

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE No. 48 of 2015

BETWEEN:

ALEX MARCUS

Employee

And

BAZIL UZOMA T/A WATCHES-R-US INC

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence de Freitas

Member

Appearances:

**Mr. Samuel A. James, President of the Antigua and Barbuda Free Trade Union,
Representative for the Employee**

Ms. Mary B.E. White, Attorney-At-Law, for the Employer

2017: May 31

2019: September 13

JUDGMENT

Aymer, C;

Background

1. Sometime in or about 2003, the Employer commenced a small business, selling and repairing watches from a removable kiosk on the sidewalk of Market Street – a main thoroughfare - in the City of St. Johns, the Capital of Antigua.



2. Adjacent to the Employer's spot on the sidewalk, the Employee plied his trade as a newspaper vendor and supplied the Employer with newspapers.
3. Arising out of this physical proximity, a cordial, friendly and informal relationship **evolved** between the Employer and the Employee; to the extent that when the Employer had to leave his kiosk to run short errands during the day, including picking up his children from school, he would ask the Employee to keep an eye on his stock during his absences – such periods said to be no longer than 45 minutes at any given time. And for these "favours", the Employer would give the Employee "something" at the weekend "according to the time expended during the week".
4. This interaction evolved further, and in a continued informal way over time, into a full time work relationship between the Employer and the Employee some time during 2004.
5. From 2004 to 2009, as the Employer's business grew he rented a small spot within the front of the building (and next to his original pitch) and engaged the Employee, while training him in the watch repair business in 2004, at a weekly wage of \$375.00. Later as his business picked up, the Employer started paying the Employee \$500.00 per week from 2012.
6. The relationship, though informal, was uneventful prior to late 2014. Before that year, all was well so the Employee had no complaints.
7. The principal issue of contention between the Employee and the Employer arose in 2014 when the Employee took two weeks vacation on or about August 25, 2014 and was due to return on September 8, 2014. However, he returned one week earlier, on September 1, 2014 and a number of issues then ensued which

led, ultimately, to the fractured employment situation. We will return to this later.

LEGAL PROCEEDINGS

The Employee's Case

8. A Reference was filed on behalf of the Employee on September 8, 2015. The Employee's Memorandum of claim was that he was *unfairly/wrongfully dismissed*. The Employee's Witness Statement and Memorandum were filed on September 8, 2015. In the Memorandum the Employee claimed, *inter alia*, that:
 - a. He was employed by the Employer in January 2002 as a Sales/Watch Repair Technician on a six-day work week earning a wage of \$500.00
 - b. Over the period of his employment he was only paid for 12 days vacation.
 - c. On or about August 25, 2014, he took 6 days vacation for which he did not receive payment and that when he returned to work on or about September 1, 2014, the Employer did not pay him for his vacation.
 - d. On or about September 8, 2014, the Employee reported for duty late and the Employer became angry and sent him home.
 - e. He prayed the Court to declare the termination unfair and unlawful and to award compensation in the sum of \$53,833.02.

The Employer's Case

9. The Employer's Memorandum of Defence and Witness Statement were filed on October 16, 2015 and November 9, 2015 respectively in which the Employer claims that:

- a. The Employer did not commence his business in the year 2002, having been employed as a truck driver and general handyman by Bargain Centre Hardware Store prior to commencing his business on the sidewalk some time in 2003. This was confirmed by letter from the Deputy Managing Director of The Bargain Centre.
- b. In 2003 the Employee commenced his business on the side walk on Market Street before taking out his business licence.
- c. He was located in front of a building. At the end of the day he would bundle his goods and store them at home overnight, repeating the same business routine the next day.
- d. Sometime in 2003, the Employee was in the course of selling newspapers at the same location when he first came into contact with the Employer who became a customer.
- e. The Employee and the Employer befriended each other over time, to the extent that the Employer entrusted the Employee with the task of watching and keeping an eye on the stock on the side walk when the Employer had to be briefly absent on occasions (e.g. when picking up his children from school). The Employee was paid "something" at weekend, at the Employer's discretion, according to the time expended during the week.
- f. In the year 2004, the Employer took out a Business Licence in the name of Bazil Uzoma t/a Watches-R-Us Inc.
- g. As business picked up between 2004 and 2009, the Employer paid the Employee \$375 per week bearing in mind that the Employee "had absolutely no knowledge of, or skills pertaining to, the repairing of watches at the initial encounter of both of them on the side walk, and it was agreed by both Employer and Employee that training for proficiency in watch repairs could take up to one year.

