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

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RESPONDENT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. Is there a term (the implied term of trust and confidence), implied by law in employment contracts, that the parties must not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them?

20 3. Should there be a departure from ordinary contractual principles when assessing damages for breach of the implied term of trust and confidence?

4. If the implied term of trust and confidence was not implied by law, was it implied in fact in the contract of the parties?

5. The issue identified in paragraph 3 of the Appellant's Submissions is not necessary to consider. The proper question is whether what occurred in this case constituted a breach of the term implied or the duty requiring co-operation between the parties.

6. The issue identified in paragraph 4 of the Appellant's Submissions does not arise as the conduct said to constitute the breach was independent of and anterior to the subsequent termination of the Respondent's employment.

30 **Part III: Section 78B of the *Judiciary Act 1903***

7. It is certified that, after consideration, notice in compliance with section 78B of the Judiciary Act 1903 is not necessary.

Part IV: Facts

8. The Appellant's statement of facts and chronology are not contested. Three further facts are relevant. First, the Respondent entered into a written contract with the employer in 2004 {FCAFC [23]}. It was this contract into which terms are implied. Second, it was the employer's preference to redeploy the Respondent and not terminate his employment

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{FCA at [203] to [207] and FCAFC at [112]}. Third, the majority also upheld the judgment on the alternative basis that there was a breach of the employer's duty of co-operation {FCAFC at [118]-[128]}.

Part V: Legislation

9. The Appellant's statement of applicable legislation is noted.

Part VI: Argument

Submission in Summary

10. Terms implied by law are implied by reference to the inherent nature of a contract and of the parties' relationship: see [15-16]. The employment relationship is unique due to the combination of distinctive features. It is a personal relationship. The employee must be a human being and perform his or her obligations personally. It involves the voluntary submission to control by another. It is a relationship of economic dependence in which there is a disparity of power. It concerns one of the most important things in the life of an employee and is the means by which employees maintain a sense of identity and self esteem: see [21-33]. As the employment relationship has evolved, so have the terms implied in law into the employment contract: see [17]. The test of implication is necessity having regard to the above matters: see [18-20].

11. The implied term of trust and confidence is necessary in the relevant sense. It protects the relationship. It prevents the destruction or serious undermining of that relationship. The maintenance of the relationship is essential to allow the employee to earn wages: see [24-26]. It is also essential so that the employee can enjoy the broader, non-wage benefits of employment: see [28-31]. The term arises, in part, from other aspects of the relationship including control, see [22-23], economic dependence and the power disparity: see [27].

12. The implication of the term is consistent with and supported by authority in Australia, see [46-59], the United Kingdom [44-45] and other common law jurisdictions: see [32-33]. It coheres with other terms implied in law: see [34-43]. It is a restatement of a long recognised duty not to engage in conduct that destroys the employment relationship: see [37-39]. It provides a sound contractual explanation of the concept of constructive dismissal: see [40-42]. Like many other terms implied in law, the content of the term, focussing as it does on the parties' relationship will vary according to the particular relationship being considered: see [71-74]. As the implied term of trust and confidence does not apply to the exercise of an express or implied right to terminate, it is consistent with other terms governing the termination of the contract: see [66-70]

13. The Australian federal unfair dismissal laws, which are different from the UK laws, neither preclude nor militate against the implication of the term: see [60-65]. Damages are recoverable for a breach of the term assessed in accordance with ordinary principles: see [75-76].

14. Alternatively, the damages arose from a breach of the duty of co-operation. That duty required the employer to take positive steps to allow Mr Barker to enjoy the benefits conferred by the contract. Those benefits included the opportunity for redeployment as contemplated by the contract: see the majority at [127] and below at [77-82] herein.

A. Terms Implied by Law

15. The distinction between terms implied in law and terms implied in fact was not clearly articulated by the common law until the 1950's. Previously the common law adopted the approach that certain duties arose from particular relationships. A clear distinction between the two types of terms was drawn after a series of seminal decisions in the House of Lords,[1] later adopted in Australia. To ascertain the implied obligations the focus of the law is on the relationship established between the parties. As the relationship changes, the terms implied in law change. The test of implication is necessity, having regard to the nature of the contract and the relationship and more general policy considerations, including the social consequences of implying, or refraining from implying, the term.

16. Terms implied by law are implied into all contracts of a particular class.[2] They act as standardised terms, are legal incidents of the class of contract to which they relate, and are not based on the actual or presumed intention of the parties.[3] The class of contract in this matter is employment contracts.[4] The term arises from the inherent nature of the contract and the relationship thereby established and operates as a default rule.[5] The term will not be implied when it is expressly excluded or is inconsistent with the terms of the contract,[6] or is not necessary because of the statutory framework in which the contract is performed.[7]

17. As the nature of the contract changes and the employment relationship changes, the terms implied in law change. Two examples illustrate this evolution. Commencing from the mid 14th century there was a presumption of yearly hiring for almost all inferior servants. It was a common law presumption well suited to an agricultural economy, but ill suited to an industrial economy. By the late 20th century the presumption had been abandoned and a new term implied in law was adopted.[8] The new implied term was a response to the change

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[1] *Lister v Romford Ice and Cold Storage Co. Ltd* [1957] AC 555 at 576 (***'Lister'***); and *Liverpool City Council v Irwin* [1977] AC 239 at 254-5 (***'Irwin'***).

[2] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448 (***'Byrne'***); *Breen v Williams* (1996) 186 CLR 71 at 103 (***'Breen'***); *University of Western Australia v Gray* (2009) 179 FCR 346 at [136] (***'UWA v Gray'***); E Peden, 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 *LQR* 459.

[3] *Breen*, note 2 above, at 90 and at 103; *Byrne*, note 2 above, at 420 and 447-9; *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 345 (***'Codelfa'***); *Irwin* note 1 above, at 254-5; and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45D (***'Malik'***); *Lister*, note 1 above, at 576.

[4] On identifying the class, see *UWA v Gray*, note 2 above, at [138] and E Peden, note 2 above, at 460-5.

[5] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 30; *Irwin*, note 1 above, at 254-25, *Malik*, note 3 above, at 45D; *UWA v Gray*, note 2 above, at [140]-[142].

