

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANULTAP2018/0009

BETWEEN:

BOARD OF EDUCATION

Appellant

and

D. GISELLE ISAAC

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Sydney Bennett

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant
Mr. Justin Simon, QC for the Respondent

2018: November 30;
2020: March 30.

Civil appeal – Industrial dispute – Constructive dismissal – Jurisdiction of the industrial court – Whether question of who is the employer of a person is solely determined by whether the purported employer has the power to hire and fire that person – Whether the board of education is the employer of the respondent – Employer-employee relationship – Interpretation Act, Cap. 224 of the Laws of Antigua and Barbuda – Board of Education Act of Antigua 1994

The appellant is the Board of Education of Antigua and Barbuda (hereafter “the Board”) and the respondent, Ms. D Giselle Isaac, (hereafter “Ms. Isaac”) was the Executive Secretary of the Board. On 18th July 2014, Ms. Isaac was informed, by way of letter from the Cabinet Secretary, that Cabinet had suspended her for a period of 28 days. Ms. Isaac stayed away from work until 18th August 2014, in obedience to the suspension letter. When she reported back to work on 18th August 2014, she was unable to access her office because the locks to her office door were changed. She was then informed by a subordinate employee that her suspension was for a period of 28 working days. Ms. Isaac

did not receive any official confirmation of the period of her suspension or of when she was to return to work.

By letter dated 22nd August 2014, Ms. Isaac informed the Board that she considered herself to be constructively dismissed. She did not, however, receive any response to that communication.

On 16th October 2014, Ms. Isaac filed a reference in the Industrial Court against the Board. Ms. Isaac's reference outlined that there was a dispute in relation to her constructive dismissal from her job on or about 19th August 2014 and a dispute concerning her entitlement to compensation and to contractual fringe benefits.

The Board responded by filing an application to strike out the reference on the basis that the Board was not responsible for hiring or firing Ms. Isaac and, as such, the Industrial Court did not have jurisdiction to hear the reference. The Industrial Court disagreed and dismissed the application to strike out the reference.

Unsurprisingly, the Board appealed. The crux of the appeal, as was the case with the application to strike out the reference, is that, by virtue of the Board of Education Act 1994 and the Interpretation Act, the power to hire, suspend and fire Ms. Isaac, and the power to fix or vary her remuneration, rested solely in the hands of Cabinet. This would mean that Cabinet was Ms. Isaac's employer and not the Board, and so the Industrial Court had no jurisdiction to determine the reference brought by Ms Isaac against the Board.

Held: dismissing the appeal and affirming the order of the Industrial Court, but varying the decision of the court that time begins to run afresh under the Industrial Court Rules from the date of delivery of the decision of the Industrial Court, and to allow time to run instead from the date of this judgment, and also awarding costs to the respondent, that:

1. A court must look further than the powers to hire and fire, and the powers to fix or vary a person's remuneration, in order to determine whether a person is an employee of the entity vested with the power to appoint, suspend or remove him. Thus, a person may be the employee of another even if a third party has the power of appointing or dismissing him.

Halsbury's Laws of England Fourth Edition Volume 16 applied.

2. When determining which of two entities is the employer of a person, the test to be applied is the three-part test for the existence of a contract of service. A contract of service, and accordingly a relationship of employer and employee, exists if these three conditions are fulfilled: (i) The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his employer. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other his employer. (iii) The other provisions of the contract are consistent with it being a contract of service.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 applied; **Montgomery v Johnson Underwood Ltd** [2001] ICR 819 approved.

3. The functions of the Executive Secretary of the Board of Education of Antigua and Barbuda are in substance no different from the functions of the Chief Executive Officers or Chief Administrative Officers of other statutory corporations in Antigua and Barbuda, whether they are appointed by their Boards of Directors or by Ministers. Ms. Isaac was subject to the direction, instruction, scrutiny and control of the Board in a sufficient degree to make the Board her employer. Furthermore, the other provisions of the contract of employment, like the payment by the Board of all employer contributions payable in respect of the employment of Ms. Isaac, are consistent with the existence of a contract of service between her and the Board of Education. Accordingly, the Industrial Court was justified in its findings of fact and law that Ms. Isaac was an employee of the Board and it was entitled to dismiss the application of the Board to strike out the reference filed by Ms. Isaac.

