

Reference No: 32 of 2002

Philmore Jarvis

and

Shoppers Pharmacy Limited

Before:

**The Honourable Edward T. Henry
The Honourable Hubert Hood**

Appearances:

**Sydney Christian, Q.C. for the Employee
Anderson Archibald, Barrister at Law, for the Employers**

15,16 & 17 March 2004

JUDGMENT

The central issues of this case concern the summary dismissal of Philmore Jarvis, an employee of Shoppers Pharmacy Ltd., and are contained in his letter of dismissal dated 29th August 2001. The facts leading up to the termination of his services must determine the fairness or unfairness thereof.

Philmore Jarvis, a registered Pharmacist of 13 years standing, began working as a part-time Pharmacist for Shoppers Pharmacy, the Employers. He was at the same time employed as an Immigration Officer. He was offered full time employment by the Employers and on 1st June 2001 the parties signed to a written contract. As set out hereunder:-

AGREEMENT

Between

Philmore Jarvis

And

SHOPPERS PHARMACY

Shoppers Pharmacy agrees to employ Philmore Jarvis of Factory Road **Monday February 19th 2001 for a period of one year**. For the first six months a salary of \$ 2,500.00 will be granted. At the end of this period there will be a review of that salary for the purpose of granting an increase of an additional \$ 100.00 monthly which would yield a total of \$ 2,600 payable for the remaining six months period as salary.

Shoppers also agrees to provide for the necessary benefits as required by law inclusive of Social Security and Medical Benefits contributions. Any additional benefits that may be introduced will be mutually agreed upon by both parties.

Shoppers Pharmacy agrees to provide for two weeks vacation annually.

In return Philmore Jarvis agrees to work as a full time Pharmacist for Shoppers Pharmacy in accordance with the following:

Undertaking all obligations relative to the role of a license Pharmacist in accordance with the stipulations of regulations provided in the Pharmacy Act.

Providing superior quality of service to customers with a view to maintaining a high standard in keeping with the Company's reputation.

All other expectations and requirements outside of the aforementioned should be mutually agreed upon by both employer and the employee.

.....
Philmore Jarvis
Pharmacist

Date: 1st June , 2001

.....
Romaneta Francis
Management – Shoppers Pharmacy

Date: 1st June , 2001

On the 28th August 2001, Coleen Samuel who had set up the Pharmacy at Shoppers Pharmacy Ltd. and had been away on a three month course in Jamaica returned and commenced work with the Employers as Chief Pharmacist. The schedule of work earlier prepared by the Employee was now prepared by Miss Samuel. The Employee found that this new schedule conflicted with the hours of work demanded by his other job and requested that he work part-time. This arrangement was acceptable to all the parties concerned and a Part-time schedule was prepared by Coleen Samuel but again Jarvis was unable to adequately meet the hours of work required by the Part-time schedule. In an effort to find resolution, the Employee sought the intervention of the Managing Director, Romanita Francis who not wishing to interfere with the authority of the Chief Pharmacist, politely declined. These happenings took place on the 28th August 2001, following Miss Samuel's return from Jamaica. Miss Romaneta Francis, the Managing Director, who had certain concerns about the amount of time Jarvis was devoting to his duties at the Pharmacy, decided to take action in accordance with the advice given by a friend.

Romaneta Francis stated that:-

Nothing was heard from the Employee on the 29th August 2001, after he expressed a disinclination to work the new schedule prepared by Coleen Samuel. On the 30th August 2001 when he returned to the Pharmacy he was handed a letter terminating his employment. In it was a cheque for \$2,522.00.

Philmore Jarvis stated that:-

He showed up for work on the 29th August, 2001, he was given the letter of dismissal.

Miss Francis, on the advice of her solicitor friend, was under the impression that Philmore Jarvis was employed on probation and within a three month period he could be summarily dismissed without notice. As a consequence he was handed the letter of dismissal on the 29th or 30th August, 2001 which read as follows:

29th August, 2001

MR. PHILMORE JARVIS
Factory Road
Antigua.

