

The Future of the Common Law in Employment Regulation

Joellen RILEY^{*}

1 WHY CARE ABOUT THE COMMON LAW AND EMPLOYMENT REGULATION?

This special issue of the *International Journal of Comparative Labour Law and Industrial Relations* focuses on the continuing role of the common law – the unwritten, judge-made law of the English legal tradition – in the regulation of employment relationships, notwithstanding the emergence of pervasive statutory regulation across the common law world. This collection of articles has been developed from a panel discussion at the Labour Law Research Network Conference in Amsterdam in June 2015, and the idea for that panel discussion emerged from some inter-jurisdictional debate about the surprising decision of the Australian High Court in *Commonwealth Bank of Australia v. Barker*¹ at the end of 2014.

It is odd indeed that a single decision from a peculiar antipodean jurisdiction should have generated such vigorous debate about the survival of the common law judicial method in the field of labour law, but it has. This is no doubt because the decision has been perceived as a full frontal attack on the acceptance in English jurisprudence of the (until now) uncontroversial proposition that employment relationships are founded on an expectation of ‘mutual trust and confidence’ between employer and employee. The *Barker* decision determined that Australian law did not, and should not, recognize the ‘mutual trust and confidence’ implied term accepted for so long in English employment contract law.² The case was probably more surprising to English

^{*} Dean and Professor of Labour Law, The University of Sydney, email joellen.riley@sydney.edu.au.
¹ [2014] HCA 32.

² See M.R. Freedland, *The Personal Employment Contract* 154–170 (Oxford University Press 2003); D. Brodie, *The Heart of the Matter: Mutual Trust and Confidence*, 25 Indus. L. J. 121 (1996); *Beyond Exchange: the New Contract of Employment*, 27 Indus. L. J. 79 (1998); *A Fair Deal at Work*, 19 Oxford J. Leg. Stud. 83 (1999); *Mutual Trust and the Values of the Employment Contract*, 30 Indus. L. J. 84 (2001); *The Employment Contract: Legal Principles, Drafting and Interpretation* 78–79 (2005); *Mutual Trust and Confidence: Catalysts, Constraints and Commonality*, 37 Indus. L. J. 329 (2008); Hon Mr Justice

employment law scholars than to most Australian lawyers. Academic opinion in Australia has been divided for some time on whether this English invention could pass the necessity test applied in Australian contract law to qualify as a recognized term implied by law.³

Perhaps more interesting than the outright rejection of mutual trust and confidence in *Barker* was the court's reasoning. A key justification for rejecting any common law recognition of any *mutual* obligation of this nature (the court affirmed that *employees* continue to owe a duty not to destroy the necessary trust and confidence in the employment relationship)⁴ was a conviction that such 'normative' developments belonged squarely within the prerogative of Parliament. It would be an impermissible act of judicial trespass into the legislature's territory for a common law court to impose such an obligation on parties to employment relationships. Of course this assumes that a court recognizing such a duty would be *imposing* a standard of behaviour, rather than merely recognizing the existing mutual undertakings of the parties themselves. So long as the parties themselves have not explicitly contracted out of any obligation to deal fairly with each other, it would be an entirely conventional application of classical contract law principles to recognize as an implied term an obligation that the parties must be presumed (from the factual matrix of their relationship) to have voluntarily accepted for themselves. There is ample ancient authority for the proposition that parties to contracts implicitly agree to 'do all such things as are necessary on his part to enable the other party to have the benefit of the contract'.⁵ And in the twenty-first century, surely it is not too great a stretch of the imagination to assume that parties to continuing employment relationships do in fact expect to deal fairly with each other.

Lindsay, *The Implied Term of Trust and Confidence*, 30 Indus. L. J. 1 (2001); M. Freedland, *Constructing Fairness in Employment Contracts*, 36 Indus. L. J. 136 (2007); D. Cabrelli, *The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle*, 34 Indus. L. J. 284 (2005).

