

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO 2005 HCV 00253

BETWEEN RUDOLPH JACKSON CLAIMANT
A N D GUARDIAN LIFE LIMITED DEFENDANT

Mr. H. Charles Johnson for Claimant

Mr. Jermaine Spence and Miss Kedian Francis instructed by DunnCox for
Defendant

**Employment – Wrongful dismissal – Contract providing for termination with notice
– Employer terminating with notice – Life Insurance Agent - Whether agent barred
from entering company premises thereafter - Whether termination amounted to
wrongful repudiation**

6th and 28th MARCH, 2008

BROOKS, J.

Mr. Rudolph Jackson was a successful life insurance sales representative. His success resulted in his being employed as a branch manager to Guardian Life Limited. It seems however, the demands of the post of branch manager resulted in pressures which were too much for his abilities at that time. When his performance fell below the acceptable level in a specific area, Guardian Life issued him a notice terminating his contract as a sales representative and, by extension, as a branch manager. He seeks compensation for wrongful termination of his contract.

Guardian Life rejects his contention. It asserts that its contract with Mr. Jackson allowed for the termination as it was done, and therefore it owes him no further obligation.

The sole question of law to be answered is whether Guardian Life acted in accordance with the terms of the contract when it issued the letter of termination. There is also a question of fact as to whether Mr. Jackson was, thereafter, refused access to Guardian's premises and whether, as a result, he was in fact dismissed without notice.

The relevant terms of the contract

It should be stated at the outset that Mr. Jackson held two contracts with Guardian Life. They are both dated 1st October, 1999 and are entitled respectively, "Contract for Branch Manager (Jamaica)" and "Sales Representative (Jamaica)". The former contract refers to the latter as, "the Prior Contract". The relevant terms of the branch manager's contract are stipulated at clause 6 thereof. The clause states in part:

"Termination

6. This Contract may be terminated at any time by Ninety (90) days written notice by either party provided, however that if the Branch Manager:

- a) fails to observe or perform any of the obligations on his part contained in this Contract then the Contract shall terminate without notice, or
- b) **The Prior Contract is terminated for any reason whatsoever then this Contract shall terminate at the same time as the Prior Contract....**

7. All provisions of the Prior Contract with respect to service of notices shall apply to this Contract as if the same were specifically incorporated herein.” (Emphasis supplied)

It would have been seen that clause 6(b) allows for the termination of the branch manager’s contract as a necessary result of the termination of the sales representative’s contract.

The relevant clauses in the sales representative’s contract are clauses 3(h), 13 and 14. Clause 3(h) speaks to minimum standards which a sales representative is obliged to maintain. It states:

“Minimum Production Requirements

h) The Representative will be required to meet the minimum production and persistency quotas set by the Company for each year of the term of this Contract. Such quotas for each year shall be notified to the Representative on or before the 1st January in each year. Until any such quota is set the quota set out in the Commission Schedule shall apply.”

Clause 13 allows for termination by either party upon notice in writing. The pertinent portions state:

“13. Termination

a) This Contract may be terminated at any time by either party giving to the other notice in writing specifying the date of such termination which shall be not more than 30 days from the effective date of such notice in the case of a notice given by the Company. In the case of a notice given by the Representative the date of receipt thereof by the Company; such notice shall be delivered within three (3) days of its date...”

d) Should the Representative:...

- ii) fail to observe or perform any of the obligations on his part contained in this contract...

then, in any or all such events, the Company shall have the right to summarily terminate this Contract upon notice in writing to the Representative;”

Clause 14 speaks to the consequences of termination. Clause 14 (e) states:

“14. Rights and obligations on Termination

- e) If this Contract is terminated as provided for under clause 13(d) hereof, all commissions, bonus, rights, benefits and privileges granted under this Contract shall cease and be forfeited as from the date of the notice mentioned therein.

It is now to be determined whether Guardian Life, in seeking to terminate the contract, adhered to the terms of the agreement concerning termination.

The letter of termination

The majority of the contents of the termination letter need to be quoted as they are critical to the analysis and decision to be made. It was dated November 9, 2004 and stated, in part:

“We refer to Memorandum dated October 11, 2004 from the undersigned to all Branch Managers in which you were advised of forthcoming performance reviews.

The review of Agents, Unit and Branch Managers' performance was conducted as at October 31, 2004. **Based on your failure to achieve the required persistency performance standards, your Sales Representative contract with the company dated October 1, 1999, is terminated effective November 30, 2004 in accordance with clause 13(d) ii) (sic) thereof.** In addition, your Contract For (sic) Branch Manager also dated October 1, 1999 is terminated at the same time pursuant to clause 6(b) of that contract and based on the poor performance of your unit.

Any items of Company property including Laptop, Receipt Book, Health Card, ID Card and Company Pin must be returned to this office at the effective date of your termination....” (Emphasis supplied)

It would have been observed that Guardian Life has relied on Mr. Jackson's failure to meet required minimum performance standards, in bringing the contract to an end.