[6] *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [59], *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; (2000) 75 ALJR 312 (***"Concut"***) at [23] and [25]; *Byrne*, above note 2, at 449-50; *Malik*, above note 3, at 45D.

[7] *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at [93]; *South Australia v McDonald* (2009) 104 SASR 344 (***"SA v McDonald"***) at [237]-[239] and [270]; and *Shaw v State of New South Wales* [2012] NSWCA 102 at [46], [47], [59]-[61].

[8] See generally S Jacoby, 'The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis' (1982) *Int J Comp LLIR* 85. In the United Kingdom the former presumption was abandoned in *Richardson v Koefod* [1969] 3 All ER 1264 at 1266. The former presumption was noted by the High Court in *Healy v The Law Book Company of Australasia Pty Limited* (1942) 66 CLR 252 at 255 and 258. The term implied in law was adopted in *Byrne*, above note 2, at 423, 429 and 446.

in the nature of employment. The second example concerns the consequences of an employee falling ill. Prior to the mid 19th century the dominant form of engagement for work was between master and domestic servant. As members of the master's household, the master took a servant 'for better and worse, and is to provide for him in sickness and in health.'[9] This included providing medical assistance for ill employees and paying wages. These obligations arose from the nature of the relationship and would now be classified as arising from implied terms. The old implied terms have been abandoned due to changes in the nature of the relationship.

18. **A term is implied in law when it is necessary**. A term is necessary when, without the implication, the contract would be 'deprived of its substance, seriously undermined or drastically devalued in an important respect'.[10] McHugh and Gummow JJ in *Byrne* at 450 state:

> *Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless or perhaps be seriously undermined. Hence, the reference in the decisions to 'necessity'.*[11]

19. The Appellant's submissions at [57] do not acknowledge that the "necessity" that was ultimately examined by McHugh and Gummow JJ was necessity in the sense in which that term was applied in cases such as *Irwin* and *Scally*.[12] Asking the question of whether an implication was necessary 'lest the contract be deprived of its substance, seriously undermined or drastically devalued in an important respect' directs attention to the nature and essential features of an employment contract. In *Irwin* in the passage quoted by their Honours at 451, Lord Wilberforce expressly identified matters which were "essentials of the tenancy" as matters which would, if no implication was recognised, be "free of contractual obligation" and "subject only to administrative or political pressure".

20. Necessity in this context 'has a different shade of meaning from that which it has in formulations of the business efficacy test.'[13] The notion of necessity is informed by more general policy considerations, including the social consequences of implying, or refraining from implying, the term.[14] It involves a consideration of the nature of the contract and the

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[9] *R v Inhabitantes de Hales Owen* (1718) 1 Strange 99; 93 ER 410; *R v Inhabitants of Sutton* (1794) 5 TR 657; 101 ER 366 at 368 and *R v Inhabitants of Christchurch* (1760) Burr SC 494 at 497. See also *Finch v Sayers* [1976] 2 NSWLR 540 at 551 and W Blackstone, *Commentaries on the Laws of England*, 13th ed, Vol II, A Strahan, 1800, at 425.

[10] *Byrne,* above note 2, at 453, an approach subsequently applied in *Jarratt v Commissioner of Police for NSW* (2005) 224 CLR 44 (***"Jarratt"***) at [78].

[11] *Byrne,* above note 2, at 450 and 452; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [59]; *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at [92]; *Breen* , above note 2, at 124.

[12] *Irwin,* above note 1; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (***"Scally"***).

[13] *UWA v Gray,* above note 2, at [142]; cf the Appellant's submissions at [59].

[14] *Lister,* above note 1, at 576; *Irwin,* above note 1, at 254-5. *UWA v Gray,* above note 2; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 38-9; *Societe Generale v Geys* [2012] UKSC 63 at [56]. Professor Peden, above note 2, especially at 467-75.

relationship. The sense of "necessity" is conveyed by Holmes' phrase, 'The felt necessities of the time' and indicates something required in accordance with current standards of what ought to be the case, rather than anything more absolute'.[15] Dyson LJ has referred to the 'somewhat protean' concept of necessity in this context and stated:

> *It seems to me that, rather than focus upon the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations.*[16]

B. The nature of the contract of employment

21. Modern employment contracts have certain distinctive features. It is what makes them unique. It is from these features that the inherent nature of the contract and the relationship thereby established can be ascertained. The contract is not a simple commercial exchange in the marketplace of goods and services. The founding principle of the ILO is that labour is not a commodity. Employment is founded on a personal relationship. It is typically long term. It involves the control of one party over the other. It is founded on economic dependence and tends to involve a disparity of power. It involves vulnerability on both sides and both parties must have trust and confidence in the other. As a consequence of each of these factors, it is necessary for the employee to be protected against actions involving the serious undermining or destruction of the relationship.

22. **Control:** The first feature is that employment contracts involve the control of one person by another. For many years control was the sole defining feature of employment. It remains a significant consideration in defining if the relationship is one of employment. The right to control is granted by a term implied in law that an employee must obey lawful and reasonable directions about matters within the scope of the employment. The right to control permits the employer to direct what, when, where, with whom and how the work is performed. This right of control has a corollary:

> *an employee must have confidence in the employer and must trust the capacity of the employer to give directions and conduct operations in a manner which will allow the employee to carry out the work in safety and without harm. It is more than the implied duty for a safe system of work; it is a recognition that for the employee to perform work under the contract, the employee submits to surrounding environments, co-workers and directions over which the worker has no control....It is impossible, in a theoretical or practical sense, for an employee to perform work*

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[15] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [1992] 26 NSWLR 234 at 261E; approved in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 240-1. The approved notion is found in the passage from O. W. Holmes Jr, *The Common Law*, 1881, page 1: 'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'

[16] *Crossley v Faithful and Gould Holdings Ltd* [2004] 4 All ER 447 at [36]; (per Dyson LJ) an approach endorsed by Lady Hale in *Geys v Societe General, London Branch* [2013] 1 AC 523 at [55]-[56]; See FCFCA at [93].

independent of the employer and in that regard, and every other, the employee places trust and confidence in the employer.[17]

23. The employee's trust and confidence in the employer is a necessary part of the relationship. It arises in part from the employer's power of control and the consequent vulnerability of the employee. It also arises because of the importance of work in the life, careers and future prospects of employees: see [28]-[31]. The employer is in a position to abuse that trust and cause great harm to the employee, as in *Malik*. The employer's necessary trust and confidence arises in part from the reliance on employees to conduct the employer's business and the representative role of employees, a defining feature of employment.[18]

24. **Personal relationship:** The second distinctive feature is that employment involves a personal relationship and the personal performance of work. An employment contract is one that requires at least one of the parties to be a human. It is, in part, because the contract is based on a personal relationship that the contract cannot be vicariously performed or assigned, terminates on the death of a party and specific performance is ordinarily declined when the damage to the relationship is irreparable.