³ See G. McCarry, *Damages for Breach of the Employer's Implied Duty of Trust and Confidence*, 26 Austrl. Bus. L. Rev. 141 (1998), published soon after the House of Lords decision in *Malik v. Bank of Credit and Commerce International SA (in liq)* [1998] AC 20. See also A. Brooks, *The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence*, 20 U. Tasmania L. Rev. 26 (2001); J. Riley, *Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?*, 16 Austrl. J. Lab. L. 28 (2003); K. Godfrey, *Contracts of Employment: the Renaissance of the Implied Term of Trust and Confidence*, 77 Austrl. L. J. 764 (2003); P. Weeks, *Employment Law – a Test of Coherence Between Statute and Common Law*, in *Interpreting Statutes* 166–196 (S. Corcoran & S. Bottomley eds., Federation Press 2005); A. Stewart, *Good Faith and Fair Dealing at Work*, in *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* 579, 583–584 (C. Arup et al., Federation Press 2006); A. Stewart, *Good Faith: A Necessary Element in Australian Employment Law?*, 32 Comp. Lab. L. & Policy J. 521, 543–544 (2010–2011); J. Riley, *Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts*, 36 Melb. U. L. Rev. 521, 525–530 (2012).

⁴ See [2014] HCA 32 at [30].

⁵ *Butt v. M'Donald* (1896) 7 QJL 68 at 70–1.

For example, in *Barker*, the mutual trust term was called upon to establish that Mr Barker was entitled to be considered for redeployment before being made redundant. It was open to the High Court to find (as the Federal Court majority did) that the confluence of certain facts demonstrated an implicit agreement that the employer would attempt to redeploy staff before making them redundant. Those facts were:

- (1) a clause in the contract of employment indicating that employees would receive severance pay on redundancy only if they had not been redeployed;
- (2) a policy document which (although explicitly not contractual) set out the procedures for redeployment;
- (3) the conduct of human resources staff who attempted (unsuccessfully) to contact Mr Barker with redeployment opportunities.

The court did not need to impose some new moral obligation to reach such a result. It needed only to assume that the employer did, in fact, intend to give effect to its own policies and procedures and that this intention formed part of the bargain between the parties.

The High Court in *Barker* wasted no words on this question, even though the earlier decision of the majority in the Federal Court appeal did find for the employee on the basis of an interpretation of his employment contract.⁶ The High Court's reasoning proceeded on the assumption that any duty not to destroy mutual trust and confidence must derive from some normative principle, imposed as a matter of policy on employers regardless of their own intentions. Since under a strict view of a separation of executive, legislative and judicial powers, new policy creation belongs in the realm of executive and legislative, but not judicial authority, the court was unwilling to accept responsibility for recognizing that the employment relationship may have evolved since master and servant times. This aspect of the decision raises interesting questions about the relationship between the common law and statute, and indeed the role of the common law at all, in the regulation of employment relationships.

2 COHERENCE

'Coherence' between the common law and statute has been a particular concern in employment contract law since the House of Lords decided *Johnson v. Unisys Ltd*,⁷ and created an 'exclusion zone' for common law remedies, in a case where

⁶ *Commonwealth Bank of Australia v. Barker* [2013] FCAFC 83.

⁷ [2003] 1 AC 518.

a statute was held to command the field. In *Johnson*, the House of Lords refused to allow any damages award for breach of the obligation not to destroy mutual trust and confidence to outstrip the statutory cap on damages for an unfair termination of employment. *Eastwood v. Magnox Electric plc*⁸ affirmed the finding in *Johnson*, and identified an inconvenient distinction between breaches of mutual trust during employment, which may sound in a common law damages award, and breaches of mutual trust constituted by the fact or manner of dismissal, in which case compensation would be limited to any award available under the statute. This pair of decisions has justified other courts (e.g., in *State of NSW v. Paige*⁹) in refusing to recognize a common law duty where statutory provisions operate.

Does concern for coherence in the law always require courts exercising common law jurisdiction to vacate the field whenever a statutory regime operates? In *Edwards v. Chesterfield Royal Hospital NHS Foundation Trust; Botham (FC) v. Ministry of Defence*¹⁰ some members of the court took notice of a statutory regime imposing obligations of procedural fairness in disciplining staff when construing the express terms of an employment contract. It was assumed that the parties included disciplinary procedures in their employment contracts in order to guide their compliance with statutory requirements, so they must therefore have intended to be subject to no more than statutory sanctions, should they breach these procedures. The existence of statutory provisions became part of the 'factual matrix' used to interpret the intentions of the parties to the contract. The Australian Federal Court has also engaged this kind of reasoning to find that a human resources policy manual *did* form part of an employment contract. The existence of statutory obligations to prevent workplace harassment was counted as evidence in favour of finding that the promises in the employer's policy manual were seriously made, would have significant consequences upon breach, and were therefore binding on both parties in contract.¹¹

So which is the better view? Is the common law now excluded from any field where there is a statutory regime mandating obligations and (often) instituting new forms of adjudication of claims and providing special remedies? Or has the development over time of new statutory protections for workers (against such risks as capricious dismissal, or workplace harassment), established such expectations in parties to employment contracts that the common law courts ought now to accept that those new norms do form part of the objectively determined, reasonable expectations of parties to an employment

⁸ [2005] 1 AC 503.

