AUSTRALIAN EMPLOYMENT CONTRACTS AND WHAT TERMS WILL NOW BE IMPLIED AFTER *BARKER*

The long awaited High Court of Australia decision in *Commonwealth of Australia v Barker* held that a duty of mutual trust and confidence is not implied into Australian contracts of employment. Click here to read our previous articles on that decision - No implied term of 'mutual trust and confidence' in Australian employment contracts and Implied duties in an employment context - what may we be able to learn from the UK experience?

Many commentators lamented that decision as severely restricting the growth of Australian employment contract law, but in its decision the High Court did not completely close the door to applications from employees on the basis of the implied duty to cooperate and/or of good faith.

A spate of recent decisions on contractual terms following *Barker* has provided an intriguing contrast between the courts' willingness to uphold employees entitlements to the benefit of promissory employment policies on the one hand, and on the other hand the courts' enduring reluctance to push the boundaries of implied contractual duties requiring co-operation and good faith.

We consider three recent cases below and seek to draw some principles from those cases for all employers.

INCORPORATION OF EMPLOYMENT POLICIES

The recent decision of the NSW Supreme Court in *James v Royal Bank of Scotland; McKeith v Royal Bank of Scotland* comes as a timely reminder for employers of the importance of excluding workplace policies from employees' terms and conditions of employment.

This matter concerned the former Chief Executive Officer of ABN AMRO Holdings Limited, who was awarded almost $3 million after the Court accepted that the employer's redundancy policy was contractually binding.

The CEO had been made redundant as a result of his employer, ABN AMRO, being taken over by an international consortium. ABN AMRO had a *"closed"* redundancy policy which was not made readily available to employees, but which provided for four weeks' severance pay per year of service plus a discretionary *"golden handshake"* based on the employee's average bonuses over the previous two years.

The CEO argued that the redundancy policy formed part of the terms and conditions of his employment, on the basis that his employment contract stated: *"You agree to be bound by the policies of ABN AMRO as may exist from time to time."*

The amount payable to the CEO when applying this policy was calculated at $430,000 in severance pay plus $2.5 million by way of an ex-gratia golden handshake. ABN AMRO declined to pay these amounts to the CEO after he refused to sign a broadly-framed Deed of Release.

The Court agreed that the policy was expressly incorporated into the CEO's employment contract, as the wording of the contract was *"the language of contract"* and created obligations which were *"not merely unilateral"* and equally bound the employer.

Notwithstanding that the policy was not made accessible to employees, the Court noted that it did not make sense to suggest that the redundancy policy was binding on the CEO but not the employer in the absence of any express contractual provision to that effect. The Court acknowledged that it should not be quick to adopt a proposition:

> *"that the employee might be bound to accept whatever the redundancy policy provided for him or her in the circumstances of the redundancy, but that the employer was not bound to offer that provision."*

This judgement acts as a timely reminder for all employers to ensure that policies are drafted in *"aspirational"* terms and to avoid the use of any promissory language, in order to provide *"principles and guidelines"* for calculating potential payments to employees. By not providing a prescriptive basis or formulae for the calculations in a policy, an employer will at least minimise their potential exposure to breach of contract claims where they determine to calculate payments on a different basis.

IMPLIED DUTIES OF MUTUAL TRUST AND CONFIDENCE, CO-OPERATION AND GOOD FAITH?

Regulski v State of Victoria

In the recent matter of *Regulski v State of Victoria*, a Victorian public servant working as a compliance inspector for the Victorian Commission for Gambling and Liquor Registration lost his breach of contract claim when the Court ruled that his employment contract did not contain implied terms requiring the parties to co-operate with each other and to act in good faith.

Mr Regulski was one of a number of employees named in a formal complaint as acting in an offensive and subordinate manner to the leader of his team. As a result of the complaint, a senior manager called Mr Regulski into his office, slamming the door on his foot and subsequently berating him using obscene language and threatening gestures for approximately 40 minutes, during which time Mr Regulski was not provided any opportunity to respond.

