

Loh Nyuk Choi ... **Appellant**

AND

Standard Chartered Finance (Brunei) Berhad ... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 17 of 2008)**

Before: Power, P; Mortimer and Davies, JJ.A.
2nd June, 2009.

Contracts of employment in Brunei Darussalam have an implied term of mutual trust and confidence. In dismissing the plaintiff after 20 years service for poor performance his employer, the bank, was in breach. The bank held liable for wrongful dismissal.

Mr Rudi Lee of Messrs. Fathan, Rudi Lee, Annie Kon & Associates for the Appellant.
Ms Elaiza Merican of Messrs. Abrahams, Davidson & Co. for the Respondent.

Cases cited in the Judgment:

Cynthia Thompson v Orica Australia Pty Ltd FCA (N 1051 2000).
Malik v Bank of Credit and Commerce [1998] AC 20.
Mallock v Aberdeen Corporation [1971] 2 All E R 1728 at 1294.
McDonald v State of South Australia [2008] SASC 134 at par 345.
Ridge v Baldwin [1963] 2 All E R 66 at 71.

Mortimer, J.A.:

1. This is a case where the plaintiff was dismissed by his employer, the Standard Chartered Bank (the bank), for poor performance after 20 years service. His claim for wrongful dismissal was rejected by Hayati J on 28 July 2008 and he now appeals. The judge held that although he signed a letter of resignation in fact he had been dismissed but that the dismissal was not unlawful.

Background

2. The plaintiff was originally employed on 16 September 1980 by the Credit Corporation Berhad (CCB) as a collection officer. He was successful and by the time the bank acquired CCB in 1991 he was a marketing manager. His letter of appointment from the bank setting out his terms employment was dated 2 January 1992. There followed an internal restructure and he was appointed a dealer relationship manager.

3. He was moved again in 1998 to become a bill collector for delinquent accounts. He performed well and in 1999 he moved to his final post, a dealer relationship manager selling higher purchase loans for cars.
4. He worked in a department with six other dealer relationship managers each with an area and each with a performance target set by the employer. Over the period January, 2000 until July, 2000 none of the six achieved his or her target. Because of his seniority the plaintiff was expected to perform better than his more junior colleagues. For this period he was third of the six in the number of units he sold but he was last in the percentage of his target achieved at only 28%.
5. He had been working for CCB and the bank for twenty years and until the last few months he had good and successful performance ratings. At the end of July, however, he was given a 4 (poor) for his mid-year appraisal.

The meeting on 11 September 2000

6. On 11 September 2000 the plaintiff was sent on a training course at the bank's Gadong branch. Hardly had it begun before he received further instructions to go to the bank's head office in Jalan Sultan to attend a meeting at the human resources department. He had no prior warning of this and he went immediately.
7. Notes were kept of the meeting which the judge accepted as broadly accurate. They are not challenged on appeal. Present were the Head of Human Resources, Hjh Hasnah Hj Azri (HHA); the plaintiff's immediate superior, Daniel Leong; the credit manager; and the relationship manager. Confronted by this group of senior officers it is not surprising that he found the meeting intimidating. He was confronted with three matters. First, his poor number 4 mid-year appraisal and the fact that he had only achieved 28% of his performance target, the lowest percentage in the department in spite of being the most senior person there. This performance, he was told, was unacceptable.
8. Secondly, he was confronted with misconduct. It was said that he had asked some dealers to pass business to himself which should have gone to his colleagues and that he had failed to pay his company mobile phone bills. To make it worse the consequence of not paying the phone bill was that the phone company had blacklisted the bank so that the bank's CEO had been embarrassed when he tried to register his own telephone.
9. The plaintiff although overawed by the occasion denied any misconduct by denying the first allegation and explaining the second. Scant attention seems to have been paid to this and he was not told whether or not his explanations had been accepted. His later conduct showed that he thought the bank was holding to these allegations.

