provide him with a written statement of employment as required under section C5 of the Labour Code.
 - (f) His daily work shifts started at 5:00 a.m. and ended at 3:15 a.m. the following day.
 - (g) He was required to collect fares from passengers and apply some of the proceeds to refuel the bus and deliver the balance to the Employer.
 - (h) On January 1st 2016, he complied fully with the Employer's warning letter demanding that he return the bus to the Employer's premises and apologize for his misconduct.
 - (i) He returned to the Employer's premises on January 2, 2016 to seek reimbursement for money he spent on fuel for the bus. The Employer refused to reimburse him and terminated the employment relationship.
 - (j) He was unfairly dismissed and is entitled to compensation.
8. In his Memorandum of Defence, the Employer disputes the Employee's claim mainly on the following grounds:
- (a) He engaged the Employee as an independent contractor under a contract for services.
 - (b) He did not initially agree that the Employee should transport members of the general public as passengers between Willikies and the East Bus Station. The Employee engaged in that practice on his own and exclusively for his own benefit.
 - (c) He permitted the Employee to transport passengers on his own account on condition that the costs of refueling the bus would be met by the Employee from the fares he collected.
 - (d) He was not responsible for the payment of statutory contributions on behalf of the Employee.
 - (e) The Employee was guilty of gross misconduct in respect of which he was required by letter dated December 27, 2015, to return the bus and apologize.
 - (f) The Employee refused to apologize.
 - (g) He terminated the arrangement with the Employee as an independent contractor but did not dismiss him unfairly or at all.

The Main Issues

9. The main issues for determination are:
- (1) Whether the Employee was engaged under a contract of service or a contract for services.
 - (2) If the Employee was engaged under a contract of service whether he was unfairly dismissed.

Resolution

Whether the Employee was engaged under a contract of service or a contract for services

10. It is common ground that there were two components to the services provided by the Employee. For present purposes, we will refer to them as Part A and Part B involving the transportation of the Resort's staff and the transportation of the general public, respectively.
11. It is also common ground that the initial engagement between the parties was informal. At the start, the relationship was grounded on mutual respect and affection to the extent that the Employer treated the Employee as if he were his son. The relationship evolved and became more complex and less respectful over time. Having regard to their pleadings, it may very well be that the initial arrangement mushroomed into: **(a) a single more complicated employment relationship based on a contract of service, as the Employee would have us believe; (b) a single complicated contract for services, as the Employer would have us believe; or (c) a hybrid situation involving both a contract of service and a contract for services running concurrently.**
12. It is well settled that the determination of whether a person is engaged under a contract of service or a contract for services requires consideration of a wide range of factors and the application of several tests. That position was stated in Halsbury's Laws of England (5th Edition volume 39 at page 21 paragraph 4) as follows:

"There is no single test for determining whether a person is an employee. The approach to the determination of whether a person is an employee (engaged under a contract of service) or an independent contractor (engaged with a contract for services) is to take into account a wide range of factors to apply a wide range of tests".
13. In Reference No. 9 13 of 2008: **Sundry Workers -v- George Dexter Tavernier and Kier Construction Ltd.**, this Court followed the Judgment of Chief Justice Simmons in **Sagcor Insurance Co. -v- Carter et al** [2007] 71 WIR 74 in applying a wide range of tests - including the control test, the organization/integration test, economic reality test and the mutuality of obligations test - to determine which of the two named employers would be liable to meet outstanding severance payments to the employees. The Sagcor case was also followed earlier in Reference No. 49 of 2014: **D. Gisele Isaac v Board of Education**. Using the same settled approach, our conclusions on the facts of this case are as set out below.

14. It is noteworthy that, according to the Employer, the Employee was engaged to perform five scheduled shifts using Bus #152 which the Employer owned. He said that in performing his tasks, the Employee was "supported" by himself and another Driver when the Employee was not available. In his Witness Statement at paragraph 5, the Employer stated that "Mr. Payne was supported by me or another driver as needed and/or by the two of us on the days when Mr. Payne was not available". That assertion is not consistent with a contract for services under which the Employee would have been responsible to provide his own support when he was not personally available to meet his obligations on scheduled shifts. Further, it is common ground that when the Employee went on sick leave in December 2015, the Employer engaged another person to work the routes assigned to the Employee. Thus, the evidence provides clear indicators that the Employee was initially engaged under a contract of service in relation to the transportation of the Resort's staff. This comprised Part A of his duties.
15. As to the payment of the required statutory contributions, the Employee testified that he noticed earlier that no deductions were made by the Employer but took no issue with that until soon after his illness in December 2015. By that time, the Employee was performing both Part A and Part B of his duties. When he submitted the "sick leave form" to be signed, the Employer refused to do so and told him that he was working as an independent contractor.
16. The position taken by the Employer in relation to his non-payment of statutory contributions is consistent with the testimony of Mr. Tonge, one of the persons he also engaged as a Bus Driver. Mr. Tonge testified that he too was engaged to transport the Resort's staff but he was responsible for making his own statutory contributions.
17. Further, we note that in his response to the query from the Social Security Scheme, the Employer admitted that he had paid contributions for one Mr. Luke who had left his employment prior to 2012. And that since then he had not employed anyone. It is clear from the evidence that the Employer did not make any statutory payments on behalf of the Employee. However, that fact does not mean that he had no obligation to do so. By extension, that fact is not conclusive that the Employee was an independent contractor.
18. On the application of the "control test", we are obliged to consider the amount of control which the Employer exercised over the Employee. We find that by reason of the scheduled shifts and the Employer's contractual obligation to the Resort, there is no doubt that the Employer had a significant degree of control over the Employee in respect of the timing and places of the performance of his Part A duties in relation to the Resort.

