

JERSEY / JUDGMENT

Surcouf v La Rocque Fisheries Limited

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Jersey Employment Tribunal This award, (subject to the right of appeal to the Royal Court, as set out in the Law) is legally binding and is the final decision of the Tribunal. Each party, if applicable, is responsible for establishing their liabilities with regard to Social Security and Income Tax payments. Case Number: 2310-185 / 06 Applicant: Mr Justin Surcouf Respondent: La Rocque Fisheries Limited Case Summary: Constructive Unfair Dismissal Hearing on 9 July 2007 Before: Mrs Nicola Santos-Costa, Deputy Chairman Mr Stewart Maurant, Panel Member Mr William McPhee, Panel Member Representation: For Applicant: Mr Surcouf represented himself For Respondent: Advocate Paul Nicholls, Walkers Witnesses: For Applicant: Miss Susan Smith Mr. Gary Whipp For Respondent: Mr Douglas Le Masurier, director The

Facts

Mr Surcouf was employed by the Respondent from 1st September 2002 to 22nd September 2006 as a Shellfish Farm Manager. Mr Surcouf requested a contract of employment many times throughout his employment and was assured by Mr Le Masurier that a contract would be provided. In December 2004 a brief statement of Mr Surcouf's terms of employment was produced by the Respondent. This statement contained very little detail of the actual conditions of Mr Surcouf's employment but did state:- ‘

7. Contract with La Rocque Fisheries being completed'. Mr Surcouf understood this sentence to mean that a more detailed, formal, contract of employment would be forthcoming. However despite Mr Surcouf's regular requests a document was not produced until February / March 2006. This is discussed in more detail in paragraph 4 below. In December 2005 Mr Le Masurier announced that he was going to sell the business operated by the Respondent. Mr Le Masurier informed Mr Surcouf and his wife of his plans in advance of putting the business up for sale so that they would not hear of Mr Le Masurier's intentions from a third party. The Tribunal were also informed that this conversation was an indication of the good relationship between Mr Le Masurier and Mr Surcouf. The Tribunal were informed that Mr Le Masurier also promised Mr Surcouf a payment on the sale of the business by way of a loyalty payment if he continued to work in the business until it was sold. It appears from Mr Surcouf's evidence that Mr Le Masurier was reluctant to name an amount for this payment but when pressed indicated that it could be about £15,000 or less if Mr Surcouf was employed by the new owners. The Tribunal noted that this evidence was not disputed by Mr Le Masurier. During 2005 and 2006 various interested parties looked around the Respondent's business with a view to purchase but no sale was concluded. Throughout this

time Mr Surcouf did not have a contract of employment and felt particularly vulnerable both in respect of his rights in the event of termination of his employment by a new owner and also, if his services were required by a new owner he did not know what his current conditions of employment were, when dealing with a new boss. The Tribunal were informed that after one prospective purchaser looked around the business, Mr Surcouf received a text message from him to the effect that if he bought the business, Mr Surcouf would receive two week's notice and be out of a job. Mr Le Masurier confirmed this by stating that on hearing about this he (Mr Le Masurier) assured Mr Surcouf, 'that he would see Mr Surcouf right, and Mr Surcouf was to trust him in this matter'. This was not disputed by Mr Surcouf. Mr Surcouf repeatedly asked for a contract of employment to be provided to him by the Respondent. In February or March 2006, Mr Le Masurier produced a draft contract of employment for Mr Surcouf. This was rejected by Mr Surcouf because it was in the same form as Mr Le Masurier had provided for his farm workers and it was not suitable for Mr Surcouf who was a manager and whose terms and conditions of work were more detailed. A copy of this draft contract was produced to the Tribunal who noted that it did not contain detailed information about such matters as the intervals of Mr Surcouf's pay, his holiday entitlement, sickness pay, notice periods or the start date of his continuous employment. In particular this draft contract did not include any reference to the loyalty bonus which Mr Le Masurier had agreed to pay Mr Surcouf on the sale of the business. Mr Le Masurier produced a further draft of the contract of employment on about the 6th September

