ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 21 OF 2004

BETWEEN:

SHOPPERS PHARMACY LIMITED

Appellant

and

PHILMORE JARVIS

Respondent

Before:

| | |
|---|---|
| The Hon. Mr. Michael Gordon, QC | Justice of Appeal |
| The Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| The Hon. Mr. Hugh A. Rawlins | Justice of Appeal |

Appearances:

Mr. William Archibald, with him Ms. Rhodette Brown for the Appellant
Mr. Jason Martin for the Respondent

---

2006: July 18;
November 29;
2007 January 15

---

JUDGMENT

[1] RAWLINS, J.A.: This appeal is against a decision in which the Industrial Court held, by a majority,[1] that the appellant, Shoppers Pharmacy, unfairly dismissed the respondent, Mr. Jarvis, summarily. That Court consequently awarded Mr. Jarvis $22,500.00 as salary for the balance of his contract period and $288.46 for vacation pay; a total of $22,788.46 compensation.

[1] Hon. Edward T. Henry and Hon. Hubert Hood, Hon. Cyril Maundy dissenting.

[2] Shoppers Pharmacy appealed on the grounds that the Industrial Court erred when it did not find that the summary termination of the services of Mr. Jarvis was a fair dismissal because he had terminated his contract of employment by repudiation or by anticipatory breach. These are the grounds on which the appeal was canvassed during the first hearing in July 2006. However, this Court subsequently requested the parties to submit further written submissions on the issue whether the contract or contracts on which the litigation was based was void for uncertainty. The case came up for mention during the sitting of this Court in Antigua and Barbuda in November 2006.

[3] The issues raised by this appeal will be considered against the factual background. However, I think that it would be helpful at this juncture to set out the relevant legal principles that relate to uncertainty in contracts.

## Relevant principles on uncertainty

[4] At common law, it is trite principle that if the terms of an agreement are so vague or indefinite that the intention of the parties cannot be determined with reasonable certainty the parties have not entered into a contract. There would be no legally enforceable contract between them. A court will usually assume that the parties intend to create legal relations and will strive to give effect and efficacy to their agreements.[2] However, the court will not make a contract for the parties where none exists or go outside of the words that they have used, except in so far as there are appropriate implications of law.[3]

[5] It is noteworthy that Lord Dunedin, LC stated, in May and Butcher Ltd. v The King,[4] that a concluded contract is one which settles everything and leaves nothing to be agreed between the parties, although it may leave matters to be

[2] See Rose and Frank Co. v J. R. Crompton & Bros. Ltd. [1923] 2 KB 261.
[3] See Hillas & Co. Ltd. v Arcos Ltd. [1932] All E. R. 494.
[4] [1934] 2 KB 17n, at page 21.

determined which do not depend upon their agreement. In that case the House of Lords held that an agreement for the sale of tentage was incomplete because it provided that the price, the dates of payment and the manner of delivery should be agreed from time to time. The important consideration in that case, however, was that the parties expressly left these vital matters subject to their further agreement but had not agreed on them. These words indicated that they did not intend to be bound until these matters were further settled by their agreement.[5]

[6] On the other hand, where a term is left open to be agreed and it can be inferred that the parties nevertheless intended to be bound immediately, a court may find that there is a binding contract.[6] Thus in Foley v Classique Coaches Ltd.,[7] the parties entered into an agreement for the purchase of petrol "at a price that was to be agreed from time to time". That Court distinguished May & Butcher on the ground, *inter alia*, that the parties believed and intended the agreement to be complete and binding because they had acted upon it over a period of time.

[7] Mr. Martin, learned counsel for Mr. Jarvis submitted that, in Antigua and Barbuda, a contract of employment must contain certain fundamental terms. In this regard he said that statutorily, section C5 of the Antigua and Barbuda Labour Code[8] represents the minimum standard that there must be in such a contract. The section provides that an employer shall within 10 days of employing a person give to the employee a written statement that sets out the employee's general responsibilities and related duties; the regular hours of work and rest periods; the starting pay and the method for calculating it; the length of the employment, if it is not indefinite; the period of probation, if necessary; the employee's leave and vacation privileges and the employee's obligations with respect to trade unions. In my view, however, this provision is meant to address a post contractual obligation on the part of employers.

