

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

ANTIGUA AND BARBUDA

ANUHCVP2015/0009

BETWEEN:

THEODORE FRANCIS T/A THEO'S TUG & BARGE

Appellant

and

DAMON FRANCIS

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Jarid A. Hewlett for the Appellant
Mr. Jason Martin for the Respondent

2017: March 2;
March 8.

Civil appeal – Payment of severance on termination of employment – Section C44 of Antigua and Barbuda Labour Code – Whether appellant employed by respondent or by incorporated company at time of termination of employment – Whether respondent proper party to proceedings

The respondent, Mr. Damon, was employed by the appellant, Mr. Theodore, a sole proprietor using the trading name "Theo's Tug and Barge" on 1st March 1999. Sometime in 2003, Mr. Theodore incorporated a company called "Theo's Tug and Barge Incorporated". On or about 12th June 2009, Mr. Damon's employment was terminated but there are divergent views between the parties as to whether, at the time of his termination, he was employed by Mr. Theodore trading as Theo's Tug and Barge or by the company, Theo's Tug and Barge Incorporated.

Following Mr. Damon's termination of employment, he made several efforts to obtain severance pay from Mr. Theodore but was unsuccessful. Eventually, he filed a reference

before the Industrial Court for determination. On 18th November 2013, Mr. Theodore filed an application to have the reference struck out but later withdrew the application. He subsequently filed another application to strike out, identical in terms with the earlier withdrawn application, save that reference was made to, a letter of employment dated 22nd January 2008 'formalizing his [Mr Damon's] relationship with the company', as well as cheques written in 2009 by the Managing Director from Theo's tug and Barge to Mr. Damon. The Industrial Court dismissed Mr. Theodore's application and ordered him to pay Mr. Damon \$1,000.00 in cost. The court found that Mr. Damon remained an employee of Mr. Theodore at least up until 2008 when the letter formalising his employment was written.

Mr. Theodore, dissatisfied with Industrial Court's decision, appealed. The crux of his appeal is that he was not Mr. Damon's employer when Mr. Damon was terminated and he is therefore not a proper party to the proceedings and that the Industrial Court ought to have struck out the reference.

Held: dismissing the appeal; upholding the decision of the Industrial Court and making no order as to costs, that:

1. The Industrial Court is a creature of statute and accordingly obtains its jurisdiction from the statute which creates it, namely, the Industrial Court Act. Unlike the High Court which was also created by a separate and distinct Act, the Supreme Court Order, the Industrial Court's jurisdiction is not as wide and all-encompassing as that of the High Court. Further, the Civil Procedure Rules 2000 as amended do not govern the procedure in the Industrial Court. As a consequence, the Industrial Court does not have the wide discretion that the High Court is clothed with to strike out claims.
2. Section 7 of the Industrial Court Act clearly stipulates the jurisdiction of the Industrial Court. Its jurisdiction is confined to the hearing of trade disputes referred to it under the Industrial Court Act. However, this in no way negates the fact that, in the exercise of its inherent jurisdiction in circumstances where there has been an abuse of its process, the Industrial Court can strike out the reference.
3. An appellate court should only interfere with the decision of a Tribunal: (a) If the tribunal was positively wrong in law; or (b) If the only reasonable conclusion on the facts found by the Tribunal was inconsistent with the determination it came to, in other words, if a Tribunal came to a conclusion which no reasonable tribunal, properly instructed, could have reached.

Yusuf Muhammed v Selsi Limited MNILTAP2012/0001 (delivered 3rd December 2013, unreported) followed.

