IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CH. 188/1975

BETWEEN	BORIS J. SMITH	PLAINTIFF
A N D	DOMINION LIFE ASSURANCE COMPANY	DEFENDANT

R.N.A. Henriques, Q.C. and D. Morrison instructed by Douglas Brandon of Livingston, Alexander and Levy for Plaintiff.

H. Small, Q.C. instructed by Michael Hylton of Myers, Fletcher and Gordon, Manton and Hart for the Defendant.

Hearing on 21.1.86 - 24.1.86; 30.6.86
1.7.86; 3.7.86 and 19.9.86

Reasons for Judgment

BINGHAM, J.

In this matter, the hearing came on for determination in January 1986, a mere eleven years after the writ was filed in the Supreme Court. The hearing was concluded on 30th June of the same year and judgment was reserved.

On 19th September, 1986, just prior to taking up an acting appointment in another echelon of the Judiciary, I delivered an oral judgment from a written draft. I had intended to revise this draft and reduce it into a stencilled form to be circulated for the benefit of the parties to suit their Attorneys and the profession as a whole, but circumstances beyond my control precluded this course being taken.

The matter has now been given, "a new lease on life" by a discovery on my part on 9th July, 1986, that an appeal has now been lodged against this judgment on 30th March, 1987.

In searching for my notebooks containing the notes of the evidence and the final submissions of Counsel in the hearing, I came across the rough draft from which my oral judgment was delivered and with certain minor alterations I have now caused it to be prepared as being my reason for the judgment which I delivered on 19th September, 1986.

The plaintiff was employed as Sales Manager with the defendant Company with effect from 19th January, 1969 and his services were terminated on 24th October 1975 by a memorandum dated 17th October 1975 sent from the defendant's head office under the signature of their Legal Counsel.

By that memorandum the defendant sought to terminate the employment of the plaintiff with effect from 24th October, 1975. The reasons for termination of the plaintiff's employment were set out in this memorandum as being that "since Mr. Smith has refused to accept the Montego Bay appointment and further refused to signify his acceptance of the alternatives outlined to him that he is discharged from the employment of the Dominion Life Assurance Company effective October 24, 1975 up to which date he has been paid".

The plaintiff prior to the letter of 17th October, 1975 had been offered the new post of Branch Manager at a branch office which the company had proposed creating in Montego Bay, when the unit there was to be upgraded to a second local branch independent of the Kingston Branch. It was the company's proposal to have this branch fully operational by October 1975.

Discussions had taken place in Jamaica in the June 1975 involving the plaintiff, the Marketting Superintendent of the company and the Branch Manager. The offer to the plaintiff was an off shoot of these discussions. Following the discussions the plaintiff was given what in the terms of the company's offer was nothing short of an ultimatum in which the alternative to refusal of the Montego Bay appointment would be tantamount to his having either to resign his position with the company, also as one of the alternatives if he refused then he could resort to personal production under his Career Contract as a Unit Manager, if the Branch Manager wanted him, and this prospect was also dubious as the relationship between them was not always of the best.

The letter from Mr. Lloyd Houle, the Senior Marketing and Sales Manager at the Company's head office in Toronto Canada dated 31st July, 1975 addressed to the plaintiff clearly sets out the company's firm stand in the matter and read in part:-

> " We also discussed in some detail the alternatives other than your accepting the promotion and opening a new branch in Montego Bay. They are to return to Unit Management and personal production in the Kingston Branch provided this still has the endorsement of the Branch Manager, or to resign from the Company. We would not contemplate the latter so let me elaborate on the former. In such event it would appear that the balance of 1975 be used as the phasing out of your Sales Manager's responsibility as you requested as opposed to your immediate cessation of Sales Manager's duties and a phasing into personal production and Unit Management. As such your current salary would continue to the end of 1975.
> Beginning in June 1976 it is proposed that you go on a Unit Manager's contract at a rate of $500 J.A. per month. In addition you would have a JA$1800 per month "Special Development Plan", the details of which are endorsed. I might add that such an arrangement has worked very successfully for a number of men who have transferred from a straight salary status. The JA $500 plus JA$1800 would be augumented by incentive income the unit Manager's agreement and the Special Development Plan to the point where your earnings would continue uninterrupted assuming full validation at or beyond the $25,000 level."

The letter ended on this note "I think this letter amply deals with the subject at hand, it has all been said and it remains now for you to reach a decision. As agreed in Gussie's office on July 1st, we expected your decision no later than at the end of four weeks or July 31st.
In view of the delay in getting this letter off to you we would now expect to receive your decision by Monday September 1st.
It is not an easy one and it would have been comfortable for all of us to have maintained a status quo. But as you realise and acknowledge forward planning must take place and the company's best medium and long range interest must be attended to immediately.

I believe you also realise that corporate need is what has prompted the present posture of the company!"

The "Gussie" referred to in the letter was Mr. A.D.DeLeon who was at the time the Branch Manager of the Company. From the letter it could clearly be seen that the plaintiff was being "sacrificed on the altar of corporate necessity." As he so aptly described his state of mind when asked by his Counsel as to how he felt when he received this letter, he responded by saying, "I felt as though I was in the hands of Pilate."

The plaintiff took time out to give consideration to the proposal. He had to weigh the consequences of the fact that his acceptance of the offer would mean the possible loss of the present holder of the Unit Manager's position in Montego Bay, Mr. Jimmy Elliott about whose position no decision had, up to time of the writing of Houle's letter, been yet taken.

The plaintiff having fully considered the matter was of the view that he preferred to remain a Sales Manager in what he then considered to be a more secure position than what on the evidence was nothing short of a glorified Branch Manager with a dissatisfied and possibly divided team of agents and an uncertain future. Furthermore, the company in ma king its offer through Houle's was one in which they recognised on their part that the needs of the plaintiff's family had to be given first priority and the plaintiff was also taking that into consideration as to whether or not he should take up the company's offer.

With all these factors in mind the plaintiff on 8th August, 1975 wrote to Mr. Houle informing him of his decision in a brief letter in which the Marketing Superintendent was advised that "after careful consideration, I am unable to accept your offer."

The defendant's reply to the plaintiff made it abundantly clear that his fate with the company was now sealed and it meant that his future with the company was virtually at an end. The letter from Mr. Houle of 11th September, 1975 clearly sets out the company's response to the plaintiff's refusal of their offer.

It read in part at paragraph 3 and 4 as follows:-

> "I have been in touch with Gussie and understand that you are currently on your annual vacation. He has been informed of your decision and as you will be dealing exclusively with your Branch Manager in the future a copy of this letter is going to him for his information.
> As you have declined our offer to accept the promotion to Branch Manager Montego Bay the alternative outlined commencing the last paragraph of page three of my letter of 31st July, 1975 automatically takes effect.
> In other words, you will phase out of the Sales Manager's position between now and the end of 1975 during which time your current salary will be continued. As of January 1976 if it is your desire, you will be considered for a Unit Manager position provided this aprointment receives the endorsation of your Branch Manager.
> Your present salary will cease at the end of 1975 and you will be eligible for Special Development Plan financing of $1800 per month as detailed in my letter of July 31st, 1975."

As the company's decision to relieve the plaintiff from the position of Sales Manager was not one arrived at after negotiation, consultation or with the agreement or consent of the plaintiff, the company clearly sought to remove him as Sales Manager with immediate effect from the date of the letter of 11th September, 1975. The fact that he was still so styled was of little or no consequence for reasons which will be made clear later on.

The plaintiff's status with the company was being substantially altered from that of Sales Manager to Unit Manager, that is on the condition that if the Branch Manager wanted him, and it is clear from the correspondence with the plaintiff by the Branch Manager after the refusal of the Company's offer that he would not be favourably considered for any such post.

At the same time that the head office of the company through Houle had been congratulating the plaintiff for keeping variable expenses down to within manageable proportions in correspondence sent from head office in letters of June 6th, July 14, and August 18, 1975, the Branch Manager in letters addressed to the plaintiff of August 29th and September 22nd 1975, while plaintiff was still on his annual vacation, sought to launch a campaign aimed at making life very uncomfortable for him.

The Branch Manager's next letter to the plaintiff dated September 11th 1975 ended on this note of sarcasm, "If therefore I am expected to do your job, might I ask the necessity of having you?" These letters to the plaintiff from the Branch Manager which were all copied to Mr. Houle in his capacity of Marketing Superintendent and coming so close after the plaintiff's refusal and Houle's reply of September 11th leaves one to consider as to just what may have prompted the Branch Manager's sudden "needling of the plaintiff" as Mr. Small so aptly puts it in his final submissions in the matter.

Be that as it may however, as there is absolutely not a scintilla of evidence to support or suggest any misconduct on the plaintiff's part to ground or form any basis for the company's decision as set out in Houle's letter of September 11th referred to supra, to terminate the plaintiff's contract as Sales Manager, this decision was tantamount to an anticipatory breach of that contract on their part as the company by the stand that it took in that letter, that come January 1st 1976 they had clearly evinced an intention to be no longer bound by their Sales Manager's contract with the plaintiff. That stand amounted therefore to a repudiation of the Contract.

The fact that the plaintiff was still being referred to for sometime after receiving Houle's letter of September 11, as Sales Manager and was receiving the same salary was of little or no consequence as immediately following the receipt of Houle's letter his duties were transferred by directives from the Branch Manager to two new appointees Messrs. Emmanuel and Bragg. This by letter addressed to the plaintiff of even date as that of Houle's letter. Was this fact just a coincidence?

In the Branch Manager's letter there also the timely reminder sent to the plaintiff of how correspondence with head office was to be treated by him. "He was told that, 'by the transference of these duties it will be necessary for Mr. Emmanuel to complete at least for the time being monthly statements for the

time being monthly statements for the variable expenses, and I must also inform you that upon the instructions from head office that all correspondence going to head office must come to the office of the Branch Manager as on any violation of this, the correspondence will be returned to the Branch Manager for his persual and comments first. Similarly, all instructions of duties and activities will be directed from the Branch Manager and not the home o ffice."

As Sales Manager the plaintiff had the authority to correspond directly with the Marketing Superintendent at head office. With his refusal of the company's offer, however, and the train of events which followed it could clearly be seen from the company's posture and the Branch Manager's approach that all his right and privileges were being eroded and "his days with the company were numbered".

Mr. Small in his final submission has in the light of the fact that the plaintiff had prior to the letter of 29th September 1975 written by his Attorney's to the company's head office and of even date addressed to the Branch Manager, been in the receipt of the same salary and was still being referred to in correspondence as Sales Manager, contended therefore that his status had not therefore been altered and he posited the question, therefore, as to whether it was the company who had by Houle's letter of September 11th, 1975 terminated the plaintiff's employment as Sales Manager or the plaintiff himself by the instructions he gave to his Attorneys in the stand they took in the letters of 29th September. In that regard the letters can be seen as being nothing more than the plaintiff's views expressed through his Attorneys that the company was in breach of his contract as Sales Manager and requesting compensation.

In short this stand by his Attorneys could be regarded on their part, on behalf of the plaintiff, of conduct on the company's part of what amounted to their repudiation of the contract. However, as Mr. Henriques has in my view so rightly pointed out that situation was not accepted by the company as they rejected any such contention in the subsequent letter of termination dated 17th October, 1975 in the clearest possible terms.

In my view it is abundantly clear that the letter written by Houle dated September 11, 1975 and addressed to the plaintiff was tanamount to a breach of the Sales Managers contract on the company's part. They repudiated the contract and the letters written by the plaintiff's Attorney amounted to an acceptance of that repudiation on their part.

In the absence of any misconduct on the plaintiff's part, in any event, the company could only bring this contract to an end either by agreement between the plaintiff and themselves to which the plaintiff was a willing and consenting party or by reasonable notice in keeping with the plaintiff's status.

On the evidence there was neither of these factors in existence.

The plaintiff had, therefore no other choice than the stand which he took through his Attorneys. Although the courses open to him were to treat the contract as at an end and to claim compensation (which is what the letter of 29th September, 1975 addressed to the company's head office sought to do,) or to treat the contract as still subsisting and insist on full performance of it by the company, a matter which is still open to doubt as there is a conflict of authority as to the existence of such a right or as to whether it is possible to order specific performance of a Contract of Service.

