

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 23 of 1990

BETWEEN:

CHARLES HUNTE - Appellant

AND

LIFE OF BARBADOS - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: S. Benjamin for Appellant
K. Archibald for Respondent

1991; June 19,
Nov. 25.

JUDGMENT

BYRON, J.A.

This is an appeal against the decision of the Industrial Court of Antigua and Barbuda dated 30th August 1990 which dismissed the appellant's claim that he was wrongfully dismissed on the ground that he was not an employee of the Respondent Company.

The respondent is a Life Insurance Company with headquarters in Barbados and an agency in Antigua managed by Miss Peggy Maynard. On 15th August 1987 the appellant signed an agreement which was subsequently signed by the respondent. This was a standard form agreement entered into with all sales representatives. The agreement described the appellant as "Representative" and provided that he "shall solicit, exclusively for the company, applications for life assurance and annuities (hereinafter referred to as assurance) and will collect and forthwith pay over to the Company such premiums as he shall from time to time be directed by the Company to collect." The agreement also provided that he did not have power to bind the Company. The remuneration clauses provided that he be paid a commission on premiums paid in cash to the Company under policies of assurance personally effected by the appellant and issued by the Company. There was an ancillary oral agreement that he would be paid \$4000.00 per month provided that he sold \$700.00 premiums per month. This was regarded as an advance on earnings. In the

/agreement,.....

agreement, clause 8(c) provided that any moneys paid to the appellant in excess of the amounts earned by him shall be a debt repayable to the Company. The company deducted social security and medical benefits from his earnings and made payments to the authority and he was included in the group insurance policies for company employees.

On 9th November 1989 Miss Maynard wrote the appellant stating “I can no longer employ you as part of the sales force of Life of Barbados.” Her letter was in accordance with clause 8(a) of the agreement which provided for summary termination of the agreement by either party on giving of notice.

In deciding the case the Industrial Court found that the appellant was paid a commission and not a fixed salary, that the social security and medical benefits payments were made only because they were demanded by the authorities and the company intended to recover them from the appellant, that the appellant had no prescribed hours of work, and he was not required to devote his full time and attention to the company’s business and that he was under no obligation to attend the office regularly and in fact did not do so. The Court concluded:

“We have looked at all the evidence submitted in support of the allegations made by both sides and we are satisfied that on a totality of the evidence, Mr. Hunte has failed to show that he was an employee of the Company.”

The Order (of the Industrial Court) was based on the finding that the contract under which the appellant performed the service of Insurance representation was not a contract of employment protected under the Antigua Labour Code.

Counsel for the appellant’s arguments could be summarised under two heads:

(i) that the Labour Code by its definition section A5 and sections C6 and C7 made any contract of employment or any clause in such a contract which did not conform to the Code null and void and therefore the clause providing for summary dismissal did not provide a legal basis for the dismissal,

and

(ii) on the facts of this the Court should classify the appellant as an employee.

Counsel for the respondent submitted that the provisions of the Code only applied where there was a contract of service and that on the facts of this case the appellant was an independent contractor and not an employee.

The provisions to which Counsel referred read as follows:

The definition section of the Antigua Labour Code Article A5 states:

“employee means any person who enters into or works under.....a contract with an employer, personally to perform any services of labour,.....”

“employer means any person..... who contracts for..... the services or labour of an employee.....”

“employment contract means any contract..... where under it is agreed that one person (the employee) will perform certain services for another (the employer):.....”

Article C6 - “An employer shall not provide employment, and an employee shall not accept employment, under terms and conditions which do not confirm to the provisions of this Code.”

Article C7 - “It shall be lawful for an employer and employee to enter into an individual contract of employment, covering terms of employment, but -

- (i) any provision which establishes conditions which fall below the minimum employment standards established by this Code shall be null and void.”