4. Section C44 of the Antigua and Barbuda Labour Code imposes a bar on the payment of severance to an employee in Antigua and Barbuda, where two conditions are met: firstly, there must be a termination of employment by an employer and secondly, there must be an offer of the same employment by a

successor employer without a break in service. Accordingly, for Mr. Damon to have been ineligible to receive severance pay from Mr. Theodore, Mr. Theodore would have had to terminate his employment and he would have had to be offered the same employment with a successor employer without a break in service. There is nothing to suggest that that Mr. Theodore terminated Mr. Damon's employment and that there existed an offer of employment by a successor employer. In the case at bar, there is no evidence to show that it was ever communicated to Mr. Damon that his employment would be transferred to the incorporated company. The letter dated 22nd January 2008 makes no mention of an offer of employment by Theo's Tug and Barge Incorporated and is insufficient to show that Mr. Damon assented to being employed by a new employer. Therefore, there is no basis to overturn the factual and legal findings made by the Industrial Court as it cannot be said that the court came to a conclusion which no reasonable tribunal, properly instructed could have reached.

Section C44 of the Antigua and Barbuda Labour Code Cap.27, Revised Laws of Antigua and Barbuda considered.

REASONS FOR DECISION

[1] **BLENMAN JA:** This is an appeal by Mr. Theodore Francis, trading as Theo's Tug & Barge (hereinafter referred to as "Mr. Theodore"), against the order of the Industrial Court in which the court refused Mr. Theodore's application to strike out the reference to the Industrial Court by the respondent, Mr. Damon Francis (hereinafter referred to as "Mr. Damon"), and ordered Mr. Theodore to pay Mr. Damon \$1,000.00 in costs.¹ At the end of the hearing of the appeal, this Court gave an oral decision and indicated that it would provide its reasons at a subsequent date. These reasons are now set out below.

[2] Learned counsel Mr. Hewlett on behalf of Mr. Theodore helpfully provided submissions in support of his appeal; however, no submissions were filed by learned counsel, Mr. Martin on behalf of Mr. Damon. The Court, having seen and read Mr. Hewlett's written submissions and having heard his oral submissions, felt that it was

¹ In the reasons for decision given by the Industrial Court, the court referred to Mr. Theodore Francis as "the Employer" and Mr. Damon Francis as "the Employee"; however, because this matter raises questions as to whether Mr. Theodore Francis is Mr. Damon Francis' employer, I will not adopt the nomenclature used by the Industrial Court.

unnecessary to invite Mr. Martin to respond and accordingly did not invite him to do so.

Background

- [3] I propose now to briefly deal with the background to Mr. Damon's reference to the Industrial Court.
- [4] Mr. Damon was employed by Mr. Theodore on 1st March 1999. When he took up employment in 1999, Mr. Theodore was a sole proprietor using the trading name "Theo's Tug and Barge". In 2003, Mr. Theodore incorporated a company called "Theo's Tug and Barge Incorporated". On or about 12th June 2009, Mr. Damon was informed by Mr. Theodore that his employment would be temporarily terminated. There are divergent views between the parties as to whether, at the time of Mr. Damon's termination, he was employed by Mr. Theodore trading as Theo's Tug and Barge or whether he was employed by the company, Theo's Tug and Barge Incorporated.
- [5] Following Mr. Damon's termination of employment, he made a claim for severance pay from Mr. Theodore but was unsuccessful. Subsequent efforts by Mr. Damon to obtain severance pay from Mr. Theodore were also unsuccessful. Mr. Damon was then re-engaged by Mr. Theodore in November 2009 but only for a 2 week period. Mr. Damon still had not received any severance pay by this time. He therefore caused a letter to be written to Mr. Theodore making representation for his severance to be paid. Mr. Theodore's attorney responded to Mr. Damon's letter and asserted that Mr. Damon had quit his job and that Mr. Theodore did not owe him any money.
- [6] The matter was eventually referred to the Industrial Court by Mr. Damon for determination. In his reference, Mr. Damon contended that having regard to the relevant laws of Antigua and Barbuda, judicial precedents, natural justice and

good industrial relations practices in Antigua and Barbuda, he is entitled to severance benefits from Mr. Theodore.

- [7] I will now refer in some detail to how Mr. Damon's reference proceeded in the Industrial Court.

