IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No. A1 of 2014

BETWEEN: **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**
Appellant

and

STEPHEN JOHN BARKER
Respondent

APPELLANT'S REPLY

Part I: Certification

1 This reply is in a form suitable for publication on the Internet.

Part II: Reply

The Issues

2 Contrary to paragraph [5] of the Respondent's submissions, it is necessary to consider what the implied term requires in the case of redundancy. Otherwise, it is not possible to determine whether the Appellant breached the implied term. The Full Court of the Federal Court found the implied term required the Appellant to take positive steps to consult with the respondent about the possibility of redeployment and to provide him with an opportunity to apply for alternative positions. Leave has been granted in relation to this issue.

3 In answer to paragraph [6], the conduct said to constitute the breach was neither independent of, nor anterior to, the termination of employment. The issue identified at paragraph [4] of the Appellant's Submissions does arise.

Facts

4 In answer to paragraph [8] of the Respondent's Submissions, the majority do not appear to have held that there was a breach of the employer's duty of co-operation itself. Rather, they held that the duty of co-operation was an alternative basis for the recognition of the implied term [118]. The Respondent did not in terms plead a breach of the duty of co-operation.

The Application of the Necessity Test

5 The Respondent's Submissions' characterisation of the necessity test at [19] fails to recognise that an implication of necessity requires a contractual point of anchorage: FCAFC [315] per Jessup J. This is the impact of the quoted statement of McHugh and Gummow JJ in *Byrne* at 450. The implications in *Irwin* at 254-255 and *Scally* at 307 each concerned the necessity of protecting a particular contractual right.

6 The Respondent argues that the Implied Term meets the necessity test for essentially six reasons. None bears scrutiny. Each reflects the difficulty that the Courts have had in articulating a convincing rationale for the implication of the term and is dislocated from the required test of necessity. This is illustrated by a pattern of judicial

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acceptance, without analysis, that the term has received sufficient recognition by other Courts to be accepted. This is true even of *Malik*.

7 The first asserted basis is that the Implied Term 'protects the relationship' and 'prevents the destruction or serious undermining of that relationship' [11]. This is circular. The relationship is a contractual relationship of rights and obligations; simply referring to "the relationship" advances the analysis not at all.

8 The second asserted basis is that 'the maintenance of the relationship is essential to allow the employee to earn wages' [11]; [26]. This is trite and also circular. Taking this logic to its extreme, it would require a comparable implied term in every contract where a party receive payments (or other benefits) on an ongoing basis. Impugned conduct of an employer will either defeat the capacity to earn wages and therefore be repudiatory, entitling the employee to treat the contract as at an end, or it will not (see FCAFC [309] (Jessup J)).

9 The third asserted basis that is that the term is 'essential so that the employee can enjoy the broader, non-wage benefits of employment' [11], which are said to include 'job satisfaction, a sense of identity, self-worth, emotional well-being, an opportunity to further their career and dignity' [29].

10 None of these matters is a right conferred by the contract. It would only be by first adopting the implied term that such broader benefits could then be contemplated as receiving contractual protection. However, to take that approach would deny the test of necessity. Conversely, if such matters were contractual rights, the implied term would be redundant. This reasoning also sits ill with the long established principle that damages are unavailable for anxiety, disappointment and distress for breach of an employment contract.

11 The Respondent at [29] cites *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 for the proposition that the common law recognises that the benefits of employment are not limited to remuneration. *Blackadder* concerned the federal unfair dismissal laws (of the Workplace Relations Act 1996 (Cth)) and whether a reinstatement order under those laws required the employer to provide work. The Court held that it did, in contrast to the common law position, which is that as a general rule an employer is not required to provide work. The passage relied on at [32] (Kirby J) concerns the unfair dismissal laws. The passage at [80] (Callinan and Heydon JJ) raises the question whether job satisfaction might require the provision of work at common law, but does not decide it. Even if this was accepted, however, it does not make job satisfaction a contractual right.

12 The fourth basis is, apparently, that the term is necessary because of the employer's right to control the employee [11]; [36]. This submission relies on the implied term that an employee must comply with reasonable and lawful directions. However, the employee is protected: they need not comply with unreasonable directions, nor with unlawful ones.

