

11 SEPTEMBER 2014

# EMPLOYMENT UPDATE

## NO IMPLIED TERM OF "MUTUAL TRUST AND CONFIDENCE" IN AUSTRALIAN EMPLOYMENT CONTRACTS

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In a welcome development for employers, the High Court has handed down a landmark decision that confirms, for the first time, that Australian employment contracts do not contain an implied term of "mutual trust and confidence".

This article briefly summarises the history of the case, sets out the High Court's findings and explains what this means for employers.

*Commonwealth Bank of Australia v Barker* [2014] HCA 32 (full text available [here](#))

### THE ROAD TO THE HIGH COURT

In 2012, Federal Court Justice Anthony Besanko found that the Commonwealth Bank of Australia (CBA)'s failure to follow its redeployment policy constituted a breach of an implied term of mutual trust and confidence in the employment contract of Mr Barker, an employee of 23 years who had been retrenched. The redeployment policy was expressly excluded from the contract, but Justice Besanko nonetheless held that CBA's disregard of the policy amounted to a breach of the implied term. CBA

was ordered to pay Mr Barker \$317,500 in damages.

On appeal, the majority of the Full Federal Court confirmed that the "weight of authority" supported the existence of an implied term of mutual trust and confidence in Australian employment contracts, but took a different approach to the case.

Justices Lander and Jacobson found that, because the redeployment policy was expressly excluded from the contract, the policy could not be used as a basis to establish a breach of the implied term. Instead, they decided that the particular circumstances of the case (e.g. the length of Mr Barker's service and CBA's size as a corporation) gave rise to the implied term and required CBA to take positive steps to consult with Mr Barker about redeployment. CBA's failure to do so was therefore a breach of the implied term, entitling Mr Barker to damages for past economic loss.

Justice Jessup dissented, finding there was no "ready consensus" as to the existence of the implied term in Australia and that its inclusion in employment contracts would introduce "new

confusions into that body of law". His Honour also found that, even if the implied term did exist, CBA had not breached it by failing to follow a policy that had been expressly excluded from Mr Barker's contract.

## ON APPEAL TO THE HIGH COURT

On appeal, the primary question for the High Court was whether Australian employment contracts contained the implied term. In essence, the term would require an employer to not, without reasonable cause, "conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

In a unanimous decision, the Court rejected the existence of the implied term for the following reasons:

*When are contractual terms implied by law?*

The Court firstly considered the legal principles relevant to contractual terms implied by law, noting that:

- all implied terms that have been accepted into employment contracts in the past (e.g. the implied duty to give reasonable notice) are subject to the express provisions of an employee's contract and any applicable statutes (e.g. the *Fair Work Act 2009*);
- to decide whether the term of mutual trust and confidence should be implied by law, the key question was whether the term was so "necessary" that, without it, the rights of parties to employment contracts in Australia could be rendered worthless or seriously undermined; and
- while Courts do have a limited law-making function, the creation and implication of broad "normative standards" such as the implied duty of mutual trust and confidence are not to be taken lightly.

*Existence of the implied term in the United Kingdom not determinative*

The Court then moved on to consider the acceptance of the implied term of mutual trust and confidence in the United Kingdom.

Rejecting Mr Barker's reliance on British law, the Court pointed towards the unique "statutory

circumstances" surrounding the emergence of the implied term in Britain, which had no equivalent and were not applicable in Australia.

*Implied term not "necessary"*

Ultimately, the Court decided that the mutual obligations imposed by the implied term were broader than could be considered "necessary" to protect the contractual rights of Australian employers and employees. Put differently, Australian contracts of employment did not require the implied term for their effective operation.

Further, the Court considered that the broad nature of the term and the complex policy considerations associated with it meant that its implication would stray too close to the law-making function of Parliament. Justices Kiefel and Gageler noted, in particular, that the implied term would excessively intrude upon the "carefully calibrated" unfair dismissal scheme in the *Fair Work Act 2009*.

## WHAT THIS MEANS FOR EMPLOYERS

The High Court's finding that the common law does not imply a term of mutual trust and confidence removes the uncertainty surrounding when the implied term might be triggered and, if so, what obligations this might impose on employers.

In our view, the Court's decision sensibly avoids adding a further layer of complexity to the already significant common law and statutory obligations faced by employers.

The key take away points for employers are as follows:

1. The High Court's decision offers employers welcome relief from claims alleging a breach of trust and confidence. As noted by Justice Kiefel, however, the question of whether an implied term of "good faith" applies generally to contracts remains undecided in Australia. This is an issue to look out for in the future.
2. Despite the High Court's favourable decision, employers should not let their guard down. In particular, employers should always make sure that any interactions with employees including those relating to redeployment, redundancy and misconduct occur in accordance with workplace policies, the terms of their employment contracts and, where relevant, unfair dismissal laws.

## MORE INFORMATION

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