

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/24 of 2017

BETWEEN:

FAITH PIGGOT

Employee

and

WOODS PHARMACY LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

Appearances:

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

Mr. Justin L. Simon QC of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2020: November 09

2021: May 28

JUDGMENT

Brown, P:

Background

1. As a company incorporated in Antigua & Barbuda, the Employer carries on a retail business under its trade name Woods Pharmacy at the Woods Centre, Friars Hill Road on the outskirts of the City of St. John's. Apart from dealing with prescription drugs, it is also engaged in the importation and sale of a variety of products falling into several groups including non-prescription, over-the-counter medication, greeting cards, toiletries, hair products, stationery and baby care products.



2. The Employee who holds a BSc degree in Accounting, commenced her employment with the Employer on December 15, 2007 in the position of Store Accountant for which her last monthly salary was \$7,850.0. In addition, she also received monthly allowances totaling \$1,500.00.
3. The Employee's responsibilities, as stipulated in Employer's letter of employment dated November 14, 2007, were as follows:

"a. Control, management and reconciliation of stores accounts.
b. Generation of monthly Financial Statements.
c. Work with stores auditors at end of financial year.
d. Participate in annual stocktaking.
e. Assist with the collection of receivables, supervision/making of local and overseas orders.
f. Payment of all Vendors not later than 15th each month.
g. Payment of all staff salaries
h. Payment of taxes on time
i. Reporting/explanation of store's financial trends.
j. Assist with stores IT
... "

4. During a meeting with two of the Employer's directors on April 06, 2016, the Employee informed them that she planned to open a retail store in the city of St. John's on June 01, 2016. The Employer became concerned that the Employee's business would compete with its own and requested details of the type of products she intended to sell.
5. Although she did not expressly decline to do so, the Employee was hesitant to comply. In light of her hesitation, by letter dated April 07, 2016, the Employer wrote to the Employee requesting that it be advised of the "type of retail business" she intended to undertake and the "type of products" she would be offering for sale.
6. In response, by letter dated April 11, 2016 the Employee undertook to submit her formal response no later than April 18, 2016. However, by letter dated April 18, 2016, she requested a further "2 days" within which to reply. Eventually, by letter dated April 19, 2016 the Employee wrote to the Employer indicating that her business would not be a competitor to that of the Employer. She disclosed neither the type of her business nor the products she intended to sell.

7. Further, by that letter, the Employee stated that she could “understand and appreciate the basis” for the Employer’s concern. Moreover, she noted her awareness of her “fiduciary role and contractual obligations” in respect of which she did not “intend on doing anything that would be harmful to the relationship of mutual trust”.
8. In turn, the Employer again wrote to the Employee by letter dated April 20, 2016 reminding her of the various items it sold apart from pharmaceuticals and seeking her assurance that as its employee she would not be competing with the company’s business. More precisely, the Employer requested that the Employee clarify whether she would be selling any of the items retailed by the Employer.
9. The Employee maintained her intransigence and, through her consultant, informed the Employer that she was under ‘no lawful or customary obligation’ to provide it with a list of items to be sold in her business.
10. By letter dated June 14, 2016 the Employee’s services were terminated on the grounds following:
 - (a) That she was in continuing breach of her implied duty of loyalty and fidelity by setting up a competing business while her employment subsisted which rendered her continued employment untenable.
 - (b) Her lack of respect for her superior and the breakdown of the employment relationship in that she refused to follow the oral instructions of Dr. Nicholas Fuller to provide him with information of the amount due to the Antigua & Barbuda Public Utilities Authority to facilitate payment of the outstanding amount.

11. We reproduce the letter of dismissal as follows:

“Mrs. Faith Pigott

...

Dear Mrs. Pigott,

I refer to the various correspondence between yourself and the undersigned between April 7 and April 20, 2016 which relates to my seeking necessary information from you to determine whether or not your retail business with your husband, recently opened in the city would be a

business competitor of Woods Pharmacy where you hold the position of Store Accountant.

Due to your failure to be any more specific than advising that, "we will not be in the pharmaceutical business but rather in a small retail business", letters from my attorneys dated April 26, 2016 to your consultant, and June 9, 2016 to your good self. To the option of resigning, your consultant has stated in his letter of June 10, 2016 that "my client does not intend to relinquish her position", after suggesting that your start-up business could in no way be considered to be competing with my well-established business.