13 The fifth asserted basis is 'economic dependence and the power disparity' [11]; [27]. The extensive legislative regulation of the employment relationship renders the premise of this proposition (expressed at such a level of abstraction as it is) hardly true in any meaningful sense. It is not simply the unfair dismissal laws, nor even laws relating only to dismissal. Employees are protected by (amongst other things):

a) the general protections provisions in Part 3-2 of the Fair Work Act which, amongst other things, prohibit an employer from taking adverse action against an employee because they have a workplace right (including making a complaint to their employer), have engaged in an industry activity or have a protected attribute;

b) the National Employment Standards under the Fair Work Act, which set minimum terms and conditions for all employees;

c) the industrial award system;

d) the various State and federal laws protecting employees from discrimination and sexual harassment;

e) the new anti-bullying laws under the Part 6-4B of the Fair Work Act, which give employees a right of action in the Fair Work Commission over workplace bullying – which is defined, in broad terms, to mean repeated unreasonable behaviour towards an employee which creates a risk to health and safety (s 789FD);

f) the federal and State workers compensation laws which provide for a system of compensation for work-related illnesses and injuries, without fault, but with an exclusion for injuries and illnesses caused by reasonable management action;

g) the unfair contracts law in New South Wales (s 106 of the Industrial Relations Act 1996 (NSW)) and Queensland (s 276 of the Industrial Relations Act (Qld) 1999).

14 Two observations follow. First, this demonstrates the appositeness of the Court's observations in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 182-183 [53], to the effect that where legislation has been enacted to "ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations", that "there is ... every reason to adhere to [principle] in cases where such legislation does not apply, or is not invoked." See [55] of the Appellant's Submissions.

15 Second, the legislative framework reflects a carefully calibrated balance between the rights of employers and employees and is subject to a continual process of augmentation and adjustment, in light of changing societal views, the political persuasions of government and practical experience of the laws.

16 The catalogue of matters to which the Respondent refers at paragraph [42] as potentially giving rise to breaches of the implied term cannot be viewed absent this legislative framework. Both abuse or humiliation of an employee (which would most likely fall within the new bullying laws) and sexual harassment (which would give rise to a range of forms of statutory action) would also potentially infringe the implied term that the employer provide a safe work environment. A substantial and prejudicial change in the duties would ordinarily breach an express term of the contract.

17 The final asserted basis is that the employment contract is with a human being and involves personal performance of work: [10], [24]. This is hardly unique to the employment relationship.

18 The Respondent here suggests that 'specific performance is ordinarily declined when the damage to the relationship is irreparable' [24]. To the contrary, specific performance is declined to avoid a need to supervise the employment relationship. See *J C Williamson Limited v Lukey and Mulholland* (1973) 45 CLR 282 at 292-293.

International Recognition of the Implied Term

19 The Respondent at [33] relies on recognition of the implied term, or similar terms, in Bermuda, South Africa, Hong Kong, Tonga, Vanuatu, Fiji, New Zealand and Canada.

20 However, with the exception of the Canadian decision, each of the decisions relied on simply adopts the United Kingdom position, without consideration. None applies the necessity test. The Canadian decision in *Wallace v United Grain Growers Ltd* [1997] 3 FCR 701 did not adopt the implied term, but rather imposed "an obligation of good faith

and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period" ([95]).

The Unfair Dismissal Laws and the Johnson Exclusion Area

21 The Respondent at [60] to [65] seeks to draw a distinction between the Australian and United Kingdom unfair dismissal laws. The Respondent appears to suggest that because of the distinction between the systems, the Johnson exclusion area should not apply in Australia. However, he then concludes that this is unnecessary for the Court to determine, as Mr Barker did not have access to unfair dismissal legislation.

22 There are two flaws in this reasoning. First, it is the nature and existence of the statutory unfair dismissal regime, not the minutiae of its operation, which is the reason for the Johnson exclusion area. Nor is there any relevant distinction between the Australian and United Kingdom unfair systems. See *Paige* per Spigelman CJ at [148] - [154].

