

# Can the implied term of trust and confidence be used to outflank the limitations on unfair dismissal claims in “Work Choices”?

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The enactment of the *Workplace Relations (Work Choices) Amendment Act 2005* (Cth), and its dramatic scaling back of employees ability to access unfair dismissal remedies has left many representing employee interests to consider whether there are prospects of expansion of common law remedies to protect job security.<sup>1</sup>

One area with potential for such an expansion is through the development of a duty of mutual trust and confidence in similar fashion to the United Kingdom courts. The recognition of such a duty as an implied term could lead to the common law allowing wrongfully dismissed employees to obtain damages for breach of that term, including not only loss of earnings but also injury to feelings, distress or loss of reputation. Such a development would serve to fill the gap in employment protection left by “Work Choices”.

## DUTY OF MUTUAL TRUST AND CONFIDENCE

The implied term of trust and confidence arose from two sources in United Kingdom law. United Kingdom legislation on termination of employment, which deemed termination to take place where the conduct of the employer could be construed as a repudiation of the contract of employment, was interpreted as involving mutual duties between the employer and employee to conduct themselves in such a way as to enable the contract of employment to be performed.<sup>2</sup> It was also grounded in case law which implied a duty of cooperation between employer and employee.<sup>3</sup>

These developments gave rise to a considerable body of secondary literature, which drew generalisations from the case law and postulated a broad term of trust and confidence which could be used to deal with unfair behaviour in the employment relationship.<sup>4</sup> An article by Brodie was particularly influential in showing how the implied term of trust and confidence could be developed.<sup>5</sup> This was taken up by the House of Lords and the implied term applied in *Malik v Bank of Credit and Commerce International*<sup>6</sup>, a distinctive case in that it did not involve

conduct of a termination and was concerned with loss of reputation of employees who were seeking employment after the collapse of the bank through the fraudulent activities of senior management.

The House of Lords held that the bank was under a duty to conduct its business in a legal way so as not to harm the reputation of its employees pursuant to an implied term of trust and confidence. This case was distinctive in that it did not involve conduct of a termination and was concerned with loss of reputation.

The developed formulation of this implied term was “that an employer will not, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”<sup>7</sup>,

However, further extension to the case of termination of employment was denied by the House of Lords in *Johnson v Unisys Ltd*<sup>8</sup>, where an employee sought to claim damages resulting from an unfair dismissal under the implied term of trust and confidence. The House of Lords there restricted the operation of the term of trust and confidence to situations other than that of dismissal. The existence of unfair dismissal legislation was taken to cover the field of liability for such unfair dismissals, and so impliedly excluded claims for distress and injury resulting from dismissal. Such an approach prevented the much-criticised decision of *Addis v Gramophone Co.* from being overturned through the House of Lords application of the implied term of trust and confidence. Although that decision had been reaffirmed for Australia in the employment context by dicta in *Baltic Shipping Co v Dillon*<sup>10</sup>, the implied term of trust and confidence had not there been argued.

## RECEPTION OF THE IMPLIED TERM IN AUSTRALIA

*Johnson v Unisys Ltd* was followed in Australia in *Aldersea v Public Transport Commission*<sup>11</sup> and *New South Wales v Paige*<sup>12</sup>. In *Aldersea v Public Transport Commission*, Ashley J in the Supreme

Court of Victoria expressed the view, on review of the authorities, that the case law did not support a proposition that damages were available for mental distress. In relation to the similarities between the United Kingdom and Australian position on unfair dismissal legislation, Ashley J said:

*“Under the Commonwealth legislation operative since 1994, then, there has been an availability of compensation for distress (not injury) in the event of harsh, unjust or unreasonable dismissal in the situations to which the legislation has from time to time applied. Many of the features of the statutory regime mirror those applicable in England as they were described by Lord Hoffman in Johnson v Unisys. The fact that in Australia, unlike in England, the legislation (sic) regime has been construed to permit an award of compensation for distress provides a further reason why, more so than in England, the legislative regime might be considered to lead to a conclusion that a term [of mutual trust and confidence] of claim should not be implied.”*<sup>13</sup> .

In *Paige*, Spigelman CJ in the New South Wales Court of Appeal reviewed the authorities and concluded that the exclusion of contractual damages at common law for anxiety, disappointment and distress extended to cases of psychiatric injury.<sup>14</sup> His review of the authorities on the implied term of trust and confidence found no material difference between the United Kingdom legislative framework and the Australian legislation (including State provisions) on unfair dismissal, which would lead to a different conclusion to the position in the United Kingdom.<sup>15</sup>

As Ashley J noted in *Aldersea*, the Australian unfair dismissal jurisdiction had found damages for distress at the mode of dismissal to be available on the basis of an implied term of trust and confidence in *Burazin v Blacktown City Guardian*<sup>16</sup>. Such damages continue to be awarded under s170CH(7) *Workplace Relations Act 1996* (Cth), and this has not been affected by developments in the approach of the common law.