25. The maintenance of the personal relationship is fundamental to the employee enjoying any of the benefits under the contract. It is the service of the employee that earns wages under a contract of employment. To serve the employer the relationship must exist. A wrongful dismissal severs the relationship. It is for this reason that an employee does not earn wages when an employer wrongfully dismisses the employee.[19]

26. The capacity to earn wages depends on the continued existence of the relationship. The implied term prevents the employer, without reasonable cause, seriously undermining or destroying that relationship, and thereby effectively defeating the capacity to earn wages. The term is therefore necessary because 'unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined.'[20]

27. **Economic dependence and power:** The third feature of employment contracts is that they tend to involve economic dependence and a disparity of power. Employees are usually economically dependent on the employer. They are not in business on their own account. This economic dependence of the employee is one of the defining features of employment. Employment usually provides the employee's sole source of income.

28. **The non-pecuniary benefits of employment:** The fourth feature of employment arises from the nature of work in modern times. As Lord Hoffman stated in *Johnson*:

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[17] *Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2008) 72 NSWLR 559 at [125] (per Rothman J).

[18] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [39]-[42].

[19] *Byrne*, above note 2, at 427–8; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 452, 454, 461 and 469; *Visscher v Guidice* (2009) 239 CLR 36 at [53]–[55]; *Jarrett*, above note 10, at [7] and [30]. The role between the relationship and the earning of wages can be traced to *Emmens v Elderton* (1853) 1V HLC 624; 10 ER 606 at 613, 617-8, 618, 619, 621-2 and 623. See M. Freedland, *The Contract of Employment* 1976, Clarendon Press, Oxford, pp.22-23.

[20] *Byrne*, above note 2, at 450 and 452; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [59]; *Breen*, above note 2, at 124.

> *Over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality.* [21]

29. The common law recognises that the benefits of employment are not limited to remuneration. Through employment employees gain job satisfaction, a sense of identity, self-worth, emotional well-being, an opportunity to further their career and dignity.[22] These features are important in establishing the inherent nature of the contract and the relationship thereby established and thereby ascertaining the implied terms that are necessary. They are also relevant in discerning the benefits of the contract that are secured through the duty of co-operation. To obtain these benefits requires a more mutually co-operative relationship than is necessary in ordinary commercial contracts.

30. Lord Millett stated in *Johnson*:

> *Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents. It is generally recognised today that 'work is one of the defining features of people's lives'; that 'loss of one's job is always a traumatic event' and that 'it can be especially devastating' when dismissal is accompanied by bad faith.*[23]

31. Jacobson and Lander JJ relied on these developments in the relationship when implying the term and adopted the justification articulated in *South Australia v McDonald* that the development of the implied term as consistent with "the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination."[24]

32. **International recognition:** The four distinctive features of employment identified in [22]-[31] are common across the common law world. To the extent the implied term of trust and confidence reflects the evolution of the employment relationship, those developments have been recognised by the acceptance of the term, or a cognate term, in all of the major common law jurisdictions. There is no reason why parallel developments in the relationship should not also be recognised in Australia by the implication of the term.

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[21] *Johnson v Unisys Ltd* [2003] 1 AC 518 ("***Johnson***") at [35]; *Buckland v Bournemouth University* [2011] QB 323 at [42]; *Quinn v Overland* (2010) 199 IR 40 at [101]. Judicially acknowledged recent changes to the relationship include: *Malik,* above note 3, at 45H-46; *Spring v Guardian Assurance Plc* [1995] 2 AC 296 at 325B; *Johnson* at [37] and [77]; *SA v McDonald,* above note 7, at [228]-[232] and the cases discussed therein.

[22] *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at [32] and [80]; *Johnson,* above note 21, at [35], [37] and [77]; *Wilson v Racher* [1974] ICR 428 at 430; *Langston v Amalgamated Union of Engineering Workers* [1974] 1 WLR 185 at 192; *Hughes v London Borough of Southwark* [1988] IRLR 56 at [12]; *Powell v Brent London Borough Council* [1988] ICR 176 at 196 and 199; *Re Public Service Employee Relation Act* [1987] 1 SCR 313 at 368; *Wallace v United Grain Growers Ltd* [1997] 152 DLR (4th) 1 at 32-3; D Brodie, 'The Heart of the Matter: Trust and Confidence' (1996) 25 *ILJ* 121 at 124; D Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *ILJ* 84 at 88-9.

[23] *Johnson,* above note 21, at [77].

[24] FCAFC at [81], [82] an [93]-[95]; *SA v McDonald,* above note 7, at [231].

33. In addition to recognition in the House of Lords in *Malik*, the implied term, or a cognate term to a similar effect, has been adopted and applied by the Privy Council in an appeal from the Court of Appeal of Bermuda and in appellate courts in South Africa, Hong Kong, Tonga, Vanuatu and Fiji.[25] In 1992 the New Zealand Court of Appeal recognised that the contract of employment 'is a special relationship under which workers and employers have mutual obligations of confidence, trust, and fair dealing.'[26] In 1997 the Supreme Court of Canada held in *Wallace* that employers had '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.'[27] A breach of the obligation did not itself sound in damages, but led to an increase in damages in the length of reasonable notice.[28] In addition, there is an implied duty to treat employees with civility, decency, respect and dignity.[29] The Supreme Court in *Keays v Honda* varied its approach in *Wallace* by finding that Canadian employers owe an obligation of good faith and fair dealing a breach of which sounds in damages.[30]