23 Second, the Johnson exclusion area applies to all employees even in the absence of access to unfair dismissal in the particular case. It would cut across the will of Parliament to give a common law unfair dismissal remedy to employees whom Parliament has decided should be excluded from the statutory unfair dismissal remedy.

24 The majority of the House of Lords had two reasons for the adoption of the Johnson exclusion area: that the Court should not create a common law unfair dismissal regime where Parliament had created a statutory one and that the implied term would otherwise be inconsistent with an express contractual term providing for termination. Contrary to the Respondents submissions, there are classes of employees excluded from the United Kingdom unfair dismissal laws and this was a key part of the rationale for the Johnson exclusion area: *Johnson* at [2] (Lord Nicholls); [37] and [58] (Lord Hoffman, with whom Lord Bingham agreed) [80] (Lord Millett, with whom Lord Bingham also agreed). Contrary to the Respondent at [63], the rationale was not to prevent double recovery.

25 Furthermore, Spigelman CJ in *Paige* applied *Johnson*, having examined the salient features of the then federal and New South Wales unfair dismissal laws and concluded that they were relevantly similar: see [148] - [154].

26 As to the various distinctions that the Respondent seeks to draw:

- The Respondent describes the United Kingdom laws as a 'statutory code' and (by implication) as a 'ceiling', as opposed to the Australian laws, which are described as a 'floor'. This is not a correct characterisation and is not explained.
- The Fair Work Commission cannot deal with claims of breach of contract, as this would be unconstitutional. When the federal unfair dismissal jurisdiction resided in the former Industrial Relations Court, employees could bring breach of contract claims in the accrued jurisdiction. See the Appellant's submissions at [42].

27 There are some inaccuracies in the Respondent's description of the system:

- An employee who earns more than $129,300 per annum can bring an unfair dismissal claim if they are covered by an award or enterprise agreement: Fair Work Act s 382.
- The Fair Work Commission has the power to award costs in particular circumstances: Fair Work Act, s 400A, 401 and 611
- The Fair Work Act provisions limiting multiple actions do not apply to common law proceedings, only statutory forms of action: Fair Work Act, s 725-732.

Other Matters

28 In answer to paragraph [35], the contractual duty of fidelity is not the same as the fiduciary duty, although there is considerable overlap. The contractual duty of fidelity does not consist of 'two duties; the no conflict duty and the no profit duty'. The duty of fidelity is a duty of loyalty owed by the employee to the employer which has been interpreted to require a range of things, such as not taking confidential information (*Robb v Green* [1895] 2 QB 315), not working for a competitor during spare time (*Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169) and not campaigning against the employer (*Lane v Fasciale* (1993) 5 VIR 508).

29 Contrary to the Respondent's submissions, there would be considerable overlap between the implied term and the duty of fidelity. The obligation of a fiduciary to act in the best interests of the beneficiary will inevitably overlap with the implied term.

30 The obligation identified in paragraphs [37], [46] and [48] of the Respondent's submissions is a formulation of the test for a repudiation of the employment contract by the employee, rather than a mutual implied duty of confidence: see *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66 at 72-73 and 81-82.

31 In answer to [59], it is not merely a 'possibility that a parliament may wish in the future to legislate in the field occupied by the implied term'. This has already happened. Furthermore, the obligation to give notice of termination under the Fair Work Act means there is no necessity to imply the term of reasonable notice. See *Byrne* at [13] per Brennan CJ, Dawson and Toohey JJ; *Australian National Hotels Pty Ltd v Jager* [2000] TasSC 43 at [26]ff per Evans J (Underwood and Crawford JJ agreeing).

The Notice of Contention: Term Implied in Fact

32 To be implied in fact, the implied term must satisfy the *BP Refinery* test. For the reasons developed in the Appellant's Submissions and above, the implied term is not necessary to give business efficacy to the contract: the contract is effective without it. Neither is the term so obvious that 'it goes without saying', having 'lain dormant for so long': *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 at [91] per Buchanan J.

33 Finally, the implied term is not clearly expressed. It leaves its content to be determined on a case by case basis: *Breen v Williams* (1996) 186 CLR 71 at 104 per Gaudron and McHugh JJ.

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