



## Duty of Mutual Trust and Confidence – an Implied Term in Australian Employment Contracts

The existence of an implied term of mutual trust and confidence in Australian employment contracts has been confirmed by a recent majority decision of the Full Federal Court in *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83.

The majority, agreeing with the decision of the primary judge, confirmed the view that there was enough authority in the common law, both in England and Australia, to accept the existence of the implied term on the basis of the evolving, contemporary nature of the employment relationship.

### ***What is the duty of mutual trust and confidence?***

In the employment context, the duty refers to an obligation that the employer will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

### ***Why is the duty more significant for employers than employees?***

Despite the word “mutual”, the duty is considered to add little to an employee’s existing common law obligations of loyalty and fidelity. The practical effect of the duty lies in its impact on the obligations of an employer.

### ***When does it apply?***

The duty applies to the employment relationship at all times apart from at the point of the dismissal. This is because of the overriding statutory framework that applies to dismissal. Also, as an implied term, it will not apply if expressly excluded by the employment contract.

### ***On what basis is a term implied into a contract?***

The test for the implication by law of a term into a contract of a particular class (i.e. employment contracts) is **necessity**. This simply means that the term is necessary in the circumstances or, without the implied term, the whole transaction would become futile.

### **The Facts of the Case**

Mr Barker was a long standing employee of the bank. His employment contract included a brief redundancy clause providing compensation if his role was made redundant and the bank was unable to redeploy him. His contract did not expressly exclude any implied terms. The bank’s HR Manual included a redundancy policy setting out a redeployment process as well a disclaimer informing employees it did not form part of their contracts of employment.

In March 2009, Mr Barker was told his position was redundant and the bank’s preference would be to redeploy him. Despite this, Mr Barker was almost immediately asked to clear his desk and leave work and his access to email and intranet facilities was withdrawn. Mr Barker did not return to work and more than a month later he was informed in writing that his employment was terminated by reason of redundancy.

Mr Barker made a number of claims against the bank including a claim that the bank had breached his contract of employment by not complying with the redundancy policy.

### **The Decision of Primary Judge – Beskano J**

Accepting that the implied term of mutual trust and confidence had become part of the common law, Beskano J found that the bank had breached Mr Barker’s contract of employment.

He held that, although the redundancy policy was not a term of Mr Barker’s employment contract (because of the disclaimer in the HR Manual), the bank’s failure to follow its own policy amounted to a breach of the duty of mutual trust and confidence that was implied into Mr Barker’s employment contract. Beskano J awarded Mr Barker over AU\$300,000 in damages for loss of opportunity.

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## Appeal

The bank appealed Beskano J's findings that there existed an implied term of mutual trust and confidence in Mr Barker's employment contract and that the bank's failure to follow its policy amounted to a breach of that implied term.

The bank's appeal was dismissed, with two of the three judges of the Full Federal Court confirming there was an implied term of mutual trust and confidence in Australian employment contracts. The majority decision applied a different reasoning to Beskano J, however, and it also considered that the bank had alternatively breached a second (related) implied term – the duty of co-operation.

## Majority Decision – Jacobson and Lander JJ

The majority held that the implied term of mutual trust and confidence had obtained a sufficient degree of recognition that it ought to be accepted. On the basis of the developing contemporary employment relationship, they considered the term to be implied by necessity.

However, the majority did not adopt Beskano J's reasoning that the breach arose because the bank had not acted in accordance with its redundancy policy. They held that once the existence of the implied term is accepted, the content of the duty (or what the duty requires) will depend on the circumstances. The relevant considerations in this case were:

- the long term nature of Mr Barker's employment (over 27 years);
- the bank's large size as a corporate employer; and
- the reference in Mr Barker's employment contract to termination on redundancy grounds if the bank was unable to place him in an alternative position.

Given these circumstances, the majority found that the implied term of mutual trust and confidence required the bank to take positive steps to consult with Mr Barker about alternative positions and give him the opportunity to apply for them before terminating his employment.

The majority also considered, in the alternative, the duty of co-operation from which the implied term of mutual trust and confidence arguably developed. Applied to all contractual relationships, the duty of co-operation is the principle upon which a party to a contract is required to do all things necessary to enable the other party to have the benefit of the contract. The majority reasoned that the failure of the bank to take positive steps to allow Mr Barker to enjoy the benefit conferred by the contract (i.e. the redundancy policy) amounted to a breach of the implied duty of co-operation.

## Dissenting Decision - Jessop J

Jessop J did not accept that there was any consensus in Australian common law about the existence of the implied term of mutual trust and confidence. He argued that the introduction of an implied term of mutual trust and confidence would take the law of contract beyond any principled development in the duty of co-operation. He examined each relevant Australian case as well as the leading English authorities and concluded that there was no solid basis for applying the implied term in Australia.

In any event, Jessop J argued that an employer's breach of a non-contractual policy could hardly amount to a breach of an implied term of mutual trust and confidence.

