

Comprehensive Guide to Unfair Dismissal: Job Abandonment

**Written By:
Akiri Heath-Adams
Attorney-at-law
Heath-Adams & Co.**

Comprehensive Guide to Unfair Dismissal: Job Abandonment

Job abandonment occurs when an employee leaves his job, has no intention of returning and does not notify his employer of his intention to quit.

Employers sometimes claim that a worker abandoned his job, when, in fact, the worker may have:

- been verbally dismissed,
- taken an unauthorized absence but still intended to return to work or
- been constructively dismissed.

This is why the court has to look at the process followed by the company to determine if what took place was legitimately a job abandonment. And if the proper procedure wasn't followed, the court may find that there was an unfair dismissal.

TD No. 303 of 2002 Banking, Insurance and General Workers Union and Cariflex Limited

The main issue which the Court is asked to determine is whether the Company through its Managing Director dismissed the worker when he allegedly told him "go from here, go from here and don't come back" or whether the worker left his job on that day and did not return to work thereby abandoning his job. The Court found as a fact that the worker was ordered to leave the Company premises and was also told that he should not return. This amounted to dismissal. Thus, there was no duty on the worker after he was dismissed to return to the Company to attend any meeting whatsoever. The worker did not abandon his job but was summarily dismissed.

Trade Dispute No. 222 Of 2014 Communication Workers' Union v Servisair Trinidad And Tobago Limited

Job abandonment can occur when a worker stays away from work without informing his employer, or "walks off" the job without the consent of his superiors. A worker may walk off his job stating that he does not intend to return thus virtually resigning this position without notice, or being deemed to have abandoned his job, in which case the employer is free to fill the vacancy vacated by the worker's action in that regard. In the first instance, however, it is not quite that simple as whilst an employee may be absent from work without permission or without informing his Supervisor/Manager (or even another colleague when it is difficult to contact the Supervisor/Manager), there is a responsibility on the employer to ascertain the whereabouts of his employee i.e. whether the address given is valid (or still valid); is the employee ill and has no means of communication with his employer; or has he left the country, amongst other questions. Following attempts by telephone, email or courier to no avail, the employer should utilize the Postal Services in dispatching a registered letter to the employee giving him a date by which he must report for work, or be declared to not be interested in continuing his employment, thus effectively abandoning his job.

The concept has quite succinctly been elucidated in Trade Dispute 222 of 2009 CWU V Servisair, where the Court stated at page 14:

“there are two aspects of job abandonment namely, an intention to abandon and the carrying out or putting into effect that intention. Job abandonment occurs when an employee has no intention of returning to the job and does not notify the employer of an intention to quit.”

This was further elaborated in IRO #17 and #18 of 1991 – SWUTT v Central Steel Mills in which the Court stated, inter alia-

“Abandonment is a matter of intention and this can only be garnered or inferred from the conduct of the person intending to abandon the job. The presence or absence of intention to remain away permanently is inferable from circumstances surrounding the absence of the employee.”

Also in Trade Dispute #235 of 2003 – ATSGWTU v Sandra Chung Proprietor Chung Photo Generation the Court opined-

“Mere absence from the workplace is not sufficient evidence of abandonment. Relevant factors to be considered in determining whether the worker intended to abandon the job include the length of the absence, whether the worker refused or failed to return on being directed to do so by the employer and whether the employer warned the worker that failure to return by a fixed date would result in dismissal.”

ESD TD Nos. 81 & 82 of 2021 Public Services Association v Water and Sewerage Authority of Trinidad & Tobago

This case concerned the dismissal of two workers, Mrs Carew (20 years’ service) & Mrs Budhram (34 years’ service). These workers were on approved pandemic leave for 14 and 15 months respectively. As per a company memo, both workers claimed that they were entitled to pandemic leave because they had minor children and they could not find any suitable childcare arrangements.

The workers received their full salaries throughout the leave. With the exception of 3 months that Mrs Carew worked, the workers did not do any work for the company during their leave. The workers had been told multiple times that the pandemic leave was putting a strain on the Company’s operations and had many different options including a flexible shift arrangement placed on the table. Mrs Budhram was even transferred to Chaguanas, as she had previously requested, but she still did not report. The Authority made every effort to have dialogue and accommodate the workers, but the workers resisted every effort and made no real attempts to solve their caregiver dilemma.

