

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 14 of 2009

BETWEEN:

RAPHAEL BENJAMIN

Employee

and

THE PORT AUTHORITY

Employer

Before:

The Hon. Philip A. Pilgrim
The Hon. Samuel R. Aymer
The Hon. Dr. Hayden Thomas

President
Member
Member

Appearances:

Mr. Ralph A. Francis - Attorney-at-Law for the Employee
Mr. Colin V. A. Derrick - Attorney-at-Law for the Employer

2010: December 02
2011: February 17

JUDGMENT

PILGRIM, P:

Establishment and structure of the Civil Service

[1](a) The establishment of the Civil Service of Antigua and Barbuda is specifically set out in accordance with **Section (3) (1) of the Civil Service Act, No. 24 of 1984**. The Act came into operation on December 27, 1984.

(b) **Section 3** of the Act provides as follows:

- (1) *“The several public offices in the public service from time to time set out in the First Schedule are deemed to constitute the Civil Service of Antigua and Barbuda which is hereby established for the purposes of this Act.”*
- (2) *“A public officer who holds a public office in the public service that by subsection (1) is deemed to be an office in the Civil Service shall be referred to as a Civil Servant.”*
- (3) *“The Minister may, from time to time, by order published in the Gazette, add to, vary or amend the classification of offices in the Civil Service set out in the First Schedule.”*
- (4)
- (5) *“The classification titles of the offices set out in the classification of offices in the Civil Service in the First Schedule shall be observed in all records and communications of the Commission, the Audit Department, and the Ministry of Finance and in all departmental estimates and parliamentary returns and appropriations.”*

Terms and conditions of employment

[2](a) The general terms and conditions of employment of a Civil Servant are set out from **Sections 6 to 11** of the Act. **Section 6** provides as follows:

“A civil servant shall hold office subject to the provisions of the Constitution, this Act or any other written law and, unless some other period of employment is specified, for an indeterminate period.”

- [3] Mr. Raphael Benjamin was born on March 01, 1950. He is 60 years of age. He resides at Clare Hall in the parish of St. John in Antigua & Barbuda.

History of Mr. Benjamin's employment record in the Civil Service

- [4] With the concurrence of both parties this Court was able to obtain a history of Mr. Benjamin's employment in the Civil Service. It was provided in a Minute by the Chief Establishment Officer (acting) to the Secretary to the Cabinet. It is dated December 08, 2010. Aspects of that Minute which are not in dispute by both parties appear at **paragraphs [5] to [9]** below.
- [5] At the age of 19 years Mr. Benjamin on December 01, 1969 commenced his employment in the Civil Service of Antigua and Barbuda. His first post was that of Clerical Assistant. A perusal of his historical record clearly revealed that Mr. Benjamin wasted no time to obtain promotions in the Civil Service. He was a man on the move. This is to be commended.
- [6] He quickly rose from his initial position to that of Junior Clerk on July 01, 1970. In 1972 he was appointed Senior Clerk. In less than four (4) years he obtained a promotion to that of Executive Officer. In 1981 he was appointed Senior Executive Officer.
- [7] In 1982 he was appointed to the post of Inspector of Customs. In September 1984 he rose to the position of Principal Inspector of Customs. On January 15, 1987 he was appointed Deputy Collector of Customs. On September 01, 1987 he was appointed Deputy Comptroller of Customs.

- [8] Whilst holding his substantive post of Deputy Comptroller of Customs, Customs Division, by letter dated June 14, 1993 from the then Chief Establishment Officer, Mr. Benjamin was seconded to the Ministry of Finance with effect from 16th June, 1993. It reads as follows:

*"Mr. Raphael Benjamin
u.f.s. Permanent Secretary,
Ministry of Finance*

Dear Sir,

I am to inform you that the Public Service Commission has approved your secondment for duties in the Ministry of Finance with effect from 16th June, 1993.

2. *During the period of your secondment, you will continue to receive salary from your substantive post.*

Yours faithfully,

*.....
Chief Establishment Officer"*

(This letter was admitted as **"RB-1"**).

- [9] In a document dated March 11, 1994 from the then Chief Establishment Officer to Mr. Benjamin he was informed that the Public Service Commission had approved his appointment on promotion as Director of Customs Research and Development, with effect from June 16, 1993. In this new position as a Civil Servant he was transferred from the Customs Division to the Ministry of Finance. (This letter was admitted as **"RB-2"**).

Mr. Benjamin continued to perform his duties in the Ministry of Finance until March 31, 1997.

The divide between the two parties

[10] What occurred from April 01, 1997 to September 15, 2004 with regard to Mr. Benjamin's tenure of employment presents the divide between the Port Authority and himself. That period is the subject of proceedings before this Court. The scenario unfolds as follows:

[11] In addition to "RB-1" and "RB-2", there are two other documents which form the basis of Mr. Benjamin's case. The third is a Decision of the Cabinet of Antigua and Barbuda. It is dated February 26, 1997. Parts 6 and 7 of the Cabinet's decision which Mr. Benjamin submits in support of his case state as follows:

"IN THE CABINET OF ANTIGUA AND BARBUDA

Wednesday 26th February, 1997

Port Manager and Deputy Port Manager- Appointment of

6. *Cabinet discussed the above subject and decided to recommend that Mr. Raphael Benjamin should be appointed to the post of Port Manager with effect from 1st April, 1997.*
7. *Cabinet also decided to recommend that Mr. Leslie Williams be appointed to the post of Deputy Port Manager with effect from 1st April, 1997."*
(It was admitted as "RB-3").

[12] The Port Authority is established in accordance with **Section 3(1) of Cap. 333** of the Laws of Antigua and Barbuda. It is a body corporate which has the authority to *inter alia* enter into contracts and to sue and be sued in its name. The Authority consists of seven persons who are designated Commissioners. There is a Chairman, Deputy Chairman and other Commissioners who perform their duties.

[13] It is the Employee's contention that the position of Port Manager became vacant in or around the month of November 1996. The Port Authority's position is that the vacancy existed from March 1997. In any event, Mr. Benjamin was interviewed by the Port Authority on March 27, 1997. He received a letter dated April 01, 1997 from the Port Authority.

[14] This letter from the Port Authority is the fourth document which Mr. Benjamin submits in support of his case. In that letter the Port Authority informed Mr. Benjamin that he was appointed as the Port Manager with effect from April 1st, 1997. The letter was signed by Mr. Lauchland Lake, acting Secretary of the Board of Commissioners of the Port Authority. It was copied to the Minister of Finance and other parties. The letter stated as follows:

*"Mr. Raphael Benjamin
Cassada Gardens
St. John's
Antigua*

April 1, 1997

Dear Mr. Benjamin,

Consequent upon your interview with the Board of Commissioners of the Antigua Port Authority at its meeting of the 27th March, 1997, I am please to inform you that the Board has decided to appoint you Port Manager with effect from 1st April 1997.

As Port Manager, you will assume the Chief Executive Officers role according to the Port Act Section 3 (4) subparagraph 2.

You will receives a monthly salary of \$7008.12 plus \$500.00 as travelling.

The Board wishes to congratulate you on your appointment and take this opportunity to welcome you to the Antigua Port Authority.

The Board is confident that with the vast experiences you bring with you the task ahead should not be too difficult.

The Board of Commissioners and the general staff of the Authority stands ready to assist you in your new role."

Yours sincerely

*Lauchland Lake
Ag. Secretary, B O C
c.c. Minister of Finance
Port Lawyer
Chairman Board of Commissioners
Accountant"*

(It was admitted as "RB-4").

[15] The Chief Establishment Officer wrote Mr. Benjamin a letter dated September 10, 2004. That letter reads as follows:

"10th September 2004

*Chief Establishment Officer
Establishment Department
Office of the Prime Minister
Ministry with Responsibility for
Civil Service
Redcliffe Street
St. John's, Antigua
A. E. 5819-II*

*Mr. Raphael Benjamin
u. f. s Permanent Secretary
Ministry of Finance and Economy*

Dear Sir,

I am to inform you that the Public Service Commission has Decided to Terminate your Secondment as Port Manager, Antigua Port Authority with effect from 15th September, 2004 and that you should be reverted to your substantive post as Director of Customs Research and Development, Ministry of Finance with effect from 16th September, 2004.

2. *Please be guided accordingly.*

Yours faithfully,

*.....
Chief Establishment Officer"*

(This letter was admitted as "RB-5").

- [16] Whilst employed at the Port Authority Mr. Benjamin states that from March 31, 2004 he received a remuneration package of (a) a gross monthly salary of \$8,129.93; (b) an entertainment allowance of \$400.00 per month; (c) exclusive use of a vehicle; (d) paid local and cellular telephone service; and (e) an annual bonus equivalent to a monthly salary.
- [17] Mr. Benjamin in the words of Mr. Francis his Attorney-at-Law *“followed (the) directive (of the Chief Establishment Officer contained in RB-5) and reported to the Ministry of Finance on the 16th September, 2004.”*
- [18] In the position of Director of Customs Research and Development the salary attached to this post was increased to \$65,064.00 per annum from September 16, 2004, \$86,760.00 per annum with effect from November 01, 2006, and \$95,436.00 per annum with effect from January 01, 2008. He also enjoyed a travelling allowance at the rate of \$7,752.00 per annum. Mr. Benjamin produced a document from the Chief Establishment Officer to the Permanent Secretary Ministry of Finance, the Accountant General and the Director of Audit. It is dated October 15, 2009. It verified these increases and his appointment in accordance with a decision of the Permanent Secretary. (It was marked exhibit **“RB-14”**.)
- [19] Mr. Benjamin’s case against the Port Authority is gleaned from three sources. The first source is his Reference filed on July 22, 2009. In that Reference he asserts that *“the issue in dispute between the parties is whether or not the employee was unfairly dismissed.”*
- [20] The basis of the case of unfair dismissal against the Port is contained in his Employee’s Memorandum. This is the second source. It was filed on July

22, 2009. At paragraph 10 of that document Mr. Francis Attorney-at-Law for Mr. Benjamin seeks the following relief:

“(a) a declaration that on 1st April 1997 he had been appointed the (substantive) holder of the post (of) Port Manager of the Antigua Port Authority.

