Judgment 27/2009 **Good v Credit Suisse (Guernsey) Ltd – Royal Court (Civil Action File 1171) – 12 June 2009**

Employment law - action for breach of contract – strike out application under Rule 52 of the Royal Court Civil Rules, 2007 – whether 'stigma' damages can be awarded following the unfair dismissal of an employee – employment contract subject to an implied term of trust and confidence – position under Guernsey customary law, and subsequent to enactment of the Employment Protection (Guernsey) Law, 1998 – held that the Courts are not now able to develop implied contractual terms that would apply to a dismissal, as the legislature has intervened to provide a statutory remedy for unfair dismissal

Approved Text
12 June 2009

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between **ALBERT FERDINAND GOOD** **Plaintiff**

-V-

CREDIT SUISSE (GUERNSEY) LIMITED **Defendant**

Date of hearing: 7th April 2009

Judgment handed down: 12th June 2009

Before: Richard John Collas Esq., Deputy-Bailiff

Advocates for Plaintiff: **S R Geall**
Advocate for Defendant: **J E Roland**

Cases & legislation referred to:

1) The Royal Court Civil Rules 2007, Rule 52(2)
2) *IFS Investments v Manor Park (Guernsey) Ltd 11 June 2004*
3) The Employment Protection (Guernsey) Law, 1998 as amended
4) *Vaudin v Hamon (1973) O en C XXIV, page 154*
5) *Morton v Paint [1996] 21.GLJ.61* at page 54, quoting Lord Lowry in *C v DPP (1996) 1 A.C. 1*
6) *Addis v Gramophone Co Ltd [1909] AC 488*.
7) *Johnson v Unisys Ltd [2003] 1 AC 518*.
8) *Malloch v Aberdeen Corpn [1971] 1 WLR 1578*.
9) *Mahmud v Bank of Credit and Commerce International SA [1998] AC 20*.

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10) *Eastwood v Magnox Electric plc [2005] 1 AC 503*.

Background

1. On 8 September 2006 the Plaintiff was told that his employment with the Defendant was terminated with immediate effect. He lodged a complaint of unfair dismissal which was upheld by the Employment and Discrimination Tribunal in a decision issued on 10 July 2007. He has also brought a claim in the Royal Court for damages arising from alleged breaches of contract. One of the heads of loss claimed is for so-called "stigma" arising from the manner of his dismissal, which is alleged to be in breach of the implied term of trust and confidence.

The Pleadings

2. In paragraph 7 of the Cause, the Plaintiff pleaded:

> *"It was an implied term of the Contract (by operation of law) that the Defendant would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and the Plaintiff."*

3. A number of breaches of contract are pleaded in paragraph 17, including breach of that implied term at sub-paragraph 17(x):

> *"17. By reason of the facts set out at paragraphs 8 to 10 above, the Defendant acted in breach of some or all of the terms set out at paragraphs 5 to 7 above.*
>
> ***PARTICULARS OF BREACH***
>
> *(x) conducting itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between itself and the Plaintiff."*

4. The particulars of loss pleaded at paragraph 18 include at sub-paragraph 18 (iii):

> *"(iii) Loss of opportunity to obtain any or any suitable similar alternative employment by reason of the Plaintiff's reputation being adversely affected by the stigma associated with the manner of his dismissal by the Defendant, such loss being foreseeable consequence of the Defendant's breach of contract particularly in a small community like Guernsey."*

The loss alleged is not quantified, the Cause claims *"£Damages to be assessed"*.

5. In an *Exception de Forme*, the Plaintiff was asked:

> *"1. Please provide full and proper particulars of how it is contended that the Plaintiff's reputation has been adversely affected;*
> *2. Please provide full and proper particulars of how any such harm has been caused by the manner of the dismissal of the Plaintiff, including those aspects of the manner of the dismissal said to cause that harm;*
> *3. Please provide full and proper particulars of the basis upon which such harm is said to give rise to a claim for damages."*

6. The Plaintiff replied:

"The Plaintiff objects to providing a reply to the matters requested upon the following grounds:

1. *The matters are adequately pleaded.*

2. *The request involves matters of evidence, argument and comment to which the Defendant is not entitled.*

The Plaintiff volunteers the following:

1. *The Defendant alleged that the Plaintiff had retired and then it became apparent that the Plaintiff had effectively been summarily dismissed. Such misinformation had adversely affected the Plaintiff's ability to work in his particular area and in particular in Guernsey.*

2. *Please refer to previous reply.*

3. *Because the loss and damage suffered by the Plaintiff was a reasonably foreseeable consequence of the breach of contract alleged."*

The Strike-out Application

7. By application dated 23 December 2008, the Defendant applied to have paragraph 18(iii) of the Cause struck out pursuant to Rule 52(2)(a) of the Royal Court Civil Rules 2007 on the ground that it discloses no reasonable grounds for bringing an action.