Board of Education Act, No. 11 of 1994 of the Laws of Antigua and Barbuda considered; **Interpretation Act**, Cap. 224 of the Laws of Antigua and Barbuda considered; **State Insurance Corporation Act**, Cap. 413 of the Laws of Antigua and Barbuda considered; **Investment Authority Act**, No. 15 of 2006 of the Laws of Antigua and Barbuda considered.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the judgment of the Industrial Court of Antigua and Barbuda, handed down on 19th September 2018, refusing the application of the appellant, the Board of Education, to strike out for want of jurisdiction a reference filed in the Industrial Court on 16th October 2014 by the respondent, Ms. D. Giselle Isaac.

Background

- [2] The Board of Education (hereafter “the Board”) is a body corporate established by the **Board of Education Act, 1994**¹ (hereafter “the Act”) Ms. D. Giselle Isaac (hereafter “Ms. Isaac”) was appointed to the position of Executive Secretary of the Board by letter under the hand of the Minister of Education, Culture & Technology, dated 27th December 2000. The letter informed Ms. Isaac that she was being

¹ No. 11 of 1994 of the Laws of Antigua and Barbuda.

offered the position by virtue of a Cabinet decision dated 6th December 2000, which endorsed the recommendation of the Board. She was informed by the letter that, if she accepted the offer of employment, her appointment would take effect from 1st February 2001. She was also informed by the said letter that she should report to the Chairman of the Board, to whom the letter was copied, for information pertaining to her salary and the terms and conditions of her contract.

- [3] After nearly 14 years on the job, by letter dated 18th July 2014, the Cabinet Secretary informed Ms. Isaac that she was suspended by Cabinet from her position as Executive Secretary of the Board for a period of 28 days, effective 18th July 2014. Ms. Isaac stayed away from work as directed, until 18th August 2014 when the period of suspension had expired, whereupon she reported back to work. Ms. Isaac was, however, unable to access her office because the locks had been changed and she was not given keys to the new locks. She was then informed by a subordinate member of staff that her suspension was for 28 working days. Later that day, whilst driving to her home, Ms. Isaac heard a press release on Observer Radio stating that her suspension was for a period of 28 working days. Ms. Isaac never received a letter or other official communication informing her that the period of her suspension had been extended, nor was she given any date by which she was expected to resume work.
- [4] By letter dated 22nd August 2014, Ms. Isaac's lawyer informed the Board that Ms. Isaac considered herself to be constructively dismissed from her employment as Executive Secretary of the Board. She never received any response to that letter.
- [5] By a letter dated 1st September 2014, Ms. Isaac was invited to a Cabinet meeting scheduled for 3rd September 2014. The letter stated that the invitation was extended in response to a letter from Ms. Isaac's lawyer dated 21st July 2014 in which he sought clarification on several aspects of the letter from the Cabinet Secretary. Ms. Isaac did not, however, attend the Cabinet meeting, her lawyer

having informed the Cabinet Secretary, by letter dated 3rd September 2014, that she would not be attending the meeting, and giving reasons for her decision not to attend.

[6] On 16th October 2014, Ms. Isaac filed a reference to the Industrial Court of a trade dispute between her and the Board, identifying the issues in dispute as –

(1) her constructive dismissal from her job on or about 19th August 2014;
and

(2) her entitlement to compensation and contractual fringe benefits.

[7] Ms. Isaac had also filed a fixed date claim on 11th September 2014 against the Attorney General and the Minister of Education seeking various reliefs in the form of declarations, damages and costs. An application to strike out the fixed date claim made its way from the High Court in Antigua and Barbuda to the Appeal Court of the Eastern Caribbean Supreme Court and then to the Privy Council in England. All three courts ruled in favour of Ms. Isaac, so that her fixed date claim survived the nuclear attack launched against it by the Attorney General and the Minister of Education. The issues adjudicated in the fixed date claim and, in particular, the application to strike it out, do not however directly bear on the issues that occupied the attention of the Industrial Court, the appeal against whose decision is the subject of this judgment.

