



I've gone from "liking" to "loving" my role at OzChild. It is a busy and challenging, with the people being of the highest calibre. I found out this week that we have a service that facilitates and supervises custody visits by (acrimonious) parental separation. "So what" you say...then you hear that some of these people are murderers and sex offenders and these are court ordered custody rights, then things get hairy.

How do you deal with this I ask "you just think of the child's welfare" is the simple but telling reply.

This has been "fosters carer's" week. Some of you may have seen the 7.30 pm Report on foster care in Victoria on last night (Friday). Lisa Sturzenegger, OzChild's CEO, has paid tribute to our carer's (see later).

Please also note that Lisa, Phil Volkovsky (newly appointed Workplace Culture and Risk Director) and others are setting off on the Kokoda trek on 3 October. This is being paid for out of their own pockets so I'm putting out a plea to all of my generous readers to either donate (we are some **\$70,000** short) or contact me with possible sponsorship opportunities

Back to business...

The major news this week is that (thankfully) the High Court challenge in *Commonwealth Bank of Australia v Barker* that dealt with the implied term of mutual trust and confidence in employment contracts (see previous newsletter). To explain this I have "borrowed" from HR@Work sponsor **K&L Gates** who I believe have a great team of industrial relations legal eagles and hopefully won't mind 😊.

By way of commentary, when was the last time you had your contract templates checked. Common law changes are often as courts of all varieties are handing down decisions that we, as HR professionals, should be reactive to them by ensuring that risks are avoided by properly worded contracts of employment.

Recent Decisions

A win for employers: High Court of Australia rejects the expansion of employment law rights

Article by **Nick Ruskin** and **David Hartnett**, **K&L Gates** (formerly Middletons):

[<http://www.klgates.com/>]

The High Court of Australia (High Court) has handed down a much anticipated decision in *Commonwealth Bank of Australia v Barker* [204] HCA32 (10 September 2014) with respect to the implied term of mutual trust and confidence in employment contracts.

The Federal Court had previously held that employment contracts contain an implied term of mutual trust and confidence. As a consequence, employers (and probably employees) were subject to what amounted to a general obligation to treat the other party to the contract fairly or reasonably. That obligation was uncertain in its scope and extended the operation of the employers' (and probably employees') express contractual obligations.

The key issue which arose on appeal is whether Mr. Barker's employment contract contained an implied term of mutual trust and confidence.

The High Court has overturned the earlier decisions of both the Federal Court (3 September 2012) and Full Court of the Federal Court (6 August 2013) by concluding that under the common law of Australia, employment contracts do not contain an implied term of mutual trust and confidence.

The Federal Court's finding in September 2012 that employment contracts contain an implied term of mutual trust and confidence, and the Full Court of the Federal Court's confirmation of that decision in August 2013, albeit adopting a different approach, was the first time that a superior Court in Australia had made such a finding. The immediate result was a significant number of claims being made by employees alleging a breach of the mutual trust and confidence term, often in conjunction with another cause of action. The Commonwealth Bank's (CBA) appeal provided the High Court with an opportunity to settle this very contentious issue and it has done so by allowing CBA's appeal.

Facts

Mr. Barker was a long serving employee of the CBA. His employment contract stated that he would be provided with a redundancy payment if he could not be redeployed. He was dismissed on the basis of redundancy. Mr. Barker contended that CBA did not make a sufficient effort to redeploy him and that its conduct constituted a breach of the implied term of mutual trust and confidence.

The Decision

The High Court held that employment contracts do not contain a term that neither the employer nor the employee will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them. The High Court held that the term was not implied in law in employment contracts generally.

Central to the High Court's decision was the view that the implication of the term into employment contracts is not 'necessary', in the sense that would justify the exercise of the Court's judicial power in a way that may have a significant impact upon employment relationships, and the law of contract of employment in Australia. The High Court elaborated on the concept of 'necessity' by referring to terms that an employment contract implicitly requires to operate. The Court held that the concept of 'necessity' is not satisfied by demonstrating the reasonableness of the implied term.

In making its decision, the High Court concluded that it was not appropriate for it to follow the approach taken by the Courts in the United Kingdom, which have found that the implied term does exist in employment contracts. In that regard, the High Court concluded that it must be cautious to observe the dividing line between judicial and legislative powers in Australia. It concluded that importing a term of mutual trust and confidence into employment contracts would trespass into the province of legislative action in the Australian context, which is not appropriate for the judicial branch of Government.

Significance for Employers

The decision is of great significance to employers as they are no longer exposed to uncertain and ill-defined potential claims arising out of their conduct, or alleged conduct, towards employees. Employers can now take comfort that their legal relationship with their employees will be determined primarily by well-defined contract law principles and legislative provisions. Employment contracts in Australia still contain numerous implied terms; however, none of those are of such wide reaching and ill-defined scope as the purported implied term of mutual trust and confidence. The case represents a significant win for employers.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Until next time...

Greg

The following is an extract from OzChild's CEO, Lisa, on foster care week. By way of information Lisa always signs off her e-mail "yours in making a difference", and OzChild this is the credo that is practiced.

Foster Care Week Sept 14- 19 September

This week we celebrate Foster Carers all around Australia, as it is Foster Care Week.

We all know that some families are not able to care for their children. Children in our care have invariably suffered abuse or neglect – they experience severe trauma in multiple and serious ways. There are many effects on children of trauma, abuse and neglect. They can have difficulty relating to other children and/or trusting adults. They can have difficulty forming loving relationships. They can have serious learning difficulties, and their development can be seriously jeopardised. They can find it very hard to take part in ordinary activities of childhood – playing with others, being part of a cricket or footy team, or getting on well with teachers and other children at school.

Our carers and our staff are therefore always dealing with very, very complex situations. For example, a high proportion of children using our services have a disability – between 30-45% of them. And half of these had more than one disability.

We can ONLY help these children in the way they need help, through our group of wonderful volunteer carers, who provide space in their homes, their families, their hearts and their minds – to care for these children. Caring, compassionate, intelligent, sensitive and committed carers are an essential part of the 'here and now' caring that these children need – so that they are safe NOW, so that the healing they need can start to happen, and so that they can grow and develop the way they should.

So I want us all to salute our volunteer carers this week, as without them we would not be able to deliver services to our children and young people at OzChild.

We celebrated some of our carers last week at the L'Oreal Citizen Day (see some photos below) and this week were holding 3 big fundraising events all to raise fund to support our children, [young people] and carers.

- Kokoda Cocktail Party hosted by Helen Maxwell-Wright (Board Member)
- Carer Corporate Night hosted by Brain Welch (& Support Crew)
- Gala Dinner* hosted by the OzChild Gala Dinner Committee

From these events all money raised will go towards:

- Therapeutic Specialists to support Carers & Children & YP
- Educational Outreach Workers to support Children & YP
- Mentoring for our YP and adolescents at risk
- Early Intervention & playgroups for indigenous families

So take time to thank a 'Carer' this week, and follow the activity on Twitter @vicfostercare and #savefostercare

Yours in making a difference

Lisa

