

Employment & Industrial Case Note

May 2007

Employment Contracts - Implied Duty of Good Faith

Russell –v- The Trustee of the Roman Catholic Church for the Arch Diocese of Sydney [2007] NSW SC104

Employment law practitioners have been waiting for judicial comment on whether Australian Courts would recognise an implied duty of good faith in employment contracts for some time. In the current climate of the Federal Workplace Relations legislation, it has been thought common law courts may give consideration to extending the rights of employees through such implied duties being imported into contracts of employment – given the statutory provisions relevant to employment.

The approach I have taken below is to set out various extracts from Rothman J's decision. The reader can then understand Rothman J's reasoning for arriving at his view there was such an implied duty of good faith in employment contracts. Comments follow on how the Judge dealt with the implied duty of mutual trust and confidence in the employment relationship and then how the duties apply to this particular case.

Russell –v- The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] NSWSC104

This is a decision of Rothman J of the New South Wales Supreme Court and delivered 19 February 2007.

Rothman J quoted from Justice Hoben in the decision of *Heptonstall –v- Gaskin [2005] NSWSC30*: "what is not at all clear is whether a 'trust and confidence' implied term in the contract of employment forms part of the Law of Australia ... The implication of such a term in employment contracts in Australia remains controversial and awaits clarification by an appellate court."

Rothman J: "whatever the original intension of Priestley *JA in Renard Constructions –v- Minister for Public Works [1902] 234* as to the basis of the implication of the duty of good faith in commercial contracts, there can be little doubt that the duty was, in later cases, implied as a matter of law. But I can accept, with great respect, the logic that it is impossible to determine whether the duty is necessary to render the contract efficacious, or whether the duty is inconsistent with the other requirements of the contract, unless one has in mind 'a content for the obligation of good faith and reasonableness'; *Vodafone Pacific Ltd –v- Mobile Innovations Ltd [2004] NSWCA* per Giles JA with whose judgement Sheller and Ipp JJA agreed."

Rothman J: "it is perhaps important to start with what such a duty is not. A duty of good faith is not a duty of utmost good faith. Further, a duty of good faith is something less than a fiduciary duty. The existence of the duty of good faith allows the parties to retain their economic autonomy or economic liberty: *Noranda Australia –v- Lachlan Resorters [1988] 14NSWLR1* at 15 point B, per Bryson J. See also, with unfeigned respect, the excellent discussion on the duty of good faith by Bergin J in *Maitland Main Collieries –v- Xstrata Mt Owen Pty Ltd [2006] NSWSC1235* in which her Honour confines the duty to acts necessary for the parties to have the benefit of the contract or deed. I accept that such a confining is appropriate."

Rothman J: "In the context of an employment relationship, if there is a duty to act in good faith, it imports a requirement that the person doing the act exercise prudence, caution and diligence, which would mean due care to avoid or minimise adverse consequences to the other party."

Rothman J: "In the circumstances before the Court, with the exception of terms relating to wages and an initial trial period, there are no express terms of the contract which would allow the parties to regulate their relationship. The parties envisage, as would be the case in most contracts of employment, a continuing, indefinite period of employment. During the period of employment, the Church was required to exercise its rights under the contract in a manner which directly affected Mr Russell and which were not discussed, and perhaps not foreseen, when the contract was formed. Likewise Mr Russell was required to perform work in circumstances which had a direct and binding effect on the Church and which work would be performed in the absence of direct fulltime supervision. One need only mention the overseas tours as an obvious example. In those circumstances it is impossible to imagine that a contract of employment could operate without a duty of good faith. And in those circumstances, the rights and/or duties reposed in either the employer or the employee would need to be exercised honestly and reasonably; with prudence, caution and diligence, and with "due care to avoid or minimise adverse consequences" to the other party that are inconsistent with the agreed common purpose and expectations of the parties to the contract. But all the while, the parties have the capacity to exercise their rights in their own interests."

Rothman J: "Moreover, the proposition that there does not exist a duty, at least in employees, of good faith in employment contract is contrary to significant authority. Thus if employees (or an employee) were to seek to work strictly in accordance with the terms of an express contract (often called "work to rule") without exercising good faith, such an employee or such employees would be engaged in industrial action and in breach of their contract of employment: see *Secretary of State for Employment –v- Associated Society of Locomotive Engineers and Fireman (02) [1972] to QB455.*"

MUTUAL TRUST AND CONFIDENCE

Rothman J: "much of what has been said on the duty to act in good faith is relevant to an analysis of whether there exists a duty not, without reasonable and proper cause, to act in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Rothman J: "in *Concut –v- Worrell [2000] 75ALR312* each of the members of the High Court, other than McHugh J who did not discuss the issue, came to the view, uncontroversially, that there existed as part of the contract of employment a necessary confidence between employer and employee and/or that the relationship of employer and employee at common law is one importing implied duties which included mutual trust."

Rothman J then referred to the decision of *Mahmud –v- Bank of Credit and Commerce International (BCCI) [1998] AC20* the approach in England. The following is an appropriate quotation the employer shall not: "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee see *Woods –v- WM Car Services (Peterborough) [1991] ICR666, 670.*"

EFFECT OF IMPLIED TERMS ON TERMINATION

Rothman J: "there is no authority, in Australia or in England, for the proposition that the implied terms to which I have referred apply to affect the right to terminate. The plaintiff accepts that limitation and submits that is possible for the Court to separate out the dismissal from the conduct leading up to the dismissal, namely, the conduct of the investigation and events surrounding it."

Rothman J: "an act terminating the contract of employment is inconsistent with the fulfilment of the contract of employment, its continuation, and the necessity to make it efficacious. Almost by definition, the implied duty, not to act to destroy the relationship of trust and confidence, will not interfere with the right of the party to a contract of employment to terminate the contract. It may be that the implied duty of good faith can operate at the point of termination, but it cannot operate in circumstances where the termination is, as a matter of fact and as a matter of law, without cause."

Rothman J: "however the common law must deal with the issue differently. The implied duties, of good faith and/or not, without reasonable proper cause, to conduct itself in a manner calculated or likely to destroy or damage the mutual trust and confidence between employer and employee, require a balancing, in good faith of the interests of the employer against adverse effects it may have on the employee."

Rothman J: "I have found that the Church acted in breach of its duties in failing to do that which an employer acting with prudence, caution and diligence, and balancing its rights against the potential disadvantage to its employee, should have done."

SUMMARY

Given Rothman J's analysis all employment lawyers will be examining the duty of good faith particularly in advising employers and employees on terminations of employment, employment restructures, promotions, demotions and disciplinary matters. There of course will be others. For example Senior Executive level arrangements. The Application will be looked at matters falling outside the jurisdiction of the dismissal provisions of the *Workplace Relations Act* where it will be examined even more closely.

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