Regarding the difficulty of establishing the content of the implied term in different circumstances, Jessop J said that the fact that the identification of the obligations imposed are open ended went against the proposition that the implied term is necessary. He reasoned the implied term of mutual trust and confidence was not necessary in order to give an employment contract commercial and industrial validity. Importantly, Jessop J raised a range of concerns with the practical application of the implied term in the employment context including its interaction with various pieces of legislation and the existing fabric of the common law and equitable remedies.

## Conclusion

Given the contentious nature of this decision, it may go to the High Court on appeal and be overturned. Until such time, Australian employers must be aware that their dealings with employees are subject to an implied term of mutual trust and confidence unless it is expressly excluded in the contract of employment.

### What Should Employers Be Doing?

- Before taking any action that may be detrimental to employees during employment, think about whether the action could destroy or seriously damage the relationship of mutual confidence and trust. This includes thinking about any policies which may be relevant to the circumstances.
- Review current policies and ensure they are up to date, clear and practical so they are understood and followed by everyone within the business.
- As a precaution, consider strengthening your employment contracts by:
  - excluding policies as contractual terms; and
  - expressly excluding the implied term of mutual trust and confidence,
- Keeping in mind that varying an existing employee's contract may require their consent and additional consideration.

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## Legislation Update

Legislative Instrument	Status	Key Proposed Changes
<i>Fair Work Amendment Act 2013</i>	Schedule 3 - "Anti Bullying Measure" will come into effect on 1 January 2014	<ul style="list-style-type: none"><li>• The new provisions allow a "worker" or group of workers to apply to the Fair Work Commission (<b>FWC</b>) if they "reasonably believe" they have been bullied at work.</li><li>• "Bullied at work" is defined as a situation where an individual or group repeatedly behaves unreasonably towards the worker (or group of workers of which the worker is a member) and that behaviour creates a risk to health and safety.</li><li>• Reasonable performance management is excluded from the definition.</li><li>• The provisions afford protection to employees, labour hire workers and contractors.</li><li>• Workers must work at a constitutionally-covered business. Employees of non-incorporated employers and state public servants will not be covered.</li><li>• The FWC may issue orders to stop the bullying or prevent further bullying by conducting a review of relevant internal bullying policies and making an order to provide additional training.</li><li>• The FWC is unable to make an order for compensation.</li></ul> <p><b>Note:</b> The coalition government has indicated it will maintain the statutory bullying regime, however its policy will require a worker to seek the assistance of the relevant state safety regulator before applying to the FWC. Watch this space.</p>

## Events

### Squire Sanders Perth 2013 Australian Labour and Employment Breakfast Series

#### 23 October 2012 "Redundancy Refresher"

Level 21, 300 Murray Street, Perth

To register for the Squire Sanders Labour and Employment Breakfast Series, please contact Isla Rollason on +08 9429 7624 or [isla.rollason@squiresanders.com](mailto:isla.rollason@squiresanders.com)



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## Did You Know? ...

The Federal Court recently ruled that the right to seek legal advice regarding employment entitlements constitutes a “workplace right” for the purpose of the adverse action provisions of the *Fair Work Act* 2009 (Cth). In the recent case of *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908, an employee was threatened with dismissal after telling her employer she would seek legal advice if she was not paid commissions owed to her. The Court held that the employee’s right to make an inquiry to her solicitor fell within the realm of a “complaint or inquiry” in the definition of a “workplace right”.

For more details on this case and its implications, please see our Adverse Action Wrap-up in the November 2013 edition of Workplace View.

## Client Quiz

**The first correct entry emailed to [Isla.Rollason@SquireSanders.com](mailto:Isla.Rollason@SquireSanders.com) will win a West Australian Good Food Guide (delivery within Australia only).**

On 27 June 2013, the Federal Parliament passed the *Fair Work Amendment Bill* 2013 (Cth) (**Amendment Act**) with most provisions commencing on 1 January 2014. Which of the following provisions is not a key change introduced by the Amendment Act?

- a) Anti-bullying jurisdiction of the Fair Work Commission;
- b) Union right of entry entitlements;
- c) Changes to civil penalty provisions; or
- d) Family friendly measures.

## Contacts



**Andrew Burnett**  
Partner  
T +61 8 9429 7414  
E [andrew.burnett@squiresanders.com](mailto:andrew.burnett@squiresanders.com)  
MARN 1174849



**Bruno Di Girolami**  
Partner  
T +61 8 9429 7644  
E [bruno.digirolami@squiresanders.com](mailto:bruno.digirolami@squiresanders.com)



**Felicity Clarke**  
Senior Associate  
T +61 8 9429 7684  
E [felicity.clarke@squiresanders.com](mailto:felicity.clarke@squiresanders.com)



**Dominique Hartfield**  
Senior Associate  
T +61 8 9429 7500  
E [dominique.hartfield@squiresanders.com](mailto:dominique.hartfield@squiresanders.com)