Mr Regulski complained about the conduct of this senior manager and a subsequent investigation found that the senior manager had breached an applicable code of conduct. The investigation recommended that the senior manager receive counselling and that a mediation be held between the senior manager and Mr Regulski. However, Mr Regulski did not return to work following the incident, and instead commenced on sick leave and subsequently lodged a workers compensation claim. That workers compensation claim was ultimately settled, but when a disagreement arose over the implementation of that settlement, Mr Regulski resigned from his employment and commenced an adverse action (general protections) claim under the *Fair Work Act 2009* (Cth). Mr Regulski alleged that the reprimand that he had received, the investigation conducted by the Commission, and his workers compensation claim were all dealt with in a way adverse to him because he had previously made a number of complaints.

As part of those proceedings, Mr Regulski claimed that his employment contract required that two terms be implied into it, which would oblige the parties firstly to co-operate with each other to enable the continuity of employment, and secondly to act in good faith towards each other.

The Court found firstly that Mr Regulski's adverse action claims should be dismissed on the basis the actions of the Commission were in no way connected with any prior complaints he had made. Most relevantly for present purposes, the Court also found that the alleged contractual duty to co-operate was specific, and ultimately held that no such general duty was implied into all Australian employment contracts. The Court emphasised that where the implication of such a duty would have complex ramifications, this should properly remain a matter for the legislature to determine.

Interestingly, the Court also found that there was no implied duty to act in good faith, but noted that even if there was, the spontaneity of Mr Regulski's manager's actions showed that this was a *"paradigm case of straight talking"*, almost the "*polar opposite"* of bad faith. This calls into question the content of any proposed duty of good faith – is this a mere requirement not to act in bad faith, or does it entail a positive obligation to act in certain way?

State of New South Wales v Shaw

In a similar vein, in the recent decision of *State of New South Wales v Shaw* the New South Wales Court of Appeal unanimously held that implied terms of mutual trust and confidence or good faith were not implied into two indigenous teachers' probationary employment contracts.

In 1999 Mr Shaw and Ms Salt were appointed as probationary teachers and were assigned to Bourke Public School. On 20 March 2000, their respective probationary appointments were annulled and they ceased to be employed in the NSW Education Teaching Service.

The teachers' employment was extensively regulated by statute and industrial regulations, and the State of New South Wales annulled the teachers' probationary contracts following incidents involving other staff and alleged performance issues, pursuant to applicable legislation. Shortly prior to the annulment, the school principal *"almost casually"* handed to one of the teachers an envelope containing a bundle of documents including material that was *"critical of and damaging to"* the teachers.

Notwithstanding that this was done in circumstances where the school principal had attempted to meet formally with the teachers on numerous occasions, and the teacher to whom he handed the envelope was aware of concerns regarding her performance and had requested to see any material relating to those issues in writing, at first instance the District Court held that the State had seriously breached an implied duty of mutual trust and confidence, prior to the annulment. It was from this decision that the State appealed.

Importantly, the High Court ruling decision in *Barker* that no term of mutual trust and confidence is implied as a matter of law into all Australian employment contracts was handed down after the District Court decision in favour of the applicants. However, on appeal, the teachers maintained that such a duty was implied into their probationary employment contracts, and required that the State *"support and nurture"* them. This was said to be the case because the probationary contracts essentially struck a bargain whereby each individual agreed to become a probationary teacher because the school needed indigenous teachers, and in return the State promised to provide assistance in developing the teachers' skills and to behave fairly in assessing their performance.

