IN THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV2011/0024

BETWEEN:

JOSEPH PATRICK HYLTON

Claimant

AND

ANGUILLA DEVELOPMENT CORPORATION dba
CUISINART RESORT AND SPA

Defendant

Appearances:

Ms. Ayodeji Bernard and Mr. Alex Richardson for the Claimant

Ms. Tara Ruan and Ms. Kristy Richardson for the Defendant

2013: April 17th; 18th; 26th

May 10th, July 1st

RULING

[1] MATHURIN, J: The Claimant in this matter ("Mr. Hylton") is claiming damages for unlawful dismissal pursuant to what he alleges is a contract of employment with the Defendant ("Cuisinart"). Cuisinart denies a contract of employment and asserts that Mr. Hylton was never employed with it as an employee but rather that his company, Joe Hylton Construction Managers Inc (JHCM) was retained as an independent contractor to carry out certain works on Cuisinart's Resort.

[2] Mr. Hylton alleges that he was employed by Cuisinart under a contract of service as Owner's representative/Project Manager from around 3rd November 2007 until his contract was without cause, wrongfully, unlawfully, unfairly and illegally terminated on or around 2nd September 2010. He states that he was employed to work on the completion of 6 new ocean villas, 2 additional villas and a 56 unit condominium. The terms of the alleged contract he states entitled him to a salary of US $300,000.00 for the first two years and an increase to US$350,000.00 per year after the third year. Pursuant to his dismissal, he has filed this claim seeking damages for wrongful dismissal and various outstanding payments as well as for damages for loss of reputation.

[3] Cuisinart alleges that the relationship between them was not that of employee/employer but rather that Mr. Hylton was an independent contractor who was in breach of his contract thereby giving rise to a termination of the contract. Cuisinart further alleges that they retained the services not of Mr. Hylton but rather of his company JHCM as the general project management company to oversee the construction of six ocean villas. Cuisinart states that JHCM was well reputed in construction management and general construction services. It states that the role of JHCM was to project plan, manage stakeholders and team, and to manage project risk, schedule, budget and quality control.

Claimant's evidence

[4] The relationship between Mr. Hylton and Cuisinart which gave rise to these proceedings originated in an informal agreement being reached between Mr. Hylton and Cuisinart's Director Mr. Leandro Rizzuto on or around the 3rd November 2007. Mr. Hylton relies on handwritten notes taken on that day to support his claim that at the time of agreement, the relationship of employer/employee was intended to be established. Those notes referred to transportation, accommodation in Anguilla at the resort, travel to St Thomas on weekends and compensation per year for a period of 3 years.

[5] Mr. Hylton also relies on a letter written to First Bank in St Thomas by Mr Richard Margulies, Vice President and General Counsel of ADC (owner of Cuisinart) on the 14th November 2007. This letter stated that "*Effective November 6th 2007, this is to confirm that the Resort has hired Mr. Hylton as the Owner's Representative at an annual salary of $300,000 for a three-year period".*

[6] Mr. Hylton asserts that over the period of his employment, Cuisinart obtained work permits from the Government of Anguilla on his behalf and he referred to two yearly work permits for March 2009 and 2010 in which it was stated that he was employed in the capacity of Project Manager at Cuisinart Resort and Spa and was subject to conditions that he only work for Cuisinart and that if he changed employer or occupation, it had to be with the approval of the Minister of Labour and an appropriate Work Permit amendment and that Social Security contributions were to be deducted from his salary/wage and paid into the Social Security Fund.

[7] Business cards of Mr. Hylton were also produced to show that he held the post of Project Manager for Cuisinart. Mr. Hylton states that indeed he is the President of the company entitled Joe Hylton Construction Managers Inc. (JHCM) which provides construction management services but that he was employed in his personal capacity by Cuisinart as Owner's Representative and that there was no contractual arrangement with his company.

[8] Mr. Hylton asserts that inasmuch that his salary was paid to JHCM, this was done on directions to Cuisinart and to facilitate opening a checking account at the bank to readily access his funds. He establishes that he incorporated a company in Anguilla with the same name to "facilitate accounting procedures". He asserts that he never signed any document as an independent contractor and it was merely as a matter of convenience that he communicated on his company's letterhead.