19. The same cannot be said in relation to his Part B duties: the use of the bus to provide passenger services to the general public. We find that, unlike Part A duties, the Employer had no control over that aspect of the services provided by the Employee. Further, we find that the Employee had no obligation to account for the fares he collected when performing Part B duties, save for his obligation to refill the bus with fuel from time to time. At the end of the day, we accept the Employer's evidence that the Employee benefitted directly from the performance of his Part B duties. In our view, the Employer was in no position to control or ascertain the extent of that direct benefit which was determined exclusively by the Employee himself.
20. Accordingly, subject to the application of other tests below, we are inclined to conclude that an employer/employee relationship was established and maintained in respect of the Employee's Part A duties on the one hand. On the other hand, there was a concurrent but contrasting principal / independent contractor relationship in respect of the Part B duties.
21. This inclination is supported by the evidence in relation to the Employee's leave entitlements. He testified convincingly that during his tenure, apart from his regular pay, he received "vacation pay" at the rate of 12 days' pay per year. Since that evidence was not disputed by the Employer, it strengthens our inclination to find that, as initially contemplated by the parties, there was a contract of service between them in relation to the Employee's Part A duties.
22. As to the "organization/integration test", we find that the engagement of the Employee to perform the Part A duties, was distinctly integrated with the business of the Employer under his contract with the Resort. On the other hand, the Employee's engagement in relation to Part B: transporting members of the general public, was not so integrated or a part of the Employer's business. This analysis will further incline us to conclude that the engagement of the Employee was twofold- partly under a contract of services in relation to the Part A duties: the transportation of the Resort's Staff and partly under a contract for services in relation to the Part B duties: transporting members of the general public. Thus, we are further inclined to conclude that there existed a hybrid situation with two distinct contractual arrangements running concurrently.
23. Accordingly, when we apply the "economic reality test", we find that in relation to the Part A duties, the Employee was engaged exclusively on the account of the Employer. At the same time, he worked largely on his own account while performing his Part B duties.
24. Similarly, on the application of the "mutuality of obligations test", we find that both parties had mutual obligations in relation to the Employee's performance of Part A of his duties: The Employer had the continuing obligation to maintain his contract

with the Resort and provide work for the Employee. In turn, the Employee had a continuing obligation to perform the work of transporting the workers to and from the Resort in consideration of his weekly wages.

25. We find no corresponding mutual obligations on the part of the parties in relation to the Part B duties. Although the Employer permitted the Employee to use his bus, he had no obligation to do so. In our view, that permission was referable to and facilitated the Employee's performance of his Part A duties. We find no nexus of continuing mutual obligations between the parties referable to the Employee's performance of his Part B duties. Most importantly, we find that the Employer did not have no obligation to pay the Employee any wages for the performance of his latter duties.
26. In the final analysis - taking into account the nature of the Employer's business, the manner in which the engagement between the parties commenced, the bases on which they performed their duties and their general course of conduct - we find that a hybrid situation subsisted throughout their relationship which involved both a contract of service and a contract for services running concurrently. There was in fact an employment agreement limited to the Employee's Part A duties: the transportation of the staff of the Resort to and from work on the scheduled shifts.

Whether the Employee was unfairly dismissed

27. Having determined that there was an employment relationship, the next key question is whether the Employee was unfairly dismissed. Based on the evidence, it follows that the Employer terminated the arrangement, he terminated the employment of the Employee in relation to his Part A duties. Therefore, the burden is on the Employer to prove that the dismissal was not unfair.
28. It is common ground that the Employer's erroneously dated letter, delivered to the Employee on December 29, 2015, was not intended to be a dismissal letter. It was essentially a demand for an apology, a form of disciplinary action, with a view to continuing the employment relationship. According to the Employer, the Employee did not apologize and as a result he terminated the arrangement. No letter of termination was issued stating the reason or reasons therefor. As a result, pursuant to section C 10 (4) of the Labour Code, the Employer was not at liberty to advance particulars of misconduct or any other just cause for the dismissal at the trial. Therefore, by the operation of law, the Employee's was unfairly dismissed and is entitled to compensation.
29. We are mindful of the nature of the Employer's business, the Employer's relative seniority and the previously good working relationship between the parties. In particular, we note the Employee's testimony that at the commencement of the

agreement the Employer was like a father to him. Further, the Employee admitted that by using profanity to the Employer he was being disrespectful. Taking the evidence as a whole, we have formed the view that the Employee had been disrespectful and insolent to the Employer on more than one occasion prior to December 28, 2015.