Mr. Jackson's complaint

Counsel Mr. Johnson, on behalf of Mr. Jackson asserted that the termination was wrongful because it was based on peripheral reasons, and was not made in good faith. Mr. Johnson made bold to say that the failure to meet the persistency requirements was not the reason; that the letter of termination was in fact "a sham". Mr. Johnson sought to point to a disagreement between Mr. Jackson and his supervisor, Mr. Hosin as the reason for the termination. Mr. Hosin is the senior vice-president in charge of individual life. Mr. Johnson does not, however, contest the evidence that Mr. Jackson's persistency level was below the standard required by Guardian Life. However, suggestions were made that the assessment was done at an unusual time and that the likelihood existed that Mr. Jackson would have been able to correct the deficiency by the usual time for review. The witnesses for Guardian Life rejected both suggestions. Guardian Life's minimum standard for persistency was 87.5%. Mr. Jackson's was 65.8% in September and 66.8% in October 2004. Mr. Hosin also testified that the

contracts of other agents and managers were terminated for low persistency at the same time that Mr. Jackson's was terminated.

Another submission made by Mr. Johnson is that Guardian Life acted unreasonably in conducting the review in respect of the agent's contract as against the branch manager's contract. He submitted that there is evidence to support a finding that there was a modification to the agent's contract which required Mr. Jackson to concentrate more on his duties as a branch manager than on his duties as an agent. Mr. Johnson pointed to a memorandum written to Mr. Jackson by his supervisor. The memorandum is dated 22nd October, 2004, a mere nine days before the review. The memorandum does not in any way adjust the contract between the parties. It instead encourages Mr. Jackson to leave the task of sales to agents. It went on to say, in the last two paragraphs:

"I have at several One to One meetings and in a few Branch Managers Meetings encouraged you to focus on Branch Management and less on Personal Sales as the performance of your branch and unit are far below company requirement.

I can only again advise you to redirect your energy in this direction."

Mr. Johnson suggested to Mr. Hosin that this requested shift in focus adjusted the standard for Mr. Jackson. Mr. Hosin did not agree. He said that where Mr. Jackson, or any manager, sought to act as a salesman, then the performance as a salesman should meet the minimum standards.

The relevant law

There is authority that an employer must act fairly when terminating a contract of employment. In *Wallace v United Grain Growers Ltd.* [1997] 3 S.C.R. 701, the Supreme Court of Canada held, in part, that:

“...at a minimum in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.” (See head-note)

That principle however does not mean that an employer is obliged to state all the reasons on which it relies in order to terminate in accordance with the terms of the contract. In *Carr v Fama Holdings Ltd.* (1989) 63 D.L.R. (4th) 25, Wallace, J.A., sitting in the Court of Appeal of British Columbia stated at page 32 a, that:

“...an employer may dismiss an employee, giving the wrong reasons, *provided that causes which would justify dismissal did in fact exist at the time.*”

Unless the employer is terminating for cause, the termination must be in accordance with the contract in order for it to be lawful. In this way the law concerning employment mirrors established principles of contract.

Applying the law to the facts

As has been stated before, there is no dispute that Mr. Jackson's persistency level was below the required level at the time that the contract was terminated. Guardian Life was therefore entitled to take the action which it did. Mr. Jackson has not proved, on a balance of probabilities, that

Guardian Life acted improperly. There is certainly no evidence that he was singled out for any unfair treatment. The evidence, which I accept as factual, is:

- a. the review of persistency levels was not abnormally scheduled;
- b. managers had been given advance notice of the review;
- c. the termination was a decision of the executive body, although it was made on Mr. Hosin's recommendation;
- d. Other agents and managers had their contracts terminated at the same time that Mr. Jackson's was, as a result of the review;
- e. Even though some of the agents whose contracts had been then terminated were subsequently rehired, no other manager in such straits was rehired.

Was Mr. Jackson summarily dismissed?

The contract did not provide for any payment in lieu of notice. This is perhaps due to the nature of the payment arrangement. Agents are paid commissions on sales; there is no regular salary to which a payment in lieu of notice could apply. Clause 13 (a) provided for a notice period of not more than 30 days. Mr. Jackson was given 21 days notice. He complains however that on the day that he received the termination letter he was excluded from Guardian Life's head office building. This complaint was

contained in his witness statement. It was not set out in his Particulars of Claim. Suggestions were also made to Mr. Hosin that Mr. Jackson was also excluded from the branch office from the date of his termination letter, but those suggestions were refuted. There is no pleading or evidence which substantiates an assertion that Mr. Jackson was excluded from all Guardian Life's premises thus making the termination, in effect, a summary dismissal.

Damages

It should perhaps be mentioned that even if Mr. Jackson had succeeded on liability in respect of this claim, he would have been entitled to nominal damages only. His Particulars of Claim averred that he had lost earnings of \$21,000,000.00 for five years, as a result of the termination. There was however no evidence whatsoever to support the averment.

Conclusion

Guardian Life has acted within the terms of the contract in terminating Mr. Jackson's employment. The letter of termination was in keeping with the provisions of the clause dealing with termination of the contract. Mr. Jackson's assertion that the letter was "a sham", to cover up an improper motive for the termination, was not supported by the evidence. Similarly there was no evidence that he was excluded from Guardian Life's premises from the date of the termination letter. His claim must therefore fail.

The order therefore, is:

1. There shall be judgment for the defendant on the claim.
2. Costs to the defendant to be taxed if not agreed.