2006. This draft included many of the sticking points in the first draft but did not include any reference to the loyalty bonus. The Tribunal were informed by Mr Le Masurier that he did not wish to be 'tied down' in respect of the bonus. As far as he was concerned all bonuses (whether the loyalty bonus or a Christmas bonus) were in his discretion and depended on the state of the business at that time. Mr Le Masurier had given 'his word' that he would look after Mr Surcouf when the business was sold and that should have been sufficient. Mr Surcouf gave evidence that he was very unhappy that a contract had not been provided to him despite his repeated requests. He also gave evidence that the Statement of Terms provided in 2004 (see paragraph 2 above) contained a reference to, '6. Vehicle', which was meant to refer to the provision of a vehicle by the Respondent for his use. In fact this vehicle was never supplied. Mr Surcouf said he believed that Mr Surcouf never intended to provide him with a contract of employment and certainly was not going to commit to the loyalty bonus in writing, and that like the previous promises of a vehicle and a contract of employment, these were just 'hollow promises'. In fact for these reasons and in order to avoid the continued feeling of insecurity about his future he resigned from his position on 15th September 2006. On leaving the Respondent, Mr Surcouf went to work for Jersey Ormer Limited a company which he had set up but sold to friends in July 2006. Mr Le Masurier gave evidence that he believed that Mr Surcouf had planned to work for Jersey Ormer Limited for some time and that Mr Surcouf's resignation from the Respondent had nothing to do with the failure to provide a contract of employment or address the loyalty payment issue. Mr Le Masurier gave evidence that in fact he had also felt vulnerable for

some time because Mr Surcouf spent time with his friends at Jersey Ormer Limited and had even travelled to Ireland with one of the owners to find out more about ormers, and Mr Le Masurier did not want to lose Mr Surcouf's services. Mr Surcouf replied that he was very interested in ormers and was only helping out a friend in his spare time and holidays – his involvement with Jersey Ormer Limited did not affect the Respondent's business at all. Mr Surcouf further said in evidence, which was supported by Miss Smith, that in fact there was no job for him at Jersey Ormer Limited because the business had not started fully and on leaving the Respondent, a job had been created for him by his friends in order for him to support his family. On the 1st October 2006, a mutual friend of Mr Le Masurier and Mr Surcouf arranged a meeting between the two men in order to try and negotiate Mr Surcouf's return to work for the Respondent. The meeting progressed well but failed when Mr Le Masurier refused to include reference to the loyalty payment in a further draft of Mr Surcouf's contract of employment. Accordingly Mr Surcouf did not return to work and filed a complaint of constructive unfair dismissal with the Employment Tribunal on 22nd October 2006, alleging that: a) The Respondent's failure to provide a written contract of employment placed him under undue stress because he could not be sure if his position was secure and permanent, and b) He had damaged his back by excessive lifting of heavy weights in his work which was exacerbated because the business was frequently short staffed, and c) That Mr Le Masurier had verbally abused him and been unappreciative of his efforts at work. All of the allegations were denied by the Respondent in its Form JET 2. The Law Article 61 (1) of the Employment (Jersey) Law 2003 ('the Law') provides as follows;

- (1) An employee shall have the right not to be unfairly dismissed by his employer. Article 62 of the Law defines the circumstances in which an employee is dismissed. In particular Article 62(1) (c) provides as follows: For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph (2), only if) –
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. For this hearing the Tribunal must be satisfied that Mr Surcouf was entitled to terminate his contract pursuant to Article 62 (1) (c) above and the supporting common law. An employee is constructively dismissed when he resigns because the employer is, itself, in breach of the employment contract. A kind of legal fiction converts the employee's resignation into a dismissal under the Law (article 62
- (1) (c) above). To claim constructive dismissal, the employee must establish that: the employer was in breach of a term of a contract of employment, and, the breach was a repudiatory one, entitling the employee to resign; and the employee resigned because of that breach of contract. The 3 principles of constructive dismissal described above have been applied by this Tribunal in *Robinson v States of Jersey, Department of Education, Sport & Culture* (2006), and *Mackee v Jacksons (CI) Limited* (2006). The Royal Court also recognised these principles in *Rosborough (Insurance Brokers) v Boon and Aziz* (2001 JLR 416), although no definitive finding regarding constructive dismissal was made at that interlocutory hearing.