---

[5] See "The Gladys [1994] 2 Lloyd's Rep. 402. It appears that had the agreement been silent on these points the court could have resolved them by the standard of reasonableness.
[6] See Pagnan S.P.A. v Freed Products Ltd. [1987] 2 Lloyd's Rep. 601.
[7] [1934] 2 KB 1.
[8] Cap. 27 of the Laws of Antigua and Barbuda, Revised Edition 1992, hereinafter referred to as "the Code".

[8] There is no indication that the written statement provided for in section C5 of the Code was prepared in this case. However, while such a statement would be evidence of the terms of a contract of employment and is no doubt intended to create certainty in such contracts, in my view the provisions of section C5 throw no light upon the issue of certainty of contract in the present case.

[9] The background facts in the present case would be a helpful precursor to a determination of the issues.

## The background

[10] 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. The parties entered a written agreement on 1st June 2001. The agreement expressly stated that Mr. Jarvis was employed from Monday 19th February 2001 for a period of 1 year. Under the agreement, Shoppers Pharmacy agreed to employ Mr. Jarvis on a full-time basis and to pay him $2,500.00 for the first 6 months. That salary was to be reviewed "for the purpose of granting an increase of an additional $100.00 monthly which would yield a total of $2,600.00 payable for the remaining six months period as salary". Mr. Jarvis was entitled to 2 weeks annual vacation.

[11] In return, Mr. Jarvis agreed to work as a full-time Pharmacist for Shoppers Pharmacy. He also agreed to undertake all obligations that related to the profession of a licensed Pharmacist in accordance with the law and to provide superior quality service to customers, in order to maintain high standards and in keeping with the company's reputation. The agreement stated that all other exceptions and requirements not expressed in the agreement should be mutually agreed by the parties. During the tenure of his full-time employment, Mr. Jarvis'

hours of work were set out in a schedule which was prepared on a monthly basis as agreed to between him and Shoppers Pharmacy.

[12] On 28th August 2001, Colleen Samuel, who was involved in setting up the Pharmacy, returned to work at Shoppers Pharmacy as the Chief Pharmacist after a 3 month course in Jamaica. Prior to her return, Mr. Jarvis had participated in preparing his own work schedule. On her return, however, Ms. Samuel discarded it and prepared a new schedule. The new schedule conflicted with Mr. Jarvis' work schedule at the Immigration Department. He asked to be employed part-time. Shoppers Pharmacy agreed. Ms. Samuel prepared a part-time schedule which would have been subject to change every month. Mr. Jarvis found that schedule inconvenient. He asked Romaneta Francis, the Managing Director of Shoppers Pharmacy, to intervene to settle the schedule. She did not intervene. Ms. Francis' evidence is that Mr. Jarvis walked away and did not report to work on the following day, 29th August 2001, but returned on 30th August 2001 when he was given a dismissal letter.

[13] The letter was dated 29th August 2001 and signed by Ms. Francis. It stated:

> "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 (sic) 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".

Ms. Francis wrote this letter on the advice of a friend who is a Solicitor. He led her to believe that Mr. Jarvis was employed with a 3 months probationary period and could therefore have been summarily dismissed within that period, without notice.

[14] In his evidence in chief, Mr. Jarvis said that when the work scheduling dispute was not resolved on 28th August 2001, he continued to work his shift and returned to work on 29th August 2001 when he was given the termination letter. This was a question of fact and the majority of the Industrial Court believed Mr. Jarvis when they stated[9] that Mr. Jarvis returned to work on 29th August 2001. Had they accepted Ms. Francis' version, this could have led to the conclusion that Mr. Jarvis abandoned his job.

[15] Quite wisely, neither before this Court nor before the Industrial Court did Mr. Archibald, learned counsel for Shoppers Pharmacy, seek to rely upon fair dismissal within the probationary period, although that was the reason expressly stated for Mr. Jarvis' dismissal in the termination letter. Mr. Jarvis was on a fixed term contract, which had no provision for a probationary period. Neither section C8 nor section C9 of the Code, which respectively provides for the length of such a period, and entitles an employer to terminate employment summarily and without reason, applied to Mr. Jarvis under his contract.

