



**TRINIDAD AND TOBAGO**  
**TRADE DISPUTE NO. 39 OF 2002**

**IN THE INDUSTRIAL COURT**

Between

**BANKING, INSURANCE AND  
GENERAL WORKERS' UNION** - Party No. 1

And

**DAILY NEWS LIMITED** - Party No. 2

**CORAM:**

**His Honour Mr. Ramchand Lutchmedial** - Chairman  
**Her Honour Ms. Bindimattie Mahabir** - Member  
**Her Honour Mrs. Lenore V. Harris** - Member

**APPEARANCES:**

Mr. Vincent Cabrera )  
President ) **for Party No. 1**

Mr. Fyard Hosein )  
Senior Counsel )  
Ms. Sasha Braithwaite )  
Attorney-at-Law ) **for Party No. 2**

**Dated: 6<sup>th</sup> April, 2005**

**JUDGMENT**

The dispute concerns a breakdown in negotiations between **Banking, Insurance And General Workers' Union** ("the union"), which is the recognized majority union for **the monthly rated employees** described in the Certificate of Recognition No. 2/97 ("**the certificate**") and Daily News Limited ("**the**

company”/“the employer”) for the conclusion of a new Collective Agreement for the period 1<sup>st</sup> June, 2000 to 31<sup>st</sup> May, 2003 in respect of the following items:

**(1) Article 4 -- General Conditions**

**Freelancers**

**(2) Article 16 -- Conditions re. Advertising Sales Representatives**

Daily News Limited is the publisher and printer of a daily newspaper known as “Newsday.”

In the course of hearing, parties executed a **consent order** relative to **Article 16- Conditions for Advertising Sales Representatives**. For the avoidance of doubt, the Court orders that the agreed terms of the consent order dated 11<sup>th</sup> April, 2003 for Advertising Sales Representatives (and attached herein) be included in the Collective Agreement currently being negotiated for the said period.

We now turn to the remaining unresolved item, **Article 4 – General Conditions for Freelancers**.

**THE PRELIMINARY OBJECTION**

**The employer’s plea to the court’s jurisdiction**

Counsel for the employer contends that Freelancers are not workers as defined in the Industrial Relations Act, Chapter 88:01, (“**the Act**”) but are independent contractors engaged under a contract for service. Counsel asked for a *stay or suspension* of proceedings pending the determination of the subject-matter by

the Registration, Recognition & Certification Board (“**the Board**”), which is vested with exclusive jurisdiction. In the circumstances, Counsel contends that the court has no jurisdiction to inquire, investigate into and determine the issue on whether Freelancers are workers and cited several judgments, including the “Pujadas case”<sup>1</sup> as corroboration.

Counsel further argues inter alia that:

- Consideration and determination of this issue by the Court would not only be a mistake of law but would amount to a duplication of the adjudication process, which ought not to occur. In other words, there is no concurrent jurisdiction on the subject-matter.
- The Certificate of Recognition does not define nor list Freelancers as an excluded category; however, this does not mean that Freelancers are automatically included in the afore-mentioned bargaining unit. In Counsel’s view, the issues of “**who is a worker and the issue of recognition is a continuing issue**” to be exclusively determined by the Board.
- The issuance by the Minister [responsible for Labour of the Certificate and Referral of the Unresolved Dispute does not necessarily invest the court with jurisdiction to adjudicate. Counsel reminded the court that the Certificate is not a legal substitute for the Board’s opinion.

---

<sup>1</sup>Counsel’s referen ce to **CA 87 of 1999 Caroni (1975) Ltd. v. A.T.A.S.S.**

- The court is a creature of statute from which its jurisdiction is drawn; therefore neither one nor even both of the disputants conjointly can approach the court directly and confer jurisdiction on it [**“consent jurisdiction”**].
- The meaning of a worker as stated in the Act and in particular, the language therein **“or a contract personally to execute any work or labour,”** is of no relevance to Freelancers, since it (the Act) refers to an arrangement **“where the contract is determined before.”** In this case, there is no pre-determination of the contract involving Freelancers, meaning that they do not enter into contract to execute work. It was only after **“the work is executed ... that a contract is struck between parties.”**

### **The union’s reply**

The union in reply to the preliminary objection contended that the court is vested with wide powers of jurisdiction and referred to the judgment of His Honour Mr. L. Elcock in **E.S.D. IRO No. 2 of 1993 between Public Services’ Association and Water and Sewerage Authority**, delivered on 29<sup>th</sup> June, 1999.

