

See 21/04
Civil Appeal

22

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 11 OF 2004

BETWEEN

PHILMORE JARVIS

Employee

vs

STANLEY BOWEN t/a CONVENIENT PHARMACY

Employer

Before:

The Hon. Genevieve L. I. Benjamin

Chairman

The Hon. Norris O. Scholar

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

**Sir Keithlyn Smith, Industrial Relations Officer,
Antigua and Barbuda Workers Union, for the
Employee**

**Mr. Egbert Joseph, Industrial Relations Officer,
Hotel Management Association, for the Employer**

2007: September 12

October 01 & 02

2008: August 18

JUDGMENT

Qualified pharmacist, holding appointment as Immigration Officer, employed as Chief Pharmacist to set up and run a new pharmacy called Convenient Pharmacy – Employee's medical certificate not honoured by

Employer - Payment terms unilaterally altered by Employer after six months.
Employee "*laid off*" shortly thereafter.

By Reference filed on August 12, 2004, the Court was informed of the existence of a dispute between the Employee and the Employer. The Employee's Memorandum filed on September 22, 2005, alleged Unfair Dismissal.

INTRODUCTION

1. The hearing of this Reference commenced on September 12, 2007, without the Employer being present against a background of several notifications having been sent by the Registrar to him which requested that he should file his Employer's Memorandum. He complied by filing his Memorandum of September 28, 2007.
2. The notes of evidence taken on September 12, 2007 were made available to him on October 01, 2007. When the hearing resumed on October 02, 2007, he was represented by Mr. Egbert Joseph of the Hotel Management Association.

THE EMPLOYEE'S CLAIM

3. In his Memorandum the Employee claims against the Employer the following relief:-

(a) 7 days vacation pay	\$ 840.00
(b) Difference between severance amount and agreed pay	\$ 64.58
(c) Severance pay (7 days)	\$ 840.00
(d) Sick leave (2 weeks)	\$1,200.00
(e) Two months salary as loss of earnings	\$4,800.00
(f) Notice pay	<u>\$ 840.00</u>
TOTAL CLAIM	<u>\$8,584.58</u>

THE EMPLOYEE'S EVIDENCE

4. The Employee gave evidence. He stated, *inter alia*, that before his employment commenced with the Employer he was employed with the Government of Antigua and Barbuda as an Immigration Officer. He submitted that he informed the Employer of his prior employment and further told him that his existing job would prevent him from working eight (8) hours every day at the Pharmacy.
5. He went on to state that the Employer operated a pharmacy called 'The Convenient Pharmacy'. He obtained the position as a pharmacist with the Employer pursuant to a verbal agreement between himself and the Employer on May 29, 2000.
6. The Employee also gave evidence of the terms of the verbal agreement between the two parties. According to him the terms were as follows:-

- (i) He would prepare the work schedules for himself and the other pharmacist which took into consideration the schedule for his immigration job;
- (ii) his salary would remain at \$2,400 per month even though his hours of work would be less than forty (40) in some weeks;
- (iii) in compensation he (the employee) would forego his entitlement to overtime pay for working on public holidays.

He received no letter from the Employer which described his job.

7. He told the Court that he worked well between the inception of his employment and December 14, 2000. However, he admitted to the Court to being late on occasions and gave evidence that he made an arrangement with another pharmacist to pay her for covering for him. On December 15, 2000, the Employee stated that the Employer informed him that his salary would be restructured. He, the Employee, would thereafter be paid \$15.00 an hour for the number of hours which he worked.
8. The Employee further gave evidence to the effect that the Employer presented him with a cheque in the sum of \$1,033.42 and a letter, both on December 29, 2000. The letter which was admitted into evidence as PJ 1 reads as follows:-

“Dear Mr. Jarvis,

Regretfully, I have to inform you that because of your other job’s interference with fulfilling the necessary hours at the Convenience Pharmacy resulting in loss of revenue on prescription items as well as the down-turn in the Antigua’s

economy it has become necessary for me to lay you off effective December 29th, 2000.