[8] On 9th January 2015, the Board applied to the Industrial Court to strike out the Industrial Court reference filed by Ms. Isaac on account of want of jurisdiction on the following grounds:

(1) The jurisdiction of the Industrial Court is limited by section 7 of the **Industrial Court Act**²;

² Cap 214 of the Laws of Antigua and Barbuda.

(2) The Board of Education is not the employer of the party who has brought the instant reference;

(3) The instant reference constitutes an abuse of process of the court.

[9] The strike out application is, in essence, an application to strike out the Industrial Court reference on the ground that the Industrial Court had no jurisdiction to hear the reference, because the Board was not Ms. Isaac's employer.

[10] The application was heard on 24th February 2015 and, by its judgment dated 19th September 2018, the Industrial Court found that the Board was the employer of Ms. Isaac and accordingly dismissed the application.

The Appeal

[11] Being dissatisfied with the decision of the Industrial Court, the Board filed a notice of appeal on 21st September 2018 appealing the court's judgment on the following grounds:

"1. The finding or decision of the Industrial Court that the Board of Education was the employer of the Respondent was erroneous in law in that the Board of Education was not vested with the power to appoint, suspend, or remove the Respondent from her office as Executive Secretary of the Board of Education or to fix or vary the Respondent's remuneration, to withhold the Respondent's remuneration in whole or in part during any period of suspension from office, and to terminate the Respondent's remuneration on her removal from office.

2. The Industrial Court had no jurisdiction in the matter as the matter before the Industrial Court was not one of unfair dismissal by an employer of an employee, it being the case that as a matter of law the Appellant was not the employer of the Respondent."

[12] The Board filed its submissions in support of its appeal, together with the notice of appeal, on 21st September 2018, while Ms. Isaac filed submissions in response on 12th October 2018.

- [13] The central issue in this appeal is whether the Board was the employer of Ms. Isaac. Resolving this issue will also resolve the related issue of whether the Industrial Court had jurisdiction in the matter, since the issue of jurisdiction arises from the question of whether the Board is Ms. Isaac's employer.

Appellant's Submissions

- [14] The Board submits that it was not vested with the power to appoint Ms. Isaac to her office or with the power to dismiss her from her office. The Board further submits that it cannot be said to be the employer of Ms. Isaac, having neither the power to hire, nor fire her.

- [15] In support of the above submission, the Board relies on section 11(1) of the Act which states:

"There shall be an Executive Secretary of the Board, who shall be appointed by the Cabinet."

The Board also relies on section 18(1) of the **Interpretation Act**,³ to support its position that it is not the employer of Ms. Isaac. That section reads:

"Subject to the Constitution, words in an enactment authorising the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested -

- (a) power, at the discretion of the authority, to remove or suspend him, and
- (b) power, exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment-
 - (i) to re-appoint or re-instate him,
 - (ii) to appoint another person in his stead, or to act in his stead whether or not there is a substantive holder of the office, and to provide for the remuneration of the person so appointed, and
 - (iii) to fix or vary his remuneration, to withhold his remuneration in whole or in part during any period of

³ Cap. 224 of the Laws of Antigua and Barbuda.

suspension from office, and to terminate his remuneration on his removal from office;

but where the power of appointment is only exercisable upon the recommendation or subject to the approval, consent or concurrence of some other person or authority the power of removal shall, unless the contrary intention is expressed in the enactment, be exercised only upon the recommendation, or subject to the approval, consent or concurrence of that other person or authority.”

[16] The Board submits that by virtue of the above provisions, it is the Cabinet, and not the Board, that has the power to appoint a person to the office of Executive Secretary, to remove or suspend a person appointed to that office and to fix or vary the remuneration of a person appointed to that office. The Board further submits that the case of **Lincolnshire County Council v Hopper**⁴ lends support to its position. The Board refers specifically to paragraphs [5], [9], [44] and [45] of **Lincolnshire County Council v Hooper**, which state:

“5 For the reasons which we will set out in some detail, we have been reluctantly driven to the conclusion that the local authority's argument in the present case must be upheld, and that, as a matter of law, the applicant is not the local authority's employee. She is, accordingly, unable to invoke the jurisdiction of the employment tribunal to adjudicate upon her claim for unfair dismissal.