The union further argues inter alia that:

- The court has jurisdiction to hear and determine the matter since a **“real and genuine”** employment relationship exists for a number of years between Daily News [their sole employer] and Freelancers, who are in fact part-time Reporters and Photographers and who perform the identical

functions as other members of the bargaining unit. Therefore, the work done by Freelancers is an integral part of the newspaper. The union further contends that the issue on whether Freelancers are independent contractors warranted an examination of what functions they perform in spite of the designated label.

- There has been undue delay by the employer in raising the objection. In any event, the “**Pujadas judgment**” has no relevance to this issue, but its citation by Counsel constitutes nothing more than a frivolous and vexatious attempt to further delay the negotiations.
- The employer having engaged in conciliation proceedings at the Ministry without raising the concern [which was the appropriate forum], the objection at this stage amounts to an unjustified attempt to impugn the Minister’s Certificate of Unresolved Dispute and constitutes an abuse of the process of this honourable court. Simply put, the employer’s plea is a **sham plea** –which nullifies the public’s right to an expeditious hearing as stipulated in the Act.
- Given the foregoing, the employer is estopped and/or precluded from now taking objection to the status of this category of workers.
- By virtue of the Board’s Certificate of Recognition, the issue on whether Freelancers are included in the bargaining unit has already been determined. The certificate clearly defines and lists the excluded job positions; and the category of Freelancers is not listed as an exclusion.

- There is no provision in the Act which permits one nor even both of the disputants conjointly to approach the Board for clarification of the description and/or composition of the bargaining unit described in the Certificate of Recognition. The certificate is explicit and constitutes a determination of the appropriate bargaining unit, which is **“all monthly rated workers.”** It stands to reason, therefore, that **“it is this court that has to hear any contention of parties relevant to industrial relations disputes which is what this is, once a certificate is granted.”**

## **RULING**

These were some of the thought - provoking arguments raised by parties in their respective pleadings on the preliminary objection. <sup>2</sup>However, the only question for decision at the trial is whether Allette [and by extension Freelancers] had been employed on a contract of service by Daily News/Newsday or had been an independent contractor on a contract for service. It is simply a matter of finding the true relationship of the parties, and which this court has jurisdiction. For an answer to the question, we turn to the admissible evidence.

## **THE UNION’S CASE**

The union called Mr. Burt Allette [**“Allette”**] as its sole witness; the employer relied on its oral and written pleadings.

---

<sup>2</sup> For further reading on the issue of jurisdiction see RULING re – T.D. No. 212 of 2003 between U.C.I.W and P.A.T.T. delivered on 17<sup>th</sup> January 2005.

### **The oral testimony of Burt Allette**

Allette attended and was successful at the job interview conducted by the Sunday Editor, who subsequently informed him that he was engaged to write exclusively for the Sunday edition of the newspaper, at least this was his recollection and understanding of that conversation. Allette was engaged with Newsday in 1996 until his separation in 2002.

Allette testified that during his engagement with Newsday “**it was often implied**” that he “**would not attempt to do work on behalf of any other newspaper**” since it was “**frowned upon**” and seen “**as a conflict of interest**”. He undertook “**engagements**” at the request originating from one of the editors of Newsday or received “**invitations ... directly... from various entities,**” for instance, the Tourism and Development Company Ltd. (“**TIDCO**”). Allette submitted the finished product (article and/or photograph) to Newsday for its consideration.

Allette was entitled to payment only for the articles and photographs published in Newsday, which he personally scanned. After sourcing that information, Allette then submitted a claim for payment via an invoice, and after corroboration, he received a cheque. During his engagement with Newsday, his earnings varied and his claims were never fully met.