8. This is the first occasion on which the Royal Court has issued a judgment considering whether stigma damages can be awarded following the unfair dismissal of an employee. An application to strike out a similar stigma claim in another case involving a different employer and another dismissed employee has been argued before me by the same two Advocates who appear in this case. The hearing in that other case finished the day before I heard counsels' submissions in this matter. I indicated I would deliver my judgment first in this matter, with no disrespect to the parties in the other matter but simply because in the other case there are other matters that Advocate Roland seeks to have struck out, in addition to the stigma claim.

9. The principles relevant to an application for strike out were considered by Day LB in *IFS Investments v Manor Park (Guernsey) Ltd 11 June 2004*. He was dealing with an application under the Royal Court Civil Rules 1989 but both Advocates agreed that the principles identified by him are also applicable under the 2007 Rules.

The law

10. My first observation is that the way that the Plaintiff has pleaded his case in paragraph 18(iii) of the Cause and the Reply to the *Exceptions de Forme* quoted above clearly demonstrates that he alleges the stigma arose from the dismissal itself and not from any breach of contract that might have occurred prior thereto. I will deal with this application on the assumption that the facts are as pleaded by the Plaintiff. For that reason, I accept that the Plaintiff suffered loss of reputation affected by the stigma associated with the manner of his dismissal. I therefore reject the submission made by Advocate Geall in paragraphs 5 and 6 of his written argument that it will be for the finder of fact to determine whether the events in question occurred before the dismissal or were part and parcel of it.

11. The parties are agreed that the contract of employment was subject to an implied term of trust and confidence, as pleaded at paragraph 7 of the Cause. The existence of a similar term in a contract of employment implied by English law was affirmed by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA [1998] AC 20*.

12. In *Johnson v Unisys Ltd [2003] 1 AC 518*, the House of Lords re-affirmed that such a term is to be implied in an employment contract and that breach of the implied term during the currency of the contract may give rise to a claim in damages. However, the House of Lords held that such a term does not apply to a dismissal.

13. In the present case, whilst counsel agreed that the Plaintiff's contract of employment was subject to an implied term of trust and confidence, they disagree as to whether Guernsey law should follow English law in holding that the implied term does not apply to a dismissal.

14. There are two related issues I must consider under Guernsey law: whether the implied term of trust and confidence applies to the manner of dismissal of the employee; and whether damages can be awarded for loss of reputation and the stigma associated with the unfair dismissal.

15. First, I will look at what was the position under Guernsey customary, or common, law before the enactment of the Employment Protection (Guernsey) Law, 1998 (" the 1998 Law") and how it has been altered, if at all, as a result of the enactment of the 1998 Law and amendments thereto.

16. Section 3 of the 1998 Law introduced a basic right not to be unfairly dismissed from employment. It is helpful to look at what the States of Deliberation understood to be the common law position and hence understand the basis of the reform the Sates were seeking to achieve.

17. The Policy Letter written by the then Board of Industry in Billet d'Etat XI of 1995 states, at page 511, that *"Common law provides no job security for employees in the Island who can currently be dismissed for any or no reason and cannot claim for anything other than notice in accordance with the contract of employment or payment in lieu"*. That statement accords with what Lord Reid said of the common law position in England, in *Malloch v Aberdeen Corpn [1971] 1 WLR 1578* at page 1581:

> *"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."*

18. Both counsel accept that represented the common law of Guernsey as it was then understood to be and that the Guernsey courts had never sought to exercise any jurisdiction in respect of unfair dismissals but Advocate Geall argues that does not prove that a common law remedy did not exist, it merely shows it had never been exercised.