- h. Up to August 2014 the Employee had received all holiday pay due to him then.
- i. On September 1, 2014, when the Employee approached the Employer for his wages and holiday pay, as he had returned from his holiday one week early, the Employer asked him to give him some time to make the payment as the Employer had just returned to Antigua from the USA with a sick wife who had been diagnosed with terminal cancer and funds were low.
- j. The Employee demanded his salary for August/September and holiday pay, which amounted to \$1500.00. The Employer did not pay him anything then, as he was in financial straits. The Employee did not remain on the job and returned about 2.00pm later that day. The Employer paid him \$500.00 which he took and left.
- k. The Employer did not see the Employee until 9 days later when he came back demanding the balance of his wages and holiday pay.
- l. A week later the Employee brought a Union Officer to the Business.
- m. The next time the Employer saw the Employee was at the funeral of the Employer's wife on 14th November 2014, at which time he asked the Employer to accept his sympathies and said nothing more to him.
- n. The Employer next saw the Employee at the Conciliation Hearing on April 1, 2015.
- o. By this time the Employee was fully employed with Sanitex and Sandals.
- p. The Employer never dismissed the Employee and the Employee was paid in full, all outstanding amounts due for public holidays.
- q. The Employer contends that the Employee abandoned his job, wherefore the Employer did not effect an unfair and unlawful dismissal of the Employee.
- r. The Employer therefore refutes any liability howsoever / whatsoever to pay compensation or at all to the Employee.

THE ISSUES

10. Based on the opposing positions of the parties as set out in their Memoranda of Claim and Defence respectively, the main issues to be determined are:

- a. Did the Employee abandon his job?
- b. Was the Employee dismissed?
- c. If the dismissal was unfair, what compensation is the Employee entitled to?

Finding of facts

11. We emphasize that the following findings of facts are provided after careful consideration of the evidence provided to the Court by the Employee and the Employer at the hearing and in their supporting documents. To this end a number of statements are examined.

12. **The date of the employment of the Employee.** The Employee's Memorandum of Claim is that he was employed in January 2002 as a Sales/ Watch Repair Technician on a six-day work week, earning a wage of \$500 per week. The evidence strongly points to the inaccuracy of this statement as follows:

- a. The Employee, during his examination-in-chief, when asked to put a date to his full-time commencement of employment with the Employer answered; *"From 2004 to be exact"*.
- b. Mr. Elias Mansoor is the owner of the property in front of which the Employer initially operated from the sidewalk and was a witness for the Employer. During his examination-in-chief he said: *"I know Basil and Alex (the Employer and Employee). I have seen them in the open space outside of my store on the side walk. Basil repaired watches and Alex*

sold newspapers". He explained to the Court that he did extensive renovations to his building in 2002 and produced invoices and receipts of building materials in support of his statement. In his written statement he stated that in 2003, when the renovations were complete the Employer asked him to rent him a small area in the building; which he did. He further stated that he thought the Employer started to work full time with the Employer "sometime in the year 2003". However under cross examination his evidence was: *"I don't know when Alex started working with Mr. Uzoma"*.

- c. In the Employee's Memorandum of claim, he stated that he worked a six day week earning a wage of \$500.00 per week. However, the Employer gave evidence, uncontroverted, that in 2004, he began to train the Employee as he was untrained in the skill of watch repairing which, according to the Employer, would take about one year to become proficient, and consequently began to pay the Employee a wage of \$375.00 per week. And in 2012 he started paying him \$500.00 per week.

13. **Vacation and vacation pay.** Further, in his Memorandum of Claim, the Employee stated that over the period of his employment he was only paid 12 days vacation. As stated in paragraph 3 above, the relationship between the Employer and the Employee was one that had **evolved**, given the nature of its genesis. Accordingly, there were none of the structural norms such as, for example, a contract (written or unwritten), which laid out job description, quantum and frequency of vacation with clear understandings of the parameters that governed those relationships. Consequently, the Court does not have a template against which to make some clear determinations. The question of vacation is a case in point.