[16] Against this background, the first question is whether the Industrial Court erred by failing to find that Mr. Jarvis had repudiated his contract of employment with Shoppers Pharmacy.

Was there repudiation?

[17] Section C7 of the Code re-affirms the common law principle that an employer and employee may enter into individual contracts. This section however renders null

[9] In the first paragraph of page 6 of their judgment.

and void 3 types of provisions in such an agreement,[10] but none of these exceptions existed to invalidate the agreement between the parties in this case.

[18] In his submissions, Mr. Archibald insisted that Mr. Jarvis repudiated his contract when he said that he could not meet the work schedule set by Ms. Samuel and asked for part-time employment instead. Mr. Archibald contended that when Mr. Jarvis asked to work part-time, he thereby committed a fundamental breach of the agreement because he entered into fresh negotiations with Shoppers Pharmacy. Mr. Archibald submitted that Mr. Jarvis "abandoned" his contract when he requested to work part-time on a contract which required him work full-time, left the job and did not return until 30th August 2001.

[19] These submissions, with respect, are fallacious because when Mr. Jarvis asked for a part-time schedule Shoppers Pharmacy agreed. They did not at that time tell him that such a proposal amounted to a breach of a fundamental term, which entitled them to repudiate the agreement. They did not then actually repudiate the contract by accepting his breach. Rather, they accepted Mr. Jarvis' proposal and set about making a part-time schedule. They had thereby agreed to amend that term in the agreement which stated that Mr. Jarvis was employed full-time, and varied it to a term that he would work part-time. There was no act of repudiation on the part of Mr. Jarvis. Ms. Francis expressly terminated Mr. Jarvis' employment in the mistaken belief that he was on probation, and this entitled her to terminate him summarily, without notice. The appeal therefore fails on this ground.

Was there anticipatory breach?

[20] In relation to anticipatory breach, Mr. Archibald submitted that Mr. Jarvis's statement to Ms. Francis that he could not meet the new schedule, coupled with

[10] These proscribed provisions are terms which establish conditions which fall below the minimum standards established by the Code; terms which require the employee to refrain from associating for the purpose of collective bargaining, or terms which conflict with a provision contained in a collective bargaining agreement under which the employee is a beneficiary to the disadvantage of the employee.

his failure to report for work on the following day, 29th August 2001, conveyed his intention of anticipatory breach of his employment contract. According to learned Counsel, Mr. Jarvis thereby behaved in a manner which showed that he intended to breach his contract. Therefore, said Mr. Archibald, no contract existed in law at the time when he received the termination letter. On the other hand, before the Industrial Court, learned Counsel for Mr. Jarvis submitted that there could have been no anticipatory breach because Mr. Jarvis did not at any time decline or express an intention not to perform his work pursuant to the contract, neither did he indicate an intention not to resume his duties under the contract.

[21] The majority of the Industrial Court made the following statements in relation to repudiation and anticipatory breach:

> "In regard to the question as to whether or not Mr. Jarvis had repudiated his contract, his hours of work were arbitrarily altered by the Chief Pharmacist. On the return of Colleen Samuel further difficulties arose in arriving at shift work in the Pharmacy that was acceptable to all. When Mr. 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 employer's contention of an anticipatory breach of contract. Having given some consideration to the matter, Jarvis returned to work the next day and received the letter terminating his employment. Anticipatory breach 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 the chain of events. … The entire matter of anticipatory breach was not in the letter of dismissal, and cannot be now allowed as a legitimate reason for dismissal."

[22] I have found that there was no repudiation that might validate Shoppers Pharmacy's summary dismissal of Mr. Jarvis. The majority of the Industrial Court did not accept Ms. Francis' evidence that Mr. Jarvis did not return to work on 29th August 2001. When they accepted Mr. Jarvis evidence that he returned to work on the 29th August 2001, the elements of anticipatory breach could not be

satisfied. The majority of that Court therefore correctly held that anticipatory breach was not a vitiating ground for Mr. Jarvis's summary dismissal. They concluded that Mr. Jarvis did not abandon his employment. This was a matter of fact which was in their purview to decide. They concluded, correctly in my view, that there was no anticipatory breach. The appeal also fails on this ground.