10. HHA then said that because of his poor performance and seniority he was to be immediately taken out of his sales role and with his poor standard of performance the bank was unable to find another position for him. At this stage he raised the question whether a retrenchment exercise was proposed in the bank and if so whether he could benefit from it. He was told that those present knew nothing of any such proposal.
11. As the meeting continued the plaintiff asked for another chance to meet his target but was told that he had been given enough time as he had been counselled in July without improvement in either July or August. He was also told that he had the opportunity to raise any concerns at the daily meetings with his sales manager and that he was no longer suitable for his sales job. When he asked about his options he was told that the bank no longer required his services and reserved the right to terminate them but that he had the option to resign on terms that he would be given three months' salary in lieu of notice and payments of his balance in the provident fund and for his leave entitlement. He asked whether he would be also paid his bonus and was told that this would be considered but that his outstanding loans would be taken into account.
12. During the meeting he was given time to consider his position and confer with Daniel Leong, his immediate superior. Having done so he decided to resign with immediate effect.

The judge's findings

13. The plaintiff's main contentions at trial were that although he formally resigned he had, on the facts, been dismissed. Further, that the dismissal was wrongful because there was a conspiracy to remove him before he became eligible for the bank's retrenchment scheme and, in any event, the bank had not given him the benefit of the procedure under its Guidelines for Managing Poor Performance (the guidelines) to which we will refer. He said these guidelines were incorporated in his contract of employment.
14. The judge rejected his allegations of conspiracy and ruled that the guidelines were not incorporated in the contract. Consequently there was no obligation on the employer to follow them. She noted that as a senior person he had been counselled about his performance in July and had the opportunity of raising any problems with Daniel Leong in his daily sales meetings but no record had been kept.
15. From the circumstances in which he resigned she found that he had in fact been dismissed but that this dismissal was not wrongful therefore she dismissed his claim.

The plaintiff's case on appeal

16. The guidelines are central to the appeal advanced by Mr. Rudi Lee, who appears for the plaintiff. He takes two points. The first is that the judge was wrong in deciding that the guidelines were not incorporated in the contract. He invites this court to hold that they were so incorporated. He contends that as there is no dispute that the plaintiff was identified by the bank as a “poor performer” it was obliged to follow the procedures set out in the guidelines and, in failing to do so, was in breach.
17. Secondly, he submits, there is in this and every employment contract, an implied term of mutual trust and confidence (the implied term). The failure to follow the procedures in the guidelines together with the manner in which his employment was brought to an end is sufficient evidence for the court to find that the failed in its obligations under the implied term.
18. On these grounds counsel invites the court to reverse the judge and hold the employer liable for wrongfully dismissing the plaintiff.

The issues

19. The issues for our consideration are:
 - 1) Were the guidelines incorporated in the contract of employment? If so, was the employer in breach of the contract for not following the procedures in the guidelines?
 - 2) In a contract employment in Brunei is there implied an obligation of mutual trust and confidence? If so, was the bank's failure to follow its guidelines and the manner in which the plaintiff was constructively dismissed sufficient to establish a breach of this implied term?
 - 3) Was the dismissal wrongful?

The pleadings

20. Given the case now advanced on appeal the pleadings leave much to be desired.
21. There is no allegation in the amended statement of claim that the guidelines were incorporated in the contract nor of a breach for failing to comply with them. The guidelines were, however, in evidence having been disclosed by the bank. They were admitted without objection and this issue was argued and decided by the judge. There can be no prejudice to the bank nor is there any good reason why this court should not also address the issue.

22. The submission of a breach of the implied term is not so straightforward. Again, neither the implied term nor its breach is pleaded. It seems that the point was first raised in the plaintiff's written closing submissions. Understandably in the absence of pleading, the bank chose not to reply to the point and the judge did not approach it in her judgment.
23. This issue was not raised in the pleadings, was not canvassed below until too late, and was not decided by judge. This court therefore does not have the assistance of the judge's reasoning on it. Usually this court will refuse to entertain an issue raised before it for the first time as the risk of prejudice to one or other party is too great.
24. On the other hand if the issue is one of law which properly arises on the evidence, and can be decided without risk of prejudice, it is greatly in the interests of the parties and justice between them that the point should be decided without further delay. Fairness may require appropriate orders as to wasted costs.
25. Subject to the questions of costs we are satisfied that Mr. Rudi Lee's second submission is one which we can safely entertain. Initially it is a question of law and there is little dispute upon the evidence relevant to any breach of the term.

