



THE UNIVERSITY OF
SYDNEY

Sydney Law School

Legal Studies Research Paper
No. 13/82

November 2013

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Phillipa Weeks Lecture in Labour Law

Wednesday, 25 September 2013

ANU College of Law, Australian National University, Canberra

Uneasy or accommodating bedfellows? Common law and statute in employment regulation

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Abstract:

In 2005, Professor Phillipa Weeks published an insightful chapter entitled 'Employment Law – A Test of Coherence Between Statute and Common Law' in S Corcoran and S Bottomley (eds) Interpreting Statutes. That chapter examined the emergence, development and ultimate emasculatation of an implied term of trust and confidence in employment, as a consequence of the interaction of judicial reasoning and legislative intervention. At the time, Professor Weeks bemoaned the 'dismal state' of Australian common law, and proposed a solution to the apparent incoherence and doctrinal imperfection in the law. This address will pick up the story where Professor Weeks left off, by considering the influence of developments – judicial and statutory – since publication of this important piece, and will revisit possible solutions in the light of those developments.

Professor Phillipa Week's contribution to employment law

It is a very great honour for me to be invited to give the Phillipa Weeks Lecture in Labour Law this year. Unfortunately, I never had the pleasure of meeting Phillipa in person, but she was a most generous labour law colleague when Rosemary Owens and I were preparing our first edition of *The Law of Work*. Even during her illness, Phillipa read and commented on my early drafts of chapters on the contract of employment. Phillipa was especially well known for her work on trade union law, and on public sector employment, but she was also esteemed as an excellent scholar in general employment contract law. So I thought that it would be fitting to celebrate her scholarship this evening by looking at a particularly important contribution she made to our understanding of the relationship between statute and common law in the development of contemporary employment law.

Incoherence in the law

The problem of coherence – or more correctly, potential *incoherence* – between common law developments and statutory innovation has become a particular concern in employment law. Phillipa was one of the first employment law scholars to pick up this theme in the chapter she contributed to a book published out of the ANU College of Law at the Australian National University. The book is *Interpreting Statutes*, edited by Suzanne Corcoran and the present Dean of Law, Stephen Bottomley.

Phillipa's chapter was called 'Employment Law – a Test of Coherence Between Statute and Common Law',¹ and it contains by far the most lucid explanation I have read of how the common law in England developed the concept of a term implied by law into every employment contract, that an employer must not, 'without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the

¹ Phillipa Weeks 'Employment Law – a Test of Coherence Between Statute and Common Law', in Suzanne Corcoran and Stephen Bottomley, (eds) *Interpreting Statutes*, 2005 Federation Press, Sydney, pp 166-196.

relationship of confidence and trust between the parties'² to that contract. I must say that, although Phillipa's chapter was not specifically cited in the recent *Commonwealth Bank of Australia v Barker*³ decision, I am sure that counsel, or possibly Justice Jessup's associate, must have consulted this work in their research on the origins of this implied term.

In the time I have this evening, I hope to provide something of an 'update' of Phillipa's important analysis in this chapter. So my presentation will have three parts.

- First, I will explain as concisely as possible how the law had become 'incoherent' by the time Phillipa was writing in 2005, and what Phillipa proposed as a solution to that problem.
- Then I will identify some further developments, since 2005, that have influenced the landscape, and perhaps added to concerns about incoherence in the law.
- Finally, I will make some modest suggestions of my own about a possible way forward.

² *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84, 85. For commentary on this implied duty, see Mark Freedland, *The Personal Employment Contract* (2003), 154 -170; Douglas Brodie 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Journal* 121; 'Beyond Exchange: the New Contract of Employment' (1998) 27 *Industrial Law Journal* 79; (1999) 'A Fair Deal at Work' (1999) 19 *Oxford Journal of Legal Studies* 83; 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *Industrial Law Journal* 84; *The Employment Contract: legal Principles, Drafting and Interpretation* (2005) 78-79; 'Mutual Trust and Confidence: Catalysts, Constraints and Commonality' (2008) 37 *Industrial Law Journal* 329; Hon Mr Justice Lindsay 'The Implied Term of Trust and Confidence' (2001) 30 *Industrial Law Journal* 1; Adrian Brooks 'The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence' (2001) 20 *University of Tasmania Law Review* 26; Mark Freedland, 'Constructing Fairness in Employment Contracts' (2007) 36 *Industrial Law Journal* 136; David Cabrelli 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle' (2005) 34 *Industrial Law Journal* 284. For Australian scholarship on this development see: Joellen Riley 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *Australian Journal of Labour Law* 28; Kelly Godfrey 'Contracts of Employment: the Renaissance of the Implied Term of Trust and Confidence' (2003) 77 *Australian Law Journal* 764; Joellen Riley, *Employee Protection at Common Law* (2005) 73-6; Andrew Stewart, 'Good Faith and Fair Dealing at Work' in Christopher Arup et al *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006), 579, 583-4; Joellen Riley, 'The Boundaries of Mutual Trust and Good Faith' (2009) 22(1) *Australian Journal of Labour Law* 73; Joellen Riley, 'Siblings but not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts', (2012) 36 *Melbourne University Law Review* 521.

