

Judgment 33/2009

**Castellino v BSI Generali Bank (CI) Ltd – Royal Court
(Civil Action File 1158) – 10 July 2009**

Royal Court Civil Rules, 2007 (Rule 52) – action by former employee alleging breach of certain implied terms of his employment – strike-out application by the employer – principles to be applied – Guernsey employment legislation – relevance of English legal principles and case law – strike-out allowed in part, so as to limit the claim to loss to breaches of contract alleged to have occurred prior to termination – statutory right not to be unfairly dismissed and provision for compensation by an Employment and Discrimination Tribunal

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1158

The 10th day of July 2009 before Richard John Collas, Esquire, Deputy Bailiff

JOSEPH CASTELLINO

Plaintiff

-V-

BSI GENERALI BANK (C.I.) LIMITED

Defendant

Whereas on 6th April 2009 considered the Defendant's strike out application and heard thereon Advocates J E Roland and S R Geall counsel for the Plaintiff and Defendant respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and

1. allowed the application to the extent of striking-out section 17 of the Cause and such parts of section 18(iv) and the Schedule as are required to limit the claim to loss arising only in respect of any breaches of contract that are alleged to have occurred prior to termination.
2. Directed the Plaintiff's Advocate to list this matter at an Interlocutory Court within the next two weeks when any applications arising out of this decision will be dealt with.

S M D ROSS

Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between	JOSEPH CASTELLINO	Plaintiff
	-V-	
	BSI GENERALI BANK (C.I.) LIMITED	Defendant

**Judgment re Defendant's Strike-Out Application
Judgment handed down: 10th July 2009
Before: Richard John Collas Esq., Deputy Bailiff**

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

Cases & legislation referred to:

Good v Credit Suisse (Guernsey) Limited
Rule 52(2) of the Royal Court Civil Rules 2007.
IFS Investments Ltd v Manor Park (Guernsey) Ltd and Others, Royal Court, 11 June 2004
Johnson v Unisys Ltd [2003] 1 AC 518
Reda v Flag Ltd [2002] UKPC 38
Takacs v Barclays Services Jersey ltd [2006] IRLR 877
Malik v BCCI 2All ER 1

Factual Background

1. The Plaintiff was formerly employed by the Defendant which is a Guernsey registered company forming part of the Generali Group ("Generali"). He claims that he was recruited by Generali to build and develop in Guernsey a corporate treasury bank to act as a central treasury resource for the whole Group and to offer treasury resources to the offshore financial intermediary market. His employment commenced on 16 June 2004 when he was employed by another company within the Generali Group before his employment was transferred to the Defendant company with effect from 1 January 2005. He can be considered to have been employed by the Defendant from the outset.
2. On 16 June 2006, the Plaintiff was given three months' notice of termination of his employment. He brought a complaint of unfair dismissal which was heard by the Employment and Discrimination Tribunal on 22 June 2007. The complaint was upheld in a decision issued on 10 July 2007 and he was awarded the full amount of compensation that could be awarded for breach of his right not to be unfairly dismissed, the Tribunal having found there was insufficient evidence to support any allegation that he had played some part in the dismissal.

