

COMMONWEALTH BANK OF AUSTRALIA v BARKER (A1/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 83

Date of judgment: 6 August 2013

Date special leave granted: 13 December 2013

The respondent was employed by the appellant ('the bank') as an executive manager in its corporate banking section in Adelaide under a written contract of employment which permitted the bank to terminate the contract, without cause, by four weeks' written notice. On 2 March 2009 the respondent was handed a letter which informed him that his current position was to be made redundant but it was the bank's preference to redeploy him to a suitable position and it would consult him to explore appropriate options. He was required to clear out his desk, hand in his keys and mobile phone and not return to work. His email facilities and access to the bank's intranet were terminated immediately. However, the human resources section of the bank, which was responsible for managing the redeployment process, was unaware until 26 March 2009 that the respondent no longer had access to his business email or mobile phone. They made a number of unsuccessful attempts to contact him by those means to inform him of the position of "Executive Manager – Service Excellence" within the bank that would have been suitable to his skill set. On 9 April 2009 the respondent was advised in writing that his employment was terminated by reason of redundancy with effect from close of business that day.

In 2010 the respondent brought proceedings against the bank for breach of his contract of employment and for damages under s 82 of the *Trade Practices Act 1974* (Cth). The claim was, in part, based upon an implied term of mutual trust and confidence in his contract of employment with the bank. The primary judge (Besanko J) found that the bank had been almost totally inactive in complying with its policies during the period after notifying the respondent of his redundancy, and that this was a serious breach of the implied term of mutual trust and confidence which sounded in damages. The respondent was awarded damages of \$317,000 for loss of the opportunity to be redeployed to a suitable position within the bank.

In the bank's appeal to the Full Federal Court (Jacobson and Lander JJ, Jessup J dissenting) there were two main issues: first, whether the contract of employment contained the implied term; and second, whether, if it did, the bank's breach of its own policies constituted a serious breach of the relationship of trust and confidence upon which the term was founded.

A majority of the Court considered that, although no High Court authority had determined the question of whether the implied term forms part of employment contracts in Australia, it had obtained a sufficient degree of recognition, both in England and Australia, such that it ought to be accepted by an intermediate court of appeal as a term implied by law. The key issue in this case was not whether the term applies at the point of dismissal, but whether it operated at a point of time anterior to and independent of the termination of the respondent's employment. The majority noted that the boundary line, between acts which occurred prior to an employee's dismissal and the dismissal itself, may be difficult to draw. But where, as here, the

bank's actions in failing to take steps to enable the respondent to obtain the possibility of redeployment were separate from and anterior to the termination of his employment, the line should be drawn in favour of the application of the implied term.

The majority considered that the bank was required to take positive steps to consult with the respondent about alternative positions and to give him the opportunity to apply for them. Instead, it failed to make contact with him for a period which the primary judge found to be unreasonable. The bank was unable to do what was required of it because it withdrew the respondent's email and mobile phone facilities without telling the person charged with the responsibility of contacting him of those facts. That was sufficient to constitute a breach of the implied term.

Jessup J held that the implied term did not form part of the common law of Australia. His Honour also considered that, even if the implied term existed, the bank's failure to comply with its own policies did not amount to a breach.

The grounds of appeal include:

- The Federal Court erred in holding that the common law of Australia requires that the contract of employment between the appellant and the respondent contained an implied term that the appellant would not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the appellant and the respondent
- The Federal Court erred in finding that the implied term of mutual trust and confidence required the appellant, on the determination of the redundancy of the respondent's position, to take steps to consult with the respondent and inform him of redeployment options in circumstances where:
 - a) it was an express term of the contract that the respondent's employment could be terminated either on four weeks' written notice or immediately with a payment of an amount equivalent to four weeks' pay in lieu of notice; and/or
 - b) any such steps would have been necessarily and directly part of the process of determining whether or not to terminate the respondent's employment