Regrettably, I must now confirm that your employment with Woods Pharmacy has been terminated with immediate effect on the ground of the continuing breach of your implied duty of loyalty and fidelity as an employee, in setting up a competing business whilst your employment subsists; given the position which you hold, your continued employment with Woods Pharmacy has become untenable.

As the Store Accountant, your responsibilities included (a) control, management and reconciliation of store accounts; (b) generation of monthly financial statements; and (c) reporting/explanation of store's financial trends – all of which provide you with full knowledge not only of Woods Pharmacy's inventory, but of our suppliers, our costs, our high and low sale items, and our profit margins. Your store, while it does not retail prescription medication, carries a number of our other high sales items which lend to our profitability. This is no accident, and your reluctance to disclose your inventory when asked clearly points to your discomfort. Our employment relationship, could not in these circumstances continue with the expected mutual trust and confidence which in itself is a substantial legal requirement.

The incident yesterday where you refuse to follow my oral instructions in respect of the APUA bill following a request from the accounts clerk that you inform her of the amount due that I may sign the necessary cheque for payment, was indicative of your lack of respect for my authority, and the breakdown of our employment relationship. Your services were accordingly terminated orally.

Kindly turn over or return all our business files and paraphernalia to Mrs. Thomasine Greenaway-Whyte. We shall in due course advise of any leave/vacation due to you for which you will be paid.

We wish you success in your business and future undertakings, and thank you for your many years of service.

With kind regards,
Dr. Nicholas Fuller

...”

The Opposing Cases

12. By her Memorandum of Claim, the Employee recited the chronology of events and made the following assertions:
 - (a) The “economic identity” of the Employer’s business is that of a pharmacy and as such the main items offered for sale were prescription and over-the-counter drugs and toiletries which accounted for 70/75% of its annual business activity.
 - (b) After her assurances that her business would not compete with that of the Employer, the Employer engaged in a series of actions intended to harass and pressure her into either providing a list of the items she intended to sell or immediately resign from her position.
 - (c) The Employer embarked on treatment towards her which was designed to harass her, pressure her and treat her with great indifference.
 - (d) The Employer’s ultimatum to the Employee that she either resign or be fired meant that the employment relationship was at an end and amounted to an act of constructive or unfair dismissal.
 - (e) Over a period of weeks the Employer demonstrated that it no longer trusted the Employee.
 - (f) The Employer’s written statement of termination did not provide a precise or the principal reason for her dismissal as required under the Labour Code.
13. On the other hand, the Employer disputed the Employee’s claim on the following grounds:
 - (a) The Employer’s business consisted of fourteen departments in respect of which the Employee had unlimited access to the Employer’s records including its product orders, its suppliers and its financial statements.

- (b) Despite its requests, the Employee steadfastly refused to inform the Employer of the products she would offer for sale in her retail business.
- (c) Despite the Employer's efforts through its legal representatives to inform the Employee of her duty of fidelity to the Employer, the Employee remained intransigent in **her resolve to continue in her employment while in competition with the Employer's business.** (our emphasis).
- (d) In addition to maintaining her intransigence, the Employee adopted an uncooperative attitude towards the Employer and refused to provide pertinent information to the Employer in respect of its payment obligation to the APUA.
- (e) The Employee's dismissal was first effected verbally on June 13, 2016 and confirmed by letter dated June 14, 2016.
- (f) The Employer was justified in dismissing the Employee on the basis that the type of products she offered for sale constituted 90% of the Employer's retail product sales, a fact which was well known to the Employee.
- (g) The Employee's claim should be dismissed.

The Legal Parameters

14. On the core facts of this case, the obvious starting point for the determination of the main issue - whether the Employee was unfairly dismissed - is the law regarding the employment relationship. The pertinent legal principles can be traced back to the late 19th Century. In the case of **Sanders v Parry** [1967] 2 All ER 803, Havers J. referred to the previously established authority of **Wesser Diaries Limited v. Smith** [1935] All ER 78, in which the court quoted the words of Smith L. J. in **Lamb v. Evans** (1893) 1 Ch 218, as follows:

"... I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity..."

15. Later, in **Hivac Ltd v. Park Royal Scientific Instruments Ltd** [1946] 1 All ER 353, Lord Greene, M. R. said:

"... it has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable..."

