IN THE COURT OF APPEAL **CL-AP 05/2023**
OF THE TURKS AND CAICOS ISLANDS

B E T W E E N

YAQUIERY CRUZ

and

ANA L. GODET (DBA) NENA BEAUTY SALON

Coram:

The Honourable Mr. Justice K. Neville Adderley	**- President, Ag.**
The Honourable Mr. Justice Stanley John	**- Justice of Appeal**
The Honourable Mr. Justice Bernard Turner	**- Justice of Appeal**

Appearance:

Jonathan Katan KC	**-**	**For the Appellant**
Ana L. Godet	**-**	**In Person**

DATE HEARD: 25 OCTOBER 2023

DATE DELIVERED: 15th DECEMBER 2023

Appeal – Labour Tribunal – Unfair Dismissal - Employer/Employee Relationship – Whether the Labour Tribunal erred in finding that no Employer/Employee Relationship existed.

Cases Considered:

Vanesha Parker v. Sky Catering Ltd. DB Top of the Cove Deli [2023] TCACA 1; *Cyffin Jones T/A the Barley Mow Public House v Miss D. Beardmore* [UKEAT/0392/09/DM]; *Crofton v. Yeboah* [2002] EWCA Civ 794; *Policarpio Fontanilla v. Tibor Machine Shop Ltd* SC 219 of 2007

JUDGMENT

John J.A.

1. This is an appeal by the Appellant from a decision of the Labour Tribunal ("the Tribunal") which found that there was no Employer/Employee relationship between the Appellant and the Respondent, and accordingly, dismissed the Appellant's claims for relief.

Introduction

2. The Appellant is a Dominican Republic national. She describes herself as a Nail Technician. The Respondent is also from the Dominican Republic. However, at the material time, she had already obtained Turks and Caicos Islander Status. She operates a beauty salon in Grand Turk doing business as "Nena Beauty Salon".

3. In 2017 whilst in the Dominican Republic, the Appellant was contacted by the Respondent who asked her to work at Nena Beauty Salon. The Appellant alleges *inter alia* that the Respondent agreed that she would be paid fifty percent (50%) of the gross

income generated from her nail care business and that she would be responsible for paying her own travel expenses to Grand Turk. No other terms were negotiated.

4. The Appellant began working at the salon on 13th July, 2017, until her services were terminated by letter dated 12th August, 2020.

The Proceedings Before The Tribunal

5. The Appellant then submitted an unfair dismissal claim before the Tribunal. In an Amended Originating Application dated the 1st June, 2021, the Appellant claimed the following relief:

    (1) Compensation for unfair dismissal (s.85(2) of the Employment Ordinance CAP 17.08), particularly a:

        (i) Basic award (s.89(a) at one week's basic wage for each year of employment in which the Appellant was not below the age of twenty-one (s.90(2)(b)); and a

        (ii) Compensatory award (s.89(b)).

    (2) One month's pay in lieu of notice (s.63(1)(c) of the Employment Ordinance) based on a weekly wage of $400.00 per week upon which the Respondent falsely declared that contributions were calculated and paid by the Respondent to the National Insurance Board ("NIB") on the Appellant's behalf.

(3) Reimbursement of funds advanced by her to the Respondent to cover the prescribed 2017, 2018 and 2019 Work Permit Fees to the Turks and Caicos Islands Government ("TCIG") (sic) permitting her to engage in the gainful employment of the Respondent $1,200.00 per annum.

(4) Reimbursement of funds advanced by her to the Respondent to cover the professional processing fees and publication of the employment advertisement expenses paid to a "Mrs. Doughty" (2017, 2018 & 2019) at $600.00 per annum.

(5) Reimbursement of funds advanced by her to the Respondent for payment of the prescribed 2017, 2018 and 2019 Labour Clearance Fees to the TCIG on application for the necessary work permit permitting her to engage in the gainful employment of the Respondent at $100.00 per annum.

(6) Reimbursement of funds advanced by her to the Respondent for payment of the non-refundable Repatriation Fee paid to the TCIG on application for the necessary work permit permitting her to engage in the gainful employ of the Respondent.

