The Biggest Employer – A New Challenge in Public Sector Employment

Justice G C Martin AM

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One of the biggest mistakes a speaker at a conference like this can make is to confidently predict how a recent amendment or a new Act will be construed and what its effect will be. Such predictions can be even more dangerous when the piece of legislation is unique and, thus, no consideration has been given to similar enactments. I hope to avoid those pitfalls this morning.

I want to talk to you about one small part of the *Industrial Relations Act* 2016 that has not received a lot of attention but may, depending upon the ingenuity of the lawyers and advocates involved, have a significant part to play in the development of industrial jurisprudence in this State.

The section to which I refer appears in s 4 of the Act which deals with the objects of the Act. Let me remind you, first, of s 3 which provides the main purpose of the Act:

> "**3 Main purpose**
>
> The main purpose of this Act is to provide for a framework for cooperative industrial relations that—
>
> (a) is fair and balanced; and
> (b) supports the delivery of high quality services,
> (c) economic prosperity and social justice for Queenslanders."

Section 4 tells us how that main purpose is to be achieved. It includes things such as (c) and (d):

> "**4 How main purpose is primarily achieved**
>
> The main purpose of this Act is to be achieved primarily by—
> …
>
> (c) promoting and facilitating security in employment and consultation about employment matters, technological change and organisational change; and
> (d) providing for a fair and equitable framework of employment standards, awards, determinations, orders and agreements; …"

But, for today's purposes I want to direct your attention to (e) – a sub-section which is new and which does not appear in any other industrial legislation in Australia. Note that I said Australia. This section has a New Zealand counterpart. I will return to the law across the ditch later.

Section 4(e) provides:

> "The main purpose of this Act is to be achieved primarily by—
>
> …

> (e) promoting productive and cooperative workplace relations including by **recognising *mutual obligations of trust and confidence* in the employment relationship**;"

So, why should you be interested in this sub-section, one of 18 in s 4?

The answer lies in the use to which objects sections in legislation may be put. This is most clearly found in s 14A of the *Acts Interpretation Act*. That section provides:

> "**14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

Of course s 4 is not the only statement of purpose in the Act. As you go through the statute you will find other objects which are applied to particular areas. For example, s 163 sets out the purpose of the chapter dealing with collective bargaining.

In this Act, the main purposes of s 3 are few, but the means of achieving them, in s 4, are many. The statutory purpose will not always be a complete or even partial solution to construing the statute. For example in *Carr v Western Australia*,[1] Gleeson CJ said:

> "That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."

Let me, then, come back to the language of s 4(e). It requires the recognition of mutual obligations of trust and confidence in the employment relationship. Let's look at the first and last words in that extract:

> "**recognising** mutual obligations of trust and confidence in the employment **relationship**"

What does "recognising" mean in these circumstances? Minds may differ on this, but one possible meaning is the acknowledgement of the existence of something. For example, I recognise your right to be paid overtime. But, does that simply beg the question? As we all know, there is at common law, no implied duty of trust and confidence. That was decided by the High Court in *Commonwealth Bank of Australia v Barker*[2] – a case to which I will return.

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[1] (2007) 232 CLR 138 at 143.
[2] (2014) 253 CLR 169.

How then can those mutual obligations be recognised? Once again, this is a matter which will need close examination should it come before the Court or the Commission. But, the *Acts Interpretation Act* does allow reference to extrinsic material including the following:

> "**14B Use of extrinsic material in interpretation**
>
> Extrinsic material includes:
>
> (b) a report of a royal commission, law reform commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted; and
>
> (c) a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted; and
>
> …
>
> (e) an explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, the Legislative Assembly by the member bringing in the Bill before the provision was enacted; and
>
> (f) the speech made to the Legislative Assembly by the member when introducing the Bill;"

Let's consider, then, the history of this subsection. The first expression of this idea is in the report of the Industrial Relations Legislation Reform Group – often referred to as the McGowan report.[3]

In chapter 9 of the report, reference is made to *Commonwealth Bank v Barker* and the following is said:

> "This decision has particular relevance in the public system due to the nature of public sector employment. The Review is concerned that this High Court decision has the potential to have a deleterious effect on the employment relationship in the Queensland industrial relations system."[4]

The report made this recommendation:

> "That, consistent with the proposed principal object (e), in relation to productive and cooperative workplace relations, the legislation provide that the Queensland Industrial Relations Commission, in exercising a power or function, give effect to the need to observe mutual obligations of trust and confidence."[5]

The review group noted the strong opposition to this proposal from the employer groups.