Were the guidelines incorporated in the contract of employment?

26. As we have indicated the guidelines were disclosed by the bank but otherwise the evidence upon them is sparse. Although several passages in the guidelines mention the importance of bringing them to the notice of employees, the plaintiff was unaware of them until they were disclosed. All he could say was that the procedure had not been followed in his case. HHA, who impressed the judge, said in cross examination that as human resources manager "*We refer to them all the time. Agree we should follow the guidelines.*" The inference must be that the guidelines were at least relevant to the plaintiff's employment.
27. Mr. Rudi Lee invites our attention to the letter employing the plaintiff on 2 January 1992 in which the Employees Handbook and the Code of Conduct are enclosed and, by inference, incorporated. There is no mention of the guidelines, but Mr Lee seeks comfort in the final note in the handbook which reads;
*"Please note:

The policy and rules governing the relationship between the bank and its employees spelt out in this handbook are subject to change at the discretion of the bank."*
28. But this is of no assistance. The guidelines are neither incorporated nor even referred to in the handbook. They bear the date 1994 but the plaintiff was

unaware of them when he was dismissed in spite of suggestions within them that they should be brought to the notice of all employees. There is no provision in the guidelines purporting to give an employee rights. All the provisions are addressed to managers giving them guidance in detail upon dealing with any “poor performer” for whom they are responsible. Note the distinction between this situation and that in *Cynthia Thompson v Orica Australia Pty Ltd* FCA (N 1051 2000) where the employer’s policy document purported to give the employees certain rights.

29. There is no evidence from which the judge could properly infer that these guidelines were incorporated into the contract. We agree with the judge that they were not.

The implied term of mutual confidence and trust

30. An important attribute of the common law is its readiness to develop and accommodate advances in social and commercial conditions. For some years before 1998 academics had been considering and judges had been holding that employment contracts contained an implied mutual obligation between employer and employee of trust and confidence. The inclusion of such a term was finally endorsed by the House of Lords in *Malik v Bank of Credit and Commerce* [1998] AC 20. Lord Steyn, with whom the other members of the committee agreed, set out the term precisely for the purposes of that case at 45 F.

“The employer shall not ‘..... without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’.”

31. He referred to some earlier decisions on the point and to the changes which had taken place in the employer and employee relationship then continued at 46 C to explain the nature of the implied term;

“It is true that the implied term adds little to the employee’s implied obligations to serve his employer loyally and not to act contrary to his employers interests. The major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer..... And 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.”

32. And finally he endorsed the term at 46 D;

“The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your lordships house. It has proved a

workable principle in practice. It has not been the subject of the adverse criticism in any decided cases and it has been welcomed in the academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.”

The Evidence Act Cap 108

Section 91 of the Evidence Act applies to this contract as the terms were reduced to the form of a document. That is the letter of 2 January 1992. The question arises whether this implied term falls within proviso (e) of Section 92.

Section 92 and proviso (e) provide:

“92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that –

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; provided that the annexing of such incident would not be repugnant to or inconsistent with the expressed terms of the contract.”

The implied term of mutual obligation of trust and confidence, even though a recent development, is implied in all contracts of employment. In these circumstances the term is within proviso (e) It is not a ‘usage or custom by which incidents not expressly mentioned in any contract are usually annexed’ but it is a usage or custom which is always annexed.

The application of the implied term

33. From time to time the application of such a general implied term to particular facts will cause difficulty. There will be no breach of the employer’s obligation if there is “reasonable and proper cause” for its conduct, further, the conduct must be calculated to destroy or seriously damage the relationship of trust and confidence. In *Malik’s case*, to which we have referred, Lord Steyn gave guidance in his speech at 53 B to C;

*“Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is “no reasonable and proper cause” for the employer’s conduct, and then only if the conduct is calculated to destroy or **seriously** damage the relationship of trust*

and confidence. That circumscribes the potential reach and scope of the implied obligation.”