³ [2013] FCAFC 83 (6 August 2013).

Phillipa Week's thesis

The essential thesis in Phillipa's chapter was that employment law – in both the UK and Australia – has suffered incoherence as a consequence of the interplay between the common law and statutory developments. She boldly lay the blame for that incoherence squarely at the feet of judges, who, she complained, had abdicated their responsibility for ensuring a coherent development of common law principle out of excessive deference for an imagined obstacle created by statutory schemes.

Phillipa's chapter explains that it was the common law's own weaknesses – particularly in the remedies available to working people – that prompted the introduction of statutory schemes permitting employees to seek compensation for unfair dismissal.⁴ A claim for a pay-out of a short notice period was rarely worth taking to the common law courts, so Parliaments enacted statutory schemes to improve compensation to unfairly dismissed workers. Subsequently, judges developed the implied term of 'trust and confidence' to ensure that employers could not avoid their statutory liabilities by bullying workers into resignation. There was a risk that employers would use this tactic because only employees who had been dismissed could use the legislation. It was not available to those who resigned.

In the *Malik*⁵ decision, which was so influential in securing broad acceptance of this new implied term in English law, the House of Lords recognised the potential for incoherent common law development in the application of this implied term. In that case, they were considering the viability of a claim for damages based on the plaintiffs' loss of employability as a consequence of being stigmatised by their association with a corrupt employer. They successfully navigated a concern with coherence between the remedies available for breach of contract, and those available in tort for defamation, by emphasising that these two bodies of

⁴ For an early history of Australian unfair dismissal regimes, see Andrew Stewart, 'And (Industrial) Justice for All? Protecting Workers against unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85.

⁵ *Malik v BCCI* [1998] AC 20

law – contract and defamation – provided for two different kinds of loss or harm. Contractual damages compensate for any financial loss flowing from breach of a contractual promise, and in this case, the loss of income-earning capacity as a consequence of a breach of the employment contract was held to be amenable to a damages claim.⁶ Damages awarded in a defamation case, however, are intended to compensate for injury to the plaintiff's reputation and sense of outrage. It is not necessary to prove any financial loss as a consequence of reputational harm in order to be awarded damages in defamation. So the court was able to articulate a distinction between two branches of the common law, to preserve coherence in the development of the common law itself.

A few short years after the *Malik* decision, however, came another highly influential case which disturbed the development of the implied obligation of trust and confidence. The case was *Johnson v Unisys Ltd*,⁷ and it concerned a man who had already received statutory compensation for unfair dismissal, but was now seeking additional compensation under the common law for more extensive damages flowing from breach of his employment contract. As Phillips explained, Mr Johnson 'contended that the manner of his dismissal had caused his nervous breakdown and consequent loss of employment prospects'.⁸ The majority denied his claim out of a concern with coherence between common law development and statute. The majority were concerned that allowing Mr Johnson access to damages for breach of contract when he had already received the maximum compensation allowable under a statutory scheme would be a 'recipe for chaos'.⁹ Lord Hoffmann explained that '[e]mployment law requires a balancing of the interests of employers and employees', and 'the point at which that balance is struck is a matter for democratic decision'.¹⁰ In other words, judges must take their lead from

⁶ It must be remembered that *Malik* was a test case, and the plaintiffs were ultimately unable to prove damages when the case was tried on its facts. See *BCCI SA v Ali* [2002] ICR 1258.

⁷ [2001] 2 All ER 801.

⁸ Weeks above n 1 at p 181.

⁹ *Johnson* [2001] 2 All ER 801, at [80]

¹⁰ *Ibid* at [37].