Your wages at December 29, 2000 is as follows:-

<i>December 16th – 29th 40 hrs @ 15.00 per hour</i>	<i>\$603.75</i>
<i>Severance Pay (6 days)</i>	<i>\$473.52</i>
<i>Less Staff A/c</i>	<i><u>\$ (43.85)</u></i>
<i>TOTAL</i>	<i><u>\$1,033.42</u></i>

Yours truly
(sgd)

Standley Bowen
Manager”

9. According to the Employee, prior to the receipt of the said letter he was never told by the Employer of any challenges which his job as an Immigration Officer posed to his job as a pharmacist with the Employer. Furthermore, he informed the Court that the Employer never recalled him to work.
10. After he was not recalled, he sought and obtained employment with Shopper's Pharmacy for the period June to August, 2001. He afterwards obtained employment at a Call Centre on January 16, 2003 for two weeks. He was unable to obtain employment at St. John's Pharmacy on High Street.

11. With respect to vacation pay, sick leave or notice of lay-off he informed the Court that he received no monies from the Employer. In this regard he stated that the period of leave due to illness was October 02 to October 16, 2000.

THE EMPLOYER'S EVIDENCE

12. In his evidence the Employer denied that he was aware that the Employee already was employed as an Immigration Officer before he employed him.

13. The Employer testified that he only became aware of the Employee's job with the Immigration Department subsequent to the commencement of his employment as a pharmacist with the Convenient Pharmacy. At the Employee's request to continue his employment upon a part-time basis, the Employer agreed to allow the Employee to maintain his employment with the Employer at the same salary as it was not anticipated that there would be a change from the Employee's 40-hour work-week at the Pharmacy.

14. The Employer stated that shortly thereafter the Employee's work attitude and ethics deteriorated rapidly; he reported ill on a regular basis, and when he did report to work he would absent himself for several hours.

15. He said that during the several months that this continued he spoke and wrote to the Employee and expressed his strong concerns to him. He was unable to produce any of these letters to the Court.

16. The Employer contended that the pharmacy suffered tremendously due to the Employee's poor work performance because in the absence of a pharmacist, customers were denied prescription service which is the largest section of the business, notwithstanding that he employed another pharmacist along with the Employee.
17. He agreed with the Employee that he did not pay him during the period of his absence from work due to illness. He gave as his reason that he learnt that the Employee travelled overseas precisely during his period of illness.
18. The Employer said that he was not familiar with labour terms, and may have used "*lay-off*" wrongly.

TRIABLE ISSUES:

19. The main issues for determination by the Court are –
- (i) Was there in existence a contract of employment between the Employee and Employer?
 - (ii) If such a contract of employment existed what were the terms of the contract?
 - (iii) Was the Employer justified in –
 - (a) Withholding the Employee's salary during the period covered by a medical certificate?
 - (b) Unilaterally re-structuring the Employee's salary?
 - (iv) Was the Employee "*laid-off*" or dismissed?
 - (v) If he was dismissed, was the dismissal unfair?

THE ARGUMENTS

20. **The Employee's Representative** submitted that the Court should accept that the terms of the contract between the two parties are those which were referred to at paragraph 6 hereof.

21. He also submitted that the Employer is liable to pay to the Employee the monies due to him for -

Vacation Pay 7 days	\$ 775.39
Notice Pay – one month	\$ 2,400.00
Sick Leave Pay – 2 nd to 16 th October, 2000	\$ 1,661.55

He characterized the Employer's restructuring of the Employee's salary as a unilateral one which was not accepted by the Employee.

22. He asked the Court to note that the Employer admitted that immediately after the Employee was "**laid off**" another pharmacist was employed to replace him. He argued that it was reasonable to believe that the true reason for laying off the Employee was because he disagreed with the proposed new payment terms, and asked the Court to find that the Employee was unfairly dismissed.

23. He submitted to the Court that the Employee is deserving of compensation in the amount of six (6) months' pay for being unfairly dismissed.