Was the employer in breach of the implied term?

34. Although the guidelines may not be incorporated into contract, even on the limited evidence available, they may be relevant to the question whether the bank breached the obligation of confidence and trust in the manner of the plaintiff’s dismissal.

35. As Anderson J. said in *McDonald v State of South Australia* [2008] SASC 134 at par 345:

“I find that I am assisted my consideration of the breach of the implied term of mutual trust and confidence, by the obvious failure of DECS to adhere to their own detailed policy on grievance resolution.”

36. We agree with this approach insofar as it applies to the present appeal. The guidelines contain the stated policy of the bank for dealing with “poor performers”. But they are addressed exclusively to the management and provide the employee with no rights, save for a right of appeal from an adverse decision, and they impose upon him no obligations. They envisage that each employee will be made aware of them although they escaped the plaintiff’s notice. He became aware of them when disclosed by the bank on discovery.

37. Ms Merican, who appears for the bank, conceded that employees could expect the guidelines to be followed.

38. In the context of a breach of the implied obligation it is necessary to turn to the allegation that in the process of dismissal the bank failed to observe procedural fairness. On this point Ms Merican, who appears for the bank, submits that as this was a pure master and servant relationship governed by the terms of the contract of employment without any element of public law rights, the plaintiff cannot rely upon any lack of procedural fairness. In support she cites the speech of Lord Reid in *Ridge v Baldwin* [1963] 2 All E R 66 at 71:

“The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with the servant at any time and for a reason or for none. But he has he done so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at trial prove breach of contract.”

39. In further support she invites our attention to the speech of Lord Wilberforce in *Mallock v Aberdeen Corporation* [1971] 2 All E R 1728 at 1294:

“One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called “pure master and servant cases”, which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or status capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter parties aspects of the relationship may be called that of master and server, there may be essential procedural requirements to be observed, and failure to observe them may result in dismissal being declared void.”

40. The speeches are of high authority but they were delivered before the development of the law endorsed by the House of Lords many years later in *Malik v Bank of Credit and Commerce* to which we have referred. In certain circumstances, including dismissal for misconduct and dismissal for poor performance the implied obligation may require the observance of procedural fairness.
41. We turn to consider the evidence and in particular the relevance of the guidelines as demonstrating the bank’s policy towards identified poor performers and, to what extent if any, the implied term obliged the bank to observe procedural fairness.
42. We recall the relevant background. The bank chose to dismiss him for poor performance and may have taken into account also the misconduct alleged. This was the dismissal of an employee who had served the bank and its predecessor satisfactorily with unblemished conduct for twenty years. This was followed by a failure to achieve a target set by the bank in deteriorating economic times over the relatively short period of six months. None of his colleagues doing the same task reached his or her target either. In the circumstances it would have been difficult for the bank to conclude that the plaintiff’s problems on which they terminated his employment were irremediable.
43. Obviously if an employer intends to confront an employee with allegations of misconduct relevant to his dismissal, fairness and the implied term require the employee to have some notice of the misconduct and the proper opportunity to be heard before any action is taken upon it.
44. The same applies to a failure to meet a performance target. If there is a good reason for the failure the bank will want to know it, and the employee will be anxious to disclose it in his own defence. The guidelines demonstrate the bank’s general policy when a poor performer is identified. They are addressed exclusively to management but when a “poor performer” is identified, HHA’s evidence, to which we have referred, shows that the bank should consider whether to follow the guidelines or to assist the plaintiff in some other way.

Of course, they are only guidelines; the bank is not obliged to follow them to the letter. Nevertheless they are of considerable relevance demonstrating the general policy of counselling and helping poor performers followed by monitoring progress. An employee who is identified as a “poor performer” can expect, as Ms Merican conceded, the policy to be followed as appropriate in the particular case.

