

JERSEY / JUDGMENT

JFSC v Mathew [2020] JRC 185 (15 September 2020)

[2020] JRC 185

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judgment

the bailiff: 1. This is an appeal by the Jersey Financial Services Commission ("the Commission") against the interim decision of the Deputy Chairman of the Jersey Employment and Discrimination Tribunal ("the Tribunal") of the 31 st January, 2020, ("the Judgment") in which the Deputy Chairman refused to strike out the claim of Miss Emma Mathew ("Miss Mathew") for constructive dismissal. The Commission argued that the claim had been lodged out of time. 2. Ms Mathew was employed by the Commission as Head of Communications under a contract of employment dated 1 st October, 2014, ("the Contract"). On the 7 th January, 2019, she resigned from that position. The Commission offered to pay her three months' salary in lieu of notice but she declined and wished to remain as an employee of the Commission for the remainder of her notice period. Under the terms of the Contract, that notice expired on the 6 th April 2019. It was agreed and required of Miss Mathew by the Commission that, for her notice period, she was on gardening leave in accordance with the terms of the Contract. 3. Insofar as is relevant, the Contract contains the following provision:- ";.... the employee shall be prohibited from engaging in activities inconsistent with the employee's continued employment status without the written permission of the Commission." 4. The Contract also provides:- "the employee shall not engage in any additional employment..... without the prior permission of the Human Resources Department". 5. Ms Mathew had been on sick leave from 3 October 2018, and it is understood that in or about December 2018, she received an offer of employment as Head of Communications from the Justice and Home Affairs Department of the Government of Jersey. Subsequently, she handed in her resignation as referred to above. 6. Notwithstanding the fact that her notice period expired on the 6 th April, 2019, on the 1 st April, 2019, Miss Mathew commenced full-time employment with the Government of Jersey. Miss Mathew did not seek the permission or agreement of the Commission to terminate her employment early, nor did she notify the Commission that she had started another full-time job elsewhere. 7. Miss Mathew brought a claim for constructive dismissal against the Commission. She lodged that complaint within eight weeks of the 6 th April, 2019, but more than eight weeks of the 1 st April 2019. Eight weeks is the period within which such a claim must be lodged. 8. Accordingly, the main issue before me is whether Miss Mathew's employment ceased at the end of her notice period on the 6 th April 2019, or when she commenced full-time employment with her new employer on the 1 st April 2019.

Amongst other things, the issue that this case raises is the nature of gardening leave and the obligations that it places upon an employee. 9. The position of the Commission on this matter is quite straightforward. The Commission argues that taking full-time alternate employment is effectively the repudiation of the Contract and accordingly the Contract ended by repudiatory breach on 1 st April 2019. If that is correct then Miss Mathew's claim for constructive dismissal is out of time. 10. On the other hand, Ms Mathew argues that she was entitled to take alternative employment because, in effect, the Contract was effectively 'defunct'. In essence, so it is argued, the nature of gardening leave is to prevent an employee going to work for a competitor or acting to the detriment of the employer during the notice period. There was no such situation here as the new employer was not in any sense in competition with the Commission, and Miss Mathew's new employment could not be to the Commission's detriment. In the circumstances there was no 'repudiatory breach' of the contract of employment. 11. The Judgment dismissed the Commission's application to strike out Ms Mathew's claim on the following basis:- (i) the Tribunal acknowledged that by undertaking "additional employment" without the Commission's permission do so, there was a breach of the contract. That, so the Judgment determined, and was indeed confirmed before me, was not in dispute; (ii) however, commencing new employment had not been proven to be detrimental to the Commission; (iii) further evidence would be required to determine if the contract provisions that prohibit her from working elsewhere applied during the period of gardening leave; (iv) further evidence was required to determine whether the contract had been varied by reason of Ms Mathew not being required to work during the gardening leave period; (v) a test for a repudiation of the contract of employment had not been met as Ms Mathew had no longer been required to provide services. The Commission did not require her to work and, accordingly, there was no 'bad faith' on her part; (vi) the breach was not serious enough to be a repudiatory breach. The Law 12. Article 94(1) of the Employment (Jersey) Law ("the Law") provides:- "An appeal on a question of law shall lie from the decision or order of the Tribunal to the Royal Court with the leave of the Tribunal or the Royal Court." 13. It is common ground that the test to be applied in an appeal on a question of law, is as set out by this court in *Voisin v Brown*