⁹ (2002) 60 NSWLR 371.

¹⁰ [2011] UKSC 58 (14 Dec. 2011).

¹¹ See *Romero v. Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177.

contract? In many cases, it seems that the answer to this question will depend upon whether the presiding judge deems it appropriate to award contract-based damages for breach of the obligation in question. Contract damages, based as they are on the principle that the party in breach must pay the price of the other party's disappointed expectations, can be significant in a case where an employee can legitimately claim the loss of an expectation to remain in employment until scrupulously fair procedures for dismissal have been followed.¹² Where there is an acceptable statutory remedy (as there was in *Johnson*), judicial reluctance to award additional compensation is understandable.

Difficulties arise where legislation is silent on a matter. Does this leave a field open to continued common law development, or is the judicial prerogative to develop common law principles in line with community values now constrained by a requirement that common law development must adopt the principles underpinning cognate statutory developments? May common law advance into a field untouched by statutory development, or must the Parliament's silence be interpreted as unwillingness to permit any legal development at all in that field? The latter view permits the judiciary to abdicate their historical common law role completely, and to stand idly by while injustice prevails in individual cases, for want of a sufficiently omniscient Parliament to predict all potential new legal disputes. This is the necessary consequence of a principled stand against what has come to be known as 'judicial activism': litigants in cases involving novel problems must suffer until an issue has garnered sufficient political interest to motivate legislative action. A great strength of the common law tradition in the past has been its ability to solve new problems on a case-by-case basis, even without the benefit of the great civil law codifications. But on these matters, equally educated minds differ.

In this special issue, Professor Douglas Brodie, noted for his seminal scholarship on the development of the notion of an obligation of 'mutual trust and confidence', or 'fair dealing' in employment contract law in the common law world, provides an evaluation of the *Barker* decision, and other recent developments, to assess the potential future development of obligations of good faith in employment contract law.¹³ Underpinning his analysis is considerable faith in the common law method.

¹² See for example a case such as *Bostik (Australia) Pty Ltd v. Gorgevski (No 1)* (1992) 36 FCR 201, where an employer was ordered to pay seven years' salary to an employee as compensation for being dismissed without the benefit of what was held to be a contractually binding obligation to certain disciplinary procedures.

¹³ D. Brodie, *The Dynamics of Common Law Evolution*, 32 (1) Intl. J. Comp.Lab. L. & Indus. Rel. 45 (2016).

Claire Mummé has contributed a note on a recent Canadian decision, *Bhasin v. Hrynew*,¹⁴ and assesses its potential for engendering clear obligations of good faith performance in employment contracts.¹⁵

Gabrielle Golding's article in this issue is less enthusiastic about trusting the judiciary and common law development with the evolution of laws so important as those determining worker's rights.¹⁶ She weighs the relative merits of relying on judge-made or statutory law in regulating employment, testing each approach against the values of democratic legitimacy in law-making and procedural efficiency. Her conclusions propose a compromise position, with Parliament determining a model set of default terms for employment contracts, to be interpreted and applied in individual cases by the common law courts. While ever the courts play any role in determining disputes over the bargains between employers and employees, there will be a need for the occasional resort to implied terms.

There is merit in the view (also expressed by Gordon Anderson) that the common law's conservative tendency to privilege property rights and the sanctity of contracts has meant that modern innovations favouring the interests of ordinary working people have come about not through judicial activism but as a consequence of statutory intervention in the labour market – either through statutes supporting rights to collective bargaining, or directly legislated protections for employees. Even the implied term of mutual trust and confidence recognized in English law was engendered from the perceived need to ensure that new statutory protections were not undermined by perverse employer conduct.¹⁷

Anderson's article presents a strong argument for regulation of employment relationships by specialist labour tribunals rather than common law courts, based on the experience of changing regulatory regimes in New Zealand.¹⁸ The common law played a limited role in the years before the 1980s, when New Zealand industrial relations were governed largely by a collectivist arbitration system. The deregulation of that system under the influence of a neoliberal political regime enabled a shift towards reliance on judicial determination of employment disputes according to the common law values of individualism, freedom of contract, and protection of the property rights of employers. As

¹⁴ 2014 SCC 71.