19. At page 513 of the Billet, the Board of Industry wrote that *"The Board believes that the time has now come for the Island's employees to benefit from some limited form*

of employment protection where the reason(s) for a dismissal appear unfair". The Board's proposals were accepted by the States and were enacted in the 1998 Law which introduced a right not to be unfairly dismissed subject to a qualifying period of two years' employment. It brought in a complaints procedure, a conciliation service and an adjudication procedure with power for compensation to be awarded if the adjudicator upheld the complaint of unfair dismissal. The amount of compensation was fixed at three months' pay (sections 19 and 20 of the 1998 Law). Section 30 provided that the compensation award was additional to any other right or remedy relating to or arising from the dismissal or the circumstances thereof; that preserved the common law remedies for breach of contract, for example to claim for payment in lieu of notice.

20. In 2004 the Commerce and Employment Department commissioned an independent review by an Industrial Relations Specialist, Mr Peter Syson, of the workings of the 1998 Law. The Department reported his findings to the States, together with the Department's comments thereon, in a Report dated 25th August 2004 published in Billet d'Etat XVIII of 2004.

21. The Department's Report contains an interesting discussion at page 1965 under the heading *"How does UK practice and procedure affect Guernsey"*:

> *"Whilst Guernsey could ignore the fundamental principles of the application of employment Law in the UK, there may be lessons to be learned from the UK experience. The UK Tribunal process has become cumbersome and more expensive than originally planned, with long delays being experienced in processing complaints.*
> *Guernsey Adjudicators, local Advocates and Trade Union Officials have found it useful to draw on examples and case law from the UK and ultimately it has influence and can be persuasive on the Adjudicators. The local Appeal Court decisions have now established some of the UK decisions as case law in Guernsey."*

22. The passage is relevant because Advocate Geall urged that I should not slavishly follow English law and in the other case argued before me (but not in this case), he argued that I could look to French Law and the *Code Civile* for persuasive guidance as to how Guernsey law should develop.

23. In my view, it is clear from the Billet quoted above, as well as from my own experience, that Guernsey employment law is based on English law. The Guernsey legislature has not imported English legislation without amendment but it has modelled our employment legislation on English law; it has adopted principles of English law and adapted them to suit the needs of this jurisdiction; the Courts have applied English case law in interpreting the legislation; and in my experience, those who advise in matters of employment law, for example in the drafting of employment contracts, look to English law principles for guidance.

24. In *Vaudin v Hamon (1973) O en C XXIV*, page 154 Lord Wilberforce considered when it is appropriate to look by analogy at other systems of law. He said, at page 164:

> *"If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, or the relevant portion of it, is similar to that which is being considered, and then that the*

> *former has been interpreted in a manner which should call for a similar interpretation in the latter."*

25. I do not believe French law is similar and so I do not consider it would be helpful to introduce new concepts from French law into our employment law. So, when looking at an aspect of employment law that is not covered by Guernsey legislation and where Guernsey common and customary law is unclear or unknown, we may look at the concepts and principles of English common law (except where they are inconsistent with some provision of Guernsey customary or statute law or are otherwise inapposite or inapplicable).

26. The Syson Report reviewed the award of compensation for unfair dismissal (established in the 1998 Law) which was then equal to three months' pay. It recommended *"that the Board adopt the principle of a basic award according to defined criteria for calculation supplemented, where appropriate, by a compensatory award similar to those in GB but adapted in as simple a form as possible to the Guernsey situation."* The Commerce and Employment Department rejected that recommendation and instead proposed a compromise of increasing the basic award from three months' to six months' pay with the facility for the Tribunal to reduce the award. It rejected the proposal of including a compensatory element in the award. In its Report to the States of 25th August 2004, the Department wrote (at page 1972 of the Billet):

> *"If the award for unfair dismissal remains fairly simple to administer and just takes account of the 'unfair dismissal' element of the complaint, then the employee who wishes, can still sue the ex-employer for loss of earnings and any other Breach of Contract claim, although in reality this has rarely happened in the past."*

27. The recommendations of the Department were accepted by the States and resulted in amending legislation, The Employment Protection (Guernsey) (Amendment) Law, 2005. The reforms thereby introduced include an increase in the compensation award from three months' to six months' pay with discretion to reduce the award if it is just and equitable to do so. Section 30 was replaced with an amended section that stated *inter alia* that the compensation award:

> *"is in addition to any other right or remedy relating to or arising from the complaint or the circumstances thereof, and accordingly (without prejudice to the generality of the foregoing) the award is not deductible form any damages that may be awarded, whether by a court of law or otherwise, or from any other payment that may become due, in respect or as a consequence thereof."*

28. So, in summary, an employee (who meets the qualifying criteria in the legislation and) who has been found to have been unfairly dismissed has two possible avenues open to claim compensation. First, by statute, he may claim compensation for breach of the statutory right not be unfairly dismissed; the sum to be awarded is fixed at six months' salary unless the Tribunal decides it is just and equitable to reduce the award. Second, at common law, he may claim damages in the Courts for breach of the express and implied terms of his contract of employment (in some circumstances there might also be a claim in tort but not in the present case).

