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EMPLOYMENT UPDATE

IMPLIED DUTIES IN AN EMPLOYMENT CONTEXT – WHAT MAY WE BE ABLE TO LEARN FROM THE UK EXPERIENCE?

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Earlier this month, the High Court of Australia delivered its ruling in the landmark case of *Commonwealth Bank of Australia v Barker*. In that ruling Australia's highest court decided that the duty of mutual trust and confidence is not implied into Australian contracts of employment. Our previous article provides a comprehensive summary of the factual background to that case and the reasoning in the various High Court judgements [click here to read our earlier article on this decision].

For Australian businesses, this judgement was long-awaited and provides welcome relief, averting what many perceived could have been a revolution in Australian employment law. Some commentators have welcomed the decision for the clarity that they think it gives to employers; while others have dubbed it the death of Australian employment contract law. The High Court has not, though, closed the door to applications from employees on the basis of the implied duty to cooperate and/or of good faith, which remain potential avenues for employees to explore.

As the High Court discussed in great detail, the implied duty of mutual trust and confidence has long been established as part of UK law. In the UK, that wider duty encompasses both the duties to cooperate and of good faith that the High Court appears to have expressly reserved in *Barker*.

As a result, the UK regime may also contain useful information and examples for Australian employers feeling their way in relation to the duty of good faith and cooperation in light of the *Barker* decision.

THE UK POSITION

The mutual duty of trust and confidence has been established as part of the legal fabric in the UK for more than 25 years. It was approved by the (then) House of Lords in 1998, the highest court in the UK, in the case of *Malik v BCCI*. That case followed a pattern of case law which had acknowledged the duty even earlier, and which stems from the principle that it would not be right for a contractual relationship of this type, made between parties with inherently unequal bargaining

power, to be regulated by express contractual terms alone. The UK has long acknowledged that contracts of personal service must be treated differently to commercial contracts – a concept which is also acknowledged in Australia.

The term implied into all contracts of employment in the UK is that *"the employer must not, without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"*.

The cornerstones of the mutual duty of trust and confidence for employers are requirements to:

- act rationally (although not necessarily reasonably);
- not act in a manner which the employee cannot reasonably be expected to put up with; and
- act with "reasonable and proper cause" in managing employees.

One very important carve out in the UK is that there can be no action for a breach of trust and confidence in a dismissal or the manner of dismissal (known as the "Johnson Exclusion") – so an employee who is dissatisfied with the manner in which their employment was terminated will only have a claim under unfair dismissal legislation, and will be subject to different rules and standards.

Practical examples

Practically, the duty is difficult to define and the boundaries have been frequently tested in litigation. Some examples (by no means exhaustive) of employer behaviour which has been held to have breached the duty are:

- operating a corrupt or dishonest business – in *Malik*, the House of Lords held that no employee can be taken to have agreed to work in furtherance of a dishonest business;
- doing anything which makes an employee's role untenable, such as imposing excessive workloads;
- workplace bullying – it has been recognised that aggressive or abusive management style which undermines an employee is capable of breaching the duty;
- a lack of transparency and fairness in consultation with staff; and
- an employer failing to exercise a discretion properly and fairly when it comes to making bonus or pay decisions, in exercising a mobility clause, or where an employer has sought to change or reduce pension benefits.

In short, the duty is a multi-faceted "umbrella obligation" which comprises a number of distinct concepts. It is a significant extension of the express contractual relationship between an employer and its employees, and seeks to prevent an employer engaging in damaging or offensive behaviour which strikes to the heart of the relationship between the parties.

Generally speaking, employees in the UK are aware of this implied term and will be quick to complain if employers act in a way which may breach it. The duty is most often relied upon by employees seeking to leave their employment and claim constructive dismissal.

A mutual duty

While the duty may seem onerous to an Australian audience, it is important to remember that it is a mutual one.

In the UK a loss of trust and confidence is increasingly recognised as a potential ground for the fair termination of an employee. This can be the case in situations where an individual's conduct in and of itself may not be serious enough to warrant termination, but the manner in which they have handled themselves (for example, by lying or trying to twist the truth in an investigation) fundamentally destroys the employer's ability to trust their judgment and integrity. It has been an area of significant development for employers in recent years, particularly in the context of employees breaching confidentiality or those engaging in employee poaching and team moves. The duty is usually relied on by employers where the individual is in a position of trust such as a manager or director, or in particular roles such as bank staff or security guards. Where the individual is very senior, employers also typically rely on breaches of the duties of obedience and fidelity.

THE AUSTRALIAN POSITION

The High Court took a strict view of contract law in forming its decision in *Barker*. The High Court said that the basic starting point is that the contractual terms are those that which are written down and signed by the parties – the express terms. Additional terms can only be implied to supplement those express terms in limited circumstances – by statute, by established custom, or where they are necessary to give business efficacy to a contract.