C. Coherence: consistency with other terms

Relationship with express terms

34. Terms implied in law operate as default rules that apply in the absence of an expression of contrary intention by the parties. The parties may expressly exclude or alter terms implied in law. The implication of the term sought would not hinder these rights of the parties.[31] Extensive regulation of the particular category of employment contract by statute, regulation and binding industrial instruments may exclude implication of the term.[32]

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[25] In the Privy Council see *Reda v Flag Ltd (Bermuda)* [2002] IRLR 747. in South Africa *Murray v Minister of Defence* [2008] ZASCA 44 at [5]-[8]; in Hong Kong see *Semana Bachicha v Poon Shiu Man Henry* [2000] 2 HKLRD 833; in Tonga see *Koloa v Helu* [1999] TOSC 80; affirmed by the Court of Appeal in *Helu v Koloa* [2000] Tonga Law Rp 49; in Vanuatu see *Melcoffee Sawmill Ltd v George* [2003] VUCA 24 (where von Doussa J was a member of the unanimous Court); in Fiji see *Kant v Central Manufacturing Company Ltd* [2002] FJCA 39 (where Sir Peter Blanchard and Weinberg J were members of the unanimous three member Court) and *National Union of Hospitality Catering and Tourism Industries Employees v Mataka*[2011] FJCA 46.

[26] *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275 at 285-6.

[27] *Wallace v United Grain Growers Ltd* [1997] 152 DLR (4th) 1 at [95]. K Banks, 'Progress and Paradox: the Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law' (2011) 32 *Comparative Labor Law & Policy Journal* 548 charts this history.

[28] Canadians adopt an atypical approach to the displacement of express terms governing notice. Express terms are often displaced (and replaced with an implied reasonable notice term) because they are interpreted contra proferentum the interests of the employer; must be entered into with a higher degree of informed consent; must be supported by consideration when the substratum of employment alters; must not be unconscionable; and the power to terminate granted by an express term must be exercised fairly: see generally G England, *Individual Employment Law*, 2nd ed, 2008, Irwin Law, at 302-6 and D Carter et al, *Labour Law in Canada*, 5th ed, 2002, Kluwer Law International, at 180.

[29] See, for example *Shah v Xerox Canada Limited* (2000) 49 CCEL (2d) 166 at [6]-[8] (Court of Appeal for Ontario) and K Banks, above note 27, at 574-6.

[30] *Keays v Honda Canada Inc* [2008] 2 SCR 362 at [57]-[59].

[31] *Byrne,* above note 2, at 449-50; *Concut,* above note 6, at [23] and [25]; *Malik,* above note 3, at 45D.

[32] *SA v McDonald,* above note 7, at [237]-[239] and [269]-[271].

The employee's duty of fidelity or faithful service

35. The implied term is separate to and consistent with the employee's contractual and fiduciary duty of fidelity. The implied term creates a contractual and not a fiduciary obligation.[33] The implied term and the employee's duty of fidelity cover different matters. The relationship of employer and employee is a recognised fiduciary relationship. Each employee has a contractual duty of fidelity implied in law. The contractual duty of fidelity 'is a re-expression of equitable obligations in terms of implied contracts'.[34] The content of the contractual and fiduciary duties of fidelity consists of two duties: the no conflict duty and the no profit duty. The contractual obligation of fidelity, being a re-expression of the fiduciary obligation, goes no further. Fiduciaries do not owe a fiduciary duty not to seriously damage or destroy the fiduciary-beneficiary relationship. The implied term does not, therefore, cover any matter that is governed by the employee's duty of fidelity.

Duty to obey directions

36. Employees have an obligation to obey lawful and reasonable directions about matters within the scope of the employment.[35] This is the implied power of control. The implied term of trust and confidence, which is only breached when a party engages in conduct without reasonable cause, is consistent with that obligation. A direction made by an employer that breached the implied term of trust and confidence would, by definition, be one made 'without reasonable cause'. A direction made without reasonable cause would not be a reasonable direction.

The duty not to engage in conduct destructive of the relationship

37. The common law has for over 150 years recognised a duty imposed on employees not to engage in conduct that is incompatible with the service or destructive of the relationship. Prior to the 1950's this duty was recognised as a rule of law. It is an implied term.[36]

38. This implied term not to engage in conduct inconsistent with or destructive of the relationship is a contractual and not a fiduciary obligation. This is apparent from the application of the term in circumstances in which no fiduciary duty of loyalty would arise as the acts were committed outside of the scope of the engagement.[37] This implied duty applies to conduct within and outside the scope of the employment as diverse as drug abuse, engaging in criminal activities (such as fraud by bank employee on the weekend) and sexual misconduct (such as a professor having sex with a student).

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[33] *University of Nottingham v Fishel* [2000] ICR 1462 at 1492-3; *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306 at [267]; see also *Johnson,* above note 21 at [24].

[34] *Concut,* above note 6, at [17] and [26]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [87].

[35] *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 621–2; *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165 at 170.

[36] *Concut,* above note 6, at [25] and the cases referred to in the footnote 20 to that paragraph; *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143 at 153; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 72-3 and 81-2: the history of the obligation is traced in M Freedland, *The Contract of Employment*, Clarendon Press, Oxford, 1976, at 214–5.

[37] See, for example, *Pearce v Foster (No 2)* (1886) 17 QBD 536 where the employee engaged in speculation on the futures market, in his own time and not with the employer's funds.

39. The implied term of trust and confidence is a mutual duty. So far as it imposes obligations on employees, it is simply a restatement of the implied term not to engage in conduct inconsistent with or destructive of the relationship. If employees have such a duty, there is no reason employers should not have the same duty under a similar term. That is, if it is necessary that a term be implied to prevent employees destroying the relationship, it is similarly necessary that a term be implied to prevent employers destroying the relationship.

Constructive dismissal

40. The implication of the term is necessary to provide coherence between the general principles of contract law and the law of employment contracts. In employment law the phrases wrongful dismissal and constructive dismissal are often used. Analysed in contractual terms, a wrongful dismissal occurs when an employer refuses to permit the employee to continue in its service for the agreed duration of the contract. The dismissal from the employer's service is either a breach of the obligation to retain the employee in its service, or a repudiation of that obligation, or both. In a wrongful dismissal, the relationship between the parties has been severed.