During the workers’ leave, the Authority wrote to each worker on no less than 3 occasions trying to make suitable work arrangements and instructing them to physically return to work. The last letter that was sent to the workers, before termination, indicated that if they did not report to work by 29th July 2021, job abandonment proceedings would be initiated against them. On 30th July 2021, the workers were notified that they had been deemed to have abandoned their jobs.

The court held that the termination of the Workers was not in keeping with the principles and practices of good industrial relations.

Job Abandonment occurs when an employee is absent from work without any communication or explanation to their employer, indicating that they have no intention of returning to work.

Employers should follow certain procedures before assuming that an employee has abandoned their job. This includes attempting to contact the employee through various means, such as phone calls, emails, and letters, using registered mail in particular, to determine the reason for their absence. Employers should also give the employee a reasonable period to respond before making any assumptions or taking any action.

There is no evidence that the Authority ever denied any of the “pandemic leave” applications submitted by the Workers. The Authority needed to inform the Workers that their applications had been considered and rejected.

The next issue is that the Authority warned the Workers that if they didn’t resume duty on July 29th 2021, job abandonment proceedings would be initiated. The workers were dismissed on the 30th July. Therefore, there were no job abandonment proceedings initiated.

The Authority knew where the Workers lived, so further communication with them on their intentions was not impossible. Nothing prevented the Authority from convening a Tribunal to initiate disciplinary proceedings or inviting the Workers and their representatives to show cause why the supreme sanction of termination should not be levelled against them.

There needed to be some sort of dialogue or follow-up communication with the Workers and or their Association before such a sanction was implemented.

The Workers’ termination without any hearing or communication was akin to a hanging sentence without any enquiry or trial.

The Employer would have been aware of the Workers’ whereabouts and they were in constant communication. In July 2021, the parties exchanged letters with each other. Such a situation cannot be deemed an abandonment and to ascribe that description to the reasons for the Employer’s action to terminate the Workers, is misconceived and not supported by the facts of this matter.

Wong v Polynova Industries Inc., 2021 BCSC 603

In this recent Canadian case, the employee had worked for 15 years. On 27th March 2020, he reported to his boss that he was unwell and would be isolated at home for 2 weeks. After 2 weeks he did not report to work nor did he contact anyone at the Company. Mr Wong attempted twice to telephone the Worker but was unable to reach him because he had disconnected his landline, which was the only phone number that the Company had on file. Consequently, Mr Wong replaced the worker with another employee.

On June 1, 2020, the plaintiff attended work and was invited to a brief meeting with Mr Wong. The following day, Mr Wong wrote to the plaintiff, asserting that the plaintiff had quit his job by

his extended unexplained absence. The worker responded that he considered the company to have terminated his employment. The Court of Appeal held that the company did not issue the plaintiff's record of employment in April 2020 or May 2020. This demonstrated that the company did not accept the worker's resignation at the time. Thus, when the company advised the plaintiff on June 1, 2020, that he no longer had a job, that action amounted to termination without notice.

In the case of **GSD No 109 of 2017 between Government Industrial and General Workers Union v Imjin Security Services Limited**, a worker was initially granted leave to attend a family emergency abroad. Whilst abroad, she wrote to the company stating that she would be taking 6 months additional leave to continue dealing with the situation abroad. The worker returned 6 months later, reported to the company and sought full reinstatement with no loss of service. The Company informed her that her request for no pay leave had not been approved and that company considered her as having abandoned her job. The Worker claimed that she had been unfairly dismissed. The Court held that the company made efforts to contact the worker but it proved futile, and they did not need to go any further than attempting to communicate with the worker via her last known address and telephone contact. In the circumstances, the company was well within their rights to treat the worker as having abandoned her job.

