

The implied duty of mutual trust and confidence in employment contracts

***State of South Australia v McDonald* [2009] SASC 219**

By Anne Sibree

Implied terms of mutual trust and confidence in employment contracts have become well entrenched in English employment law as a means of protecting employees from undue prejudice and exploitation by employers, and to provide access for aggrieved employees to statutory safeguards. The term has been described as:

'An obligation on an employer not to, 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 the employer and employee.'¹

The application and scope of the implied term to Australian employment contracts continue to generate debate, as demonstrated by a recent Full Court decision in the Supreme Court of South Australia.

In *McDonald v State of South Australia* [2008] SASC 134, delivered on 21 May 2008, a single judge of the Supreme Court awarded a schoolteacher \$392,850 in damages for his employer's breach of an implied term of mutual trust and confidence in the employment contract.

On 30 July 2009, the Full Court of the Supreme Court overturned the decision, considering that no such term should be implied in the circumstances.²

BACKGROUND

In April 2004, Mr McDonald, a teacher formerly employed by the Department of Education and Children's Services (DECS), instituted proceedings against the State of South Australia for damages for breach of his employment contract.

Mr McDonald alleged that the minister (his employer) had, over a period of some years, acted in such a manner as to evince an intention not to be bound by or to observe the contract of employment. He alleged, *inter alia*, that the Minister had subjected Mr McDonald to an unsafe system of work, had exposed him to bullying and harassment in the workplace, and had failed to deal with grievances or provide proper management and supervision.

On 11 April 2003, Mr McDonald wrote to the premier and the director-general of education setting out his complaints about his treatment as a teacher, stating 'Therefore I dismiss myself from my employment...'

Mr McDonald's claim relied on the existence of three terms which, he alleged, were to be implied into the contract of employment. They were:

1. an implied term requiring the minister to take reasonable care to provide a safe place and system of work;
2. an implied term that the minister would not act 'in a manner likely to damage or destroy the relationship of mutual trust and confidence between the parties as employer and employee'; and
3. an implied term that the minister would exercise his powers in relation to Mr McDonald fairly and reasonably.

According to the plaintiff, a persistent refusal to comply with those terms entitled Mr McDonald to terminate the contract and claim damages for wrongful dismissal, comprising loss of past and future earnings.

DECISION AT FIRST INSTANCE

Following a trial of approximately six weeks in which Mr McDonald appeared unrepresented, Anderson J found in favour of the plaintiff, awarding damages to Mr McDonald in the amount of \$392,850 by way of past and future earnings.

Anderson J found that it was an implied term of the contract of employment that the minister provide a safe system of work, and an implied term of the contract of employment that the minister would not damage or destroy the relationship of trust and confidence between employee and employer without reasonable cause.

He found that the minister had breached each of these terms over a period of time, and that the breaches were such that Mr McDonald was entitled to treat the contract of employment as terminated.

The state appealed against the decision on the basis that >>

it denied the existence of a duty to maintain a relationship of trust and confidence, and denied that any such duty had been breached in the circumstances.

THE IMPLIED TERM OF MUTUAL TRUST AND CONFIDENCE

Having considered a number of English and Australian authorities, Anderson J at first instance concluded:

'It is my view that such a term is part of Australian law in relation to the contract of employment and should be implied... There are so many examples in the workplace where, without such an implied term, an employer could capriciously and unreasonably prejudice an employee in the workplace without any sanctions. On the face of it, if the term were not to be implied, it would allow employers to make unreasonable and unfair decisions without consultation with the employee and with consequences affecting the employee's enjoyment of their job...'³

On appeal, the state contended that no such term formed part of Australian contract law and, in the alternative, that any such term was not necessary for the operation of Mr McDonald's employment contract. As the basis for that proposition, it relied on the comments of Deane J in the High Court decision of *Hawkins v Clayton*,⁴ that:

'a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case'.

The Full Court discussed the origins of the implied term, confirming that – since the 1979 decision of the English Employment Appeal Tribunal in *Courtaulds Northern Textiles Ltd v Andrew*⁵ – the term had now 'become entrenched in English law'.⁶ In particular, it was acknowledged that the implied term was developed to enable aggrieved employees to lawfully terminate their contracts, thereby permitting access to the statutory unfair dismissal regime.⁷

Upon conducting a review of the Australian authorities, the court concluded that, while several Australian cases have implied a mutual obligation of trust and confidence in employment relationships,⁸ none of those situations was comparable to the specific employment relationship of Mr McDonald.

Given that Mr McDonald was self-represented on the appeal, and the Court was not afforded the opportunity for full submissions on that point, the Full Court refused to determine the question of whether the implied term applied to Australian contracts generally. Indeed, it considered it 'inappropriate' to do so,⁹ and thought it sufficient to address only the state's alternative submission – that the implied term did not form part of Mr McDonald's contract of employment.

The Full Court discussed extensively the way in which Mr McDonald's employment relationship was extensively regulated by statute, regulations, and industrial awards,¹⁰ concluding that teachers have considerable rights of appeal and well-developed dispute resolution processes and grievance procedures.¹¹

Given those circumstances, the Court concluded that no duty of trust and confidence should be implied, and made the following observations:

'In our opinion, the statutory and regulatory context in which Mr McDonald's employment contract operated made the implication of a term concerning mutual trust and confidence unnecessary. The statutory and regulatory framework itself provided restraints on the exercise of power by the Minister and by those exercising supervisory or other powers under the Education Act which could affect Mr McDonald adversely... In this way, teachers such as Mr McDonald obtain the kind of protection to which, as we understand it, the implied term as to mutual trust and confidence is directed.'¹²

The court went on to observe that, while those remedies did not preclude the implication of a term relating to mutual trust and confidence, they instead 'simply provided part of the context to be considered in the event that recourse is had to those remedies'.¹³ However, such an approach would mean that the need for implication of the term would have to be found in other circumstances, which were not easily identifiable in the present case.

The Full Court then considered the question of breach and concluded that, even if a term of trust and confidence were implied, the term was not breached in the circumstances. It further considered that there had been no repudiatory breach of the minister's implied contractual obligation to take reasonable care.

CONCLUSION

The Full Court ordered that the appeal by the state be allowed, and that the orders made in favour of Mr McDonald be set aside. Mr McDonald's claim for damages against the state was dismissed.

Therefore, while the Full Court has not shut the door on the existence of an implied term of mutual trust and confidence as part of Australian employment law, it is clear from this decision that the circumstances of the employment relationship as a whole will be critical in deciding whether it will be necessary to imply such a term in a particular case. ■

Notes: **1** *Woods v WM Car Services (Peterborough) Limited* [1981] IRLR 347. (Browne-Wilkinson J at [17]). **2** *State of South Australia v McDonald* [2009] SASC 219 (Doyle CJ, White and Kelly JJ). **3** *McDonald v State of South Australia* [2008] SASC 134 at [388]. **4** (1988) 164 CLR 539 at 573. **5** [1979] IRLR 84. **6** *McDonald v State of South Australia* [2008] SASC 134 at [212]. **7** *State of South Australia v McDonald* [2009] SASC 219 at [213]. **8** See, for example, *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186; *Koehler v Cerebros (Australia) Limited* (2005) 222 CLR 44. **9** *State of South Australia v McDonald* [2009] SASC 219 at [236]. **10** *Ibid.*, at [240] – [268]. **11** At [269]. **12** At [270]. **13** At [271].

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