30. Having regard for the conflicting evidence in relation to what transpired between the parties throughout the entire period of employment, in particular the events between December 28, 2015, and January 02, 2016, we find the Employer to be a generally a more credible witness. In the final analysis, we find that the terms of the Employer's letter and his demand for an apology in particular, were not unreasonable. We also find that the Employee failed or refused to apologize. As a result, we are of the view that the Employee is blameworthy. He contributed to his dismissal. Taking all the relevant matters into consideration, we apportion the extent of his contribution to be 40%.

Compensation

31. In the circumstances, subject to an equivalent reduction reflecting the Employee's contribution to his unfair dismissal, we assess the compensation due to him as follows:

(i) Notice Pay

Under this heading the Employee is entitled to compensation equivalent to one week's pay in the sum of **\$800.00**.

(ii) Loss of Protection

The Employee is entitled to the equivalent of severance pay, had his services been terminated because of redundancy. Since the Employee worked for 95 months, he is entitled to **\$10,857.14** being one day's pay per month ($\$114.29 \times 95$) under this head.

(iii) Immediate Loss

Based on the Employee's own testimony, we find that he was not as diligent as he should have been in finding new employment. Accordingly, we limit the first portion of his award under this head to **\$6,933.33** being the equivalent of his full wages for 2 months $\{[(800 \times 52) \div 12] \times 2\}$.

In addition, we estimate that if he had been more diligent he would have earned no less than 75% of his former wages for the remaining four months

when he remained unemployed. Accordingly, we award the additional sum of **\$3,466.67**, being 25% of his previous wages for 4 months. Thus, his total award under this heading is **\$10,400.00**.

(iv) Vacation Pay

Based on the sketchy evidence, we would award eleven days pay in lieu of vacation for the last 11 months of his employment in the sum of **\$1,257.14** (114.28×11).

(v) Overtime Pay

Each employee who works overtime is entitled to receive premium pay which is 1.5 times his basic wage. Since the Employee was paid his basic wage he is entitled one half of his pay for the overtime hours. In the circumstances, doing the best we can with the available evidence, we would award overtime pay at the rate of \$7.14 per hour or \$57.12 for 8 hours overtime per week. This amounts to **\$23,514.40** $\{[(57.12 \times 52) - 12] \times 95\}$.

(vi) Public Holiday Pay

Based on our count of 87 public holidays between February 2008 and December 2015, assuming that the Employee worked on all of them, we award public holiday pay at the rate of 1.5 times of his regular pay in the sum of **\$14,913.54** ($114.28 \times 1.5 \times 87$).

Total Award: \$61,742.22

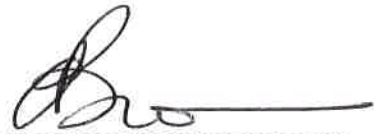
32. For the avoidance of doubt and for reasons which should be obvious, we make no further award regarding the Employee's engagement as an independent contractor performing his Part B duties. Such matters are not within our purview. Moreover, we refrain from making any additional remarks in that regard except to underscore that the state of affairs, resulting from the course of conduct between the parties over time, was most unfortunate.
33. In the final analysis, **the Employee is entitled to \$37,045.33** being 60% of \$61,742.22, the total mount assessed above. In our opinion, having regard our statutory mandate under section 10 (3) of the Industrial Court Act, we consider an award of this sum to be fair and just. This amount should satisfy the Employee's quest for "fair justice" in these proceedings.

Order

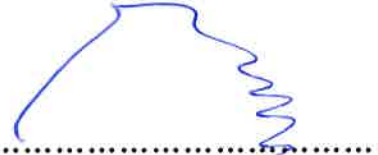
34. By reason of matters aforesaid, we order as follows:

1. The Employer shall pay compensation in the sum of \$37,045.33 to the Employee for his unfair dismissal.
2. Payment of the said sum of \$37,045.33 shall be made no later than August 31, 2021.
3. There shall be no order as to costs.

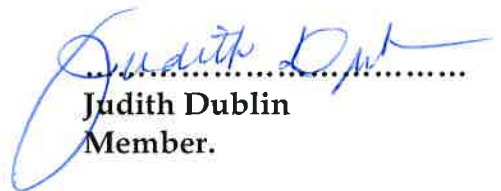
Dated this 13th day of July 2021



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



.....
John Benjamin
Member



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