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29. The Syson report did not consider whether stigma damages should be recoverable and the legislation makes no provision for them, so an unfairly dismissed employee will be able to recover such damages only if they are recoverable at common law in the civil courts.

30. To answer that question, I begin by looking at the English common law. The starting point is the House of Lords decision in *Addis v Gramophone Co Ltd [1909] AC 488*. The headnote reads:

> *"Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment."*

31. The decision was considered by the House of Lords in *Johnson v Unisys Ltd [2003] 1 AC 518.* Lord Millett said, at page 546F:

> *"69. That case [Addis] established the principle that damages are awarded for breach of contract and not for the manner of the breach; accordingly nothing can be recovered for mental distress, anxiety, injury to feelings or (so it is said) damage to reputation. The case was concerned with a contract of employment and the actual decision was that damages for wrongful dismissal are limited to compensation for the financial loss arising from the premature determination of the contract where proper notice of dismissal has not been given: they cannot include compensation for the employee's injured feelings because he has been dismissed in an offensive and humiliating manner. The principle, however, is not limited to contracts of employment but is of general application in the law of contract."*

32. In a dissenting speech in *Johnson*, Lord Steyn said at page 526G:

> *"The headnote [in Addis] is arguably wrong in so far as it states that the House decided that a wrongfully dismissed employee can never sue for special damages for loss of employment prospects arising from the harsh and humiliating manner of the dismissal…. Nevertheless, the statement of the law encapsulated in the controversial headnote has exercised an influence over this corner of the law for more than 90 years. It has had a restrictive impact on the damages which an employee may recover for financial loss actually suffered as a result of the manner of wrongful dismissal"*.

33. In the other case argued before me the previous day, Advocate Geall made forceful submissions to persuade me not to follow the decision in *Addis* in so far as it relates to stigma damages. He did not argue so forcefully in the present case, possibly because he sensed that I was not persuaded by his previous argument.

34. I accept that the summary of the decision in the headnote in *Addis* may be controversial but I do not need to analyse whether it is wrong or to question whether the case was correctly decided because, as Lord Steyn acknowledged in his minority speech, it has influenced the development of the law in England. By analogy, the headnote has also influenced the development of Guernsey law in this area over the last 100 years.

35. Employment legislation has also been a significant development. If the States had not introduced a statutory right not to be unfairly dismissed, it is possible that the Guernsey Courts could have developed a common law remedy, as the Court of Appeal did in respect of occupiers' liability in the case of *Morton v Paint [1996] 21.GLJ.61.* At page 54 of the report of the judgment in the Guernsey Law Journal, quoting Lord Lowry in *C v DPP (1996) 1 A.C. 1*, the Court of Appeal offered *"some aids to navigation across an uncertainly charted sea":*

> *"(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."*

36. I believe all these five matters point away from the courts creating a new remedy to award stigma damages for unfair dismissal. The solution may be doubtful and I am not persuaded that it would achieve finality in that there could be continuing uncertainty as to the circumstances in which such damages are recoverable.

37. Also, it would alter the well-established relationship between employer and employee or master and servant whereby, as Lord Reid said in *Malloch v Aberdeen Corpn [1971] 1 WLR 1578* in the passage quoted above,

> *"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."*

38. The common law position may be regarded as highly unsatisfactory in the 21st century but, in my view, the biggest obstacle preventing the Courts from developing a satisfactory remedy is that the States have been very active in legislating in this area; they enacted the 1998 Law which they amended in 2002 and then fundamentally reviewed in 2004 leading to further amending legislation in 2005. The issue of stigma damages may not have been drawn to the attention of the States but the controversy, such as it was, regarding the decision in *Addis* was known and, for example, *Johnson* was decided by the House of Lords in 2002 and published in the Law Reports in 2003. That was before Mr Syson began his review, during the course of which he consulted widely with interested parties. There was, at the very least, an opportunity to draw the issue to his attention; for example, Appendix B to his report records that those he invited to participate in his review included the Guernsey Bar Council and a number of individual Advocates.