Parliament. Common law development must be consistent with legislative policy, and should not undermine the 'evident intention of Parliament'.¹¹

The consequence of this decision for the development of the implied term of trust and confidence was the articulation of a clear limit on its application: the employer's obligation not to act in a manner calculated to destroy mutual trust and confidence could not be extended to constrain any decision to terminate the employment contract, nor could it lead to any compensation for damages arising as a consequence of the termination of employment itself. This has become known as the '*Johnson* exclusion zone',¹² and it has generated considerable debate and concern. Subsequent cases (such as *Eastwood v Magnox*¹³) have highlighted the practical difficulties in seeking to distinguish harm arising from an employer's conduct prior to dismissal, from harm flowing from the fact of dismissal itself. The most appalling conduct following the issue of a termination letter would not give rise to any common law claim. And this would apparently be so, even if the employee concerned had no statutory rights because he or she was excluded from the statutory unfair dismissal regime (for instance, because he or she earned more than the statutory high income threshold).

Phillipa's chapter warned of a risk of 'injustice in the form of arbitrary and anomalous outcomes' as a consequence of a judicial abdication from developing the common law of the employment contract, for fear of broaching territory occupied by limited statutory remedies for dismissal. Her own proposed solution – if an easy statutory solution was not forthcoming – was that courts should allow the development of the implied term of trust and confidence to encompass claims related to the manner of termination of employment.¹⁴ She opined that the policy of the unfair dismissal legislation would not be substantially undermined by such a development. She argued that internal consistency and coherence in common law reasoning

¹¹ Ibid at [58].

¹² See the discussion in Carolyn Sappideen et al, *Macken's Law of Employment*, 7th ed, 2011, Thomson Reuters, Sydney, at pp 167-173.

¹³ In *Eastwood v Magnox Electric plc*, it was made clear that this principle meant that a breach of the mutual trust obligation during employment might sound in common law damages, but a breach arising out of the fact or manner of the termination of employment would be confined to statutory remedies.

¹⁴ Weeks above n 1 at p 195.

should not be disturbed because judges were afraid to develop the common law in a field now also inhabited by statute. And so she urged the courts 'to take the lead in restoring coherence to the common law'.¹⁵

There is much force in Phillipa's argument. For a start, her view that the common law and statutory rights and responsibilities coexist without necessarily intermingling is supported by the High Court decision in *Byrne v Australian Airlines*,¹⁶ which held that a binding industrial award did not necessarily become part of an employee's common law contract of employment. The two systems of law – common law contract, and industrial arbitration leading to compulsory awards – were based on different principles, and so produced different remedies. Contract law is predicated on the assumption that parties should be bound to observe their own voluntarily made commitments. If they breach those commitments, they are bound to put their counterparty into as good a position as they would have enjoyed if the promises had been fulfilled. The system of arbitrated awards, however, was based on the entirely different principle that employers in an industry should be compelled (regardless of any agreement) to respect the minimum conditions of employment determined as a consequence of a tribunal's decision made in the public interest, to resolve an industrial dispute. The remedies flowing from breach of an award are those stipulated in the statutory scheme creating that compulsion.

Phillipa's argument – and it is one with which I agree – is that the statutory unfair dismissal regime in Australia is a separate and different body of law from the common law of employment contracts. In Australia, as we well know, unfair dismissal applications are dealt with in a completely different jurisdiction from common law claims. They are arbitrated by a tribunal exercising administrative power. While the rights and responsibilities under the employment contract may be relevant in determining whether a dismissal was 'unfair', there is no necessity to demonstrate breach of the employment contract to seek a remedy. The principal remedy for a successful applicant is reinstatement (which is a remedy generally unavailable at common law), and the underpinning policy of the legislation is to promote job

¹⁵ Weeks above n 1 at p 196.

¹⁶ (1995) 185 CLR 410.

security across the labour market. It is a law concerned with the broad public interest in providing a measure of job security for ordinary workers, notwithstanding that their employment contracts do not guarantee them that security.

On this view, the legislative unfair dismissal scheme in Australia – under the *Fair Work Act 2009* (Cth) – does not manifest any intention to interfere with the separate development of the common law of individual employment contracts. Hence, there is no injury to the integrity of the statutory scheme if the common law of employment is able to develop its own principles in a doctrinally coherent manner. In the case of the employer’s obligation not to act in a manner calculated or likely to destroy trust and confidence, this would mean that any breach of such an obligation, including a breach manifested by the manner in which the employer terminates the employment, should sound in damages if it causes particular loss the employee. If the employee has a contractual entitlement to respectful treatment, then manifestly and seriously disrespectful conduct which sounds in special loss ought to be compensable, under conventional principles of contract law. This was the rationale for Wilcox J’s judgment in the first instance decision in *Nikolich v Goldman Sachs JB Were Services Pty Ltd*.¹⁷

Notwithstanding the great force of Phillipa’s arguments, I seriously doubt that her recommendations will bear much fruit in the foreseeable future. A number of developments in both common law and statute in the years since Phillipa published her thesis would suggest that her proposals have unfortunately proven to be rather too optimistic.