...During the subsistence of the contract of service and during his master's time the servant has to look after, not his own interests, but those of his master".

“... in my view, the obligation of fidelity subsists so long as the contract of service subsists, and even in his spare time an Employee does owe that obligation of fidelity...”

Discussion

16. As we understand the authorities the essential questions in this case are:

- (a) Did the Employee owe a duty of fidelity and good faith to the Employer?
- (b) If owed, did the Employee commit a breach of it?

17. As to the answer to the first question, the answer is indisputable. The Employee does owe that duty.

18. In relation to the question of the breach of the duty, we consider Reference No. 5 of 1994, **Alexander John v. Peter Reitz t/a Caribbean Dental Services** to be most instructive. In that case, the employee was employed as a Dental Technician. He was a senior member of staff with 10 years tenure as a highly competent and trustworthy employee in charge of a department in the Employer's business. Over the years the employer and employee developed a close and respectful personal relationship. The employee had access to the employer's customer's files and knew their names and addresses of its suppliers. He therefore was privy to or had access to much of the Employer's confidential information and business connections.

19. In reaching its decision in that case, this Court determined that the employee owed the duty of fidelity to the employer but the extent of that duty varies according to the nature of the employment. In its judgment, the Court noted its reluctance to impose restrictions that would hamper employees' efforts to increase their earnings in their spare time. The Court referred to the judgment in the **Hivac case** which held that employees should be restrained from working for competitors in their spare time if in doing so, they caused or were likely to cause great harm or serious harm to the employer's business. On that basis, the Court concluded:

“In the final analysis, we do not find that the Employee's act in working for PreOre lab during his spare time, even if distasteful to the Employer, caused great harm or serious harm to the Employer and in the circumstances, we are forced to conclude that the dismissal was not fair.”

20. Being dissatisfied with that outcome, by **Civil Appeal No. 9 of 1996 Peter Reitz v. Alexander John** the employer appealed against the decision of the Industrial Court. The Court of Appeal, in a blunt oral decision allowed the appeal thereby setting aside the finding of the court below. It reasoned that, by working for the appellant's competitor, the employee was in direct breach of the implied term and caused great harm or serious harm to the employer. As a result, it concluded that the dismissal was not unfair.
21. We are mindful that each case turns on its own facts. We note the following salient points. There can be no doubt that in the employment contract there is an implied term imposing a duty of fidelity on the Employee. That is indisputable. Based on the authorities, we think it safe to say that, given the Employee's position in the Employer's business, consideration of the effect of a breach or potential breach of that implied term is critical. It is obvious that the Employer's information regarding its customer's supplies and pricing and so on, to which the Employee was privy, could potentially be most valuable in the establishment of her own family business.
22. Based on the nature of the Employer's business and that in which the Employee was about to engage, there can be no doubt that a considerable amount of competition was likely to develop. That conclusion is based on our knowledge of the geographical location of the businesses, the products and population size. This point is underscored, having regard to the fact that at the material time, the Employee's competing business was at a start-up phase which means that the Employer's confidential information if it had not already influenced the employee's decision, could potentially play a part in its success, given the nature of the products, the possible seasonal changes in demand, the pricing of products and the sources for new supplies.
23. The Employee was a senior employee providing professional services and not a junior employee providing, say, manual labour. Moreover, she was not intending to engage as a mere employee in her own business but rather would always, with her husband, be at least a joint proprietor and/or manager engaged at the highest level of decision making. Even at the first blush, it should be easy to see how her specialized knowledge of the Employer's business would potentially be pivotal for the success of the new venture.
24. On the facts of this case, there was a clear risk that great or serious harm could result from the engagement of the Employee in her competitive business. This

harm could manifest itself in terms of the overall volume of turnover, the rate of turnover of particular items and the ultimate profitability of the business as a whole or of in certain departments and for certain product items.