(7) Reimbursement of funds unlawfully deducted from any remuneration to cover the Respondent's portion of the prescribed statutory contribution to the NIB on her behalf at $25.00 per month for 36 months.

(8) Reimbursement of funds unlawfully deducted from her remuneration to cover the Respondent's portion of the prescribed statutory contribution to the National Health Insurance Plan ("NHIP") on her behalf at$18.40 per month for 36 months.

(9) Payment of wages below the statutory minimum wage during her tenure of employment.

(10) Three years earned vacation pay (based on the Respondent's false declaration of a wage of $400.00 per week upon which contributions to the NIB were made by the Respondent).

(11) Unpaid overtime pay 2017, 2018 & 2019 based on an average of 60 hours per week worked, beyond the 44 hours maximum permissible hours an employer may require an employee to work without liability to pay overtime pay.

(12) Reimbursement of funds deducted by the Respondent from her pay against the cost of payment of the wages of the Cleaner over the period of two years at $17.00 per week.

(13) Unpaid wages for the period between 1st August, 2020 to 12th August, 2020.

(14) Discrimination on the grounds of social origin arising out of the unlawful and potentially corrupt treatment of her by the Inspector of Labour (sic) and Immigration officials orchestrated by the Respondent and her daughter by virtue of her national origin and their social and personal influence with Labour and Immigration officials (described in paragraph 23-25, 30 and 58 of the Appellant's Originating Application).

(15) Abuse of process.

6. The Respondent submitted a Defence, (and an Amended Defence dated 6th August, 2021, which was subsequently struck out by the Tribunal).

7. The Appellant filed a witness statement. The Respondent failed to file a witness statement despite having been given several opportunities to do so.

8. The Respondent did not appear at the hearing before the Tribunal, nor was she represented.

9. At the hearing, the Appellant gave evidence consistent with her witness statement, alleging *inter alia* that she was unfairly dismissed, was never paid a weekly wage, that there was no written contract setting out terms and conditions of employment and that she paid one half of the fees for her work permit. I now set out the material parts of her evidence:

i. Her normal working hours were from 9:00 a.m. to 6:00 p.m. 6 days a week.

ii. She found the Respondent and all the people working with her discriminated against her.

iii. Before coming to Grand Turk, the Respondent told her that she would be paid 50% of the earnings she generated from her nail care business. She assumed this would be in addition to her normal weekly wage.

iv. After her arrival in Grand Turk, the Respondent told her that she would have to pay the cost of the advertisement in the newspaper, the professional fees to the immigration consultant, all National Insurance Board ("NIB") and National Health Insurance Board ("NHIB") contributions and all application fees in relation to her work permit.

v. When she worked for the Respondent, she did not know that the Respondent was not allowed to make her pay to cover the cost of her work permit. However, she paid 50% of the cost of the work permit.

vi. She did not receive any holiday or sick pay during her employment.

vii. Her employment ended on the 12th August, 2020, when she was dismissed without notice on the grounds of misconduct. She denied receiving any warning letters from the Respondent on the 26th December, 2019 and 6th March, 2020 (as alleged in the Respondent's Defence).

viii. The day of her dismissal was a normal working day as far as she was concerned. On that day, she was approached at her place of work by three uniformed officers, two from Immigration and Inspector Vivian Glinton of the Employment Services Department, along with Ms. Paloma Godet ("Paloma"), the Respondent's daughter. One of the Immigration Officers Mr. Croy Forbes was the brother of Paloma Godet's boyfriend.

ix. Paloma attempted to hand her an envelope which she indicated contained a letter terminating her employment.

x. She told Paloma that she would not accept it as she (Paloma) was not her boss or the one who signed for her work permit.

xi. Inspector Glinton took the envelope from Paloma and demanded that the Appellant accept it from her. The Appellant felt intimidated so she accepted it.

xii. Once the Appellant took the envelope, Officer Forbes asked for her passport and Work Permit Card. She told them they were at her home. The two officers took her in the immigration van to her home to collect them.

xiii. The Respondent and Paloma used the Public Authorities and Officials to terminate her employment and get her out of the TCI without her having any opportunity to defend herself, or receive payments which were due to her.