41. Constructive dismissal is a settled part of Australian employment law.[38] Analysed in contractual terms, a constructive dismissal arises when an employee who has not been wrongfully dismissed has a right, which he or she exercises, to elect to terminate the contract in response to a serious breach or repudiation by the employer.[39] To give rise to the right to terminate the employer must have committed either a serious breach (being a breach of an essential term or a sufficiently serious breach of an intermediate term) or the employer's conduct must have been such as to convey to a reasonable person, in the situation of the employee, renunciation of a fundamental obligation under it.[40]

42. A constructive dismissal can arise when there is a serious breach or repudiation of an obligation created by an express term (such as a refusal to pay earned wages) or an obligation created by implied term (such as the employer's duty of care). But those examples aside, there is still an array of conduct an employee in the 21st century should not have to put up with. Examples include the abuse or humiliation of an employee, sexual harassment, a substantial and prejudicial change in the duties or status of an employee, making serious accusations without reasonable cause or attacking the integrity of an employee. If such conduct justifies an employee electing to terminate the contract, this must be because it breaches a particular term. The term breached in such cases will often be the implied term of trust and confidence.

Consistency with rights to terminate

43. The implied term of trust and confidence must be consistent with other implied or express terms of the contract. Each party, in the absence of a term to the contrary, may terminate

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[38] *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186, at [141]; *Easling v Mahoney Insurance Brokers* (2001) 78 SASR 489 at [2] and [99]; *Blaikie v South Australia Superannuation Board* (1995) 65 SASR 85 at 102-106; *Martech International Pty Ltd v Energy World Corporation Limited* (2007) 248 ALR 353 at [19]; *Hem v Cant* (2007) 159 IR 113 at [22].

[39] *Cook v CFP Management Pty Ltd* (2006) 152 IR 358, at [17]-[18].

[40] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44] and [49]-[51].

on reasonable notice. The contract may also, as in this case, provide express rights regarding termination. The common law, and often express terms, confer the right to terminate the contract without notice. The implied term of trust and confidence has been described as an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship (see *Johnson* at 549G). Accordingly, the implied term does not apply to conduct that consists of the exercise of a right to terminate the contract, whether such right is expressed or implied. This is, in part, because the exercise of a right to terminate is not conduct that destroys or undermines the relationship without reasonable cause: rather, it is conduct that the parties have contemplated as being in accordance with their relationship.

D. The development of the term in the United Kingdom

44. The implied term has many histories, drawing on the multiple justifications for its role. To the extent that it is an aspect of the duty of co-operation, it can be traced to the late 19th century.[41] To the extent that it is a re-expression and extension of the obligation not to engage in conduct inconsistent with or destructive of the relationship (see [37-39] above), or as an aspect of the employer's obligation to maintain the relationship to permit the employee to earn wages under the contract (see [24-26] above), it can be traced to the mid 19th century.[42] To the extent it reflects changes in the nature of the contract of employment, it can be traced to the late 20th century: see [28- 31].

45. The catalyst for the clearer articulation of the term was prompted by changes to legislation in the United Kingdom. This development occurred concurrently with the recognition by the Courts of the changing nature of employment. There is nothing in the cases (including *Malik*) to suggest that the rationale for the implied term is founded on statutory and not contractual considerations. The same evolutionary changes in the nature of employment that prompted the development of the term in *Malik* led to the adoption of the term across the common law world and the development of cognate terms in New Zealand and Canada. Those judicial developments were unrelated to the UK legislative changes that precipitated the *Malik* formulation of the term.

E. Treatment of the implied term in Australia

46. In *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66, Starke and Evatt JJ at pp.72-73 said:

> *As manager for the appellant, the respondent was in a confidential position. And it is clear that he might be dismissed without notice or compensation if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the confidential relation between himself and the appellant*

47. Per Dixon and McTiernan JJ at pp.81-2:

> *Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or*

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[41] *Mackay v Dick* (1881) 6 App. Cas 251; *Butt v M'Donald* (1896) 7 QLJ 68.

[42] *Emmens v Elderton* (1853) 1V HLC 624; See M. Freedland, *The Contract of Employment* 1976, Clarendon Press, Oxford, pp.22-23.

is destructive of the necessary confidence between employer and employee, is a ground of dismissal.

48. That obligations of this nature are *mutual*, has some (albeit limited) express recognition by judges of this Court.

49. *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21; (1931) 45 CLR 359, relied on in both passages in *Blyth.* In *Shepherd* Dixon J at 378 had said:

> *Moreover, the contract established a relation between the parties intended to subsist for a period, and it involved some degree of mutual confidence and required a continual co-operation.*[43]

50. The term was recognised by Olsson J in *Blaikie v SA Superannuation Board*[44], and in *Easling v Mahoney Insurance Brokers.*[45] *Blaikie* and the passage from *Easling* were adopted by Allsop J as 'expressing the principle with clarity' in *Thomson v Orica Australia Pty Ltd.*[46] See also the analysis in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[47] and discussion in *Russell v Roman Catholic Church* [2008] 72 NSWLR 559 at [29] to [33].

51. The existence of the term was accepted also by the Full Court of the Industrial Relations Court of Australia in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144, at 151 (per Wilcox CJ, von Doussa and Marshall JJ), and again in *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186, at 191.[48] It was considered in *South Australia v McDonald* (2009) 104 SASR 344 and its existence assumed by the New South Wales Court of Appeal in *Downer EDI v Gillies* [2012] NSWCA 333 at [83].

52. This court has noted the implied term in *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [26] and [51] and in *Koehler v Cerebos* (2005) 222 CLR 44 at [24] without apparent question as to its existence. There is no reason to consider that it was not 'seriously considered' in those cases.[49]

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[43] See also Starke J at 372; See further *Concut*, note 6 above, at p706 (per Kirby J) *"The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentially and mutual trust."*

[44] *Blaikie v South Australia Superannuation Board* (1995) 65 SASR 85, at pages 104-105, referring with approval to the New Zealand decision of *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 considering that it *"accurately summarises the modern Australian law"; see* also *Russian v Woolworths (SA) Pty Ltd* (1995) 64 IR 169, at p 172 (per Jennings SJ, Cawthorne and Parsons JJ) in which the Court refers to Olsson J's summary of the law in *Blaikie,* made a month earlier, with apparent approval.