14. The Employee has stated that he was only paid 12 days vacation over the period of his employment. During the hearing, however, in replying to questions under cross examination by Learned Counsel, Attorney Ms Mary White, these were the responses given by the Employee. Attorney: *"Did you travel on several occasions to Guyana between 2003 and 2004?" Employee answer: "Yes".* Attorney: *"Did you get rebated tickets?" No answer.* Employee continued: *"I did travel and it was vacation".* (Reference to rebated tickets alluded to evidence given that the Employee's wife was an airline employee and had access to such facility). During his examination-in-Chief, the Employee was asked: *"Did you receive payment of any kind for public holidays?" Answer: "Yes, I have the cheques - about 2013 - started receiving payments about 2013".* Further questioning during examination- in-chief: Question: *"When you started working with the Employer at first were you receiving vacation and vacation pay?" Answer: "Monies received".*

15. **Did the Employee Abandon His Job?** The outcome of exchanges on September 1, 2014 and beyond gave rise to the Employer's Defence of Job Abandonment. It is the Employee's case that "on or about August 25, 2014 he **"took** 6 days vacation but my Employer did not pay me my vacation pay for the 6 days". The Employee returned to work on September 1, and asked for his wages and holiday pay. The Employee's return to work coincided with the return of the Employer's wife to Antigua from the USA, having been diagnosed with terminal cancer.

16. This unfortunate familial episode gave rise to a number of challenges, including financial ones, for the Employer who had to travel to the USA to accompany his sick wife back to Antigua. The Employee knew of this domestic development. In addition the business had to be closed at intervals as the Employee's vacation

overlapped with these events and there was no one to manage the business with both Employee and Employer being away at the same time.

17. Notwithstanding the requirement of Part 2 C18(3) of the Antigua and Barbuda Labour Code which states that *"the dates of the taking of earned vacation leave shall be fixed by agreement between employer and employee"*, this situation points to the informal and unstructured relationship that existed between the Employer and Employee in that the taking of vacation was seemingly a unilateral decision by the Employee who, as he put it, **"took"** 6 days vacation at a time when the taking of such vacation clearly impacted the running of the business.

18. The uncontroverted evidence is that in response to the Employee's request for payment, the Employer pointed out his financial difficulty and asked the Employee to give him time to pay having regard to his domestic circumstances.

19. It is the Employee's evidence under cross examination by Learned Counsel that before the September 1, 2014 exchanges, all was well with the employment relationship. In the Employee's own words: *"I did not complain - there was basically no problem"*.

20. Arising out of the September 1, exchanges are two different related responses. On the one hand, the Employee, in his Memorandum of claim stated that on or about September 8, 2014, he reported for duty late and the Employer became very angry and sent him back home.

21. The Employer, on the other hand, stated that the Employee demanded his holiday pay and salary which amounted to \$1500.00. *"I did not pay him anything when he showed up. He did not remain on the job and returned about*

2.00 pm later that day. I paid him \$500 which he took and left. I did not see the Employee until 9 days later when he came back demanding the balance of his wages and holiday pay. I begged the Employee to be reasonable stating that I had no money since I had to close the business more often than it was opened”.

22. It is the further evidence of the Employer that he next saw the Employee **one week later** with a Union Officer, and yet later on November 14, at the funeral of the Employer's wife at which the Employee offered condolences and said nothing more. His last encounter with the Employee was at a Conciliation hearing on April 1, 2015, **some seven (7) months after the initial exchanges** on September 1, 2014.
23. **Other Concurrent Employment:** In addition to the above exchanges, another issue of fact that might have impacted the behavior of the parties in this matter and on which the claim of job abandonment could conceivably have been grounded, was the matter of concurrent employment, which we now address.
24. Tendered and unchallenged in evidence were documents which provided credible government records indicating that during the currency of the employment with the Employer, including period of claimed *unfair dismissal*, the Employee held full-time employment concurrently with a number of other employers.
25. From November 2013 up to and including August 2015, the Employee was fully employed by Philip's Carpeting and Cleaning with total earnings amounting to \$45,449.25. From September 2015 to October 2015, the Employee further obtained employment with 3-D Engineering and earned some \$982.50. The Employee was also employed with Sanitex.