And so I will move to the second part of this paper: developments in employment law that have influenced the relationship between common law and statute, and perhaps added to concerns about the internal coherence of the common law.

¹⁷ [2006] FCA 784.

Recent developments

I will note three particular developments that I believe have changed the landscape since Phillipa was writing.

The obvious change is the increasingly prescriptive provisions in the statutory scheme which give more credence to a view that Parliament intends to ‘cover the field’ of remedies for a harsh dismissal. At the time Phillipa was writing, the *Burazin* decision¹⁸ was the most important Australian decision on this issue. In that case the Industrial Relations Court of Australia (which was subsequently folded into the Federal Court) awarded a measure of damages for hurt and humiliation because of the despicable manner in which the dismissed employee was marched off the premises. The court emphasised that this head of damage was awarded as an element of the statutory compensation available to Ms Burazin, and would not be available under common law, for so long as the *Addis*¹⁹ principle remained good law. That is, the principle that there is no compensation in contract for hurt and humiliation alone. Since the introduction of the *Work Choices* amendments to unfair dismissal provisions in 2006, the statutory scheme has specifically prohibited awarding any compensation in respect of ‘hurt and humiliation’.²⁰

This statutory development is likely to fuel arguments that Parliament has now spoken the last word on whether hurt, humiliation or distress can sound in a compensatory award following dismissal from employment. It would be difficult now to mount an argument in a common law termination case that the common law should overturn more than a century of its own jurisprudence to develop a remedy that a recently enacted statute clearly forbids.

This is not to say that there is not still room for common law damages for a range of other consequences arising out of the manner in which a person is dismissed. We have seen

¹⁸ *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

¹⁹ *Addis v Gramophone Co Ltd* [1909] AC 488.

²⁰ See the *Workplace Relations Act* 1996 (Cth) s 654(9), which was in force from 27 March 2006 until the enactment of the *Fair Work Act* 2009 (Cth) s 392(4).

successful claims in Australia for psychiatric harm consequent upon dreadful treatment of an employee bullied out of employment.²¹ But aggravated damages to compensate for the employee's sense of outrage – such as were awarded in *Burazin* - would seem to be out of the question now.

A second development since Phillipa wrote on this subject is the decision of the UK Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham (FC) v Ministry of Defence*.²² In that rather complex pair of cases,²³ it was held (by some of the bench at least²⁴) that certain express provisions in an employment contract should not have the effect one would normally expect a contract term to have. These proceedings involved two similar matters, both concerning employees who had been dismissed after badly managed disciplinary processes. *Edwards* concerned the sacking of a doctor, and *Botham* involved a social worker. Each of these employees had been engaged under written employment contracts which contained express clauses entitling them to certain procedures before they could be dismissed on disciplinary grounds. In both cases, the employers failed to follow their own procedures. The employees first sought compensation under statute for unfair dismissal, and then also brought common law proceedings for breach of their employment contracts. Mr Botham's unfair dismissal proceedings appear to have concluded that he had been the victim of maliciously false allegations. Unlike Mr Johnson (in *Johnson v Unisys*), neither Mr Edwards nor Mr Botham needed to rely on any argument based on the implied term of mutual trust and confidence to make their common law case, because their contracts already contained express clauses promising the disciplinary procedures which they had been denied.

Normally, one would expect breach of such terms to sound in expectation based damages – as they did in Australian cases such as *Bostik (Australia) Pty Ltd v Gorgevski (No 1)*,²⁵ and *Dare v*

²¹ See *Sneddon v Speaker of the Legislative Assembly* (2011) 208 IR 255, 312 [282] (Price J).

²² [2011] UKSC 58 (14 December 2011).

²³ There were five different opinions in this case, including a vigorous dissent from Lady Hale. I propose to deal here only with one of the decisive findings in the case.

²⁴ Lords Dyson, Walker and Mance.

²⁵ (1992) 36 FCR 20.

Hurley.²⁶ But in *Edwards*, Lords Dyson, Walker and Mance held that the employers' breaches of these promised procedures ought *not* to sound in common law damages, because the employers must be assumed to have included these terms in their employment contract documentation only to demonstrate an intention to comply with statutory obligations to afford employees procedural fairness. Working from the assumption that contract law gives effect to the intentions of the parties, these judges held that the employers intended to be bound only by statutory obligations, and must not be presumed to have intended to be subject to ordinary common law sanctions should they breach these terms in their employment contracts. A complainant would still be confined to statutory compensation for breach, because any claim concerning disciplinary procedures was necessarily a complaint about the manner of dismissal, and Parliament had enacted a statute to deal with such complaints.