[9] Mr. Hylton asserts that he performed all his duties in a satisfactory and competent manner until his dismissal in August 2010. He states that Cuisinart at all material times provided the manpower, raw material and other resources necessary for him to do his job as Owner's Representative/project manager. He insists that Cuisinart

maintained full control over the exercise and manner in which he carried out his work, him having to provide weekly reports to Cuisinart and carrying out work according to its directives.

[10] Mr. Hylton said that he also ordered materials, created budgets and check requests, did inventory, interviewed, engaged and talked with contractors and filed reports. He also states that he worked on the project even when he was off the site. Mr. Hylton says that he was treated like part of the management staff of Cuisinart and to further his assertion that it was not his company retained, he says he never took employees to Anguilla and was required to produce weekly and sometimes daily work logs. He asserts that his travel to St Thomas was not for completion of the St Thomas Humane Society Building project as alleged. He says he was not assigned vacation time but he took vacation and was paid US$25,000.00 a month. In fact he states that he travelled to St Thomas on the majority of weekends and also travelled to Oklahoma to attend his daughter's wedding and son's graduation. He also stated he had two heart attacks and received treatment there.

[11] The event culminating in his termination occurred in August 2010. Hurricane Earl was due to approach Anguilla and required preparation of the property for its arrival and Mr. Hylton states that by Friday 27th August he was satisfied that the property was cleaned and ready for the storm and he left for St Thomas to secure his personal property. He intended to return to Anguilla on the 30th August but Hurricane Earl prevented this disrupting travel to the island and he was not able to return to Anguilla until 2nd September 2010. On 31st August however, he received the following communication by email from Mr. Rizzuto;

> *"Dear Joe,*
>
> *I am really disappointed that you left Anguilla knowing that Hurricane Earl was coming after you had told me that you would be staying on the project to finish the Chilled Water System. As soon as I turn my back, you leave me and now you can't get back on island.*

This letter is to inform you that our relationship is ended and I don't need you back. I tried to support you with the government but it is a losing battle and it is apparent you don't care about your reputation with me or anyone else. Take this letter as notice of termination immediately.

Leandro Rizzuto"

[12] Mr. Hylton insists that he had done nothing wrong in the performance of his job and that his termination was for the financial gain of Cuisinart to ensure the acquisition of the Temenos Golf Course. He says his contract of employment was breached and Cuisinart has failed to compensate him for the unexpired portion of his contract and failed to give him mandatory notice as is required by law in the sum of three month's salary. He claims the following;

(a) The sum of US$87,503.01 for pay in lieu of notice

(b) Loss of outstanding sums due under the Contract from 1st January 2010 through 31st August 2010 at US$4,166.67 per month in the sum of US$33,333.33

(c) Loss of wages as a result of the termination from 1st September 2010 to date of filing US$175,001.22 and continuing

(d) Reimbursable expenses - US$2012.22

(e) Loss of bonus and ability to receive bonus upon completion of task

(f) US$75,000.00 for additional work on completion of Spa which he was not paid

(g) US$18,000.00 for additional work on Tokyo Bay for which he was not paid

(h) Loss of reputation

(i) Solicitors fee - US$20,000.00.

Defendant's evidence

[13] Cuisinart, in its defence certified by Mr. Richard Marguilies, asserts that at no time was Mr. Hylton employed as "Owner's Representative/Project Manager" but rather that it was the company JCHM which was retained to oversee construction works at the Resort. It states that Mr. Hylton provided project oversight services on behalf of JCHM and there was no agreement with him in his personal capacity. It states that the role of general project manager was to project plan, manage stakeholders and team, project risk, schedule, budget and quality control. Mr. Marguilies certifies that the handwritten note that Mr. Hylton relies on merely reflects discussion points during negotiations for the contract for service and did not confer any terms of contract of service.

[14] Mr. Marguilies admits providing information to the Claimant's bank in St Thomas but states information so provided was merely to facilitate Mr. Hylton but in fact that Mr. Hylton was never paid personally and was not on Cuisinart's payroll. He certifies that all payments for work carried out were made to JCHM and that no social security deductions or payments were made from these payments to JCHM.