26. These engagements were largely “graveyard” assignments involving all night and early morning working and led to a request from the Employee to the Employer for a change of starting hours to a later daily starting time on the job. Evidence was given by the Employer that the Employee was often found sound asleep during the course of his day job with the Employer. Indeed this was also confirmed in oral evidence given by Mr. Elias Mansoor when he stated in giving evidence that: *“I see Alex sleeping and Basil saw him as well”*. This was confirmed in his written evidence where he stated: *“I can see the operation. It is just a screen between the watch business and mine... I have seen the Employee sleeping on the job. He sometimes put his head on my cash register”*.

27. Given the chronology of the dates of absences of the Employee from his job with the Employer, as outlined in paragraphs 21 and 22 above, and his periods of other full time engagements concurrent with the period for which he is claiming unfair dismissal by the Employer, we are of the view that the employee showed very little interest in, and noticeable indifference, to continued employment with the Employer after the exchanges of September 1, save and except to mount a claim for unfair dismissal.

28. It is instructive that the Employee gave evidence that the Employer did not know of his concurrent employment with other agencies even as he was claiming unfair dismissal.

29. Mr. James for the Employee, made much of some procedural principles that, in his submission, the Employer ought to have followed and particularly as regards communication between the Employer and the Employee on the road to establishing Job Abandonment, and the Court is grateful to him for the research he put into these submissions. In one such submission quoted from HR

Knowledge (The HR Blog) on the issue of Job Abandonment he quoted the following:

‘As an employer it is usually a good practice, although not legally required, to reach out to contact the employee who fails to show for work.....If the employee doesn’t contact the company within a certain number of days with a reasonable explanation, the employer can then terminate the employee for job abandonment’.(Emphasis is the Court’s).

30. In the field of industrial relations we cannot overlook the importance of the peculiar prevailing circumstances and facts of each case. In the instant case, it has been stated *supra* that the relationship between the Employer and the Employee evolved into a close informal one where, initially, the Employer was accommodating and compassionate not only to the Employee but also to his family. The relationship evolved and the normal arrangements that would govern employer/employee interaction at the workplace were more implied than expressed.
31. Uncontroverted evidence was given that the bonding was so strong in the instant case, that at times the Employer advanced payments of significant amounts to the Employee to pay for the Employee’s rent and for school fees for his children. Whether these were gifts or loans remained questionable, but the Employee did not deny that these payments were indeed made by the Employer on his behalf. Further, the Employer was invited to, and attended the wedding of the Employee. This close relationship was further underpinned by the Employer initiating a dialogue with the Employee with a view to encouraging the Employee to set up a self-employed business of his own – a matter that did not materialize as this was overtaken by the events of September 1, 2014.

32. In brief, a body of trust had developed between the Employee and the Employer and upon reviewing the evidence, we conclude that the Employee conducted himself in a manner calculated to destroy the relationship and confidence between the Employer and himself and evinced an undeniable intention not to cooperate with, nor come to the aid of, the Employer in his time of dire need.
33. Given all of these circumstances and the lack of interest and indifference shown by the Employee, we find that it was reasonable for the Employer to conclude that the Employee had abandoned his job – a conclusion with which we agree.

Was the Employee dismissed?

34. From the evidence, it was clear that the Employer did not dismiss the Employee. In fact in answer to a question put to him by Counsel: **“Was the Employee terminated?”** The Employer replied: **“I would not terminate him. He was my only assistance”**. Moreover, the Employer emphatically denied sending the Employee home to await recall.
35. Having regard to the foregoing and to the demeanour of the litigants during the trial we are of the view that the Employer did not dismiss the Employee. Consequently there is no need to discuss the provisions of C10 of the Labour Code.
36. We are mindful though, of Clause 10 (3) of the Industrial Court Act [CAP.214] which states that this 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 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....."*

The Decision

37. Consequently, the Reference is hereby dismissed and there is no order as to costs.

Dated this 13th day of September 2019


.....
Samuel R. Aymer
Chairman


.....
Dr. Hayden Thomas
Member


.....
St. Lawrence deFreitas
Member

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