[2007] JRC 047 at paragraph 18. In that judgment the court said that there was no power to interfere with the Tribunal's decision unless it established:- "(a) that the Tribunal misdirected itself in law or misunderstood the law or misapplied the law; or (b) that there was no evidence to support a particular conclusion or finding of fact; or (c) that the decision was either perverse in that it was one which no reasonable Tribunal, directing itself properly on the law, could have reached or alternatively, was one which was obviously wrong...." 14. The Judgment was an interlocutory decision and therefore this Court will be slow to intervene. In *Jones v Royal Bank of Scotland International*

[2007] JRC 125 , Clyde-Smith Commissioner, citing *Broere and Others v Broere and Others*

[2003] JCA 222 , stated:- "I would normally be slow to grant leave to appeal on a matter of discovery. Such matters are principally for the discretion of the court at first instance and.... leave should only be granted in such interlocutory matters where there is a clear

case of something having gone wrong [see *Glazebook v Housing Committee* [13 th November 2002] Jersey Unreported [2002/217]]." 15. The Commission's appeal is primarily on the basis that the Deputy Chairman misunderstood or misapplied the Law, and accordingly leave to bring this appeal, as required by Article 94(1) of the Law, was granted by the Tribunal. 16. A number of authorities have been placed before me in dealing primarily with the question of repudiatory breach and the law relating to gardening leave. 17. The first was the case of *De Sousa v Danny Yau Limited trading as Princess Garden*

[2019] JRC 169 in which the Court, considering amongst other things the failure by an employee to return to work on a particular date as agreed, said:- "41 ... The heart of this appeal is not a legal question but a factual one - was the conduct of the appellant to be treated as a repudiation by her of the Contract, and therefore, for the purposes of the Law as a resignation; or was it merely a breach which meant that the Contract subsisted and the employer had a choice between dismissing the appellant by the repudiating the contract itself as a result of the breach or alternatively suing for resolution and/or damages. The factual issue therefore falls to be determined by analysing who brought the contract to an end in accordance with the Jersey law of resolution". At paragraph 50, the Court said:- "The present case requires me to consider whether a breach of contract can amount to a repudiation of it such that the contract automatically comes to an end. In my judgment, where the implied duty of good faith in an employment contract is destroyed, that goes to the heart of the contract and the party who causes that state of affairs to come about cannot assert against the innocent party that the contract continues." At paragraph 38 of the judgment the Court said that:- "... a party to an employment contract who deliberately breaches that duty does by that conduct leave herself exposed to the assertion that she has terminated it." and, at paragraph 56, the Court said:- "It is noteworthy that there is a dismissal by the employer in circumstances where either the employer gives notice or otherwise terminates the contract of employment, or where the employee terminates it with or without notice in circumstances in which the employee would be entitled to terminate it without notice by reason of the employer's conduct. What is absent from the definition of the circumstances in which an employee is dismissed is the circumstances where the employee terminates the contract with or without notice for reasons of his or her own which are unrelated to the employer's conduct." At paragraphs 52 and 53, the Court said:- "The conduct of the appellant in failing both to turn up for work for 14 days and to make any contact with the Respondent destroyed the implied trust and confidence which the contracting parties needed to have with each other. It almost certainly would have amounted to gross misconduct enabling the Respondent to terminate the contract without notice but it is unnecessary to get to that point. The Respondent's power to dismiss without notice would have been relevant if the Appellant had by her conduct generally evinced an intention that the contract continue. However, on the facts she had evinced no such intention. The only reasonable conclusions that the Respondent could draw from her conduct, given the findings of fact, were that either the Appellant did not intend to return to the Island at all or, if she did, that she did not intend to return to work