[15] General Manager Stephane Zaharia in his witness statement of 31st July 2012 also says that Mr. Hylton was never on payroll and all cheques were payable to JCHM and also that no social security payments were made. Mr. Zaharia also stated that Cuisinart assisted Mr. Hylton with obtaining work permits because of their familiarity with the jurisdiction and not because he was an employee. He states that Mr. Hylton had to incorporate JHCM in Anguilla as it was necessary for him to do so to provide project management services to Cuisinart. He admits not being present when the agreement between Mr Hylton and Mr Rizutto was made. It is regrettable, in my view, that the author of the document which gives rise to such contention was not required to give evidence by either side. Mr. Zaharia's vague responses and limited memory seemed to be limited to the fact that it was his belief that Mr. Hylton was the project manager.

[16] Mr. Basil Dathorne who works at Cuisinart states that JHCM was hired as project managers in place of SKANSKA sometime during 2008 and that he worked with Mr Hylton who was the Construction Project Manager who maintained control over the site and ordered all material to be used, directed the sequence of work and chaired meetings with contractors and subcontractors. He also stated that Mr Hylton had the authority to hire and retain subcontractors. He also said that in 2008 Mr. Hylton was finishing a job in St Thomas and that was one of the reasons he was travelling back and forth there. He did however on cross examination admit that he had not seen Mr. Hylton's contract and he did not know the terms of the agreement between Mr. Hylton and Mr. Rizutto but was of the opinion that since SKANSKA was project manager before Mr. Hylton who took over from SKANSKA, so therefore was Mr. Hylton.

[17] Ms Elizabeth Chronika who was the Mechanical Project Manager at Cuisinart at the material time indicated that Mr. Hylton's role was to plan the project, manage the team, manage project risk, schedule the construction, prepare and control the budget and quality control of contractors work. She also states that he prepared the contracts, requested payment for all contractors and provided construction reports to the Owner as well as ordered materials and secured the site. Ms Chronika also states that he kept weekly contractor meetings and organized and planned the work to be completed.

[18] Ms Chronika also recalls Mr. Zaharia ordering a few structural changes to be made to the villas. She details this as connecting the bedrooms to the living room by making an opening in the masonry in the wall. She also states that Mr Hylton was away from time to time and weekends but 90% of the time he remained accessible to her and others by email and telephone and he was responsive when contacted and work continued when he was away.

Independent Contractor/ Employee?

[19] Counsel referred me to several authorities to assist in the distinction between a contract for services and a contract of service. Lord Justice Stephenson in Young

& Woods Ltd v West (1980) EWCA Civ 6 approved a fundamental test as "*Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service".* The task however of distinguishing the two is not an easy one, especially given the myriad of circumstances which could point in either direction.

I would borrow the words of Waite J in Four Seasons v Hamarat EAT 396/84

"*The law clearly recognizes and acknowledges that the distinction between contracts of service and contracts for services remains an infinitely fine one controlled by the particular circumstances of each individual case."*

[20] It is settled law that the label which the parties use to describe their relationship cannot alter or decide their true relationship, but in deciding what that relationship is, the expression by them of their true intention is relevant but not conclusive. Its importance varies according to the facts of the case. In the circumstances of this case, it seems that the nature of the relationship is not clear and consideration has to be given as to the parties' intentions as inferred from the dealings between the two.

[21] In Young & Woods Ltd v West , Lord Justice Stephenson cited with approval the words of Justice Boreman in Ferguson v Dawson stating that one must look "*at the realities of the situation and not to the form alone, and particularly not alone to the label that was put upon the plaintiff by both the plaintiff and defendant, for it is contended that the form may be, and in this case is, a mere façade; whether or not the plaintiff regarded himself, whether or not the defendants regarded him, as a 'self employed labour only contractor' may be a matter, a serious matter, to be taken into consideration, but it is by no means conclusive, and a question remains whether in reality the relationship of master and servant existed…"*

[22] Lord Justice Ackner agreed that the fundamental test to be applied is this. "*Is the person who has engaged himself to perform these services performing them as a*

person in business on his own account? If the answer to that question is yes, then the contract is a contract for services. If the answer is no then the contract is a contract of service."