(b) a declaration that the result of the letter (dated) the 10th day of September 2004 is that the Employee was unlawfully dismissed from the position of Port Manager.

(c) that there be an award of compensation to cover:

(1) Loss of salary

(2) Loss of benefits

(3) Loss of pension

(4) Manner of dismissal”

[21] The third source which reveals Mr. Benjamin’s case against the Port Authority is his Witness Statement. It was filed on May 14, 2010. At **paragraph [3]** of that Witness Statement Mr. Benjamin states as follows:

“On Wednesday 26th February, 1997 Cabinet recommended that I should be appointed to the Post of Port Manager.”

[22] After making reference to the interview between the Port Authority and himself at **paragraph [4]** of his Witness Statement. Mr. Benjamin stated at **paragraph [5]** as follows:

“I was also informed of my privileges and benefits including free local and cellular telephone, annual bonus, contribution to thrift fund, retention of my years of service and on retirement pension at the Port Manager salary.”

[23] The Port Authority caused its Employer's Memorandum to be filed on November 20, 2009. The Employer's understanding of the nature of the relationship between itself and Mr. Benjamin was put by its Attorney-at-Law Mr. Derrick at paragraph 3 subparagraphs (i) to (vi). They are as follows:

“(i) On or about March 1997 the post of Port Manager was vacant;

(ii) The Employee was interviewed for the vacant position on the basis that if successful he would be on secondment from his substantive post as Director of Customs Research and Development within the Ministry of Finance of the Government of Antigua and Barbuda;

(iii) notwithstanding that the Employee's secondment to the Employer to occupy the post of Port Manager would entitle the Employee to enjoy remuneration, benefits and allowances more favourable than that which he enjoyed in his substantive post as Director of Customs Research and Development within the Ministry of Finance the Employee knew or ought to have known that at the termination of the secondment the Employee would revert to the remuneration, benefits and allowances of his substantive post.

(iv) at all material times the Employer and the Employee understood that the Employee is a Civil Servant and that his substantive employer was the Government of Antigua and Barbuda and that his substantive post is Director of Customs and Research and Development within the Ministry of Finance.

(v) that throughout the Employee's tenure and secondment with the Employer the Employee considered his substantive status to be that of a Civil Servant within the employ of the Government of Antigua and Barbuda and he maintained and enjoyed the benefits

of that status throughout the tenure of his secondment with the Employer.

(vi) That throughout the Employee's tenure of secondment with the Employer the employee recognized the Government of Antigua and Barbuda to be his substantive Employer and when appropriate he acted in accordance with such directions as were issued to him by the Permanent Secretary of the Ministry of Finance and/or The Chief Establishment Officer of the Establishment Division."

[24] At **paragraph [18]** of his Witness Statement Mr. Benjamin also stated as follows:

"A bundle of all relevant documents is attached hereto."

The documents to which Mr. Benjamin made reference are **"RB-1"** to **"RB-5."** In essence Mr. Benjamin presented to this court no documents after **"RB- 4"** (April 01, 1997) and before **"RB-5"** (September 10, 2004).

[25] The documents referred to from **"RB-1"** to **"RB-5"** do not provide me with a clear answer with respect to what was the real intention and purpose of the Port and Mr. Benjamin as they commenced their relationship on April 01, 1997 and for the period from then to September 15, 2004.

[26] At **paragraph [18]** of Mr. Benjamin's Witness Statement he states in part as follows:

"...I do maintain that I was appointed the substantive holder of the post of Port Manager. Further, I also maintained that I had not been seconded from the Ministry of Finance..."

[27] (i) Mr. Benjamin no doubt would have or ought to have had sight of the Employer's Memorandum. He would have been aware that the Port Authority's view of the relationship was that he enjoyed the position of Port Manager on secondment from his position at the Ministry of Finance.

(ii) In addition, Mr. Benjamin occupied a position of some substance in an established office in the Civil Service. In answer to Mr. Derrick Attorney-at-Law for the Port Authority, Mr. Benjamin stated as follows:

"I am aware that in the Civil Service Regulations a Civil Servant can be seconded out of government service or placed in another section of the public service or placed outside of the Civil Service to a Statutory Corporation or regional organisation or to an international organisation. When a person's secondment ends he or she reverts to his or her substantive position enjoying the current benefits."

[28] As the matter of secondment was properly raised by Mr. Benjamin and the Port Authority, I am unable to discern from the exhibits which Mr. Benjamin produced to this Court (**RB-1 to RB-5**) whether or not he was seconded from his substantive position in the Civil Service to the Port Authority or whether as he claims he (a) ***"was appointed the substantive holder of the post of Port Manager"*** – (see paragraph [18] of his Witness Statement) and (b) he was informed by the Port Authority of his ***"retention of (his) years of service and on retirement pension at the Port Manager salary."*** (See paragraph [5] of his Witness Statement.) These documents do not clarify the issues which I am required to determine. They do present a clear ambiguity.

The issues

[29] The issues for determination are as follows:

- (i) Whether a contract of employment existed between Mr. Raphael Benjamin and the Port Authority which is capable of founding an action of unfair dismissal.**
- (ii) If a contract of employment did exist between Mr. Benjamin and the Port Authority which is capable of founding an action of unfair dismissal, was Mr. Benjamin dismissed and if so, was it done by the Port Authority?**
- (iii) If Mr. Benjamin was dismissed by the Port Authority was he unfairly dismissed?**
- (iv) If Mr. Benjamin was unfairly dismissed what is the measure of damages which is due to him?**

The first issue

Whether a contract of employment existed between Mr. Raphael Benjamin and the Port Authority which is capable of founding an action of unfair dismissal.

[30] (a) Section 28 of the Act provides *inter alia* that:

the “Minister may make regulations prescribing all matters which are required to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to this Act, and in particular for the following namely:

- (a) for prescribing the terms and conditions of employment in the Civil Service;**
- (b).....**
- (c).....**

(d).....

(e) for regulating the duties and the conduct of civil servants;

(b) The Minister accordingly made Regulations on December 15, 1992.

These are called The **Civil Service Regulations 1993 No. 1.**

[31] In **Regulation (2)** of the Regulations (the Interpretation section) the following terms have been defined:

“appointment” means the conferment of an office of emolument in the civil service upon an officer or any other person.”

“the Commission” means the Public Service Commission established under Section 99 of the Constitution.”

“secondment” means the temporary movement of an officer from his substantive office for duty in another office in or out of the civil service with a view of returning him to his substantive office at a later date.”

“transfer” includes the conferment whether permanent, on secondment or on promotion of an office upon an officer other than that to which he was last substantively appointed.”

[32] **Regulation 3** states as follows:

“These Regulations shall apply to all civil servants except in so far as any part thereof is excluded to the application of an officer in terms of his conditions on appointment.”

[33] **Regulation 4** provides that every Ministry and Department or Division shall obtain and keep a copy of the Regulations and other laws relating to the civil service for use in its operations and every officer shall have access to the Regulations.

[34] **Regulation 10** provides for terms of appointment of a civil servant. It states as follows:

“An officer may be appointed into the civil service on –

- (a) permanent terms; or**
- (b) temporary terms; or**
- (c) contract terms.**

[35] (a) The matter of an officer’s secondment is provided for by **Regulations 12 and 25**. **Regulation 12** states as follows:

“An officer on permanent terms may be seconded by the Commission to a post in or out of the civil service on such terms and conditions as the Commission may stipulate.”

(b) **Regulation 25** states as follows:

“(1) An officer on secondment in the civil service shall draw the full remuneration of the post to which he is seconded and shall be eligible to increments if any, normally payable in such post.

(2) An officer on secondment to a post outside the civil service shall be considered as remaining on the establishment of the civil service of Antigua and Barbuda and shall be eligible for promotion.

(3) An officer on secondment shall be eligible for the leave applicable to an office to which he is seconded and while on such leave during secondment he shall be paid the salary of that office which he occupies on secondment.”

[36] (a) Matters of resignation, termination and retirement are catered for at **Regulations 28 to 35 and 96 (1)**. **Regulation 28 (1)** provides as follows:

“An officer appointed on permanent terms shall give at least three month’s notice of his intention to resign.”

(b) **Regulation 96 (1)** states as follows:

“An officer who is about to resign from the civil service may prior to resignation and following the required period of notice, be granted any vacation leave due to him not exceeding three months.”

[37] **The Antigua and Barbuda Constitution Order 1981 (“the Constitution”)** provides at section 99 (1) for the establishment of the Public Service Commission. It states as follows:

(1) “There shall be a Public Service Commission for Antigua and Barbuda (hereinafter in this section referred to as the Commission) which shall consist of a chairman and not less than two or more than six other members who shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister. The proviso to Section 99 (1) is immaterial to this judgment.”

[38] **Section 100 (1) of the Constitution** makes provision for *inter alia* the appointment of public officers. It states as follows:

“Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to make appointments on promotion and transfer and to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission.”

[39] The manner in which a civil servant may demit office is contained at **Section 12 of the Act**. That section provides as follows:

12. “The modes by which a civil servant may leave the Civil Service are as follows:-

(a) on dismissal or removal on consequence of disciplinary proceedings;

(b) on compulsory retirement;

(c) on voluntary retirement;

(d) on retirement for medical reasons;

(e) on resignation;

(f) on the expiry or other termination of an appointment for a specified period;

(g) on the abolition of office;

(h) in the case of a civil servant on probation, on the termination of appointment;

(i) on retirement in the public interest.”

