

Contract Law: Developments for Employment Lawyers

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What this talk will cover:

- The implied term of trust and confidence
- Controls on the exercise of contractual discretion
- Legacy questions from *Societe Generale v. Geys*

Development of T&C Term



- Historic range of employer duties, but no duty to act reasonably
- ***Western Excavating v. Sharp*** [1978] QB 761 – need to identify fundamental contractual term; no protection for Ees getting “squeezed out”
- ***Woods v. WM Car Services (Peterborough)*** [1981] ICR 666:

“In our view, it is clearly established that there is implied in a contract of employment, a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employer and employee”

Development of T&C Term



- ***Malik v. BCCI*** [1997] ICR 606
 - Not constructive dismissal
 - NB Lord Nicholls vs. Lord Steyn re “*calculated to*”
 - NB introduction of “*mutual*”
- Growth restricted by ***Johnson v. Unisys*** [2001] ICR 480

The Contents of the Duty



- Is “*calculated to*” a distinct part of the duty at all?
 - ***Amnesty International v. Ahmed*** [2009] IRLR 884
 - ***Yapp v. FCO*** [2015] IRLR 112
 - Strategic advice: always plead both limbs
- What is the role played by subjective intentions?
 - ***Tullett Prebon v. BGC Brokers*** [2011] IRLR 420
 - ***Rose v. Leeds Dental Team*** [2014] IRLR 8

- **Leach v Ofcom** [2012] EWCA Civ 959
“The mutual duty of trust and confidence ... is not a convenient label to stick on any situation in which an employer feels let down by an employee, or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate.”
- Lord Steyn in **Malik**:
“the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.”
- Applies both ways: danger of overuse of T&C so that it is (a) applicable to any unreasonable conduct; and (b) applicable to one-off incidents

Contractual Discretion (1)



- The question is one of construction, and the issue is whether the contract provides that the court merely has a power of *review*, or that it should decide the issue *for itself*;
- There will be clear cases which provide for a review eg **Braganza** “*if, in the opinion of the company or its insurers*”, but compare and contrast **Skidmore v Dartford and Gravesham NHS Trust** “*It is for the authority to decide under which category a case falls*”;
- In other cases, it will be for the court to decide on the balance of probabilities whether a given factual situation has arisen eg the employee is guilty of gross misconduct – the classic test in wrongful dismissal claims;
- The court itself may decide even where the issue is one of reasonableness eg as to price, length of notice etc;
- Note the influence of practical considerations and relative expertise in deciding the role of the court eg **Brogden v Investec Bank** (2015) “*30% of the economic value added (“EVA”) generated by the Equity Derivative business*”.

What must the employer take into account?

- The clause and/or its context may make this clear as a matter of construction;
- The classic example is ***Clark v Nomura International Plc*** [2000] IRLR 766: discretionary bonus “is not guaranteed in any way, and is dependent upon individual performance”; accordingly taking into account other factors and awarding nil bonus was perverse and irrational

Contractual Discretion (3)



- Following ***Keen v Commerzbank AG [2007] IRLR 132***:
 - Generally abstentionist approach by the courts;
 - Focus on outcomes rather than process.
- Although ***Keen***:
 - was based on an agreed position that the test was one of rationality;
 - did not explore the commercial case law in which the analogy with public law is drawn; and
 - did not explore the role of the mutual trust and confidence term in detail, save to say that it required reasons for the decision to be given.
- NB, though, the mutual trust and confidence term has been used to challenge substantive decisions by the employer eg ***United Bank v Akhtar*** (mobility clause); ***The Post Office v Roberts*** (application for a transfer); ***BG plc v O'Brien*** (exclusion from enhanced redundancy scheme).

BRAGANZA V BP SHIPPING LIMITED [2015] 1 WLR 1661

- Contract term: *“For the avoidance of doubt compensation for death, accidental injury or illness shall not be payable if, in the opinion of the company or its insurers, the death, accidental injury or illness resulted from amongst other things, the officer’s wilful act, default or misconduct whether at sea or ashore ...”*
- Chief engineer disappeared overnight whilst working on a vessel in mid-Atlantic which was having mechanical difficulties;
- After investigation, the inquiry team could not rule out the possibility that he left his cabin to inspect the weather conditions and had an accident. But they concluded that suicide was the most likely cause of death given that Braganza’s attention to detail in record-keeping had slipped, that he had received e-mail messages from his family suggesting that he had been having some family and/or financial difficulties (his wife had described him as “afraid of life”), and that he had been concerned about the state of repair of the ship and his resulting workload.

- The role of the court was *review*; However, given the employer's inherent conflict of interest and the imbalance of power, the court would ensure that the employer's contractual powers were not "*abused*";
- For this purpose the court would imply a term: "*that the decision-making process be lawful and rational in the public law sense*" ie both limbs of the **Wednesbury** test;
- **Wednesbury** permits a challenge to the way in which the decision was taken, as well as the outcome itself; ie
 - "*whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.....*
 - [and whether] *although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*"
- It followed that the court could examine the employer's approach to the evidence in deciding that Braganza had committed suicide.