[45] *Easling v Mahoney Insurance Brokers* (2001) 78 SASR 489 at [99].

[46] *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 at [141], [146].

[47] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) NSWLR 198 at 229-230 (per Rothman J).

[48] See also the Full Court of Western Australia in *Delooze v Healey* (2007) WASCA 157 at [32] and *Downe v Sydney West Area Health Service (No. 2)* (2008) 71 NSWLR 633 at [320] to [328].

[49] *Farah Construction v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134] and [158].

53. Australian academic commentators have been supportive of the recognition of the term.[50]

54. As for the cases said by the Appellant at [31] to cast doubt on the term, the reservations of Buchanan J in *McDonald v Parnell Laboratories Pty Ltd* (2007) 168 IR 375, with which Tracey J in *Van Efferen v CMA Corporation Ltd* (2009) 183 IR 319 agreed, were reservations premised on a perceived potential inconsistency between the implied term, and its ability to meet two of the criteria set down in *BP Refinery*. With respect, such inconsistency does not arise where the term can be properly seen to be implied by law. The observations of Kenny J in *Walker v Citigroup Global Markets Australia Pty Ltd* (2005) 226 ALR 114 concerned an implied duty of good faith in decisions to dismiss, a different issue to the implied term of trust and confidence. *Heptonstall v Gaskin (No 2)* (2004) 138 IR 103 was a summary dismissal case in which Hoeben J concluded at [23] that he certainly could not say that the existence of the term is not arguable.

55. When the necessity test in *Irwin* is not limited in the manner contended for by the Appellant the criticism by the Appellant at [56] to [58], and Jessup J in dissent at [288] to [290] to the effect that the courts who have applied or assumed the existence of the implied term have failed to grapple with the test of necessity is shown with respect to be in error.

56. It is appropriate to say something further of the dissenting judgment of Jessup J. With respect to His Honour the respondent questions the assertion that the test of necessity "has never been the subject of detailed attention by an appellate court" [288]. The respondent also questions His Honour's concerns over 'content': [317]. The term appears to have been applied for something approaching a half century without courts having a difficulty in recognizing beach when breach exists. As Lord Steyn observed in *Malik* at 46E:

> *It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.*

57. The policy considerations that led to *Malik* and the line of authority following it in the United Kingdom apply with equal force in Australia.

58. Those policy considerations, recognising the need for employees to be protected against action which seriously undermines the relationship, receive little, if no, attention in the Appellant's submissions. Further policy reasons for implying the term include the consideration that it promotes co-operation between the parties and the fulfilment of the purposes of the contract: [28]-[30]. The term promotes fairness by imposing a mutual duty in circumstances in which the employer already has the benefit of the duty: [37]-[39]. Without the term, an employee frequently has no other available remedy when an employer engages in conduct that destroys their relationship. The term discourages dishonesty and grossly unethical behaviour. It promotes coherence in the law of contract: see [40]-[43].

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[50] J. Riley "Siblings but not twins: Making sense of 'Mutual Trust' and 'Good Faith' in employment contracts" (2012) 36 *Melbourne University Law Review* 521, at p 532; M. Irving, *The Contract of Employment* (2012), at [8.13]; I. Neil & D. Chin, *The Modern Contract of Employment* (2012) at [7.50]; C. Sappideen et al, *Macken's Law of Employment* (2011, 7th Ed) at [5.140] – [5.330]; J. Riley, *Employee Protection at Common Law* (2005), at p 73; K. Godfrey "Contracts of employment: Renaissance of the implied term of trust and confidence" (2005) 77 *Australian Law Journal* 764.

59. The possibility that a parliament may wish in the future to legislate in the field occupied by the implied term is no bar to its acceptance. To the extent legislation has been an act of governing matters regulated by implied terms and employment contract or fiduciary obligations, it ordinarily permits concurrent operation of implied terms. For example, the statutory duties of fidelity and confidence in ss.182 and 183 of the *Corporations Act 2001* (Cth) operate concurrently with an employee's contractual and equitable obligations; the employer's contractual duty of care operates concurrently with similar duties in occupational health and safety laws and the duty to give notice in the *Fair Work Act 2009* (Cth) operates concurrently with the implication of the term governing reasonable notice.

F. Interaction with Australian Unfair Dismissal Legislation

60. The Appellant relies on *Johnson* and the unfair dismissal scheme under the *FW* Act in Australia to argue that the term should not be implied, that damages are not recoverable for the breach, and that any damages for a breach of the term in this matter are not recoverable. As noted in [43], to be consistent with express and implied rights to terminate the contract, the implied term of mutual trust and confidence does not apply to the exercise of those rights. This limitation arises for two reasons: First, to ensure coherence with the general principles of contract. Secondly, conduct that the parties contemplate as being in accordance with the contract could not also be conduct that destroys or seriously undermines the relationship without reasonable cause.

61. In the United Kingdom an employee who can recover damages for the manner of dismissal under the statutory unfair dismissal system cannot recover those damages for breach of the implied term. Such damages are said to be within the *Johnson* exclusion area. In *Johnson* the employee was given notice in accordance with his contract. As a consequence of the manner of his dismissal Mr Johnson suffered a psychiatric injury. He sought damages for breach of the implied term. The principal reason his claim failed was that a common law right to damages embracing the manner in which an employee is dismissed could not satisfactorily coexist in the UK with the statutory right, part of a code, not to be unfairly dismissed. That system codified the right to recover compensation for distress and psychiatric damage arising from the manner of his dismissal.[51] Such damages were not recoverable if they flowed directly from the dismissal or 'in the course of the dismissal process'.[52] Outside the '*Johnson exclusion zone*' are losses that arise from a cause of action that exists independently of the dismissal.[53]

62. The decision is distinguishable and the statutory scheme considered by the House is different from that established by the *FW Act*. One of the reasons for the creation of the *Johnson exclusion zone* was that in the United Kingdom there was a statutory code. The code applied to all employees, no matter how senior. There is no unfair dismissal code in

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[51] *Johnson*, above note 21, at [2], [47]–[57] and [72]–[80]. See also *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22, at [19]–[23].

[52] *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22, at [51], [60], [94] and [99] and *Johnson*, above note 21, at [2], [45], [58] and [77]–[80].