[40] (a) The circumstances in which a pension may be granted to a civil servant are contained in **Section 6 of The Pensions Act, Cap. 311 of the Laws of Antigua and Barbuda**.

Section 6 (a) states in part as follows:

“No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases –

(a) on attaining the age of sixty years, ...”

(b) **Section 8(1) of Cap. 311** states as follows:

“An officer shall retire from the public service on attaining the age of sixty years.”

[41] The Act makes provision for the creation of an Establishment Division. This is contained at **Section 14 (1)**. The head of this Department is the Chief Establishment Officer.

[42] The powers and duties of the Establishment Division are set out at paragraph 15 (1) of the Act. Its duties include:

(a) to maintain the classification of the offices in the Civil Service;

(b).....

(c) to administer any regulations respecting the Civil Service.

[43] **Simon Deakin and Gillian S. Morris** the authors of the textbook '**Labour Law**', Fifth Edition, Hart Publishing, Oxford and Portland, Oregon, 2009 state at pages 236 and 237 as follows:

“Construing an employment contract is not necessarily straightforward. There may be a formal offer of employment contained in a written document to which the employee is invited to assent, but even then it would be unusual for the document to constitute an exhaustive account of the contract terms. It would be usual for some terms, at least, to be implied as incorporated by reference to one of a number of external sources, such as a collective agreement or company handbook. The manner in which the contract is performed is also an important guide to its contents. In principle, the substance of a contract, once made, cannot be modified merely by the parties’ subsequent behaviour; contractual obligations can only be varied by mutual agreement. This is to assume, however, that the substance of the original agreement is completely clear; and this will rarely be the case with contracts of employment. Two forms of practice, in particular, will be important in construing the agreement: the ‘custom and practice’ of the plant

or establishment, which the parties may (not must) be assumed to have had in mind when they contracted; and their own conduct subsequent to the agreement, which may be taken to be a guide to what they initially intended”.

[44] Where the initial set of documents in this case (**RB-1 to RB-5**) reveals an ambiguity with regard to the nature of the contract between Mr. Benjamin and the Port Authority, the case law has presented some guidance which aids to determine what was the two parties’ intention. Whether Mr. Benjamin and the Port Authority intended these documents (**RB-1 to RB-5**) to be the entire record of the terms of their agreement is a question of fact which this Court shall decide. I make reference to four cases.

[45] (a)The first case is **Moore v Garwood (1849) 4 Exch 681; 154 ER 1388**.

In this case the plaintiff sued for a return of a deposit of money which he invested to buy shares in a company. The company was never incorporated. Whether his action was successful depended upon the terms of the prospectus, some letters, and partly upon what was said at a meeting of the promoters and subscribers. **Pollock the Chief Baron at pages 684 and 685** of the report directed the jury in the following manner.

“That the nature of the contract into which the parties had entered was rather a question of fact than of law, because it did not consist of one distinct contract between the parties but of a series of acts and things alone, from which the jury were to determine what was the real intention and meaning of the parties when they entered into the mutual relation in which they stood....and that the jury were to collect what was the nature of the contract from the documents, and from what was done by the respective parties;...”

- (b) On appeal to the **Court of Exchequer Chamber**, **Patterson J.** gave the Court's decision. He stated at **pages 689 – 690**:

“Now there was a good deal of evidence, independent of these letters and of other documents. There was the conduct of the parties, which was relied upon, and which appeared from the statements of the witnesses in the progress of the trial. We therefore think that, looking to all the circumstances of the case, the Lord Chief Baron could hardly have put the case in better terms to the jury.”

- [46] (a) The second case is **Tayside Regional Council v McIntosh [1982] IR LR 272 (EAT)**.

In this case an employee was dismissed because he was disqualified from driving. A formal written contract was entered into by both parties. It was silent concerning the employee's necessity to hold and maintain a clean driving licence. **The Employment Appeal Tribunal** held that as the contract was silent with regard to an essential matter, the court was correct to examine another source in order to ascertain whether the employee should have held and maintained a clean driving licence.

- (b) **Lord McDonald** at **pages 273 and 274** of the report stated as follows:

“In this connection we were referred to broad principles of the law of contract contained in such works as Bells Commentaries and Gloag on Contract to the general effect that it is not competent to contradict, modify or explain writings by parole or other extrinsic evidence. There are however, many exceptions to these general principles in particular where a written document is ambiguous or indeed silent upon an essential matter.”

[47] (a) The third case is **Charles Hunte and Life of Barbados (Civil Appeal No. 21 of 1990.)** In this case the Court of Appeal was required to decide whether or not a contract of service or a contract for service existed. In upholding the decision of the Industrial Court, **Byron JA** (as he then was) in writing the unanimous decision stated at **page 7** as follows:

“In this case there was a lot of evidence before the Industrial Court. It had the contract documents and a lot of evidence as to how the appellant and the respondent discharged their respective functions over the years that the relationship lasted. In my view they applied the correct principles in coming to their decision and there was evidence to support their findings of fact.”

(b) In the Industrial Court’s judgment of the same case, (**Reference No. 1 of 1989**), the Chairman at **page 5** of the judgment stated as follows:

“.....the court should have regard not only to the Agreement signed by the parties but also to any other matters outside the Agreement which affected the relationship. In other words the court should examine the entire relationship to see what in fact existed and not what the parties may have described the relationship to be in the Agreement.”

[48] The fourth case is **Stevedoring and Haulage Services Ltd. v Fuller and others [2007] IRLR 627 (CA)**.

At **page 628** of the judgment **Lord Justice Tuckey** stated as follows:

“Moreover, in this field the search for an agreement or its terms should not be confined to a consideration or construction of the documents unless it is clear that the parties intended them to be the exclusive record of their agreement, if any. The parties’ intention

may be inferred from other sources, including subsequent conduct.

We think this point is self-evident....”

[49] I agree that the Court’s approach to decide this issue is that it must examine the nature and extent of the entire relationship which existed between Mr. Benjamin and the Port Authority during the period April 01, 1997 to September 15, 2004. This shall involve an examination of several letters which were placed in evidence before this Court by both parties. In addition, this Court shall also take into consideration the evidence of the witnesses for both parties and any additional documents which were produced by them.

The employee’s case

The evidence of Mr. Benjamin

[50] In addition to Mr. Benjamin’s Witness Statement filed on May 14, 2010, Mr. Benjamin also gave sworn testimony. In his evidence in chief he stated that he was not aware that he was seconded to the Port. His view was that he was appointed permanently to the position as Port Manager based on **(a) the Cabinet Decision of February 26, 1997 and (b) a letter dated April 01, 1997 from the Port Authority to him.**

[51] As a Civil Servant he stated that he was seconded on two prior occasions. On these occasions he was issued with letters from the Chief Establishment Officer. These were dated June 14, 1993 and March 11, 1994 (Exhibits 1 and 2 respectively). In the case of the Port he did not receive a letter from the Chief Establishment Officer.

- [52] Mr. Benjamin stated that he received the Chief Establishment Officer's letter of September 10, 2004 (**RB-5**). He was informed by the Ministry of Finance to report for duty. He did report for duty on September 16, 2004.
- [53] Upon his resumption of duty he enquired of the Permanent Secretary Ministry of Finance what was the salary and benefits to which he would be entitled. He was informed by the Permanent Secretary that he was reverting to his position as Director of Customs Research and Development. In this position he would receive the salary of the Director.
- [54] Mr. Benjamin also informed the Court that he received a letter from the Permanent Secretary, Ministry of Finance and Economy dated September 16, 2004. This was admitted as "**RB-6**". Mr. Benjamin also received a letter from the Chief Establishment Officer dated January 18, 2005. This was admitted as "**RB-13**".
- [55] Mr. Benjamin informed the Court that he resumed the position as Director of Customs Research and Development in the Civil Service out of fear of being told that he had abandoned his job.
- [56] Mr. Benjamin stated that he saw the Witness Statement of Mr. Walter Armstrong. He is the Chairman of the Port Authority. Mr. Benjamin informed the Court that Mr. Llewellyn Smith was the Chairman of the Board of Commissioners of the Port Authority on April 01, 1997. After Mr. Smith's departure, Mr. Clarvis Joseph became the Chairman. When Mr. Benjamin departed from the Port in 2004 Mr. Joseph was the Chairman.

[57] (a) Mr. Benjamin stated that from about 1981 Mr. Leslie Williams was sent to work at the Port Authority from the Ministry of Finance upon secondment. According to Mr. Benjamin, Mr. Williams resigned from his substantive position at the Ministry of Finance and commenced employment with the Port Authority as Accountant.

(b) It is Mr. Benjamin's further testimony that Mr. Williams acted as Port Manager from November 1996. When Mr. Benjamin assumed the position of Port Manager in 1997, Mr. Williams took up the newly created job as Deputy Port Manager.

[58] In answer to Mr. Derrick, Attorney-at-law for the Employer, Mr. Benjamin stated that he never resigned his position as Director of Customs Research and Development in the Civil Service. He stated that he knew Mr. Llewellyn Smith during his tenure as the Manager of the Port. Mr. Llewellyn Smith was the Chairman of the Board of Commissioners of the Port Authority when Mr. Benjamin was interviewed for the position of Port Manager in early 1997.

[59] Mr. Derrick referred him to Exhibits **"WA-12 and 13"** respectively. These were letters written by Mr. Smith and Mr. Leslie Williams dated January 02, 2001 and September 02, 2003 respectively.

[60] Mr. Derrick also drew Mr. Benjamin's attention to Exhibits **"WA-3", "WA-4", "WA-5", "WA-6", , "WA-7" "WA-10" , and "WA-11"**.