Procedural History

3. In addition to the compensation he has received from the Tribunal, the Plaintiff claims that he is entitled to damages for breach of certain implied terms of the employment contract and hence he has brought this claim in the Royal Court.
4. On 12 October 2007, the Defendant lodged defences consisting, almost entirely, of Exceptions de Forme requesting further particulars of the claim. A hearing before me of the Exceptions was adjourned on 21 April 2008 to enable Advocate Geall to consider revising the Cause, following which he applied on 2 May 2008 to file a revised Cause and he was given leave to do so unopposed.
5. By application dated 14 May 2008, the Defendant issued an application to have paragraphs 17 and 18(iv) (including the schedule) of the Cause struck out on the ground that they disclosed no reasonable cause of action. The application was part heard on 6 and 12 November 2008 when it was adjourned in the light of how I indicated that I saw the matter. In particular, I raised a question about the interaction of the express terms and the implied terms of the contract of employment.
6. Directions were agreed in a Consent Order signed on 28 November and those directions were amended by a Consent Order dated 23 December, following which the Defendant filed a revised application to strike out the Cause in its entirety. The revised application (my copy of which is dated 10 February 2009) came before me for hearing on 6 April 2009. I apologise to the parties that I have taken longer to prepare this judgment than I would normally like. There are two reasons for the delay, first the same two Advocates appeared before me in another matter, *Good v Credit Suisse (Guernsey) Limited*, on a question as to the recoverability under Guernsey law of damages for stigma arising out of the manner of termination of an employment contract in breach of an alleged implied term of trust and confidence. That is one of the questions arising in the present case and it was agreed that I would deliver judgment in that matter first. The other reason for the delay is that, unfortunately, pressure of other work has delayed the judgment in this case for longer than I would have liked.

The Pleaded Case

7. In an amended Cause dated 2 May 2008, it is alleged that in order to induce the Plaintiff to commence employment with Generali, the Defendant made a number of representations and warranties concerning the establishment, resources and support that would be given to him in creating a treasury function. Those representations and warranties, it is said, turned out to be false. For the purpose of this judgment, I assume that the Plaintiff's allegations are true.
8. The Plaintiff also pleads that the Defendant breached three implied terms of the contract:

“8. *Implied terms (by operation of law) of the contract provided that (“the Implied Terms”):*

8.1 *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; and/or*

8.2 *the Defendant would afford the Plaintiff a reasonable opportunity of making the Treasury Division profitable within 24 months; and/or*

8.3 *the Defendant would not conduct itself in such a way as to prevent the performance of the Contract.”*

9. The loss suffered is pleaded in paragraph 18 of the Cause:

“(i) *the Defendant denied the Plaintiff of receiving a payment pursuant to clause 2.3 of the Contract. As the Contract was terminated more than two years after the Commencement Date, but less than 4 years after, this payment would have been twice the Plaintiff’s annual remuneration.*

2 x £88,000 = £176,000.00

(ii) *Loss of opportunity to participate in the non-discretionary Division bonus scheme pursuant to clause 6.2 of the Contract*

= £100,000.00

(iii) *Loss of opportunity to participate in the discretionary bonus scheme of the Defendant pursuant to clause 6.3 of the Contract*

= £50,000.00

(iv) *Loss of opportunity to obtain suitable alternative employment caused by the fact that the Plaintiff’s reputation has been adversely affected by the stigma associated with the breaches by the Defendant of Clauses at 8.1 and/or 8.2 and/or 8.3 (particularised above), particulars of which are set out at Schedule 1 attached and served hereto, such loss being a foreseeable consequence of the Defendant’s breaches of contract*

= in excess of £300,000.00”

The Law Relating to Strike Out

10. The application for strike-out is brought under Rule 52(2) of the Royal Court Civil Rules 2007:

“(2) *The Court may strike out a pleading if it appears to the Court-*

(a) that the pleading discloses no reasonable grounds for bringing or defending an action”

11. Advocate Geall, on behalf of the Plaintiff, reminded me of the principles governing strike-out applications that were considered by Day L B in *IFS Investments Ltd v Manor Park (Guernsey) Ltd and Others, Royal Court, 11 June 2004* (a case in which I appeared for one of the defendants and Advocate Roland appeared for the plaintiff). In that case we were concerned with the Royal Court Civil Rules 1989 which have since been repealed and replaced by the 2007 Rules.
12. Advocate Geall also drew my attention to CPR 3.4(2) on which Rule 52(2) of our 2007 Rules appears to be based and suggested that English case law on the interpretation of the CPR is relevant. He quoted from the commentary at paragraph 3.4.2 of the White Book 2008:

*“However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact. (*Farah v British Airways, The Times, January 26 2000, CA* referring to *Barrett v Enfield Borough Council [1989] 3 WLR 83, HL; [1999] 3 All ER 193*). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown [2000] LTL January 19, CA*). An application to strike out should not be granted unless the court is certain the claim is bound to fail (*Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] PNLR 35, CA*).”*

13. Those principles were not disputed by Advocate Roland and they seem to me to be uncontroversial.

Implied Terms in the Contract of Employment

14. Advocate Roland argued, by citing paragraph 37 of Lord Hoffman’s speech in *Johnson v Unisys Ltd [2003] 1 AC 518*, that

“Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed.”

15. Advocate Roland also relied upon the decision of the Privy Council, on appeal from the Court of Appeal of Bermuda in *Reda v Flag Ltd [2002] UKPC 38*, at paragraph 45:

*“Their Lordships accept that the appellants’ contracts of employment contained an implied term that Flag would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of such a term is now well established on the authorities: see *Imperial Group Pensions Trust limited v Imperial Tobacco Ltd [1991] 1 WLR 589 at pp. 597-9; Malik v Bank of Credit and Commerce International S.A. [1998] AC 20; Johnson v Unisys [2001] 2 All ER 801*. But in common with other implied terms it must yield to the*

express provisions of the contract. As Lord Millett observed in Johnson v Unisys it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause.”

16. Advocate Roland argued that the scope for implying terms into the Plaintiff’s contract of employment is greatly limited by its express terms, in particular, by the following express terms:
- (i) Paragraph 2.1 that permitted either party to terminate the contract on three months’ notice;
 - (ii) Paragraph 3.4 that states the Defendant was not obliged to appoint the Plaintiff to, or retain him in, any office of the Defendant company;
 - (iii) Paragraph 3.5 that says the Defendant was not obliged to provide any work for the Plaintiff; and
 - (iv) Paragraphs 2.2, 2.3 and 2.4 that provided for a severance payment to the Plaintiff only in certain circumstances.
17. She accepted that there is an implied term of trust and confidence in every contract of employment but she added two qualifications. The first was that it does not apply to the termination of employment. For the reasons I gave in my decision in Good v Credit Suisse (Guernsey) Limited, I agree with that submission. As the same counsel were involved in that case and with no disrespect to the parties in this case, I wish to adopt my reasoning in that judgment without repeating it all in this judgment. Instead I will summarise briefly the main reason I gave which was that because the States of Deliberation legislated to introduce a statutory right not to be unfairly dismissed along with a statutory remedy for breach of the right, it is not now open to the Courts to imply any contractual terms that would apply to the termination of a contract of employment.
18. Therefore, I agree with Advocate Roland’s submission that the implied term of trust and confidence applies during the contract but does not apply to termination.
19. The second qualification put forward by Advocate Roland was that the implied term needs to be interpreted correctly and could not, for example, be understood as imposing an obligation that the parties cooperate which, it is submitted, is what the Plaintiff appears to have pleaded at paragraph 16 of the Cause. I agree that it must be correctly interpreted and I must consider whether that can be done at this stage, or only after hearing evidence.

Can the Claim be Struck Out?

20. In the presentation of her client’s arguments in support of its strike out application, Advocate Roland focussed on the heads of loss claimed in paragraph 18 of the Cause. Regarding the claim for two years’ salary allegedly payable under paragraph 2.3 of

the contract, she argued that the Plaintiff had not taken account of the entirety of paragraph 2.3; on its true construction, it was a pre-condition to receiving any severance payment that the Treasury Division be profitable. Furthermore, by virtue of paragraph 2.4, the Plaintiff has lost any entitlement to a payment by bringing a claim in respect of the termination.