Proceedings in the Industrial Court

- [8] Mr. Damon's reference came before the Industrial Court for consideration and on 18th November 2013, Mr. Theodore filed an application to have his reference struck out. At the hearing of the strike out application on 18th January 2014, the Industrial Court noted that there were fundamental weaknesses in the supporting evidence of Mr. Theodore's application and this led to the application being withdrawn by his counsel.

- [9] Mr. Damon's reference was set down for trial on 26th November 2014. On 19th November 2014, Mr. Theodore filed another application to strike out the reference. It is this application that forms the basis of Mr. Theodore's appeal. The application was in identical terms to Mr. Theodore's earlier withdrawn application and the affidavit in support was substantially the same, save for the addition of one paragraph which states:

"[5] As further evidence of the fact that the company Theo's Tug and Barge Incorporated was the Employee's successor employer, I attach hereto **"Exhibit TF2"** which is a copy of a letter of employment to the Employee formalizing his relationship with the company and signed by the then-Managing Director, Lawrence "Larry" Francis. I also attach copies of cheques written in June 2009 to the Employee from Theo's Tug and Barge, which were by the Managing Director Lawrence "Larry" Francis and mark them [sic] **"Exhibit TF3"**. If I was conducting business in my personal capacity trading as Theo's Tug and Barge, these cheques would have had to be signed by me personally. The Employee was receiving payments from the company Theo's Tug and Barge Incorporated because he was the company's employee, and not mine."

- [10] The letter of 22nd January 2008 exhibited to Mr. Theodore's strike out application provided for Mr. Damon to sign to indicate his acceptance of the terms and

conditions outlined in the letter and it was indeed signed by Mr. Damon and returned to Mr. Theodore.

Grounds on Strike Out Application

[11] The grounds of Mr. Theodore's strike out application were as follows:

- "1. The Applicant is not the proprietor of a business trading under the name "Theo's Tug & Barge".
2. In 2003 the Applicant and another incorporated a company "Theo's Tug & Barge Incorporated".
3. Theo's Tug & Barge Incorporated is a legal personality separate and distinct from the Applicant.
4. Theo's Tug & Barge Incorporated traded under its name.
5. As at 2009 the Applicant was not the employer of the Respondent."²

[12] In his affidavit in opposition to Mr. Theodore's application, Mr. Damon deposed that he had been an employee of Mr. Theodore from 1st March 1999 to 12th September 2009. He stated that sometime in 2003 he had become aware of some paper work that was being executed in relation to Mr. Theodore's business but that he was not told specifically what those changes would be or how it would affect his employment status or benefits with the business. He deposed that he did not receive any information regarding the change in legal identity of Mr. Theodore's business and that the economic activity of the business remained the same. He also deposed that he did not receive any written communication about any change of name of Mr. Theodore's business in 2003 and that he did not receive any severance pay.

[13] At the end of the hearing, the Industrial Court dismissed Mr. Theodore's application to strike out the reference. In the court's subsequent written reasons for the decision, it identified the relevant provision of the Antigua and Barbuda **Labour Code**³ in relation to severance pay. Indeed, the Industrial Court referred to section C44 which provides that:

²See Mr. Theodore's notice of application filed on 19th November 2014.

³ Cap. 27, Revised Laws of Antigua and Barbuda 1992.

“Severance pay is not payable if the employee’s employment is terminated by an employer who has gone out of business but, without any break in service, he is offered the same employment by a successor-employer:

Provided, however, that his tenure of employment, for subsequent severance purposes, dates from his original hiring by the first of a series of predecessor-employers; in which case the successor employer, in the event of a subsequent termination for redundancy, shall be responsible for the payment of the employee’s severance pay computed on the basis of his full tenure of employment by himself and all predecessor-employers.”