¹⁵ C. Mummé, *Bhasin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or just Tinkering at the Margins?*, 32 (1) Intl. J. Comp. Lab. L. & Indus. Rel. 117 (2016).

¹⁶ See G. Golding, *The Role of Judges in the Regulation of Australian Employment Contracts*, 32 (1) Intl. J. Comp. Lab. L. & Indus. Rel. 69 (2016).

¹⁷ M. Freedland, *The Personal Employment Contract* 155 (2003).

¹⁸ G. Anderson, *The Common Law and the Reconstruction of Employment Relationships in New Zealand*, 32 (1) Intl. J. Comp. Lab. L. & Indus. Rel. 93 (2016).

Anderson demonstrates, through an analysis of some key decisions, judicial adherence to these values has resulted in stronger support for employer interests, and limited the development in New Zealand law of any genuine obligation of 'mutual trust and confidence' in employment relationships. Anderson concludes that 'the greater the degree of autonomy given to specialist labour courts ... the greater the likelihood that they will develop the law in a way that is more sympathetic to a bipartite approach'.¹⁹

3 WHY NOT GO ALL THE WAY?

If there is such an appetite to defer completely to statutory regulation of all matters affecting labour rights and obligations, one wonders what role remains for the common law contract of employment. Is contract a useful conceptual tool at all in employment regulation? Perhaps this 'figment of the legal imagination'²⁰ is now well and truly past its use-by date in the statute-heavy field of labour market regulation. This author has argued elsewhere²¹ that a legal model based – philosophically and practically – on the enforcement of voluntarily assumed obligations does not suit the resolution of contemporary employment disputes. So many terms and conditions of employment are now mandated by either statute or instruments made under statute without the necessity of establishing the consent of the parties. For many decades, contemporary western industrial societies have implicitly recognized that the employment relationship is not uniformly a relationship between autonomous actors with equal freedom to choose their contract partner and bargain for terms. Many jurisdictions have enacted extensive regulation to control maximum working hours, minimum wages and entitlements to various forms of leave. Employers bear many mandatory obligations (for instance, under discrimination statutes) that constrain their freedom in recruitment and dismissal. Job security legislation, imposing obligations upon employers to refrain from unfair (or 'harsh, unjust and unreasonable'²²) dismissal has been most influential in recent decades in eroding any similarity between employment and other commercial contracts under which work is performed. Australian unfair dismissal legislation²³ permits

¹⁹ *Ibid.*

²⁰ See O. Kahn Freund, *Labour and the Law* 1–17 (P. Davies & M. Freedland eds, 3d ed., Stevens 1983); S. Deakin, *The Many Futures of the Contract of Employment*, in *Labour Law in an Era of Globalisation* (J. Conaghan, R.M. Fischl & K. Klare eds, Oxford University Press 2002).

²¹ J. Riley, *Beyond Contract: Reconceptualising the Fundamentals of the Law of Work*, Paper presented at the LLRN Conference in Barcelona, June 2013.

²² This is the formulation of words used in Australian legislation: see the *Fair Work Act 2009* (Cth) s. 385.

²³ See the *Fair Work Act 2009* (Cth) Pt 3-2.

an arbitral tribunal to order reinstatement of an unfairly dismissed employee, much to the annoyance of employer lobby groups who lament the loss of a freedom to hire and fire at will. So in many jurisdictions, there is no unfettered freedom to contract when the kind of contract contemplated describes an employment relationship.

Employers themselves often elect to eschew contract in determining conditions of employment, preferring instead to govern workplaces and work practices by means of fluid, non-contractual workplace policies. The contention in *Barker* concerned a workplace policy governing employees' entitlement to seek redeployment before being dismissed for redundancy. An express stipulation in the human resources manual containing the policy included a statement asserting: 'The Manual is not in any way incorporated as part of any industrial award or agreement entered into by the Bank, nor does it form any part of an employee's contract of employment'.²⁴ This statement was held to be effective to relieve the bank of any obligation to honour its own policies. If employers themselves are resorting to forms of governance that assert managerial prerogative in all matters not already determined by statute when settling employment arrangements, where is the role for contract law in governing ordinary working relationships?

