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Implied term of mutual trust and confidence in employment contracts: what does it mean for Commonwealth agencies?

For some years, there has been debate as to whether the implied contractual term of mutual trust and confidence (which exists in English law) forms part of Australian law. In the recent case of [Barker v Commonwealth Bank of Australia \[2012\] FCA 942](#), the Federal Court of Australia found that a serious breach by the employer of its HR policies amounted to a breach of this implied contractual term, for which damages were awarded.

What is the implied term of mutual trust and confidence?

In England there is a term implied into contracts of employment that an 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 (see *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 3j, 4a, 5–6 and 15–16).

There is a reciprocal duty on the employee.

The parties to the contract of employment are free to exclude the implied term or modify it (*Malik* at 15).

If an employer breaches the implied term of mutual trust and confidence, the employee is entitled to treat this as a breach that repudiates the contract of employment and the employee may then elect to terminate the contract of employment. A party to the contract of employment may also seek damages for breach of the implied term of mutual trust and confidence (*Malik*).

The implied term has received some recognition by superior courts in Australia (see, for instance, *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198 and on appeal in (2008) 176 IR 82, where the NSW Court of Appeal appears to have assumed the existence of the implied term). A majority of the High Court of Australia has also assumed such a term exists (*Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 at 54-55 (*Koehler*)).

However, some single judges of the Federal Court have expressed doubt about whether the implied term of mutual trust and confidence can be implied generally into contracts of employment or whether damages flow from a breach of the implied term, assuming it exists (see the more recent case of *Dye v Commonwealth Securities Ltd* [2012] FCA 242 at [599]–[611]).

Background to decision

Stephen Barker (the employee) was an executive manager for the Commonwealth Bank of Australia (the Bank).

The employee's position was made redundant after a restructure by the Bank.

The employee was advised of the decision to make his position redundant and was advised that it was the Bank's preference to redeploy him to a suitable position within the Bank. The employee was told to work out the day, clear his desk, hand in his keys and mobile telephone and go. The Bank placed the employee on paid leave for the redeployment period and terminated his access to its intranet and email facilities. The employee was advised that if he was not redeployed during the redeployment period, he would be retrenched.

The Bank had a redundancy and redeployment policy that applied to the employee's circumstances.

Some attempts were made by the Bank to contact the employee during the redeployment period. However, at the end of the redeployment period, the employee was retrenched.

The employee commenced proceedings in the Federal Court of Australia against the Bank claiming, relevantly, damages for breach of his contract of employment. The employee's contract case was put in alternative ways and focussed on an alleged breach by the Bank of its HR policies (primarily the redundancy and redeployment policy). Amongst other things, the employee claimed that:

- the HR policies were incorporated, as terms, into his contract of employment and a breach of the HR policies amounted to a breach of contract
- his contract of employment contained an implied term of mutual trust and confidence which was breached by the Bank's failure to comply with its HR policies.

Summary of decision

Besanko J relevantly held:

- the HR policies were not incorporated as terms into the contract of employment (this turned on the particular facts of the case)
- the Bank seriously breached its redeployment policy which amounted to a breach of the implied term of mutual trust and confidence
- damages in the amount of \$317,500 for past and future economic loss should be awarded to the employee for the breach of the implied term.

The existence of the implied term of mutual trust and confidence in Australian law

Besanko J held that there was an implied term of mutual trust and confidence in the contract of employment between the employee and the Bank. Besanko J regarded this as being consistent with the approach taken in England and consistent with the majority of the High Court in *Koehler* ([323]–[330]).

Besanko J noted that the existence of such a term did not interfere with the parties' freedom of contract, as they were free to exclude the term if they wished. His Honour also noted that the term *only* operates where a party does not have reasonable and proper cause for their conduct and the conduct is likely to *destroy* or *seriously damage* the relationship of confidence and trust between employer and employee ([330]).

Besanko J also made clear that in this case he was not deciding whether the implied term applies at the point of dismissal. English authorities have recognised that the implied term does not apply in relation to the manner of the dismissal (see, for instance, *Johnson v Unisys Ltd* [2001] 2 All ER 801).

A serious breach of policies can amount to a breach of the implied term

His Honour noted that the Bank issued policies and it had a right to amend or vary them. It did so to protect its own interests and to make employment at the Bank attractive. The Bank made the policies available to employees and they assisted in working out matters that related to the employment relationship. Further, each party would expect that the policies would be adhered to, subject to the fact that some of the statements were no more than aspirational or descriptive ([332]).