The Employer's Representative

24. The Employer's Representative submitted that the work schedules prepared by the Employee for himself and the other pharmacist were never presented

to the Employer, but were simply posted on the wall of the pharmacy. This was an area which the Employee told the Employer was off limits to all non-pharmacists which would include the Employer.

25. He further requested that C 9 3(b) of the Labour Code be considered for application regarding the period of notice (and therefore notice-pay) required as the Employee was a line staff who was paid fortnightly.

26. He submitted that the Employee had a verbal agreement with the Employer to schedule himself having regard to his immigration job. He submitted that in light of the Employee's admission that he would pay the second pharmacist for covering for him in his absence, to consider what other arrangements there might have been of which the Employer was unaware.

27. On the subject of payment for the period of sick leave in October 2000, the Employer's Representative questioned which of the Employee's two employers was the recipient of the sick leave application which the Employee advised in his Memorandum had been made, and drew attention to C 17 of the Antigua Labour Code in regard to payment.

28. The Employer's Representative stated categorically that without notifying his work-place or the Employer, the Employee did not work on December 24, 2000, noting that the Employer was called by another staff member to close the business. He added, without corroborating evidence, that there was no dispensing of prescriptions during the period 3pm to 10.30p.m. on that day.

29. He submitted that on 29th December, 2000, the Employee was temporarily terminated without a date of return. This was following a meeting between the Employer and the Employee on the 15th December, 2000, and shortly before the pharmacy section of the business was closed in February, 2001, followed by the closure of the entire business thereafter.

30. The Employer's Representative also submitted that close consideration be given to C 40 of the Labour Code when considering the Employee's claim to severance pay.

THE LAW

31. The Law which governs the matters raised by the parties is contained in certain relevant sections of the Antigua and Barbuda Labour Code, Cap.27 (hereinafter called "the Labour Code") and the Industrial Court Act, Cap. 214, Laws of Antigua and Barbuda (hereinafter referred to as "Cap. 214").

32. C 5 of the Labour Code stipulates *inter alia* that an employer must, within ten days of employing an employee, furnish the employee with a written statement setting forth the terms and conditions of the employment including the responsibilities, work periods, pay, vacation leave and the term of employment if other than indefinite.

33. C 9 of the Labour Code deals with the Employer's notice of termination. Sub-section 3(a) provides for notice to employees within their probation period and sub-section (b) provides:-

“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 pay day;”

34. C 16 of the Labour Code provides:-

“Each employee is entitled to leave on workdays, or parts thereof, during which he is ill or otherwise physically incapacitated for work:”

Sub-section (i) provides for evidence of actual illness in the form of, e.g., a doctor’s certificate on the third consecutive day of sick leave.

35. C 17 of the Labour Code provides as follows:-

“Each employee, for at least the first twelve days of sick leave taken during any twelve consecutive months calculated from the date of commencement of employment and any anniversary date thereof shall be entitled to the basic wage which he would have received had he worked on those days.”

36. By C56 of the Labour Code every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause.

37. C 58 (2) lays down the test to be applied in determining whether a dismissal is reasonable.

38. By Section 9 of Cap 214, the Court is not irrevocably bound by the rules of evidence and has a discretion to depart therefrom.

THE DECISION

39. This case highlights the need for employers to have a working knowledge of the national labour laws, to set the parameters of the job by providing a written job description as required by Section C5 of the Labour Code, to maintain written records of employees' work history and to have written communications with their employees with regard to important matters that affect the working relationship between the two parties.

40. The Employer, during the course of the trial, admitted ignorance of the Labour Code and labour terms, and although there was acceptance by both parties that some written communications had passed between them none was produced to the Court.

Issue No. 1 – Contract of Employment

41. In breach of C5 of the Labour Code the Employer failed to provide the Employee with a written statement setting forth the terms of his employment. The Employer in his Memorandum denied the existence of the verbal terms of the contract which were pleaded by the Employee in his Memorandum at paragraph 3 thereof.