He added that *"No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

[23] The Court also looks at the correspondence between the parties, the conduct of the parties, the control exercised over the worker by the employer, who provides the tools and equipment which assist in getting the job done, the performance of duties outside the scope of his expertise and how integrated the job was to the business or whether or not the engagement was for the purpose of completing a specific task which is accessory to the main business to assists its determination. As stated before, this list is not exhaustive. I have considered the several authorities that Counsel helpfully provided to assess the distinctions between a contract for services and a contract of service and to assist the court in its determination.

[24] So the primary question to be determined in this matter is whether Mr. Hylton was an employee of Cuisinart or whether his Company JHCM was an independent contractor retained to provide services to Cuisinart. The answer is a difficult one especially noting factors overlapping in the absence of clear documentation defining the relationship between the parties. I do not consider that the written

agreement assists in that determination and have taken into consideration various facts to arrive at my conclusion.

[25] I noted JHCM provides construction management services and a brochure advertising the services that the company offers states that "*Under the scope of services, the Owner becomes more involved in the administration of the project than under a more traditional Owner/Contractor agreement. JHCM assists our clients in the administration of the work, and provides the basic services enumerated…*"

[26] Services that are offered by JHCM and referred to are as follows:

a. provide business administration and management services to coordinate the work of the contractors under the project;

b. advise on the separation of the Project into contracts for various categories of the work;

c. develop a project construction schedule;

d. the construction manager shall endeavor to achieve satisfactory performance from each contractor;

e. provide regular monitoring of the approved estimate of the construction cost;

f. recommend necessary or desirable changes to the Architect and the Owner and if accepted prepare a change order for approval;

g. receive and review from the contractor all required shop drawings, product data, samples and other submittals;

h. record the progress of the work and submit written progress reports to the Owner;

i. Arrange for the delivery and storage, protection and security for Owner-purchased materials, systems and equipment.

[27] The brochure of services also includes project examples amongst which referred to Cuisinart in both February 1999 to May 2000 and from October 2007 to September 2010. It also refers to the St Thomas Humane Society New Campus project from June 2006 to April 2008 which is significant in my view as it would mean that this project was running parallel with the Cuisinart project with which Mr. Hylton claims to be an employee. On cross-examination he denied travelling to St Thomas to complete the project.

[28] Mr. Hylton also stated that it was not correct to say that the list of services in the brochure were offered in relation to the project examples listed because he was either general contractor or project manager. Mr. Hylton says he was not in control of the work and did not direct contractors on how to do the job. He says he coordinated contractors with each other and was responsible for seeing that projects were completed. The distinction to my mind is artificial. The project updates submitted regularly clearly indicate Mr. Hylton's control in how and when the work was done as well as by whom. He communicated regularly with Mr. Rizzuto who is the Owner about budgeting and cost, schedules and payment of contractors, suppliers, suggestions on how to proceed, all evidenced by the voluminous documents filed by the Claimant. I find that the services offered in JHCM's brochure were similar in nature to what Mr. Hylton says he did as employee.

[29] Mr. Hylton's employment history in his resume states that he was principal of a small firm, JHCM, offering a full range of construction management and general construction services founded and licensed in St Thomas in 1993 and which had completed projects totaling $120 million. Amongst the listed projects are the St Thomas Humane Society New Campus from June 2006 to February 2008 and Cuisinart from February 1999 to May 2000. When questioned about this Mr. Hylton stated that he considered himself to be an employee of Cuisinart in the 1999 project but did not offer a reason as to why he did not include this in his employment history. Again in his resume it is evident that the project in St Thomas ran parallel to at least some part of his tenure at Cuisinart. He also lists

as a project Linda Keen Residence House #2 as running from 2003 to present (being at least 2008) which would also suggest that other projects were being attended to at the time when he claimed to be fully employed by Cuisinart.

[30] Another important factor, in my view, was the manner of payment. Mr. Hylton's explanation was that he never received any personal payments and did not have a personal account. He said he used to have a personal account but that the bank closed it. He says that the bank advised him that he would have to open a business account and that he could not open a personal account. Mr. Hylton also says that the bank did not tell him he had to receive cheques in the name of JHCM. Why then did Mr. Hylton not require his salary to be paid to him personally? It is understandable that a cheque made out to JHCM could not have been paid into a personal account…however, I am not persuaded that an employee, who is permitted to work in Anguilla pursuant to a work permit, would not be allowed to open a personal account in which to deposit his income. This was not confirmed by the bank to which Mr. Hylton refers.