Principles of Job Abandonment:

1. Mere absence from the workplace is not sufficient evidence of abandonment.
2. Job abandonment is when the worker is absent from his job without consent/approval, has no intention of returning and does not notify his employer of an intention to quit.
3. The worker must have taken an unauthorized absence from work. If the worker's absence is authorized, even if it is detrimental to the company's operations, it cannot be considered abandonment.
4. There is a responsibility on the employer to ascertain the whereabouts of his employee. The employer must have attempted to communicate with the worker via phone call and message, enquiring about his whereabouts & the reason for his absence, and instructing him to return to work.
5. Following attempts by telephone, email or courier to no avail, the employer should utilize the Postal Services in dispatching a registered letter to the employee giving him a date by which he must report for work or communicate his intention to return, or be declared to not be interested in continuing his employment, thus effectively abandoning his job.
6. If the employee is in communication with the employer during the absence, or the employer is aware that the employee intends to return, he cannot be deemed to have an intention to abandon his job, and therefore the employer must treat it as an unauthorized absence and apply the disciplinary procedure.
7. The employer must exhaust every reasonable avenue to communicate with the employee and he must make a reasonable number of attempts to communicate with the employee.
8. The employer must give the employee a reasonable amount of time to return to work.

9. If the employer sends the final warning to the employee stating that he must return to work by a specific date or be deemed to have abandoned the job, and that date passes and the employee still has not returned or communicated with the employer, the employer must send a notice to the employee indicating that he has been deemed to have abandoned his job.
10. Relevant factors to be considered in determining whether the worker intended to abandon the job include: the length of the absence, whether the worker refused or failed to return on being directed to do so by the employer and whether the employer warned the worker that failure to return by a fixed date would result in dismissal.
11. If the employer failed to properly implement the job abandonment procedure during the employee's absence (in particular, if the employer did not send correspondence to the employee's address giving the employee the deadline by which to return, and after that deadline passed, if the employer did not send the notice to the employee that he has been deemed to have abandoned the job), and the employee returns seeking his job, it may be held that the employer did not treat the employee as having abandoned his job and a refusal to allow the employee to continue in his job, may be deemed a dismissal.
12. If the employee returns to work with a legitimate reason (for eg. if he was incapacitated or stranded out of the country, and had no means of communication), especially if only a short time has passed, it may be prudent for the employer to reinstate him. Failing to reinstate the employee may result in the court finding that the employer acted harshly and unreasonably.
13. If the employee is absent because he is sick, this is not an abandonment. The sickness procedure, not the job abandonment procedure, must be applied.

Job Abandonment vs Sickness Absence

Temporary absence due to illness or injury is not job abandonment (nor is it grounds for dismissal).

TD No. 204 of 2004 Westend Sawmill and Lumber Yard v National Union of Government and Federated Workers

The worker in this case is extremely incapacitated and appeared almost to be a paraplegic. These symptoms were as a result of a stroke which the worker suffered in November 2003... The worker's wife went to the Company to collect his wages and also submit a sick leave certificate on behalf of the worker...but she did not receive any wages for the worker. The Employer refused to accept the sick leave...The Company argued that the worker abandoned his job since he had not reported for duty since November 2003. The Company was informed of the worker's health in November 2003 by a medical certificate which was submitted for and on behalf of the worker, yet the Company chose to ignore this information and it also refused to accept a further medical certificate related to the worker's medical condition. It is stated in *Patterson vs Messrs. Bracketts* (1977) IRLR 137 that when the health of a worker is considered by the employer the following is a useful approach: "...first, there should be

consultation or discussion with the employee, and secondly, such other steps as are necessary should be taken to enable the employer to form a balanced view about the employee's health." It is clear therefore that when it was informed of the worker's health, there was a basic obligation on the Company to inquire into the nature of the worker's illness, this certainly was not done...

The Company had a duty to inquire about the worker's whereabouts and the state of his health when he failed to report to work in November 2003 before it could conclude that he had abandoned his job.

On the totality of the evidence, the worker did not abandon his job but the Company abruptly ended its contract of service with the worker without first ascertaining the true status of the Worker's health.

The Company by its very act dismissed the worker in circumstances which were harsh and oppressive.

TD No. 50 of 1978 Sissons Paints (W.I.) Limited and Transport and Industrial Workers' Union

The worker was dismissed on 12th October 1977. He had received chemical burns on his wrist on 5th October 1977. He was attended to at the Factory and continued to work up to Friday 7th October 1977. He did not report to work from Monday 10th October to Friday 14th October. He was informed that he was dismissed with effect from 12th October, on the ground that he abandoned his job.