- [14] The Industrial Court found that for there to be a bar on payment of severance pay as imposed by section C44, two conditions must be met: (1) there must be a termination of employment by the employer; and (2) there must be an offer of the same employment by a successor-employer without any break in service. The court concluded that there was no termination of Mr. Damon’s employment by Mr. Theodore and by extension no offer of the same employment by the company. Accordingly, there was no employee/successor-employer relationship so that Mr. Damon remained an employee of Mr. Theodore at least up until 2008 when the letter formalising his employment was written.
- [15] The Industrial Court found that the letter dated 22nd January 2008 did not indicate that it was issued by the company and otherwise bore no distinguishing words to that effect. The court found that the use of the word “company” in the letter and the signature of “Larry Francis, Managing Director” did not individually or collectively convey the existence of a company named “Theo’s Tug & Barge Incorporated”. The Industrial Court further found that the cheques issued to Mr. Damon all showed the payer to be “Theo’s Tug & Barge”, Mr. Theodore’s trading name and were signed by Lawrence Francis, whose identity was not disclosed on the cheque. The Industrial Court concluded that the combined effect of the letter in 2008 and the cheques suggest that Mr. Theodore continued to do business using the trade name as in 1999. The signatures “Larry Francis” and “Lawrence Francis” were collectively or individually equivocal.

[16] The Industrial Court dismissed Mr. Theodore's strike out application and awarded costs in the sum of \$1,000.00 to Mr. Damon. In doing so, the court exercised its power to award costs for exceptional reasons under section 10(2) of the **Industrial Court Act**.⁴ The Industrial Court justified the costs award on the basis that Mr. Theodore engaged in an abuse of the court's process sufficient to amount to exceptional reasons to ground an award of costs.

[17] I propose now to outline Mr. Theodore's grounds of appeal.

Grounds of Appeal

[18] Mr. Theodore has filed 2 grounds of appeal against the Industrial Court's order. He complains that the Industrial Court erred in law by dismissing the application to strike out Mr. Damon's reference on the grounds that:

“(a) The respondent's [Mr. Damon's] Reference and pleadings contained in the Employee's Memorandum dated May 17, 2013 as well as his exhibits filed on even date, describes the Respondent [Mr. Damon] as being terminated by a company; the Appellant [Mr. Theodore] not being a company.

(b) Having been terminated by a company, the Appellant [Mr. Theodore] was not the Respondent's [Mr. Damon's] Employer at the date of termination and should not be a party in proceedings before the Industrial Court.”

[19] To my mind, the first ground of appeal is essentially subsumed by the second ground. The crux of Mr. Theodore's appeal is that he was not Mr. Damon's employer when Mr. Damon was terminated and he is therefore not a proper party to the proceedings.

[20] I will now consider the relevant submissions of Mr. Theodore.

⁴ Cap. 214, Revised Laws of Antigua and Barbuda 1992.

Submissions on Behalf of Mr. Theodore

- [21] The overarching complaint of Mr. Theodore is that the Industrial Court erred on a point of law and fact. In essence, learned counsel for Mr. Theodore, Mr. Hewlett, contended that there was no basis on which the Industrial Court could have concluded that Mr. Damon was employed by Mr. Theodore at the time he was terminated.
- [22] Learned counsel, Mr. Hewlett pointed to the letter of 22nd January 2008 in support of the above argument. Mr. Hewlett argued that the letter was a letter of employment to Mr. Damon, and that it was signed by Larry Francis in his capacity as managing director of the company, Theo's Tug and Barge Incorporated. Learned counsel, Mr. Hewlett argued that only body corporates have managing directors and that the only way the letter of employment made logical sense was if it was issued on behalf of the company. To interpret the letter in any other way, he contended, would be in effect to find that it was issued by the managing director of Theodore Francis, sole proprietor. Mr. Hewlett submitted that a sole proprietor cannot have a managing director and that the only logical conclusion that the Industrial Court ought to have drawn from this evidence is that it was issued by Theo's Tug and Barge Incorporated.
- [23] Learned counsel, Mr. Hewlett's second argument is in relation to the Industrial Court finding that there was no termination of Mr. Theodore's employment. Mr. Hewlett contended that what the Industrial Court intended to say when it made this finding was that, at the time when Mr. Theodore ceased to carry on business in his personal capacity trading as "Theo's Tug and Barge", and the operation of the tug and barge business was being conducted by "Theo's Tug and Barge Inc.", Mr. Damon remained Mr. Theodore's employee notwithstanding. He submitted that the basis for the court making this finding was that no formal letter of termination was issued by Mr. Theodore to Mr. Damon despite Mr. Theodore ceasing to carry on business in his personal capacity. Mr. Hewlett argued that this is an error of fact and law.