I must say that when I first read this decision I found this to be an ingenious argument. On this reasoning, it seemed that an employee could never win. Even if the employee insisted on negotiating an express term in the employment contract, guaranteeing procedural fairness before dismissal, it could be defeated by this interpretation of the assumed intentions of the parties. The court anticipated this objection by stating that these kinds of express contractual terms could be given full contractual force under the common law, if the parties 'expressly agree'²⁷ that breach would give rise to contract-based damages. Only a lawyer could be trusted to make, or to understand, such a distinction, and to ensure that the right 'magic words' were drafted into the contract.

It remains to be seen whether these particular findings from *Edwards* will be adopted in any Australian case.²⁸

²⁶ [2005] FMCA 844.

²⁷ At [39].

²⁸ As at 17 September 2013 it appeared (from a scan of the austlii data base) that two Australian cases had cited *Edwards*, but neither for this particular finding. The cases are *Ramsay v Annesley College* [2013] SASC 72, and *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 at [332].

The findings in *Edwards*, if adopted by Australian courts, have the potential to turn my earlier argument above on its head. The *Edwards* argument assumes that the only reason that an employer would include promises of procedural fairness in an employment contract is to signal a commitment to compliance with new norms encouraged by the statutory unfair dismissal scheme. Since their inception, Australian unfair dismissal provisions have allowed tribunals to consider procedural matters (such as whether an employee was given reasons and warnings prior to dismissal) in determining whether a dismissal was relevantly ‘harsh, unjust or unreasonable’.²⁹ Since the introduction of unfair dismissal protections, it has become common for employers to engage human resources managers to implement extensive policies to manage staff performance and guide the investigation of any disciplinary matters. These policies are generally communicated to employees in policy manuals. It has become increasingly common for employers to foreswear any contractual effect for these manuals. I must confess that in the past I have often expressed the view that this seems somewhat hypocritical of employers. They insist that employees must comply with their policies, at the risk of disciplinary action (and possibly dismissal), but then assert that the policies do not form part of the employees’ contracts of employment. After reading *Edwards*, I can see the alternative view, that if employers have created policies only in order to manage compliance with their statutory obligations, perhaps it is reasonable to permit employers to exclude those policies from having contractual effect. Breach of a policy will be relevant only where it indicates such ‘harsh, unjust or unreasonable’ treatment of an employee that would attract a statutory sanction, or where it would constitute ‘adverse action’ for a discriminatory reason.³⁰

It is easy to see why employers would wish to exclude these express stipulations about how the workplace is to be managed from contractual effect. Depending on the nature of the employment relationship, contract damages can be quite impressive, and considerably more generous than the limited statutory compensation available under unfair dismissal laws. The successful contract claim in *Walker v Citigroup Global Markets Australia Pty Ltd*³¹ provides a

²⁹ The current provisions are in the *Fair Work Act 2009* (Cth) Part 3-2.

³⁰ According to the ‘General Protections’ in the *Fair Work Act 2009* (Cth) Part 3-1.

³¹ (2006) 233 ALR 687 (Gyles, Edmonds and Greenwood JJ).

striking example. Mr Walker was awarded damages amounting to about two and half years' pay, when Citigroup reneged on its contract to engage him in a senior management position. Access to these kinds of damages depends on proof of a contractual entitlement to remain in employment for a considerable period of time. If an employee can demonstrate that, *but for* the breach of a contract term promising fair procedures before dismissal, the employer would have engaged the employee for a long period of time, then an Australian employee can legitimately claim damages for the loss of an opportunity or chance to remain in employment. Other Australian cases have also accepted the legitimacy of a 'loss of chance' claim in an employment context.³²

So – my second concern is that the common law judges have taken deference to statutory schemes even further, by assuming that employers are focused on statutory compliance alone when they make their contracts. Perhaps the statutory schemes have become so influential, that their effect in modifying organisational behaviour does warrant this kind of judicial notice.

The final development in Australia which makes me less than optimistic about Phillipa's thesis is the present state of our jurisprudence on mutual trust and confidence.³³ Here I would like to

³² See for example *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357; *Guthrie v News Ltd* [2010] VSC 196.