During the weekend following his injury, the condition of his wrist had become worse. He went to the doctor on 10th October and obtained a medical certificate recommending 5 days leave from that date. His wife went to the doctor with him and he asked her to take the certificate to the Company. She did not do this. According to the worker, she had forgotten to deliver the certificate and did not tell him until 12th October. The next day he gave the certificate to a co-worker and the Company received it on the 13th.

The worker had built up an unenviable record of absences and the Company had given thought to what would be the future of his relationship with them in light of this record. Against this background when the worker failed to turn up for work during the week October 10-14, the Company terminated his services on the ground of abandonment.

The Company was aware that the worker had received injuries on the job on the 5th and had no reasonable ground for drawing the conclusion that he had abandoned his job. The Company argued that the worker displayed irresponsibility in not ascertaining from his wife whether the certificate had been submitted, but the Court did not find the worker to be irresponsible or negligent. Nevertheless, the Company became aware of a reason for the worker's absence when they received the certificate and this was an occasion for a reasonable employer to reconsider a decision taken the day before to dismiss a worker on abandonment of his job.

'While we understand the anxiety to be rid of a Worker with a record such as [this worker], we think the employer should have exercised a little more caution than they did in dealing with the circumstances of the case on October 13, 1977.'

The employer acted unreasonably in that there was on the basis of the medical certificate reasonable ground for re-consideration of its decision and secondly, the employer having previously indicated the manner in which he proposed to register his disapproval of the worker's

absence, that is, by way of suspension, he should have issued a warning to the worker if he intended to implement a sterner form a discipline, namely dismissal.

Job Abandonment vs Unauthorized Absence

When an employee is absent, if he remains in communication, it is clear that he does not have the intention to abandon his job. So even if he is absent for a long time, the absence must be dealt with through the disciplinary procedure. He must be charged with misconduct and invited to a hearing where he must be given the opportunity to be heard. The longer the absence (without good reason), the more likely that a decision to dismiss because of the unauthorized absence may be considered fair. Therefore, even though the job abandonment procedure will not apply in this case, the end result may be the same.

But in determining the appropriate disciplinary action to be taken, all of the proper steps must be implemented, i.e the company must conduct a proper investigation and disciplinary hearing, and if the worker is found guilty of taking an unauthorized absence, a fair punishment should be imposed having regard to all the relevant considerations; dismissal is never automatic.

Questions to ask your client to determine whether they abandoned their jobs or were unfairly dismissed:

1. Were you verbally dismissed?
2. Did your employer say/do something that made you want to leave your job, or made you believe he no longer wanted you there?
3. Did you leave your job without consent/approval, with the intention of not returning and without giving notice of same to your employer?
4. When were you rostered for duty/required to be at work?
5. Did you report for work as required?
6. Were you absent because you were sick or injured? Did you inform your employer of that?
7. Was there a legitimate reason for your absence? Did you communicate the reason to your employer? Were they aware of the reason for your absence? Did the company give you approved leave?
8. Did you seek approval for your leave? Did the company indicate that your leave request was not approved?
9. If you took unapproved leave, did you intend to return to the company?
10. Did you communicate with your employer to let him know that you intended to return?
11. When did you communicate? How soon after you failed to report for duty?
12. Did your employer send you any communication enquiring about your whereabouts and instructing you to return to work?
13. Did your employer reach out to you via phone call, email, WhatsApp or via mail delivered to your address?
14. How many calls, messages or emails did your employer send to you? How many attempts did they make to contact you and find out the reason for your absences?

15. Did your employer tell you that if you didn't return to work by a specific date, or if you didn't inform him of when you intended to return by a specific date, that you would be deemed to have abandoned your job?
16. Do you have a record of any of these communications?
17. Did you receive notice from the company that they deemed you to have abandoned your job?
18. When did you receive that notice? Did you reach out to the company after you received the notice to tell them that you didn't abandon your job? How soon after the notice did you reach out to the company?
19. How long have you worked for the company? How long were you absent?

Sources:

1. Case Law

2. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Roper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir