



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 1998/C-091

BETWEEN	SANDRA CHIN	CLAIMANT
AND	NEM INSURANCE COMPANY (JAMAICA) LIMITED	DEFENDANT

Mr. Terrence Ballantyne instructed by Ballantyne, Beswick & Company for the Claimant.

Mr. David Batts instructed by Livingston Alexander & Levy for the Defendant.

**Employers – Employee Wrongful Dismissal – Whether in the Circumstances
Dismissal Justified**

Heard on: 26th, 27th, & 28th February & May 29, 2008

THOMPSON-JAMES J (AG.)

NEM Insurance Company (Jamaica) Ltd hereinafter referred to as NEM employed the claimant Miss Sandra Chin in July 1989. By way of letter dated August 18, 1997 she was separated from her job.

By Writ of Summons filed on March 5, 1998 the plaintiff Miss Chin claims against the defendant NEM to recover damages for breach of contract of employment, for that on the 15th day of July 1997 the defendant unlawfully and without reasonable and just cause suspended the plaintiff from her job as a customer service representative and has since the 1st day of August, 1997 refused to remunerate the said plaintiff in the course of her said continual employment.

NEM contends that it was at all material times an expressed or implied term of the claimant's contract of employment that she would at all times act with due diligence and in accordance with the rules and instructions given to her by the defendant and that by letter dated the 18th August 1997 the claimant's contract of employment was lawfully terminated for cause in that the claimant acted with a lack of due care, attention and diligence and in breach of her employers instruction.

Miss Chin's Account

Miss Chin testified that in July 1989 she was a customer service representative employed to NEM.

She listed her primary duties which included

- (1) Interviewing the client to satisfy the company's requirements as stipulated by the company's guidelines. If satisfied,
- (2) The client would be asked to fill out a proposal form
- (3) The customer's identification that is, his drivers licence and all corresponding documents would be checked.
- (4) The client would be told of his premium breakdown.
- (5) The client would then sign a contract form.

After the process is completed all the supporting documents would then be taken to a senior that is, a manager or supervisor for "vetting". If satisfied the cover note would be signed. The cover note is issued for 30 days pending the issuance of a certificate of insurance.

Rohan Barrett was introduced to her by two (2) of her friends - Coleen Nugent and Sophia McKay.

She had some social interaction with Mr. Barrett and her friends.

On the 13th November 1997 Mr. Barrett came to the office (there seems to be an error in relation to this date, as her termination letter which is uncontested is dated the 18th August 1997 and the proposal for Motor (Private car) Insurance has its inception date as the 13th November 1996). He had documents for a 1996 Daewood Racer for which he needed insurance. She requested to see his drivers licence along with the car papers. He filled out a proposal form and she made him aware of his premium breakdown.

She later prepared and issued to him a cover note for 30 days pending his supplying NEM with outstanding documents. All the relevant documents were obtained for Mr. Barrett's policy and passed to her supervisor Miss Bomfield before the cover note was issued. She had observed all the relevant rules contained in the defendant's motor underwriting guide.

She was not aware of any information which would have alerted her to the fact that Barrett was a person of questionable character.

Sometime during the week she was advised by Sophia McKay that she Miss McKay did not want to be noted as Barrett's agent as he was too 'nagging' and 'problematic'. Miss Chin requested and obtained the business.

Sometime later Miss McKay called her and told her that she did not think Miss Chin should take the business for the reason given. However, she did not get the opportunity to do the necessary change as the file could not be located.

Miss Chin eventually located the file and handed it over to someone to do the necessary amendments. Apparently this was not done as Miss Chin later went on sick leave and the necessary amendments were not done until the 27th January 1997.

Miss Chin was shown a cover note in the name of Rohan Barrett. In the area for registration letters and number this was blank. Miss Chin explained that as this was new business and more than likely the plate would be registered in the previous owner's name.

When Miss Chin was shown a proposal form she explained that after a cover note expires, the client would have to get a second cover note and the same procedure as to the issuance of the first cover note would be followed.

In Cross-examination

Miss Chin agreed that it would be unnecessary to follow the first procedure to issue a second cover note and agreed that what she had said earlier was not quite true. She indicated that at the time that she commenced working with NEM she had had experience working with other insurance company and was already aware that insurance involved the coverage of risk.

She agreed that the one who offers insurance coverage has to know the level of risk involved before coverage for the risk is accepted and that it is vital that the information from the proposer is accurate so that the risk can be assessed.

Miss Chin agreed that she was an underwriting clerk and that NEM had a written underwriting guide issued to her to assist her in carrying out her duties.

Miss Chin further agreed that in completing the proposal form in relation to Barrett

- (1) She accepted a description of his occupation as that of a 'businessman' contrary to the underwriter's guide. She did not see this as a clear breach of the underwriters guide although there was nothing in the guide to permit her to thus designate Mr. Barrett's occupation.

(2) She further agreed that she failed to have his business address or place of work properly completed.

(3) In handling the proposal she said she would not agree that she did not deal with obtaining proof of no claim bonus properly. However she agreed that she did not ask about such proof.

Although the proposer had informed her that he had previously held a motor policy in his wife's name, he had also informed her that he had no accident in the last 3 years hence she would have expected him to have an entitlement to a no claim bonus.

Miss Chin also agreed that proof of no claim bonus is a method by which information on previous accidents could be obtained yet she made no request of United General Insurance Co., Mr. Barrett's previous insurer concerning Mr. Barrett's no claim bonus. Although Mr. Barrett was not the owner of the vehicle she made no report or obtained from him proof that he had purchased the vehicle.

She did not give instructions for the Insurance to be cancelled based on Mr. Barrett's none disclosure.

She was not aware that Mr. Barrett was involved in an accident in Bog Walk on the day that the insurance coverage was issued to him neither was she aware that a later accident that Mr. Barrett was involved in had cost NEM in excess of 1 million dollar (\$1M).

She denied that her failure to complete the proposal form as well as to inquire of Jamaica Association of General Insurance Company (JAGIC) concerning Mr. Barrett being on the black list had cost NEM.

The Account of the Defence –

Miss Patricia Scully testified that she was the Administrative Manager for the defendant and is now retired and at all material times it was an expressed or implied term of Miss Chin's contract of employment that she acts with due care, attention and diligence in accordance with the rules and instructions given by NEM. Her testimony in so far as the underwriting aspects of Miss Chin's duties are concerned I find coincides with that outlined earlier by Miss Chin.

Miss Scully went on further to testify that by letter dated the 18th August 1997 Miss Chin's contract of employment was terminated for cause in that she acted with a lack of due care, attention and diligence and in breach of NEM's instructions.

The circumstances leading up to her termination concerned her negligence in allowing a policy of insurance to be issued notwithstanding that payment had not been made and notwithstanding irregularities and or breach of procedure in the underwriting of the risk. She listed the error in relation to the prospective customer Rohan Barrett as-:

1. Miss Chin failed to clearly define Mr. Barrett's occupation or business – the underwriter guide clearly prohibits the term "businessman" as being too vague. The description of business is necessary for the underwriter to determine if the proposal meets NEM's risk profile and to calculate the applicable premium.
2. Miss Chin failed to have Mr. Barrett clearly state the address of his business.
3. Miss Chin also failed to obtain evidence of previous insurance renewal notices or a letter from his previous insurer- United General Insurance Company. This verification of previous insurance history is necessary to confirm representations

about claims history, entitlement to no claim bonus and moral hazard which influences risk acceptance or rejection and the amount of premium to be charged.

She referred to the following documents in respect of the acts of negligence of Miss Chin Exhibit P.S – ‘3’

- (a) cover note dated 13th November 1996
- (b) motor insurance Proposal form dated 13th November 1996
- (c) Motor Vehicle Certificate of Title dated 30th July 1996
- (d) Motor Vehicle Registration Certificate

Miss Scully further testified that Miss Chin at the time of Mr. Barrett’s application for Insurance coverage was employed to NEM for approximately eight (8) years. Fifty-seven (57) days after Mr. Barrett’s application was accepted he was involved in an accident. This was his second since he had transacted the business with Miss Chin.

The first did not impact on NEM. However NEM had to pay out on the second accident a total of 3 claims amounting to over one million dollars (\$1M). Mr. Barrett being awarded the largest amount of \$514,000.00.

The loss to NEM could have been avoided had Miss Chin carried out her responsibilities properly by noting the irregularities in the proposal form and investigating previous claims as well as the fact that Barrett did not own the Daewoo.

In cross-examination

She agreed that a partial premium payment was made. Miss Scully explained that the purpose of an address is to locate and communicate with the insured. In this instance the address just said Spanish Town this was too vague. She did not know if a second cover note was issued.

She agreed that 57 days after a cover note was issued NEM could have denied liability and that if no insurance was in place and NEM paid out on that claim, they would have been negligent. Miss Scully admitted that she was seeing the motor vehicle certificate of title for the first time in court. Having seen the transfer on the back of the title her conclusion in terms of ownership of the vehicle would have been different.

The Expert Witness' Account

Mr. Cedric Stephens, a self-employed Insurance consultant testified that the matter that requires his expert opinion is whether the mistake/error that was made by Miss Chin in the execution of her duties ... was unpardonable, inexcusable and damaging to NEM.

He opined that Miss Chin committed a number of errors in underwriting Mr. Rohan Barrett's proposal for motor insurance. He detailed the errors/mistake under 3 heading

1. Proposal Form
2. Underwriting guide
3. Other important factors

The Proposal Form

Miss Chin he said omitted to ask Mr. Barrett to define his occupation or business as requested by the underwriters guide. Occupation as 'Businessman' and address Sp. Twn are too vague. A clear and accurate description of the business is necessary to determine if the proposed meets the company's risk profile and to calculate the correct premium.

The proposer stated that he had regularly driven motor cars for five (5) years and that he held motor insurance before with United Generals Insurance Co. No evidence of previous Insurance accompanied his claim, neither did Miss Chin enquire as to no claim

bonus. His evidence in relation to the motor vehicle registration and the ownership of the Daewoo was retracted in cross-examination.

The Underwriting Guide

There was no evidence from Miss Chin, he testified that she had reminded the proposer about his duty of disclosure and the consequence of misrepresentation – innocent or otherwise. The requirement for proof of no claim bonus, he said, seems to have been ignored.

The details of previous insurance were not furnished. No contact was made with United General Insurance to confirm the accuracy of the representation that was made by Barrett to NEM.

Other Important Factors

In relation to Sophia McKay describing Barrett as too “nagging” and “problematic” having dealt with him on previous occasions, Miss Chin seemed not to have made enquiries. Miss Chin also failed to find out the cause of Miss McKay’s advising her not to take the business.

Mr. Stephens posed the question “**Were Miss Chin errors/mistakes unpardonable and inexcusable?**”

Succinctly put he said, “insurance companies are in the business of handling risks underwriting is one of the main method by which wide variety of risks that insurers are offered are examined accepted or rejected, and appropriate levels of premium computed.

The process of underwriting is at the core of the business operation of companies like NEM.

Poor underwriting practices and controls in an insurance company and improper pricing can threaten its viability.

Repeated errors or violations of underwriting guidelines and control as in the case of Mr. Barrett can lead to the acceptance of risk that otherwise would have been rejected.

In his opinion the errors committed by Miss Chin in accepting Mr. Barrett's proposal for insurance were unpardonable and inexcusable having regard to her job experience, her knowledge of her functions, the conditions which existed at the time these functions were discharged, the underwriting errors/mistake that she made and her failure to exploit opportunities to correct those errors shortly after they were committed.

Mr. Stephens concluded that Sandra Chin failed to properly carry out her job and as a result Mr. Barrett became one of NEM's client. He appeared to have used that status to defraud NEM. NEM suffered significant financial losses as a result of these error/mistakes.

In Cross-examination

He said the underwriting guide sets out a series of rules as to what should or should not be done. He admitted that there were differences between guidelines and rules. Rules are more rigid and should be followed, guidelines are more flexible and can be deviated from.

When the motor vehicle certificate of title was shown to him in court he said he was seeing it for the first time and agreed that there was some evidence that a transfer was signed by Miss Sybil Wright and on this basis he would not have concluded that Miss Chin had not collected some evidence that the vehicle had not been transferred from Miss Sybil Wright.

Further there was an error in his calculation of the premium to be paid.

The following areas I find are not in issue:

1. That NEM is a General Insurance Company
2. That the business of insurance has the underwriting and assessment of risk as a main focus.
3. That Miss Chin on the 13th November 1996 when she accepted Mr. Barrett's proposal had been employed to NEM for 8 years and had worked in the Insurance business for sometime before
4. That Miss Chin was responsible for completing the proposal form in relation to Mr. Barrett's offer.
5. That she failed to properly complete the form in accordance with the underwriter's guide provided by NEM. She inserted Barrett's occupation as "Businessman" which was vague as well as his address as "Sp Twn".
6. That she failed to enquire of Mr. Barrett as to his no claim bonus as well as to his previous insurance history.
7. A cover note was issued to Mr. Barrett and fifty-seven (57) days after Miss Chin processed the proposal for Mr. Barrett he was involved in an accident the second in as many days.
8. This accident cost NEM in excess of one million dollars (\$1M) and Mr. Barrett was awarded the largest amount.

It seems to me that the main area in issue in this matter is whether Miss Chin was wrongfully dismissed as she contends and as NEM rejects.

I find the following areas of inconsistencies in this case

On Miss Chin's Evidence

In examination in chief she said that the person filling out the proposal form would have to return to the company to get a second cover note and the same procedure as to issuance in the first instance would have to be followed.

In cross-examination she agreed that it would be unnecessary to follow the first procedure and agreed that what she said in examination in chief was not quite true.

Her attempt at clarification of this statement in re-examination did nothing at all to assist.

On Miss Patricia Scully's Evidence

In examination in chief she said that no payment was made as to premium, in cross-examination she admitted that a partial payment was made.

In examination in chief she stated that Miss Chin appeared to have accepted the proposal for the motor vehicle although the motor vehicle registration certificate bore the name Sybil Wright and that no documents were submitted to Miss Chin to prove Mr. Barrett's ownership of the vehicle. In cross-examination having been shown the motor vehicle certificate of title Miss Scully agreed that this statement would have been different had she been supplied with the title before.

On The Expert Witness Mr. Cedric Stephens Evidence

In examination in chief he testified that if a transfer was effected this was not indicated however when he was shown the motor vehicle registration title he agreed that there is some evidence that a transfer was signed. This he said would affect one of his findings

under the heading Proposal form, that is, that no document of title was submitted to Miss Chin to prove Mr. Barrett's ownership of the vehicle.

He further stated that he remembered saying that Mr. Barrett was never insured with United General Insurance and then went on to say that Mr. Barrett could have been insured with United General Insurance.

Finding of Facts

I accept the unchallenged evidence of Miss Scully that at all times it was an expressed or implied terms of Miss Chin's contract of employment that she would at all times act with due care, attention and diligence in accordance with the rules and instructions given to her by NEM.

I find as a fact that Miss Chin's action in not amending the file when it was located rather than handing it over to some one else to do the necessary changes amounts to carelessness especially since she had been advised by Miss McKay not to take the business. Miss Chin's testimony is that apparently this was not done. She did not give instructions for the policy to be cancelled.

I find as a fact that Miss Chin's failure to enquire of Mr. Barrett as to his no claim bonus also amounts to negligence particularly in light of her evidence that no claim bonus is a method by which proof of previous accidents could be obtained as well as her failure to make any request of United General Insurance Company concerning the said no claim bonus. This is the unchallenged evidence of Miss Scully supported by that of Mr. Stephens which I accept.

I find that Miss Chin did not get verification from United General Insurance, Mr. Barrett's previous insurers as to his previous insurance history which would have

influenced acceptance or rejection of the risk as well as the amount of premium to be charged.

I find as a fact that previous accident of a potential insured can affect the amount of insurance premium to be paid.

It seems doubtful to me that Miss Chin made contact with NEM claims department concerning Mr. Barrett's proposal as she is expected to do as there was nothing in writing to support her claim that she did so.

I find as a fact and it is agreed on both sides that Miss Chin failed to get adequate description of Mr. Barrett's occupation as well as a specific address "Businessman" and "Sp Twn" being too vague contrary to the underwriters guide. I find that occupation as well as address is important in determining whether to accept or reject the risk and impact upon the premium to be charged.

I find that although the guidelines outlined in the underwriters guide might not have the rigidity of rules based on Mr. Stephens's evidence, which I accept, Miss Chin's failure to adhere to these must be in breach of NEM's rules and instructions.

Mr. Stephen is an expert; his role I find is to assist the court to determine the issues in dispute. I assessed his evidence and I must say that his report and his conclusions carried conviction with me. I have evaluated his conclusion and I am satisfied with the validity thereof.

I accept his evidence when he said that in his opinion the errors committed by Miss Chin in accepting Mr. Barrett's proposal for motor insurance were unpardonable and inexcusable. In failing to carry out her job properly, NEM suffered significant losses.

I appreciate that Mr. Stephens and Miss Scully had prepared statements and report respectively based on the absence of a motor vehicle certificate of title in relation to Mr. Barrett's Daewoo and that there are inconsistencies in their evidence. I recognize that in relation to the ownership of the Daewoo, they may well have relied on an assumption unsupported by evidence as the said title revealed. In the case of Miss Scully her report reflected no payment of premium when there was in fact a partial payment.

These I do not find affect the main areas of proof in the NEM's case. I am prepared to rely on their evidence.

I recognize also that Miss Scully testified that if an accident occurred fifty-seven (57) days after a cover note was issued NEM could have denied liability. She also agreed that if no insurance was in place and NEM paid out they would have been negligent. The fact still remains that a cover note was issued and NEM paid out as a result.

Application of the Law to the Findings of Facts

In **Gulstine vs Anchor Life Insurance Co. Ltd** 1976 27WIR page 68 it was held inter alia

“That the court recognized that the immediate dismissal of an employee is a strong measure and it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence. In the circumstances of this case his immediate dismissal was justified.”

In **Jupiter General Insurance Co. vs. Shroff** (1937) 3AER page 67 – at page 74 Lord Maugham pointed out that:-

“It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee and that decisions in other cases are of little value – we have here to deal with the businesses of life insurance. A mistake in accepting a risk may lead to a very considerable loss and repetition of such mistakes may lead to disaster.

The undertaking is one in which the undertaking of each individual risk is necessarily hazardous and it is only by unremitting care and prudence that the business can profitably be carried on.”

Miss Chin’s acceptance of Mr. Barrett’s proposal led to a considerable loss by NEM.

Miss Chin it seems to me by her negligence could no longer command the confidence of her employer. Her dismissal therefore is justifiable as her actions were not prudent.

Damages

In **Johnson v Unisys Ltd 2001 2AER by 801 at page 817** Lord Hoffman points out that in **Malik v Bank of Credit and Commerce 1997 3AER 1** at page 19 -20 Lord Steyn said that the true ratio of Addis (Addis v. Gramophone Co. Ltd 1909 AC 488) was that damages were recoverable only for loss caused by breach of contract, not for loss caused by the manner of its breach. He went on further to say that as McLachin J said in **Wallace vs United Grain Growers Ltd 1997 152 DLR (4th) 1** CANSC the only loss caused by a

wrongful dismissal flows from a failure to give proper notice or make payment in lieu.

I find therefore that Miss Chin is entitled to payment in lieu of notice. Miss Chin testified that she agrees that at the time of her termination an employee in her position would receive 2 weeks pay and notice.

The letter Exhibit P.S.- 2 dated the 18th August 1997 terminating Miss Chin's employment in the last paragraph states 'that the administrative superintendent has been advised to pay you for 3 weeks in lieu of your vacation leave balance along with any other payments due'.

If this was complied with then it seems to me that NEM would have met its obligations concerning Miss Chin's termination.

Conclusion

On a balance of probabilities I find that NEM acted reasonable in the circumstances and was justified in dismissing Miss Chin based on her conduct in handling Mr. Barrett's application for motor vehicle insurance and thereby causing NEM to suffer losses in excess of one million dollars (\$1M).

Order

- (1) Judgment for the Defendant
- (2) Costs to be agreed or taxed