...

9 It is, of course, no part of our function to comment upon the organisation of the registration service. However, we entirely agree with the proposition that the present system whereby registration officers are not employees and thus unable to invoke the provisions of the Employment Rights Act 1996 is anachronistic. We would go further. In our view, the current system perpetrates an injustice. It is, we think, unacceptable in the 21st century that a person in the applicant's position should be denied access to an employment tribunal for the determination of her allegation that she had been unfairly dismissed.

...

44 We would very much have liked to be able to accept Mr Bourne's submissions. In our view, they accord with both justice and common sense. However, it seems to us that the arguments all shatter against the unanswerable proposition that Parliament has provided by section 6(4) of the Registration Service Act 1953 that “Every superintendent registrar and

⁴ [2002] ICR 1301.

every registrar of births and deaths shall hold office during the pleasure of the Registrar General”.

45 In our view, this must inevitably mean that the local authority, whilst the paymaster of a registrar and responsible for most of his or her terms {of} conditions of employment, is unable to exercise the power to dismiss. That can only be done by the Registrar General. As we indicated earlier in this judgment, we agree with Mr Sheldon that it must inevitably be a necessary term of any contract of employment that the employer has the right to dismiss the employee]. We cannot find anywhere in the documentation before us any provision which empowers the local authority in this case to dismiss the applicant. The only power in that regard lies in section 6(4) of the Registration Service Act 1953.”

- [17] The Board also seeks to rely on the case of **Smith v Selby**⁵ on the point that the court’s role is not to correct legislation, but to give effect to what Parliament intended;

“[10] It must be remembered that the court’s responsibility is to give effect to the intention of Parliament not to correct legislation to ensure that it is just and expedient. If the court considers that there is a variance between the language used and its understanding of the special purpose of the Act it should be left to Parliament to amend the legislation. Where the words of the statute are not ambiguous there could be no justification for interpreting them in a manner that would alter their meaning, unless it may be necessary to resolve an inconsistency within the statute itself. So, the conjecture that Parliament may have intended a meaning that is different to the words used is not a sufficient reason for departing from their ordinary and natural meaning.”

- [18] The Board reiterates that section 11(1) of the Act makes clear that it is Cabinet that appoints the Respondent to the office of Executive Secretary. Further, the Board submits that section 18(1) of the **Interpretation Act** makes clear that it is Cabinet that is vested with the power to suspend and remove or dismiss the Respondent from her office of Executive Secretary and to fix or vary her remuneration. The Board argues that if it was the intention of Parliament to make the Executive Secretary an employee of the Board it would have been very easy for Parliament to use clear words to express this intention. The Board ultimately argues that redress by Ms. Isaac to the extent that she is aggrieved at the fact that

⁵ (2017) 91 WIR 70 at 77.

she no longer holds her former office, must be sought against the body which had the power to appoint, suspend and remove her.

Respondent's Submissions

[19] Ms. Isaac accepts that she was appointed by Cabinet pursuant to section 11(1) of the Act. She also accepts that the authority to suspend and to dismiss her is vested in Cabinet by virtue of the provisions of section 18 (1)(a) of the **Interpretation Act**. She submits, however, that the laws of Antigua and Barbuda recognize three categories of employees. These are - “established employees of Government, who are appointed, disciplined, and removed by the Public Service Commission pursuant to section 100(1) of the **Antigua and Barbuda Constitution Order 1981**⁶ (the “Constitution”); non-established employees of Government who are employed on a week to week or month to month basis as defined by section 2 of the **Pension (Non-Established Government Employees) Act**,⁷ and all other employees defined in section A5 of the **Antigua and Barbuda Labour Code**,⁸ as “*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.*” She submits that she was not an established employee of Government who could be appointed, disciplined and removed by the Public Service Commission; she was not a non-established employee of Government who was employed on a week-to-week or month-to-month basis; she was a person who entered into and worked under a contract with an employer personally to perform services.