for him. Either way, that would amount to a repudiation of the contact by her which, in other language, amounts to a resignation. 53. Continuing her conduct therefore, amounted to a resolution unilateral.". 18. That facts of that case were of course different to the present case in a number of respects but the principles set out by the Court are, in my judgment informative. 19. I was referred to a decision of the Employment Tribunal in the matter of *Kelly v Specsavers Jersey Ltd* (Case No. 2804-043/08) and whilst, of course, the decisions of that Tribunal are not of authority in this Court it is interesting to identify the approach. At paragraph 36 of the decision consideration was given to the meaning and effect of gardening leave. The Tribunal said this:- ".... Such leave is a potentially onerous obligation on an employee because they are prevented from finding other employment whilst it remains in force. It also means that the contract of employment between employer and employee remains in force for the duration of the garden leave and all other rights and obligations continue to apply, including for example pension provisions, a parking space, health benefits, as well as the right to continue to receive a salary. However, the employee must be informed that garden leave is in force - it can never simply be assumed ..." 20. In the case before the Employment Appeal Tribunal in London between *Cerberus Software and Rowley*

[1999] UKEAT 1023_98_1407 the Tribunal (the Honourable Mr Justice Morison presiding) said this at paragraph 13:- "..... The essence of garden leave is that, in theory, it enables the employer to keep an employee away from his place of work during his notice period whilst at the same time keeping the contract of employment in existence, thus preserving the covenants in restraint of trade. So long as the employment contract remains in existence the employee cannot take another job for a competitor....." 21. In the case of the *States Employment Board v Alwitry*

[2019] JCA 134 the Court of Appeal considered amongst other things the terms of an employment contract and whether or not there was an implied term that an employee should not conduct himself in a manner likely to destroy the relationship or confidence and trust between him and the employer. At paragraph 24 et seq the Court said this:- "The SEB also submitted (by reference to *McDonald v St. Helier* (supra), at §28, citing *Malik v BCCI*

(1988) AC 20, at 34G - 35C) that it is an implied term of any contract of employment that the employee should not, without reason and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between him and his employer, and that the test for assessing whether an employee has acted in breach of that duty is an objective one. We do not consider it to be either necessary or desirable to express a view on the existence or scope of any such implied term in his jurisdiction, because in the present case there is an express term (see §4 above), and as a result there is no room (because there is no need) to imply any such term. Nevertheless, we consider it appropriate to note and to adopt, in relation to any assessment whether there has been a breach of the express term, the approach taken in *Malik v BCCI* to the same question in relation to the implied term - namely, that it is an objective test. 25. The objective nature of

the test is significant. It means that , when the court is seeking to ascertain whether an employee's conduct goes "to the root of the contract" or involved "a breach of fundamental condition" or was "sufficiently serious to justify the termination of the contract" the question is not answered by reference to the employer's actual reaction at the time: subjectively, the employer might or might not have considered the conduct to be repudiatory, but that is not the test." Nor is the question answered by reference to any inquiry as to the employee's motives or intentions: the employee might well have intended to repudiate his contract, or he might have been blind to the likely consequences of his actions, but in either event his subjective state of mind is generally irrelevant. 26. In order properly to apply an objective test, the court must ensure that it does not slide into a factual inquiry as to what each side actually thought at the time. The question is not whether one side intended, or the other side accepted, a repudiation. Rather, the question is whether the conduct, viewed objectively, went "to the root of the contract" or involved "a breach of a fundamental condition" or was "sufficiently serious to justify the termination of the contract". That question is answered by reference to a test of reasonable foreseeability: in other words, the question is whether it was reasonably foreseeable to an employee performing that particular function that that particular conduct would be regarded by that particular employer as repudiatory. That is what Lord Nicholls meant in *Malik v BCCI* (supra) when he referred to the obligation "not to engage in conduct likely to undermine the trust and confidence required" (ibid, at 35A, emphasis added), a point he repeated shortly afterwards, saying: "The conduct must, of course, impinge on the relationship in the sense that looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have his employer" (ibid at 35C, emphasis added). It is also reflected in Lord Steyn's speech where he referred to conduct "likely to destroy or seriously damage the relationship of confidence and trust" (ibid at 45F