Having regard to these matters, Besanko J held that a serious breach of the Bank's redeployment policy would give rise to a breach of the implied term of mutual trust and confidence (this was notwithstanding that the redeployment policy was not a term of the contract) ([332]). His Honour found support for this holding in the judgment in *Thomson v Orica Australia Pty Ltd* [2002] 116 IR 186 where Allsop J held, in the circumstances of that matter, that a serious breach of a family leave policy amounted to a breach of the implied term of mutual trust and confidence (without needing to decide whether that policy itself was a term of the contract of employment).

Besanko J did not really comment as to whether every serious breach of an employment policy would give rise to a breach of the implied term. However, he did note that it would be difficult to establish a serious breach if the policy was expressed in entirely aspirational or descriptive terms (at [331]).

There was a serious breach of the redeployment policy

Besanko J accepted the employee's claim that the Bank did not comply with its redeployment policy.

- The first time the Bank raised with the employee the possibility of an alternative position was well into the redeployment period and less than a week before the employee's exit date proposed by the Bank. The alternative position was also one that the employee was very unlikely to secure ([347]).
- The lack of communication with the employee during the redeployment period was significant (some of the Bank's attempts to contact the employee had been to his work email and telephone, which he no longer had access to) ([347]).
- The forwarding of a career circular to the employee fell well short of engaging in any meaningful way in the redeployment process. Further, the fact that the employee's solicitors were threatening legal action against the Bank at the same time did not relieve the Bank of its obligation under the redeployment policy ([347]).
- In relation to matters specified in the redeployment policy, there had been no consultation with the employee, the possibility of retraining was not raised or discussed with the employee, advice about redeployment options and process were not sought by the employee's manager and there was no redeployment plan developed or implemented ([349]).

The employee himself did very little in terms of taking proactive steps to seek redeployment (essentially because he did not think the Bank was genuine in stating that it wished to redeploy him). Besanko J noted that, in other circumstances, inactivity by an employee might

excuse the Bank from taking any steps, or further steps, under the redeployment policy. However, in the significant circumstances of this case, it was reasonable for the employee to consider by a certain point that there was no reasonable prospect of redeployment. Besanko J regarded the following circumstances as significant (at [351]):

... that Mr Barker, an employee of the Bank for approximately 27 years, was advised that his position was redundant and asked to leave the Bank and return items associated with his employment on the very day he was given such advice. Furthermore, his access to the Bank's intranet and email facilities were immediately withdrawn. In that context, although it was not incumbent on the Bank to redeploy Mr Barker, it was incumbent on it to take timely and meaningful steps to comply with its own policy. It did not do that. It did not contact Mr Barker because of an internal error. When it did contact him, it was very late in the piece.

Besanko J held that the Bank's almost total inactivity within a reasonable period meant that its breach of its redeployment policy was a serious breach and that it was in breach of the implied term of mutual trust and confidence ([352]).

The employee also argued that the Bank breached its policies in selecting him (or his position) for redundancy. However, Besanko J found on the facts that the Bank's decision to make the employee redundant was not a serious breach of its policy.

Damages for breach of the implied term of mutual trust and confidence

Besanko J assessed the employee's chances of redeployment at 25 per cent (had the Bank followed the redundancy and redeployment policy).

The damages awarded were based on 25 per cent of the amount of past economic loss and future economic loss. The employee's future economic loss comprised the amount that the employee would have earned up to retirement age, less 30 per cent to take account of residual earning.

What does the judgment mean for Commonwealth agencies?

The judgment in *Barker v Commonwealth Bank of Australia* represents a growing recognition of the implied term of mutual trust and confidence in Australian law.

While most Commonwealth employment exists within a statutory setting (for example, under the *Public Service Act 1999*), case law suggest that terms can be implied into contracts of employment between the Commonwealth and its employees (see, for instance, *Bennet v President, Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119 at [117]).

Accordingly, the implied term of mutual trust and confidence may form part of the contracts of employment of Commonwealth employees (unless the term is excluded by the contract or is contrary to the statutory setting).

The judgment in *Barker v Commonwealth Bank of Australia* leaves open the possibility that a serious breach by a Commonwealth agency of its HR policies may entitle an employee to claim damages for breach of the implied term of mutual trust and confidence if loss or damage is suffered as result of that breach.

Commonwealth agencies will need to take care that they comply with their own policies when dealing with their employees and otherwise ensure that they do not, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

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