There is however, some authority to suggest that the Courts will not as a general rule grant specific performance of a contract for personal service or appear to enforce such a contract by the grant of an injunction.

However, since Hill vs. Parsons (1971) 3 AER 1345 there have been cases which establish that in special circumstances, sometimes referred to in the letter decided cases ass exceptional circumstances, a court will enforce a contract of employment by declaring that it still subsist although there has been termination by an employer.

In the instant case the plaintiff has not resorted to such equitable relief in order to rely on the rule seeking to bring his case within the exceptional circumstances outlined in Hill vs. Parsons and to treat the contract of service as still subsisting. He has sought the remedy of damages in order to compensate him for the loss suffered.

In determining the primary question, therefore, as to whether it was the plaintiff who terminated the contract or the Company, Carey J.A. in dealing with a similar question in Supreme Court Civil Appeal No. 2/84 Hotel Four Seasons vs. National Workers Union, unreported Judgment delivered on March 29, 1985, in considering the nature of the conduct capable of repudiating a contract stated the position at page 10 of the said Judgment thus:-

> "The repudiatory conduct must be such if it is to be be capable of acceptance and so terminate the contract as to demonstrate this intention of refusing to perform. The conduct must go to the root of the contract, "the raison d'etre of the contract must be destroyed."

At page 11 he continued in no less a vein when he said in words which when fully examined would be no less applicable to the instant case:

> "What I suspect will entail some difficulty is to recognise when the contract has been terminated. Plainly there can be no difficulty if the employer formally dismisses the employee whether in writing or otherwise." (The company's letter of October 17, 1975 is of relevance in this regard).
> If the employer replaces the worker by another or so organises the job that the former duties are spread around, I am inclined to think that it would be agreed that the contract of employment has been terminated."
>
> (Emphasis mine)

In the instant case:

1. The post of Sales Manager was being abolished and a new position of Branch Supervisor created.
2. The former duties of Sales Manager was being spread around by being divided up between the Training Officer, Mr. Bragg and the Branch Supervisor, Mr. Emmanuel.

It would not have required anyone with more than a modicum of common sense to conclude, therefore, given the facts outlined above that the plaintiff's contract of service as Sales Manager had been terminated.

The letters of September 29, 1975 written by the plaintiff's Attorneys to the company's head office and the Branch Manager were directly concerned with breaches of the Sales Managers contract. This fact seemed to have completely escaped the notice of the company as by paragraph 2 of their letter of October 17, 1975 written under the hand of their legal counsel the Career contract which was still dependent upon the Branch Manager's approval come January 1st, 1976, and in event of such approval not being forthcoming written notice of termination of at least seven days was required. As this contract did not provide as to how communication was to be made and as Mr, Henriques has contended, this would have meant that under the general law, there would have to be proof of such notice period calculated as from the date of posting. The onus of proof have being upon the party giving the notice to show strict compliance in accordance with the general law as to notice and there being no evidence forthcoming, this fact one would conclude therefore from the letter of termination being dated October 17, 1975, the effective date of termination being stated therein as October 24, 1975, the plaintiff's agency contract was also brought to an end without the proper notice.

On the questions, therefore, as to whether the company was in breach of these two contracts, these questions must be answered in the affirmative and the issue of liability must it follow be determined in favour of the plaintiff.

DAMAGES

One needs now to turn to the question of Damages. This falls to be determined under two main heads namely:-

1. Special Damages in which area there are five separate subheads to be considered.
2. General Damages claimed on the basis of mental anguish.

The second head having to do with general damages can be briefly disposed of as no medical evidence has been adduced to establish that the defendants conduct either caused or contributed to the plaintiff's condition following the meeting on 15th September, 1975 and up to the time of the letter of termination and no award is therefore made under this head.

In the area of special damages therefore, I now wish to turn to the question of the first subhead having to do with what sum ought reasonably to be awarded to the plaintiff as salary in lieu of dismissal.