[61] In further response to Mr. Derrick Mr. Benjamin informed the Court that when an officer proposes to retire from the Civil Service that officer takes all

of the leave which is due to him. He was aware of **Rule 96 (2)** of the Regulations.

[62] On each occasion when he made applications for payment in lieu of accumulated leave when he was the Manager of the Port Authority, Mr. Benjamin considered himself as being employed by the Port Authority. Any leave which was due to him as Director of Customs Research and Development was earned prior to April 01, 1997.

[63] Mr. Benjamin further stated that he received the letter from the Chief Establishment Officer addressed to him (**RB-5**). After receiving it he consulted the Chairman of Commissioners of the Port Authority and reverted to his position as Director of Customs Research and Development in the Ministry of Finance. He handed over to Mr. Leslie Williams, the Deputy Port Manager.

[64] Mr. Benjamin stated that he was eventually paid all of his benefits which included his salary. He received a pension from the Central Government. The pension which he receives reflects (a) his total years of work in the Civil Service; and (b) the seven and a half (7½) years which he worked at the Port Authority.

The Employer's case

The evidence of Mr. Walter Armstrong

[65] Mr. Walter Armstrong was the first witness for the Port Authority. He is seventy-five (75) years of age. He resides at Mc Kinnon's in the parish of St. John. He is the Chairman of the Board of Commissioners of the Port Authority. He assumed this position from June 01, 2006.

- [66] Mr. Armstrong's Witness Statement was filed on October 26, 2010. Several exhibits are attached to this statement. According to him the contents of the Witness Statement are true and correct.
- [67] Mr. Armstrong's Witness Statement and the exhibits attached thereto were tendered as his evidence. They were admitted with the consent of both Mr. Francis and Mr. Derrick. In answer to Mr. Francis, Attorney-at-Law for the Employee, Mr. Armstrong stated that his evidence was obtained from the Port Authority files.
- [68] Mr. Armstrong deposed at **paragraph [3]** of his Witness Statement that Mr. Benjamin commenced employment as Port Manager on April 01, 1997 *"on secondment from the employ of The Government of Antigua and Barbuda where he held the post of Director of Customs Research and Development in the Ministry of Finance pursuant to"* (a) the Cabinet Decision of February 26, 1997 **(RB-3)** and (b) *"a successful interview with the then Board of Commissioners on the 27th day of March, 1997"* as was evidenced by a letter from the Port Authority to Mr. Benjamin dated April 01, 1997 **(RB-4)**.
- [69] Mr. Armstrong stated as follows at **paragraph [4]** of his Witness Statement:
- "The Employer and Employee knew and accepted that during the Employee's tenure he occupied the post of Port Manager on secondment from the Government of Antigua and Barbuda as is evidenced by the Employee's Memorandum to the then Chairman of the Board of Commissioners, Senator the Honourable Llewellyn Smith, dated 17th April, 1998 together with the attached decision*

number 79 of the Cabinet of Antigua and Barbuda dated Wednesday, 10th December, 1997 and a letter addressed to the Employee from the Permanent Secretary of the Ministry of Finance dated 15th April , 1998 where he applied for payment in lieu of accumulated vacation leave in respect of his substantive post as Director of Customs, Research and Development. True Respective Copies of the said correspondences are attached and exhibited herewith and marked “WA-3; “WA-4” and “WA-5”.

[70] **WA-4** is a decision of the Cabinet of Antigua and Barbuda. It was made by the Cabinet on December 10, 1997. That decision stated as follows:

“IN THE CABINET OF ANTIGUA AND BARBUDA

Wednesday 10th December 1997

Payment in Lieu of Vacation Leave to

Mr. Raphael Benjamin, Director of Customs

Research and Development, Seconded as Port

Manager, Antigua Port Authority

79. *Cabinet agreed that Mr. Raphael Benjamin, Director of Customs Research and Development, seconded as Port Manager, Antigua Port Authority, should receive payment in lieu of six (6) months of his accumulated vacation leave to which he is entitled. The necessary adjustment should be made on Mr. Benjamin’s leave record.”*

This Cabinet Decision was received by the Ministry of Finance and Social Security on January 08, 1998.

[71] (a) Mr. Benjamin’s direct response to Mr. Derrick with regard to the Cabinet Decision of December 10, 1997 (**WA-4**) was as follows:

“I see WA-4. It is a Cabinet Decision made on 10th December 1997. It is headed “Payment in Lieu of Vacation Leave to Mr. Raphael

***Benjamin, Director of Customs Research and Development,
seconded as Port Manager, Antigua Port Authority”.***

(b) Mr. Benjamin also referred to the Cabinet Decision **(WA-4)**. It referred to payment in lieu of six (6) months accumulated vacation leave to which he was entitled. He agreed with Mr. Derrick that this leave referred to his leave whilst he was employed in Central Government.

[72] In addition to Mr. Benjamin's testimony with respect to the Cabinet Decision of December 10, 1997, Mr. Eden Weston, the then Permanent Secretary of the Ministry of Finance and Social Security had occasion to write to him by letter dated April 15, 1998. This letter drew Mr. Benjamin's attention to the Cabinet Decision of December 10, 1997. (This letter was admitted as **WA-5**).

[73] Mr. Lauchland Lake the then Secretary of the Board of Commissioners of the Port Authority on behalf of the Authority expressed the Board's opinion that Mr. Benjamin's accumulated leave should be paid for by Central Government.

[74] At **paragraph [69]** Mr. Armstrong made reference to **(WA-3)**. This was a letter which was written by Mr. Benjamin to Mr. Llewellyn Smith the Chairman of the Port Authority. It was dated April 17, 1998.

[75] Mr. Armstrong also drew the Court's attention to a letter dated June 08, 1998. It was written on behalf of the Board of Commissioners of the Port by Mr. Lauchland Lake the acting Secretary to Mr. Eden Weston the then Permanent Secretary, Ministry of Finance and Social Security. The Port was

of the view that the Central Government should pay for Mr. Benjamin's accumulated leave. (This letter is marked "WA-7").

[76] The Permanent Secretary Ministry of Finance and Social Security replied to Mr. Lauchland Lake the Acting Secretary of the Board of Commissioners of the Port Authority. The Permanent Secretary opined that the Port Authority should pay for Mr. Benjamin's accumulated leave. (This letter was admitted as "WA-6").

[77] Mr. Armstrong also made reference to a Cabinet Paper dated April 12, 2000 and certain correspondence which deals with Mr. Benjamin's leave for the period 17th July 2000 to 31st December 2000. The Cabinet Decision granted Mr. Benjamin *"fifty (50%) payment in lieu of vacation leave to which he was entitled prior to his appointment as Port Manager. The necessary adjustment should be made on Mr. Benjamin's leave record"*. (This was admitted as "WA-10").

[78] In a Minute from the Chief Establishment Officer to the Permanent Secretary, Ministry of Finance dated February 16, 2001, that officer stated as follows:

"Mr. Benjamin's leave record will be adjusted to reflect Cabinet's Decision in respect of the period 17th July, 2000 to 31st December 2000 when it is confirmed that he has received payment"

(This was admitted as "WA-11").

[79] The Permanent Secretary, Ministry of Finance in a letter to Mr. Benjamin dated February 23, 2001, referred to (WA-10) and (WA-11) and requested Mr. Benjamin to inform him when payment was made. This was admitted as "WA-9".

- [80] Mr. Benjamin in his letter dated April 02, 2001 to the Permanent Secretary, Ministry of Finance informed her that he had received payment in accordance with the Cabinet's Decision. (This letter was admitted as "**WA-8**".)
- [81] Mr. Armstrong also made reference to two letters dated January 02, 2001 and September 02, 2003. These were written by the Port Authority to two banks on behalf of Mr. Benjamin. (These letters were admitted as **WA-12**" and "**WA-13**" respectively).
- [82] Mr. Armstrong provided the Court with copies of documents which showed that Mr. Benjamin caused the Port Authority to make certain payments on his behalf to the Antigua and Barbuda Public Service Association during the tenure of his employment with the Port Authority. Samples of these payments which were provided to the Court were for the months of October, 2000, May 2002, December 2003 and August 2004. Each sum paid by him to the Association was \$40.00. (These documents were marked "**WA-14**" to "**WA-17**" respectively).
- [83] It was Mr. Armstrong's opinion that the Chief Establishment Officer's letter to Mr. Benjamin dated September 10, 2004 properly terminated Mr. Benjamin's secondment to the Port as its Manager. It is Mr. Armstrong's view that Mr. Benjamin complied with "**RB-5**". He vacated the post of Port Manager. The Port did not terminate his employment.

The evidence of Mr. Washington Hazel Spencer

- [84] Washington Hazel Spencer was the second and final witness for the Port Authority. He is sixty-one (61) years of age. He resides at Piccadilly in the parish of St. Paul. He is a Civil Servant. He formerly held the position of Chief Establishment Officer for the period April 19, 2004 to November 20, 2005.
- [85] Mr. Spencer has held the position of the Secretary to the Cabinet of the Government of Antigua and Barbuda from November 21, 2005 to the present date.
- [86] In his position as the former Chief Establishment Officer he stated that his duties included *“dealing with all Human Resource matters concerning Civil Servants pursuant to the Civil Service Act (Cap. 87) and the Regulations made thereunder and the Pension Act (Cap. 311) and acting in accordance with the directives of the Public Service Commission”*.
- [87] Mr. Spencer swore to a Witness Statement on October 25, 2010. Some exhibits are attached to this document. These exhibits were extracted from the records of the Establishment Division and the Cabinet Office. He stated that the contents of his Witness Statement are true and correct.
- [88] Mr. Derrick referred Mr. Spencer to the Cabinet’s Decision of February 26, 1997. Mr. Spencer stated that the Cabinet is not empowered to appoint a Civil Servant to a particular position. This power resides with the Public Service Commission. According to Mr. Spencer it is his experience as the Former Chief Establishment Officer and the present Cabinet Secretary that

the Public Service Commission appoints Civil Servants to positions in the Civil Service.