10. At the hearing the Appellant was asked by Mrs. Kenya Jagger, a member of the Tribunal, whether she paid her NIB contributions herself or whether the Respondent paid it to the NIB. The Appellant's response was: *"when she would pay me, we have a little book, she would deduct it from my wages and she would let me know"*.

11. In response to a question from Mr. Carlis Williams, a member of the Tribunal, as to the actual cost of the work permit, the Appellant said it was $1,200.00 but she had to pay an additional sum of $650.00 to *"a lady who prepared all the papers".*

The Ruling of The Tribunal

12. The Tribunal delivered its decision on the 21st March, 2023. The Tribunal determined that for the Appellant to succeed, it must first be established that the Employer/Employee relationship existed between the Appellant and the Respondent and the onus of so proving fell upon the Appellant.

13. The Tribunal found that the Appellant did not address that matter and simply put forward her claim on the basis that the Employer/Employee relationship existed.

14. In the absence of a contract setting out terms and conditions, the Tribunal adopted the "control test" to determine whether the relationship existed. On that issue this is the Tribunal's findings:

> "[4] Through the evidence, it was gleamed (sic) that the Respondent did not control how the Applicant worked. No evidence was submitted by the Applicant to that effect. The Respondent operated a hair salon and based on the evidence, did not own the tools the Applicant used to ply her trade of nail technician. The Applicant was free to book appointments and solicit her own customers. The Applicant was not dependent upon the Respondent to provide her customers despite that the customers who came to the salon for hair care could be potential customers for nail care. Therefore, the Tribunal concluded that there was no Employee/Employer relationship between parties based on the control test; and found that the Applicant was not integrated into the Respondent's business. The Applicant did not provide her services to the Respondent, but rather to third party customers under the shelter of the Respondent's salon.
>
> [5] There are also other considerations such as whether the Applicant was integrated into the Respondent's business, who owned the tools, etcetera. This was not a matter traversed in evidence before the Tribunal. However, since the Respondent did not purchase travel tickets for the Applicant, neither did she pay for the work permits or contributions to NHIB or NIB then it is not a stretch for the Labour Tribunal to conclude that she would not have paid for the Applicant's tools or

appliances used in her trade of nail technician. These circumstances deny the existence of the Employee/Employer relationship between the parties.

[6] The Applicant provided no evidence to support a work schedule except what she stated in her claim. In the absence of the evidence the Tribunal found that the Applicant was never under any obligation to work a set number of hours or at a particular time of the day or days to works. The Respondent, therefore, had no obligation to pay other than the mutual agreement that they would split the income from the Applicant's activities as a nail technician and even then, no evidence was submitted proving the split or lack thereof.

[7] The Applicant's witness statement was very clear 'before coming to Grand Turk Nena told me that I would be paid fifty percent (50%) of the earnings that I generated from the business. Nena also told me that I would have to pay for the cost of my travel visa and the cost of ticket for travel to the Islands'."

15. Ultimately the Tribunal found that the Employer/Employee relationship did not exist and accordingly there could be no unfair dismissal. Under the rubric **"Conclusion",** the Tribunal said:

"[1] There was no Employee/Employer relationship and as such there can be no unfair dismissal and therefore no compensation for unfair dismissal.

[2] The Applicant did not produce any evidence in support of the various claims made. There is no liability on the Respondent to pay notice pay, work permit fees or any other payments the Applicant claimed."

THE APPEAL

The Appellant's submissions:

16. The Appellant appealed the Tribunal's decision. Counsel submitted as follows:

    i) As a matter of law, it was not open to the Tribunal to make a finding that the Appellant was not an employee of the Respondent.

    ii) All the evidence before the Tribunal was consistent with the finding that the Appellant was an employee of the Respondent. It was not open to the Tribunal to rely on matters that were not in evidence before the Tribunal and/or reject parts of the Appellant's evidence that were not challenged; particularly when the issues were not raised during the hearing thereby denying the Appellant's counsel the opportunity to address them.

    iii) The Tribunal failed to address the issue of the Appellant's application for compensation for unlawful discrimination.

