

**IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO: ANUHCV2017/0084**

**BETWEEN:**

**ANTIGUA AND BARBUDA SOCIAL SECURITY BOARD OF CONTROL**

**CLAIMANT**

**AND**

**ABBOTTS CONSTRUCTION LIMITED**

**DEFENDANT**

**Before:**

Justice Jan Drysdale

**Appearances:**

Joanne L.T. Smith of counsel for the Claimant

Kwame L. Simon of counsel for the Defendant

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2021: July 12<sup>th</sup>  
2022: February 17<sup>th</sup>

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**JUDGEMENT**

[1] **Drysdale, J:** The Claimant claims against the Defendant the aggregate sum of \$46,659.80 for unpaid social security contributions and surcharge for specified employees pursuant to the **Social Security Act**<sup>1</sup> ("The Act").

**Background**

[2] The Claimant is a Statutory Body governed by the Act and its corresponding Regulations. The Defendant is a construction company wholly owned by a single Managing Director and Shareholder, Mr. Collin Abbot.

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<sup>1</sup> Cap. 408, Revised Edition 1992 (as amended) and its corresponding Regulations to include the Social Security (Collection of Contribution) Regulation.

- [3] The Defendant was retained by property owners to construct a Villa at NonSuch Bay. The Defendant engaged the services of several workers to perform specified duties on the project site. The Claimant's compliance inspectors conducted a spot check at the Defendant's project site. During the spot check, the Claimant interviewed the workers on the Defendant's site regarding their social security contribution. The inspectors unearthed that the workers' contributions were outstanding.
- [4] Thereafter, upon the request of the Claimant, the Defendant's representative attended a meeting where the Claimant argued that based on the information elicited from the workers, that these persons were employees of the Defendant and as such the Defendant was responsible for the payment of the social security contribution of the workers. That meeting and subsequent meetings led the Claimant to furnish the Defendant with a demand letter, giving the Defendant thirty (30) days to settle.
- [5] There was no settlement between the parties, which led the Claimant to file a claim against the Defendant for outstanding social security contributions of employees and surcharge allegedly due and owing to it. Subsequently, on 20<sup>th</sup> November 2018, the Claimant amended its claim form to adjust the period for which contributions and surcharge were owed and the corresponding amount owed now being the sum of \$46,659.80.
- [6] The Defendant also filed a defence and a subsequently an amended defence denying liability. The Defendant contends that the alleged workers were in fact independent contractors save Collin Abbott who was and is a director and shareholder of the Defendant and who does not receive a salary. The Defendant further contends that these independent contractors having been hired under a contract for service was by law obligated to pay their respective contributions to the Claimant. The Defendant therefore absolves itself from all liability as alleged by the Claimant.
- [7] At trial, the Claimant relied on five (5) witnesses: Rawle Browne, Hilson Francis Neville Hazelwood, Wilford Theophile and Julian Denzil Anglin. The Defendant relied on 2 witnesses, Pascale Gillis<sup>2</sup> and Collin Abbot. Before exploring the submissions of the parties, it is useful to set out the contents of the evidence of the witnesses.

## **The Evidence of the Claimant**

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<sup>2</sup> Pascal Nunes, Ms. Nunes and Pascal Gillis are one and the same person

### **Neville Hazelwood**

- [8] The affidavit of Neville Hazelwood is 7 paragraphs long. He deposes that Mr. Abbott is familiar with him as a carpenter by trade and him as a person skilled in masonry work. Sometime around November 2013, he was called to work for the Defendant at NonSuch Bay. He was offered the rate of \$150 per day which was \$50.00 less than his usual rate of \$200.00 per day but which he accepted as work was very slow.
- [9] His stipulated that working time was 7:30 am – 4:30 pm. He further states that transportation was provided that required him to pay a contribution towards refueling the pick-up. This cost he never paid as it was his belief that the site being more than 5 miles away it was the duty of the employer to provide transportation free of charge. Notwithstanding the non-payment he was never precluded from riding in the company's vehicle.
- [10] Daily, he was supervised by Mr. Abbott's foreman. Approximately a month and a half after the commencement of his work he was approached by Mr. Abbott to sign a Service Agreement. The agreement stipulates he was an independent contractor responsible for paying his own social security contribution. Mr. Hazelwood deposes that he took the form without signing as he didn't think it to be his responsibility to pay these contributions. He avers that save for the reduced pay that his terms and conditions of this job were no different from his previous employment in the construction industry. He stated further that in his previous employment, his employers paid his contributions.
- [11] Under cross examination the witness denied that he was hired as a subcontractor and denied signing any agreement to that effect. However, when confronted with the service agreement he agreed that this was his signature and then proffered an explanation being that he had no choice as was desperate for work and would not have been employed if he did not sign the same. The witness agreed that he was given an opportunity to take the agreement and seek legal advice before signing.
- [12] The witness asserted that he worked exclusively for the Defendant for the period November 2013 to March 2014. However during that time he did not receive any holiday or sick leave pay and or any overtime. He also did not make a claim for any severance benefits when his services were terminated. Finally, he agreed that he did not make any payments towards social security on his behalf.

### **Julian Denzil Anglin**

- [13] In the affidavit of Mr. Anglin he deposes that he worked for the Defendant from November 2013 to July 2015. He was contracted to work as a foreman of the day-to-day operations at NonSuch Bay with a pay of \$250.00 per day. He states that he was required to work 7:30 am – 4:30 pm with half an hour lunch, fifteen minutes break, five days per week. These were fixed hours, and he was not afforded the privilege to leave the job site outside these hours. He was given a pick-up by the Defendant to take the workers to NonSuch Bay and they were all required to contribute to the refueling of the vehicle. His pay was eventually raised to \$275 per day sometime in 2014. The witness states that he too was given the Service Agreement to sign, and he saw no difference in the standard he was held to Mr. Abbott and the other employers who employed him prior and have paid his contributions.
- [14] Under cross examination the witness asserted that he is multi skilled worker with certificate in drawings. For that reason, he was hired by the Defendant as the site supervisor for a project at NonSuch Bay in 2013. He worked with the Defendant until the end of the project.
- [15] The witness agreed that he was a subcontractor and that he signed an agreement to that effect. He further explained that the first agreement presented raised many concerns with the various workers and as such it was adjusted. Thereafter he signed that agreement. This agreement was renewed annually and he was given an opportunity to review and seek advice. He understood that effect of this was that he was responsible for making his own payments for social security contributions to the Claimant and in fact did so for a period of two years though inconsistently.
- [16] Finally, he agreed that NonSuch Bay was a resort which specific rules concerning construction. He was issued those rules and it was mandatory that all workers comply with those rules which amongst other things stipulated the time of work.

**Wilford Theophile**

- [17] The witness deposed that he is a mason by trade and for almost 19 years he worked exclusively with the Defendant as an employee. Throughout his employment the Defendant the Claimant made contributions on his behalf. During the period November 2013 to July 2015 he worked on the NonSuch Bay project and was paid the sum of \$180.00 per day.
- [18] It was the routine that workers would be picked up daily from the Gas Station close to the Central Marketing Corporation and taken to NonSuch Bay to commence work at 7.30 am. He received a 15 minute break at

9 a.m. and a 30 minutes lunch. The workday ended at 4.30p.m. He worked weekdays being Monday to Friday.

- [19] Instructions for the project were given by the Foreman, Mr. Anglin. He also arranged payment and on Fridays which were typically short days a lesser sum than the \$180.00 was usually paid.
- [20] Under cross examination the witness agreed that he last worked on the project in May 2017. Thereafter he brought a claim against the Defendant for unfair dismissal. However, the Labour Tribunal dismissed the matter deeming it to be an abandonment of job.

**Rawle Browne**

- [21] The witness deposed that he is an Inspector with the Claimant. In that capacity his duties include amongst other things the monitoring of employers to ensure that social security contributions are paid, conducting routine field visits, and contacting delinquent employers and self-employed persons for the non-payment of social security and other related matters.
- [22] On 26<sup>th</sup> November 2012 he visited NonSuch bay for a routine field visit. He observed a construction site in the foundation stage. He was advised by an employee that Collin Abbott was the Contractor for the project. He had a conversation with Mr. Abbott who advised that he had three employees on the job and the other workers were sub-contractors. The alleged sub-contractors were interviewed and details about their pay, functions and start of employment were noted.
- [23] Subsequently a check of the records relating to the Defendant was conducted and revealed that there was no payment for Collin Abbott and the other workers whom Mr. Abbott had classified as sub-contractors.
- [24] A second visit was made to the site on 11<sup>th</sup> March 2015 with another inspector. Again discussions were engaged with Mr. Abbott and he revealed that there were 11 workers, 6 being employees of the Defendant whilst 5 were sub-contractors. Another interview was conducted with the employees on site. The employees revealed that although they had signed a contract stating that they were sub-contractors that based on working conditions they did not believe that they were in fact sub-contractors. Thereafter a further discussion was held with Mr. Abbott, and it was explained that the working conditions were not consistent with that of an independent contractor and as such he remained responsible to make the requisite social security payments. Mr. Abbott disagreed and maintained that he was not responsible for these payments.

- [25] Eventually the matter was escalated to his supervisor Hilson Francis who spoke to Mr. Abbott on the matter. A meeting was also held with Pascale Gillis a representative of the Defendant. The meeting did not yield an agreement as the Defendant did not resile from its position that the workers were sub-contractors.
- [26] Thereafter Mr. Francis gave instructions for him to prepare an assessment. A letter was also prepared outlining the outstanding liability for the workers who were not accounted for during the work period. That letter was delivered to Mr. Abbott on 27<sup>th</sup> March 2015 at NonSuch Bay.
- [27] A further letter was delivered to Mr. Abbott on 11<sup>th</sup> May 2015 giving 30 days for a response. The Defendant did not respond to the letter. The matter thereafter was referred to the legal department for action.
- [28] On cross examination the witness advised that the remittance forms were internal documents that would not have been provided to the Defendant. He explained that the assessment with a breakdown was what that was provided. He explained that the assessment form did not detail the specific contribution for each employee but would have had a total of the outstanding contributions.
- [29] He admitted to not being aware that one of the workers which worker formed part of the assessment had ceased working in 2014.

**Hilson Francis**

- [30] The witness deposed that he is the Compliance Manager for the Claimant. In that capacity he has responsibility for the Inspectorate and Data Processing Departments. Prior to that he was the Inspectorate Supervisor. Rawle Brown was an Inspector who reported to him. On March 11, 2015 Mr. Browne reported that he and another inspector had conducted a spot check at the construction site at NonSuch Bay. That based on their investigations it was determined that there were several workers whose contributions were not accounted for contrary to the Act. It was indicated that there were several workers whom the Defendant considered as independent contractors but whom but for the signing of a contract, worked under the same terms and conditions as other workers and who saw themselves as being no different.
- [31] Subsequently a meeting was convened with Ms. Nunes a representative of the Defendant. The Claimant explained its position and concerns, but the meeting ended without any agreement. Thereafter he wrote Mr. Abbott outlining the position of the Claimant based on investigations and the Claimant's interpretation

of the law. The letter also requested that Mr. Abbott produce all outstanding records and contributions for certain named workers for a period dating back to three years. Although the letter did give a time to respond no response was received.

[32] Mr. Browne was then instructed to prepare an assessment statement for outstanding contributions. Once again, the Defendant was given time to respond but failed to do so. Consequent upon this a demand letter was delivered to the Defendant giving it 30 days to settle. Upon the failure to respond the matter was referred to the legal department.

[33] In cross examination the witness was challenged about the assertion that the Defendant failed to respond to the demand letter. He was shown a letter which was part of the exhibits of the Defendant and admitted that that letter was dated after the demand letter. He stated that he was not familiar with that letter and reasoned that it may be because at the time the letter was received the matter had already been referred to the legal department.

[34] The witness also agreed that remittances are used to prepare the assessment forms and that no remittances were provided to the Defendant prior to the trial of the matter.

### **The Evidence of the Defendant**

#### **Collin Abbott**

[35] Mr. Abbott's deposed that he was the Director and sole Shareholder of the Defendant. Prior to the incorporation of the Defendant, he worked as a self-employed construction engineer both in England and in Antigua. In that capacity he had worked for a construction company and had fixed hours of work and a tea and lunch break. He was never considered an employee and remained responsible for the payment of his taxes and pension contributions.

[36] Since the formation of the Defendant both he and the Company Secretary have always ensured that monthly remittance forms were submitted outlining the earnings and contributions of each employee. Any persons not listed on those forms were not employees but independent contractors.

[37] In October 2013 the Defendant was retained to construct a villa at NonSuch Bay. Given the scale of the project the decision was made to outsource certain tasks on the project site. By virtue of the project being done within a residential development, the Management of NonSuch Bay issued guidelines that restricted

construction work to set days and time slots to prevent disturbance to neighboring homeowners. To prevent any operational issues with the build the workers were given a copy of these guidelines.

- [38] Based on the nature of the build, the independent contractors were often paid on a daily rate and sometimes by price work calculated at the square footage. He states further that the independent contractors were free to leave the project site at any time they so desired. If, however, the contractors who were paid on a daily rate left the site early their rate was prorated. On several occasions, the independent contractors left the site to perform more favourable jobs and usually returned to the Defendant's job site if there was work available.
- [39] The Site Supervisor Julian Anglin operated the Defendant's pickup. Mr. Anglin used that vehicle to transport workers who had no means of transportation to and from the job site. Workers who used this method of transportation were responsible for making contributions to Mr. Anglin for the refueling of the pickup.
- [40] Following a spot check on the site on 11<sup>th</sup> March 2015 the Defendant was invited to a meeting with the Claimant. The Company Secretary attended the meeting and was advised that issues regarding the non-payment of contributions for certain workers on the site. Subsequently a letter dated 19<sup>th</sup> March 2015 followed, requesting outstanding contributions. A notice dated 8<sup>th</sup> May 2015 demanding payment of the sum of \$43,690.60 was received for contributions allegedly due and owing at as March 31, 2015.
- [41] The matter remained unresolved until the Claimant commenced these proceedings against the Defendant. During the course of these proceedings the Claimant filed a response to the Defendant's request for information and added two additional names being Neville Hazlewood and Rene Gayral thereby making 9 workers for which contributions were claimed.<sup>3</sup> The Claimant also listed an erroneous amount of the breakdown of the salaries that were allegedly paid to these workers.
- [42] Save and except himself, the other 9 workers prior to the commencement of that project never previously worked for the Defendant and are all independent contractors, they all having signed a contract to that effect. Further, although he is listed as director and sole shareholder of the Defendant, he is not an employee and therefore does not draw a salary from the Defendant and is not liable to pay contributions.

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<sup>3</sup> The 7 previous workers for whom contributions were being sought were Julian Anglin (Foreman), Evelyn Holsborough (Mason), Marvin Forde (Carpenter), Moses James (Mason), Leon Braithwaite (Mason), Phabian Nation (Labourer) and Jayme Phillip (Heavy Duty Operator)

- [43] The witness continued to deny being an employee of the Defendant and on cross examination stated that he supported himself from rental income, savings and his partner Pascal Nunes Gillis who had a full-time job. The witness stated that although social security payments were made on his behalf during the life of the project this was because he had sourced other smaller jobs and the contributions were made for those jobs.
- [44] The witness restated that the Defendant only had three employees all of whom contributions were made on their behalf. He challenged the accuracy of the assessment but admitted that he had provided no evidence that it was incorrect.
- [45] He denied that the workers having to pay their social security contributions would reduce the expenses as he suggested that these workers were paid at a higher rate of pay.
- [46] He agreed that the workers and his employees for the most part came to work at the same time being 7.30 and left at 4.30. Further that they also took their break at the same time 9a.m. The witness eventually admitted that Julian Anglin did not have a vehicle of his own and picked up the workers in a private vehicle belonging to the Defendant daily.
- [47] The witness admitted that he obtained legal advice in the preparation of the contract and maintained that due care and attention was given to it notwithstanding that the execution of all of these documents appeared to present issues.
- [48] The witness explained that he did not initially respond to the first letter from the Claimant as he did not believe that the workers for whom contributions were claimed were employees. He agreed that the Defendant only responded more than 2 months after the Claimant issued a notice demanding payment. He acknowledged that a schedule of payments had been produced by the Defendant and formed part of the documents of the Defendant. He further agreed that to prepare this schedule that the Defendant must have in its possession a record from which the information was extrapolated. However, he laid this issue squarely in the hands of the Company secretary and stated further that he was unaware of whether any evidence had been submitted to rebut the assessment of the Claimant.

**Pascale Gillis**

- [49] The essence of the evidence in chief save for some linguistic styling difference was largely a mirror of the evidence in chief of Collin Abbott. For the purpose of brevity, the same will not be duplicated in this judgment.
- [50] However of note was that on cross examination this witness admitted that much of her evidence was relayed to her by Collin Abbott as she operated out of an office in Browns Bay. For that reason, she was also not in a position to verify that the workers were free to leave the site at will as she had previously indicated.
- [51] The witness denied that Collin Abbott either received a salary or any takings or drawings from the Defendant. She insisted that if he was to be paid anything it would have been a decision of the company.
- [52] The witness admitted to preparing a schedule of payments which differed with the assessment done by the Claimant. She explained that the information was extrapolated from the cheques paid to the workers which gave a relatively good indication of their start and end date. However, she admitted to never providing the Claimant with any such information to rebut its assessment.

## **The Issues**

- [53] The parties are essentially in agreement that the issues for consideration are as follows:
- a. Whether the contracts are valid?
  - b. Whether the 9 identified workers are employees or independent contractors falling within the scope of the Labour Act?
  - c. Whether Collin Abbott is an employee of the Defendant?
  - d. Whether the assessment provided by the Claimant can be relied upon to determine the contributions owed?

## **Legislative Framework**

- [54] A person doing paid work falls into one of two categories, employee or independent contractor/self-employed. Under the Antigua and Barbuda Labour Code<sup>4</sup> an "employee" is defined 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

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<sup>4</sup> Cap 27 of the Laws of Antigua and Barbuda as amended

contract be oral or written, expressed or implied; and the term includes a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporary layoff, strike, or lockout, as well as an apprentice whose services or labour may be designed primarily to train such apprentice; but the term does not include established employees of the Government;'

- [55] The Labour Code further defines employer as 'any person, including any of his representatives, who contracts for or stands ready to contract for the services or labour of an employee and the term includes any body of persons corporate or incorporate.'
- [56] No definition of self-employed/independent contractor is provided in the Labour Code. Whilst the Social Security Act attempts at a definition it is a wide and generic definition stating that a self-employed person as "a person gainfully occupied in employment in Antigua and Barbuda who is not an employed person."
- [57] In any event the various definitions only give a guide as to the categories of worker. It is only upon a fulsome consideration of all the facts and the law that the issue of the status of the worker will be resolved.

## **ANALYSIS AND THE LAW**

### **Whether the contracts are valid**

- [58] Before delving into the crux of the matter the issue of whether there exists a contract that can be relied on has arisen and must be settled. The Claimant premised its argument that there is no valid contract on the purported failure to properly execute the same. The Claimant urges the Court to accept that the Defendant did not take proper care in the execution of those contracts resulting in some contracts being signed by the worker and the Defendant but not witnessed, other contracts being signed by the worker as service provider and witness, contracts being signed by the worker as witness and not as a party to the contract and finally the contract being signed by the parties and one witness as opposed to two witnesses. Therefore, the Claimant posits that this failure in form is sufficient to render the contracts as invalid. The Defendant argues that these failings are insufficient to vitiate the contract if the main feature of the contract is present. That is, the intention of the parties to enter into legal relations; the presence of an agreement of which an offer has been legally accepted; and either the promise is contained in a deed under seal, or it must be supported by consideration. The Defendant also submits that the court may also be willing to infer that the parties have reached a binding contract where one party renders partial performance.

- [59] By law a contract may be either oral and or in writing expressed or implied.<sup>5</sup> As such there is no obligation statutory or otherwise that a written contract of employment must be witnessed. What really matters is that the fundamental elements necessary to formulate a contract being that is there is an offer, acceptance, consideration and the intention to create legal relations are present. The fact the Defendant was neglectful or perhaps inattentive to the fact that the workers may not have signed in the designated areas and or witnesses did not sign in the spaces allocated and or generally the contract was not executed properly is insufficient to render the agreement invalid.
- [60] From the conduct of the parties, it is clear that there was an agreement to provide services for payment. Further all the essential terms to formulate a contract was present. This coupled with at the very least part performance of the parties is indicative of there being an employment agreement of some sort. The effect and consequences of that agreement will be later explored in attempting to resolve the vexatious conundrum that is the status of the various workers.
- [61] However having accepted that there was a valid contract the more pertinent issue is whether this was a contract of or for service.

### **Whether the 9 identified workers are employees or independent contractors**

- [62] Having found that the agreements are valid I am still obligated to review the same to determine the status of the workers. The fact that the parties to the contract have ascribed a certain label to themselves of the work performed is not determinative of whether the worker qualifies as an independent contractor. 'The court will not validate whatever status the parties confer on themselves if all the evidence points the other way<sup>6</sup>.' This is a question of fact and law which can only be resolved by looking at all of the evidence. Mummery J in the case of **McMeechan v Secretary of State for Employment and another**<sup>7</sup> agrees stating:

'A statement that he supplies them as a self-employed worker is not conclusive of his status, since it has been said many times that whether someone is an employee is a matter of

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<sup>5</sup> Antigua and Barbuda Labour Code defines employment contract as "any contract, whether expressed or implied and whether written or oral, whether it is agreed that one person (the employee) will perform certain services for another (the employer); and the term shall include any indenture or contract of apprenticeship;"

<sup>6</sup> Labour Law 6<sup>th</sup> edition by Deakin and Morris page

<sup>7</sup> [1994] UKEAT 1006

analysing all the rights and obligations created by the contract. The question is not determined by the label which the parties themselves put on the relationship.’

