



JUDGMENT

Philmore Jarvis v Shoppers Pharmacy

From the Court of Appeal of Antigua and Barbuda

before

**Lady Hale
Lord Collins
Sir Jonathan Parker**

**JUDGMENT DELIVERED BY
Lord Collins
ON**

17 February 2010

Heard on 14 December 2009

Appellant
James Guthrie QC
Richard Samuel
(Instructed by M A Law
LLP)

Respondent
Not represented

LORD COLLINS :

1. At the conclusion of the argument on this appeal, at which only the appellant Mr. Philmore Jarvis (“Mr. Jarvis”) was represented, the Board indicated that it would humbly advise Her Majesty that the appeal be allowed. These are the reasons for that advice.

The Facts

2. Mr Jarvis has been a qualified registered pharmacist since about 2000. He has also had a full-time job with the Immigration Department of Antigua and Barbuda as an immigration officer at the VC Bird International Airport.
3. In February 2001 he started working with the respondent, Shoppers Pharmacy Limited (“Shoppers Pharmacy”), on a part-time basis, while continuing to work as an immigration officer. In May 2001, Ms Colleen Samuel (“Ms Samuel”), a pharmacist who also worked part-time, left to go on a 3 month study course in Jamaica. Mr Jarvis was then asked by Ms Romaneta Francis, the Managing Director of Shoppers Pharmacy (“Ms Francis”), to work full-time.
4. Mr. Jarvis and Shoppers Pharmacy entered into a written contract of employment dated June 1, 2001, which was in the following terms:

“Shoppers Pharmacy agrees to employ Philmore Jarvis of Factory Road [from] Monday February 19th 2001 for a period of one year. For the first six months a salary of \$2,500.00 will be granted. At the end of this period there will be a review of that salary 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.

Shoppers also agrees to provide for the necessary benefits as required by law inclusive of Social Security and Medical Benefits contributions. Any additional benefits that may be introduced will be mutually agreed upon by both parties.

Shoppers Pharmacy agrees to provide for two weeks vacation annually.

In return Philmore Jarvis agrees to work as a full time Pharmacist for Shoppers Pharmacy in accordance with the following:

Undertaking all obligations relative to the role of a license[d] Pharmacist in accordance with the stipulations of regulations provided in the Pharmacy Act.

Providing superior quality of service to customers with a view to maintaining a high standard in keeping with the Company's reputation.

All other expectations and requirements outside of the aforementioned should be mutually agreed upon by both employer and employee."

5. Although there was no express term dealing with the matter, it was agreed or understood that Mr Jarvis would continue to work as an immigration officer. His hours (mainly in the evenings, but with some early mornings) and those of two other pharmacists working there were set out in a schedule which he prepared. Ms Samuel returned from Jamaica in mid-August 2001, and on August 28, 2001 she produced a new schedule of working hours for the pharmacists, including Mr Jarvis. This schedule conflicted with the hours of work required by Mr Jarvis' job as an immigration officer and he asked to be able to work part-time. This was acceptable to Shoppers Pharmacy and a part-time schedule was prepared by Ms Samuel, but again it conflicted with Mr. Jarvis' hours as an immigration officer. Mr Jarvis asked Ms Francis to intervene, but she did not wish to interfere with the authority of Ms Samuel.
6. Mr Jarvis was not happy with this outcome, and Ms Francis' evidence before the Industrial Court was that he had left "in disgust." Ms Francis took advice from a solicitor friend and was under the impression that Mr. Jarvis had been employed on a probationary basis and that within a 3 month period he could be summarily dismissed without notice. When he returned to Shoppers Pharmacy on August 29 (on his case, to work) he was given a letter of dismissal in these terms:

"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 had become part of your agenda as an employee within the first three months of full time employment would suggest serious problem 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."