It is common ground that the proper measure of damages in the plaintiff's case ought to be determined on a basis having to do with the status of the particular employee. The principle applicable being that the higher position held by the particular employee the greater the notice required to properly terminate the contract of employment.

It is common ground that in so far as the Sales Managers contract was concerned no proper notice was given to the plaintiff. Mr. Henriques in relying on the letter of termination of October 17, 1975 as a basis for contending that this contract was unlawfully terminated, as no proper and reasonable notice was given, sought to further contend and quite properly, so in my view that as seven clear days notice directed to the plaintiff was what was required to terminate the Career Contract and the latter was dated October 17, 1975 not only was it deficient in not being adequate notice but as the letter was addressed to the plaintiff's Attorney, it could not thereby amounted to proper notice in compliance with the common law principles.

Hence the Career Contract which also falls for consideration was by the same parity of reasoning also unlawfully terminated, it seems to me that this arguement has much to commend it.

Having digressed somewhat , I now return to the question of what sum would be considered as reasonable compensation for salary in lieu of notice in so far as the Sales Managers Contract is concerned. One would in fixing the sum also take into consideration the manner of the plaintiff's dismissal which strikes me as somewhat high handed. He had served the company from all appearances well during his tenure of office and both the company and himself h had prospered as the local branches performance especially in the area of the production of new business seemed to bear out this contention.

At the time of his dismissal the Jamaican Branch of the company was still in the forefront of the Insurance field as far as that company was concerned. Mr. Henriques has relied upon Rose vs. Jamaica Times, a judgment of Wright J. in which the plaintiff an assistant Manager and therefore someone in a position not on parr with the plaintiff,was awarded six months salary in lieu of notice.

It cannot be doubted that top executives in the Insurance field are among the highest paid individuals in the private sector and that applying the principle resorted to earlier a longer notice period would not be out of place, therefore, when the plaintiff's status as well as the manner of his dismissal is taken into consideration. For support for this approach one need only to offer to Chitty on Contracts, (24th Edition) paragraph 3636 where the learned editor in dealing with the question said: "the normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in the other employment."

The plaintiff has claimed one years salary in lieu of notice. Mr. Henriques contends that this claim is reasonable.

Mr. Small on the other hand contended that six months salary ought to be regarded as sufficient. Relying on Rose vs. Jamaica Times Limited as a guide, even six months salary would not be adequate. Having regard to the summary nature of the plaintiff's dismissal it would not have been easy and even of some difficulty for the plaintiff to obtain suitable alternative employment of a similar status within a short period. It is common knowledge that the Insurance Industry in Jamaica is a closely knit unit and that word tends to get around swiftly.

Having lost the confidence of one company, it would not be easy for the plaintiff to get his foot into the door of another before some reasonable period had been allowed to pass. For this reason I would consider the period of one year's salary as being a reasonable "cooling off period" to enable the plaintiff to obtain such alternative employment if he so desired or to mitigate his loss.

The sum of $32,000 claimed under this head is therefore awarded as justifiable in the circumstances.

In reverting to the second subhead - the amount of $52,000 being two years agency commissions claimed. Mr. Small contended that there is a contradiction here in so far as the sum of $32,000 would include commissions based on the formula which would also include in it an amount computed from the commissions earned from the agents.

Mr. Henriques argued, however, that there was in fact no contradiction as the subhead was computed from:-

1. Renewal commissions in respect of the plaintiff's own underwriting of policies.
2. Commissions from that earned by new agents in respect of their underwriting of new policies.

In that regard based upon the Sales Manager's compensation formula this contention is sound and I accept it as being a fit and proper basis for such an award to be made.

In so far as the third subhead is concerned, that relating to the benefit accrued based upon performance quota of an all expense paid trip to the Company's Convention in Bermuda this is self explanatory and has been proved and the amount is not being challenged.

There is a similar situation in relation to the claim of $8,000 in relation to loss of commissions in respect of policies underwritten by the Plaintiff under the agency agreement for which sum the commissions are due and payable to the plaintiff. This sum is also not being challenged.