25. It is common ground that immediately before the commencement of her business in early June 2016 the Employee had steadfastly failed or refused to disclose the particulars of the items she intended to sell. That failure or refusal continued after the commencement of the Employee's competing business.
26. Moreover, the Employee testified that it was her understanding that 'competition' and 'conflict' had to do only with the physical proximity of her business to that of the Employer. She said, "My understanding of competition was that I had to be in Woods Mall. If I am Redcliffe Quay, there would be no competition and I was advised that this is the case."
27. In proceeding, we turn to the reasonableness of the conduct of the parties at the material times. We bear in mind the provisions of sections C 59 (1) (a) which empowers an employer to summarily terminate the employment of an employee who is guilty of misconduct so serious that the employment relationship cannot reasonably be expected to continue. In that regard, we are also mindful of section C 9 (1) which provides for the termination of the services of an employee, without advance notice, where he has engaged in misconduct related to his work. Needless to say, the Employer's actions in effecting a dismissal grounded on those sections turns on the application of the test of reasonableness under section C 58 (2).
28. Ultimately, the question we are obliged to answer is whether the Employer acted reasonably or unreasonably under the circumstances when it dismissed the Employee. The answer can only come upon careful consideration of the pertinent chronology of events. The starting point, in our view, is the then subsisting good working relationship between the parties. The watershed developed on or about April 6, 2016 where the Employee informed the Employer of her intention to shortly open her family's retail store in St. John's and the Employee declined to comply with the Employer's request for details of the type of products she intended to sell.
29. In our estimation, being mindful of the implied term imposing the duty of good faith and fidelity, it was reasonable for the Employer to make the request. There is a clear inference that the Employer had legitimate concerns about possible conflicts of interest in the performance of the Employee's duties and the potential

competition in the market place by the actual sale of products. We have no evidence that the meeting on April 6, 2015 was anything but cordial.

30. By the following day, it appears that the battle line was drawn by the Employer's letter formally requesting the required particulars. The Employee's failure to respond up to April 11 was indicative that she was inclined to resist the Employer's request. That inclination was confirmed when she requested an additional week within which to reply. When she did reply eventually by letter dated April 19, 2016 it was abundantly clear that she intended to refuse to comply with the Employer's request. In her misguided view, it was sufficient to merely state that her business would not be a competitor to that of the Employer and that she intended to maintain the "mutual trust" between them. In our opinion, the Employee's response to the Employer's reasonable request was misguided in that while she paid lip service to the maintenance of mutual trust, her very refusal to provide the required details was in and of itself inimical to that principle. By this point the watershed was clearly defined and would eventually become more pronounced and fateful.
31. We note the Employer's continuing reasonableness in the face of the Employee's stated position. It promptly responded by highlighting the inadequacy of the Employee's response and highlighted its ongoing concern by listing the wide range of its products and enquiring if her business would be "selling any of the items retailed by Woods Pharmacy".
32. In response, Mr. Carty wrote to the Employer by letter dated April 25, 2016. The terms of that letter were quite unfortunate in that it attempted to "flip the script" by accusing the Employer of threatening the Employee's "job security" exerting "undue pressure" on her. We find that the evidence before us discloses no such threats or pressure. Most pointedly, he confirmed that the Employee's refusal to comply with the Employer's reasonable requests was based on his advice.
33. In response to Mr. Carty's letter the Employer's Attorney-at-Law Mr. Nicholas Fuller attempted to reset the Employee's focus on the settled legal principles and the Employee's unreasonable intransigence. The Employer's sound position and the Employee's untenable stance as correctly highlighted by Mr. Fuller are instructive. In part, his letter reads:

"Mr. Anderson Carty

...

...

You will be well aware that all employees have a lawful duty of loyalty and fidelity to their employer. It is well documented in the common law and is an implied term of employment. This duty includes a duty not to compete with the business of the employer as such competition is harmful to the employer. I attach hereto excerpts evidencing these lawful duties.

If your client wishes to open a business that competes with her employer then she may do so after she resigns her employment.

It is unreasonable and a conflict of interest for your client as a senior employee of Woods Pharmacy to have access to all of my client's confidential information including wholesalers, pricing, profits, income and the like and then open her own retail business that competes with her employer while at the same time remaining in the employment of my client. I am sure you can see the issue here.

In order to clarify that there will be no such competition issues, my client simply requested information as to the type of items that your client will be retailing to the general public. Nothing more.

For whatever reason, your client has refused to divulge this information and you have advised in your letter that your client has been "firmly advised against doing so".

I am of the opinion that this advice to your client is unhelpful to her as the information requested will come to light once your client's store opens to the public in June. Refusing to divulge this information at this stage only gives the impression that your client's new retail store will indeed compete with the retail business of her employer. If your client is to retail shoes and socks, for example, why not say so and clear the air of any competition issues?

I trust you now understand the reason for my client's information request.