17. In support of Counsel's submission that the Tribunal ought to have given him the opportunity to address the issue of the Appellant not being employed by the Respondent and in effect was a self-employed/independent contractor, Mr. Katan K.C referred to the

following authorities: **Vanesha Parker v. Sky Catering Ltd. DB Top of the Cove Deli Derrick [2023] TCACA 1** and **Cyffin Jones T/A the Barley Mow Public House v Miss D. Beardmore [UKEAT/0392/09/DM]**. He highlighted the statement by His Honour Judge Serta K.C in ***Cyffin***:

> "The first point that needs to be considered is whether the Decision of the Employment Tribunal could be regarded as fair to the Respondent. The Employment Tribunal decided this case on a basis that was never raised by the Claimant nor put to the Respondent's solicitor, as I have noted. Mr. Merry has drawn my attention to the well-known case of **Hereford and Worcester County Council v. Neale** [1986] 1RLR 168 CA in which May LJ at paragraph 54 said:
>
> > 'It would be unwise and potentially unfair for a Tribunal to rely on matters which are clear to the members of the Tribunal after the hearing and which have not been mentioned or treated as relevant without the party against whom the point is being raised being given the opportunity to deal with it unless the Tribunal can be entirely sure that the point is so clear that the party could not make any useful comment in explanation'."

18. In further support of his submissions that the Tribunal found that the Appellant was self-employed, notwithstanding that there was no evidence, Mr. Katan K.C referred to **Crofton v. Yeboah [2002] EWCA Civ 794** where Lord Justice Mummery said at paragraph 95:

"Inevitably there will from time to time be cases in which an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed."

The Respondent's submissions:

19. By letter dated 17th October, 2023, and addressed to the Registrar of the Supreme Court, the Respondent set out several factual allegations for the Court's attention. These allegations included the following:

    i. **Vacation Payment**: The Appellant was paid twice because she went on vacation to Providenciales for a week. The exact dates are not readily available, but she did take this time off.

    ii. **Payment**: The Appellant was informed that she would receive a payment of 50%, which exceeds the minimum wage of $6.25. This amount was intended to cover her expenses, including her national insurance. It was not communicated to her that she would receive additional weekly wages. Working on a profit-sharing model, the Respondent expected that the earnings would cover expenses such as nail products, rent, utilities and pay for half of the Appellant's insurance and work permit.

    iii. **Visa Payment**: The Appellant paid for half of the visa and the Respondent covered the other half. The Appellant had previously expressed her financial

constraints, and the Respondent assisted with the payment. This arrangement was made with full understanding**.**

iv. **Contract Employment**: The Appellant was provided with a contract of employment as required for her work permit application. Her working hours were flexible, and she was compensated based on a 50% profit-sharing model. If her earnings were below the minimum wage, she received the minimum to cover her expenses.

v. **Work Permit Payment**: The Appellant initially borrowed money to pay for her work permit, which the Respondent had to assist with. The Appellant assured she would repay the loan but failed to do so.

vi. **Termination**: The Appellant's employment was not terminated solely because she refused to work with Paloma (which the Appellant had alleged). Her behaviour, including drinking at the workplace and frequent arguments, created disruptions in the salon. There were multiple instances of her quitting and then attempting to return. The Appellant received numerous warnings about her behaviour, and most of the time, she would casually dismiss them, expressing her difference (sic).

The Appeal hearing

20. In his oral submissions, Mr. Katan KC invited the Court to set aside the Order of the Tribunal and find that an Employer/Employee relationship existed between the parties.

He further invited the court to make a finding of unfair dismissal and the matter be remitted to the Tribunal to make the necessary assessment of damages.

21. The Respondent and her daughter Paloma appeared at the hearing. Paloma, translated for the benefit of the Court what her mother wished to say. In answer to questions from the Court, Paloma spoke to her mother and then she (Paloma) informed the Court that her mother said that the Appellant was an employee. Additionally, she was asked whether the Appellant received annual vacation and again Paloma after speaking to her mother replied in the affirmative.