The general legal principle is stated in 4th Halsbury’s, Vol.16, para 501 as follows:

“The law of employment does not apply to all contracts under which one person agrees to work or provide services for another. The law distinguishes between a contract of service and a contract for services, and correlatively, between an employee and an independent contractor..... The distinction between an employee and an independent contractor is particularly important in terms of the relationship which each enjoys with the employer and of the liability of the employer to third parties.”

The wording of the definitions do not highlight the distinction between contracts of services and contracts for services. But as a general principle contracts for services are not contracts of employment. They may be a specifically identifiable type of contract for example, a building contract, a haulage contract or a commission agent contract.

/This point.....

This point was elucidated in the case of Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance (1968) 1 ALL E.R. 433 by MacKenna J. who explained that not all contracts to perform services and provide labour are contracts of service. One of the distinguishing features was whether provisions in the contract were inconsistent with contracts of service.

At 440 he said:

“.....I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

- (i) A contract obliges one party to build for the other providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control; it is a building contract.
- (ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance; it is a contract of carriage.
- (iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.
- (iv) A contract obliges one party to work for the other accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of performance.
- (v) The same instrument provides that one party shall work for the other subject to the other's control, and also provides that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind.

I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient condition of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The Judge's task.

/is to.....

is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour).....”

A perusal of the Labour Code shows that the minimum standards with which it requires contracts of employment to conform include provisions relating to probation, leave privileges, minimum remuneration and hours of work. It is obvious that these provisions cannot apply to the relationship between an employee and an independent contractor.

In my judgment the Antigua Labour Code is limited to contracts to perform services under contracts of employment, that is contracts of service, and does not provide any protection for independent contractors employment under contracts for service.

Counsel for the appellant submitted that in any event the Court was wrong to find as a matter of fact that the appellant was an independent contractor and not an employee. The only case on this point under the Antigua Labour Code to which we were referred was *Douglas Merchant v British American Insurance Company Limited*. This was decided by the Industrial Court in reference No.2 of 1978. In a decision delivered by the President P. Cecil Lewis the Court held that an insurance agent was an employee and had been wrongfully dismissed. In dealing with the statutory meaning of employment he concluded:

“So that in a case where a person offers his service to another and that other person accepts such services on terms agreed between the offerer and the offeree the resulting agreement is an employment contract and the relationship of an employer and employee is thereby created.”

However while he was considering the evidence he went on to find as follows:

“Clause 4 shows that the company exercises to a marked degree the right to control its agents. This is a test in law to determine whether or not the relationship of employer and employee exists. A further point to be noticed in relation to this question of control is that an agent is allocated a particular area in which to work. This allocation is obviously done by the company and the agent is not free to work where he likes.”

This decision did not analyse in specific terms whether the distinction between contracts of service and contracts for services was relevant in determining whether the claimant was an employee. But on my reading of the case the Court took into account principles

/of law.....

of law which were relevant to the application of that distinction and found that the claimant was an employee on the evidence.

In that case the Industrial Court found that the company exercised “to a marked degree the right to control its agent.”

It is very significant that in this case we are now considering the Industrial Court found that company did not have control over the appellant’s attendance at office nor his full time, nor the area in which he worked. These were findings of fact therefore that were different in a substantial way. There was also another significant difference. In Merchant’s case the Court found that Merchant had a fixed wage based on the average of his weekly commissions. Whether that finding was justified or not in this case the Court found the appellant was not entitled to any salary but that his earnings depended entirely upon his own efforts. On a perusal of the agreement it is clear that the Court was entitled to come to that conclusion.

