

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 32 OF 2002

BETWEEN:

PHILMORE JARVIS

Employee

and

SHOPPERS PHARMACY LIMITED

Employers

Before:

The Honourable Cyril L. Maundy
The Honourable Edward T. Henry
The Honourable Hubert Hood

President
Member
Member

Appearances:

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

2004: March 15, 16 & 17

JUDGMENT

Qualified Pharmacist holding 2 jobs – one year Contract of employment between Employer and Employee under which Employee was required to work forty hours per week – shortly before end of three months Employee's hours re-scheduled – because of his other job Employee unable to work new schedule – Employee asks to work part-time and new Part-time schedule drawn up but unable to work the hours set out therein – Employee summarily dismissed without Notice.

In February, 2001, the Employee, a Registered Pharmacist of 13 years standing, began working as a part-time Pharmacist for the Employers. The Employee, at the same time, was employed as an Immigration Officer, which he regarded as his main job. The Employers later asked the Employee to work full-time and, on June 1, the parties entered into a written contract, which provided that, inter alia:

- (a) For the first six months the Employee would be paid a salary of \$ 2,500.00. At the end of the above period there would be a review for the purposes of granting an increase of an additional \$ 100.00 monthly.
- (b) The Employers would pay the Employee's Social Security and Medical Benefits contributions.
- (c) The Employee would receive two weeks annual vacation.
- (d) The Employee shall work for the Employers as a full-time Pharmacist at their Pharmacy in St John's (Shoppers Pharmacy) and undertake all obligations relative to the rôle of a licensed Pharmacist within the Pharmacy Act, provide superior quality of service to customers with a view to maintaining a high standard in keeping with the company's reputation. – See Exhibit PJ1.

On August 28, 2001, Colleen Samuel who had set up the Pharmacy and had been away on a three-month course in Jamaica returned and commenced working with the Employers as Chief Pharmacist. The Employee had earlier participated in preparation of a Schedule, which was in operation, but this was discarded and Miss Samuel prepared a new schedule. The Employee could not work the new schedule because of conflicts with his other job. The Employee informed the Employers of the conflict of hours and asked them if he could work part-time. The Employers agreed to the Employee's request to work Part-time and a Part-time schedule was prepared but again he could not work the part-time schedule drawn up. This schedule was subject to change each month.

The Employee informed Romanita Francis, the Managing Director, of his situation and asked her to intervene. Miss Francis told the Employee she could not interfere and asked him what he wanted her to do. The Employee did not reply but stood waiting for a while and then walked away muttering as he did so. All this occurred on August 28, 2002.

Nothing was heard from the Employee on the following day but on August 30, 2002 (two days later), he came to the Pharmacy, as if to work, and was given a letter terminating his employment and a cheque for \$ 2,522.00 – See Exhibits PJ2 and PJ3.

The Employee now contends that his dismissal was Unfair, that he is entitled to compensation for the balance of the Contract period and claims:

- (1) His salary for the balance of the Contract period as follows:
 - (a) 3 months @ \$ 2,500.00.....\$ 7,500.00
 - (b) 6 months @ \$ 2,600.00.....\$ 15,600.00
- (2) Vacation Pay.....\$ 1,250.00
- (3) Compensation for Manner of Dismissal.....\$ 2,500.00

\$ 26,850.00
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The Employers contended that they were not liable for any compensation and expressed the view that, inter alia:

- (i) The Employee had abandoned the job.
- (ii) The Employee was guilty of an anticipatory breach of the contract

With regard to the claim for compensation for Manner of Dismissal, this applies only where the Dismissal would render the employee a prime contender for dismissal from another job or less employable than previously. Thus, in *Antigua Village condo Corporation V Jennifer Watt*, Civil Appeal No. 6 of 1992, at Page 6, Sir Vincent Floissac, C.J., in setting aside an Award under this head by the Industrial

Court, summed up the position thus, "The Industrial Court, therefore, wrongly awarded compensation for the manner and circumstances instead of rightly awarding compensation for the financial consequences (if any) likely to be incurred as a result of the manner and consequences. In the present case, there was no evidence of the likelihood or risk of financial loss to the respondent as a result of the manner or circumstances of her dismissal. There was no evidence that the manner or circumstances of the dismissal made the respondent less acceptable to potential employers or exceptionally liable to selection for dismissal."