Allette testified that though he was called a Freelancer, he was known as and performed the job of a “**Social Reporter and/or Photographer,**” and as the years went by, he saw himself as part of the editorial staff. Allette listed his functions as “**reporting of news, information - various kinds...**” having

functioned in several areas where he “...**undertook a lot of the social reporting, entertainment, business and ...crime reporting.**” Allette was identified as a Newsday representative and was provided with a “Newsday Pass” in the conduct of his work assignments, which he described as flexible.

Allette had access to Newsday’s tools and equipment, for instance telephones and computers. He had his own digital camera. Allette did not receive TD 4 supplementaries, nor did he file income tax returns. He recalled that tax was deducted from his earnings on three occasions. He had no fixed/mandatory hours of work; he was not required to sign an attendance register nor was he eligible and/or entitled to sick, vacation and health benefits.

Finally, on 16<sup>th</sup> August, 2002 Allette recalled he was summoned to the office of the Chief Executive Officer, who informed him that due to the restructuring exercise, she was unable to **take** his work. Allette understood those words to mean that his services were no longer required; he was dismissed. Allette however, did not pursue a grievance over the termination of his services.

### **The Union’s Contention**

The union urged the court to accept the evidence of Allette as representative of a continuing employment relationship with Daily News. The union was quick to point out, that the title of Freelancer was a misnomer, which had no meaning in industrial relations. The union’s officer drew the court’s attention to the dictionary [Oxford] meaning of a Freelancer as “**a person working for no fixed employer.**” The officer contended that an examination of the employment

situation of Freelancers described by Allette was conclusive evidence that Daily News was their “... **single fixed employer.**”

The officer further contended that Freelancers are workers employed on a contract of employment, who perform regular bargaining unit work and are entitled to the terms and conditions of the collective agreement. The union urged the court to so find.

### **The Employer’s Contention**

Counsel for the employer contended that the question of whether Freelancers were independent contractors was a question of fact finding for the court. He contended that the union had not discharged the onus which it bore, since the evidence adduced was insufficient for the court to make a conclusive finding. Furthermore, Counsel reminded the court that the job title of a Freelancer was not a misnomer in the media industry. To this end, he argued that the products offered by Freelancers were regularly purchased by media houses. Counsel pointed out that Freelancers were excluded from the established bargaining units of the two unionized newspapers - the Trinidad Publishing Company Ltd. and The Trinidad Express Newspapers Ltd. In support thereof, Counsel submitted the relevant collective agreements as part of his documentary evidence. In the premises, Counsel urged the court to dismiss the dispute.

### **THE COURT’S FINDINGS**

There was no written contract which determined the relationship between Allette and Daily News. It now therefore, becomes our duty to establish what the

contract is. In this sense, **“the court is searching for what must be implied.”** Lord Wilberforce in the House of Lords case, **Liverpool City Council v. Irwin** [1976] 2, W.L.R. 562, 566 -567, quoted in [Court of Appeal] **Ferguson v. John Dawson & Partners ( Contractors) Ltd.** [1976] 1. W.L.R. 1220 -1221.

The answer to the question on whether Freelancers are independent contractors and as a consequence thereof, are engaged under a contract for service is to be decided by an evaluation of the admissible evidence presented to the court.<sup>3</sup> This entails as a matter of procedure, a mix of law and fact.

## **Independent Contractors**

### **Meaning**

The independent contractor may be described in various ways including - freelance and self-employed , and who enters a contract for service as opposed to a contract of service. Harvey, on **Industrial Relations and Employment Law**, Vol.1 states that inherent in this arrangement **“The employer buys not so much the right to the worker’s service, as the right to the end product of his labour. He pays not so much to do the job as to get the job done.”**

**Selwyn’s Law of Employment [13<sup>th</sup> ed.]**, under the subject **“The nature of a contract of employment,”** para. 2.119 lists the relevant indicia in the determination on whether a worker is an independent contractor.

In determining whether a contract of employment exists, we have followed the guidance of **McKenna J. in Ready Mixed Concrete (South East) Ltd. v.**

---

<sup>3</sup> Clifford v. Union of Democratic Mineworkers [1991] IRLR 518.