Uncertainty

[23] Mr. Archibald submitted that the original written agreement under which Mr. Jarvis worked full-time was a validly constituted contract. According to Mr. Archibald, that contract was brought to an end when Shoppers Pharmacy agreed to accept Mr. Jarvis' new offer that he should be permitted to work part-time. Mr. Jarvis' new offer amounted to a repudiation of the full-time contract. The terms of the contract around which the new offer was to be based were never settled and the new contract was therefore void for uncertainty and otherwise incomplete.

[24] Mr. Martin is basically in agreement with Mr. Archibald's position on the issue of uncertainty. He stated that the written agreement of 1st June 2001 was valid because it contained the minimum terms provided in section C5 of the Code. He then stated the following in relation to "the second agreement":

> " … this agreement is clearly lacking in fundamental and definite terms and is therefore unenforceable. The only term agreed was that the Respondent would be working part-time. However this is extremely imprecise in and of itself, as there is no agreement on what amount of hours the Respondent would be working, and whether this in turn would be suitable to the Appellant. Further and flowing from this there was no agreement as to the calculation of the Respondent's remuneration."

[25] Mr. Martin pointed out that not only was the term part-time imprecise as far as it concerned the number of hours which Mr. Jarvis was expected to work, but more, there were no discussions as to his terms of employment, including vacation privileges, and there was no performance by either party on it. Mr. Martin stated that the new agreement was apparently embarked upon by Mr. Jarvis in a moment of frustration in response to a unilateral change in his work schedule; and it is

silent on the remuneration that is to be paid for the part-time employment. Mr. Martin concluded that the part-time contract, which was unwritten, was therefore void for uncertainty.

[26] I agree that the contract into which the parties entered on 1st June 2001 was not void for uncertainty notwithstanding that it did not specify Mr. Jarvis' exact hours of work. It was a written contract signed by the parties. It stated that his work was full-time. Mrs. Francis stated in her evidence that this meant that he was to work for 40 hours per week. The parties agreed from time to time on the actual monthly work schedule. They agreed on the other fundamental terms of the agreement. The consideration and the commencement date were stated. The contract was for a definite duration of 1 year. It contained his job title. The work which he promised to perform was defined. Importantly, the intention of the parties to be bound by the agreement is evidenced in the fact that they acted upon it over a period of time until Ms. Samuel returned.

[27] I am inclined to think that Mr. Jarvis' decision to seek to work part-time and Shoppers acceptance indicated that the parties were in the process of negotiating what might have amounted to a variation of the original contract. Had the parties specifically preserved the original agreement this would have been put beyond doubt. It is really a question of intention. The evidence indicates that the parties were mainly concerned with scheduling the hours that Mr. Jarvis was to work. There was no action which constituted a termination or repudiation of the original contract. However, whether I am correct in this view or whether, on the other hand, the original contract was at an end and the interests of the parties depended upon them entering into a new contract, it is clear that no valid or completed contract existed after Shoppers Pharmacy accepted Mr. Jarvis' proposal to work part-time.

[28] If the parties only intended to vary the original contract of employment, the term part-time work is imprecise in the first place. Secondly, even if they intended to

vary the original contract so that the only term with which they were concerned related to the work schedule, there was no agreement on this. Additionally, the parties did not agree on the level of remuneration for the part-time work. There was no performance under the varied agreement which could assist in the resolution of these uncertainties. In this scenario, the agreement was void for uncertainty. If, on the other hand, by the intention of the parties the original agreement was at an end, the only term on which they agreed for the purpose of a new contract was that Mr. Jarvis would work part-time. There would have been no enforceable contract between them. The result is that Mr. Jarvis could not claim compensation for wrongful dismissal against Shoppers Pharmacy. The majority of the Industrial Court therefore erred when they awarded Mr. Jarvis $22,500.00 compensation for wrongful dismissal.

[29] In the foregoing premises, I would allow the appeal, set aside the judgment of the Industrial Court and make no award as to costs since no special circumstances arise to warrant it under section 10(2) of the Industrial Court Act.[11]

Hugh A. Rawlins
Justice of Appeal

I concur

Michael Gordon, QC
Justice of Appeal

I concur

Denys Barrow, SC
Justice of Appeal

[11] Cap. 214 of the Laws of Antigua and Barbuda, Revised Edition, 1992.