Case Study: Commonwealth Bank of Australia v Barker [2014] HCA 32

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Facts

• Mr Barker commenced employment with CBA in 1981.
• During his employment, he progressed to the position of bank manager.
• In 2009, his position was made redundant. His access to work emails and IT systems was cut off.
• CBA sent emails as to possible redeployment options, but Mr Barker could not access them until after the deadline for applications.
Case history

• Barker sued CBA on the basis that they had breached the implied term of mutual trust and confidence.
• In the first instance, the Federal Court found in favour of Barker.
• CBA appealed to the Full Federal Court.
• Full Federal Court found in favour of Barker 2 to 1
  o One judge of the Full Federal Court dissented on the basis that there was no implied term to breach.
Case before the High Court

• CBA appealed to the High Court.
• The question in issue:
  o *Do Australian employment contracts contain an implied term of mutual trust and confidence?*
• The High Court found that they do not.
Reasons

• CJ French, Bell and Keane JJ
  o Implied terms must be necessary;
  o There is still a general obligation for both parties to act in good faith, as there is with all other contracts

• Kiefel J
  o Express term overrides implied term, if it existed.

• Gagelar J
  o Term doesn’t exist, endorsed the dissenting judgment of Jessup J in the Full Federal Court.
Practical implications – Award staff

• Even though the term doesn’t exist, the decision does not mean that employers can act in bad faith against employees
• For Award covered employees, councils still need to consider legislative rights and statutory remedies:
  o Applications under *Industrial Relations Act*,
  o Obligations on industrial instrument
Practical implications – senior staff

- Senior staff can’t make unfair dismissal claims, but still have a number of potential avenues when terminated:
  - Section 106 – unfair contract claims (see *Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4)
  - Breach of contract – for example, clause 6.2.1
  - Misleading and deceptive conduct – section 18 *Australian Consumer Law*, formerly section 52 *Trade Practices Act*
  - Discrimination claims.