21. In response, the Defendant relied upon the High Court decision in *Takacs v Barclays Services Jersey Ltd [2006] IRLR 877* in which the claimant claimed for non-payment of a bonus to which he would have been entitled had he attained a specified sales target and which he alleged he had been denied the opportunity of achieving by breach of the implied term of trust and confidence. Master Fontaine held, at paragraph 56 that:

“56. *I do not consider that the implied term of trust and confidence asserted by the Claimant contradicts or is inconsistent with the express terms of the contract. The contract provides that there may be termination for other than gross misconduct, but the Claimant relies upon a breach of the implied duty of trust and confidence occurring before termination, and which is entirely independent of the express terms of the contract relating to termination. I accept the Claimant’s submissions that the decisions in *Reda v Flag* and *Johnson v Unisys* are capable of being distinguished from the facts in this case. The consequences of such a breach are not dealt with at all in the express provisions of the contracts.*

57. *Whether there has in fact been such a breach is an issue that will require oral evidence. The claimant’s witness statement provides prima facie evidence to substantiate such a breach. That is denied by the defendant, and the disputed issues of fact will have to be determined at trial. Accordingly, I consider that the claimant does have a real prospect of success in his claim that the defendants were in breach of their implied duty of trust and confidence.....*

58. *It is also clear from the many authorities that I have been referred to in the course of the hearing, only some of which I have referred to in the course of this judgment, that this is an area of the law which is in the process of developing. The vast majority of the cases have been heard during the last five or six years. It would not, in my judgment, be appropriate to determine this claim at a summary hearing, so that there is also some other compelling reason for the claim to proceed to trial”*

22. I believe that Master Fontaine’s line of reasoning also applies in the present case. (I do not have the benefit of any witness statements and must accept that the material facts are as pleaded by the Plaintiff.) The breaches of the implied terms of the employment contract (including the implied term of trust and confidence) relied upon by the Plaintiff include breaches that are alleged to have occurred prior to termination. As in *Takacs*, the contract did not expressly provide for what was to happen in the event that the Defendant committed such breaches.

23. Advocate Roland argued that the present case can be distinguished from *Takacs* on its facts and on the basis of its different contractual provisions. She is right to remind me that we should be looking at the legal principles involved.
24. The way I have approached the matter is to look at the situation immediately prior to the commencement of the termination of the contract and to ask whether, at that moment, the Plaintiff had accrued a cause of action arising out of a breach of an implied term and, because this is a strike-out application, whether there is some question fit to be decided by a Judge or Jurats after a trial. I cannot allow the strike out unless I am certain the claim is bound to fail.
25. I am also conscious that this is a developing area of Guernsey law. I was persuaded, on well-established legal principles, that there is no room for the Courts to develop and introduce implied contractual terms that would apply to a termination of contract. I also accepted that certain terms, such as the trust and confidence term, are to be implied during the currency of the contract. However, I am not aware of any previous Guernsey case in which the Courts have been asked to imply and interpret such terms. I believe, as I said in my judgment in *Good*, that the Guernsey law of employment has been based substantially on English law, although the States resolved not to follow English law directly when they decided not to base the remedy for breach of an employee's right not to be unfairly dismissed on the English statute but, generally, English legal principles apply. English case law is therefore heavily persuasive and by and large we follow the English decisions but we may not follow every aspect of the English cases; there is some scope for Guernsey law to develop differently in certain respects and it may or may not do so.
26. There are a number of factual issues that arise which, in my view, should be determined by the Jurats after hearing evidence. Were the representations and warranties pleaded in paragraph 2 of the Cause made to induce the Plaintiff into the contract and, if they were made, was it intended that they should have contractual force? If they were not incorporated into the express terms of the written contract, what is their effect? If not, how do they interact with the terms of the contract? What terms can properly be implied into the contract? What is the interrelationship between the implied and express contractual terms? Had there been a breach prior to the termination process? If there was a breach, what loss has the Plaintiff suffered that can be attributed to such breach? These are issues of mixed fact and law that should be decided at trial. The fact that there are some legal questions that have not previously been considered in Guernsey is an added reason for the matter to go to trial.
27. Lieutenant-Bailiff Day said in *IFS Investments* that a defendant has a high hurdle to surmount if he is to succeed in a strike out application. In my view, the Defendant in the present case has not quite done enough to surmount the hurdle in respect of the implied terms at paragraphs 8.2 and 8.3 and the loss claimed in paragraph 18(i).