³³ A number of cases have doubted the existence of the implied term completely. See for example *Heptonstall v Gaskin and Ors (No 2)* [2005] NSWSC 30, [22]; *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903, [96]; *Van Efferen v CMA Corporation Limited* [2009] FCA 597, [79]-[86]; *Yousif v Commonwealth Bank of Australia* [2010] FCAFC 8. On the other hand, a number of Australian cases have been prepared to concede the existence of the mutual trust term. See for example *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186; *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559; (2008) 176 IR 82, (and particularly the statements of Campbell JA, [73]) conceding the point accepted by Rothman J in (2007) 69 NSWLR 198; [2007] NSWSC 104; *Morton v Transport Appeal Board* [2007] NSWSC 1454 (Berman AJ); *Rogers v Millenium Inorganic Chemicals* [2009] FMCA 1, [119] (Lucev FM); *Rogan-Gardiner v Woolworths Ltd [No 2]* [2010] WASC 290, [222] (upheld on appeal: see [2012] WASC 31); *Gillies v Downer EDI Ltd* [2011] NSWSC 1055, [204]; *Foggo v O'Sullivan Partners (Advisory) Pty Limited* [2011] NSWSC 501, [99] (Schmidt J); *Barker v Commonwealth Bank of Australia* [2012] FCA 942 (Besanko J) (upheld on appeal [2013] FCAFC 83). Even in cases which have conceded the existence of a 'mutual trust and confidence' and/or good faith obligation, plaintiff employees' claims have been defeated by the existence of some statutory scheme covering the field: see for example *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198; [2007] NSWSC 104 and *State of South Australia v McDonald* [2009] SASC 219.

make some brief remarks about the recent full court decision in *Commonwealth Bank of Australia v Barker*.³⁴

Although the facts of the *Barker* decision were particularly convoluted at first instance, the essential issue that emerged in the case was whether the bank had breached its employment contract with a senior manager when it failed to comply with its own redeployment procedures before terminating his employment for reasons of redundancy. The specifics of the redeployment procedures were contained in a policy manual which the bank claimed was not part of its employment contracts. The reason the procedures were not followed properly in Mr Barker's case was that he was deprived of all means of effective communication from the bank's HR people when his mobile phone was confiscated and his email access was cut off. The bank's own conduct made it practically impossible for the bank to communicate effectively any potential new positions that he might take up rather than accept redundancy.

At first instance,³⁵ Besanko J held that the policy document was not incorporated into Mr Barker's employment contract, however the bank's conduct in making it impossible for Mr Barker to enjoy the potential benefit of redeployment was a breach of its implied obligation not to destroy mutual trust and confidence. This breach of contract occurred while he was still employed, so it could sound in damages for breach, without offending the '*Johnson* exclusion zone'. Damages were assessed on the basis that Mr Barker had lost a valuable opportunity for redeployment, and he was awarded compensation of \$317,500.

At the time this decision was published there was a furore among employer lawyers, because the case seemed to defeat their best drafting strategies, employed since the *Nikolich* decision, to specifically exclude employer policy documents from having any contractual force. When I first read the decision myself, I didn't find it particularly exciting. It seemed to do little more than provide another example of the way in which the implied term (of mutual trust and confidence) may work, and it was certainly consistent with the decision of Allsop J in *Thomson v*

³⁴ [2013] FCAFC 83.

³⁵ *Barker v Commonwealth Bank of Australia* [2012] FCA 942 (3 September 2012).

*Orica Australia Ltd.*³⁶ In *Thomson*, however, the court did not find it necessary to determine a damages award, because the matter was settled confidentially, after the finding of liability. In my humble view, Besanko J's decision in *Barker* was made on entirely orthodox and established principles. No award was made for hurt and humiliation, nor for lost reputation. In my view, if the CBA staff left in charge of managing Mr Barker's redundancy had not acted negligently (or perhaps vindictively), and clearly in breach of a duty not to destroy trust and confidence in a continuing employment relationship, by taking away Mr Barker's means of finding out about the promised redeployment opportunities, he would not have succeeded in his claim. Nevertheless, the bank appealed the decision.

The full bench decision is an interesting one for those of us concerned with the potential development of the common law of employment contracts. The majority (Jacobson and Lander JJ) decided the case as a matter of contract construction. They held that the Redeployment Policy was not a term of the employment contract, so breach of the policy itself could not constitute a breach of contract. Nevertheless, they held that Australian law does recognise the implied duty not to destroy mutual trust and confidence, and that this duty had its origins in a general duty of cooperation. The implied term operated so as to ensure that the parties to the contract cooperated in allowing each to enjoy the intended benefits of the contract. In this case, the intended benefit was apparent in a clause written into the contract itself, which included the following sentence:

In the case where the position occupied by the Employee becomes redundant and the Bank is unable to place the Employee in an alternative position with the Bank or one of its related bodies, in keeping with the Employee's skills and experience, the compensation payment will be calculated . . .etc.³⁷

The majority held that this clause 'contemplated the possibility of redundancy and redeployment within the Bank as an alternative to termination'.³⁸ The bank had failed in its duty to cooperate when it acted in a manner that prevented Mr Barker from accessing the

³⁶ (2002) 116 IR 186.