An employment contract contains both written and implied terms. Mr Surcouf did not have a written contract of employment containing the particulars required by Article 3 of the Law. The Tribunal have looked at the implied terms of the contractual relationship to ascertain if there has been a breach of contract. Implied terms of any employment contract are such matters as the duty of trust and confidence and the duty of cooperation between the parties. It is the implied duty of trust and confidence which is relevant to this case. In the English case of *Malik v BCCI*

- [1997] IRLR 462 HL. It was stated that an employer may not, 'without reasonable and proper cause conduct itself in a way calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'. This test was applied in both *Robinson and Mackee*, above. It could be construed as imposing an obligation on employers to act reasonably when dealing with implied contractual duties and has been referred to in an English case as creating an obligation of 'fair dealing' (*Shiner Limited v Hilton*
- [2001] IRLR 727). The Tribunal has looked at each of the three areas described in paragraph 13 above in turn in reaching its decision. Decision Was the employer in breach of a term of the contract of employment? For the reasons stated in paragraphs 15 and 16 above this Tribunal finds that Mr Surcouf can only allege that the implied duty of trust and confidence between himself and the Respondent has been breached by the Respondent's failure to provide him with a written contract of employment and in particular a written acknowledgement of the loyalty payment to be made to him upon the sale of business. The provision and existence of a contract of employment is a fundamental and important part of an employer and employee's relationship. Its contents govern the parties expectations, the manner in which they will behave towards each other as well as regulating their conduct – in effect it sets out the extent and limits of their working relationship. It is a simple principle of fairness that each party in an employment relationship should know what is expected of the other on a daily basis. The importance of a contract of employment is recognised by the Law – it is the first matter to be dealt with under the Law and is expected to be provided to an employee within 4 weeks of starting employment (of more than 8 hours a week) even if the employee leaves within this time. The Tribunal places great importance on the duty in employment contracts of an employer to provide a contract of employment. The Law has been in force since 1st July 2005, and even prior to it there were regulations requiring a statement of terms to be provided. The Law provides that breaches of an employer's duty to provide a contract of employment can result in a fine of up to £5,000, which is a significant sum. Accordingly the importance and value of a contract of employment is recognised by the Law and reflects the wishes of society for the terms of employment relationships to be recorded in writing for the clarity and certainty of each party. It is not disputed that in this case no written contract of employment compliant with the Law was issued, although it is noted that during 2006 a contract was under negotiation. The Tribunal considers that it is a part of the implied duty in employment contracts to maintain trust and confidence that an

employer should comply with the Law and issue a contract of employment to an employee which at the very least complies with the minimum requirements of the Law and that it should be provided within 4 weeks of such employee starting work. The Tribunal considers that the Respondent has, by failing to produce a contract of employment for Mr Surcouf for over 3 years despite his requests, breached its implied duty to maintain the trust and confidence of its employee. Is the breach of contract a repudiatory one, entitling the employee to resign? The Tribunal has considered whether the breach of contract by the Respondent is fundamental to their relationship, thus entitling Mr Surcouf to resign without breaching the contract himself. The Tribunal has paid attention to these following issues. Mr Surcouf gave evidence that he, by nature, took promises given to him at face value. Accordingly when Mr Le Masurier promised him a vehicle in the December 2004 Statement of Terms (see Paragraph 2) he believed that it would be provided, and was disappointed when it was not forthcoming. The Tribunal heard that Mr Le Masurier and Mr Surcouf worked together as 'father and son' and 'superbly' for the first 3 years, and there is little doubt that Mr Le Masurier was a good employer. Indeed Mr Le Masurier helped or offered to help Mr Surcouf with setting up Jersey Ormer limited and there seemed to be no difficulties between them. However their relationship changed soon after Mr le Masurier announced his intention to sell the business and particularly regarding Mr Le Masurier's reluctance to commit his promise to pay Mr Surcouf a loyalty bonus to writing. Mr Le Masurier admitted in his own evidence that this was the reason for the deterioration in their relationship coupled with Mr Surcouf's increased interest in Jersey Ormer Limited. The Tribunal is mindful of the fact that Mr Surcouf had been asking for a contract of employment for nearly 18 months before the first draft was produced in February/March 2006. The Tribunal does not consider the 2004 Statement of terms to be a contract of employment under the Law. The Tribunal has also noted that the promise of a vehicle for Mr Surcouf's use was not fulfilled. Finally and most crucially, the Tribunal has borne in mind the fact that the Respondent's business was for sale and that prospective purchasers were looking at the business in the presence of Mr Surcouf whilst he did not have the security of a contract of employment with the Respondent. The Tribunal can understand that the text message received from a prospective purchaser threatening to give Mr Surcouf 2 week's notice following the purchase of the business would have been very unsettling. From the evidence heard the sticking point in the conclusion of the contract of employment appeared to have been Mr Surcouf's reluctance to commit his promise of a loyalty payment to writing and his insistence that his word was sufficient in the circumstances. The Tribunal heard in evidence that Mr le Masurier was taking advice at this time from his accountant and JACS and it considers that Mr Le Masurier could have taken professional advice on this point so that appropriate wording could be found occupying the middle ground between the parties. It was obvious to the Tribunal that Mr le Masurier wanted to keep Mr Surcouf's services. It was also noted that the loyalty payment was proposed by Mr Le Masurier on his own initiative. It is not unreasonable for Mr Surcouf to ask for this intention to be expressed in writing. The Tribunal would have found any reasonable attempt by Mr Le Masurier to express this arrangement in Mr