The Court of Appeal acknowledged the High Court's caution against implying a term of mutual trust and confidence into a broad category of contracts. The Court of Appeal noted that there were grievance procedures available to the teachers, and held that the teachers' probationary employment contracts did not require the implication of such a term for their efficacy or worth. The Court found that:

> *"it has not been demonstrated that a probationary common law contract of employment would be rendered nugatory or worthless or that it would be seriously or undermined or devalued because of the absence of a term of mutual trust and confidence to this effect."*

Furthermore, the Court stated that the applicable statutory regime permitted the annulment of a probationary teacher's employment without compensation, for reasons unrelated to performance. The Court found this power operated against the alleged necessity of implying terms of mutual trust and confidence and good faith to give each probationary employment contract efficacy.

Whilst the Court was not required to consider the position more broadly, the obvious extension to the Court's position is that where the implication of such an implied term would deny an employer the flexibility to terminate a probationary employee, for performance or other reasons, the implication itself would seriously undermine or devalue the contract.

Our earlier article Implied duties in an employment context - what may we be able to learn from the UK experience? noted that the acceptance of a mutual duty of trust and confidence in UK common law stemmed from the principle that it would not be right for a contractual relationship made between parties of vastly unequal bargaining power, to be regulated only by express contractual terms. Notwithstanding that the teachers concerned in the *Shaw* decision had raised numerous allegations of racial discrimination during the course of their employment, and the District Court acknowledged the distinct disparity of bargaining power between the teachers and the State, the Court of Appeal was nonetheless reluctant to imply a specifically-formulated term into a broad class of contracts. Ultimately the Court of Appeal reached its decision, however, without relying on the parlance of equality of bargaining power, and instead gave significant weight to the fact that the teachers' employment was already heavily regulated by legislation and industrial regulations.

HUMAN ELEMENT IN EMPLOYMENT CONTRACTS

Fundamentally, the success of any contractual arrangement depends upon the parties' mutual trust and confidence in each other's ability to perform the contract, and on co-operation between the parties to achieve goals of the contract. This is especially true of personal contracts for service, and as such, a good dose of emotional intelligence is required for both the effective performance and proper enforcement of those contracts.

In many ways the framework of employment and industrial relations law in Australia recognises the need for an employment relationship to be founded on mutual trust, confidence and co-operation. For example, Australian courts have long provided employees with recourse and remedy for constructive dismissal, and regularly refuse to make orders for reinstatement where the employment relationship has broken down, notwithstanding that reinstatement is designated as the primary remedy in unfair dismissal applications.

However, whilst this may indicate a tacit acknowledgement of the practical need for mutual trust, confidence and co-operation between employees and employers, Australian courts have formulated recourse and remedies without expressly relying upon any implied duty formulated in those terms.

WHAT DOES THIS MEAN FOR EMPLOYERS?

These cases demonstrate the courts' willingness to assist employees by enforcing contractual entitlements to the benefits of employment policies, where the

intention of the parties to incorporate those polices into the terms and conditions of employment can be made out, and the courts' reluctance to engage in what they consider may be *"law-making"* by implying terms with potentially complex ramifications into all employment contracts. Even absent significant regulation of employment in a particular industry, as in the *Shaw* decision, Australian courts have time and again refrained from imposing any such implied terms.

Some commentators might see this as stemming from an enduring democratic respect for the rule of law and the separation of powers. Others may characterise it as mere *"lip-service"* to such ideals in circumstances where the tacit acknowledgment of such duties is clearly evinced in the approach of the courts in other aspects of employment and industrial relations law, and the courts' reluctance to clearly demarcate the content of any implied obligations in fact perpetuates uncertainty for employees and employers alike.

Whatever view is held, the present push by employees to explore and stretch the boundaries of implied duties in employment contracts may prompt the legislature to more clearly define obligations with respect to trust, confidence and good faith in employment contracts. Whilst the High Court in *Barker* contemplated that parties may be able to expressly exclude any implied duties through careful drafting of the employment contract, if the legislature is minded to create statutory obligations to clarify the much argued for implied duties owed across all employment contracts, then this may prevent the parties to an employment contract from contracting out of these duties.

MORE INFORMATION

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