The next step was the introduction of the Bill and the Explanatory Note. The only reference of any importance in the Explanatory Note was:

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[3] Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland*, December 2015 <https://s3.treasury.qld.gov.au/files/review-of-qld-industrial-relations-framework.pdf>.
[4] At 93.
[5] At 94.

> "The Bill reframes the objects of the legislation around a fair and balanced system, the primacy of collective bargaining and **recognising obligations of mutual trust and confidence**;"[6]

In accordance with the usual procedures, the Bill was referred to the relevant committee. That committee reported that it was not able to reach a majority decision on a motion to recommend that the Bill be passed. In that circumstance, the utility of the report in construing the Act is greatly diminished. It is interesting, though, to note that the committee included in its report some advice it had received about the effect of s 4(e). That advice, which came from the relevant government department, included the following:

> "Queensland's existing industrial framework provides employees with a range of protections and avenues to appeal and seek redress where an employer exceeds or breaches their legal duties. In addition, the Bill proposes enhancements to this range of protections including through the introduction of general protections and genuine consultative obligations, and the further institutionalisation of good faith bargaining principles. Therefore, it is anticipated that the practical implications of the inclusion of the term itself in the objects will be limited in that it is intended that the term supports rather than expands existing protections for employees."[7]

That analysis is, with respect, difficult to follow, inconsistent with the Report and the Explanatory Note, and may be regarded by some as being of little assistance. The Second Reading Speech did not touch upon this issue.

The issue, then, is does the Act create and apply mutual obligations of trust and confidence? Well, the answer is not obvious. Presumably, the requirement to "recognise" will fall on employers, employees and the Industrial Tribunals. But, that recognition may only apply to matters within the jurisdiction of the Commission and the Court. This "recognition" is for the purposes of the Act and so is most unlikely to survive outside the purview of the Act. There is also no obvious intention to create a duty for any other purposes.

The last word in the extract of s 4(e) is "relationship". This is an interesting use of the word because the Act is replete with references to contracts of employment or employment contracts but the only other reference to an employment relationship is in Schedule 1 where the relationship of employer and employee is referred to as being one factor in the definition of industrial matter. Much has been written about the difference between an employment contract and an employment relationship. They are not completely congruent but overlap to a significant extent. Now, though, is not the time to revisit that analysis. It will be enough to note that the employment relationship generally covers more aspects than the contract does.

So, what does s 4(e) do? Does it insert into the employment relationships covered by the Act the mutual obligations of trust and confidence? Or does it assume their existence and require that they be taken into account? Or does it do something else? One of the benefits of being a judge is that when confronted by a hard question you can sometimes require further submissions. I'm not asking for them now but you would be wise to consider these issues if the chance arises.

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[6] Explanatory Notes, Industrial Relations Bill 2016, 2.

[7] Cited in Finance and Administration Committee, Parliament of Queensland, *Industrial Relations Bill 2016: Report No. 32, 55th Parliament* (2016), 5.

What, though, is the position if those obligations are indeed created or are implied into the employment relationship? That is where we need to consider the ambit of the obligations and the consequences to a party to the relationship who breaches them.

The history of this mutual obligation is traced in great detail in the decision of Jessup J in the Full Court of the Federal Court of Australia's decision in *Commonwealth Bank of Australia v Barker*.[8] His Honour was in dissent but much of his analysis was upheld by the High Court of Australia.

