

What's the Verdict?

Australian Employers have been patiently awaiting the High Court decision on *CBA v Barker* [2014] HCA 32, and they have not been disappointed! Yes, employers can finally breathe a sigh of relief, with the High Court effectively overturning the decision of the Full Court of the Federal Court on this issue. The High Court has determined that there is NO term of mutual trust and confidence implied in Australian employment contracts at common law.

Why Was the Full Court's Decision Overturned?

The High Court found that implying such a term went beyond the legitimate law-making functions of the Australian courts and, given the complex policy considerations involved, it was more appropriate for our legislature to assume that responsibility.

While the Full Court's decision had relied heavily on the UK decision of the House of Lords in *Malik*, the High Court was not impressed with this approach, finding the history of the development of the term in the UK was not applicable to Australia. The Court advised that to find such a term exists, regard must be had to the principles governing implied terms in that class of contract, which include considering whether the implication of the term is necessary.

In doing so, the Court considered whether the implication of the term was 'necessary', in the sense of being implicitly required by the nature of the contract or the contractual relationship being rendered futile without it. It also considered in a broader context whether it was 'necessary' to justify a decision which would significantly impact on employment relationships and employment law in Australia.

The Court noted that the implication of such a mutual term would impose obligations on employees as well as employers and the mutual aspect of the obligation could not simply be characterised as a restatement of an employee's existing duty of fidelity. Implementing such a duty would go beyond the material conditions of employment. The implied duty of trust and confidence in *Malik* was said to be directed towards the employment relationship, which is dependent on social conditions and desirable social policy, rather than the performance of the contract.

What Does This Mean for Employers?

While the existence of an implied term of mutual trust and confidence in Australia has finally been laid to rest, the High Court said this conclusion should not be taken to reflect on the question of whether there is a general obligation to act in good faith in the performance of contracts. The High Court also referred on occasion to the duty to co-operate, which requires a party to do all things necessary to enable the other party to have the benefit of the contract. Accordingly, while this is good news for employers, employers should ensure they are seen to act co-operatively and in good faith in their performance of employment contracts to minimise any employee claims.

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