42. However, in his evidence as stated at paragraph 13 above, the Employer testified that upon becoming aware of the Employee's job at the Immigration Department he agreed to allow him *"to work on a part-time basis"* and that his *"pay packet would not change immediately"*

because it was agreed that he would still put in forty hours a week”
at the Pharmacy,

43. The Court finds that there was indeed a contract of employment, if not from the date of his first employment, certainly prior to the issue of the “*lay-off*” letter – PJ1.

44. The Court finds that the existence of this contract would have from its inception posed both parties with challenging difficulties to execute especially with the Employee’s performance of his duties at the Pharmacy. As the Court referred at paragraph 7 of this judgment, even the Employee’s own evidence revealed that he could not fulfill his duties at the Pharmacy on several occasions. The Employee himself would have contributed in some measure to his eventual departure from the Pharmacy, and this contribution will have to be borne in mind when the Court makes a finding with respect to the question of the level of compensation to be paid by the Employer.

Issue No. 2 – Terms of the Contract of Employment

45. The Employee’s evidence as to the terms of the contract is as stated at paragraph 6 above. The Employer’s evidence is that the contract was for part-time work of forty hours a week with no change in salary. He admitted that the agreed salary was \$2,400 per month when he gave evidence that the \$15 an hour which he paid the Employee from December 15, 2000 was the hourly rate based on \$2,400 a month.

Issue No. 3 (i) – Withholding Salary for Period covered by Medical Certificate

46. C 16 and 17 of the Antigua Labour Code make provision for an Employer to pay to the Employee his basic wage for the first twelve days of sick leave taken annually. In the absence of evidence of earlier periods of paid sick leave the Employee is entitled to payment for twelve (12) days of sick leave (October 02 to 14, 2000) of the period October 02 – 16, 2000 covered by a medical certificate. As he was employed on a six (6) day a week basis his daily rate of pay is calculated as follows: $\$2,400 \times 12 / (52 \times 6) = \$92.31$. Payment due is therefore $\$92.31 \times 12 = \$1,107.72$.

Issue No. 3 (ii) – Re- structuring of salary

47. The term of employment relating to payment of salary is a fundamental term of any contract and any change in such a term to the detriment of the Employee and without his consent is a breach of such a term. In the circumstances of this case and taking into consideration the submissions of both parties, the Court finds that the Employer was not justified in unilaterally re-structuring the Employee's salary.

Issue No. 4 – Was the Employee “laid-off” or dismissed?

48. At paragraph 29 above, the Employer's Representative submitted that the Employee was temporarily terminated without a date of recall, but that before the expiration of the three-month period stipulated in Section C 41 (2) (b) of the Labour Code for payment of severance pay, the business ceased to exist.

49. Having regard to all of the evidence led by both parties and taking into consideration the submissions made in support of the Employer and the Employee, the Court does not accept the Employer's submission that the Employee was temporarily terminated. The Employer himself admitted that he may have used the term "*lay-off*" wrongly and that he immediately employed a new pharmacist on or about the first working day of January, 2001. The Court recalls that the Employer's letter to the Employee was dated December 29, 2000. The Court concludes, therefore, that the Employer used the term "*lay off*" colloquially, to mean that he had dismissed the Employee. This action might have been taken in frustration as there is evidence in the Employee's own exhibit – PJ2, work schedules for the period 3rd September to 23rd December, 2000 – that while he scheduled himself to work in excess of 40 hours for three weeks, the average scheduled hours for the remaining seven weeks was less than twenty. However, other reasons have been advanced in the letter of December 29, 2000.

Issue No. 5 – Was the Dismissal Unfair?

50. The Labour Code provides ample means to institute disciplinary measures against an employee. However, no evidence was presented to the Court that such measures were ever instituted by the Employer. Taking into consideration all of the facts of this case, the Court is of the view that the Employee was unfairly dismissed.