Analysis and The Law

The Existence of an Employer/Employee Relationship

Whether the Tribunal's Findings is supported by the Evidence?

22. The **Employment Ordinance Chapter 17.08** defines employee as follows:

> ""employee" means a person who offers his or her service under a contract of employment, a dependent contractor and includes, where appropriate, a former employee."

23. This is an unfortunate case. The testimony of the Appellant, together with the documentary and other evidence which was before the Tribunal are supportive of the Appellant's case that she was an employee. The Tribunal erred in failing to address

properly or at all the several facts that were supportive of the Appellant being an employee namely:

i. The letter of 19th January 2020 addressed to the Secretary of the Work Permit Board;
ii. The Warnings Letters;
iii. The Letter of Termination; and
iv. The Assessment Form prepared by Labour Inspector Vivian Glinton.

24. By letter dated 19th January 2020 and addressed to the Secretary at the Work Permit Board, the Respondent stated as follows:

> "**This letter is to confirm that the above named Dominican National was employed by me for two (2) years and a couple months**. At this point in time, I do not need her in my beauty salon working anymore because of her behavior. If anyone else can seek her a job elsewhere, any assistance rendered in this matter is greatly appreciated.
>
> Thank you,
>
> Ana L. Godet."
>
> [Emphasis Mine]

25. By letter dated 6th March 2020 and addressed to the Appellant under the caption, **"Employment Warning Letter",** the Respondent stated as follows:

"**This is an official warning letter being issued to you for display of misconduct in the Beauty Salon against me as your Employer and your co-workers** on March 2nd, 2020.

Ms. Yaqueiry Cruz please do not involve yourself in any of such situation as the additional disciplinary action will have to be taken against you.

Thank you

Ana L. Godet"

[Emphasis Mine]

26. The Respondent's letter of termination dated August 12th, 2020 said *inter alia:*

"**This letter is to inform you that your services at Nena Beauty Salon as a Nail Tech has been terminated** as of Friday the 12th Day of August 2020.

This decision has come after trying numerous outlets to have you cease and desist your behavior **as an employee in my salon**…

You have disrespected me as your Employer time and time again…According to the Employment Ordinance section 60 and 61 regarding all terms and conditions of your employment and as a result of your Poor employment ethics and demeanor to which you have portrayed repeatedly towards me your employer.

Please be aware that a copy of this Termination letter will be forwarded to the Labour Department of the Turks and Caicos Government and the Director of Immigration [depart] for the revoking of your work permit.

We acknowledge that we do have our part to play and so we want to inform you that we have purchased a One-Way ticket from Grand Turk to the Dominican Republic via Caicos Express to depart on this upcoming Sunday the 16th Day of August."

[Emphasis Mine]

27. Labour Inspector Vivian Glinton who was in attendance at a councilory meeting at the Employment Services Department attended by both the Appellant and the Respondent, prepared an Assessment Form for the Appellant in which she referred to her as an employee at Nena's Beauty Salon. In that form she also referred to vacation pay to which the Appellant was entitled.

28. In my view, the letter of termination is clear evidence that the Respondent considered that the Appellant was her employee and is entirely inconsistent with any suggestion that there was an "agreement" between the Appellant and Respondent that the Appellant was self-employed.

29. In addition thereto, the warning letters and the oral admissions by the Appellant through her daughter are clear indications that at all material times the Respondent considered the Appellant her employee.

30. While the Court of Appeal will not easily overturn a Tribunal's findings of fact, as stated by Lord Justice Mummery in **Crofton (suora)**

> "Inevitably there will from time to time be cases in which an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed."

31. In these circumstances, I find that on the totality of the evidence, the Tribunal erred in fact in their findings that the Appellant was not employed by the Respondent.

Whether the Tribunal's findings are supported by the law?