#### **EXTENSION OF THE TERM: CONDUCT LEADING TO TERMINATION**

In *Eastwood v Magnox Electric plc*<sup>17</sup> the House of Lords distinguished *Johnson v Unisys Ltd* in a situation where the conduct occasioning the relevant damage gave rise to causes of action which accrued before dismissal took place. The claimants were therefore entitled to pursue their actions for breach of the implied term of trust and confidence because of this distinction. The House of Lords said the implied term of trust and confidence covered the situation of conduct leading up to termination, but not in the termination itself. It was recognised that to leave the

law in this state would lead to anomalies. But this was said to be a matter for Parliament.<sup>18</sup>

As yet, Australian courts have only dealt incidentally with arguments based on an implied term of trust and confidence after *Eastwood v Magnox*, and its operation in relation to pre-termination conduct. But the New South Wales Court of Appeal refused to strike out a pleading asserting a contractual duty of trust and confidence between employer and employee in *Irving v Kleinmann*<sup>19</sup>, and the High Court in *Koehler v Cerebos*<sup>20</sup> alluded to the existence of such a duty. But a strong case could be mounted for implication of a term of trust and confidence in relation to unfair dismissal in Australia after “Work Choices” comes into operation<sup>21</sup>. The scope of exclusions from unfair dismissal legislation, particularly the exemption of “small businesses” with less than 100 employees, means that the statutory scheme does not have that comprehensive character which was influential in the House of Lords reasoning in *Johnson v Unisys*, and followed in Australia in *Aldersea* and *Paige*.

As the law stands at present, it cannot be clearly affirmed that the way is open for courts to award damages for distress, injured feelings and loss of reputation in the context of termination of employment. But this may change in Australia if the courts considered that, because of the limited scope of unfair dismissal legislation after “Work Choices”, the implied term of trust and confidence could be relied on in the absence of other remedies. But to achieve this result, the courts would have to adopt a different view of the nature of the contract of employment than at present, and which has been proclaimed in “Work Choices”: that the contract of employment is an ordinary contract of exchange between parties and that relative bargaining power is irrelevant to contractual issues. The reality is that the contract of employment has relational and social implications: its security is the basis on which individuals make decisions about housing, family life and other social issues. This recognition of the contract of employment as having a relational and social character beyond a mere economic exchange is the most important step the Australian common law has to take in relation to employee protection.<sup>22</sup>

#### **ENDNOTES**

1. The main developments in relation to unfair dismissal are summarized in F Anderson, “Work Choices- The Changes to Termination of Employment” FindLaw Australia [www.findlaw.com.au/articles](http://www.findlaw.com.au/articles), accessed 1.2.06. The prospects for a greater use of common law remedies are discussed in J Howe et al “The Coalition’s Proposed Industrial Law Changes: an Interim Assessment” National Institute of Labour Studies [www.ssn.flinders.edu.au/nils](http://www.ssn.flinders.edu.au/nils) accessed 20.1.06, p. 9
2. As discussed in *Eastwood v Magnox Electric plc* [2004] 3 WLR. 322, 3

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# NTWLA 2006

## update

### COMMITTEE

There have been several changes to the Committee since November. At the AGM in September Stephanie Trezise-Conroy was elected President; however in early January, at short notice, she left Darwin for Queensland.

Under the constitution it is possible to fill casual vacancies on the committee from within the committee; after discussion, Frieda Evans was elected acting President for the remainder of Stephanie's term. The committee thank Stephanie for her contribution.

Anna Swindley has taken on the role of Newsletter editor.

Two members have been coopted to the committee – Kathryn Ganley and Andrea Videon. These two members comprise the Events Team to organise meetings and functions. The program for the rest of this year will be available by the end of February.

### FUNCTIONS

The next function will be a meeting to amend the constitution. With the new Associations Act, the current constitution no longer complies. The amendment involves the insertion of a clause dealing with dispute resolution.

We plan to hold one major fundraising event, with the money raised being used to bring an interesting speaker to Darwin. The Attorney-General will host a reception at Parliament House, probably during the August sittings and we will also be holding the ever popular Patron's Drinks.



### ALICE SPRINGS

The membership in Alice Springs is small but growing. Helen Nicholas coordinates activities there and the Committee appreciates her efforts. Frieda Evans hosted an informal drinks meeting in February. Two other functions will be held later in the year.

### AWL

The updated AWL website is now up and running; the address is [www.womenlawyers.org.au](http://www.womenlawyers.org.au). The data on the previous site has been weeded or updated. The only thing that is not finalised is the photo section but this should be rectified soon. The editor is very keen that each state has a list of legal female 'milestones' on the AWL site. The NT committee will be contributing local data over the next few months. We will also be finalising the NT site so a link can be made from the AWL site.

Frieda Evans  
President  
NT Women Lawyers Association

## Can the implied term of trust and confidence be used to outflank the limitations on unfair dismissal claims in "Work Choices"? cont...

3. Secretary of State for Employment v ASLEF (No 2) [1972] 2 QB 455
4. M Freedland, *The Personal Employment Contract*, (Oxford, 2003) 155
5. D Brodie, "The Heart of the Matter: Mutual Trust and Confidence", (1996) 25 *Industrial Law Journal* 121. Influence noted M Freedland, *The Personal Employment Contract*, (Oxford, 2003) 155
6. [1997] 3 WLR 95
7. *Eastwood v Magnox Electric plc* [2004] 3 WLR 322, 326)
8. [2001] 2 WLR 1076
9. [1909] AC 488
10. (1993) 176 CLR 344
11. (2001) 3 VR 499
12. (2002) 115 IR 283
13. (2001) 3 VR 499, 517-8
14. (2002) 115 IR 283, 305
15. (2002) 115 IR 283, 306-10
16. (1996) 142 ALR 144
17. [2004] 3 WLR 322
18. [2004] 3 WLR 322, 328
19. [2005] NSWCA 235
20. (2005) 79 ALJR 845, 849
21. J Riley, *Employee Protection at Common Law*, (Sydney, 2005) 93-95
22. D Brodie, "Mutual Trust and the Values of the Employment Contract" (2001) 30 *Industrial Law Journal* 84, 88-9.