THE AWARD

51. An employee who is unfairly dismissed is entitled to compensation under the established heads as follows:—

(i) **Basic Award**

The amount payable here is similar to that in cases of severance pay in accordance with C40 of the Labour Code, which is not applicable to this Employee.

(ii) **Manner of Dismissal**

There shall be no award as there is no evidence that the dismissal made the Employee less employable or more likely for dismissal if employed.

(iii) **Immediate Loss**

An Employee who is unfairly dismissed is entitled to compensation for loss of earnings for the period subsequent to the date of his dismissal and the trial of the matter. Of course the Employee during this period has a duty to mitigate his loss.

During the trial of this matter the Employee's evidence upon this issue was that he did not obtain another job until June, 2001. He stated that he sought and obtained part-time employment at Shoppers Pharmacy for the period June to August, 2001. Yet he is the same **Philmore Jarvis referred to in Civil Appeal No. 21 of 2004 Shoppers Pharmacy Ltd v Philmore Jarvis**. At paragraph 10 of the Judgment the Court wrote *inter alia* as follows:

"Mr. Jarvis is a registered Pharmacist. He was employed as an Immigration Officer, but worked as a part-time Pharmacist for Shoppers Pharmacy from 1st February, 2001."

In the circumstances of this case his entitlement is one (1) month and two (2) days, i.e., \$2,584.62

(iv) **Future Loss**

There shall be no award made under this head as (approximately one month) after the Employee's dismissal the Employee obtained a job which paid him a higher salary than his position at the Convenient Pharmacy paid him.

OTHER AWARDS

52. In addition to the above, the Employee is entitled to –

- (a) **Seven (7) Days Vacation Leave** under C18(1) of the Labour Code, which provides for an employee to be entitled to vacation leave at the rate of one day per month, i.e., $\$92.31 \times 7 = \$646.17$.
- (b) **Full payment** for the last two weeks of employment, i.e., December 16 – 29, 2000, i.e. \$1,200.
- (c) **Notice Pay** for one month, he having been employed on a monthly basis even though he was paid fortnightly according to the evidence of both parties. The sum to be paid to him is \$2,400.

53. The Court, on many occasions, has held that an employee who has contributed to his dismissal will not go unscathed, and an award made in his favour will be reduced in accordance with his degree of culpability. An example of this principle is **Ref. No. 79 of 2000 – Judith Bramble and St. Nicholas Primary School – Judgment dated 27th June, 2006**. It is clear to the Court that the Employee was aware that on average he was scheduling himself to work far less hours per week than was agreed to with the Employer, additionally, he admitted to being late for work on occasions. The award for Notice Pay (\$2,400) and Immediate Loss (\$2584.62) totalling \$4984.62 is therefore reduced by 30% (\$1495.39) to \$3,489.23

CONCLUSION

54. The Court arrived at the conclusions determined herein having taken into consideration the evidence of the Employee and the evidence of the Employer, the submissions presented by the representatives of both parties, the written pleadings, the Labour Code and the Industrial Court Act.

55. It is hereby ordered that the Employer shall pay to the Employee:-

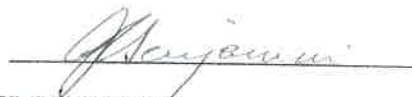
Discounted Notice Pay and Immediate Loss	\$3,489.23
Payment for sick leave	\$1,107.72
Payment for vacation leave	\$ 646.17
Full salary for the last two weeks of employment	<u>\$1,200.00</u>
	<u>\$6,443.12</u>
Less the amount paid on dismissal - Salary	\$603.75
Severance	<u>\$473.52</u>
	<u>\$1,077.27</u>
	<u>\$5,365.85</u>

56. There shall be no Order as to costs.

PAYMENT

57. Payment shall be made by the Employer to the Employee on or before the 18th day of September 2008.

Dated the 18th day of August 2008.



GENEVIEVE L. I. BENJAMIN
CHAIRMAN

I concur



NORRIS O. SCHOLAR
MEMBER

I concur



DR. HAYDEN THOMAS
MEMBER