[24] Mr. Hewlett relied on the general principle of frustration of contracts in support of the above argument. He submitted that a contract will be terminated automatically if it is frustrated, that is, if a change of law or circumstances such as to mean that the contract becomes impossible of performance or that performance of the contractual obligation would produce a result radically different from that which was originally undertaken in the contract. Mr. Hewlett posited that this doctrine applies to contracts of employment and reflects what occurred in this case, that is, there was a fundamental change of circumstance – the taking over by an incorporated company of the business of a sole proprietor. He submitted that, the fact that a natural person and an artificial person such as a company are two wholly different legal personalities, the contract of employment between Mr. Theodore and Mr. Damon was frustrated.

[25] Mr. Hewlett, relying on the case of **Hirji Mulji v Cheong Yue Steamship Co, Ltd**,⁵ submitted that applying the doctrine of frustration to the present case, it is clear that by ceasing to carry on business as a sole proprietor, and continuing business operations as a separate legal entity, that is, as Theo's Tug and Barge Inc., the employment contract between Mr. Theodore and Mr. Damon, by operation of law, came to an end.

Discussion and Conclusion

[26] It is noteworthy that the Industrial Court is a creature of statute and accordingly it obtains its jurisdiction from the statute which creates it, namely, the **Industrial Court Act**. Unlike the High Court which also was created by a separate and distinct Act, the **Supreme Court Order**,⁶ the Industrial Court's jurisdiction is not as wide and all-encompassing as that of the High Court. In this regard, the Industrial Court does not have the wide discretion that the High Court is clothed with to strike out claims. Further, the **Civil Procedure Rules 2000** ("CPR") as amended do not govern the procedure in the Industrial Court. Section 7 of the **Industrial Court**

⁵ [1926] AC 497 at p. 509.

⁶ Cap. 422A, Revised Laws of Antigua and Barbuda 1992.

Act clearly stipulates the jurisdiction of the Industrial Court. Its jurisdiction is confined to the hearing of trade disputes referred to it under the **Industrial Court Act**. This in no way negates the fact that in the exercise of its inherent jurisdiction in circumstances where there has been an abuse of its process, the Industrial Court can strike out the reference. However, this was not the complaint before the Industrial Court and therefore the court cannot be faulted for the approach it took to the application to strike out for reasons that will become obvious shortly.

[27] I will now address the merits of the application and the findings of the Industrial Court.

Approach of Appellate Court to Factual Findings of a Tribunal

[28] It is important to put into context the approach of an appellate court to the decision of a tribunal. In so far as is applicable to this case, section 17 of the **Industrial Court Act**⁷ provides that:

“(1) Subject to this Act, any party to a matter before the Court shall be entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no others –

...

(d) That any finding or decision of the Court in any matter is erroneous in point of law;”

[29] In **Yusuf Muhammed v Selsi Limited**,⁸ this Court, dealing with a similar provision under the **Montserrat Employment Act**⁹ opined that an appellate court should only interfere with the decision of a Tribunal:

- (a) If the tribunal was positively wrong in law; or
- (b) If the only reasonable conclusion on the facts found by the Tribunal was inconsistent with the determination it came to, in other words, if

⁷ Cap. 214, Revised Laws of Antigua and Barbuda 1992.

⁸ MNILTAP2012/0001 (delivered 3rd December 2013, unreported).