[89] According to Mr. Spencer the Port Authority is a Statutory Corporation. It is *“not a division or department within the Civil Service of the Government of Antigua and Barbuda”* – See **paragraph [7]** of his Witness Statement. Accordingly in Statutory Corporations the Boards of Management appoint persons to work in these entities.

[90] It was Mr. Spencer’s opinion that the Cabinet Decision of February 26, 1997 was forwarded to the Ministry of Finance and the office of the Chief Establishment Officer.

[91] Mr. Spencer made reference to a Minute from the Chief Establishment Officer to the Secretary of the Public Service Commission. It is dated April 07, 1997. It makes reference to the Cabinet’s Decision dated February 27, 1997 *“which recommends the appointment of Mr. Raphael Benjamin to the post of Port Manager with effect from 1st April 1997”*.

[92] In **“HS-2A”** the Chief Establishment Officer stated at **paragraph [2]** as follows:

“The Commission should note that the post of Port Manager is a non-established post and consequently renders the recommendation invalid”.

[93] Mr. Spencer explained to the Court the meaning of a *“non-established post”*. The Secretary to the Cabinet stated that a non-established post is not a position which is located or catered for within the Civil Service listing. According to Mr. Spencer, Mr. Benjamin’s position as Director of Customs

Research and Development is an established position within the Civil Service listing.

[94] In an established post the holder of it is appointed by the Public Service Commission. It is the Secretary to the Cabinet's opinion that the Chief Establishment Officer was of the view that the Cabinet's recommendation was invalid because the Cabinet is simply not empowered to make such an appointment. It was Mr. Spencer's opinion that it was the Public Service Commission and not the Cabinet which has the authority to second a public officer from the Civil Service to a post outside of the Civil Service.

[95] Mr. Spencer drew the Court's attention to Exhibit "**HS-2A**". In this Exhibit Mr. Spencer makes reference to the Chief Establishment Officer's Minute to the Public Service Commission dated April 07, 1997. That officer stated as follows:

"The Commission may therefore wish alternatively, to consider the secondment of Mr. Benjamin to the post of Port Manager, Antigua Port Authority with effect from 1st April, 1997".

[96] Mr. Spencer made reference to Exhibit "**HS-2**". This is a decision of the Public Service Commission. The meeting was held on April 09, 1997. At **paragraph [9]** of the Commission's Decision it states as follows:

"Decision of the Public Service Commission

Conveyed in Minute PSC66 of 11.4.97

Meeting held on 9.4.97

9. *Reference Your Minute A.E. 5819-II dated 7th April, 1997 – Mr. Raphael Benjamin, Director of Customs Research & Development.*

The Commission APPROVED the secondment of Mr. Raphael Benjamin, Director of Customs Research and Development to the Antigua Port Authority, with effect from 1st April, 1997.”

[97] It is Mr. Spencer’s experience that after a decision is made by the Public Service Commission, this decision is communicated to the relevant Ministry and the Civil Servant who is affected by the decision. He was not aware if at the relevant time the Public Service Commission’s decision of April 09, 1997 was forwarded to the Ministry of Finance or Mr. Benjamin. In response to Mr. Francis, Attorney-at-law for Mr. Benjamin Mr. Spencer stated that Exhibit “**HS-2**”, should have been circulated to the Ministry of Finance and Mr. Benjamin.

[98] In answer to Mr. Francis Attorney-at-Law for Mr. Benjamin, Mr. Spencer informed the Court that he cannot say for sure if the Chief Establishment Officer forwarded a letter to Mr. Benjamin which stated that he was seconded to the Port Authority.

[99] Mr. Spencer stated that when a Civil Servant is seconded by the Public Service Commission he is paid the salary of the position to which he is seconded. During the period of his secondment he remains a Civil Servant. He is entitled “**to all the benefits inclusive of outstanding accumulated leave which was outstanding or accrued during such tenure**”.

When his secondment ends, he returns to the position which he formally held. His salary is now based upon the position to which he reverts.

– See paragraph [6] of Mr. Spencer’s Witness Statement.

[100] Mr. Spencer stated that when he performed the duties as Chief Establishment Officer his experience was that a Civil Servant may be seconded by the Public Service Commission to work in a position elsewhere for years. When a Civil Servant is seconded from one position to another position it is not on all occasions that he works in that position for a specific period.

[101] Mr. Spencer expressed his opinion at **paragraph [10]** of his Witness Statement on Mr. Benjamin's tenure in the post of Port Manager. He stated as follows:

“Owing to inadvertence the office of the Chief Establishment Department did not formally convey the said Public Service Commission's decision of 9th April, 1997 to the Employee but for all intent and purposes during the Employee's tenure in the post of Port Manager he remained a Civil Servant and was considered, treated and recognized as being on secondment from his substantive Post of Director of Customs Research and Development in the Ministry of Finance.”

[102] According to Mr. Spencer only civil servants are members of the Antigua and Barbuda Public Service Association. He made reference to **“HS-10”** to **“HS-13” (WA-13 to WA-17)**. In his opinion these payments by Mr. Benjamin suggest to him that Mr. Benjamin still considered himself to be part of the Civil Service. Although the Association is unable to represent civil servants beyond the Senior Executive Officer rank in the Civil Service, this does not preclude someone from being a member of the Association.

[103] Mr. Spencer produced a copy of the decision of the Public Service Commission dated September 09, 2004. It is marked “HA-14.” It states as follows:

“DECISION OF THE PUBLIC SERVICE COMMISSION

CONVEYED IN MINUTE PSC/66 OF 9.9.04

MEETING HELD ON 9.9.04

Reference your Minute A.E. 5819 dated 7th September, 2004

Mr. Raphael Benjamin, Director of Customs Research & Development, Ministry of Finance Seconded as Port Manager, Antigua Port Authority

The Commission DECIDED as follows:-

- i) to TERMINATE the Secondment of Mr. Raphael Benjamin as Port Manager, Antigua Port Authority with effect from 15th September, 2004;***
- ii) that Mr. Benjamin should be reverted to his substantive post as Director of Customs Research & Development, Ministry of Finance with effect from 16th September, 2004.”***

[104] At paragraph [13] of Mr. Spencer’s Witness Statement he stated as follows:

“The Employee retired from the Civil Service on the 1st day of March, 2010 on the basis of forty (40) years’ service calculated from 1st December, 1969 to 28th February, 2010 which period included the employee’s tenure of secondment to the Employer and was granted a gratuity of One Hundred and Ninety-eight Thousand Eight Hundred and Twenty-five Dollars (\$198,825.00) and a reduced pension of Forty-seven Thousand Seven Hundred and Eighteen Dollars per annum (\$47,718.00 p/a) or its equivalent of Three Thousand Nine Hundred and Seventy-six Dollars and fifty cents per month (\$3,976.50 p/m).”

Submissions on behalf of Mr. Benjamin

[105] (i) Written submissions on Mr. Benjamin's behalf were filed on December 17, 2010. Mr. Francis submits at **paragraph [26]** of his Written Submissions that *"the Employee was employed as (an) established worker in the Civil Service of Antigua and Barbuda"*.

(ii) Mr. Francis made reference to the two occasions when Mr. Benjamin was seconded to two government departments in 1975 and 1993 respectively. On both occasions Mr. Benjamin was informed in writing.

(iii) Learned Counsel further submitted that *"while a transfer within the Civil Service may be effected without the concurrence of the employee; a secondment outside of the Civil Service could not be effected without the express concurrence of the Civil Servant"*.

(iv) Mr. Francis submitted that no communication existed between the Establishment Division and the Port Authority with respect to the secondment of Mr. Benjamin to the Port as Port Manager. Further, Mr. Francis is of the view that *"the employee was never advised at the time of his appointment as Manager of the Port Authority that his appointment was a temporary one"*.

Mr. Francis referred to (a) the Cabinet's Decision of February 27, 1997 and (b) the letter of April 01, 1997 from the Port Authority to Mr. Benjamin. Mr. Francis stated that Mr. Benjamin began his employment with the Port Authority *"confident in the view that he was a permanent employee of the Antigua Port Authority in the position of Port Manager"*.

(v) At **paragraph [31]** Mr. Francis submits as follows:

"It would appear that the Public Service Commission was acting in good faith and it recognized that it did not have the

power to appoint the Employee to the post of Port Manager and that the Commission did what it thought was the best solution under the circumstances. However, such was done without reference to the Employee and could have been done by a different method. The Employee could have been asked to resign from the Civil Service. The Employee having taken up his position as Port Manager could have been deemed to have abandoned his job in the Civil Service. The Employee having started his life as a Public Servant 28 years before and as Port Manager would have continued his life as a Public Servant, arrangement could have been made to ensure the retention of the benefits that he had acquired and increment of those benefits in the new position he would have undertaken as a Public Officer. The latter is obviously what the Employee expected from explanations given to him”.

- (vi) It is Mr. Francis’ submission that none of the documents which were produced by the Port Authority *“impacts negatively upon the Employee’s contention that he was the substantive holder of the Post (of) Port Manager”.*
- (vii) With regard to Mr. Benjamin’s contributions to the Antigua and Barbuda Public Service Association Mr. Francis described them as *“voluntary and made out of a sense of loyalty to an association of which he was founding member”.*
- (viii) On the question of the payment of Mr. Benjamin’s leave by the Port Mr. Francis is of the view that *“both Cabinet and the Ministry of*

Finance had arrived at the conclusion that the Employee had taken up his position as permanent Port Manager”.