[53] *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at [27]–[33]; and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at [50]–[51] and [55]–[59], [94]. A similar approach was taken in *State of New South Wales v Paige* when considering if such acts gave rise to a duty of care: *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [132]–[155]

Australia, in part due to the patchwork of constitutional coverage. Further, the Australian federal unfair dismissal system does not apply to employees who earn more than $129,300 per annum. [54] Industrial tribunals in the United Kingdom are granted jurisdiction in respect of a claim for damages for breach of contract where the claim arises or is outstanding on the termination of the employee's employment.[55] No similar jurisdiction is conferred on the Fair Work Commission.

63. Contrary to paragraphs [64-67] of the Appellant's submissions the existence of Federal unfair dismissal legislation in Australia provides no basis for rejecting the existence of the implied term of trust and confidence. Unlike the statutory regime considered in *Johnson*, the Australian industrial law system acts as a floor of rights, rather than a ceiling precluding the implication of terms or preventing the growth of the common law. [56] One of the reasons for the creation of the *Johnson* exclusion zone was to prevent double recovery by the employee for the same damages: once in an unfair dismissal claim and another in contract for breach of the term. Established principles governing the law of damages would prevent any double recovery.[57] In Australia, statutory provisions limit multiple actions involving unfair dismissals.[58] When *Johnson* was decided an employee could recover damages for distress under the UK unfair dismissal regime and so it was unnecessary to provide, in effect, 'a second bite of the cherry' under the common law.[59] Mr Johnson had sought such damages. In Australia damages for 'shock, distress or humiliation, or other analogous hurt' are not available under the unfair dismissal regime. [60] In the United Kingdom the unfair dismissal system allowed for an award of compensatory damages, including damages for breach of contract, many times more than the maximum award conferred by the FW Act.[61] Costs could also be awarded, unlike in Australia.[62]

64. It is not necessary in this matter for the Court to determine if the Johnson exclusion zone applies in Australia as Mr Barker does not have unfair dismissal rights under statute. Mr

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[54] Section 94 of the *Employment Rights Act* 1996 (UK) and s 382 (b) of the *Fair Work Act* 2009 (Cth) and regulation 3.05 of the *Fair Work Regulations* 2009 (Cth).

[55] Section 3 (2) (c) of the *Employment Tribunals Act* 1996 (UK) and article 3 of the *Employment Tribunals Extension of Jurisdiction Order* 1994 (UK).

[56] S Deakin and G Morris, *Labour Law,* 5th ed, Hart Publishing pp 386–8; M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp 162–7, 303–5, 342–5, 362–4; R Hepple and G Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 *ILJ* 245 at 253; D Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 *LQR* 604 at 624–5; D Brodie, 'Fair Dealing and the Disciplinary Process' (2002) 31 *ILJ* 294. For example, the notice scheme in s 117 of the *FW Act* does not preclude a term being implied in law requiring reasonable notice: *Grout v Gunnedah Shire Council (No 2)* 58 IR 67 at 80 (not affected by the appeal at (1995) 134 ALR 156); *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 285 at 289.

[57] See, for example, *Redding v Lee* (1983) 151 CLR 117 at 137 and 145-6.

[58] See ss 725-732 of the *Fair Work Act* 2009 (Cth).

[59] *Johnson,* above note 21, at [55]: damages were recoverable in the unfair dismissal system 'for distress, humiliation, damage to reputation in the community or to family life.'

[60] Subsection 392 (3) of the *Fair Work Act* 2009 (Cth).

[61] Section 392 (6) of the *Fair Work Act* 2009 (Cth). The formula for compensation is set out in ss 119 (2), and 124 of the *Employment Rights Act* 1996 (UK).

[62] Section 611 of the *Fair Work Act* 2009 (Cth), compare section 13 of the *Employment Rights Act* 1996 (UK).

Barker could not pursue an unfair dismissal claim as his earning exceeded the statutory limit. Further, the breach of the implied term of trust and confidence was independent of and anterior to the termination. Damages arose after the termination, but the breach itself was perfected before the termination: FCA at [278] and FCAFC at [136]. If *Johnson* is correct and was applied in this case then Mr Barker would have had a right to damages between 2 March 2011 (when the breach of the implied term occurred) and 9 April 2011 when he was wrongfully dismissed. The argument would permit a wrongful act to extinguish the breach. Manifest justice favours a different conclusion. The Appellant's incorrect portrayal of this case as a dismissal case is discussed below.

65. For the reasons set out above the salient features of the United Kingdom unfair dismissal system that underpinned the reasoning in *Johnson* for the *Johnson exclusion zone* do not apply in Australia. In particular, the Australian scheme is not a code, and did not apply to Mr Barker. The FW Act does not confer jurisdiction to determine contractual claims and sets a floor of rights, not a ceiling.

G. The express term to terminate on notice

66. The parties may agree that the contract is terminable on notice. In the absence of terms to the contrary, an employer may terminate on reasonable notice. The parties also have express or implied rights to terminate for serious breach or repudiation, usually for serious misconduct.

67. In this matter there was an express right to terminate on notice. The existence of that right does not mean the term of trust and confidence is not implied. Such a term has been compulsory in the United Kingdom since at least 1996.[63] It has never been suggested that it excludes the implication of the implied term. The right to terminate pursuant to an express term is not modified by the implied term, but this is merely an application of a principle that applies to the relationship between all express and implied terms. The existence of the express right to terminate is relevant when assessing damages for breach of the implied term as described below.

68. In accordance with the least burdensome performance rule, in the assessment of damages for an employee accused of misconduct whose employment has been terminated, Courts adopt the usually sound assumption that the employer will terminate the contract by exercising a right to terminate at the earliest possible time.[64] That assumption has a weaker factual foundation when the employer wishes to retain the services of a valued employee in the long term. In assessing damages, courts do not assume that an employer would act irrationally to rid itself of such an employee.[65] The assumption will not be made when it is contrary to the evidence.[66] When dealing with the possibility that an employer may

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[63] See s 1 (4) (e) of the Employment Rights Act 1996 (UK).

[64] *Lavarack v Woods of Colchester* [1967] 1 QB 278 at 298; see also *McDonald v Parnell Laboratories Ltd* (2007) 168 IR 375 at [79]–[82].

