

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 28 OF 2013

BETWEEN:

DAMON FRANCIS

Employee/Respondent

And

THEODORE FRANCIS T/A THEO'S TUG & BARGE

Employer/Applicant

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

**Mr. Anderson E. Carty of the Antigua & Barbuda Tradesmen & United Workers'
Federation for the Employee**

Mr. Jarid Hewlett, Attorney-at-Law of Watt, Dorsett & Co. for the Employer

2015: June 17

DECISION

BROWN, P.:

1. On March 30, 2015, two applications, one filed by each of the parties, were scheduled to be heard. At the commencement of the hearing the Employee withdrew his application. I proceeded to hear the Employer's Application filed on November 19, 2014 for an Order striking out the Employee's Reference. Immediately after the hearing, I delivered an oral decision dismissing the application and ordering that the Employer pay costs of

\$1,000.00. By letter dated April 7, 2015 the Employer requested reasons for my decision. The reasons for my decision are as follows:

Background

2. By an application filed on November 18, 2013 the Employer applied for an Order striking out the Reference and an award of costs.
3. At the commencement of the hearing of that application on January 18, 2014 I noted fundamental weaknesses in the supporting evidence of the Employer. As a result, Javid Hewlett, Counsel for the Employee, wholly embraced my invitation and withdrew that application.
4. The Reference progressed until it was ripe for hearing. By the Directions Order made on September 8, 2014; the Reference was set down for trial on November 26, 2014. On 30, 2014, a notice confirming the trial date was served on the Employer.
5. On November 19, 2014 the Employer filed this Application for an order striking out the Reference and an award of costs. It is in identical terms as the earlier application withdrawn by Counsel almost one year earlier. The Affidavit in Support was substantially the same as the one filed earlier except that it contained one additional paragraph.

The Employer's Evidence

6. In his Affidavit in Support the Employer deposed that:
 - "[1]
 - [2] The Applicant is making a claim for severance relating to the cessation of his employment in 2009. I was not the Respondent's employer in 2009.
 - [3] For years I conducted a business under the name "Theo's Tug & Barge."
 - [4] In 2003 my business was incorporated and became a company, Theo's Tug & Barge Incorporated. I attach as Exhibit TF1 a copy of the

certification of incorporation of Theo's Tug & Barge Incorporated dated 28th March, 2003."

7. Exhibited with the Employer's Affidavit is a letter dated January 22, 2008 issued to the Employer stating, inter alia,:

"This correspondence is issued to formalize the terms and conditions of your employment with Theo's Tug & Barge which commenced on 1st March 1999. It details conditions of your employment with the Company as Facilities Manager which is to be regarded as of a strictly non-contractual nature."

The last paragraph of the letter stated:

"Please sign and return the attached copy of this letter in order to indicate your acceptance of the stated terms and conditions of employment."

The "letter" was issued on the letterhead of "Theo's Tug & Barge" and signed by one "Larry Francis, Managing Director."

The Employee signed at the foot of the "correspondence stating that he "accept the terms and conditions of the Employment as set out above"

8. As part of its evidence the Employer also exhibited photocopies of 7 cheques issued by "Theo's Tug & Barge" to the Employee in June 2009. The signatory on the cheque was one "Lawrence Francis.
9. According to the Employer, by issuing the letter dated January 22, 2008, he was formalizing the Employee's relationship with the company. Further, the Employer stated that if he was conducting business in his personal capacity, the cheques would have been signed by him personally.

The Employee's Evidence

10. In his Affidavit opposing the Application filed on February 23, 2015 the Employee deposed that he had been employed by the Employer since March 1, 1999 up to September 2009. At paragraphs 4 - 8 of his Affidavit the Employee states:

- “.....
4. Sometime in or around 2003, I incidentally became aware of some paper works that were being executed in relation to the business but I was not told specifically of what the changes would be, if they were completed at any point or as to whether or not they would affect my employment status or benefits with the business.
 5. In any event, if any changes were eventually executed, they did not affect my status or benefits in any material way throughout my employment tenure.
 6. I did not receive any information regarding any change to the legal identity of my Employer's business in 2003 or thereafter, and neither were there any subsequent consultations with me, regarding any change to my status as an employee.
 7. Further, the nature and economic activity of my employer's business had remained unchanged during my entire tenure of employment and therefore, there was absolutely no reason for me to believe or even to contemplate that there was any change in the legal identity (or name) of my employer as known to me.
 8. I did not receive any written communication advising of any change in the name of my employer in 2003 and neither was I a recipient of severance pay. Further, no separation option was discussed nor offered to me at any time during the said period that I worked for the business.”

The Submissions

11. Skeleton Submissions on behalf of the Employee were filed by Mr. Carty on March 9, 2015 pursuant to the Directions Order dated February 10, 2015. No submissions were filed on behalf of the Employer.
12. In his Written Submissions, Mr. Carty astutely identified the applicable law to be Section C 44 of the Antigua & Barbuda Labour Code (the Labour Code). He contended that the Employer was properly named as the employer of the Employee.

13. Further, Mr. Carty summarized the pertinent evidence of the Employee and submitted:
- (a) The Employer's letter dated January 22, 2008 was in fact his belated effort to fulfill its legal obligation to issue a Written Statement to the Employee at the commencement of his employment in March 1999.
 - (b) The Employee received no communication from the Employer and had no basis on which to conclude that the legal and/or economic identity of the Employer had changed.
 - (c) It is settled industrial relations practice that employees should be consulted whenever a successor-employer takes over a business previously carried on by the predecessor-employer.
14. In his Submission, Mr. Carty identified the triable issue to be:
- “Whether or not the purported new entity created by the Employer in 2003, lawfully became the Employee's employer.”
- I agree with and adopt this statement of the issue.

Analysis

15. Striking out a claim is often described as a draconian measure. If an applicant is to succeed on an application to strike out he must present strong, cogent and persuasive evidence.
16. As identified in the Employer's Affidavit, the Employee's claim is about severance pay. In that regard, Section C 44 of the Labour Code provides:
- “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."

17. The Employer's contention in this matter is that while trading as "Theo's Tug & Barge" in 1999 he initially employed the Employee but later, upon the incorporation of his business as "Theo's Tug & Barge Inc." in 2008, his position of employer was superseded by the newly formed company. In effect, the Employer's submission is that he is no more than a predecessor-employer while his company became the successor employer.
18. It is clear that the bar on payment of severance pay as imposed by Section C44 applies when two conditions are met: Firstly, there must be a termination of employment by the employer. Secondly, there must be an offer of the same employment by a successor-employer without any break in service.
19. I find that there was no termination of the Employee's employment by the Employer. By logical extension, there was no offer of the same employment by the company. As a result, the employee/successor-employer relationship was never constituted so that the Employee remained the employee of the Employer at the very least up to 2008 when the letter was written to "formalize" the terms and conditions of employment.
20. I move on to consider the effect of the letter dated January 22, 2008. The question must be: Did it make a difference so as to transform the Employer and his company into predecessor-employer and successor-employer respectively within the meaning and ambit of Section C 44 of the Labour Code.
21. The 2008 letter must be considered in the context of the prevailing facts and surrounding circumstances. Although he was employed since March 1, 1999 the Employee had received no written statement of the terms and conditions of his employment prior to the 2008 letter. That letterhead did not indicate that it was issued by the company and

otherwise bore no distinguishing words to that effect. Further, the use of the word “company” once in the second paragraph and the signature of “Larry Francis, Managing Director” do not individually or collectively convey the existence of the company named “Theo’s Tug & Barge Incorporated” which had taken over the business previously carried on by “Theo’s Tug & Barge”.

22. The bundle of copies of 7 cheques issued to the Employee in June 2009 and one in July 2009, as exhibited with the Employer’s affidavit, all show the payer to be “Theo’s Tug & Barge” the Employer’s trade name. They were signed by “Lawrence Francis” whose identity was not disclosed on the face of the document.
23. In the final analysis, the combined effect of the letter in 2008 and the cheques in 2009 suggest that the Employer continued to do business using the same trade name as in 1999. In the circumstances, the signatures “Larry Francis” and “Lawrence Francis”, individually or collectively, are equivocal.
24. There is no evidence the incorporation of the Employer’s business was brought home to the Employee. Indeed, it appears that no attempt was made to do so. The letter of 2008 and the cheques of 2009 were not sufficient to convey to the Employee that the nature and identity of his employer had changed. Most importantly, the Employer never terminated the Employee’s employment and the company never offered him the same employment, so as to trigger the operation of bar as established by Section C44.
25. In the circumstances, I conclude that the Employee remained the employee of the Employer for the entire period of his employment. No predecessor-employer or successor-employer were constituted as contemplated under Section C44 if the Labour Code.
26. For the reasons stated above, I am constrained to dismiss the Employer’s Application.

27. In its Application the Employer sought an award of costs as he did in the 2013 application. The Employee in turn in his “Application in Opposition”: also applied for costs on the basis that an identical application had been disposed of one year earlier. The result is that the Employee was obliged to prepare its argument in opposition twice.
28. In considering whether or not to award costs, I am mindful of the provisions of Section 10 (2) of the Industrial Court Act which prohibits an order for costs unless exceptional reasons exist.
29. The Court’s record discloses that after the first application was withdrawn in 2013, the Reference had progressed to a stage when it was ripe for hearing and a trial date had been fixed.
30. In considering the issue of costs, I take in account the fact that the nature and content of the earlier application, being identical to this one, and the circumstances under which it was withdrawn. The supporting evidence was substantially the same, save that an additional paragraph was added to exhibit the 2008 letter and the 2009 cheques. In essence, there was no “fresh evidence”. All that were disclosed were well known to the Employer at the date of filing the first application.
31. Perhaps most decisively, the Employer had blatantly disregarded the clear provisions of Section C44 requiring the distinct termination of the old employment by the predecessor-employer and the distinct contemporaneous offer of fresh employment by the successor-employer. The Employer should have known that he is in no position to succeed in constituting the company as a successor-employer at the material time.
32. It is contrary to the principles and practices of good industrial relations for the Employer to change its legal identity or transfer its business without informing the Employee. The Employer’s actions and/or omissions are not only manifestly unfair and unjust to the Employee, they are also not in the best interest of the national community as a whole.

33. In the circumstances, I agree with Mr. Carty's submission that the Employer has engaged in an abuse of the Court process, which abuse in my view is sufficient to amount to exceptional reasons and ground an award of costs. Accordingly, I award costs in the sum of \$1,000.00 to the Employee.
34. In summary, I order that:
- (1) The Employer's application for an order striking out the Reference is dismissed.
 - (2) Costs to the Employee in the sum of \$1,000.00.

Dated this the 17th day of June, 2015.


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CHARLESWORTH O.D. BROWN
PRESIDENT