⁹ Cap. 15.03, Revised Laws of Montserrat 2008 at section 41.

a Tribunal came to a conclusion which no reasonable tribunal, properly instructed, could have reached.¹⁰

[30] The Industrial Court made a number of findings of fact in reaching its decision. The law is well settled in relation to the approach of an appellate court on an appeal against the factual findings of a judge at first instance. In **McGraddie v McGraddie and another**¹¹ the correct approach of an appellate court to a trial judge's findings was stated in the headnote as follows:

"it was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it was satisfied that he was plainly wrong..."

[31] In **Beacon Insurance Company Limited v Maharaj Bookstore Limited**¹² in explaining the meaning of the phrase 'plainly wrong', the Privy Council opined:

"It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong"...This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts...Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions."¹³

[32] In **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**,¹⁴ this Court summarised the approach the Court of Appeal should take upon reviewing the factual findings of a trial judge:

"The Court of Appeal should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn

¹⁰ See also *Edwards (Inspector of Taxes) v Bairstow and Another* [1956] AC 14 (Lord Radcliffe); *O'Kelly and others v Trusthouse Forte PLC* [1984] QB 90 (Sir John Donaldson MR); *Lee Ting Sang v Chung Chi-Keung and Another* [1990] 2 AC 374 (Lord Griffiths).

¹¹ [2013] 1 WLR 2477.

¹² [2014] UKPC 21.

¹³ At para. 12.

¹⁴ BVIHCVAP2012/0028 (delivered 20th April 2016, unreported). See also *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911; *Margaret Blackburn v James A.L. Bristol* GDAHCVAP2012/0019 (delivered 12th October 2015, unreported).

from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.”¹⁵

[33] Having placed into context the approach that this Court should take in assessing the factual findings of a court at first instance, I will now consider whether the Industrial Court’s findings can be properly criticised.

[34] I will first deal with the Mr. Hewlett’s submissions in relation to the doctrine of frustration of the employment contract between Mr. Theodore and Mr. Damon. Mr. Hewlett argued that when Mr. Theodore incorporated the company, Theo’s Tug and Barge Incorporated on 28th March 2003 he ceased doing business as a sole proprietor (Theodore Francis trading as Theo’s Tug and Barge) and the effect of this was that the employment contract was frustrated, in other words, the employment contract by operation of law, came to an end. With the greatest of respect to learned counsel, Mr. Hewlett, this argument cannot be sustained. While I accept that a contract of employment can be frustrated, it is well settled that frustration will only occur where no fault can be attributed to either party.¹⁶ It will arise in situations where either party, through no fault of his own, is unable to perform the contract, for example due to prolonged illness or death. It cannot be said that a contract is frustrated where a sole proprietor has sought to change the identity of the business, by his own volition, as in such a situation the inability for the contract of employment to be performed has resulted from the deliberate actions of one party to the contract. Therefore, it cannot be said that the contract of employment between Mr. Theodore and Mr. Damon was frustrated.

[35] In any event, frustration simply does not arise in relation to the issue in these proceedings, that is, whether Mr. Theodore, trading as Theo’s Tug and Barge is

¹⁵ At para. 46.

¹⁶ See *Paal Wilson and Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34 (Lord Brandon of Oakbrook).

the correct party to the proceedings. Accordingly, the law of frustration has no relevance and does not advance Mr. Theodore's argument on the appeal.

[36] For the sake of completeness, I will now consider the effect of the incorporation of the company, Theo's Tug and Barge Incorporated, on the contract of employment between Mr. Theodore and Mr. Damon. This is a question of mixed fact and law.