Let me remind you of the basic facts in that case. Mr Barker had been employed by the bank for more than 30 years. He was an executive manager and under the terms of his employment contract there was a provision concerning redundancy and entitlement to compensation under certain circumstances. In early 2009, the bank decided to make his position redundant. He was informed of that decision and was told that while the bank would like to redeploy him, if that did not happen then his employment would be terminated at some future date. He had to hand back his office keys and his mobile phone and his bank email account was terminated. The bank had intended to offer him assistance with redeployment in accordance with its policies. Unfortunately for both sides, the bank tried to make contract with him through his now dead email account. Further efforts were made but they were unsuccessful and his employment was terminated. He commenced proceedings against the bank seeking damages for breaches of various terms of his contract including a breach of the implied term which we have been discussing.

The trial judge held that the bank had breached its policies and had breached the implied term and that the breach sounded in damages so that Mr Barker was entitled to recover for the loss of the chance of redeployment.

On appeal, the majority did not consider that it was a breach of the policies that enlivened the implied term. They held that the bank was required to properly engage with Mr Barker in respect to any possible redeployment and that the failure to do this resulted in a breach of the implied term.

When the matter eventually got to the High Court the appeal by the bank was unanimously dismissed. There were, though, three separate judgments. French CJ, Bell and Keane JJ together held that the implication of a term of mutual trust and confidence was beyond the bounds of the "legitimate law making function of the courts". This conclusion was arrived at after a review of the history and evolution of both employment contracts and employment relationships. Their Honours carefully examined the English cases which gave rise to the decisions in Australia in which some judges determined that the implied term did, in fact, exist. They observed that the decisions of the House of Lords in *Johnson v Unisys Limited*[9] and *Malik v Bank of Credit and Commerce International*[10] serve to emphasise the difference in the history of employment relationships and of industrial relations generally in Australia when compared with that which exists in the United Kingdom. Further, they took into account that the statutory framework is not uniform across Australia because of the nature of the federation. In particular, they observed that judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian

[8] (2013) 214 FCR 450.
[9] [2003] 1 AC 518.
[10] [1998] AC 20.

judges must "subject [foreign rules] to inspection at the border to determine their adaptability to native soil".[11]

Their Honours went on to say that the common law in Australia must evolve within the limits of judicial power and not trespass into the province of legislative action. They went on to say:

> "The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine."[12]

It is arguable, then, that the legislature has taken up that indication and embraced it in terms of s 4(e).

The final question to be considered is: what is the content of these mutual obligations? Some serious issues arise and I will describe some of them – not as answers to the questions I ask but as markers for consideration. Three in particular need thought.

First, how will this duty intersect with legislated norms of conduct? For example, the Act provides for reinstatement and the principles which must be observed. The Act provides for dealing with adverse action and the principles which must be observed. As Jessup J observed in the Full Court any general implied term of trust and confidence may overlap with standards of employer conduct legislated by occupational health and safety laws and various anti-discrimination statutes. His Honour expressed a general concern that an obligation of this type may be too indeterminate and would risk interfering or overlapping with statutes designed to regulate workplace conducts. Of course, as I have observed earlier, this mutual obligation would only apply to matters within the purview of the *Industrial Relations Act*. But, that Act now has a very wide area of effect.

Secondly, is there any room, now, for an order for compensation for breach of the obligation? The *Industrial Relations Act* has no equivalent of s 392 of the *Fair Work Act* 2009 which prohibits the Fair Work Commission from awarding compensation in respect of hurt or humiliation in a wrongful dismissal case. That section was designed to override the decision in *Burazin v Blacktown City Guardian Pty Ltd*.[13] Would it be possible, for example, for compensation to be awarded to the maximum of six months on a reinstatement case where such an award might not otherwise have been made?

Thirdly, the public sector and local government area is awash with directives and policy statements. The interaction between a mutual obligation and several of those directives could be problematic.

Finally, I made an earlier reference to New Zealand. That country enacted the *Employment Relations Act* in 2000 and it includes as one of its objects the building of:

> "productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship -

[11] At 185.
[12] At 195.
[13] (1996) 142 ALR 144.

(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."

That section has been the subject of some consideration in the New Zealand Court of Appeal[14] but has yet to be examined closely. It may be of some assistance. It is, though, one of those areas where you must subject any decisions to inspection at the border to see whether they will die or thrive in this country's legal soil.

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[14] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.