**Minister of Pensions and National Insurance [1968] 2, QB, 497 at 515.** This requires three conditions to be fulfilled: “ (i) that the servant agrees that, in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master, **mutuality of obligations**; (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s **control** in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with it being a contract of service.”<sup>4</sup>

We have also followed the guidance found in the case of **Montgomery v. Johnson Underwood Ltd.**<sup>5</sup> that tribunals must consider the whole picture to see whether a contract of service emerges and in addition, “**mutual obligation**” and “**control**” must be identified to a sufficient extent before looking at the whole picture (the other provisions of the contract) to see whether a contract of service exists.

We have done that and find:

- That Daily News / Newsday imposed no control or supervision and little direction on Allette to establish a relationship of an employer and employee. Suffice it to note that its absence (control) is inconsistent with the terms of a contract of employment. A contractual relationship concerning work to be carried out in which there is no control cannot sensibly be called a contract of employment. It is not essential that

---

<sup>4</sup> Quoted in *Montgomery v. Johnson Underwood Limited* [2001] IRLR

<sup>5</sup> *Ibid*, 269 -270

**“there is control of how the work should be done ... However, some sufficient framework of control must exist.”**<sup>6</sup> In other words, Allette undertook at times to produce a given result, but in the actual execution of the job, he was not under the order or control of Newsday and he used his own discretion even in things not specified beforehand or subsequent. See **Can. Utilities Ltd. v. Mannix Ltd. (1959) ,29, W.W.R.289, 20 D.L.R. (2d) 654, (Alta C.A.)**.

- That Daily News was not obligated to provide for and/or accept work from Allette and more importantly, did not guarantee that work would be available. The evidence is he worked as and when he was asked to do so. There is no evidence of continuity of employment and/or availability for work and/or receipt of remuneration when he did not work.<sup>7</sup>

In the absence of evidence to the contrary, Allette was obliged to perform the job when given. Here is a case where Allette was told by Newsday’s editors to “Do this” and “he doeth it.”<sup>8</sup> There was therefore a basic obligation to work for, although not necessarily to serve Newsday.

We are satisfied that a contractual relationship under which there was no obligation on the employer to provide work, notwithstanding that work was done cannot in our view be called a contract of employment. In the circumstances,

---

<sup>6</sup> Ibid, 270

<sup>7</sup> For further reading on this subject see Halsbury’s Laws of England, Vol. 16, 4<sup>th</sup> ed. under the heading Contract of Employment and in particular para. 27 – Provision of Work.

<sup>8</sup> Quoted in [Court of Appeal] Ferguson v. John Dawson & Partners, op.cit; 122.

mutuality of obligation was not identified to a sufficient extent, which we think was necessary or consistent with a contract of service.

In keeping with the guidance, of *Mc Kenna J. and Montgomery v. Johnson Underwood Ltd. op.cit*, we have also examined the other essential terms of the contract and find:

- That there was no mutuality of interests in terms of similarity of wages, hours of work and working conditions to the monthly rated employees.
- That there was no established periodicity of payment; that is, no regular intervals of payments. The moneys received by Allette at any period of time cannot correctly be called a “wage” or a “salary.” We further find that there was no contractual term and/or requirement and /or obligation as to remuneration.<sup>9</sup> We accept Counsel’s (for the employer) argument that a contract as to payment was formed only subsequent to the execution of the job, or more accurately, after the job was accepted and published. Even then, payment was not a given. Allette said payments were contingent on his submission of a document **“outlining those stories and photographs that were published over a given period of time.”** Allette also received a lowered percentage of his claims.

---

<sup>9</sup> Halsbury’s Laws of England, op.cit.

- Daily News/Newsday was not Allette’s (and by extension Freelancers) **“single fixed employer.”** Allette testified that he **“undertook engagements... on the request ...by one of the editors, or from invitations ...sent directly ...from various entities.”**

Suffice it to point out that these terms are inconsistent with a contract of service.

### **DECISION**

On the totality the evidence, we are satisfied that Allette was engaged with Daily News/ Newsday as an independent contractor. Therefore, Freelancers engaged with the Daily News/ Newsday were also independent contractors, and as such, they have no standing to inclusion in the collective agreement

It is so ordered.

**Mr. Ramchand Lutchmedial**  
**Chairman**

**Ms. Bindimattie Mahabir**  
**Member**

**Mrs. Lenore V. Harris**  
**Member**