[20] Ms. Isaac further submits that there is no statutory provision in which Cabinet is stated to be an employer or is given the status of a legal entity. She submits also that “Cabinet is an amorphous body (consisting of a minimum of two persons), and created by section 70(1) of the Constitution with a specific function: *There shall be a Cabinet for Antigua and Barbuda which shall have the general direction and*

⁶ Cap 23 of the Laws of Antigua and Barbuda.

⁷ Cap. 310 of the Laws of Antigua and Barbuda

⁸ Cap. 27 of the Laws of Antigua and Barbuda

control of the Government and shall be collectively responsible therefor to Parliament.”

- [21] It is the submission of Ms. Isaac that a review of the transcripts of proceedings, specifically the cross examination of the Chairperson of the Board, Ms Leslie Ann Yearwood, shows clearly that except for the specific powers of appointment, suspension or dismissal, the Board “exercised absolute control over the Respondent [Ms. Isaac] in respect of the performance of her duties, and there was mutuality of obligation exclusively between them.”
- [22] Ms. Isaac submits that the three essential conditions of a contract of service as laid out in the case of **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance**⁹ existed between the Board and the Respondent. She noted these to be in the form of “payment of wages and statutory contributions; the duty to be the Board’s Chief Administrative Officer, and be subject to the general directions of the Board; reporting solely to the Board, and participation in the Board’s Thrift Fund as an employee.” It is submitted that section 12 of the Act speaks specifically to the aforementioned matters and that the evidence of the then Chairperson of the Board is evidence which “provides the factual basis on which the relationship between Appellant and the Respondent can be determined.”
- [23] Ms. Isaac further submits that the fact that the powers of appointment and dismissal reside in another does not necessarily create an employment contract with that other. In this regard, she relies on the case of **Montgomery v Johnson Underwood Ltd. and another**,¹⁰ as well the authority of **Halsbury’s Laws of England**¹¹ which addresses the characteristics of the relationship of employer and employee. Ultimately, she submits that the Industrial Court properly found that

⁹ [1968] 2 QB 497 at p. 515.

¹⁰ [2001] ICR 819.

¹¹ 4th Edn. Volume 16 at para 502.

Cabinet had no statutory function in relation to her as it related to the daily performance of her duties as Executive Secretary. It is her contention that this finding by the Industrial Court was after its analysis of the facts and that a reading of the Act will clearly show that the Executive Secretary of the Board is not subject to Cabinet directives or reporting duties and that the Board is a stand-alone legal entity.

- [24] Accordingly, Ms. Isaac submits that the appeal should be dismissed with costs and the decision of the Industrial Court affirmed.

Discussion and Analysis

- [25] The provision contained in section 11 of the Act on the appointment of the Executive Secretary of the Board is worded differently from the provisions in other legislation in Antigua and Barbuda establishing statutory corporations and providing for the appointment of their Chief Executive Officers.
- [26] Section 11(1) of the Act states:
“There shall be an Executive Secretary of the Board who shall be appointed by the Cabinet.”
- [27] This provision must be read together with section 18(1) of the **Interpretation Act**, which is set out in full in paragraph 15 hereof and need not therefore be repeated.
- [28] The conjoint effect of section 11(1) of the **Board of Education Act, 1994** and section 18(1) of the **Interpretation Act**, is that it is the Cabinet, and not the Board, has the power to appoint a person to the office of Executive Secretary, to suspend or remove a person appointed to that office, and to fix or vary the remuneration of a person appointed to that office.
- [29] It is the nub of the Board’s appeal that if Cabinet can appoint, suspend and remove a person from an office, then it is Cabinet which is the employer of the person. But this cannot be the end of the matter, because if the power to appoint,

suspend and dismiss an employee makes someone or some entity the employer of the person appointed, suspended or dismissed, then every public servant would be an employee of the Public Service Commission and every police officer would be an employee of the Police Service Commission. This is not however the case, and one must look further to determine whether a person who may be appointed, suspended or removed by another person is necessarily an employee of the person vested with the power to appoint, suspend or remove him.

[30] It may be useful at this juncture to examine the provisions contained in the legislation establishing other statutory corporations in Antigua and Barbuda to see how their Chief Executive Officers are appointed.