Dear Mr. Jarvis:

Further to our communication at the meeting of Tuesday 28th August, 2001, I have reviewed the various problems pertaining to your hours of work. Furthermore, I have become concerned about the priority your other job (Immigration full-time) will take over my work here at the pharmacy.

Already, I have experienced your having to take hours off to clear shipments entering the harbour as well as occasional time off to run certain errands from time to time.

This pattern of work that has become part of your agenda as an employee within the first three months of full time employment would suggest serious problem for business from now onwards. As a result, I am choosing not to go any further with your employment, than the three months probationary period as required by the Labour Code.

Thank you very much for working at Shoppers Pharmacy.

Yours truly,

.....
MS.ROMANETA FRANCIS

SHOPPERS WORLD LIMITED

**SHOPPERS PHARMACY SHOPPERS WHOLESALE
HIGH STREET - TEL: 462-4706
ST. JOHN'S, ANTIGUA - FAX: (809) 462-7779**

Mr. Anderson Archibald, Counsel for the Employer, in summary argued that when the Employee could not meet the schedule of work prepared by Miss Samuel and asked for a part time schedule, he had in point of fact repudiated his contract. Further his subsequent statement to Miss Francis that he could not again meet the new schedule coupled with his alleged failure to turn up the following day (29th Aug.) conveyed his intention of anticipatory breach of contract. He behaved in such a way as to show that he intended to breach the contract. There was therefore no contract in existence on which to make a case on grounds of unfair dismissal. He contended that the Employee received a letter terminating an employment that in law did not exist. The Employee not the Employer provoked the termination. When the Employee asked for part time work it meant that he had abandoned the contract. He had a full time job he knew that he could not satisfactorily perform at the two jobs.

Mr. Sydney Christian QC, counsel for the Employee, in summary made the following points. He contended that the assertion that Philmore Jarvis, the Employee was on probation did not arise since there was uncontroverted evidence that he had been employed since February. There was evidence that during the period 1st June to 28th August, 2001 two pharmacist were working at the Pharmacy so that any suggestion that the Pharmacy would have been seriously affected by Jarvis' absence at any time leading to closure was fallacious. Before Jarvis took up the job at the Pharmacy it was well

known that he was employed full time as an Immigration Officer. The schedules of work prepared by him in the absence of Coleen Samuel were designed to accommodate his working hours at his main job. He worked at the Pharmacy mainly in the evenings. The question that comes to mind is: Did the Pharmacy get rid of Jarvis in order to accommodate Samuel? Samuel who was now in charge since her return from Jamaica, proceeded to draw up a schedule totally inconvenient to Jarvis. There was no evidence to show that Philmore Jarvis had abandoned the work. The termination letter of the 29th says nothing about abandonment, what it says is "I am choosing to go no further...". No end of persons would have lost their jobs if persons could be deemed to have thus abandoned their jobs.

He emphasized that the rights of both Employers and Employees are subject to the employment standards and industrial relations as set out in the Labour Code. He invited attention to sections C8 and C9 of the Antigua Labour Code on the question of probation and in determining what Philmore Jarvis was entitled to. He rejected the submissions of anticipatory breach of contract since at no time did the Employee decline or express a positive intention not to perform. Nor did he indicate that he had no intention of resuming his duties. There was no repudiation of his contract.

Triable Issues

1. Was the Employee ever formally placed on probation. Was such a condition stated in his contract.?
2. Did the Employee repudiate his contract?
3. Was he guilty of anticipatory breach of contract?
4. Was he fairly dismissed on the grounds contained in his letter of dismissal?