32. In this case the Tribunal began this matter on the basis that the Appellant was an employee. They managed and conducted the case on the basis that the Appellant was an employee. The Respondent did not challenge the jurisdiction of the Tribunal or call into question the existence of the Employer/Employee relationship. Without giving the Appellant an opportunity to be heard, the Tribunal of their own volition determined that the Employer/Employee relationship did not exist. This was erroneous.

33. The question whether the Appellant was an employee or an independent contractor was a matter to be addressed prior to the hearing. It was for the Respondent to raise as a preliminary issue that the Appellant was not an employee but an independent contractor. If a preliminary issue was raised and it was determined that the Appellant was an independent contractor, the continued hearing of the case would have been outside the parameters of the Tribunal. The Appellant's recourse would have been to commence a common-law action. In the absence of any objection by the Respondent, the Tribunal also erred in law when after the hearing they determined that the Appellant was not an employee.

Whether the Appellant's dismissal was unfair?

34. An appeal from a decision of the Tribunal is a rehearing, and the Court of Appeal is empowered to substitute its own findings. Section 67 (1) of the Employment Ordinance provides that *"every employee shall have the right not to be unfairly dismissed by his employer"*. The evidence of the Appellant on the unfairness of the dismissal before the Tribunal (as set out at paragraph 9 above) was uncontested, the Respondent having failed to file a witness statement. Before this Court the Respondent did not adduce any further evidence as regards the fairness of the dismissal and the matters raised in the Respondent's said letter to the Registrar dated 17th October, 2023 (even if treated as evidence, which it is not), do not provide any clarity about the fairness of the dismissal.

35. Section 69 (1) of the Employment Ordinance provides that whether the dismissal of an employee was fair or unfair, it shall be for the employer to show what was the reason (or,

if there was more than one, the principal reason) for the dismissal, and that it was as a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of the employee. The Respondent has failed to satisfy this burden. Further there is no evidence that the Respondent acted reasonably in dismissing the Appellant. In all the circumstances in my view on all the evidence before the Tribunal and this Court the Appellant's dismissal was unfair.

Was the Appellant under an obligation to pay for the work permit?

36. For completeness and to provide clarity to the Tribunal on the issue of who is obliged to pay for an employees work permit, I have considered that in the case of **Policarpio Fontanilla v. Tibor Machine Shop Ltd SC 219 of 2007,** Lord Chief Justice Christopher Gardner KC said at page 14, paras 1 and 2:

> "[1] The responsibility for paying the Work Permit fee for an employed person is that of the employer.
>
> [2] Any term in a contract of employment that purports to make the employee responsible for the Work Permit fee payable is unlawful."

37. Accordingly, the Respondent was responsible for paying all of the fees for the Appellant's work permit. The Appellant is entitled to be reimbursed the 50% of the cost of the work permit.

CONCLUSION

38. For all the above reasons:

a) The Appeal is allowed.

b) The findings of the Tribunal are set aside.

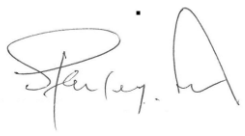
c) The relationship of Employer/Employee existed between the parties within the meaning of Section 2 of the Employment Ordinance CAP. 17.08.

d) The Appellant's termination of employment was unfair within the meaning of Section 67 of the Employment Ordinance.

e) The matter is remitted to the Tribunal to address the question whether the Appellant was discriminated against because of her nationality, and if so, what compensation, if any, she may be entitled to.

f) The Tribunal to determine to what valid claims the Appellant is entitled.

g) The Respondent to repay to the Appellant 50% of the cost of the work permit.

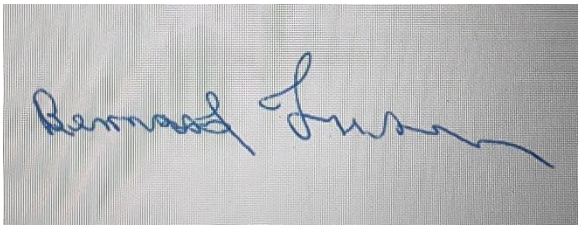


John, JA

I agree

Adderley, JA (President, Ag.)

I also agree



Turner, JA