³⁷ At [167]

³⁸ At [127].

option of redeployment. This conduct occurred while Mr Barker was still an employee. Mr Barker was entitled to claim damages for any loss suffered as a consequence of the bank's breach. In this case, Mr Barker had lost a valuable chance of redeployment, which could be compensated according to 'an orthodox application of established principles',³⁹ determined by the High Court of Australia in *Commonwealth of Australia v Annan Aviation Pty Ltd.*⁴⁰

While the majority recognised the implied duty of mutual trust and confidence, and was prepared to employ it to find that the bank was liable for damages for breaching its employment contract, the court did not make any decision that would challenge the *Addis* principle. Nothing in *Barker* would provide any confidence that the courts will be prepared to take the step urged in Phillipa's thesis, that the implied term of trust and confidence should be extended to the manner of termination of employment.

We also cannot ignore Jessup J's vigorous dissent in this case. Justice Jessup methodically demolishes the foundation for the implied term, by asserting that the English authority upon which it has been developed is questionable, that the term lacks the required 'necessity' to justify its acceptance according to the precepts of Australian contract law, and ultimately he objects that acceptance of the implied term would 'overlap a number of legislated prohibitions and requirements in particular dimensions of the employment relationship' and so tend to 'compromise the democratically-drawn architecture of the relevant obligations'.⁴¹ In other words, a term implied as a matter of common law principle would be incoherent with contemporary statutory regimes, and statutory regimes should prevail.

So from the *Barker* decision we have two views on the relationship between common law and statute: the majority decision permitting a principled but very limited development in the common law, founded on older common law authority; the dissenting minority preferring to

³⁹ At [138].

⁴⁰ (1991) 174 CLR 64 at 103.

⁴¹ At [340(g)].

cut off further common law development in deference to an increasingly extensive statutory reach into the regulation of employment.

And so I come to the third and final part of this paper: if Phillipa's thesis has fallen on deaf Australian ears – what alternative visions are there, to promote coherence in Australian employment law?

The case for a new statutory obligation?

I think the answer is probably buried in Phillipa's thesis itself. She says, 'relief may come from the legislature', but she expresses pessimism about how realistic a legislative solution may be, especially, she says, 'in Australia where there are multiple jurisdictions'.⁴² Since that time, however, we have made considerable headway towards creating a single national jurisdiction for private sector employment law (notwithstanding some Western Australian exceptionalism). Since that time, the Fair Work legislation has created more extensive protections for workplace rights in the 'adverse action' provisions, and these have been engaged on behalf of workers who would not be eligible to bring unfair dismissal proceedings. More recently, we have seen amendments to the legislation conferring a limited jurisdiction on the Fair Work Commission to attempt to resolve complaints about workplace bullying.

It may well be that the newly elected federal government does not have the same appetite for extending statutory protections for employees as the architects of the Fair Work legislation. Nevertheless, a statutory solution may be the best way forward for Australian employment law. It may be time for Australian law – like New Zealand Law – to recognise a general statutory obligation of 'good faith' in employment contracts. The *Employment Relations Act 2000 (NZ)*⁴³ articulates this obligation among its objects in s 3, and also in s 4:

3 Object of this Act

⁴² Weeks above n 1 at 194.

⁴³ I am indebted to Gordon Anderson, *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* Victoria University Press, Wellington, 2011, for my information on New Zealand labour laws.

The object of this Act is— (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; . . .

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)— (a) must deal with each other in good faith; and (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—(i) to mislead or deceive each other; or (ii) that is likely to mislead or deceive each other.

Further sub-sections of s 4 articulate more clearly the practical implications of this duty.

I am going to take the enormous risk of suggesting (without investigating actual New Zealand experience in case law) that promoting good faith as a statutory obligation is sensible, because it avoids the problem of trying to develop a coherent common law in a field heavily regulated by statute. One of the most significant benefits of developing a statutory obligation would be the scope for developing appropriately designed statutory remedies for breach of the obligation.⁴⁴ Ideally a statutory scheme would also set up an appropriately qualified specialist court or tribunal to deal with employment disputes.