I now turn to the final item claimed under this head, which relates to a claim of $19,000, being a sum claimed for loss of pension rights or more particularly what have amounted to the employer's contribution to the pension fund to which the plaintiff was a contributory up to the time of his dismissal.

Mr. Small has argued that the plaintiff's entitlement to share in a group pension scheme created a status and not a right to the employer's contribution in the fund and in any event when the principles relating to the measure of damages to be applied in considering an award under this head is looked at, the plaintiff ought to be awarded no more than the loss of pension calculated for a period awarded by the Court as being a reasonable period in lieu of notice.

This would in the light of the award under the first subhead of the Claim for Special Damages be the pensionable contribution computed over a period of one year,

Mr. Henriques has relied in support of his contention upon:

1. Copson and Another vs. Eversue Accessories Ltd. (1974) NIRC 636.
2. Smith Kline and French Laboratories Ltd. vs. J.I. Coates (1977) I.R.L.R. 220.

In Copson's case the facts are clearly distinguishable as there the plaintiff was someone who was placed in a worse position on re-employment. He was moreover no longer a contributory to a pension scheme.

In the second case, Dr. Coates having been awarded sexteen (16) months compensation at the outset was only able to obtain, an appeal by the defendants, compensation for eight (8) months which the Employment Appeal Tribunal regarded as an adequate period to enable him to obtain suitable alternative employment,

The ratio decidendi to be extracted from both these cases would seem to me to be one in which the plaintiff is only entitled to such loss of pension rights which when quantified amounts to his actual loss calculated for a period sufficient to enable the employee to obtain suitable alternative employment. It is only where the alternative situation as as in Copson's case left the plaintiff (employee) in a worse situation that some more special consideration in terms of the award is made in order to leave the plaintiff employee in no worse a position that he was prior to the termination of his services.

It is also for the employee to take steps to mitigate his loss.

In the instant case the plaintiff following his dismissal left the Insurance Industry on his Doctor's advice and took up farming as a full time occupation before re-entering the Insurance Industry in 1981 in a Managerial position. There was no evidence adduced as to what is his present pensionable benefits, if any, arising out of his employment with this company although it is not unknown that the practice in the Insurance Industry is that such contributory Pension schemes are common place in that field and part and parcel of the usual package of benefits aimed at attracting and keeping the right cadre of persons in as Career individuals.

Assuming, therefore, that the plaintiff in his new employment has now once more become a contributory to a group pension scheme with his new employers then the proper measure of damages is in my view, as Mr. Small has submitted such a sum on the employer's side as would be required to place the plaintiff in the same position had his contract of service been lawfully terminated by the defendants, in this case twelve months loss.

As there is no actuarial sum available based on the evidence of the expert called by the plaintiff, Miss Daisy Coke to guide me in arriving at a sum forming a basis for a calculation in order to fix an award under this head, I have been left to fall back on a rough and ready method of calculation.

As the plaintiff may, in his present employment be enjoying an equal or greater benefit, as the Branch Manager of Crawford, Fletcher and Amos in Ocho Rios, Saint Ann, this would in all probability leave him no worse off, but in a better position than that enjoyed previously with the defendant company.

For these reasons no award was made under this head as the onus being on the plaintiff there was in the final analysis, no evidential basis for such an award and in the alternative neither was there proof of a loss in any event.

In the light of the above and based upon the reasons which I have attempted to set out in some detail I awarded the plaintiff a sum of $95,000 being special damages with costs to be agreed or taxed.

In addition based upon submissions made before me by both Mr. Henriques and Mr. Small I awarded the plaintiff interest on the said judgment calculated at 16% as from the date of the filing of the Writ to the date of the delivery of the said judgment. This rate of interest being awarded on the basis of the commercial rate represents an approximate mean average taking into consideration the commercial rates prevailing at the time of the filing of the Writ in 1975 when such sums were attracting a return on fixed term deposits of between 12% to 13% and the commercial interest rates prevailing at the time of the hearing in 1986, at which time term deposits were attracting a return on investment in excess of 20%.

It is using the minimum and maximum rate over this period that I have been able to arrive at the rate of 16% which I considered to be one which would be just and reasonable in the circumstances.

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