- [63] The Courts in this region have also endorsed the above approach. This was demonstrated in the case of **National Insurance Board v Bottlers (St. Vincent) Ltd.**<sup>8</sup> Mitchell J articulated the principle in the following words:

‘That they are employed under a contract that characterises them as self-employed has long been held not to be decisive. The court does not look to see by what name or character the parties to a contract distinguish their contract. The court must consider the categorisation of the person in question objectively, and make its own finding about the nature of a contract in law.’

- [64] The Defendant issued standard contracts to the workers. The contracts provide that the term of engagement to be typically one year and the hourly rate which varied due to skill and job performed by the various workers. In addition to these terms the contract contains a term dealing with the status of the service provider which articulates that the worker is an independent contractor. As much emphasis has been placed on the effect of this term the entirety of that section is set out below:

**‘STATUS OF SERVICE PROVIDER’**

“The Service Provider is an independent contractor. The Service Provider is not an employee or agent of the Client. No employee, agent or sub-contractor of the Service Provider is an employee, agent or contractor of the Client. The Service Provider will not represent or hold out, and will not permit any employee, agent, or sub-contractor of the Service Provider to represent or hold out, that the Service Provider or any such person is an employee, agent, or contractor of the Client.

The Parties acknowledge and agree that the Services provided by the Service Provider, its employees, agents or sub-contractors shall be as an independent contractor and that nothing in this Agreement shall be deemed to constitute a partnership, joint venture, agency relationship or otherwise between the parties.’

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<sup>8</sup> ECSCJ No. 260 of 2000

- [65] The contract has repeatedly restated in different forms that the worker is an independent contractor. It therefore goes on to prohibit the worker, his agents or subcontractors from representing themselves to be an employee of the Defendant. Relying on the above term the Defendant highlights that the classification of the worker as an independent contractor coupled with the ability of the worker to subcontract or substitute is inconsistent with an undertaking to provide services as an employee pursuant to a contract of services.
- [66] The Claimant's argument as I understand it questions the manner in which the contract was performed and suggests that in reality the practice runs contrary to this term and is not indicative of the true relationship between the parties. In particular the Claimant argues that each of the workers were required to personally provide their skills for an hourly rate. Leaving the job site was not a viable option as it resulted in financial consequences in the pay of the worker being prorated. A full day of personal work was required on the job site during workdays. Therefore, the evidence establishes that personal service was a feature of the contractual relationship and thereby runs contrary to a contract for service.
- [67] Where the way in which a contract is performed bears little or no relationship to the terms set out in the agreement, it may be open to the court or tribunal to go beyond the written text when construing the contract. Support for this is found in the case of **Autoclenz Ltd v Belcher**<sup>9</sup> where the court held that where the written documents do not truly reflect the relationship that the onus is on the court to determine what the relationship is.
- [68] The issue of how to determine the status of a worker has through the years confounded the courts. For that reason, several tests have been developed over time starting with the issue of control being the sole and determinative factor and then evolving into several tests one of which is found in the case of **Ready Mix Concrete v Minister of Pensions and National Insurance**<sup>10</sup>. In that case McKenna J expressed that a contract of service existed if the following three conditions were present:

1. 'The servant agrees that in consideration for wages or other remuneration, he will provide his own work and skills in the performance of some service for his master.

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<sup>9</sup> [2011] IRLR 820

<sup>10</sup> [1968] 2 QB 497

2. The servant 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.
3. The other provisions of the contract are consistent with it being a contract of service.'

[69] In this instance, the multi factor test was used. This entails consideration of other tests and factors before arriving at a conclusion. The greater the number of tests satisfied the more likely that the individual would fall into the category of employee. Support for this position was found in Halsbury's Laws of England wherein it was stated that '[t]here 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 under a contract for services) is to take into account "a wide range of factors," and to apply a "wide range of tests."

[70] The case of **Sagicor Insurance Company v. Livingstone Carter and Others**<sup>11</sup> was similarly of the view that a careful balancing exercise of all factors and a consideration of multiple tests should be undertaken to resolve this issue. In a quite comprehensive judgment it was decided that:

"Upon an analysis of established authority and tests formulated therein, including the control test, the organization or integration test, the economic reality test, the multifactor test and mutuality of obligations, the proper approach to the issue required a thorough examination of all aspects of the relationship between the parties including an examination and construction of the terms expressly set out in the written contracts as well as the manner in which the contracts were performed. The written contracts were the principal, though not the only, sources of information as to the nature of the contractual relationship between the parties. There were other factors or features of the relationship that required examination. No single factor or feature was likely to be decisive in itself. Each might vary in weight or direction pointing either towards a contract of service or a contract for services. Having given such balance to the respective factors in all the circumstances on the evidence the ultimate question was whether the worker was carving on business on his/her own account or not. It was a mixed question of fact and law, depending not solely upon a construction of the written contracts but also an investigation and evaluation of the factual circumstances in which the work was performed..... As Lord Wright advised in *Montreal v Montreal Locomotive*

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<sup>11</sup> Nos 1050, 1051, 1052 and 1053 of 2006

Works Ltd. (supra) at p. 169: "In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties..... "

- [71] The Court accepts this to be an accurate statement of the law and will be guided by these principles and authorities in order to resolve this dilemma.

## CONTROL

- [72] In **Ready Mixed Concrete v Minister of Pensions and National Insurance** Makenna J described control as including "the power of deciding the thing to be done in the way, the means, the time and the place.' Dixon J in **Humberstone v Northern Timber Mills**<sup>12</sup> in assessing this issue also posits that:

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

- [73] Applying the guidance above to the factual matrix I note that the workers were closely monitored in the performance of their jobs and the time spent at the job site. Whilst I agree with counsel for the Defendant that some level of monitoring and control is necessary, the extent of the monitoring was such that the Defendant designated a start and end time as well as times and duration for any break including lunch. The fact that the Defendant was obligated to obey the rules of NonSuch Bay which limited the times within which work could be conducted does not provide justification for determining when and how long a worker could take a break and the number of breaks allowed. Neither could the Defendant set specific times for work. At best the Defendant could prohibit work from being conducted outside of the time set for such activities by NonSuch Bay. The fact that specific timelines were set for the start and end of work is indicative that the workers were not free to choose when to work. They had to abide the rules dictated by the Defendant.
- [74] According to Ms. Gillis the workers were 'at liberty to leave the job site on breaks or pursue other work.' Although this was said to convince the Court that the workers were independent contractors of importance here is clear indication that the workers could only leave the job site during breaks thereby demonstrating

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<sup>12</sup> (1949) 79 CLR 389

that they little control over their hours of work and were required to be present during the day. Moreover, any derogation from the hours of work would result in a financial loss to the worker as his pay was pro-rated according to the time spent away from the site.

[75] The issue of control was also evident in the payment of the workers. Where workers were paid for price work according to the evidence at the end of the day the work would be measured by the Forman who would inform the Defendant and a determination would be made by the Defendant on the resultant payment. In all other cases the evidence is that the Defendant set the rate of payment for each worker. There was no negotiation between the parties. It was very much a take it or leave it situation.

[76] The workers also had no control over the work they performed. The evidence is that on a daily basis they reported for duty and the Foreman would designate and inform them of what their respective tasks were. By doing so the Defendant exercised the right not simply to control what was to be done but to tell the workers what was needed to be done and on a daily basis exercised that right. The workers couldn't exercise their own discretion in determining the nature of the work that was required to be done on any given day. All in all, it appears that the workers were obliged to obey the rules of the Defendant in the daily execution of their duties.

### **PERSONAL SERVICE AND SUBSTITUTION RIGHTS**

[77] The unlimited power of substitution runs contrary to the obligation to provide personal service which is usually indicative of a contract of service. It is therefore an important element in resolving the status of the various workers.

[78] The Defendant relying on the service provider clause above which specifically stated that '[t]he Parties acknowledge and agree that the Services provided by the Service Provider, its employees, agents or sub-contractors shall be as an independent contractor...' argues that this is evidence of there being no requirement for personal service. However I am reminded of the words of Mitchell J in the **National Insurance Board Case** where he said:-

"Because a worker is permitted to hire whomsoever he wishes at his own cost to help him in the performance of his duties, does that automatically make him an independent contractor? I cannot find either in law or applying common sense that that is the inevitable conclusion."

[79] Whilst the 'Service Provider' provision seems to reference the ability to provide a substitute, in order to resolve this, I need to consider whether there is a genuine substitution clause. From the contract it is evident that there is in fact no substitution clause. Further nowhere in the contract is there any provision of the details of how the substitution is to take place, the party responsible for payment and other essential elements that such a clause should possess. A genuine substitution clause should set out clearly that the worker is not obliged to personally provide the defendant with the agreed services and that the worker is entitled to invoke this clause and send a substitute if they are unable to personally perform the services. The mere reference that a worker or sub-contractor shall not be considered as an employee is insufficient to qualify as a substitution clause. I am of the view that there is no genuine right of substitution consistent with a contract for service.

[80] In the event that I am mistaken, I note that the evidence of the Defendant is that several workers put the Defendant on notice of 'other job opportunities which prevented them from working on the project site.' To my mind this undermines the argument that there was the ability to substitute and rather is indicative that there was a need for personal service. Where the worker was unable to perform there no option but to terminate the agreement provided as opposed to substitute. I therefore conclude that personal service was a feature of the engagement between the Defendant and the various workers.

## **OTHER FACTORS**

### **Bargaining Power**

[81] The case of **Autoclenz Ltd v Belcher**<sup>13</sup> ruled that the 'relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed.' Lord Clarke further advised that a purposive approach which meant that 'the true agreement will often have to be gleaned from all the circumstances of the case' needed to be adopted to determine this.

[82] The evidence is that the workers signed or intended to sign the agreement which defined them as self-employed. However, they felt that there was little choice as at the material time as this was a precondition to obtaining work. The inequitable bargaining power of the workers vis a vie the Defendant was also evident as it concerned payment. Although the Defendant's witness Collin Abbott suggested that the workers were paid at a higher rate of pay, having closely examined evidence in chief and his demeanor I formed the distinct impression that he was not being truthful in this regard. Specifically as it related to his evidence in

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<sup>13</sup> [2011] IRLR 820

chief I noted that he stated that 'on several occasions independent contractors left the site to perform more favourable jobs...'. This to my mind runs contrary to the ascertain that they were paid at a higher market rate. In contrast the evidence of the workers was consistent in that at the time of engagement that they were all desperate for work, work in the industry being slow. They therefore accepted a lower rate of pay to what was ordinarily charged for a person with their requisite skill set. Therefore, I believe the evidence of the Claimant in this regard. Having preferred the evidence of the Claimant that the workers were paid below the normal standard rate of pay I reject the assertion by the Defendant that the workers had opportunity for profit.

### **Transportation**

- [83] Another factor to be considered is the effect if any of the transportation of the workers. The workers were transported along with other employees of the Defendant daily to the job site by the Forman, Julian Anglin who has possession of the Defendant's vehicle. The Defendant attempted to downplay this by suggesting that this was done at the behest of the Forman and that the workers were required to reimburse the Defendant for the diesel used. However, I note that the requirement for repayment was not strictly enforced as supported by the evidence of Nevil Hazelwood. On cross examination I found the evidence of the Defendant witness Collin Abbott to be unreliable in this regard. The witness again seemed evasive and after prodding finally admitted that the vehicle in which the workers were transported was the private vehicle of the Defendant. I also note from his evidence in chief that he deposed that Julian Anglin operated the company vehicle. The other witness also deposed that the Forman was in charge of the company vehicle and responsible for refueling it. As the Forman forms part of the group of workers alleged to be independent contractors by the Defendant it therefore waxes strange that the Defendant would give that worker daily charge over the private vehicle of the company and tacitly endorse him using the vehicle in this manner when according to it there was no obligation to do so and further the Defendant did not provide transportation for anyone.

### **Exclusivity**

- [84] Typically, the workers worked an 8 hour day and depending on whether time was taken off on a Friday, a 36 to 40 hour week. The number of hours worked suggests an exclusive arrangement between the workers and the Defendant as there was little to no opportunity to engage in any other meaningful employment. If they wanted to do so they had to terminate the agreement. Essentially therefore all the workers time and energy were given to performing the tasks allocated to them by the Defendant. The practical effect is that this was an exclusive arrangement.

## Mutuality of Obligations

- [85] Mutuality of obligations is said along with control to be an irreducible minimum for there to be a contract of service. Simply put it is the obligation on the employer to provide work, and an obligation on the worker to accept work and provide his or her own work or skill. In the case of **Stevenson v Delphi Diesel Systems Ltd**<sup>14</sup> Elias J states that during the currency of a contract that there is no question of mutuality of obligation as it naturally arises from the relations. He stated:

‘The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.

The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not.’

- [86] In addition to the above I have taken cognisance of the authority of **Drake v Ipsos Mori UK Ltd**.<sup>15</sup> In that case the Court found that a market researcher who worked on an ad hoc basis, who was not subject to any sanction for not completing work and who had the ability to terminate the relationship at will to be an employee there being sufficient mutuality of obligation to establish an employment relationship. In discussing the issue of mutuality of obligation Judge Richardson reasoned:

‘I have no doubt that there was a contract in place – and the requisite mutuality – when the Claimant was actually undertaking an assignment for the Respondent. The fact that the

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<sup>14</sup> [2003] ICR471

<sup>15</sup> UKEAT/0604/11

assignment could be brought to an end does not mean that there was no contract in existence while the assignment was continuing. Plainly there was a contract while the assignment was continuing: there was an agreement to undertake work in return for payment.'

- [87] The Defendant accepts that there was an obligation to provide work and an obligation by the workers to accept such work but suggests that the ability to leave the site to look for alternative work negated an exclusive arrangement and by extension the mutuality of obligation required for there to be a contract of service. However having found that there was an exclusive arrangement for work and a requirement for personal service this defeats this argument. Further as the cases clearly establish where there is an obligation to give and accept work the mutuality of obligation feature is clearly established.

#### **Taxes, Sick and Holiday Pay and Discipline**

- [88] Consistent with the service agreement which designated the workers as independent contractors, no payment of taxes and social security contributions were made on their behalf. Additionally, they received no sick or holiday pay. The workers were also not subjected to any disciplinary or grievance process. I concur with the Defendant that the lack of these elements is generally consistent with an independent contractor relationship.

#### **Tools and Materials**

- [89] Although the Defendant did provide the materials for the work, it disputed that it provided the tools of trade for specialized workers. I take note that the Defendant employed various workers ranging from highly skilled to ordinary unskilled labourers and as such this denial is only applicable to some workers and not all of the 9 workers for which the Claimant has sought to recover alleged outstanding benefits. Ordinarily the failure to provide tools lends more towards a contract for services as opposed to a contract of services. However, I must consider this in relation to all the other factors to determine whether it lends in favour of the worker being an independent contractor or employee.

- [90] Having set out all of the factors it is clear that some weigh in favour of both parties. I am mindful that this is a balancing exercise. Therefore, considering the nature of the various factors that support each party and having considered them in the round and given appropriate weight is given to them, I quite unhesitatingly find that the relationship which existed was of employer and employee. The Defendant exercised a measure of control over the workers, not simply for quality control but in all aspects of their job. The workers had

little independent discretion and in fact relied on the Defendant to give them the direction for their daily tasks. They did not have the ability to leave the site and come and go at their own free will but rather had to abide to the rules of the Defendant in terms of the times present. If there was any derogation from the same, their pay was pro-rated.

- [91] The workers were also obligated to provide personal service to the Defendant notwithstanding the suggestion that the contract provided otherwise. The reference to substitution does not reflect what occurred in practice as when they were unable to personally perform, these workers would be forced to terminate the agreement and then return later if there was work available.
- [92] There was also no opportunity for profit as the workers were paid below the ordinary market rate for these jobs. Further a determination of how much workers were paid was made exclusively by the Defendant even in the circumstance of price work. They had no economic interest in the way work was being done. They had no opportunity to profit by working faster or longer except when in limited circumstances price work was engaged as it was dependent on the amount produced. However even in such circumstances, the Defendant determined what the appropriate remuneration was. They had no financial risk in the business and exercised no managerial powers or control.
- [93] The workers also worked exclusively for the Defendant. The time required for them to be on site daily meant that there was no opportunity for them to engage in any alternative employment. The fact that the skilled workers provided their own tools in the context of the working arrangement still meant that they were in economic dependence on the Defendant.
- [94] The non-payment of taxes and social security contributions is not conclusive that the workers were independent contractors. The unequal bargaining power meant that workers were not able to demand that this be done. Clearly the Defendant had from early adopted the posture that it would not pay those contributions and never resiled from it. It was also abundantly clear that due to the unequal bargaining power even in circumstances where there was opportunity for the workers to consult someone and obtain legal advice on the contract that in order for them to obtain work and or continue to work that they were required to sign the agreement.
- [95] Finally, I pause here to specifically consider the evidence of Julian Anglin on cross examination being that he understood that he was a subcontractor and periodically paid his own social security benefits. Whilst

this may seem contrary to an employer employee relationship in the context of all of the above circumstances, and the workers having little choice but to accept these terms foisted on them in order to be employed that this in and of itself is insufficient to transform him into an independent contractor.