- (ix) In all of the circumstances of this case Mr. Francis finally submitted that Mr. Benjamin was in fact the substantive holder of the post of Port Manager. The decision of September 10th, 2004 to remove him from that position was unlawful. The Employee is therefore entitled to receive the difference between the pay, privileges and allowances he would have received as Port Manager and that which he received on his return to the Ministry for the period September 2004 to 28th February, 2010. Furthermore the Employee is entitled to gratuity and pension calculated on the basis of the Port Manager salary as of the 28th of February 2010”.

Submissions on behalf of the Port Authority

- [106] (i) Written Submissions were filed on behalf of the Port Authority by Mr. Colin Derrick its Attorney-at-Law on December 15, 2010. Mr. Derrick submits that Mr. Benjamin *“was employed in the post of Port Manager from 1st April, 1997 until 15th September, 2004 on secondment from his substantive post of Director of Customs, Research and Development at the Ministry of Finance within the Government of Antigua and Barbuda”.*
- (ii) Mr. Derrick further submits that Mr. Benjamin *“never resigned his employment in the Civil Service of Antigua and Barbuda prior to or during his engagement with the Employer”.* Mr. Benjamin should have resigned from his substantive position as Director of Customs Research and Development *“for the Employee to be considered the*

substantive holder of the post of Port Manager at the Antigua Port Authority". In the absence of Mr. Benjamin's resignation from his substantive position it is Mr. Derrick's submission that *"he would not have been entitled to claim payment in lieu of accumulated vacation nor could he at that date have been entitled to any outstanding accumulated vacation"*.

- (iii) Learned Counsel for the Port Authority referred to Exhibits "HS-2", "HS-2A", the evidence of Mr. Spencer and Rules 2, 12 and 25 of the Regulations. According to Mr. Derrick these factors support a submission that Mr. Benjamin's employment as Port Manager at the Port Authority was approved **"as a secondment from his post as Director of Customs, Research and Development by the Public Service Commission on the 9th April, 1997"**.
- (iv) It is Mr. Derrick's view that there are *"sundry correspondences and Cabinet Decisions during and subsequent to the Employee's tenure as Port Manager at the Antigua Port Authority which are consistent with his tenure being on secondment from his substantive post of Director of Customs, Research and Development in the Ministry of Finance..."*
These documents were made Exhibits by Messrs Armstrong and Spencer respectively.
- See **paragraph [5] at page 6** of his Written Submissions.
- (v) Learned Counsel for the Port Authority further submits that employees of the Port Authority are not civil servants save and except that *"they are on secondment with the permission of the Antigua*

and Barbuda Public Service Commission which the Employer contends applied to the Employee in this Reference”.

- (vi) Mr. Derrick further contends that the letter dated September 10, 2004 issued by the Chief Establishment Officer to Mr. Benjamin *“was lawfully issued in accordance with the decision of the Public Service Commission and did not amount to an unlawful dismissal. It was not issued by or on behalf of the Antigua Port Authority and therefore the Employee is not entitled, as against the Employer, to the declaration sought at paragraph [10] (b) of his Memorandum”.*
- (vii) As a consequence of Mr. Benjamin’s retirement from the Civil Service of Antigua and Barbuda having attained the age of sixty (60), and having received a pension which was calculated based on forty (40) years of service including the seven (7) years and five (5) months spent at the Port Authority, and having regard to all of the circumstances of this case, Mr. Benjamin is not entitled to the awards of compensation as set out in paragraph 10(c) of his Employee’s Memorandum. In essence Mr. Derrick submits that the Reference be dismissed, with costs, payable to the Port Authority, if this Court deems necessary.

No cases were cited by either Counsel in their Written Submissions.

The legal position between Mr. Benjamin and the Port Authority

[107] The case of **Diocese of Southwark v Coker [1998] ICR 140 (CA)** presented the Court with the task to decide whether or not a contract of employment existed, and whether the curate was an employee in circumstances where he instituted proceedings of unfair dismissal. The reasoning of the Court,

although it dealt with a different factual matrix, provided some useful guidance to me to determine the main issue under consideration.

[108] The legal position is as follows:

(i) *“Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations”.*

-See Mummery L. J. at page 147 Letter B

(ii) *“[I]t is not practicable to lay down a hard and fast list of what is required to constitute a contract of service. There are too many variants.”*

-See Mummery L. J. at page 146 Letter H

(iii) *“That intention is to be objectively ascertained. In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a binding contract has been negated.”*

- per Mummery L. J. at page 147 Letter C.

(iv) *“In some cases, however, there is no contract, unless it is positively established by the person contending for a contract that there was an intention to create a binding contractual relationship.”*

-per Mummery LJ at page 147 Letter D.

Conclusion

[109] Mr. Francis readily conceded that Mr. Benjamin **“was employed as (an) established worker in the Civil Service of Antigua and Barbuda”**. Counsel made reference to **“RB-1”** and **“RB-2”**. These documents related

to two occasions when Mr. Benjamin was seconded to two departments within the Civil Service. It should be noted that in both instances **Mr. Benjamin was seconded by the Public Service Commission.**

[110] Learned Counsel for the Employee makes an interesting concession at **paragraph [31]** of his Written Submissions. This is repeated at paragraph **105 (v)** above. Mr. Francis makes reference to the *“Public Service Commission’s (act of) good faith. . . .”* This was in respect of the Commission’s decision of April 09, 1997. That decision was set out in *“HS- 2”*. It made the appointment of Mr. Benjamin very clear. It stated that *“the Commission APPROVED the secondment of Mr. Raphael Benjamin, Director of Customs Research and Development to the Antigua Port Authority, with effect from 1st April, 1997”*.

[111] I fully agree with Mr. Francis’ submission upon this ground. There was clear authority for the Commission’s act of **“good faith”**. I also agree with Mr. Spencer’s opinion that **it is the Public Service Commission and not the Cabinet which has the authority to second a Public Officer from the Civil Service to a post outside of the Civil Service.** The authority of the Commission to do so is conferred by **Section 100 (1) of the Antigua and Barbuda Constitution.** The decision of the Cabinet dated February 26, 1997 to recommend that Mr. Raphael Benjamin should be appointed to the post of Port Manager with effect from 1st April 1997 was subject to the provisions of Section 100 (1) of the Antigua and Barbuda Constitution. The Public Service Commission was therefore correct in its decision made on April 09, 1997. In any event however, **the Cabinet’s decision of February 26, 1997 was a mere recommendation. It could have and was in fact properly corrected by the Public Service Commission in its decision of April 09, 1997.**

[112] In addition, Mr. Francis referred to the letter of appointment of April 01, 1997 from the Port Authority to Mr. Benjamin which according to Mr. Francis made the Employee to be **“confident in the view that he was a permanent employee of the Antigua Port Authority in the position of Port Manager”**.

[113] (i) I reject Mr. Francis’ submission that the letter of appointment contained any provision which stated expressly or by implication that Mr. Benjamin was employed as a permanent employee of the Port Authority.

(ii) I also reject Mr. Benjamin’s evidence that he ***“was appointed as the substantive manager of the Port”*** based upon the Cabinet Decision of February 26, 1997 and the letter of April 01, 1997.

[114] (i) I have already dealt with the Cabinet’s Decision of February 26, 1997 (see **paragraph [111]** above.) Now I shall analyse the Port Authority’s letter of April 01, 1997. Mr. Benjamin gave the following evidence in cross examination to Mr. Derrick.

“When I took up the position of Port Manager in the Port Authority I acquainted myself with some sections of the law. The Port Authority is a Statutory Corporation. Persons employed by the Port Authority are governed by the Port Authority Act and its Regulations. The governing body of the Port Authority is the Board of Commissioners”.

(ii) In addition, Mr. Benjamin also gave the following answer in cross examination:

“I see the letter of appointment. It is RB-4. I see paragraph 2 which makes a reference to Section 3(4) subparagraph 2”.

Mr. Benjamin assumed *“the Chief Executive Officers role according to the Port Act Section 3(4) subparagraph 2”*.

- See letter from the Port dated April 01, 1997 to Mr. Raphael Benjamin, (RB-4).

(iii) Neither Counsel in this case drew to the Court’s attention (a) what **section 3 (4) sub-paragraph [2]** is or (b) what is the relevance if any to a determination of the issue. I now set it out for clarity.

Section 3(4) of **Cap. 333** states as follows:

“(4) The provisions of the Second Schedule shall have effect as to the officers and employees of the Authority their appointment, dismissal and conditions of service and otherwise in relation thereto”.

[115] (i) **Sub-paragraph [2]** which is contained in the **Second Schedule** of **Cap. 333** contains four (4) paragraphs. For the purposes of this judgment I set out **sub-paragraph [2] (1)**. It states as follows:

“2 (1) The emoluments of any public officer who is in the Service of the Authority shall, at the end of every month after the commencement of this Act, be paid into the Consolidated Fund by the Authority for the benefit of such public officers.”

(ii) The term **“public officer”** is defined at Section 2 of **Cap. 333** as follows:

“public officer” shall have the meaning assigned to it by the Constitution”.

(iii) **Section 127 (1)** of the **Constitution** defines the term “**public officer**” as follows:

“public officer” means a person holding or acting in any public office and includes an officer or member of the Police Force”.

[116] (i) Mr. Benjamin had accumulated six (6) months’ vacation leave which was due to him whilst employed in his post in the Civil Service. The Permanent Secretary by his letter to Mr. Benjamin dated April 15, 1998 made reference to and enclosed a Cabinet Decision dated December 10, 1997. That Cabinet Decision made reference to Mr. Benjamin’s secondment to the Authority as its Manager.

(ii) Mr. Benjamin in his Memorandum dated April 17, 1998 addressed to the Chairman of the Port Authority confirmed having seen the Cabinet’s Decision of December 10, 1997.