With regard to the issue of Unfair Dismissal, this was a contract for a defined period, viz, one year and is thus a fixed-term contract so that if there were a breach thereof by the Employee he would be at fault and would not be entitled to any compensation; such a breach, anticipatory or otherwise, would have to be a fundamental breach, i.e. a breach that went to the core of the contract. Further, the Employers had an option to treat the breach as a repudiation of the contract. Mr Christian contended that the dismissal was a termination of the contract with a further nine months to run and entitled the Employee to a payment of compensation. Mr Archibald took a different viewpoint and submitted that there was an anticipatory breach by the Employee when he declared he could not work the new schedule, that this went to the root of the contract, was a breach of a fundamental term and thus the Employers were entitled to regard the contract as at an end.

The question for which I am searching for an answer is that, if someone is employed to perform certain duties and he thereafter declares that he is unable to continue these what then must the employer do, bearing in mind that these duties are fundamental to the Employer? I am aware that "dismissal" is a dreaded word in the ears of an employee but the Court has to be cognisant of the position of the employer as well. Indeed, when adjudicating on issues of Unfair or Wrongful Dismissal, Section C.10(3) of the Industrial Court Act, Cap. 214, stipulates matters that the Court should consider and provides thus, "Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall:

- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
- (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.

But the term provided in the contract had not expired so were the Employers in breach when they issued the letter of termination? Also, was it of any significance that the dismissal was without Notice and took place within three months of the contract? Except in matters of misconduct it is a general rule that an employer is under a duty to give a Notice of intended termination and this is also mandatory in the case of a fixed-term contract. Thus, Section C.9 of the Labour Code provides:

- C 9. (1) An employer may, without advance notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59 (1) or (2).
- (2) With respect to a person who has been engaged for a specified term of employment of less than one week's duration, the employer need give no further notice of his intention to terminate said employment at the end of the specified term, unless the terms of his employment specify otherwise.
- (3) In all other cases, the employer must give advance notice to the affected employee of an intention to terminate that person's employment, as follows:
- (a) with respect to an employee within his probation period, an employer must give at least 24 hours

advance notice of his intention to terminate said employee's employment;

- (b) with respect to all other employees, the period of said advance notice shall be at least equivalent to the interval of time between the affected employee's paydays;
- (c) in no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period.

It is to be noted that the contract between the parties does not state any probationary period and I have not been able to find nor has it been shown by Counsel that there is a minimum period in the Labour Code or any other authority – under the Labour Code the period shall not exceed three months unless there is a provision for a greater period in a collective agreement between the Employer and a registered trade union acting as sole bargaining agent for all employees in an appropriate bargaining unit. During the probationary period an employee's employment may be terminated without any reason being given except an infringement of self-organisational rights as set forth in Part 1 of Division K. See Section 8 of the Labour Code.

In my view and to my knowledge, most employers and employees in Antigua and Barbuda regard the first three months of employment as the probationary period and based on the foregoing and in the circumstances and no evidence to the contrary being adduced or authorities cited, I have to conclude that the dismissal would be within the probationary period, if there were one so that the Employer was required to give at least 24 hours notice.

To my mind, when he stated he was unable to work the hours contained in the new schedule (or refused to do so) and asked to work Part-time in lieu the Employee thereby committed a breach of the written contract – which was to work forty hours per week – this was a fundamental breach that went to the root of the contract since it therefore meant that unless a replacement could be found the

Employers would have had to close their business during the hours allocated or operate in infringement of the provisions of the Pharmacy Act, i.e. without a Registered Pharmacist being present. At this juncture the written contract came to an end and ceased to exist.

With regard to his vacation pay, the Employee worked for almost $\frac{1}{4}$ of the employment period set out in the contract and is thus entitled to $\frac{1}{4}$ of his vacation pay of \$ 1,250.00, i.e. \$ 312.50.

I am not satisfied that the evidence adduced is sufficient to hold that the dismissal was unfair.

The Contract was repudiated when the Employee announced that he could not work the schedule and an agreement (new contract) was reached between himself and the Employers (Managing Director) to work Part-time.

I would hold that the Reference be dismissed although the Employee is entitled to the vacation pay mentioned above. The Employers shall pay the Employee the sum of \$ 312.00, payment to be made by the 27th day of May, 2004. There shall be no order as to costs.

Employee is granted an Application for stay of Execution of six weeks duration pending an Appeal.

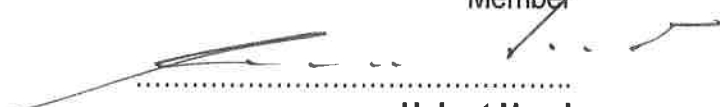
DATED the 13th day of May, 2004

I dissent

I dissent


Cyril L. Maundy
President


Edward T. Henry
Member


Hubert Hood
Member