- [96] The Defendant attempted to rename the nature of the relationship with the contract but that in and of itself considering the overwhelming evidence is insufficient to defeat the conclusion that the workers were employees of the Defendant.

### **Whether Collin Abbott is an employee of the Defendant**

- [97] The undisputed evidence is that Collin Abbott is the Director of the Defendant. Although he is also a carpenter by trade, I can find no evidence that he acted in that capacity on the project during the duration of the project. From all intents and purposes, it appears that Mr. Abbott when he was on site appeared more so for the purpose of monitoring the works in the capacity as Managing Director.
- [98] There is no contract between Mr. Abbott and the Defendant. The Claimant asserts that Mr. Abbott when questioned on site admitted to being an employee. I do not believe this to be the case. Mr. Abbott who is the face of the company has from the inception maintained that having worked with several companies prior to the establishment of this one had always worked as an independent contractor for which no contributions were made. It is also abundantly clear that he was of the opinion that persons performing these functions did so as independent contractor. Moreover, the witness consistently asserted that all previous remittances submitted concerned three employees of which he was not one. It would therefore be contrary to the position taken to declare to the Claimant's Inspector that he was an employee. I believe that this was an assumption made by the Claimant's employee which was later solidified in the Claimant's mind because it was noted on remittances provided by the Defendant that there had been contributions made in the name of Collin Abbott.
- [99] In the face of limited evidence what therefore is the effect of these remittances? The evidence is that for the period October 2013 to May 2014 whilst Mr. Abbott's name appeared on the remittance forms submitted by the Defendant there were no contributions paid on his behalf as his salary was zero rated. However, contributions were paid for Mr. Abbott for April 2015 to July 2015. Mr. Abbott suggests that this was due to him performing certain smaller jobs and not indicative of him being an employee of the Defendant. I find this explanation hard to digest. Mr. Abbott throughout his testimony held firm and fast to the belief that persons in his trade as a carpenter or performing like works in the industry were independent contractors.

In fact, Mr. Abbott went into great detail in his evidence in chief to set out all his previous experiences working in the industry and the fact that he was always considered an independent contractor regardless of there being fixed hours of work. Further both Mr. Abbott and Ms. Gillis were again adamant that only employees were submitted on the monthly remittance forms that were provided to the Claimant. I note also that this is essentially a one-man company with Mr. Abbott being the director and his partner Ms. Gillis being the secretary. Therefore, it defies logic that contributions would be paid for Mr. Abbott by the Defendant if he had worked for it as an independent contractor. Mr. Abbott was the directing mind and will of the Defendant. His name being included as an employee with contributions paid was deliberate decision of the Defendant. I believe it represented the true status of Mr. Abbott. I also believe that although no contributions were made for Mr. Abbott for October 2013 to June 2014 that this was an attempt to conceal the reality of his employment status. I believe therefore that Mr. Abbott was an employee of the Defendant and whether the same was declared or not and received a monthly payment from it for his services as Managing Director.

**Whether the assessment provided by the Claimant can be relied upon to determine the contributions owed**

- [100] The Claimant emphasized to this court that **Social Security (Collection of Contribution) Regulation No.15 of 2013, section 9** gives the Claimant right to access sums owed to it by the Defendant, a right which they have exercised. On cross-examination, Ms. Pascale Gillis admitted that the Defendant submitted into evidence a spreadsheet of the actual weeks worked on-site by each worker but did not rebut the assessment prepared by the Claimant although this information was available to it.
- [101] Save for the admission of Neville Hazelwood who was a witness in this matter that he only worked for a few months with the Defendant being November 2013 to March 2014 I have no reason to question the validity of the assessment provided by the Claimant. The fact that Julian Anglin confirmed on cross examination that two workers had for some unknown period left the site and returned later does not in reality assist the Defendant in disputing the validity of the assessment. The evidence in this regard is vague and unhelpful and without more calls for speculation on the part of the court as to the timeline wherein these workers were absent.
- [102] The Defendant was given every opportunity to challenge the Claimant concerning its assessment yet did nothing. The Defendant was also aware of the workers that formed the subject of the Claimant's case for unpaid contributions. Only at trial several years later was an unsigned spreadsheet not supported by any

exhibits or documents produced. Clearly if this information was readily available to the Defendant, whether or not the Defendant was of the belief that the named workers were self-employed should have been produced at a much earlier stage with supporting documentation to at the very least challenge the quantum claimed by the Claimant. The Defendant having failed to produce any rebuttable evidence, save for Neville Hazelwood<sup>16</sup> the assessment of the Claimant which will be adjusted to reflect the period worked by him is deemed to be good and sufficient evidence in the circumstances.

## **ORDER**

[103] In light of the foregoing, it is hereby ordered as follows:

- a. The Defendant shall pay the Claimant the sum of \$42,043.00 representing outstanding contributions for the period November 2013 to July 2015.
- b. The Defendant shall pay to the Claimant the sum of \$4,204.30 representing outstanding surcharge for the period November 2013 to July 2015.
- c. Prescribed Costs in accordance with CPR 65.11
- d. Interest

**Jan Drysdale**

**High Court Judge**

**By The Court**

**Registrar**

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<sup>16</sup> The difference being 5 weeks between the assessed period for this witness and the time in fact spent on site being \$375.00