- G, emphasis added), a point he again repeated later in his speech (at 47F - G). It is reflected again in Lord Millett's speech in *Johnson v Unisys Ltd*

[2003] 1 AC 518 , where he referred to "the obligation not to do anything which would damage or destroy the relationship of trust and confidence" (ibid at §78, emphasis added), and also in Dyson LJ's judgment in *Omilaju v Waltham Forest LBC*

[2005] ICR 481 , at §14. 27. Having asserted that the court should follow English law, the SEB also points out in this context that Pothier says that "La Bonne foi qui doit régner dans le contrat de louage, de même que sans les autres contrats, oblige le conducteur a n'user d'aucun mesonage ni d'aucun autre artifice pour faire paroître l'ouvrage qu'on lui donne a faire" (*Ouvres Complètes de Pothier*, vol 6, Septieme Partie, Chapitre II, Art. 11, pp. 291-292). For the avoidance of doubt, contracts for services were included in Pothier's *Traité de Louage*. This submission is closely related to the SEB's separate point (by reference to *Rawlinson v Brightside Group Ltd*

[2018] ICR 621 , at §18) that, under English law, it has been held that the relationship of trust and confidence under an employment contract imports an obligation not to mislead. Whether an obligation of good faith arises in every contract is not a matter for this judgment, but we accept that there is a mutual obligation of good faith in a contract of employment." The arguments of the Commission 22. The Commission in essence argues that it is clear that someone working for another person during gardening leave without permission is in breach of the express terms of the contract and acts in a way that goes to the heart of the employment contract. Following paragraph 38 of de Sousa (above), it is not, so the Commission argues, necessary to make a finding of deceit. 23. Furthermore, the Commissioner argues that the Tribunal erred in concluding that Ms Mathew's conduct was such as could have been carried out in good faith. This, it is argued, is not possible as she deliberately took up new employment contrary to her contract, which is not something that could have been done in good faith whilst retaining the benefits as she did of employment by the Commission. It was not open to her to argue that it "did not matter" and she was not acting with candour to commence employment with a new employer without telling the original employer and accepting payment from both. 24. As to the nature of gardening leave, the Commission argues that the Judgment was in error in failing to find that the duty not to work for another person without permission was the main remaining duty under her Contract. The Commission relies on the judgements in Kelly and Cerberus mentioned above. The Commission argues that an obligation not to work for third parties during gardening leave is not the same as an obligation that may arise from restraint of trade rules. In the former case, which we are concerned with here, the employment had been continuing, Ms Mathews was working for the employer, and hence she had no ability to work for someone else. The prohibition does not need to be justified because it is a term of the contract and the employee is receiving remuneration throughout garden leave. This is not the same as a restraint of trade case, so it is argued, where restraints need to be justified on public policy grounds. The Commission argues that the question to be answered is whether the breach by Ms Mathew was of a fundamental nature and therefore went to the heart of the contract. It may relate to issues of good faith but it was not necessary to establish deceit. 25. In determining whether or not there is a fundamental breach, the nature of the breach must be considered in terms of what is to be performed under the Contract. The Commission argues that in the case of gardening leave the employee's performance is simply that she does not work for anyone else. It follows, therefore, on the Commission's analysis that someone on gardening leave who commences employment elsewhere breaches that fundamental remaining obligation. 26. It is further argued that it must be the case that in the light of the fundamental breach the Commission's obligation to pay salary also ceased and therefore there was nothing left of the contract or obligations in the employment contract. It is accordingly argued that the Tribunal erred in that it did not hold such a total destruction of the remaining obligations between the parties did not have the effect of immediately terminating of the contract. 27. The Commission also relies on the well-known principle of Jersey Law of "la convention fait la loi des parties" and in this case, the position in relation to garden leave is not open