The problem of remedies

I do suspect that much of the judicial reluctance to develop the common law has been influenced by concern with the nature of common law remedies. Contract law remedies are based on putting a disappointed party into the financial position they would have been in, had the contractual promises been fully performed. This basis for assessing compensation is supported by the underpinning rationale of a system of law designed to support the risk management decisions of commercial parties. It is an entirely justifiable approach for charter parties, sales of goods, and construction deals, where parties have made careful calculations of the costs and benefits of entering transactions, and can reasonably be expected to carry those

⁴⁴ See for example the penalties for breach available under the *Employment Relations Act 2000* (NZ) s 4A.

costs, should they breach their deals. Long term employment relationships are rarely like that, especially when the employee is undertaking the kind of professional or managerial work typically the subject of complaints about destruction of mutual trust and confidence. (It is indeed hard to find any blue collar worker who has brought such a case.) Parties enter into these kinds of employment relationships expecting a degree of adaptability from each other, as the demands of the enterprise evolve over time. Rarely will they lock into place rigid expectations about how the job is to develop, and often these kinds of employment arrangements implicitly assume progression through promotion and improving remuneration over time. In short, contemporary employment relationships generally assume a highly flexible and open-textured set of mutual obligations, sometimes described by organizational behaviour theorists as a 'psychological contract',⁴⁵ but in reality bearing little resemblance to the features of the classical 19th century commercial contract. Apart from anything else, there is no real freedom to contract over employment terms and conditions, because statutory schemes now mandate so many aspects of the business of employing people. Certainly, when the 'psychological' employment contract breaks down, and parties end up court, the application of the hard precepts of commercial contract law can produce results which frustrate the expectations created by the 'psychological' contract. Usually it is the disappointed employee who experiences most frustrations with legal solutions, but in a rare case an employer is aggrieved to find themselves locked into to paying a significant price for exercising what they believed was a legitimate prerogative to change their minds. I am sure Citigroup contested the *Walker* case on this basis. And no doubt the Commonwealth Bank has been disconcerted by the result in *Barker*, and what it may mean for a big organisation, juggling restructuring plans.

If employment does not really conform to the expectations and philosophical underpinnings of commercial contract law, it is no surprise that it is difficult to apply the remedies from commercial contract law to employment relationships in any way that produces acceptable

⁴⁵ See Christeen George, *The Psychological Contract: Managing and Developing Professional Groups*, Open University Press McGraw-Hill, UK, 2009. See also Katherine van Wezel Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace*, Cambridge University Press, UK, 2004, at pp 88-92.

results. In the past, this difficulty was managed by the assumption that an employer could buy out all employment obligations simply by paying the employee for a relatively short period of reasonable notice. That assumption was not seriously challenged until statutory schemes were developed. The statutory schemes prompted the courts in England to develop the implied duty not to destroy trust and confidence, and in Australia, they encouraged employers to accept new obligations to guarantee their employees fair and respectful treatment, generally expressed in their own policies and procedures manuals. Employment law has found itself in a conceptually incoherent mess, because these developments are difficult to reconcile with classical contract law principles.

If statute created these developments because legislators have recognised that employment relationships are not like other commercial contracts, then perhaps it is best that statute take over the field completely, and develop a range of appropriate remedies to deal with breakdowns in employment relationships, to be applied by specialist tribunals empowered for the task.

It may be time to abandon completely the notion that employment is a contractual relationship, amenable to adjudication in the ordinary courts. Creation of a specialist tribunal, able to mediate and arbitrate employment separation disputes for the full range of employed workers (and not just those who fall within the restricted unfair dismissal jurisdiction) may be the best answer to the problem of incoherence in employment law. I feel sure that some of the saddest cases in this field – such as *State of South Australia v McDonald*⁴⁶ – would have been managed more justly had Mr McDonald been entitled to early access to the assistance of a specialist body, charged with a responsibility to arbitrate his dispute with his employer. The legal complexity of his case, in which a common law claim based on breaches of mutual trust and also a duty of care were ultimately defeated out of deference to overriding public sector employment regulations, was entirely unmanageable for an unrepresented litigant such as Mr McDonald. (But that is a whole other story, for another time . . .)

⁴⁶ [2009] SASC 219]

Of course, this was the answer buried in Phillipa's chapter all along: 'Relief may come from the legislature. It is easy to prescribe a statutory solution.'⁴⁷ Whether it is any more likely a solution today than it was when Phillipa was writing in 2005 is hard to say.

⁴⁷ Weeks above n 1 at p 194.