[31] I also consider of note that the application for the work permit reflected a salary of US$75,000.00 per annum. The earnings shown were those received by JHCM in the sum of US$300,000.00 which is an excess of US$225,000.00 per annum. This, to my mind, favors the conclusion that Mr. Hylton was in business on his account as an independent contractor.

[32] The evidence shows that during the entire time that Mr. Hylton was in Anguilla, only two payments were made to him personally in April and May 2008. All other payments were made to JHCM and there is evidence that on occasion Mr. Hylton, before the opening of the business account and on some instances after, submitted invoices on JHCM's letterhead to the Accountant stating that "*There is due at this time the sum of $25,000.00 for the Construction Management fees for the month …*"

[33] Mr. Hylton stated that he was not assigned vacation time but that he took vacation and was paid US$25,000.00 per month. The presence or absence of holiday pay

in my view does not amount to a clear indication as to whether there was a contract for services or a contract of service but can be an indicator as to the intention of the parties.

[34] Several factors, when taken as a whole, lead me to the conclusion that Mr. Hylton was not an employee but rather a contractor for services who was performing them as a person in business on the account of JHCM.

a. All communication was written on his letterhead which he brought to Anguilla from St Thomas despite saying that he could have requested letterheads from Cuisinart and it was not a directive for him to do so. He says he used the stationary as it was available to him and he had gotten used to it. It is difficult to accept that Mr. Hylton as an employee would incur the unnecessary expense of stationery for copious documentation over a period of three years.
b. Mr Hylton registered a company JHCM in Anguilla and all cheques from Cuisinart were paid into a bank account in the name of that company. Even before (and for some time after) the account was open, Mr. Hylton was sending invoices in the name JHCM to the Cuisinart accountant Mr. Halley for construction management fees.
c. Mr. Hylton never paid social security despite it being a condition of his work permit.
d. Mr. Hylton travelled nearly every weekend to St Thomas from either Thursday or Friday to Monday or Tuesday to take care of business related activities amongst other things. He states this in a letter dated June 7th 2008. He also stated that the trips back and forth were not for pleasure.
e. Although a continuous record of what Mr. Hylton did (as provided by him) was kept, Cuisinart did not appear to control the way in which he did his work, what work had to be done, when he would work and for what hours. Although not independently conclusive, in my view there was insufficient control to establish a contract of service.
f. The documents relating to employment history and the brochure of JHCM showed projects done by JHCM running parallel to the project at Cuisinart and

in the latest brochure of JHCM, a listing that Cuisinart was one of the projects done by JHCM between 2007 and 2010.

[34] Taking into account all the various factors as a whole, my view is that the relationship did not amount to a contract for service. I find on the evidence that Cuisinart did not intend to create an employment relationship with Mr. Hylton but rather viewed the arrangement as a contract for services with JHCM. In conclusion, I am of the view that Mr. Hylton was not employed under a contract of service so as to be able to avail himself of the unfair dismissal provisions of the Anguillla Fair Labour Standards Act but rather that JHCM was employed under a contract for services and consequentially, the claim is hereby dismissed.

Counterclaim

[35] Cuisinart counterclaims that it incurred losses as a result of a breach of contract in the sum of US$2,925,000.00. During the course of the trial however, the focus was on the capacity in which Mr. Hylton was employed and that issue was not ventilated in a way which would lead the court to references made to the delay of the project. There was insufficient evidence with which I could proceed. I am not satisfied that the matter was litigated in a way that assisted the court to come to any conclusion and it is my view therefore that the counterclaim has not been established and it is consequentially dismissed.

[36] I thank learned Counsel for their industry in this matter.

Conclusion

[37] In summary the judgment of the court is as follows:

(a) The claim is dismissed.
(b) The counterclaim is dismissed.
(c) Each claim being dismissed, the parties are ordered to bear their own costs.

Cheryl Mathurin

High Court Judge