28. I cannot decide whether the other two terms, pleaded at paragraphs 8.2 and 8.3 of the Cause, may properly be implied into this contract because they may depend on the evidence so, again, I am not persuaded that they can be struck out.
29. Advocate Roland argued that the Plaintiff could not be eligible for the bonus claimed in paragraph 18(ii) because he was no longer employed by the Defendant. Paragraph 6.2 of the contract provides for an employee who is no longer employed to be eligible in exceptional circumstances detailed in the rules of the scheme. The rules define the “Eligible Participants” as including someone who is under notice of termination in circumstances in which he is not a “Bad Leaver”. That latter term is a defined term which broadly includes someone whose employment has been terminated in circumstances that would justify summary dismissal under the terms of his contract. I am not aware that the Defendant intends to allege that the Plaintiff could have been summarily dismissed but if it does, the Plaintiff will no doubt deny it. At this stage I have to accept that there is a possibility that the Plaintiff could have been eligible to participate in the bonus scheme. Although, as his employment terminated on 14 September 2006, the last date on which he might have qualified for payment of a bonus was 31 March 2006.
30. Advocate Roland argued that the Division was not profitable and hence there would have been no bonus but the Plaintiff’s case is that, in breach of an implied term, he was denied the opportunity to make it profitable. I cannot resolve that argument at this stage so the Defendant has not persuaded me to strike-out the paragraph. However, I would add that the Plaintiff’s pleading requires amendment to make clear what is claimed; the explanation given by Advocate Geall in argument as to the basis of the claim is different from what I understood when I read the Cause.
31. Paragraph 18(iii) is a claim for a discretionary bonus. Advocate Geall candidly admitted that it will be a tougher claim to establish but, because it also involves an allegation that, in breach of an implied term, the Defendant frustrated the Plaintiff’s endeavours to attain the required performance criteria, I will allow it to go to trial.
32. Paragraph 18(iv) is a claim for ‘stigma’ damages. For the reasons I gave in my decision in *Good*, there can be no claim for any stigma arising from the termination of the employment but that leaves open the question as to whether there could be a claim in respect of any stigma arising from a breach of contract that was committed prior to the termination process.
33. Advocate Roland argued that there was no precedent for such a claim other than in circumstances involving a corrupt employer, such as was the case in *Malik v BCCI 2All ER 1*. She may well be correct but as this is a novel legal point, at least in Guernsey, I do not think it would be correct for me to say at this stage that the Plaintiff’s claim has no prospect of success.

Conclusion

34. Advocate Roland put forward some powerful and compelling arguments in support of the application to strike out the whole of the claim. Both she and her client may feel that I have not fully addressed them in this judgment. If so, that is because I feel that enough factual issues have been raised to justify the matter going to trial when the Court will be better able to deal with the legal arguments after the factual circumstances surrounding the claim have been established.
35. Whilst I cannot grant the application to strike out the whole of the Plaintiff's claim, I am satisfied that it is appropriate to allow the application to the extent of striking-out section 17 and such parts of section 18(iv) and the Schedule as are required to limit the claim to loss arising only in respect of any breaches of contract that are alleged to have occurred prior to termination
36. I do not want to raise the Plaintiff's expectations; I have expressed no opinion on the merits of the remainder of his case but I hope he realises that there is a substantial difference between allowing a case to go forward at this stage and actually succeeding at trial.
37. I direct the Plaintiff's Advocate to list this matter at an Interlocutory Court within the next two weeks, when I will deal with any applications arising out of this decision.