39. It is very helpful to look at what Lord Hoffmann said about the relative contribution of statute and common law in *Johnson,* (page 539D):

> *"36. The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence….*

> *37. The problem lies in extending or adapting any of these implied terms to dismissal. There are two reasons why dismissal presents special problems. The first is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed. The second reason is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord."*

40. In my opinion, what Lord Hoffmann said about Parliament and the development of English statutory law applies equally to the States of Deliberation and the development of employment legislation in this Island. Lord Hoffmann accepted that it would be possible for the courts to have developed a remedy by implying a term into the contract of employment that the employer should not dismiss an employee except for good cause and after allowing the employee to show that no such cause existed. One of the difficulties in doing so would be that the courts would then be straying into the area where the legislature had intervened by introducing a statutory remedy for unfair dismissal. He explained (page 543 F):

> *"My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of Malloch v Aberdeen Corporation [1971] 1 WLR 1581. The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount."*

41. Again, in my view, the same also applies in Guernsey. It is also to be noted that, in 2004 when reviewing the 1998 Law, the States expressly rejected the opportunity to include in the statutory award for compensation an element to reflect some heads of

damage that could be recoverable on common law principles. The Guernsey legislation expressly preserved (in section 30 of the 1998 Law) the remedies in damages available through the civil courts but, in my view, those were the existing remedies and the States did not, and did not intend to, create any new heads of damage.

42. The States' objective was to retain the simplicity of the Tribunal procedure without adding complexity to it. The States introduced the concept of what is 'just and equitable', but only so as to reduce the award, not to increase it above the six months' maximum. There may be, indeed there probably will be, cases where that may not be fair because the dismissed employee may not be adequately compensated for the loss arising from the injury, especially psychiatric injury, flowing from the unfair manner of the dismissal. When the facts of the present case are established, it may be found to be an example of such unfairness, I know not. (In any event, the facts are for the Jurats to determine and not for me to express an opinion upon).

43. Advocate Geall submits that it would be very unjust if the Guernsey Courts could not award stigma damages in cases of unfair dismissal. He urged me to allow Guernsey law to develop independently and free of the constraints of English common law and he invited me to steer a different path in the development of legal remedies in Guernsey in order to avoid the difficulties that English law has encoutered.

44. The implied term of trust and confidence was again considered by the House of Lords in *Eastwood v Magnox Electric plc [2005] 1 AC 503*. Lord Nicholls of Birkenhead reviewed the remedies established by statute for infringement of the statutory right not to be unfairly dismissed and the causes of action available at law for breach of contract or otherwise and acknowledged that identifying the boundary between the two can give rise to unsatisfactory consequences. He urged that the situation merits urgent attention by the Government.

45. However, in my view, the States have established statutory remedies for breach of a statutory right not to be unfairly dismissed and it is not for the Courts to stray into the same territory by developing its own remedies. I am therefore of the opinion that the *"Johnson exclusion area"* as it was described in *Eastwood* also exists under Guernsey law. In other words, the implied term of trust and confidence does not apply to a dismissal.

46. This conclusion may well be considered to be unsatisfactory especially in cases where a dismissed employee suffers psychological or reputational damage arising from the manner in which he or she was unfairly dismissed (I make no comment as to whether the Jurats would find that to be so in the present case if the matter went to trial). If so, that is for the States to resolve, not the Courts.

Conclusion

47. The right of an employee not to be unfairly dismissed from employment is a statutory right; the procedure for dealing with complaints is as laid down by the legislature; the remedy for breach of the right is statutory; and the tribunal with jurisdiction to award compensation is the Employment and Discrimination Tribunal, not the Court. If the legislature had not intervened in this area, the Courts might have developed a common law remedy, but they are no longer free to do so. The Courts are now not in a position to develop implied contractual terms that would apply to a dismissal; the implied terms of trust and confidence applies during the contract but does not apply to

any dismissal. Consequently the Guernsey Courts are not able to develop common law remedies to enable an employee to recover damages for any loss he suffers arising from the manner of his dismissal, whether by way of loss of reputation, stigma or otherwise.

48. Having regard to the principles that I must apply to a strike-out application, I am satisfied that even if the facts alleged by the Plaintiff are all proved, the Plaintiff's claim in respect of the loss pleaded under sub-paragraph 18(iii) of the Cause discloses no cause of action. Therefore, for the reasons I have given, I grant the Defendant's application to strike-out that sub-paragraph.

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