Contractual Discretion (Braganza – 3)



- *“The employer is entrusted with making a decision which has serious consequences for the family of a deceased employee. It deprives them of what would otherwise be a contractual right.....”*
- *Employers can reasonably be expected to inform themselves of the principles which are relevant to the decisions which they have to make.*
 - *Employment law is complicated and demanding in many legal systems, but employers are expected to know it.*
 - *They can also reasonably be expected to know how they should approach making the important decisions which they are required or empowered to make under the terms of the employment contract.” (per Lady Hale para 36)*
- *there had been an error of approach in the evaluation of the evidence by the employer in that, in effect, the decision maker had not directed himself to start from the proposition that suicide was an inherently improbable explanation (given its statistical rarity) and that there would therefore need to be cogent evidence to show that this was what had happened.*

Contractual Discretion (Braganza – 4)



Potential Bases for Challenge post-*Braganza*

- errors of law by the employer;
- errors of approach to the evidence. Here the (legal) principle which the employer had overlooked was that where the standard of proof is the balance of probabilities, and a given event is inherently improbable, cogent evidence is required to discharge the burden of proof; but note the unusual circumstances and the ability of the court to perform the analysis of the evidence itself c.f. bonus decisions; also note reticence of the Court to apply *Wednesbury/Braganza* principles in the employment context in *Patuel v. DB Group Services* [2015] EWHC 3660
- relevant evidential matters were not taken into account and/or irrelevant ones were taken into account;
- bad faith, arbitrariness and capriciousness;
- the outcome is manifestly unreasonable to the point of being perverse;
- the approach or outcome are at odds with the purpose of the contractual provision.

Geys v. Société Générale



[2013] 1 AC 523

Importance:

- Theory of repudiation
- Disconnect with other areas of emp. law
- Remedies
- PILON clauses

Facts

- Contractual terms
- “Termination” on 29/11/07
- Reservation of rights on 7/12/07
- Payment of PILON on 18/12/07
- Knowledge of payment at end 12/07
- Affirmation on 2/1/08
- Termination letter on 4/1/08; rec’d on 6/1/08

Geys v. Société Générale



Elective v. Automatic theories

- Competing accounts of historical position
- Role of remedies

“Employment law is not an exception to the common law rule that a repudiated contract is not terminated unless and until the breach is accepted by the innocent party”

- Artificiality of result (per Sumption)

Geys v. Société Générale



- Communication requirements lead to a mismatch between common law and statutory termination regimes (ERA, s.95)
- Is this consistent with other areas of employment law?
 - Acceptance of beneficial terms: ***Hershaw v. Sheffield City Council*** [2014] IRLR 919
 - Revival of contract post-appeal: ***Salmon v. Castlebeck*** (2014) EAT/0304/14

Remedies: a new role for Specific Performance?

“The big question whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance...is beyond the scope of this appeal” (para.77)

Remedies – Specific Performance

- [2014] IRLR 526
- Role of affirmation
- Refusal of injunctive relief requiring reinstatement of War Horse musicians
- Debt v. damages
- Increased role for damages as form of relief in other areas of the law (***Lawrence v. Fen Tigers*** [2014] UKSC 36)
- Would increased availability of specific performance be desirable?

- ***West London Mental Health NHS Trust v. Chhabra*** [2014] IRLR 227
 - Contractual disciplinary procedures
- ***Hendy v. Ministry of Justice*** [2014] IRLR 856
 - Policy documents
- ***Stevens v. Univ. of Birmingham*** [2015] IRLR 899
 - T&C re accompaniment to quasi-disciplinary proceedings

- [2014] EWHC 2633; [2015] IRLR 57
CoA
 - Availability of injunctive relief to employer
 - Need for good reason for affirmation
 - Cessation of payment ≠ repudiatory breach where Eee refusing to work
- ***Elsevier Ltd v. Munro*** [2014] IRLR 766
 - Scrutiny of “enforced idleness” claims

PILON

- 3 months' notice
- PILON clause in Handbook:
“SG reserves the right to terminate your employment at any time with immediate effect by making a payment to you in lieu of notice (or, if notice has already been given, the balance of your notice period)...”

PILON

- What was required to give notice under the PILON clause? Baroness Hale:
 - PILON clause does not dispense with existing notification requirements
 - Implied term that “*obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring a contract to an end is being exercised, and how and when it is intended to operate*”

PILON

Para.58: “It is necessary, therefore, that the employee not only receive his payment in lieu of notice, but that he receive notification from the employer, in clear and unambiguous terms, that such a payment has been made and that it is made in the exercise of the contractual right to terminate the employment with immediate effect”

- Does this require payment to be made before termination is effective in PILON cases?

Undiscovered Repudiatory Breach



Question as to whether Eer could rely on prior undiscovered repudiatory breach of Eee to defeat claim of constructive unfair dismissal:

- ***RDF v. Clement*** [2008] IRLR 207
- ***Tullett Prebon v. BGC*** [2010] IRLR 648
- ***Aberdeen v. McNeill*** [2014] IRLR 114

Resolved in the EAT by ***Atkinson v. Community Gateway Association*** [2014] IRLR 834 – prior repudiatory breach relevant to remedy only

Cf. position in wrongful dismissal cases: ***Boston Deep Sea Fishing*** principle

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