[65] *Lavarack v Woods of Colchester* [1967] 1 QB 278 at 295; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 154–6; A Stewart, 'Damages for Wrongful Dismissal and the Problem of Contingencies' (1993) 6 *AJLL* 50 at 56.

[66] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 93, 114, 132–3, 146 and 150 : see also the approach in *Ryan v The Commonwealth* (1936) 57 CLR 136 at 146.

exercise a right to give notice or otherwise terminate the contract, the appropriate course is to treat the decision to exercise the right as a hypothetical future event and award damages on the basis of a loss of a chance.[67]

69. The same principles apply to a breach of the implied term of trust and confidence. The court at first instance and the majority on appeal proceeded on the basis of findings that the Bank preferred to redeploy Mr Barker, a notion inconsistent with the assumption that the Appellant wanted to terminate the employment at the earliest available opportunity: majority in the FCFCA at [112]; trial judge at [203]. Consistent with ordinary principles, the Court calculated the damages by reference to the loss of an opportunity of Mr Barker.

10 70. The Appellant incorrectly attempts to portray this case as being a dismissal case. No doubt in some employment situations the redundancy of the position concerned may inevitably lead to termination. This was not such a case. The circumstances of the breach were demonstrably removed from the dismissal.

H. The content of the term and uncertainty

71. The Appellant's complaint (at paragraph [74]) that recognition of the implied term leaves its content to be determined on a case by case basis is not a ground for rejection of the implied term. Terms accepted to be implied by law embrace concepts such as 'reasonableness', 'best efforts', and 'all that is necessary'. What is required of the parties by such terms is always given its content by the unique facts and circumstances of the
20 individual case. Like many other terms implied in law, the content of the term, focusing as it does on the parties' relationship, will vary according to the particular relationship being considered.

72. In the present case the Full Court had no difficulty at all in identifying the content of the implied term – or what it required the Appellant to do. This was to take steps to consult with the Respondent about the possibility of redeployment and to provide him with the opportunity to apply for alternative positions within the Bank.

73. The Respondent was a senior employee of 23 years' experience working within a major organisation with a large workforce. His contract specifically contemplated redeployment as a step prior to any termination. The Respondent faced the loss of his job if not
30 redeployed. The Appellant (like the Respondent in *Scally*) was well aware of important information – in this case, the existence of opportunities for redeployment but failed to advise the Respondent. As a result, he lost the benefit of his employment.

74. In these circumstances the Full Court was correct in appreciating that the fact that the contract specifically contemplated the possibility of redeployment within the Bank as an alternative to termination, and the fact that the Bank was a very large corporation was sufficient to give rise to the obligation to require the Bank to take positive steps to consult with the Respondent and inform him of suitable employment options.

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[67] *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 at [83]. The same approach applies to the loss of a chance to obtain the renewal of a fixed term contract that has been wrongly terminated, or any other benefit that might have been obtained through the proper performance of the wrongfully terminated contract: *Tasmania Development and Resources v Martin* (2000) 97 IR 66 at [37]-[38] and *WT Partnership (Aust) Pty Ltd v Sheldrick* (1999) 96 IR 202 at [36]-[39].

I. Damages for breach

General principles and Addis

75. The general principles of contract law governing damages should be applied in assessing damage for breach of the implied term of trust and confidence.[68] The ordinary rule is that damages are recoverable when they are caused by the breach and are not too remote. Breaches of other terms implied in law in the employment contract sound in damages, even when the damage is suffered after the relationship has terminated. There is nothing extraordinary about this term, and the damages awarded in this case, that prevents the application of the ordinary rule.

10 76. This is not a matter where the damages awarded were governed by the decision in *Addis*. That case is considered to addresses the manner of dismissal and the non-availability of damages for such manner of dismissal.[69] As the damages awarded were different in nature to those contemplated in *Addis*, this is not a case in which the implied term is being relied on to circumvent that case. The case at bar does not raise for consideration by this Court the continuing application of *Addis* as authority in Australia.

J. The implied duty of co-operation

77. The implied duty was described by the High Court in *Secured Income Real Estate (Australia) Limited v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 in the following terms:

20 > *It is a general rule applicable to every contract that each party agrees, by implication to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.*

78. Jacobson and Lander JJ were correct in determining (at [126] and [128]) that the contract of employment, properly construed in light of all of the relevant circumstances, conferred a benefit giving rise to the operation of the implied term.

79. The circumstances were that the Respondent had been employed by the Appellant for 23 years when the contract was entered into and that the Appellant was a large corporation with a huge workforce with many positions at various places throughout the country: see [128].

30 80. As clause 8 of the Respondent's contract of employment clearly contemplated the opportunity of redeployment being explored prior to termination of employment on account of redundancy taking place, the majority was correct in determining that the prospect of such redeployment was a benefit in the relevant sense. The Appellant's failure to co-operate by taking reasonable steps to consult with the Respondent and inform him of suitable employment options clearly denied to the Respondent the chance of continuing employment.

Part VII: Notice of contention

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[68] *Malik,* above note 3, at p39D (per Lord Nicholls) and p52H (per Lord Steyn).

[69] *Addis v Gramophone Co Ltd* [1909] AC 488 at 491, 492, 496, 501 and 503–04; *Johnson,* above note 21, at [44] and [69]; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at [1].

81. The Full Court should have found that in respect of this Respondent the term would be implied by fact as a term necessary to give efficacy to the executive contract signed by the Respondent on 6 August 2004.[70] Trust and confidence must exist between a bank and its senior officers (executives) acting with significant authority.

82. The matters said to make the implication necessary by law, apply in conjunction with the specific circumstances of the Respondent to make the implication necessary in fact to give the written contract efficacy.

83. Those specific circumstances are that the contract contained no detail as to the Respondent's employment duties except that he shall be "employed as an executive of the Bank and shall serve at any location where the Bank or one of its related bodies operate" and an express obligation to "observe and be subject to the provisions of the Bank's instructions except as varied herein", that the Respondent was an employee of some 23 years standing when it was entered into, FCAFC at [110], that because of this fact clause 8 applied and envisaged the subsistence of the relationship even in the event of redundancy.

Part VIII:

84. It is estimated that the respondent's oral argument will require **3** hours.

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[70] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 26.