to speculation - it is governed by the express terms of the Contract. There is nothing void in the Contract by operation of law and the Commission, understandably, relies upon the obligation in the term of the Contract that the employee should not engage in any additional employment without permission. 28. There is a specific section in the Contract relating to gardening leave, (at clause 13.5) which provides:- "During any unexpired portion of any notice period (irrespective of whether notice has been given by the Commission or by the employee), the Commission may suspend the employees duties and exclude the employee from the Commission's premises and direct that the employee remains absent from the Commission's premises on "gardening leave." Throughout such period of "gardening leave" the employee's salary and other benefits shall continue to be paid Throughout such period, the employee shall be prohibited from engaging in activities inconsistent with the employee's continued employment status without the prior written permission of the Commission." 29. The Commission also refers to a number of other findings of the Tribunal set out in the Judgment. Paragraph 58 the Judgment provides:- "In addition, neither parties seems to have anticipated that the claimant would actually attend work after 7 January 2019, so it appears that there was, at least, some alteration to the contract." 30. The Commission argues that the Tribunal cannot be correct in finding that, as Ms Mathew no longer attended work in accordance with the terms of the Contract, that of itself could be a variation of the Contract. By reason of the clause referred to above, it is clear, so the Commission argues, that gardening leave is a feature of the Contract and not an alteration of it. 31. At paragraph 55 of the Judgment the Tribunal said that it was unclear if Ms Mathew commencing employment with the States Employment Board was " inconsistent with her present employment status ". Again, the Commission relies on the express terms of the Contract to indicate that this must have been an error. 32. It is argued that there was simply no need for the Tribunal to determine whether or not there had been a detriment to the Commission in order to establish that there had been a repudiatory breach. The terms were clear, and they were fundamental, so the Commission argues. 33. The Commission argues that if the Contract was "defunct", as Ms Mathews argues, there was no employment, and it had therefore terminated before Ms Mathew had taken up her new employment. If it had not terminated, and accordingly could not be termed to be defunct, then she owed the obligations inherent in gardening leave under it. 34. The Commission in its skeleton argument summarises its position as follows:- "In summary, if an employee walks away from their employment they cannot claim to still be in that employment - it is a repudiation of the contract of employment. This is the essence of the decision in de Sousa, its ratio. In de Sousa, the employee walked away from her employment by not turning up for several weeks without telling her employer anything. The present case is if anything clearer: the employee of the JFSC started full time employment somewhere else. The contract of employment unsurprisingly expressly forbade Ms Mathew from doing this. To put it simply, Ms Mathew walked out of her employment with the JFSC and into employment with the States Employment Board. To argue that Ms Mathew was able to take up employment elsewhere because the JFSC were paying her to do nothing is to turn the express contractual position

on its head: "doing nothing" was her remaining, fundamental obligation under the contract." The argument of Ms Mathew 35. Ms Mathew does not appear to argue that she is not in breach of her contract of employment. 36. She refers firstly to the statutory basis of a claim for unfair dismissal and that statutory interpretation should not, following English principles, be used as a means of dictating the scope of employee's statutory rights. In support of this the Respondent cites the case of *Gisda Gida v Barette*

[2010] IRR 1073. 37. Further, Ms Mathew argues that she resigned because of the Commission's own behaviour, which had caused her mental anguish. This, so she alleges, was in breach of the implied term of trust and confidence. She gave contractual notice that would expire on 6 April. She was, however, claiming she was constructively dismissed because the Commission was itself in repudiatory breach of contract. 38. Ms Mathews further argues that it cannot be suggested that there was a relationship of trust and confidence existing between the parties after 7 January. She asserts that had been irrevocably destroyed by the Commission's own breach. 39. I interject to say that I am not convinced by that submission, as it seems to me that the corollary of this is to suggest that there was no obligation to behave with good faith between the Commission and Ms Mathew after 7 January. I find that difficult to accept. It seems to me clear that there was a subsisting relationship between them, which was in effect employment, and which fell within the gardening leave provisions of the Contract. That seems to me to be equally subject to an obligation to act with good faith. The Commission continued to pay Ms Mathew and afford her the benefits that are associated with employment and Ms Mathew continued to take them. The Commission, as appears to be common ground, had offered to allow Ms Mathew to resign forthwith and to pay her but she elected to serve out her notice. It seems to me, therefore, without prejudice to her claim for unfair dismissal, she had affirmed the Contract. 40. With regard to the Commission's argument, that in effect, the Tribunal should have followed *de Sousa* and should not have found that Ms Mathew was not in breach of duty of good faith/implied trust and confidence by finding no evidence of deceit, Ms Mathew argues that the facts of *de Sousa* were entirely distinguishable and the Tribunal examined the facts and did not find a repudiatory breach of contract - the contractual default was minor. The contractual terms relied on by the Commission did not apply to termination and Ms Mathew refers to clauses 13.3 and 13.6 of the Contract which states:- "If the employee leaves the Commission without giving due notice they will be considered to be in breach of this contract of employment." and "If the employee's employment under the contract is terminated by reason of the employee's gross misconduct, no notice is required to be given by the Commission to the employee" 41. It is pointed out that clause 13.3 does not state that leaving without giving due notice is gross misconduct nor that the contract terminates automatically. 42. With regard to the second ground of appeal as characterised by the Commission, namely that the Tribunal was in error in not finding that working elsewhere while on garden leave was inconsistent with employment status and in error in finding there was some alteration to the contract by reason of the Respondent not being required to work after 7 January, Ms Mathew

argues that the Tribunal was right to find no evidence of dishonesty and, whether the breach of contract is deliberate or not is irrelevant because the subjective intention of the contract breaker does not inform the question of whether the contract has been breached. Nor, it is argued, does it inform a judicial determination of whether the breach is fundamental/repudiatory. It is clear that Ms Mathew accepted that in leaving before the end of the notice period, she was in breach of contract but not in fundamental breach and this point was clarified by her before the Tribunal. Decision 43. The issue in this appeal is whether or not it is clear that the taking up of alternate employment some five days or so before her notice period applied amounts to a repudiatory breach by Ms Mathew of the Contract. 44. There seems to me to be little doubt that the relationship between Ms Mathew and the Commission had broken down and indeed the Commission had been prepared to pay her immediately and not require her to work gardening leave at all. Although, for reasons that are not clear to me, she elected to do otherwise, there was never any expectation on either side that Ms Mathew would return to work for the Commission or discharge any positive duties in connection with continued employment. 45. It is clear that Ms Mathew was at fault in not seeking the permission of the Commission to terminate her employment early so that she could start work elsewhere. Although, of course, I cannot say whether the Commission would have agreed to such a course, it may very well be that it would. There were only five working days left and it is perhaps, unlikely that the Commission would have seen a point in holding Ms Mathews to the full term of her notice period. 46. However, that is speculation and Ms Mathew received benefit for the extra five days which would have continued to be paid because she did not tell the Commission she had started work elsewhere early. She accepts, as indeed she must, that those sums are repayable. 47. As I have already indicated, the facts of this case are not in any sense as stark as those in *de Sousa* but it seems to me that the principle is the same. 48. Gardening leave imposes obligations upon an employer and employee. It is continued employment. It would be strange were it otherwise and for an employer to retain the obligation to make payments to an employee whilst they had secured alternate employment and remuneration elsewhere. Taking up alternative employment strikes at the very root and obligation of continuing employment which is the fundamental feature of gardening leave. It is a clear repudiation of that Contract. 49. In my judgment the arguments of the Commission are correct and the Judgment fails to address the fundamental nature of the breach to this case. Accordingly I allow the appeal 50. This leads to the conclusion that Ms Mathew's claim for constructive dismissal was out of time. It is therefore for the Tribunal to consider what, if any, powers it has to extend the period to permit a claim to be brought late. I have not heard argument on that point and it does not fall for me to determine. *Authorities Employment (Jersey) Law 2003. Voisin v Brown*

[2007] JRC 047 . *Jones v Royal Bank of Scotland International*

[2007] JRC 125 . *Broere and Others v Broere and Others*

[2003] JCA 222 . *De Sousa v Danny Yau Limited trading as Princess Garden*

[2019] JRC 169 . Kelly v Specsavers Jersey Ltd (Case No. 2804-043/08). Cerberus Software and Rowley

[1999] UKEAT 1023_98_1407 . States Employment Board v Alwitry

[2019] JCA 134 . Gisda Gida v Barette

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