Decision

When Romanita Francis decided to terminate the services of Philmore Jarvis by letter dated 29th August 2001 she did so summarily and thereby at the same time terminated a contract that had some nine months before completion. This was done on the misguided directions of a solicitor friend who may not have been fully cognizant of the facts of the matter. Firstly there **was no probationary period mentioned in either his contract** or indeed his terms of employment. Jarvis was a qualified pharmacist of thirteen years standing and had taken up employment with the Employer since February, well beyond any presumed three month probationary period. **The contract of fixed term employment shows the starting date as February 19th, 2001.**

Section C5 (1) of the Antigua Labour Code states that the employer shall furnish employee with a written statement which shall set forth:-

- c) the period of probation, if any

Probation must be stated to have effect. If probation is not stated, there is no probation.

In regard to the question as to whether or not Jarvis had repudiated his contract, his hours of work were arbitrarily altered by the Chief Pharmacist. On the return of Coleen Samuel further difficulties arose in arriving at shift work in the Pharmacy that was acceptable to all. When Jarvis allegedly turned off in disgust on the 28th August, 2001 at not having reached a satisfactory settlement of the shift issue, it was presumed that he had abandoned the job. The next day a letter was drawn up in anticipation of him breaching the contract of employment hence Counsel for the Employers' contention of an anticipatory breach of contract. Having given some consideration to the matter, Jarvis returned the next day and received the letter terminating his employment. Anticipatory breach or repudiation of any contract could only apply if Jarvis had expressed a positive intention not to perform on the job

In anticipatory breach the party claiming breach must have had no complicity in any condition resulting in the breach. In other words neither party should prevent the other from performing. The working hours of the employee were unilaterally changed, contrary to the contract of employment, and this started a chain of events.

Counsel for the Employee stressed the importance, inter alia, of adhering to the provisions of the Antigua Labour Code in matters before this court and drew attention to the fact that the Employer was bound by the grounds of termination as stated in her letter of dismissal. Grounds that were never proved. **The entire matter of anticipatory breach of contract was not in the letter of dismissal, and cannot be now allowed as a legitimate reason for dismissal.**

Summary dismissal is a very strong and severe measure which can be justified only in the most exceptional circumstances. Under the Antigua Labour Code Sec. C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or relation to his employment so serious that the employer cannot reasonably be **expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has:**

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
- (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer; or
- (c) behaved immorally in the course of his duties.

Whether the conduct in question is serious enough to warrant summary dismissal is always a question of fact in each case.

In my view Philmore Jarvis was unfairly dismissed and is entitled to compensation for the balance of the Contract period and claims.

Salary for the balance of contract period

(a) 9 months @ \$2,500.00.....\$ 22,500.00

Vacation Pay.....\$ 288.46

[Total Annual Earnings \$ 2,500 x 12 = \$ 30,000
Per week \$ 30,000/52 = \$ 576.92

Per two weeks = \$ 1,153.84

Vacation Pay for 3 months

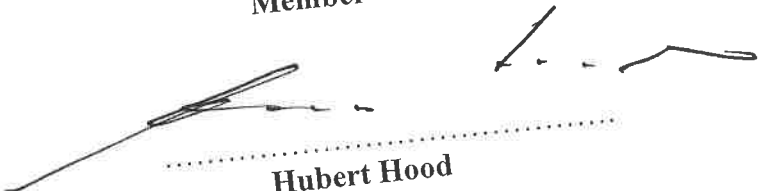
3/12 of \$ 1,153.84 = \$ 288.46]

\$ 22,788.46

Payments shall be made by 30th June 2004

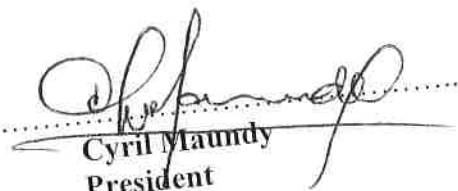
DATED the 13th day of May 2004


.....
Edward T. Henry
Member


.....
Hubert Hood
Member

I concur

I dissent


.....
Cyril Maumdy
President

Delivered by Mr. Edward T. Henry