A common reaction to this idea is scepticism. Of course, say the detractors, employment must be a contract. Any other conception of the relationship countenances slavery. Not so. Just because the relationship must be initiated by a voluntary act does not mean that the on-going dealings between the parties must be governed by the principles of commercial contract law. Our legal system recognizes many voluntary relationships that are not regulated by the principles of commercial contract law. Marriage, for instance, no longer succumbs to contract principles when disputes arise, although we may still occasionally speak of the 'marriage contract'. Many who continue to refer to the 'employment contract' are describing a special category of 'employment contract law' which has departed in many important respects from classical contract law principles. For example, in the employment context, we readily accept that terms may be ambulatory, to allow for the exercise of 'managerial prerogative' and flexibility, without destruction of the underpinning commitment to the relationship. Organizational behaviour theorists describe this kind of relationship as a 'psychological contract'.²⁵ The psychological contract describes the employment relationship as a cooperative endeavour, based on certain explicit and implicit

²⁴ *Barker*, [283].

²⁵ See C. George, *The Psychological Contract: Managing and Developing Professional Groups* (Open University Press McGraw-Hill 2009). See also K. van Wezel Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* 88–92 (Cambridge University Press 2004).

expectations of how parties will mutually benefit from the relationship, and how they will adapt the terms of their bargain over time, generally in the interests of accommodating the business needs of the employer. For a lawyer, the use of the word 'contract' in this context is misleading because the nature of the relationship loosely described by the 'psychological contract' does not conform to the precepts of classical contract law. When parties to this 'psychological contract' experience a relationship breakdown, and their dispute ends up in a courtroom, the application of the hard principles of commercial contract law, which purport to hold parties only to the original terms of their formal bargain, can produce results which defeat the expectations engendered by the 'psychological' contract. My argument is that, in these circumstances, the vocabulary of 'contract' is apt to mislead and disappoint the expectations of the parties. If employment relationships really do depend upon principles other than the enforcement of sufficiently certain and serious bargains, would we not be better off developing a new vocabulary which better reflects those true principles? The big question is, which common law principles, if any, adequately describe the reality of employment relationships, and could usefully be engaged to frame the mutual responsibilities of employment and resolve employment relationship problems?

4 EQUITABLE PRINCIPLES

Jill Murray has proposed an appropriation of the equitable doctrines deriving from the old English courts of Chancery.²⁶ She proposes, somewhat ambitiously, that the concept of the fiduciary obligation ought to inform the development of employers' obligations to their workers. Unlike contract law, which assumes equally matched autonomous parties who enjoy a freedom to pursue their own selfish interests, fiduciary law assumes that one party accepts an obligation to sacrifice his or her own interests to those of a beneficiary. Employees are often held to be fiduciaries when they occupy positions of trust, and are capable of affecting the property rights of their employers. Employees can be required to account back to employers for profits made from opportunities arising out of their employment. But employers never owe fiduciary duties to employees, not unless an employer finds itself in possession of property that belongs (in equity) to the employee, and that will be a rare fact situation. Employers will never owe fiduciary duties to employees, because the very nature of the underlying economic relationship is that the employer seeks to exploit the labour power of

²⁶ See J. Murray, *Conceptualising the Employer as Fiduciary: Mission Impossible?*, in *The Autonomy of Labour Law* 337 (Bogg et al. ed., Hart 2015).

the worker (in the sense that the employer calculates upon paying less in wages than the value of the work). Employers do not engage workers as an act of charity. They expect to profit from the arrangement. The fiduciary principle is completely inept to describe such a relationship.