45. It is not clear whether the allegations of misconduct played a part in the dismissal. There was, however, no purpose in confronting him with the allegations unless they were intended to be one of the reasons for removing him. Yet he was given no notice of the meeting, none of the misconduct, and none of being confronted with the failure to meet his target and its consequences.
46. He denied the first allegation of misconduct and gave an explanation for the second but the bank gave no indication whether his denial and explanation were accepted or whether the misconduct was still held against him. Although it may be said that notice of the meeting would not have assisted him in giving any better defence to substantially missing his target, he may have been able to put forward a better case for requesting another chance. As it is all the more senior people present were aware of the bank’s policy towards “poor performers” and yet gave him no indication as to why the guidelines were not to be followed or other steps taken to help him.
47. As we have already indicated the bank’s defence is that it had fulfilled its obligations because the plaintiff was of managerial status, he had been counseled by his senior Daniel Leong, and he had the opportunity of speaking to Daniel Leong at their daily sales meeting. The difficulty is that this evidence lacks detail. There is no evidence of what was said or done or whether the plaintiff was effectively assisted, warned or monitored. Of this the evidence is lacking.
48. Failure to follow the procedure in the guidelines is not necessarily a breach of the bank’s implied obligation. However, the failure to follow published general policy of assisting a “poor performer” whose problem is not irremediable may well be. In our view the failure to consider some means of assisting the plaintiff, or explain why none was to be given, when he asked for a chance to improve was a breach. The bank’s claim that he had been given all the necessary assistance falls to the ground for the reasons we have indicated. He ought at the least to have been given advice upon how he could improve his performance and then be given a chance to show improvement over a reasonable period.
49. When an employer is dismissing a longstanding employee for cause, as in this case, rather than terminating his employment out of commercial necessity there are few circumstances in which it is more important for the employer to fulfil his obligations. We are satisfied that there was no reasonable or proper cause for the bank’s conduct in the manner in which the plaintiff was dismissed. We are also satisfied that the conduct we have described was

calculated to destroy or seriously damage the relationship of trust and confidence. It undoubtedly did so in this case.

Conclusion

50. We therefore hold that the bank failed in its implied obligation when dismissing the plaintiff for poor performance in the following ways:
51. He was given no notice or warning of the meeting, the allegations of misconduct, or the intention is to dismiss him for poor performance after his half yearly assessment.
52. He was not told whether his denial and explanation of the misconduct was accepted. Nor, was he told whether the misconduct was one of the reasons for his dismissal.
53. When he asked for a chance to improve consideration was not given to whether the policy of assisting a poor performer was to be undertaken, nor was any explanation offered why it was not to be followed in his case. The bank's attempt to show reasonable and proper cause for its conduct because it had counselled the plaintiff in July and because he had attended daily sales meeting failed.
54. We therefore allow the appeal and order that judgment should be entered for the plaintiff with the damages, if any, to be assessed.

The assessment of damages

55. Before we leave this matter we need to say something about the assessment of the damages. It will not be easy. It will depend upon the available evidence. Part will depend upon the plaintiff establishing that even if appropriate steps to comply with the obligation had been taken his employment would have continued beyond, and if so how much beyond, the three months notice he was given. If the reasonable period to show improvement would have taken him to the time when the bank's retrenchment was undertaken he could be entitled to some damages for the loss of the chance to partake, but all will depend upon the evidence.
56. All this is against the background that at common law he had no statutory protection other than as provided in his contract of employment.

Costs

57. As we have said, the grounds upon which the plaintiff has succeeded on appeal were never pleaded. They were not advanced in front of the judge save in written final submissions. Rightly neither the judge nor the defendant

addressed the point. On the case advanced the judge's decision below was unassailable and we have not had the advantage of the judge's decision on the issues upon which the appeal turned. In the circumstances, even though the plaintiff has succeeded in his appeal, we do not interfere with the order for costs made below.

The Orders

58. We order:

- 1) The appeal is allowed.
- 2) Judgment is entered for the plaintiff.
- 3) The damages to be assessed.
- 4) Nisi that the costs of the appeal the paid by the respondent to the appellant. The order to be made final unless application to be heard is made before 9 a.m. on 4th June.
- 5) The orders for costs made below shall stand.

Power, P.

Mortimer, J.A.

Davies, J.A.