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Implied terms of mutual trust and confidence and good faith in employment contracts: what do they mean for Commonwealth agencies?

In the landmark case [Commonwealth Bank of Australia v Barker \[2014\] HCA 32](#) the High Court has settled a long-running controversy and established that Australian law does not imply a duty of trust and confidence in all employment contracts. The Court left open the possibility that there is an implied general obligation to act in good faith.

Background

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 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 a Full Court of the Federal Court held that:

- as a matter of law a term of mutual trust and confidence is implied into all employment contracts
- the content of the duty requires that the employer will 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 the context of the particular employment relationship in issue, where the employment contract contemplated the possibility of redundancy and redeployment within the Bank as an alternative to termination, the employer's duty of trust and confidence required the employer to take positive steps to consult with the employee about the possibility of redeployment and to provide him with the opportunity to apply for alternative positions within the Bank
- the employee was entitled to compensation for the employer's breach of contract.

High Court decision

No implied term of mutual trust and confidence

The High Court has now ruled that a duty of trust and confidence is not implied into employment contracts as a matter of law.

The Court has left open the possibility that a court can find an implied term of trust and confidence if satisfied that it is necessary to give business efficacy to a particular contract (which the Court referred to as an implication in fact: see [21]–[22] and at [43]).

The Court held at [43] that as a matter of fact the term was not implied into the employment contract between the Bank and Mr Barker. In this regard the Court referred to its reasons for finding that implication as a matter of law was not necessary in the relevant sense and held that there was no special feature of the contract to support an implication as a matter of fact.

The implication as a matter of law of a term of mutual trust and confidence would have had potentially significant consequences for all employers, including public sector employers. As observed by the High Court at [39], in its most far-reaching form the development of the implied term could extend beyond a duty of cooperation to a positive obligation on the employer to take all steps necessary to achieve the purposes of the employment relationship, embracing not only the material conditions of employment, such as pay and safety, but also the psychological conditions that are essential to the performance by an employee of his or her part of the bargain.

Other implied duties—duty of good faith

The High Court in *Barker v Commonwealth Bank of Australia* expressly left open at [42] the question whether there is a general obligation to act in good faith in the performance of contracts and the question whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in the sphere of public law. Justice Kiefel said at [104] that ‘fairness in dealings between contractual parties’ may be an aspect of good faith but noted at [107] that ‘the question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia’ and that the content of that standard for employment contracts was still to be considered.

Discussion of possible implied duty of good faith

As stated by the High Court at [21], contractual terms that are implied in law and are effected by the common law (rather than by statute) may be displaced by the express terms of the contract or by statute.

Accordingly, any implied term of good faith imposed by the common law may form part of the contract of employment of a Commonwealth public sector employee unless the term is displaced by the express terms of the contract or by statute.

While most Commonwealth employment exists within a statutory setting (for example, under the *Public Service Act 1999*), it is established that at least some terms are implied as a matter of law into contracts of employment between the Commonwealth and its employees. For instance, in *Bennet v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [117] to [127] the Federal Court held that a Commonwealth employee in the Australian Public Service was subject to an implied contractual duty of good faith and fidelity. (See AGS *Litigation Notes* No. 11, 22 October 2004. See also *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24 to 25 and *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34] to [35].)

The decision of a Full Court of the South Australian Supreme Court in *State of South Australia v McDonald* (2009) 104 SASR 344 (concerning a teacher employed by the State) is an example of a case where a court found that a public sector employment contract displaced any implication of a term by the common law (in that case the implied term of mutual trust and confidence). The Court held at [269] to [271] that the implied term of mutual trust and confidence did not form part of the public sector employment contract in that case because the statutory and regulatory context in which the contract of employment operated made the implied term unnecessary. The High Court in *Barker v Commonwealth Bank of Australia* at [35] referred with apparent approval to this conclusion in *State of South Australia v McDonald*.

Even if a term of good faith is implied in an employment contract, its terms are not clear. One attempted formulation is that an implied duty of good faith requires that the employer act honestly and reasonably, and with prudence, diligence, caution and due care, when exercising employer powers and entitlements, or otherwise dealing with employees; that the implied duty of good faith does not require utmost good faith or discharge of a fiduciary duty; and that the implied duty does not deprive the employer of its capacity to exercise rights in its

own interests. (See the decision of the NSW Supreme Court (Rothman J) in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198 at [112]–[118]. That decision was overturned by the NSW Court of Appeal in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559 (*Russell*).)

The NSW Court of Appeal in *Russell* referred to case law that had found a duty of good faith to exist in some circumstances. The Court left open the issue whether the duty is implied in all employment contracts and, if so, the scope and content of the duty. Justice Basten observed at [33] to the effect that the scope and content of any duty of good faith is uncertain: ‘Recognising that an employer may act with reasonable and proper cause to pursue its own interests, whether or not they are adverse to those of the employee, and may terminate the employment at any time without cause on giving notice, casts some uncertainty on the scope and extent of the implied duties [of trust and confidence and good faith]’.

An implied duty of good faith does not require an employer to act without any deficiencies. For example, the NSW Court of Appeal in *Russell* held that the fact that a misconduct investigation could have been improved by conducting an interview with the suspected employee face to face rather than by telephone and was to that extent defective did not establish any breach of any implied duty of good faith (or of trust and confidence).

Implications for agencies

To ensure that they comply with any implied duty of good faith, it would be prudent for Australian government agencies to endeavour to act as a model employer by ensuring that when they exercise employer powers and entitlements or otherwise deal with employees:

- they act honestly and reasonably, and with prudence, diligence, caution and due care
- they make employment-related decisions, including any decisions under the contract of employment, in a manner that is consistent with administrative law requirements.

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