Massey v Crown Life Insurance Co. (1978) 2 All E.R. 576 shows that depending on the terms of his contract an insurance agent could be classified as a commission agent and not an employee. The appellant was employed as a branch manager by the respondents, an insurance company, from 1971 to 1973 under two contracts, under one of which he was treated as an employee and under the other as a general agent. In 1973 the appellant, who wished to be taxed as a self-employed person, approached the respondents with a view to coming to a new arrangement with them. The respondents agreed and the parties entered into a new agreement whereby the appellant called himself John L. Massey and Associates a name which he registered under the registration of business Names Act 1916. In 1975 the appellant was dismissed with one month’s notice and he made a complaint to the Industrial Tribunal for unfair dismissal. His complaint was dismissed on the ground that he was not an employee but an independent contractor. The Court of Appeal dismissed his appeal.

Denning MR at 580 discussed the status of his employment before the new contract:

“Coming back to this case, for myself I have considerable doubt whether Mr. Massey was really a servant from 1971 to 1973. It looks to me much more as if he was even in that time a commission agent. He could take on other work. He did in fact work for another insurance broker. He was paid on commission. He received a minimum sum but over and above that he was paid on
/commission.

commission as many commission agents are. So I think it is very doubtful whether he was under a contract of service from 1971 to 1973. But I am perfectly clear that afterwards in 1973, when this agreement was drawn up and recast, although the same work was done under it, the relation was no longer master and servant relationship. It was employer and independent contractor relationship."

The appellant relied heavily on the case of Rudder v Dallaway (1984) 38 W.I.R., p. 56, and I find that the approach taken by Sir William Douglas C.J. at page 58 helpful.

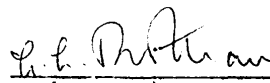
"In the instant case no evidence was led before the magistrate in regard to many factors which would have helped to indicate whether this was a contract of service or a contract for services. The parties spoke only of remuneration. The only other factor which was put forward was the fact that the respondent owned his own trumpet, which, in the case of a musician, could hardly be a determining factor. In the circumstances the magistrate accepted the evidence of the respondent and gave judgment in his favour, there being clear evidence upon which he could reach the conclusion that a contract of service had been proved. This court sees no reason to interfere with that finding."

In this case there was a lot of evidence before the Industrial Court. It had the contract documents and a lot of evidence as to how the appellant and the respondent discharged their respective functions over the years that the relationship lasted. In my view they applied the correct principles in coming to their decision and there was evidence to support their findings of fact.

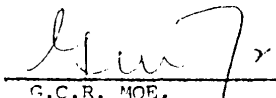
I would dismiss the appeal.


C.M.D. BYRON
Justice of Appeal

I would also dismiss the appeal


L.L. ROROTHAM,
Chief Justice

I too would dismiss the appeal.


G.C.R. MOE,
Justice of Appeal.

commission as many commission agents are. So I think it is very doubtful whether he was under a contract of service from 1971 to 1973. But I am perfectly clear that afterwards in 1973, when this agreement was drawn up and recast, although the same work was done under it, the relation was no longer master and servant relationship. It was employer and independent contractor relationship.”

The appellant relied heavily on the case of Rudder v Dallaway (1984) 38 W.I.R., p.56, and I find that the approach taken by Sir William Douglas C.J. at page 58 helpful.

“In the instant case no evidence was led before the magistrate in regard to many factors which would have helped to indicate whether this was a contract of service or a contract for services. The parties spoke only of remuneration. The only other factor which was put forward was the fact that the respondent owned his own trumpet, which, in the case of a musician, could hardly be a determining factor. In the circumstances the magistrate accepted the evidence of the respondent and gave judgment in his favour, there being clear evidence upon which he could reach the conclusion that a contract of service had been proved. This court sees no reason to interfere with that finding.”

In this case there was a lot of evidence before the Industrial Court. It had the contract documents and a lot of evidence as to how the appellant and the respondent discharged their respective functions over the years that the relationship lasted. In my view they applied the correct principles incoming to their decision and there was evidence to support their findings of fact.

I would dismiss the appeal.

C.M.D. BYRON.
Justice of Appeal

I would also dismiss the appeal

L.L. ROBOTHAM,
Chief Justice

I too would dismiss the appeal

G.C.R. MOE
Justice of Appeal