[117] (i) Mr. Lauchland Lake the Acting Secretary of the Board of Commissioners and who signed the Board’s letter of appointment to Mr. Benjamin dated April 01, 1997, wrote a letter dated June 08, 1998 to Mr. Weston the Permanent Secretary in the Ministry of Finance and Social Security. In this letter he stated in part as follows:

“The Board concluded that the Port Manager (accrued) this leave in his substantive post as Director of Customs Research and Development and as such should be paid by the Central Government”.

- See “WA-7”.

(ii) Mr. Benjamin in response to Mr. Derrick, Attorney-at-law for the Port Authority stated that he saw “**WA-7**”, the letter from Mr. Lake, the acting Secretary of the Port Authority to Mr. Weston, the Permanent Secretary, Ministry of Finance and Social Security dated June 08, 1998. This letter made reference to Mr. Benjamin’s leave which he earned “*in his substantive post as Director of Customs Research and Development...*”. It was copied to him and the Chairman of the Board of Commissioners of the Port Authority.

(iii) In reply to Mr. Francis his Attorney-at-law, Mr. Benjamin stated that he had “**seen**” and “**initialled**” “**WA-7**”.

[118] (i) Mr. Weston responded to Mr. Lake’s letter of June 08, 1998. In his letter dated August 27, 1998 he stated at **paragraph [4]** as follows:

“The request is also made against the backdrop that although Mr. Benjamin has been seconded to the Port, he is still in the service of the Government of Antigua and Barbuda, to which we all belong”.

- See “**WA-8**”.

(ii) As early as June 1998, just over one year after Mr. Benjamin commenced employment with the Port Authority, the Board of Commissioners made it very clear to the Permanent Secretary, Ministry of Finance and Social Security that Mr. Benjamin’s “**substantive post**” was that of Director of Customs Research and Development. If ever there was any doubt of the way how Mr. Benjamin was regarded by the Port Authority, the Permanent Secretary Ministry of Finance and Social Security made it absolutely clear to the Authority in language which I have referred to at **paragraph [117] (ii)** above.

[119] (i) Mr. Benjamin gave evidence with regard to Exhibit “WA-6”. In answer to Mr. Derrick, Attorney-at-law for the Port Authority he stated as follows:

“I see WA-6. It is a letter from Mr. Weston, Permanent Secretary in the Ministry of Finance to Mr. Lake, the acting Secretary of the Board of Commissioners of the Port. It states that Mr. Benjamin was seconded to the Port and is still in the service of the Government of Antigua and Barbuda, to which we all belong. Mr. Weston should have been aware of the circumstances of my employment at the Port. I now see that it was carbon copied to the Port Manager of the Antigua Port Authority. I cannot recall but I do believe that I probably would have received this letter. This letter is asking the Port Authority to pay me my accumulated leave as the Director of Customs Research and Development. I do not recall making a response to paragraph 3 of Mr. Weston’s letter which refers to my secondment to the Port”.

(ii) So Mr. Benjamin is quite aware that in or about August 1998, the Ministry of Finance and the Port Authority both regarded him to be employed by the Port Authority as its Port Manager **in the form of a secondment from the Civil Service**. He is told quite clearly that *“he is still in the service of the Government of Antigua and Barbuda. . . .”*. Mr. Benjamin produces no evidence whatsoever that he misunderstood how the Ministry of Finance or the Port Authority regarded him. He writes no letters of disapproval to any party. He is clearly at this stage struck with clear evidence that he is employed as the Port Manager in the circumstances outlined by Mr. Weston and understood by the Port.

[120] (i) Mr. Benjamin accumulated further leave for the period July 17, 2000 to December 31, 2000. The Cabinet in its decision dated April 12, 2000 recommended that Mr. Benjamin should receive fifty percent (50%) payment in lieu of vacation leave. The necessary adjustment should be made to his leave record.

(ii) The Chief Establishment Officer in a MINUTE to the Permanent Secretary, Ministry of Finance adjusted Mr. Benjamin's leave record to reflect the Cabinet's Decision. Mr. Benjamin was required to state when he received payment. Mr. Benjamin was forwarded the Cabinet's Decision and the Chief Establishment Officer's Minute by the Permanent Secretary Ministry of Finance in its letter to the Permanent Secretary dated April 02, 2001. Mr. Benjamin in his letter confirmed that he had received payment.

[121] Mr. Derrick, Counsel for the Port Authority referred Mr. Benjamin to a letter dated January 02, 2001. It was written by Llewellyn Smith the Chairman of the Board of Commissioners of the Antigua Port Authority. In answer to Mr. Derrick he stated as follows:

"I knew Mr. Llewellyn Smith of the Port Authority during my tenure as Manager at the Port. Mr Llewellyn Smith was the Chairman of the Board of Commissioners of the Port Authority when I was interviewed for the position of Port Manager. I see WA-12. It was written by the Port Authority to Caribbean Banking Corporation. I was in the position of getting a loan from Caribbean Banking Corporation which is now RBTT. In 2001, I asked the Port Authority for a job letter to be sent to Caribbean Banking Corporation. I got a copy of that letter of January 02, 2001. In that

letter I am described as being “seconded at the Antigua Port Authority as Port’s Manager”.

[122] Mr. Derrick also showed Mr. Benjamin “WA-13”. His response was as follows:

“I see WA-13. I sought a loan from Antigua and Barbuda Commercial Bank. I requested the Port Authority to send a job letter to Antigua and Barbuda Commercial Bank. It is dated September 02, 2004. I got a copy of that letter then. It was sent to Antigua and Barbuda Commercial Bank. In that letter I am described as being “employed with the Government of Antigua and Barbuda at the Ministry of Finance since December 01, 1969 and is now seconded at the Antigua Port Authority as Port Manager”.

[123] Mr. Benjamin informed the Court that having received both “WA-12” and “WA-13” respectively, he *“did not do anything about these letters”*. He *“did not check those letters then”*.

[124] Mr. Benjamin was employed in a position of some responsibility in the Civil Service. If he was of the opinion that he held the position as Port Manager in a permanent capacity, then the contents of “WA-12” and “WA-13” violently contradicted his view. He had the duty at that stage to have the matter clarified. He failed to do so.

[125] (i) It should be noted that “WA-13” was signed by Mr. Leslie Williams the Deputy Port Manager. It was Mr. Benjamin’s testimony that when he commenced his duties as Port Manager on April 01, 1997 Mr. Leslie Williams was acting as the Port Manager.

(ii) Mr. Williams was therefore in an excellent position to state with some clarity and knowledge the true capacity in which Mr. Benjamin performed his duties as Port Manager. His description of Mr. Benjamin's being "*seconded at the Antigua Port Authority as Port Manager*" is of some significance to understand Mr. Benjamin's employment status with the Port. I accept Mr. Williams's description as being sound and truthful.

[126] (i) In answer to Mr. Francis, Mr. Benjamin stated that Mr. Leslie Williams was seconded from the Ministry of Finance to the Port Authority from about 1981. This secondment was for between one to two years. According to Mr. Benjamin, **Mr. Williams resigned from his substantive position in the Civil Service** and commenced working at the Port Authority as an Accountant.

(ii) Mr. Williams was promoted by the Port to the position of acting Port Manager. Mr. Williams obtained the newly created position of Deputy Port Manager.

[127] (i) At **paragraph [39]** above I set out the different ways how a Civil Servant may demit public office.

(ii) At the end of his testimony Mr. Spencer, the Secretary to the Cabinet was asked what condition would Mr. Benjamin be required to discharge for him to state accurately that he held the permanent position as Port Manager. Mr. Spencer stated as follows:

"Mr. Benjamin would have had to resign from his position as Director of Customs Research and Development at the Ministry of Finance for him to hold the position of Port Manager".

(iii) Mr. Benjamin never resigned from his established position in the Civil Service. He did not otherwise demit office as a civil servant prior to March 01, 2010, when in accordance with **section 12 (c) of the Act** he retired from being employed in the Civil Service. He maintained this office in the Civil Service. I accept Mr. Spencer's opinion at **paragraph [127] (ii)** above. It accords with common sense, good administration and civil service custom and practice. His failure to resign from his substantive position is clear evidence that he held the position of Port Manager as a consequence of being seconded to the Port Authority from his substantive position in the Civil Service.

[128] At the end of Mr. Benjamin's evidence having drawn his attention to specific exhibits in the case which include the Cabinet's Decision of December 10, 1997 "**WA-4**", the Cabinet's Decision of April 12, 2000 "**WA-10**", the Chief Establishment Officer's MINUTE dated February 16, 2001 "**WA-11**", the two letters to the banks "**WA-12**" and "**WA-13**" Mr. Benjamin stated that *"the Port may have had in mind the Cabinet Decision of December 10, 1997 which suggests that I was seconded to the position as Port Manager. It seems to be a matter of confusion"*.

[129] Happily no confusion whatsoever exists in this case. The very letter of his appointment from the Port dated April 01, 1997 clearly states the capacity in which he was appointed as the Port Manager. The Board of Commissioners exercised a choice of determining the basis of Mr. Benjamin's appointment as Port Manager. The Board could have appointed Mr. Benjamin in accordance with **Section 3(4) subparagraph (1) or Section 3(4) subparagraph (2) of Cap. 333**. It appears to me that if Mr. Benjamin had fulfilled certain conditions and he was appointed by the Port Authority in

accordance with **Section 3(4) subparagraph (1)** this appointment would have been permanent.

[130] As his appointment was made in accordance with **Section 3(4) subparagraph (2) of Cap. 333** I hold that he was appointed as a “*public officer who is in the service of the Authority. . . .*” upon secondment from his established position as Director of Customs Research and Development, Ministry of Finance.