Nicholas A. Fuller"

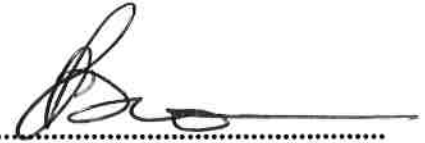
34. By June 9th when the Employer's Attorney-at-Law wrote to the Employee, the Employee's family business had taken off or at least was up and running. In that letter, it was noted that the products sold in the Employee business include the Employer's client's bigger sale items as disclosed in their Sales Statistics. Ultimately, the Employer concluded that the Employee had been using the Employer's confidential import and sales information" for her personal use "in open direct competition" with the Employer.

35. In his Witness Statement Dr. Fuller one of the Employer's directors, asserted that when the Employee's store opened in early June 2016 the Employer found that "90% plus of her products were indeed being sold by Woods Pharmacy, and were indeed our big sellers". Further, at the trial he testified that when the Employee first informed him of her intention to open a store in which she would be selling "trinkets and stuff to tourists", he specifically told her: "If you sell what we sell, it is going to be an issue with the store, you can't compete with us... if you are going to compete with us it would be a problem".
36. He further testified that "it became obvious that the significant majority of the goods being sold are the same as those sold by the Employer... including over-the-counter drugs and toiletries... it was like a mini-Woods Pharmacy".
37. For the Employee's part, she testified that she did not think it was necessary to give the Employer a list of the items she intended to sell. According to her, "I did not see it as an obligation" to do so. Further, she said that when Dr. Fuller told her about the type of products, she told him that it was going to be a "convenience store" but "I did not go into details" Moreover, she repeated that "I did not think at that time it was necessary".
38. Further, the Employee admitted that before working for the Employer she had no experience in the retail business and that "since working at Woods I became knowledgeable about retail business". Earlier, she had admitted that she was aware of the Employer's business activities; she had a good idea of its customer range which was of a wide variety; and that she was also aware of its suppliers both overseas and local.
39. As to the competition, the Employee testified that based on the location of the stores she did not consider selling the same products would be detrimental to the Employer. According to her, they were not in the same geographical area for competition.
40. We find that both Dr. Fuller and the Employee to be credible witnesses. When their evidence differ on material points, we prefer that of Dr. Fuller.
41. Having regard for the legal authorities and the evidence before us, Learned Counsel's submissions are far more convincing and persuasive than those of the Employee's Representative. In the final analysis we find the following as matters of law and fact:

- (a) The contract of employment between the parties included an implied term that the Employee owed a duty of good faith and fidelity to the Employer.
 - (b) The Employee did in fact open and carry on the business of a retail store selling such products as to constitute itself as a competitor with the Employer's Wood Pharmacy Store.
 - (c) The Employee's implied duties include an obligation to avoid conflicts of interest between the parties and to avoid the erosion of the mutual trust and confidence between them.
 - (d) By conducting herself as she did the Employee acted in breach of the duties of fidelity and good faith arising from the implied terms of the employment contract. Moreover, her actions contributed to the erosion of mutual trust and confidence between the parties. Ultimately, the Employee was guilty of competing with the Employer while the employment contract between them subsisted.
 - (e) The actions of the Employer in response to the potential and eventual realization of a situation of competition and conflict of interest were reasonable. The Employer's action in dismissing the Employee falls squarely within the band of reasonable actions which a reasonable employer would take in the circumstances. In effect, the Employer has passed the test of reasonableness under Section C58 (2) of the Labour Code. We are satisfied that the dismissal of the Employee was not unfair.
42. In passing, we note that, in accordance with the employment contract, the Employee received her severance pay annually as well as the prorated amount for her services for the period June 1 to June 13, 2016.
43. For completeness, we also note that the opposing positions of the parties in respect of the manner in which the dismissal was effected and the reasons therefor were taken into consideration. In particular, we are mindful of circumstances surrounding the Employer's request for certain information to facilitate payment of the APUA utility bill which gave rise to an issue of insubordination. However, it is not necessary to give any particular consideration to that issue since our conclusions above will suffice to fully determine this matter.

44. For the reasons stated above, we are constrained to dismiss the Employee's claim of unfair dismissal. And we make no order as to costs.

Dated this 28th day of May, 2021



Charlesworth O.D. Brown
President



Samuel Aymer
Member