[31] Section 7(1) of the **Airport Authority Act, 2006**¹² provides that -

“For the purposes of carrying out its functions under this Act, the Board shall appoint a person with suitable qualifications and experience in commerce to be the Chief Executive Officer of the Authority.”

[32] Section 18(1) of the **Tourism Authority Act, 2008**¹³ provides that –

“The Authority shall with the approval of the Minister appoint a Chief Executive Officer and other suitably qualified persons to such offices as may be designated by the Minister.”

[33] Section 3(4) of the **Public Utilities Act**,¹⁴ provides that –

“The provisions of the Second Schedule shall have effect as to the officers and employees of the Authority, their appointment, dismissal and conditions of service and otherwise in relation thereto.”

Section 1(1) of the Second Schedule provides as follows:

“Subject to the provisions of this Act, the Authority may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a General Manager, an Accountant and such other employees as may be necessary and proper for the due and efficient administration,

¹² No. 17 of 2006 of the Laws of Antigua and Barbuda.

¹³ No. 6 of 2008 of the Laws of Antigua and Barbuda.

¹⁴ Cap. 359 of the Laws of Antigua and Barbuda.

management and performance by the Authority of its functions under this Act.”

The Authority under the Public Utilities Act is the equivalent of the Board under the **Board of Education Act, 1994** and the General Manager is the equivalent of the Executive Secretary.

- [34] Section 9(1) of the **Antigua and Barbuda Hospitals Board Act, 1999**¹⁵ provides that–

“The Board shall appoint, at the remuneration, terms and conditions approved by the Cabinet, a Hospital Director who shall be a full-time officer of the Board and the principal executive officer of the Board”

- [35] Section 12 of the **Antigua and Barbuda Sugar Industry Corporation Act**,¹⁶ provides that –

“Subject to the provisions of this Act, the Board may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a General Manager”

- [36] Section 14(1) of the **Medical Benefits Act, 2010**¹⁷ provides that –

“The Board shall, with the approval of the Cabinet, appoint on the terms and conditions as it considers appropriate, a fit and proper person to be Chief Executive Officer of the Scheme, who shall be the chief administrative officer and who shall, subject to the provisions of this Act and the general directions of the Board, be responsible to the Board for the administration of the Scheme and the management of the staff of the Board and for carrying out the policy and decisions of the Board.”

- [37] To similar effect is the provision in the **Financial Services Regulatory Commission Act, 2013**¹⁸ appointing the Chief Executive Officer of the statutory corporation known as the Financial Services Regulatory Commission. Section 10(1) of that Act states:

¹⁵ No. 1 of 1999 of the Laws of Antigua and Barbuda.

¹⁶ Cap. 30 of the Laws of Antigua and Barbuda.

¹⁷ No. 4 of 2010 of the Laws of Antigua and Barbuda.

¹⁸ No. 5 of 2013 of the Laws of Antigua and Barbuda.

“The Board, after consultation with the Minister, shall appoint a fit and proper person to be the Chief Executive Officer.”

- [38] To similar effect, though differently worded, is the provision in the **Antigua and Barbuda Development Bank Act**,¹⁹ for the appointment of the CEO of that statutory corporation. Section 16 of that Act states:

“The Bank may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a general manager, a secretary and such other officers, agents and servants as it deems necessary for the proper carrying out of its functions under this Act”.

Although the wording of section 16 of the **Development Bank Act** speaks of the Bank appointing, this is really no different from saying that the Board may appoint, because the appointment by the Bank of its Chief Executive Officer can only be effected by the Board of Directors of the Bank.

- [39] This review of the provisions in legislation establishing statutory corporations in Antigua and Barbuda for the appointment of the Chief Executive Officers of the corporations, shows that there are no other statutory corporations in Antigua and Barbuda (at least none that I have come across) whose Chief Executive Officers are appointed by Cabinet. There are, however, two that I have encountered in my research whose Chief Executive Officers are appointed by the relevant Minister of Government – the State Insurance Corporation and the Investment Authority.

- [40] Section 16(2) of the **State Insurance Corporation Act**,²⁰ provides that -

“The General Manager shall be appointed by the Minister by instrument in writing on the recommendation of the Board for such period and on such terms and conditions as the Minister determines, from among persons who possess qualifications in insurance or in related fields, or who have had substantial experience or training in such fields.”