Disposal

[131] There are certain features of this case which include (a) Mr. Benjamin’s appointment to the position of Director of Customs Research and Development in the Civil Service, (b) his secondment to the Port Authority to perform the duties as Port Manager, (c) the source and scope of his duties as Port Manager, (d) the relationship between himself, the Port, the Ministry of Finance, the Establishment Division, the Public Service Commission, and the Cabinet, for the period April 1997 to September 10, 2004, (e) his failure to resign from his substantive position, (f) his continued maintenance of his membership of the Antigua and Barbuda Public Service Association, (g) his failure to show that he was dismissed or dismissed by the Port Authority, which together have the cumulative effect of preventing me from concluding that there ever existed the creation of a contract between himself and the Port that is capable of giving rise to legally enforceable obligations.

The second issue

If a contract of employment did exist between Mr. Benjamin and the Port Authority which is capable of founding an action of unfair dismissal, was Mr. Benjamin dismissed by the Port Authority?

[132] If there was in existence such a contract – **and there was none** – I would have held that Mr. Benjamin was not dismissed by the Port Authority or at all. He was lawfully informed by the Chief Establishment Officer by letter dated September 10, 2004 who communicated the decision of the Public Service Commission dated September 09, 2004, that (a) his secondment as Port Manager Antigua Port Authority was terminated with effect from September 15, 2004 and (b) that he should revert to his substantive post with effect from September 16, 2004.

The third issue

If Mr. Benjamin was dismissed by the Port Authority was he unfairly dismissed?

The fourth issue

If Mr. Benjamin was unfairly dismissed what is the measure of damages which is due to him?

[133] In light of the findings of this Court at **paragraphs [130] and [131]** above there is no need to determine these issues. Mr. Benjamin's Reference is hereby dismissed.

Abuse of process

[134] The process of the Court must be used *bona fide*, properly and must not be abused. The factors which I take into consideration to determine whether an abuse of process of this Court has taken place are as follows:

(i) Mr. Benjamin held a position of some responsibility in the Civil Service;

(ii) Mr. Benjamin's post in the Civil Service was established;

(iii) In order for him to move from an established position in the Civil Service to another position of permanency, he knew or ought to have known that he would have been required to resign from his established position;

(iv) Mr. Benjamin's failure to resign from his established position in the Civil Service ought to have clearly meant to him that he still held that position;

(v) His failure to resign from his established position should have caused him to conclude that he held the Port Manager's position upon being seconded from his established position;

(vi) The letter of appointment dated April 01, 1997 was very clear that if Mr. Benjamin had read the relevant sections of **Cap. 333**, he would have been aware that he was being appointed as a public officer and not as the substantive holder of the post;

(vii) No evidence was led by Mr. Benjamin to show that any person promised him that upon taking up the position as Port Manager he would have been able to retain (his) years of service in the Civil Service and on retirement to receive a pension at the Port Manager's salary. The evidence which was led by the Port of which Mr. Benjamin was well aware clearly established that his contention in this regard was untrue.

(viii) (a) Mr. Benjamin produced to this Court Exhibits **"RB-1" (1993), "RB-2" (1994), "RB-3" (1997), "RB-4" (1997) and "RB-5" (2004)**. He was able to retain these documents in support of his case.

(b) His evidence clearly discloses that at some time Mr. Benjamin was in possession of Exhibits (i) **"WA-4"** – the Cabinet Decision of December 10, 1997, (ii) his Memorandum, April 17, 1998; (iii) Mr. Weston's letter of August 27, 1998 (**"WA-6"**), (iv) **"WA-7" (1998)**, (v) **"WA-12" (2001)**, and (vi) **"WA-13" (2003)**. If Mr. Benjamin was able to produce documents prior to 1997 and after 2003, why were these other documents not produced by him? It is clear that he knew that the Court would have taken these documents into consideration together with the other relevant material to decide the outcome of this matter.

(c) Against the clearly stated facts in Exhibits **"WA-12"** and **"WA-13"** that he was ***"seconded at the Antigua Port Authority as Port Manager"*** he could still in answer to his Counsel state:

“I see “WA-12”, “WA-13” and “WA-4” – but I still felt that I was appointed to the substantive position as Port Manager”.

[135] The matters which I have set out at **paragraph [134]** above in my opinion do amount to an abuse of the process of this Court.

The matter of costs

[136] The matter of costs is governed by **Section 10 (2) of the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda**. It is settled law that this Court normally makes ***“no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise”.***

[137] Employees must never be afraid to commence actions in the Industrial Court in circumstances where the facts do reveal a reasonable cause of action. Such cases, if not successful are seldom visited with an award of costs to the winning party.

[138] The term **exceptional reasons** is not defined in **Section 10 (2) of the Industrial Court Act**. The matters which the court may take into account are stated in **Section 10 (3)**. These include principles of good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations.

[139] The term **exceptional reasons** includes some form of misbehaviour by the employee or employer which is either (a) wholly incompatible with clear principles of law and or (b) is inequitable, wrong or unjust to either party. It is not possible or desirable to state a test to determine whether

exceptional circumstances do exist in a particular case in a form which could be applied in all cases. Circumstances may vary greatly. Each case must be determined upon its own merits.

[140] The assistance to be obtained from decided cases is therefore necessarily limited. Much comfort however is derived from the **Trinidad and Tobago Court of Appeal decision of Airports Authority of Trinidad and Tobago and Estate Police Association Civil Appeal No. 13 of 2002.**

[141] In that case the Court was required to consider *“whether in the light of Section 10 (2) there are any exceptional circumstances in this case, which would justify an order for costs.”*

- See paragraph [8] of the judgment.

[142] Section 10 (2) of the **Industrial Relations Act, Cap. 88:01** of the **Laws of Trinidad and Tobago** states as follows:

“The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise and notwithstanding anything to the contrary in the Supreme Court of Judicature Act, relating to the award of costs, the Court of Appeal shall in disposing of any appeal brought to it from the Court make no orders as to costs, unless for exceptional reasons, the Court of Appeal considers it proper to do otherwise.”

[143] In that case **Sharma C. J.** who wrote the Court’s judgment stated *inter alia* at **paragraph [9] on page 4** as follows:

“The question whether there is a right of appeal from a decision of the special tribunal to the Court of Appeal was authoritatively determined many years ago in the decision of this Court in Civil

Appeal No. 7 of 1981 Trinidad and Tobago Police Service Association v the Chief Personnel Officer in which it was unanimously held that the Court of Appeal had no jurisdiction to entertain an appeal which arose from the special tribunal. Notwithstanding such clear authority, the Appellant (the Airport Authority) went ahead and filed an appeal..... As a result, the respondent was totally justified in retaining counsel to appear on its behalf”.

[144] At paragraph [14] of the judgment Sharma C. J. stated *inter alia* as follows:

“This is a case where there has been clear authority laid down by this Court, which has stood the test of time. All persons who appear before the Industrial Court including non-lawyers ought to have been aware of it.”

[145] Sharma C. J. in the same case stated at paragraphs [15] and [16] as follows:

“15. How it could have escaped the mind or the attention of the appellant or their Attorneys is something that is truly a mystery to me. It seems to me that if I were to make no order as to costs, we would be sending the wrong message to parties. Notwithstanding the informality of the rules of evidence and proceedings in the Industrial Court one of the objectives of the Industrial Court is to conduct its proceedings in a manner that is conciliatory and which would lead to speedy settlement of disputes. However, there are times when the Court must insist that certain rules be adhered to and certain principles of law be followed otherwise chaos would result.

16. When, therefore, there is a clear binding decision of a Court of competent jurisdiction and a flagrant violation of that principle by an aggrieved party who seeks to invoke the jurisdiction of the Court of Appeal, then it seems to me that this would amount to a clear abuse of the Court. I therefore, consider this case a proper one in which to make an order.”

[146] The court in that case held that upon the facts which constituted “*a clear abuse of the process of the Court*” that case was “*a proper one in which to make an order*” for costs in favour of the Estate Police Association.

-See paragraph [16] of the judgment.

[147] It is equally a mystery to me why the Employee or his Attorney-at-Law in this case were not aware of the clear principles of law which are set out at **paragraph [134] (ii), (iii), (iv), (v) and (vi)** above.

[148] Equally, Mr. Benjamin’s failure to produce certain documents outlined at **paragraph [134] (viii) (b)** above was manifestly unfair and unjust to the Employer. Moreover, Mr. Benjamin’s marked inability to produce any evidence whatsoever to establish his position that he would have been able to retain his years of service upon assuming the position of Port Manager was also wrong and unjust to the Employer.

[149] In addition to the matters which are set out at **paragraph [134]** above, the Employee and his Attorney-at-Law ought to have been aware of the clear principle of law that it is the responsibility of the Public Service Commission as opposed to the Cabinet, which has the authority to second a Public Officer from the Civil Service to a position outside of the Civil Service.

[150] If I do not make an order for costs in this case the Court would be sending the wrong message to parties. This is an occasion when this Court must insist that certain basic principles of law be observed otherwise chaos and uncertainty would result.

[151] Accordingly, the matters which I consider to be **exceptional reasons** why the Court considers it proper to, and do make an award of costs against Mr. Benjamin are (a) the matters which are more particularly set out at **paragraphs [134] and [149]** above; (b) Mr. Benjamin was never dismissed by the Port Authority; and (c) no cause of action ever existed against the Port Authority.

[152] In the circumstances of this case I hold that Mr. Benjamin shall pay the Port Authority's costs in the sum of **Five Thousand Dollars (\$5,000.00) on or before March 31, 2011.**

Dated the 17th day of February, 2011



PHILIP A. PILGRIM
President

I agree.



SAMUEL R. AYMER
Member

I also agree.



DR. HAYDEN THOMAS
Member