The key rationale for the decision in *Barker* was that the term of mutual trust and confidence was not considered necessary for the employment contract to function and therefore it was not up to the courts to *"trespass into the province of legislative action"*.

In *Barker*, although the duty of trust and confidence was held not to be part of the employment contract, the High Court appears to have endorsed and reserved the implied duty to cooperate into employment contracts and has also left open the implication of the even more general obligation to act in good faith in the performance of contracts.

The duty of good faith?

In relation to the duty of good faith, the majority judgement of the High Court in *Barker* said that its decision should *"... not be taken as reflecting upon whether there is a general obligation to act in good faith in the performance of contracts"*.

Further, Justice Keifel said in a separate judgement:

> *"The question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia. Neither that question, nor the questions whether such a standard could apply to particular categories of contract (such as employment contracts) or to the contract here in issue, were raised in argument in these proceedings. It is therefore neither necessary nor appropriate to discuss good faith further, particularly having regard to the wider importance of the topic."* [references omitted]

It was noted that the Australian courts have, though, already acknowledged (under the auspices of the duty of good faith) some duties which are implied in the UK under the banner of the duty of mutual trust and confidence.

If it exists in an Australian employment context (and the matter does not appear to be completely settled), the duty of good faith will not require a party to act in the interests of the other, although they must not act perversely or capriciously and it may sometimes require the parties to have regard to the interests of the other party. While it is yet to be settled, it could be said that while such a duty may not apply to all acts of an employer, it may apply where the exercise of a discretion or a power by an employer may affect the enjoyment by an employee of the essential benefits of their employment contract.

For example, the NSW Court of Appeal has previously recognised the duty on an employer to not act capriciously, arbitrarily or unreasonably when exercising a discretion in relation to bonuses, pay rises and other benefits (*Silverbrook Research Pty Ltd v Lindley*) and the requirement to act reasonably when operating a mobility clause by giving proper notice has also been recognised. The more recent introduction of a bullying law in Australia was also said to codify a principle which in the UK is yet another facet of the implied duty of trust and confidence.

So even though the High Court has dismissed the existence of an implied duty of trust and confidence, there appears to remain a requirement for employers to at least act rationally in the exercise of any discretion. In many ways, that does not differ significantly from the UK position.

The duty to cooperate?

The rationale behind the decision to uphold the implied duty to cooperate was that the duty to cooperate was necessary in the application and performance of contracts generally – it is not a concept specific to the world of employment law. Plainly, it is imperative for any contract to work that the parties cooperate to achieve the goals of that agreement.

The implied duty to cooperate requires the parties to a contract not to prevent or hinder the occurrence of an express condition upon which the performance of the contract depends.

At first blush this appears narrower than the duty of mutual trust and confidence, and indeed it forms just one part of the duty in the UK. It does, however, form the basis for a significant number of UK claims regarding breach of the implied duty.

Interestingly, the House of Lords in *Malik* noted that the mutual duty of trust and confidence probably had its origin in *"the general duty of cooperation between contracting parties"*.

There may remain substantial scope for employees to argue that employers have breached the duty to cooperate if their employer makes it in any way difficult for them to perform their role or to adhere to their contractual obligations.

The "duty to cooperate" would, at its base level, require employers to avoid making it impossible for an employee to perform their role. But it is not difficult to imagine that it could potentially be used by claimants to argue that employers should be required to act in such a way as to enable an employee to perform their role to the best of their ability. This is clearly much wider than simply requiring cooperation. It could even, in theory, evolve into a duty to provide suitable support, allow flexible working, not subject employees to bullying or discriminatory behaviour, and not make negative comments about an employee – all of which are acknowledged as part of the implied duty of trust and confidence in the UK.

WHAT DOES THIS MEAN FOR EMPLOYERS?

So, while the *Barker* decision may initially appear to be a "get out of jail free" card for employers, employers should be aware of this potential scope for employees and their representatives to continue to push the boundaries of implied contractual duties in Australia by looking to rely upon a general duty of good faith or an implied duty to cooperate. While the overall duty of mutual trust and confidence has been rejected by the High Court, key components of that duty have already been accepted and may yet be developed further.

The differences between the UK and Australian positions may be more a case of different labelling rather than a significant disparity in the standards required of employers and employees in each country. Perhaps if the High Court had implied a mutual duty of trust and confidence into the employment contract, that would not have been as significant a change to the current landscape as some commentators had feared.

MORE INFORMATION

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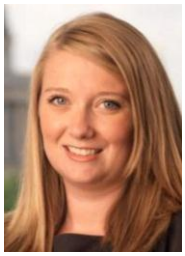

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