Surcouf's contract of employment to be acceptable. The Tribunal has also noted that Mr Surcouf was willing to continue work despite the injury to his back because he wanted to be working for the Respondent at the time the business was sold and thus qualify for the loyalty payment. After careful consideration of all the circumstances of the case the Tribunal finds that in this case the breach of the implied duty of trust and confidence by the Respondent through its failure to provide a contract of employment is heightened to a repudiatory breach of contract because:

- a) the business was for sale, which could be expected to create a greater feeling of insecurity in Mr Surcouf as an employee whether or not he had a contract of employment;
- b) Mr Surcouf had been promised a loyalty payment if he continued to work for the Respondent until the sale;
- c) Mr Surcouf was willing to carry on working until the date of any sale despite the injury to his back, but wanted Mr Le Masurier to commit his promise to writing in order to settle the terms of their arrangement;
- d) Mr Le Masurier steadfastly refused to commit the arrangement to writing, and
- e) Mr le Masurier had previously failed to provide a vehicle or a contract of employment to Mr Surcouf, despite promises to do so. Did the employee resign because of that breach of contract? The Respondent has alleged that Mr Surcouf resigned because he wished to pursue another business venture with Jersey Ormer Limited and not because of any breach of contract by the Respondent. The Tribunal heard evidence from Miss Smith that at the time Mr Surcouf left the employ of the Respondent, Jersey Ormer Limited was not in business because it had been unable to import ormer seed into Jersey and, in any event the breeding season was over. Accordingly, a decision had been made by the owners of Jersey Ormer Limited not to start business for about a year. Further, in order to do Mr Surcouf a favour they offered him a few weeks maintenance work from the beginning of October to the end of November only. The Tribunal were also informed that Mr Lewis met with Mr Le Masurier and Mr Surcouf on the 1st October 2006 in order to try and negotiate an agreement between them so that Mr Surcouf would go back to work for the Respondent. Evidence was also heard that Mr Le Masurier and Mr Surcouf tried to negotiate again in January 2007 for Mr Surcouf to start back to work but again the discussions failed. In both cases the Tribunal were informed that Mr Surcouf was willing to work for the Respondent but the talks failed because Mr Le Masurier would not include a reference to the loyalty payment in Mr Surcouf's contract of employment. The Tribunal concludes from this evidence that Mr Surcouf resigned because of the failure of the Respondent to produce a contract of employment for Mr Surcouf which included a reference to the loyalty payment which had been promised to him. Accordingly, Mr Surcouf resigned because of the repudiatory breach of contract described in paragraph 27 above.

Conclusion

This Tribunal finds that Mr Surcouf was constructively unfairly dismissed. AWARD Mr Surcouf was employed by La Rocque Fisheries Limited for 4 years and 3 weeks and pursuant to the Employment (Awards) (Jersey) (Order) 2005 is entitled to 21 weeks pay by way of compensation. Mr Surcouf earned £423.07 per week. AWARD £423.07 x 21 weeks = £8,884.47 FINES The Respondent failed to provide a contract of employment for Mr Surcouf as required by article 3 of the Law. In accordance with article 9 of the Law this is an offence punishable by a fine not exceeding £5,000 as set out in the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993. The Respondent is HEREBY FINED the sum of £250.00 NOTES: Mr Surcouf alleged in his Form JET 1 that he also resigned because of the damage to his back caused by the excessive lifting of heavy weights in his work and because the business was frequently understaffed. In addition Mr Surcouf stated that Mr Le Masurier had been verbally abusive to him and unappreciative of his efforts at work. On hearing the evidence in this case the Tribunal finds these allegations to be unsubstantiated and has disregarded these statements. The Tribunal finds Mr Le Masurier to have been a reasonable employer in his practices and in the treatment of his staff. Signed: Dated Mrs N Santos-Costa, Deputy Chairman

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