The proceedings in the Industrial Court and the Court of Appeal

7. The Industrial Court found by a majority that the letter of termination had been written on the basis of misguided advice. There was no probationary period in either the written terms of contract (as required by section C5(1) of the Antigua and Barbuda Labour Code) or any other terms of employment. In any event he had been at Shoppers Pharmacy for well over 3 months.
8. The majority found that Mr Jarvis had not repudiated his contract of employment. His hours of work had been arbitrarily altered by Ms Samuel. When Mr Jarvis left on August 28, 2001, not having received a satisfactory settlement of the shift issue, it was presumed that he had abandoned the job. Having given some consideration to the matter, Mr Jarvis returned the next day and received the letter terminating his employment. He had not expressed an intention not to perform his duties. There was no anticipatory breach of contract, and there was no basis for summary dismissal. Mr Jarvis had been unfairly dismissed and was entitled to compensation for the balance of the contract period.
9. Shoppers Pharmacy appealed to the Court of Appeal on the ground that the Industrial Court erred in finding that the summary termination was an unfair dismissal. The Court of Appeal accepted that Mr Jarvis had not repudiated the contract. When Mr Jarvis asked for a part-time schedule, Shoppers Pharmacy agreed. It accepted his proposal and set about making a part-time schedule. Ms Francis terminated Mr. Jarvis's employment on the mistaken ground that he was on probation and that this entitled her to terminate his employment summarily without notice. Nor had there been any anticipatory breach, since Mr Jarvis had returned to work on August 29.
10. But the Court of Appeal allowed the appeal on another issue, which had not been raised by Shoppers Pharmacy but which was raised by the Court of Appeal itself at the hearing, and on which the parties were requested to submit further written submissions. That issue was whether the contract or contracts on which the litigation was based was or were void for uncertainty.
11. The process of reasoning of Rawlins JA began as follows. The contract of June 1, 2001 was not void for uncertainty simply because it did not specify Mr Jarvis' hours of work. The fundamental terms were agreed and the parties acted on it. The parties were in the process of negotiating what might have amounted to a variation of the original contract. The parties were mainly concerned with scheduling the hours which Mr. Jarvis was to work. There was no action which constituted a termination or repudiation of the original contract.
12. Then Rawlins JA said (at [27]) that it was "clear that no valid or completed contract existed after Shoppers Pharmacy accepted Mr. Jarvis' proposal to

work part-time.” He went on to reason that if the parties intended to vary the contract of employment, the term part-time work was imprecise. If they intended to vary the contract of employment only as regards the work schedule, there was no agreement on that. 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 those uncertainties. The agreement was void for uncertainty. If the parties intended to terminate the original agreement, the only term which they agreed for the purpose of a new contract was that Mr. Jarvis would work part-time, and there would have been no enforceable contract between them. Accordingly, Mr Jarvis was not entitled to claim compensation for wrongful dismissal.

Conclusions on appeal

13. This analysis of the situation is wrong. Mr Jarvis was employed full-time under the contract of June 1, 2001 on the understanding that he was entitled to work such hours as would permit him to undertake his duties as an immigration officer. It is not necessary to decide whether that entitlement would last until the expiry of the contract in February 2002, or was terminable on reasonable notice. What is clear is that Shoppers Pharmacy did not have the power unilaterally to impose a schedule without reasonable notice which would have made Mr Jarvis choose between being in breach of his contract with Shoppers Pharmacy and being in breach of his duties as an immigration officer. What is equally clear is that Shoppers Pharmacy did not have the right to terminate his employment on the ground of a 3 month probationary period. It is also clear on the Industrial Court’s finding of fact that Mr Jarvis did not repudiate his contract by evincing an intention not to perform his job.
14. All that had happened, on the Industrial Court’s findings, prior to Shoppers Pharmacy’s wrongful termination of the contract and wrongful dismissal of Mr Jarvis, was that there had been inconclusive discussions about Mr Jarvis working part-time on a new schedule. There was simply no basis for the finding by the Court of Appeal that there had been a consensual termination of the contract of employment. Consequently there was an extant, undischarged contract of employment which the parties were negotiating to vary, but no agreement had yet been reached upon a variation and the existing contract stood. The Board is therefore satisfied that the judgment of the Court of Appeal was wrong.