- [41] Section 8(1) of the **Investment Authority Act, 2006**²¹ provides that –

¹⁹ Cap. 24 of the Laws of Antigua and Barbuda.

²⁰ Cap. 413 of the Laws of Antigua and Barbuda.

²¹ No. 15 of 2006 of the Laws of Antigua and Barbuda.

“The Minister shall appoint an Executive Director who shall have standing, knowledge and experience, either professional or academic, in commerce, tourism, banking, finance or real estate, on such terms and conditions as the Minister may determine, subject to the provisions of this Act.”

[42] An examination of the functions of the Chief Executive Officers of both the Investment Authority and the State Insurance Corporation show clearly that, although the appointment is made by the Minister, in whom therefore the power to suspend and remove from office will be vested in accordance with the Interpretation Act, the work undertaken by the Chief Executive Officer is the work of the Corporation as directed by the Board. And so it is too with the Board of Education.

[43] Section 16(1) of the **State Insurance Corporation Act** provides that –

“There shall be a General Manager of the Corporation who shall perform the functions conferred on him by this Act, and such other functions as may be conferred on him by the Board.”

Section 17(1) provides that –

“The General Manager shall be responsible to the Board for the execution of its policy and for the management of the Corporation.

Section 17(2) then proceeds to detail the functions of the General Manager, all of which are consistent with his role as the chief employee of the Board carrying out his statutory functions.

[44] Section 8(2) of the **Investment Authority Act** provides that –

“The Director shall be the administrative head of the Authority and shall perform the duties assigned to him under this Act and such other duties as the Authority may determine.”

Section 9 then proceeds to detail the responsibilities of the Executive Director of the Authority to be performed “subject to the provisions of this Act and the general direction of the Board of the Authority”.

[45] Although not as expansive, the relevant provision of the **Board of Education Act, 1994** is to the same effect. Section 11(2) states:

“The Executive Secretary shall be the Chief Administrative Officer of the Board and shall, subject to the provisions of this Act and the general directions of the Board, be responsible for the direction of the staff and for the management of the Board.”

[46] The Board however argues, in effect, that unlike the provisions in the legislation establishing statutory corporations which give the power of appointment to the board of directors of the corporations, or even to the relevant Ministers, the specificity of the **Board of Education Act, 1994** in giving the power of appointment to Cabinet would ipso facto make the Executive Secretary of the Board an employee not of the institution but of the Cabinet.

[47] I have already given an indication that I am not persuaded by this line of argument, because the functions of the Executive Secretary under the **Board of Education Act, 1994** are no different in substance to the functions of the Chief Executive or Chief Administrative Officers of the other statutory corporations in Antigua and Barbuda, whether their Chief Executive Officers are appointed by their Boards of Directors or the relevant Minister. The appellant’s argument is further undermined by judicial and other authorities which do not equate the appointer of a person to an office with the employer of the person in that office.

[48] One can start off with **Halsbury’s Laws of England**²² where it is stated at paragraph 502 that – “A person may be the employee of another even if a third party has the power of appointing or dismissing him”.

[49] Then there is the seminal case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** (already referred to in paragraph 22 hereof) in which the Court had to answer the question, as posed by the judge

²² 4th edn. Volume 16.

himself – “what is meant by a contract of service”. Mackenna J answered his question with the following now frequently-quoted words:

“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service.”

[50] Although the question asked and answered by Mackenna J in **Ready Mixed Concrete** arose in the determination of the status of a person contracted by another, that is, whether the person contracted was engaged under a contract of service or some other contract in which payment is made for services rendered, his answer to the question has frequently been used as a test to determine whether a contract of service exists between two parties such as to make one the employer/employee of the other.

[51] Then there is the case of **Montgomery v Johnson Underwood Ltd** (also referred to in paragraph 22 hereof) which followed **Ready Mixed Concrete** and applied Mackenna J’s three-pronged test to a situation, like in the present case, in which the court had to determine which of two entities was the employer of a person employed. In giving judgment in the English Court of Appeal, Buckley J said:

“For my part, I regard the quoted passage from **Ready Mixed Concrete** as still the best guide and as containing the irreducible minimum by way of legal requirement for a contract of employment to exist between two parties.”

