



A powerful tool

Can a failure to secure prompt payment of employees' bonuses be a breach of the implied term of trust & confidence, asks John McMullen

IN BRIEF

► Development of the principle of 'trust and confidence'.

► The implied term: a powerful tool.

In *Nair v Lagardère Sports and Entertainment UK Ltd* [2020] EWHC 2608 (QB), [2020] All ER (D) 09 (Nov) the issue was whether the implied term of trust and confidence applied to circumstances where the employer failed to secure bonus payments due to an employee under contracts with other companies broadly in the same group, and where he was (allegedly) 'strung along'. The alleged breach consisted of a failure to secure payment of bonuses due from other companies in the broad group of companies in which Nair (N) was employed and over which it is argued Lagardère (L) had sufficient de facto control, or where the conduct was a positive 'stringing along' and avoiding honouring the bonus payment, leading to a breakdown in trust and confidence. The question in this preliminary hearing was whether the claim should fail at an early stage on the basis that the courts have, in the past, rejected the notion of an implied duty on an employer to take steps to protect the financial welfare of employees. But in this case the stakes were huge. The sum involved was enormous, involving a bonus of at least \$25m.

Lawyers often talk about the duty implied into the employment contract to maintain 'trust and confidence'. It now even has an acronym: the 'TTTC'. The principle was developed over decades of employment law.

To start with, in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 the claimant, Mrs Woods, was, in her view, badly

treated. She had been employed since October 1952, at a garage. The business was sold in 1980 to W.M. Car Services. She was told her employment terms would not change, or at least be no less favourable. After the takeover, though, things soured. First, she was asked to take a pay cut. She refused, after taking advice; but this did not go down well. Then she was asked to increase her hours. Again, she declined. Then there was an incident about who should, henceforth, do the cashing up.

Mrs Woods said words to the effect that she considered that someone else was doing her job. The company issued her with a verbal and written warning as to her conduct. The tribunal at first instance found this was an overreaction by the employer. But by now the company also introduced new accountancy procedures which were required by its bank and had been recommended by its accountants. These were discussed with her and she was given a new job specification. She thought it included more work than one person could handle. She resigned, claiming constructive and unfair dismissal. An industrial tribunal concluded that none of these experiences *singly* were a repudiation of the contract. It also considered whether *cumulatively* they amounted to a breach of an implied term in the contract that the employers would not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. They decided there was no breach of such an implied term. The EAT disagreed and said this: '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 and trust between employer and employee...'

Professor ACL Davies traces the history of the formulation of the implied term of trust and confidence in her most useful 'The Primacy of Statute' (in *The Contract of Employment* (General Editor Mark Freedland, Oxford 166) arguing the case law had to be understood in the light of both the doctrine formulated by Lord Hoffmann in *Johnson v Unisys* [2001] UKHL13 (the '(dismissal) Johnson Exclusion Zone') and the implied terms of the employee's contract (in *The Contract of Employment* (General Editor Mark Freedland, Oxford 166). Later she discusses the need to interpret the common law and statute to create a coherent regime between the two.

The EAT in *Woods* continued thus: 'Experience in this appeal tribunal has shown that one of the consequences of the decision in the *Western Excavating* case has been that employers who wish to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had resort to methods of "squeezing out" an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a

redundancy payment or compensation for unfair dismissal.

‘It is for this reason that we regard the implied term we have referred to as being of such importance. In our view, an employer who persistently attempts to vary an employee’s conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee’s terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such employer has therefore breached the implied term. Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract...’

‘Applying those principles to the facts of this case, if the matter were for us to decide we would hold that the conduct of the Company in this case did amount to a breach of the implied term. Although it may not be fair to describe the Company’s behaviour as unscrupulous, its actions were directed to inducing Mrs Woods to accept a change in her terms of service. Starting immediately after the takeover and for a period of four months thereafter the Company tried unilaterally to reduce Mrs Woods’ wages, to increase her hours of work, to change her job title, to change her contract of service, to change her job content fundamentally and to impose a job description which she considered to be more than she could manage. In the face of her protest, on each occasion (save the last) the Company withdrew from its original requirement only to make a fresh requirement of a different kind. In the same period, the Company gave her a verbal and written warning relating to her conduct which the industrial tribunal found to be unnecessary. All this was against the background that management was “gunning” for Mrs Woods, not to get rid of her but to get her to agree to a change in the terms of her contract which they desired, notwithstanding the fact that they had agreed to employ her on terms not less favourable in any respect

than her previous employment with Mr Todd. The fact that such conduct was calculated or likely to damage seriously the relationship of confidence and trust between Mrs Woods and the Company seems to us to be shown by the actual breakdown in the normal relationship between employer and employee.’

Nair v Lagardère Sports and Entertainment [2020] EWHC 2608 (QB) is not a departure from *Johnson v Unisys* as it is not a dismissal case. But it will be a very interesting case at full trial on the maturity of the trust and confidence rule short of dismissal and create some waves. If successful.

Implied term

The implied term is a powerful tool. The most authoritative iteration of the principle of trust and confidence is in *Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation)* [1998] AC 200, [1995] 3 All ER 545 where Lord Steyn said: ‘The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.’

L applied to strike out the claim and/or for summary judgment. Its case consisted of three essential elements, namely: first that there was no real prospect of N establishing there was a positive contractual requirement that L had to use reasonable steps to procure repayment of sums due from the former employer of N within the group; second, that the pleaded case on breach (failure to take those steps) stood no real prospect of success in any case, and third, that there was no reasonable prospect of establishing causation of loss.

But Master McCloud held the case should not summarily be thrown out:

- ▶ This was a case concerning whether the recognised implied term as to trust and confidence applies to circumstances where the employer (on complex facts yet to be ascertained) failed to secure payments

due to N under contracts with other companies broadly in the same group.

- ▶ There was nothing in principle which meant that (in the judge’s words) ‘it was fanciful to suppose that the ITTC can be breached where the employer “prevaricates”, “strings along”, “wriggles” or however one wishes to describe it and simply fails to respect very large bonuses which are known to be due from companies in the group and where the payments originally fell due under the employee’s relationship with the connected companies and where the discussions included officers who were or may have been in a position to secure the payments (such as the CEO)’.

- ▶ The existing case law on the issue of whether there is an implied term (or an extension to the ITTC) in relation to an employer protecting or not damaging the financial interests of an employee was not strong enough to demonstrate the claim stood no real prospect of success.
- ▶ The test was whether, on the facts, in all the circumstances, the employer so conducted itself as to destroy or seriously undermine the relationship of trust and confidence between it and the employee without reasonable or probable cause. According to the judge: ‘Conduct can take the form of failure to do something or the form of positively doing something and often the difference may be merely semantic. That is fact specific.’

Comment

Mr McNair might have a real fight on his hands on the facts at full trial, but the observations of Master McCloud on the ITTC are fascinating in their increased potential to use the principle of trust and confidence to regulate employer behaviours. NLJ

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