Some years ago, Paul Finn identified a schema of three broad standards applicable to the regulation of consensual relationships: the fiduciary principle, the good faith principle, and the unconscionability principle.²⁷ Because the fiduciary principle commands a self-sacrificing commitment to service of the other, it will never describe the relationship of an employer to an employee. To try to make it do so is to attack the fundamental definition of the fiduciary concept. Nevertheless, the other two principles may have a role to play. The unconscionability principle requires parties – even those acting legitimately with self-interest – to refrain from exploiting a known special disadvantage of the other. The unconscionability principle controls the most egregious opportunism and already operates as an equitable constraint in commercial (and hence also employment) contract law, but generally only as a means of vitiating, or escaping, an exploitative contract. Employees who have been the victim of exploitative contracts will generally not benefit from rescission of the contract. They do not need to escape the contract entirely: they need fairer terms. The weakness with the unconscionability principle, while it remains an equitable principle limited to equitable remedies, is that it does not guarantee fairer terms. Some jurisdictions have enacted statutory regimes to permit a broader range of more useful remedies for unconscionable conduct. For example, the prohibitions on unconscionable dealing in the *Competition and Consumer Act 2010* (Cth), Australian Consumer Law Schedule, section 22, can be enforced by an order for variation of the offending contract terms.²⁸ Again, we see the necessity for statutory intervention to do better justice than is available under the common law, even assisted by equity.

Finn's good faith principle is a more promising concept, because the good faith principle recognizes that parties to a joint endeavour owe mutual obligations to cooperate, notwithstanding that each is permitted to regard their own interest in the bargain. The good faith principle, however, is not strictly an equitable doctrine, but a borrowing from the civil law's approach to contract. Douglas Brodie's article in this issue considers the scope for development of the good faith principle in employment law.

²⁷ P.D. Finn, *The Fiduciary Principle*, in *Equity, Fiduciaries and Trusts* 3 (T.G. Youdan ed., Carswell 1989).

²⁸ See *Competition and Consumer Act 2010* (Cth) s. 87.

5 TORT LAW AND THE CONCEPT OF A 'DUTY OF CARE'

Another common law concept that may be put to use in employment regulation is the concept of a duty of care in tort. The law of tort side-steps the preoccupation of contract law with voluntarily assumed duties, and demands compliance with those standards of conduct that a civilised community expects of its members. Is the employment relationship more appropriately regulated by the underpinning principles of tort law and its imposition of duties of care towards those whose lives are sufficiently connected to our own? Certainly tort law has played an important role in developing the mutual duties of care owed by employers and employees in the course of their engagements, but it has focussed principally on protection of workers from physical, and more recently psychological harm, and to some extent, reputational harm.²⁹ Tort law is reluctant to usurp the territory of pure economic harm. So while we have developed the employer's duty not to bring the employee into foreseeable risk of unnecessary harm, the conception of harm does not presently extend to the harm of penury arising from a capricious dismissal. While we continue to treat employment as a contractual relationship, it is unlikely (in the extreme) that a court exercising common law jurisdiction would be willing to develop remedies in tort for capricious dismissal, in the face of a contract that already purports to deal with termination of employment. In Australia, the High Court has already held that it will not be a breach of a tortious duty of care for an employer to insist upon its rights under an employment contract.³⁰ If we were to abandon the notion that employment relationships must conform to the principles of contract law, there may be room to develop the notion that an employer owes a duty of care towards employees not to cause unnecessary risk of economic harm by capricious treatment. While tort law may provide the essential principle, it is more likely that such developments will come through statutory intervention.

Even in the field of physical workplace safety, statutory developments have been more effective in addressing risks for workers. For many decades, occupational health and safety statutes have provided forms of regulation geared towards the prevention of workplace harm. Statutes empowering inspectorates to monitor compliance with safety laws make infinitely more sense than reliance on a long-delayed *ex post facto* determination by a court that someone breached a duty of care and should now be required to compensate the victim for the harm suffered.

²⁹ See *Spring v. Guardian Assurance plc* [1995] 2 AC 296.

³⁰ See *Koehler v. Cerebos (Australia) Ltd* (2005) 222 CLR 44.

6 CONCLUSION

There will always be a role for judges in interpreting statutes and applying them to resolve disputes in particular fact scenarios. The broader question is, how far does the judicial role extend? Can we expect judicial development of a broad obligation to cooperate ‘in good faith’, even absent statutory fiat? Douglas Brodie’s article illuminates this question. Claire Mummé’s note on *Bhasin v. Hrynew*³¹ suggests there is some hope for common law development of a duty of good faith performance in employment, if Canadian precedent is found to be persuasive in other parts of the common law world. However, if the *Barker* decision of the Australian High Court proves influential, those of us who earnestly desire the development of more egalitarian labour laws will need to direct our attention to the lobbying of parliaments. Perhaps that is the better solution. As Gordon Anderson’s article explains, history tells that the common law has a poor record for protecting employees.

³¹ 2014 SCC 71.