[52] Accepting and applying the test laid down by Mackenna J in **Ready Mixed Concrete**, and followed by Buckley J in **Montgomery**, to the facts of the case at bar, there is no dispute that Ms. Isaac received remuneration in consideration of which she provided her work and skill in the performance of a service for her employer. The chairperson of the Board, Mrs. Leslie-Ann Yearwood, in giving evidence on behalf of the Board in the proceedings of the Industrial Court, testified that Ms. Isaac received her remuneration from the Board out of its own funds, and

not from any funds provided by Cabinet. She also testified that all employer contributions to be paid by law by Ms. Isaac's employer (like Social Security, Education Levy, Medical Benefits, and Thrift Fund) were paid by the Board out of its own funds, and not from any funds provided by Cabinet. Ms. Yearwood also testified that the Board directs and instructs the Executive Secretary in the performance of her duties, that the Executive Secretary reports to the Board with respect to the performance of her duties, and that the performance of the duties of the Executive Secretary comes under the scrutiny of the Board.

[53] This undisputed evidence, almost all of which came from the testimony of the Chairperson of the Board, makes it pellucid that Ms. Isaac received her remuneration from the Board and provided her work and skill in the performance of her services to the Board. The undisputed evidence also makes it pellucid that in the performance of her services Ms. Isaac was subject to the control of the Board in a sufficient degree to make the Board her employer. In fact, she was subject to the control of the Board to every material degree, in that she was directed and instructed by the Board in the performance of her duties, the performance of her duties was under the scrutiny of the Board, and she reported to the Board in the performance of her duties. With respect to the third and final limb of Makenna J's three-pronged test, it is no less pellucid that the other provisions of the contract of employment, like the payment by the Board of all employer contributions payable in respect of the employment of Ms. Isaac, are consistent with the existence of a contract of service between the Board and its Executive Secretary.

[54] Barring the power of appointment given to Cabinet by the **Board of Education Act, 1994**, and the consequential powers of suspension and removal given to the appointer by the **Interpretation Act**, there is nothing on the facts of this case and the law applicable to this case which creates even the semblance of a relationship of employer and employee between the Cabinet of Ministers and the Executive Secretary of the Board. On the contrary, the facts and the law all point to a

relationship of employer and employee between the Board and its Executive Secretary.

- [55] The facts and law also point to Ms. Isaac being neither an established nor a non-established employee of Government, as defined in section A5 of the **Labour Code**, so that she will necessarily fall into the category of a person who entered into or worked under a contract with an employer personally to perform services for the employer. This category of employee could not be an employee of Government or of the Cabinet, which is itself an entity of or within the Government. Ms. Isaac must therefore have been an employee of the Board.

Conclusion

- [56] The finding of fact and law made by the Industrial Court in its judgment dated 19th September 2018, that Ms. D. Giselle Isaac was at the material time the employee of the Board of Education, was justified by the facts of the case and the applicable law. The Industrial Court was also justified in its finding that it did have jurisdiction in the reference made to it by Ms. Isaac of a dispute about her alleged unlawful dismissal by the Board. The Industrial Court was therefore justified in dismissing the application made by the Board to strike out the reference by Ms. Isaac to the Industrial Court on the basis that the Court had no jurisdiction to determine the reference.
- [57] I will accordingly dismiss the appeal and affirm the decision of the Industrial Court to dismiss the Board's strike out application. I will vary the decision of the Industrial Court that time begins to run afresh under the Industrial Court Procedure Rules 2015 from the date of delivery of the decision of the Industrial Court to allow time to run instead from the date of this judgment. I will also order costs to the respondent in this appeal to be paid by the appellant in an amount to be assessed if not agreed by the parties within 21 days.

[58] It is regrettable that this 2014 dispute between the appellant and the respondent is still before the courts; a circumstance for which this Court bears some of the blame. It is to be hoped though that, if not already settled, this dispute can be settled between the parties with the assistance of the very able counsel on both sides who represented the parties in the appeal.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Sydney Bennett

Justice of Appeal [Ag.]

By the Court

Chief Registrar