[37] In **Steel Workers Union of Trinidad and Tobago v Iron and Steel Company of Trinidad and Tobago and Caribbean Ispat Limited**, the Trinidad and Tobago Industrial Court found that employees were not eligible for a severance payment, since they had been absorbed into the successor company without a break in service as an alternative to being retrenched. This decision reflects the law under section C44 of the Antigua and Barbuda **Labour Code**.¹⁷

[38] The Industrial Court at paragraph 18 of its written decision quite correctly identified the two conditions that impose a bar on payment of severance to an employee in Antigua and Barbuda: firstly, there must be a termination of employment by an employer; and secondly, there must be an offer of the same employment by a successor employer without a break in service. Accordingly, for Mr. Damon to have been ineligible to receive severance from Mr. Theodore, Mr. Theodore would have had to terminate his employment and he would have had to be offered the same employment with a successor employer without a break in service.

[39] I agree with the Industrial Court's finding that there was no termination of Mr. Damon's employment by Mr. Theodore and as a result no offer of employment by a successor employer. To my mind, the letter of 22nd January 2008 to Mr. Damon was attempting to do just what it stated in the first paragraph:

"This correspondence is issued to formalize the terms and conditions of your employment with Theo's Tug & Barge which commenced on 1st March 1999."

¹⁷ As stated at para. 13 above.

Mr. Damon commenced employment with Mr. Theodore trading as Theo's Tug & Barge on 1st March 1999. He did not commence employment with Theo's Tug & Barge Incorporated in March 1999. Further, the letter makes no mention of the termination of Mr. Damon's employment with Theo's Tug & Barge and an offer of employment with Theo's Tug & Barge Incorporated. The letter simply states that it is formalising his employment with Theo's Tug & Barge. The fact that the letter refers to Theo's Tug & Barge as "the Company" and is signed by one Larry Francis as "Managing Director" is of no moment. No mention is made of an offer of employment by Theo's Tug & Barge Incorporated to Mr. Damon. Even the letterhead states the name "Theo's Tug & Barge" and not "Theo's Tug & Barge Incorporated", the company incorporated by Mr. Theodore in 2003.

[40] I also agree with the Industrial Court that the cheques issued to Mr. Damon in 2009 which were exhibited to the affidavit of Mr. Theodore also offer no assistance in support of his argument. The name on the cheques is "Theo's Tug & Barge" the trading name of Mr. Theodore. The fact that the cheques were signed by Larry Francis and not Theodore Francis is equivocal. Mr. Damon would have no reason to believe, based on those cheques, that his employment with Theo's Tug & Barge was terminated and that he was offered employment by Theo's Tug & Barge Incorporated.

[41] I am fortified in my view by the common law position on the transfer of business by an employer. In **Noakes v Doncaster Amalgamated Collieries Ltd**¹⁸ the House of Lords was pellucid in its pronouncement on this position. Viscount Simon LC stated that:

"It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law - the principle, namely, that **a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.**" (My emphasis).¹⁹

¹⁸ [1940] AC 1014.

¹⁹ At p. 1020.

[42] There is no evidence to show that it was ever communicated to Mr. Damon that his employment would be transferred to the incorporated company “Theo’s Tug & Barge Incorporated” and I agree with the Industrial Court that the letter dated 22nd January 2008 is not sufficient to show that Mr. Damon assented to being employed by a new employer.

[43] I can find no basis to overturn the factual and legal findings made by the Industrial Court. It cannot be said that the court came to a conclusion which no reasonable tribunal, properly instructed, could have reached. It was clearly open to the Industrial Court to come to the conclusion that it did based upon the evidence as a whole that was before it. In light of the foregoing, I would dismiss the appeal and make no order as to costs.

Costs

[44] Section 10 (2) of the **Industrial Court Act** provides that, ‘...the Court of Appeal shall in disposing of any appeal brought to it from the Court make no order as to costs, unless for exceptional reasons the Court of Appeal considers it proper to order otherwise.’ Accordingly, no order is made as to costs.

Order

[44] The order of the Court is as follows:

- (1) The appeal is dismissed.
- (2) The decision of the Industrial Court is upheld.
- (3) There is no order as to costs.

[45] I gratefully acknowledge the assistance of learned counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar