The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence

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The common law of employment resides to a very large extent in the implied terms of the contract. The law sees these terms as so inherently a feature of 'employment' that they will be implied into all employment contracts in default of express provision. One would expect then, as society changes, as relationships between employer and employee evolve, that there would be a steady, if slow, increase in the list of implied terms. That has not, however, been the case - or if it *is* the case, the time-frame is still too short to observe it in operation. Arguably, the entire twentieth century saw only *one* addition to the list.[1] That addition is the duty of the employer to be 'good and considerate' to the employees - alternatively presented as the employer's part of a duty of 'mutual trust and confidence'. It appeared in Britain in the late 1970s, as a development from the statutory provision of remedies for unfair dismissal and the associated concept of 'constructive dismissal'.[2] The operative statutes[3] were interpreted to extend the

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1 This involves interpreting the so-called 'duty not to obey orders in an unreasonable manner', put forward in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, as merely the operation in the particular circumstances of the case of the established duty to obey orders.

2 This process of appearance is elaborated below. I do not wish to suggest that the concept of 'constructive dismissal' has any necessary identity with that of 'mutual trust and confidence'. The latter derives from the common law contract; the former is a statutory device activating rights based on an unfair dismissal. Conduct found to amount to a constructive dismissal may or may not amount also to a breach of the implied contractual duty. However, it is important to be aware of the distinction between the two concepts - particularly since the statutes, and the judicial interpretation of them, vary between Australia and Britain. For a detailed analysis of 'constructive dismissal' in these, and other, jurisdictions, see G McCarry, 'Constructive Dismissal of Employees in Australia' (1994) 68 *Australian Law Journal* 494.

3 *Trade Union and Labour Relations Act 1974* (UK) sched 1, para 5(2)(c), and subsequently the *Employment Protection (Consolidation) Act 1978* (UK) s 55(2)(c).

remedies to situations where the employee had left the employment in response to conduct of the employer not qualifying as an actual dismissal. Since then, the duty has been recognised in actions on the contract independent of statute. As the new century opens, it is timely to consider the development of the duty since its conception just over 20 years ago.

However, before examining the contractual duty, it is important to make clear that it is not coterminous with constructive dismissal. The central factor in constructive dismissal is to be able to categorise the employee's ceasing employment as a dismissal - in the words of the relevant ILO Convention, a termination 'at the initiative of the employer'.[4] Once that is established, there remains the question of whether that termination was, in street parlance, 'unfair' – the various legislative instruments use adjectives such as harsh, unjust, unreasonable, in various orders.[5] Where an employer breaches the duty of trust and confidence and the employee leaves the employment as a result, this will amount to a constructive dismissal that is 'unfair'. However, there can be constructive dismissals that do not involve breaches of the duty, and even constructive dismissals that are not unfair.[6] There can also be breaches of the duty that do not eventuate in constructive dismissal, where the employee does not elect to treat the breach as releasing him/her from further obligations, or where the employee is not aware of the breach until after the contract has been terminated in some other manner (as occurred in *Malik v Bank of Credit and Commerce International SA (in compulsory liq)*.[7] This 'relationship but not identity' of the two concepts means that care must be taken in using unfair dismissal cases in an analysis of the common law duty. That said, it remains true that the common law duty was first acknowledged in unfair dismissal cases - where the conduct of the

4 *ILO Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, [1994] ATS No 4, art 3 (entered into force 23 November 1985) (hereafter 'Termination of Employment Convention').

5 See, eg, *Workplace Relations Act 1996* (Cth)s 170CA ff, *Industrial Relations Act 1996* (NSW)s 84 ff.

6 In *Blaikie v SA Superannuation Board* (1995) 65 SASR 85, 104-5, Olsson J refers to such cases, quoting from the decision of the New Zealand Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372:

> The concept [constructive dismissal] is certainly capable of including cases where an employer gives a worker an option of resigning or being dismissed; or where an employer has followed a course of conduct with the deliberate purpose of coercing a worker to resign ...

7 [1997] ICR 606.

employer precipitating the termination was identified as being of such a nature as to constitute a breach of the newly identified contractual obligation.

Prehistory of the Duty

The duty itself first saw the light of day in *Courtaulds Northern Textiles Ltd v Andrew*, a judgment of December 1978, reported in 1979.[8] But in November 1977 (reported 1978), the case of *Western Excavation (ECC) Ltd v Sharp* [9] acted as harbinger. In this case, a man sought compensation for an unfair dismissal under the *Trade Union and Labour Relations Act 1974*. Schedule 1 of that Act defined dismissal to include, in para 5(2)(c), the situation where 'the employee terminates [the] contract with or without notice in circumstances such that he is entitled to terminate by reason of the employer's conduct'. The facts were that the employer had mitigated an intention to dismiss Sharp for misconduct to a five-day suspension without pay. He needed money for the family and asked for his accrued holiday pay or a loan. The employer refused and so Sharp resigned in order to receive his holiday pay. An industrial tribunal held that the circumstances came within para 5(2)(c), and awarded compensation. The Employment Appeal Tribunal dismissed an appeal, but the Court of Appeal allowed it. Counsel for the employee argued that para 5(2)(c) imported a concept of reasonableness into contracts of employment - that an employee's leaving would come within the paragraph by virtue of the concept that the employer must act reasonably in his treatment of the employees. If the employer did not and the employee left, the leaving would come within para 5(2)(c). The Court of Appeal rejected this argument of a statutory concept of reasonableness. They preferred a 'contract test'. An employee's leaving would come within the paragraph when it followed a repudiation by the employer. In other words, they held that para 5(2)(c) covered a standard rescission for repudiatory breach.[10] There was no breach of contract by the employers, and therefore Sharp's leaving was not a 'dismissal' that could

8 [1979] IRLR 84.

9 [1978] IRLR 27.

10 Throughout this article, I have referred to 'rescission' rather than 'termination' to indicate one party's releasing him/herself from further obligations under the contract in response to a repudiatory breach by the other party. While this may leave open a possible confusion with a rescission *ab initio*, I consider the chance of confusion greater in using the term 'termination', which does not distinguish between lawful and unlawful terminations. None of the references to 'rescission' herein are to rescission *ab initio*.

give rise to a right to compensation under the statute. It is important to note that the 'reasonableness' requirement was not argued to derive from the contract, but from the statute itself. If the paragraph in question operated only on straightforward rescissions, then there was nothing in the contract to justify Sharp's leaving as such. For constructive dismissal to lead to the present day implied duty, it would have to be found to exist in the contract.

A step in that direction had already been taken in *Isle of Wight Tourist Board v Coombes*,[11] though it was not referred to in *Western Excavating*. In *Isle of Wight*, a director had said of his personal secretary that she was an 'intolerable bitch on a Monday morning'. The Employment Appeal Tribunal described the comment as having shattered the relationship of complete confidence that must exist between a director and a personal secretary, justifying the secretary in rescinding. Arguably, the necessity of this relationship arose out of the particular nature of the job of a 'personal' assistant, and was not such as to give rise to any general obligations on employers.

Judicial Recognition of the Implied Duty - Great Britain

While 'a duty to be good and considerate' is a useful shorthand phrase, it does not clearly indicate what is involved in the duty. Much more useful is the statement that employers must not, without reasonable and proper cause, conduct themselves in a manner calculated to destroy or damage seriously the relationship of confidence and trust between the parties. That phrasing was adopted in the identification of a general duty in the case of *Courtaulds Northern Textiles Ltd v Andrew*.[12] In that case, the conduct in question was the statement by an assistant manager of the employing company to a competent employee of some 18 years standing that: 'You can't do the bloody job anyway'. Arnold J, in the Employment Appeal Tribunal, noted that the comment had arisen out of a 'row', that it was not in fact the assistant manager's opinion of the employee, and that the employee was known to the employer to be a proud man, 'upset by things which were said to him'[13] - presumably things said in criticism. Having accepted the proposition of counsel for the employee that there was an implied term as formulated at the beginning of this paragraph, Arnold

11 [1976] IRLR 413.
12 [1979] IRLR 84.
13 Ibid.

J held the circumstances to amount to a repudiatory breach of that term:

> Here is a man, a sensible man, with a long record of satisfactory work in a supervisory capacity whose immediate superior in the management ladder thinks that he is a good workman and thinks that he can do his job properly. Nevertheless, in those circumstances, that manager says to him 'You can't do the bloody job'. Now it seems to us that, in those particular circumstances, that is conduct which is likely to destroy the trust relationship which, in the circumstances, is a necessary element in the relationship between this supervisory employee and his employers.[14]

Thus, knowingly unwarranted criticism is a repudiatory breach of the implied duty. However, the decision does not extend to all criticism. Arnold J concluded his judgment by saying:

> We should be sorry if it were thought that anything we have said suggests that criticism, even as trenchantly expressed as was this criticism, of a workman's performance would necessarily, and in every case, lead to the conclusion that the voicing of that criticism constituted conduct of a repudiatory nature so as to lead to constructive dismissal ... Where criticism is made, however trenchantly, because criticism is thought to be appropriate, then the circumstances of each case would plainly have to be considered with a view to a decision on the merits of the particular matter whether or not the repudiatory conduct is made out.[15]

In *Post Office v Roberts*,[16] a breach was found in rejecting a transfer on the ground that there were no vacancies in the area to which the employee was moving, when in fact the reason behind the rejection (which was followed by the employee resigning) was an unfavourable performance review of which she had not been informed. The Employment Appeal Tribunal found that this amounted to a repudiation by the employer. They stated that there does not have to be deliberate conduct or bad faith for the employer to be in breach. In discussing the nature of the employer's conduct, the Employment Appeal Tribunal stated that 'if there was evidence to support a finding that ... employers were deliberately singling [an employee] out for special treatment inferior to that given to everybody else and that they were doing it arbitrarily, capriciously and inequitably',[17] that might well justify a claim based on constructive dismissal.

14 Ibid 86.
15 Ibid.
16 [1980] IRLR 347.
17 Ibid 352.

The existence of the duty, and what constitutes a breach of it, came before the Court of Appeal in *Woods v W M Car Services (Peterborough) Ltd*[18] in 1982. The conduct in question is described in the judgment of Lord Denning MR. Following the take-over of a garage business by the respondents, who kept the staff on,

> [t]he new management got on well with most of the staff. The management had no complaints. But they thought that Mrs Woods was rated too highly and that she was being paid too much for the work that she did. So they tried to persuade her to take less or to work longer hours. She resented this. She refused. They gave in. Much friction arose. She went to solicitors. They told her to keep a note of anything untoward that took place. She did so. Over the next four months there were several incidents. It would be tedious to go through them. They seem trivial to an outsider but both parties magnified them out of all proportion. All trust and confidence was lost on both sides. Finally, only four months after the takeover ... her solicitors advised her to leave.[19]

The headnote reveals that the additional incidents included omitting 'chief' from her previous job description of 'chief secretary and accounts clerk'. The employee applied for a remedy under the *Employment Protection (Consolidation) Act 1978* (UK) as having been constructively dismissed. The issue before the Court of Appeal was whether the Employment Appeal Tribunal (and the Court of Appeal itself) were entitled to interfere with the finding of the original industrial tribunal that the employer's conduct did not amount to a repudiation. All three judges held that such interference was not permissible, the finding being one of fact. Only Lord Denning MR had anything to say about the nature of the duty itself:

> It is the duty of the employer to be good and considerate to his servants. Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them: see *Courtaulds Northern Textiles Ltd v Andrew* ... But I prefer to look at it in this way: the employer must be good and considerate to his servants. Just as a servant must be good and faithful, so an employer must be good and considerate.[20]

He did not canvass whether in his opinion that duty had been broken, since it was a question of fact for the original tribunal. However, the survey of the cases, which precedes the judgments, notes that the Employment Appeal Tribunal had considered there was no repudia-

18 [1982] ICR 693.

19 Ibid 695-6.

20 Ibid 698.

tory breach on the facts, but had been unable to interfere with the finding of the industrial tribunal unless it was impossible or perverse, which they concluded it was not.

In *Bliss v South East Thames Regional Health Authority*,[21] the question of the implied duty not to destroy or damage mutual trust and confidence arose in the context of a claim for damages for its breach. The precise conduct of the employer in that case that allegedly constituted a breach of duty was the employer's requiring the plaintiff, a consultant orthopaedic surgeon, to undergo a psychiatric examination. This requirement followed a breakdown in the plaintiff's relations with another of the consultants at the relevant hospital, and the plaintiff's sending of some heated letters of complaint about the other consultant to members of the hospital administration. The administration, encouraged by the other consultant, had interpreted the matter as indicating paranoia on the plaintiff's part. The plaintiff refused to undergo the examination, and was suspended from duty. Subsequently, a committee of inquiry decided in favour of the plaintiff - there was no pathological behaviour by him, but rather a severe degree of breakdown of relations within the Orthopaedic Department. The suspension was lifted, but the plaintiff chose to leave, on the basis that the employer had repudiated the contract, and sued for damages for the breach. At first instance, the Court agreed that the employer had repudiated the contract, but held that, by not indicating an intention to rescind until two months after the report of the committee of inquiry and the lifting of the suspension, the plaintiff had affirmed the contract. The judge therefore limited damages to the period of the suspension. On appeal, the Court of Appeal held that there had been no affirmation, the employer having agreed to give the plaintiff time to decide whether or not to return to the hospital as a consultant. Dillon LJ noted that the judge at first instance had stated that *any* breach of the relevant implied term was repudiatory:

> I do not find it necessary to generalise. There must be some breaches at least of such an implied term which are fundamental and repudiatory and go to the root of the contract, and if ever there was a breach of such a term going to the root of the contract, it was this. It would be difficult, in this particular area of employment law, to think of anything more calculated or likely to destroy the relationship of confidence and trust which ought to exist between employer and employee than, without reasonable cause, to require a consultant surgeon to undergo a medical, which was correctly understood to mean a psychiatric examination, and to suspend

21 [1985] IRLR 308.

> him from the hospital on his refusing to do so .... what [the defendant] did was by any objective standard outrageous.[22]

In *United Bank Ltd v Akhtar*,[23] an employer's conduct in requiring an employee to transfer his place of employment from Leeds to Birmingham at short notice and without financial assistance was also held to be a repudiatory breach of the implied duty. This was so despite the presence in the contract of an express clause whereby

> [t]he bank may from time to time require an employee to be transferred temporarily or permanently to any place of business which the bank may have in the United Kingdom for which a relocation allowance or other allowances may be payable at the discretion of the bank ...[24]

The employer argued that, since the clause entitled it to transfer employees without paying an allowance, it could not be a repudiation of the contract to do so. The operation of the implied term was effectively excluded in relation to the matter. The Employment Appeal Tribunal dismissed that argument. Of the employer's conduct, Knox J said, quoting the judgment of the initial tribunal hearing:

> In a nutshell (and putting the most charitable interpretation on the facts from the employer's point of view) this is a case of a small employee being crushed by a stunning ineptitude and lack of foresight or understanding of what decisions taken in London mean to a £100 a week clerk in a branch in the provinces. If that were not the case, and if the negative attitude and response of the bank were deliberate, then they were the actions of a callous and indifferent employer consciously seeking to drive out from its employment an employee without wishing to compensate him in any way by way of redundancy or otherwise.[25]

His Honour also referred to the decision of the Employment Appeal Tribunal in *Woods v W M Car Services (Peterborough) Ltd*,[26] in which Browne-Wilkinson J had stated, after citing the formulation of the duty in *Courtaulds*:

> To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

22 Ibid 315.
23 [1989] IRLR 507.
24 Ibid 509.
25 Ibid 511.
26 [1981] IRLR 347.

As to the effect of the discretion in the express 'mobility' clause, Knox J went on:

> The ... principle, which is enunciated by Mr Justice Browne-Wilkinson's judgment ... is capable of applying to a series of actions by an employer, which individually can be justified as being within the four corners of the contract because we take it as inherent in what fell from Mr Justice Browne-Wilkinson that there may well be conduct which is either calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, which a literal interpretation of the written words of the contract might appear to justify, and it is in this sense that we consider that in the field of employment law it is proper to imply an over-riding obligation in the terms used by Mr Justice Browne-Wilkinson, which is independent of, and in addition to, the literal interpretation of the actions which are permitted to the employer under the terms of the contract.[27]

With respect, the reasoning of the Employment Appeal Tribunal is unconvincing.[28] Certainly it goes further than is necessary to resolve the particular dispute. I would suggest that it is totally illogical to argue that conduct of an employer that is expressly authorised by an employment contract can amount to conduct likely to destroy the trust and confidence necessary to the relationship created by the contract. However, to say that is not to say that such express clauses amount to a 'contracting out' of the implied duty. All that they do is to specify details of the operation of that implied duty. Any conduct not covered by the express authorisation can still be a breach by the employer. This was made clear by Lord Steyn who pointed out, in *Johnson v Unisys Ltd*,[29] that the trust and confidence term is not an implication of fact but one of law: 'It is an overarching obligation implied by law as an incident of the contract of employment ... It requires at least express words or a necessary implication to displace it or to cut down its scope'.[30]

27 [1989] IRLR 507, 512. A similar decision was made in the later case of *French v Barclays Bank plc* [1998] IRLR 647, where the employer changed the terms of relocation allowances and loans, such that the benefits available to French were substantially less than those made available to other employees in the past.

28 As pointed out also by Douglas Brodie, 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Journal* 121, 126-8.

29 [2001] 2 WLR 1076, 1088.

30 On the issue of 'contracting out' of the implied duty of trust and confidence, see also Douglas Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial Law Journal* 79, 82-6. It is to be noted that Lord Steyn in *Johnson v Unisys Ltd*, ibid 1084, referred to Brodie's interpretation as 'different' from his own, effectively rejecting it on that particular point.

Employer action in relation to matters *outside* the contract of employment can in appropriate situations amount to conduct in breach of the duty. It was stated in *Imperial Group Trust v Imperial Ltd*[31] that for the employer to consent unilaterally and differentially to alterations to terms of a pension scheme would amount to a breach, even though the pension scheme had a legal existence separate from the contract of employment.

In *Smyth v Croft Inns Ltd*,[32] the conduct allegedly in breach was the failure of the owner of a bar in a Protestant neighbourhood to take any steps when a Catholic barman received threats from loyalist customers, merely telling the employee he could 'stay or go'.[33] The Northern Ireland Court of Appeal accepted the industrial tribunal's categorisation of the situation as one of 'apparent complete lack of sympathy and concern' and of 'total indifference', whereby the employers 'simply washed their hands of the problem and quite literally hoped that the problem would go away'.[34] As a result, the Court found that the employee had been constructively dismissed.

Judicial Recognition of the Implied Duty - Australia

Perhaps the earliest Australian discussion of the implied duty of trust and confidence is that of Olsson J in *Blaikie v S A Superannuation Board*.[35] However, the point at issue was not whether such a duty had been breached, but whether the employee had resigned or had been retrenched. The apparent resignation was held to have been forced by the conduct of the employer, with the result that the employee was entitled to retrenchment benefits under the *Superannuation Act 1988* (SA). Thus, the central question was whether there had been a constructive dismissal, but in the course of examining that question, Olsson J referred briefly to Browne-Wilkinson J's finding in *Woods v W M Car Services*[36] that there was an implied term that the employer

31 [1991] ICR 524.

32 [1996] IRLR 84.

33 Ibid 86.

34 Ibid 87.

35 (1995) 65 SASR 85. There had, of course, been earlier discussions of *constructive dismissal* in the context of unfair dismissal claims - some of them referred to in *Blaikie* itself. Subsequently, the decision in *Blaikie* as to the meaning of 'retrenchment' was approved and followed in two further superannuation cases - *Wilson v S A Superannuation Board (No 2)* (1996) 64 IR 226 and *Morante v S A Superannuation Board* (1998) 82 IR 318 - but neither case raised issues of the implied duty of trust and confidence.

36 [1981] ICR 666.

would not act so as to destroy the relationship of confidence and trust. It is (very strongly) implied that his Honour considered the employer's conduct in question would have amounted to a breach of that term:

> What occurred was little short of unconscionable. The sanctity of contract having been jettisoned to the four winds, the applicant was, for all practical purposes, denied adequate access to his legal adviser and not allowed an extension of time for that purpose. In essence 'the gun was pointed at his head' and he was required to accept what had been put to him, or suffer the threatened potential adverse consequences. It is small wonder that, as he said, he 'panicked' and felt that he had no option but to sign the instrument of resignation tendered to him.[37]

The existence of the implied duty of trust and confidence was recognised even more directly in *Russian* v *Woolworths (SA) Pty Ltd*,[38] a case arising out of a claim for compensation for unfair dismissal under s 105 of the *Industrial and Employee Relations Act 1994* (SA). The basic issue was whether or not there had been a 'dismissal' within the meaning of the Act. The employer had attempted an immediate demotion of the employee, in which the employee had not acquiesced. However, the employee - though absenting himself from work - had supplied medical certificates, and had retained and continued to use the company car supplied to him. These facts gave rise to two questions: first, was the attempted unilateral demotion conduct entitling the employee to bring the contract to an end? Second, if so, had the employee acted upon the conduct so as to bring the contract to an end? The first question led the Commission to consideration of the implied duty. The second question was concerned more with the concept of constructive dismissal. The Industrial Relations Court of South Australia referred to the British authorities - *Western Excavating (ECC) Ltd v Sharp*,[39] *Woods v W M Car Sevices (Peterborough) Ltd*,[40] *Post Office v Roberts*[41] - and to the New Zealand case of *Auckland Shop Employers Union v Woolworths (NZ) Ltd.*[42] The Court stated that

37 (1995) 65 SASR 85, 106. To underscore the strength of this passage, it should be noted that the applicant had been Chairman and Chief Executive of the SA Health Commission, and the standover tactics described by Olsson J had been part of negotiations in which the State Premier was a participant.

38 (1995) 64 IR 169.

39 [1978] IRLR 27.

40 [1982] ICR 693.

41 [1980] IRLR 347.

42 [1985] 2 NZLR 372.

in *Blaikie*,[43] Olsson J had described the New Zealand case as having 'accurately summarised the modern Australian law on conduct by an employer justifying resignation on the employee's part resulting in warranting a finding of constructive dismissal'.[44] On the basis of these authorities the Court held that the employee was entitled to treat himself as discharged from the contract. Further, they considered that, despite the presentation of medical certificates and retention of the company car, the employee had elected to treat the contract as at an end with the result that there had been a dismissal by the employer within the meaning of s 105 of the Act.

Three points need to be made about the case of *Russian*. First, the Court, in its reference to and lengthy quotation from the authorities mentioned, clearly accepted the existence of the duty of trust and confidence. Second, they did not examine whether or not the duty fulfilled the requirements of 'necessity' of implication as outlined in *Byrne v Australian Airlines*.[45] Third, it was not really necessary for the determination of the case to establish an implied duty of trust and confidence (and a breach thereof). The relevant employer conduct was an attempted demotion and consequent salary reduction. This was an attempted unilateral variation of the express terms of the contract, involving a clear repudiation giving the employee the right to rescind.[46] The second and third points thus detract from the strength of the acceptance referred to in the first point.

A more lukewarm acceptance of the implied duty not to destroy or damage the relationship of trust can be found in *Brackenridge v Toyota Motor Corporation Australia Ltd.*[47] The case was heard in the Industrial Relations Court, being an application under the *Industrial Relations Act 1988* (Cth) claiming that the employee had been unlawfully dismissed. The applicant also claimed damages for breach of implied terms in the contract, in the Court's associated jurisdiction. Beazley J rather unenthusiastically referred to the duty. Her Honour noted that the court in *Bliss* had found such a duty, stated that it 'might be considered to be the reverse obligation of good faith which an employee

43 (1995) 64 IR 145.

44 (1995) 64 IR 169, 172.

45 (1995) 185 CLR 410. The variation in the British and Australian tests for implication of a term are discussed below at pp 42-3.

46 On this point, we may note that there was no reference to the implied duty of trust and confidence in the decision, on appeal, of the South Australian Supreme Court, the question there being whether Russian had unequivocally elected to accept the unilateral demotion as a termination of his contract.

47 (1996) 67 IR 162.

has to an employer', and stated that she was 'prepared to assume for present purposes that there was such an implied term'.[48] However, she did not consider that it had been breached by the respondent employer. The proceedings had resulted from an argument between the applicant, a canteen chef supervisor at one of the employer's plants, and the chef supervisor at another plant over the transfer of certain canteen assistants. There was a contest in evidence as to what took place, the other supervisor alleging that the applicant had physically attacked her. The incident was reported to management. Management conducted an inquiry with extensive interviews of the 'combatants' and others. The allegations were detailed to the applicant, and she was invited to reply in writing within a week. This was done via the applicant's solicitors. The applicant was then demoted to a non-supervisory position but without immediate diminution of salary (though award increases would be passed on only on the basis of the job actually done and not the previous one). Through her solicitors, the applicant treated this as justifying her in leaving and bringing proceedings, which was foreshadowed unless the demotion was revoked. In considering the claim that there had been an unlawful dismissal within the meaning of the *Industrial Relations Act 1988*, Beazley J found that there had not - the employer having acted reasonably.[49] Thus, when turning to the associated claim for damages based on alleged breach of the implied term, her Honour stated:

> Assuming that there was such an implied term, I do not consider that the term has been breached by the respondent. I have set out in detail the investigations which the respondent undertook ... I have stated my view that those investigations were proper and appropriately carried out. I have also expressed my view that the respondent's action after having conducted the investigation was reasonable. The respondent's conduct did not amount to breach of such an implied term.[50]

Beazley J might possibly have referred to the implied duty more positively, had the employer's conduct been clearly 'unreasonable'. As it was, it was not strictly necessary for her to make a decisive finding as to the existence of the duty, since - on her analysis - even had it ex-

[48] Ibid 190.

[49] Though there was a finding of a failure to give all the reasons for the demotion, and therefore of an opportunity to be heard on the reasons not communicated. On the more substantive issues, however, Beazley J found that there was a valid reason to demote and that the demotion was not harsh, unjust or unreasonable. In fact, she had found that the demotion did not constitute a termination at all, but then considered the situation on the assumption that it had that effect.

[50] (1996) 67 IR 162, 190.

isted, it had not been breached. In *Linkstaff International Pty Ltd v Roberts*,[51] the South Australian Industrial Relations Commission (Full Commission) expressed no doubts as to the existence of the duty, in circumstances where they were satisfied that the employer conduct (attempting a unilateral variation of the respondent's work tasks by substantial increase in the required level of billings) was conduct likely to destroy or damage seriously the relationship of trust, and entitled the employee to treat herself as discharged from further performance of the contract.

Burazin v Blacktown City Guardian,[52] a decision of the Full Court of the Australian Industrial Relations Court, also supported the existence of the implied term. The proceedings arose as a claim of unlawful dismissal under the *Industrial Relations Act 1988*, and an associated claim for damages for breach of the contract. The appeal to the Full Court was limited to the question of the appropriate measure of damages, both under the Act and in the contractual claim. The Court said there was 'ample English authority' for implication of the employer's duty in relation to trust and confidence, mentioning *Woods*, *Bliss*, *Akhtar*, and also the Court of Appeal decision in *Malik v Bank of Credit and Commerce International SA*.[53] As McCarry has pointed out,[54] what is 'ample authority' in England is not necessarily compelling in Australia, given a different approach to what constitutes 'necessity' for the implication of a term as a matter of law. The Australian approach is represented by *Byrne v Australian Airlines*,[55] an implication being *necessary* to avoid the contract being rendered nugatory. Nevertheless,

> ... if an employer was at liberty to destroy trust and confidence with impugnity [sic], it seems inescapable that, from an employee viewpoint, the contract would be seriously undermined or drastically devalued in an important respect. Since the decision in *Byrne*, there should be little difficulty for an Australian court in finding that the implied term exists here when called on to decide the matter authoritatively.[56]

51 (1996) 67 IR 381.

52 (1996) 142 ALR 144.

53 [1995] IRLR 375. The case went on further to appeal to the House of Lords and its decision is discussed below.

54 G McCarry, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26 *Australian Business Law Review* 141, 144-5.

55 (1995) 185 CLR 410, 453 (McHugh and Gummow JJ).

56 McCarry, above n 54, 144.

Their Honours did not examine whether the facts had amounted to a breach of the implied duty, apparently accepting the view of Madgwick J at first instance that they did. The facts in the case consisted of a brief but heated interchange between the applicant, a sales representative of the respondent newspaper, and a secretary, the sister of the general manager. The interchange occurred as the applicant was going into the office of the sales manager. When she left his office, she was forcibly removed from the premises by two police officers who had been summoned by the general manager. The next day she received a letter stating that her employment had been terminated and making allegations about her conduct, which the employer later acknowledged to be unjustified.

The House of Lords *Imprimatur*

Perhaps the case on the implied duty that has received the most attention is the House of Lords decision in *Malik v Bank of Credit and Commerce International SA*.[57] However, the most noteworthy aspect of the decision is its discussion of damages. There was nothing particularly surprising in the finding that the duty had been breached. The breach lay in the respondent bank's carrying on a corrupt and fraudulent business. This was held by the House of Lords to breach an implied duty not to carry on such a business, which - according to Lord Nicholls of Birkenhead - 'is no more than one particular aspect of the portmanteau general obligation not to engage in conduct likely to undermine the trust and confidence required ... ' for the employment relationship to continue.[58] All members of the House of Lords agreed as to the existence of that obligation, and as to it having been breached by the respondent bank.

Post-*Malik* Recognition of the Implied Duty

In *SITA (GB) Ltd v Burton*,[59] the employee resigned as a result of fears as to possible changes to employment terms and conditions following the foreshadowed transfer of his employer's enterprise to SITA. The Employment Appeal Tribunal overturned the industrial tribunal's (rather bizarre) finding against the transferee - by whom the applicant had never been employed. However, Lord Johnston acknowledged (*obiter*) that there could be a breach by the transferor

[57] [1997] ICR 606.
[58] Ibid 610.
[59] [1997] IRLR 501.

employer where the consequences of the transfer were known by the employer to be dire for the employees. That was not the case before him, where the employee's post-transfer terms and conditions were protected by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (UK). Uncertainty as to the future with the *same* employer following proposed changes to the operations did not give rise to a breach in *Brown v Merchant Ferries Ltd.*[60] There was nothing in the employer's conduct, viewed objectively, from which the employee could properly conclude that the employer was repudiating the contract. In *Hill v General Accident Fire and Life Assurance Corporation plc*,[61] the employee applicant was on sick leave when the employer terminated the employment on grounds of redundancy. Had the employment - and the sick leave - been allowed to continue a further four months, the employee would have become entitled to benefits under a retirement pension scheme. Counsel for the employee argued that the implied duty involved an obligation on the employer not to use their contractual powers of dismissal when such use would frustrate an accruing entitlement to pension. The Outer House of the Court of Session held that there was no such duty - that it went beyond the duty accepted in cases such as *Malik*. Not surprisingly, a course of behaviour by a manager, amounting to sexual harassment, was held in *Reed and Bull Informations Systems Ltd v Stedman*[62] to amount to a breach of the implied duty such that the employee's subsequent leaving should be treated as a constructive dismissal.

It is clear from the cases so far discussed that a breach of the employer's implied duty not to destroy or damage the relationship of trust and confidence can be constituted by omissions as well as actions. However, the courts have been cautious in construing subordinate duties of positive action out of the 'portmanteau' obligation. One case in which the court so declined was *Bank of Credit and Commerce International SA v Ali*,[63] part of the 'fall-out' from *Malik*'s case. The starting point had been a series of redundancies in 1990. As part of the redundancy package, a number of employees entered into an agreement with the bank accepting a payment 'in full and final settlement of all or any claims ... of whatsoever nature that may exist' against the bank. Subsequently the bank went into liquidation, its dishonest operations were disclosed, and were held - in *Malik* - to have

60 [1998] IRLR 682.
61 [1998] IRLR 64.
62 [1999] IRLR 299.
63 [1999] ICR 1068.

constituted a breach of the employer's duty in relation to trust and confidence. Effectively, the claimants in *Ali* sought to argue that the 1990 agreement did not abrogate claims based on the conduct that was later held by the House of Lords to be actionable. It was argued that the implied duty involved a duty on the part of the bank at the time of the redundancy agreement to disclose the wrongdoing on which a claim could have been based, and that the failure to disclose rendered the 1990 agreement inoperative to bar the claim. Lightman J rejected the argument. It was settled by long-standing authority[64] that neither employer nor employee were under a duty to disclose prior misconduct. No such duty could be now derived from the 'new' implied term. The employees' ignorance at the time of the agreement that they might have common law claims did not constitute a unilateral mistake, nor did the employees have a cause of action in misrepresentation. In the same year, it was held[65] that the duty did not cover the case where an employee, choosing to retire on a particular date, was not told by the employer that his pension rights would have been greater if he had delayed the retirement by a day. The employee had asked what the pension would be if he retired on 31 July 1994. The pension was calculated on the basis of his salary as on the three '1st Augusts' preceding the retirement. In the case of a retirement on 31 July 1994, that meant 1st August of 1991, 1992 and 1993. The University supplied the correct information to the employee's query. They did not, however, volunteer the information that if he delayed the retirement by a month, the pension would have been calculated on his salary as at 1st August 1992, 1993 and 1994, raising it from £4937 to £5118. Hart J denied that the implied duty would be breached by the failure to *volunteer* the information.

This case must be distinguished from the earlier decision in *Scally v Southern Health and Social Services Board*,[66] a decision of the House of Lords, which found that the Board had been in breach of contract by not informing the employees that they had rights in relation to the superannuation scheme that were required to be exercised before a particular cut-off date, of which the employees were not and could not have been aware. The House of Lords found an implied term in the circumstances of the case that the employers should advise the

64 *Bell* v *Lever Bros Ltd* [1932] AC 161. Note, however, the expression of some doubts as to the correctness of Lightman J's application of *Bell*'s case in *Concut Pty Ltd v Worrell* [2000] 176 ALR 693, 702-3 (Gleeson CJ, Gaudron and Gummow JJ).

65 *University of Nottingham* v *Eyett* [1999] ICR 721.

66 [1991] ICR 771.

employees of the right. This would seem clearly to be 'a sub-set of the portmanteau' trust and confidence duty, as Lord Nicholls described the duty not to conduct a dishonest business in *Malik*.

Omission also lies at the heart of the conduct found to be a breach of the 'trust and confidence' duty in *Police Service of New South Wales v Batton*.[67] The question arose in proceedings claiming compensation for unfair dismissal under the *Industrial Relations Act 1996* (NSW). The applicant employee had taken a medical retirement. To succeed under the Act, it was necessary to show termination at the initiative of the employer, a requirement that could be satisfied by a 'constructive dismissal'. That was found in the employer's failure to give any counselling or support to the employee following his reporting of corrupt conduct by other officers, and subsequent threats. The situation took its toll on his health, but still no support was forthcoming. The Industrial Relations Commission found this failure a breach of the implied duty, and that the retirement on the grounds of ill health produced by the breach and the failure to provide support constituted a constructive dismissal.

Obviously, in many cases, the conduct of the 'employer' that constitutes a breach of the duty will derive from the conduct of representatives of the employer. A corporate employer cannot conduct itself other than through its managerial employees, and particular activities of employees will be the result of the employer's 'conduct' in setting up or allowing systems that do not restrain such activities. In those cases, the employer is directly, personally, in breach. In *Moores v Bude-Stratton Town Council*,[68] the Employment Appeals Tribunal found that the Council could be vicariously liable for the conduct of a councillor - verbal abuse and accusations of dishonesty - to a Council employee. The majority of the Tribunal held that individual councillors were under a duty not to engage in conduct likely to undermine the trust and confidence required in employment contracts, and that if that duty had been breached, the Council must be vicariously liable. With respect, I do not think the reasoning is acceptable. The duty is one which arises out of an employment contract - that between the council, as a corporate entity, and the council employee. The council also has powers independent of employment law in relation to members of the council. Failure by the council to protect the employees from abusive conduct by individual councillors can amount to a

[67] [2000] 98 IR 154.

[68] [2000] IRLR 676.

breach by the council of its own duties as an employer. It is a personal and not a vicarious liability.

The case of *Gogay v Hertfordshire County Council*,[69] a Court of Appeal decision, applied the 'trust and confidence' duty in a situation of (unfortunate) topicality. The employee was a residential care worker in a children's home. One of the children in the home suffered severe learning and communication difficulties and had a history of subjection to sexual abuse by her parents. This created difficulties in her relationship with the carers in the home, particularly with the claimant, with whom the child became obsessed. This caused considerable stress to the claimant who communicated her worries to her superiors. Eventually, as a result of comments by the child in therapy sessions, it was concluded that an investigation under s 47 of the *Children Act 1989* (UK) should be held. It was decided that the claimant should be suspended pending the outcome of the investigation, and this decision was communicated to her in a letter that stated: 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care'. The investigation concluded that the child had never said or disclosed anything that could be construed as an allegation of abuse by the carers. The claimant was informed that she was reinstated. The Court of Appeal held that the procedure adopted by the Council amounted to a breach of its duty to the employee. Clearly, the possibility of abuse of children in care is something to be taken very seriously by those with responsibilities for the children. However, that does not abrogate responsibilities towards the employees. The two should be reconciled to the greatest extent possible. Lady Justice Hale stated:

> The conduct in this case was not only to suspend the claimant but to do so by means of a letter which stated that 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care'. Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this.[70]

She concluded that clearly there was not. The response of the employer had gone way beyond what the evidence to hand justified. Whether or not an investigation was warranted, it did not automatically require the suspension of the employee. Nor did the comments

[69] [2000] IRLR 703.
[70] Ibid 710.

of the child in therapy amount to allegations of sexual abuse. The fulfilment of the Council's responsibilities in the situation did not necessitate the suspension of the employee nor the content of the letter informing her of it.

The case of *Easling v Mahoney Insurance Brokers Pty Ltd*[71] was a claim for damages in two parts. The first part was the employer's failure to deal adequately with allegations of sexual harassment made by co-workers against Easling. The second part was the employer's subsequent attempt to vary Easling's duties and conditions of employment. Although the judgment contains lengthy evidence of the negotiations following the sexual harassment episode, there is little judicial analysis devoted to this as a justification for termination - either by the employer on the ground of misconduct or by the employee on the ground of conduct destroying or damaging trust and confidence. That is because the employee continued for some months more in the employment. Wherever the breach lay, it had been condoned.[72] This finding left Easling's claim dependent on showing that the variation of duties was sufficiently far-reaching to constitute a repudiation of the contract. In dealing with this part of the claim, Doyle CJ and Bleby J concluded that, whether or not the alterations to duties could have amounted to unwarranted attempts at variation if insisted upon in the face of employee unwillingness, they had not been imposed unilaterally but were still under negotiation at the time the employee chose to leave the employment. Olsson J did not directly allude to the continuation of the negotiations, but merely found the variations sufficiently 'profound ... that they amounted to a constructive dismissal'.[73]

Olsson J was thus in the minority. However, his was the only one of the three judgments to contain any extended consideration of principle. The issues of principle involving the implied duty of trust and confidence are, nevertheless, really only relevant to the matter of the sexual harassment investigation, and Olsson J concluded his consideration of that matter by rejecting the claim that the employer's conduct had been in breach of that duty (while acknowledging that 'the respondent may not have handled the whole situation in the most professional and efficacious manner').[74] For the principles relevant to

71 [2001] SASC No 22 (Unreported, Supreme Court of South Australia, 14 February 2001).

72 See ibid 25 of the judgment of Olsson J.

73 Ibid 28.

74 Ibid 26.

the variation in duties, his Honour turned to an academic text - Macken, McCarry and Sapideen's *The Law of Employment.*[75] He quoted:

> The issue whether the employer is entitled to change the principal duties or the employee's job is essentially concerned with the question of what are the express or implied terms of the contract of employment. As with change of location, some term must be present, and 'the general rule is that a contract by which a person is employed in a specific character is to be construed as obliging him to render, not indeed all service that may be thought reasonable, but such service only as properly appertains to that character.
>
> Accepting that as the general rule of law, the answer to whether a change of duties is permitted in a particular case will almost always have to be derived from the facts of that case, unless, of course, there is express agreement. The change of duties question is sometimes raised in the context of determining whether the original contract of employment has been varied or has come to an end by mutual consent. If there is no express or implied term or variation allowing change of job or duties and there is a change without the consent of the employee the employee may sue for breach of contract for damages or for constructive dismissal.

Where the employer insists upon a variation that is beyond what the contract expressly or impliedly allows, the employer has no legal right deriving from the contract to performance of the terms as varied and any attempt to act upon the variation – as, for example, the payment of a decreased salary - is a breach. But this is not a breach of an implied duty of trust and confidence. It is a breach of the express terms setting out the task, the salary, the conditions etc.[76]

The cases discussed demonstrate the broad reach of the implied duty. To determine whether or not it has been breached by an employer requires close attention to the particular circumstances of each case. However, some rough categorisation of situations likely to constitute a breach can be made. One such situation is knowingly unwarranted and/or unduly trenchant criticism. Related to this is unfair and insensitive overreaction to the perceived need to investigate possible employee misconduct and also a lack of consideration for the employee's reputation. Another is refusal of benefits and allowances in an arbitrary and inequitable manner, and failure to give employees adequate

75 (4th ed, 1997) 137.

76 Or possibly of terms implied from fact - as by incorporation of workshop practice, of collective agreements. This is in contrast to the basic implied terms of the employment contract – such as obedience, confidentiality, care for safety etc - which are terms implied by law.

access, through information, to benefits and allowances to which they are legally entitled. Another is lack of response to stresses or even threats to which the work environment is subjecting the employee. But broad though the duty is in its nature, it is not limitless. It requires a degree of sensitivity, but it does not demand benevolence. In a real sense, it is negative in substance. It prohibits departure from a (necessarily inchoate) standard of decency, and penalises the employer who falls below that standard. For this reason, its formulation in *Courtaulds*, subsequently generally accepted, as a duty not to destroy or damage trust and confidence, is preferable to Lord Denning's favoured version in *Woods* of a duty to be good and considerate. That said, we can expect - on the evidence to date - that the standard of decency will be gradually raised.

Contracting Out

I have referred already to the question of whether an employer can 'contract out' of the implied duty of trust and confidence. This is an issue which was of importance in the decision of *United Bank Ltd v Akhtar*,[77] and which was relied on in argument by the defendant employer in *Johnson v Unisys Ltd*,[78] though it was fairly quickly passed over by both majority and minority in the House of Lords.[79] Brodie, in 'Beyond Exchange: The New Contract of Employment',[80] suggests as one of a variety of methods of contracting out 'a clause in the contract which states baldly and categorically that the term does not apply to that contract'. Such a method is, for obvious reasons, unlikely to be adopted. More likely is the existence of express clauses authorising particular types of conduct which might otherwise qualify as breach of the implied term. This was the situation in *Akhtar*, and - according to counsel for the defendant - in *Johnson*. However, these are not truly situations of an express clause on a particular matter preventing the implication of a term on that same matter. Rather, the express clause limits the range of matters to which the implied term can apply. The true situation of an express clause as a barrier to implication would be one where the implied term would have been limited to the subject matter that the particular contract had expressly dealt with - for example, the express clause dealing with repayment of

77 (1989) IRLR 507.

78 [2001] 2 WLR 1076.

79 See ibid 1084 and 1087-8 (Lord Steyn), 1092-3 (Lord Hoffman), 1101 (Lord Millett).

80 Brodie, above n 30, 82.

employee expenses in *Puppazoni v Fremantle Fishermen's Co-operative Society Ltd*[81] barring the importation into that contract of the implied duty of an employer to indemnify the employee for expenses incurred on the employer's behalf. Where the implied term in question is a broad one applicable to a wide variety of circumstances, such as the duty of trust and confidence or the employer's duty to take care for the employee's safety, an express statement about one of the circumstances covered will merely excise that circumstance from the implied term's purview, leaving the term still in full force as regards all of the other possible circumstances. To suggest, as did the Employment Appeals Tribunal in *Akhtar*,[82] that the express term should be limited by the 'over-riding' implied term, is not merely contrary to the orthodoxy on implication of terms but is contrary to logic.

Arguably less illogical is the possibility of reading express statements of employer *discretion* as subject to the implied duty of trust and confidence. These discretions can be contractually expressed to exist, for example, in relation to the awarding of a bonus or salary increase or to the size of such bonus or increase,[83] or to the payment of relocation allowances (as in *Akhtar*). Even here, however, there would appear to be a torturing of language and logic in reading down the references to 'absolute' or 'unfettered' discretion in supposed application of the trust and confidence obligation. In *Clarke*, the relevant clause stated '... salary shall be reviewed annually and be increased by such amount if any as the board shall in its absolute discretion decide';[84] yet it was held that the discretion could not be exercised 'capriciously or in bad faith'.[85] Brodie 'solves' the logical dilemmas of such a situation by arguing that 'on public policy grounds, certain implied terms in law should be immune from contracting out', with the implied duty of trust and confidence being one.[86] Though such a situation may be seen as very much in the employee's favour, it should be noted that Brodie's comment is made in the context of the argument that the employment contract is moving towards 'becoming an out and out relationship of good faith',[87] which might well increase the obligations of employees as well as of employers - for example, in

81 [1981] AILR 168.
82 See above pp 36-7.
83 As in *Clarke v BET* (1997) IRLR 348.
84 Ibid 349.
85 Ibid.
86 Brodie, above n 30, 85-6.
87 Ibid 87.

relation to an employee duty to disclose adverse information about him/herself.[88] In the immediate and middle term, the question of 'contracting out' lies with the courts. The House of Lords, as late as 2001, has supported the 'orthodoxy' that terms implied by law, such as the implied duty of trust and confidence, *can* be displaced, but only by appropriately-worded express terms.

Consequences of Breach of the Duty

Broad as the situations giving rise to breach of this duty may be, the consequences of their having occurred are of necessity somewhat limited - both by the nature of the duty itself, and by the effect of certain principles affecting contractual remedies. The basic rule as to contractual breach is that it gives rise to a right to damages for loss caused (providing the loss is not too remote), and that if it is a repudiatory breach, it *also* gives rise to a right in the innocent party to rescind the contract, releasing him/herself from any obligations binding upon him/her.[89] I mentioned earlier, in discussing *Bliss*, that the judge at first instance expressed the opinion that all breaches of this particular duty are repudiatory. Dillon LJ in the Court of Appeal neither agreed nor disagreed. He expressed a wish not to 'generalise', satisfying himself with holding that the particular conduct in the case was clearly repudiatory. His reluctance was appropriate, in that the task for the judge is to decide the question before the court, not questions that in other circumstances might arise. Academic writing is, however, not circumscribed in that way. It is not merely permitted but desirable to 'generalise', to examine the outermost limits of the subject before the writer. Accepting that freedom from circumscription, I suggest that the judge at first instance in *Bliss* was correct in his opinion. The very formulation of the duty accepted in all cases indicates the repudiatory nature of a breach. To destroy or seriously damage what is necessary for the relationship created by the contract is surely to repudiate the contract. In a number of cases, courts have asked if the conduct in question was repudiatory, but it seems to me that what they were really asking was whether the conduct was a breach. Did it, or did it not, destroy or seriously damage the necessary trust and confidence? Some employer conduct might be regrettable but not impact sufficiently on the employee so as to damage trust and confidence to the extent that the employee could not be ex-

[88] Ibid 87-9.

[89] Butterworths, *Halsbury's Laws of England*, vol 6 (at 15 July 1998), 110 Contract, VIII Remedies [11-11010], [110-11050] to [110-11055]

pected to 'put up with it'. *That* conduct would not amount to a breach. This repudiatory nature of the breach of the duty is clearly indicated by its origins in the idea of constructive dismissal. The duty was formulated to justify treating the employee's leaving the employment as an employer-initiated termination. Thus the duty was one breach of which justified rescission.

This analysis is important in the context of what the consequences of a breach are - what can the employee *do* following employer conduct amounting to a breach? The employee can waive the breach - can ignore it, can grit the teeth and put up with conduct that is beyond what must legally be borne. If that is done, the employee not only passes up the freedom to leave the employment, but also (subject to a possible qualification to be discussed later) any claim to damages.[90] The rights to damages are directed (almost) entirely to the losses flowing from being 'forced out' of the job. And the effect of a waiver goes further, in that it means the breach has no bearing on the employee's own obligations of performance. This issue was discussed by the Court of Session in *Macari v Celtic Football and Athletic Co Ltd.*[91] Macari was manager of the club, and there was friction between him and McCann, the new managing director of the board. There were a number of matters on which McCann gave orders with which Macari did not comply. Finally, Macari was summarily dismissed. Macari claimed the summary dismissal was a breach by the employer. The employer countered with the argument that Macari was in repudiatory breach by reason of his refusal to obey orders. Macari responded that the employer was in breach of the implied duty not to destroy or seriously damage the relationship of trust and confidence and that therefore he was not bound to fulfil his contractual obligations. There is some difficulty in applying the judgments to the chronology of the facts; however the statements of principle are quite clear. The Court of Session were of the opinion that the employer had committed a breach of the implied duty that would have entitled Macari to rescind. He did not rescind. He therefore remained bound by his own obligations, such as the duty of obedience. In breach of that duty, he disregarded orders. That was a repudiatory breach by Macari, for which the employer was entitled to dismiss him summarily. The conduct of the employer that amounted to breach of the implied duty in relation

[90] Note, however, that where conduct is persisted in after a waiver, the pre-waiver conduct can be taken into account as part of a course of conduct culminating in an eventual rescission. See *Lewis v Motorworld Garages Ltd* [1986] ICR 157.

[91] [1999] IRLR 787.

to trust and confidence was the exclusion of Macari from board meetings, the failure by McCann to establish any rapport with Macari, and the failure of McCann to discuss matters with Macari before reporting to the board that he was dissatisfied with Macari's performance and sending out warning letters. The Court of Session were prepared to proceed on the basis that Macari had not waived the right to take action on the breach at some future stage; the important point was that he had not done so at the time that he refused to obey orders of the employer. The Court noted that certain contractual obligations can be mutual, in that one party's obligation will be in abeyance unless and until the other party performs. However, the employee's duty to obey orders was not coterminous with the employer's duty not to damage confidence. For as long as the employee continues in the contract after the employer's breach of the trust and confidence duty, the employee remains bound to comply with the employer's instructions. Thus, where there is a breach by the employer of this duty, the employee's rights depend on the initiating step of termination of the employment.

I have chosen the wording of the preceding sentence carefully. It is not that the employee's rights depend on *the employee rescinding*. It is that they depend on *the contract being terminated*. The implications of this distinction are made clear in *Malik*. In that case, the bank went into liquidation, and the liquidators terminated the contracts of the relevant employees on grounds of redundancies. Subsequently, the employees discovered that their previous connection with the bank, given the publicity given to its course of dishonest dealing, prevented them from securing other employment. They claimed, effectively, damages[92] for that loss - a loss based on the inability to gain employment. The House of Lords stated that it was unclear from the facts whether the applicant employees had learned of the bank's dishonesty before or after the termination of employment. Lord Nicholls proceeded as if this fact were not crucial: 'If anything turns on this, the matter can be investigated further in due course'.[93] The most noteworthy parts of the House of Lords decision relate to the losses that can be compensated in damages for breach of the implied term, and I will return to this issue. At this point, the issue is the prior one - does a breach of the term give a right to damages when the termination has not been by way of rescission based on the breach? The House of

92 In fact, they submitted a proof of debt in the liquidation. However, the judgments proceeded on the basis of principles applicable to contractual damages.

93 [1997] ICR 606, 611.

Lords held that - in appropriate circumstances - it does. Their Lordships thus recognised the implied term as one having an existence separate from the concept of constructive dismissal. Clearly, if the employee has not left employment as a result of the employer's conduct, he or she has not been 'constructively dismissed'. Nevertheless, an 'independent' termination can be followed by an action for damages to recompense loss caused by the breach of the implied duty. Breach of the duty thus gives rise to actions for damages for two different types of loss, but the circumstances of the termination will determine which of the types of loss are compensable. Where the termination is by way of employee rescission, the employee is entitled to what Lord Nicholls referred to as 'premature termination losses'[94] - damages to compensate for termination without proper notice, which will be a sum equivalent to the notice period or the unexpired portion of a fixed term (subject, of course, to mitigation). Where the termination has been for some reason other than the conduct amounting to breach of the implied duty, then 'premature termination losses cannot be attributable to a breach of the trust and confidence term',[95] and will be available only where the termination is an employer repudiation of the contract via some other term. Thus, in the circumstances of an 'independent' termination, it is only losses *other than* premature termination loss that will sound in damages.

The development of principle in *Malik* makes it important to examine the conduct complained of in relation to the termination, in order to identify situations where there has truly been a breach and to determine the possible remedies. Specifically, one must examine cases where the conduct allegedly amounting to a destruction of trust and confidence is a particular dismissal or termination. I would suggest that these cannot be cases where the employer's conduct needs to be examined in relation to the trust and confidence duty. If the terminations are actionable, it will be for some other reason.[96] For example, in *Hill*, the employer's conduct raised by the employee was termination on the ground of redundancy while the employee was on sick leave: it is logically not possible to say that terminating the contract is conduct so damaging of trust and confidence that the employee would be entitled to rescind. The nature of the conduct is that there is nothing left to rescind. A termination may be justified by the con-

94 Ibid 612.

95 Ibid.

96 This is a separate argument from saying that the surroundings of the dismissal, the 'manner of the dismissal', cannot be an independent breach. See below pp 60-2.

tract, or it may be wrongful, but its wrongfulness cannot in logic come from the trust and confidence term. Agreed, the Court found for the employer, but on the basis that the conduct was not sufficient to destroy confidence. A more logical justification for the decision would have been that the period for operation of the trust and confidence duty had already been legitimately terminated. Another arguable misapplication of the term was in *Police Service of New South Wales v Batton*.[97] The employee resigned on grounds of ill-health. The ill-health was caused by conduct of the employer that constituted a breach of the term. The employee sought compensation for unfair dismissal, and therefore needed to be able to reinterpret the termination as one at the initiative of the employer. This was done by showing the causal connection between the employer's callous conduct and the ill-health. That there was such a connection was true. But I would suggest that the resignation could not logically be presented as the employee's reaction to the employer's unacceptable conduct. That is not to say that the ill-health would not be compensable. It would, for the conduct that damaged trust and confidence *also* amounted to a breach of the duty to ensure reasonable care was taken not to expose the employee to risks to health and safety.

I will return to these misapplications later.[98] For now, the points to be drawn are that a breach of the trust and confidence duty entitles the employee to (a) waive the breach; or (b) rescind, and (c) claim damages.[99] It is also possible, either because the breach is not known to the employee or because the employee has not acted on it (in circumstances *not* amounting to a waiver), for the employee to claim damages other than premature termination loss after an 'independent' termination, whether initiated by the employer or the employee. The employee's action or inaction subsequent to conduct by the employer that is allegedly in breach of the duty has an additional importance, I would suggest. Where the employee continues with the employment, it is open to argue that the employer's conduct was not sufficiently damaging to trust and confidence to constitute a breach. If the employee 'puts up with it', it may be because trust and confidence remain. It is true that the courts have stated that the effect on trust and confidence must be viewed objectively, and it is true also that financial or other pressures may lead an employee to pass up the right to give up the employment. Nevertheless, since the nature of the con-

97 [2000] 98 IR 154.

98 See below pp 60-2.

99 Or statutory compensation.

duct must be viewed, though objectively, in light of the circumstances of the case, in situations of uncertainty or ambiguity, the employee response can be enlightening.

Damages Available for Breach - Subsequent Financial Loss

Where the employee rescinds as a result of the employer breach, it is clear that the rescission is treated as a wrongful dismissal - without notice, or before the expiration of a fixed term. The damages for the 'premature termination' will be calculated exactly as in a case of an actual, rather than constructive, wrongful dismissal: salary and contractually agreed benefits for the notice period or the unexpired portion of the term, subject to reduction by the mitigation principle. Damages will thus not include loss avoided by reasonable steps in mitigation, or which would probably have been avoided if reasonable steps had been taken.[100]

If the employment is terminated other than by rescission by the employee, will damages be available? If so, for what? As the House of Lords pointed out in *Malik*, premature termination losses will not be available since they do not flow from the employer's breach. The termination was not for that reason. There may, however, be other losses. Can these be terminated? This was the most significant issue before the House of Lords in *Malik*. The employees claimed damages not for salary and benefits for the notice period, but for financial loss resulting from inability to obtain jobs because of the 'stigma' attaching to them as previous employees of the dishonest bank. Deciding the availability of such damages involved a reassessment of the authority of *Addis v Gramophone Co Ltd.*[101] This decision has been much muttered against during at least the last half of its almost 100 years of history. In part the muttering is because the results of its application in particular cases has been perceived to be *unjust*. In part, the muttering has been because of the uncertain nature of its reasoning. *Addis* has been constantly, if reluctantly, applied, and in its application courts have constantly cited its principle in the words of its headnote:

> An employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may

[100] These principles have become so categorically established in so many thousand cases that citation of authority is unnecessary.

[101] [1909] AC 488.

> sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.

This statement is not, however, the clear ratio of the case. It comes, as Lord Nicholls pointed out in *Malik*,[102] from the judgment of Lord Loreburn.[103] Examination of the other judgments in *Addis* discloses that it was only Lord Loreburn who referred to loss resulting from the difficulty of obtaining fresh employment. The other members of the majority referred to: damages not being available in contract for injured feelings, or 'mental distress' as it is more commonly referred to today; aggravated/exemplary damages not being available in contract; and damages not being available in contract for what is effectively a defamation not actionable in tort. As to those matters, it is true that neither aggravated nor exemplary damages were, or are, available in contract. It is true that damages were not then available in contract for injured feelings, but that blanket statement is no longer true. Additionally, as Lord Nicholls stated,[104]

> these observations cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss. *Addis v Gramophone Co Ltd* was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles.

The decision of the House of Lords in *Malik* thus does not overrule *Addis*, but confines its application to the question of damages for *wrongful dismissal.*

This confining of *Addis* did not of itself clear the way for damages for financial loss through stigma. There were other decisions and contentions that had to be dealt with. First was the argument of the liquidators that 'injury to reputation is protected by the law of defamations. The boundaries set by the tort of defamation are not to be side-stepped by allowing a claim in contract that would not succeed in defamation'.[105] As mentioned, this was one aspect of the reasoning of a number of the Law Lords in *Addis*. However, without here referring to *Addis*, Lord Nicholls rejected the submission as 'misconceived':

[102] [1997] ICR 606, 614.
[103] [1909] AC 488, 491.
[104] [1997] ICR 606, 615.
[105] Ibid.

> I agree that the cause of action known to the law in respect of injury to reputation is the tort of defamation. With certain exceptions this tort provides a remedy, where the necessary ingredients are present, whether or not the injury to a person's reputation causes financial loss ... It by no means follows, however, that financial loss which may be recoverable as special damage in a defamation action is irrecoverable as damages for breach of contract. If a breach of contract gives rise to financial loss which on ordinary principles would be recoverable for breach of contract, those damages do not cease to be recoverable because they might also be recoverable in a defamation action ...
>
> Furthermore, the fact that the breach of contract injures the plaintiff's reputation in circumstances where no claim for defamation would lie is not, by itself, a reason for excluding from the damages recoverable for breach of contract compensation for financial loss which on ordinary principles would be recoverable.[106]

The final submission to be dealt with was that compensation for damage to *existing* reputation is barred by *Withers v General Theatre Corporation Ltd.*[107] This case arose in the context of exceptions to the general rule that there is no duty on the employer to provide work as well as wages - one of the categories of exception being contracts in the area of 'entertainment', where the employee's future engagements depend on the reputation gained from publicity in earlier ones. Damage had been assessed in *Withers* on the basis that what was to be considered was the extra reputation that the employee would have received from performing under the contract, and not the damage to prior reputation that would flow from a period of exclusion from access to publicity. Lord Nicholls pointed out that *Withers* was in 'acute conflict' with the earlier Court of Appeal decision in *Marbe v George Edwardes (Daly's Theatre) Ltd*,[108] and preferred the views in *Marbe*.[109] Lord Steyn also disapproved of the decision in *Withers*, pointing out[110] that in that case, Scrutton LJ had mistakenly interpreted *Marbe* as inconsistent with the House of Lords decision in *Herbert Clayton and Jack Waller Ltd v Oliver*.[111] It was not inconsistent, since *Oliver* did not involve a claim for loss of existing reputation, and the House of Lords had in fact approved *Marbe*.

[106] Ibid 615-6.
[107] [1933] 2 KB 536.
[108] [1928] 1 KB 269.
[109] [1997] ICR 606, 617.
[110] Ibid 627.
[111] [1930] AC 209.

Thus, where conduct in breach of the trust and confidence duty causes subsequent financial loss, such as by hampering the search for future employment, damages will be available for that loss - and that will be so whether the initial contract is terminated by the employee rescinding on account of the breach or 'independently'. In either case, the loss will 'flow from' the employer's breach. In the case of rescission, the damages can cover premature termination loss and subsequent financial loss, in the case of independent termination, subsequent financial loss only. This effective 'over-ruling' of that part of the *Addis* doctrine that had denied the availability of damages for post-termination financial loss (over and above the salary for the notice period) was taken further by Lord Steyn in *Johnson v Unisys Ltd.*[112] Put briefly, *Johnson* concerned a claim for damages on the basis that the manner of the employer's dismissal of the employee had constituted a breach of the duty of trust and confidence, and had resulted in a mental breakdown and an inability to undertake further employment. It was only the financial aspects of this - the cost of medical treatment, the loss of future earnings - for which compensation in damages was sought. In the House of Lords, Lords Nicholls, Bingham, Hoffman and Millett dismissed the employee's appeal on the grounds that the unfair dismissal provisions of the *Employment Rights Act 1996* (UK) evidenced a legislative intention that such claims should be restricted to the tribunal provided by the Act. Lord Steyn dismissed the appeal on the ground that, while the employee had a prima facie action based on breach of the implied duty of trust and confidence, he had no realistic prospect of showing the damage to be not too remote. Although the appeal was dismissed, these actual grounds of decision go on the one hand to the particular legislation referred to, and on the other hand to the particular facts of the case. The comments directed at the remaining extent of the *Addis* doctrine are of far broader significance.

Lord Steyn commenced his judgment[113] by acknowledging the nature of the *Addis* decision as 'controversial for a long time'.[114] After reviewing the facts of the case before him, his Lordship noted that in the Court of Appeal, Lord Woolf MR had characterised the substance of the employee's case as relating to the manner of his dis-

[112] [2001] 2 WLR 1076.

[113] Ibid 1079.

[114] A vote of thanks to Lord Steyn for resurrecting the case note on *Addis* by Sir Frederick Pollock in (1910) 26 *Law Quarterly Review* 1-2. As Lord Steyn summarises Pollock's reaction, 'he plainly thought that as a matter of legal principle the decision was questionable'.

missal, and then posed three crucial questions:[115] first, what was the effect of the decision in *Addis*?; second, whether Lord Loreburn's claim that such damages *were* precluded, though not part of the ratio of *Addis*, was correct; and third, 'what was the impact of [*Malik*] on *Addis*?'. As to the first question, Lord Steyn concluded that (despite the headnote) the ratio of the case did not preclude the recovery of 'special damages for loss of employment prospects flowing from the manner of a wrongful dismissal'.[116] Intriguingly, his Lordship did not answer the second question. Rather, he answered the question 'is it *still* correct?', and his answer to that was a clear 'no', given the changes in the employer-employee relationship which lessen the relative subservience of the employee, and given the recognition of stress-related psychiatric problems as more than mere 'injured feelings'. In relation to the third question posed by Lord Steyn, the answer is best stated in his own words:

> Damages for wrongful dismissal are governed not by a special rule applicable to employment contracts but by ordinary principles of contract law ... the observation of Lord Loreburn LC in *Addis*, which rules out in all cases a claim for financial loss resulting from the manner of a wrongful dismissal, is qualified by the unanimous decision of the House in [*Malik*]'.[117]

It must be acknowledged that Lord Steyn was in a minority to the extent that he considered the manner of a dismissal could be a breach of the implied duty of trust and confidence. Both Lords Hoffman and Millett expressed a lack of agreement on this point,[118] regarding the trust and confidence duty as 'concerned with preserving the continuing relationship which should subsist between employer and employee' that 'does not seem altogether appropriate for use in connection with the way that relationship is terminated'. This argument is clearly related to the point I made earlier,[119] as to whether – *logically* - a dismissal can be a breach of the duty of trust and confidence. However, I think that there is a modicum of difference, in that the cases I was criticising had found the breach of the trust and confidence duty in the *fact* of dismissal rather than in its *manner*. Moreover, as Lord Steyn stated in answer to the objection:

[115] *Johnson v Unisys Ltd* [2001] 2 WLR 1076, 1081.
[116] Ibid 1083.
[117] Ibid 1085.
[118] Ibid 1093 (Lord Hoffman), 1101-2 (Lord Millett).
[119] See above pp 52-3.

> It is a legalistic point. It ignores the purpose of the obligation. The implied obligation aims to ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship.[120]

Nevertheless, it would seem that this particular point may still remain in some doubt given the disagreements between the Lords in *Johnson*. Lords Millett and Hoffman did not, however, disagree with Lord Steyn's central point that there is no justification for limiting the availability of damages for post-termination financial loss in the case of 'genuine' breaches of the trust and confidence duty (subject to the loss not being too remote).

Damages Available for Breach - Injured Feelings and Mental Distress

Nothing in the House of Lords decision in *Malik*, nor in the various judgments of their Lordships in *Johnson*, opened the door to damages for injured feelings per se. Other cases dealing with the trust and confidence duty have dealt with such a claim; but in all such cases, the courts have found themselves barred by the supposed effect of *Addis*. In *Bliss*, Dillon LJ stated that:

> The general rule laid down by the House of Lords in *Addis v Gramophone Company Ltd* ... is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Modern thinking tends to be that the amount of damages recoverable for a wrong should be the same whether the cause of action is laid in contract or in tort. But in *Addis* Lord Loreburn regarded the rule that damages for injured feelings cannot be recovered in contract for wrongful dismissal as too inveterate to be altered ... There are exceptions now recognised where the contract which has been broken was a contract to provide peace of mind or freedom from distress. See *Jarvis v Swan Tours Ltd* ... Those decisions ... do not however cover the present case.
>
> In *Cox v Philips Industries Ltd* Mr Justice Lawson took the view that damages for distress, vexation and frustration, including consequent ill-health, could be recovered for breach of a contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause such distress etc. For my part, I do not think that

[120] *Johnson v Unisys Ltd* [2001] 2 WLR 1076, 1089.

> that general approach is open to this court unless and until the House of Lords has reconsidered its decision in *Addis*.[121]

Two initial points can be made about this. First, it seems unduly cautious. There is no doubt that the blanket disapproval of 'mental distress' damages in contract, of which *Addis* is an exemplar, has been overtaken by the 'exceptions' such as that in *Jarvis*.[122] Where an employment contract or clause therein falls within an established 'exception', there seems no reason to await a specific House of Lords extension of the exceptions to employment contracts. Second, in *Cox*, the damages allowed by Lawson J were not for wrongful dismissal, but for an unjustified demotion. Lawson J confined the *Addis* ban on mental distress damages to its particular facts of breach by wrongful dismissal.[123] There is, moreover, an underlying question as to whether cases like *Jarvis* should be seen as 'exceptions' to an earlier principle, or whether both the 'earlier principle' and the 'exceptions' are merely the application of *fundamental* principles to particular circumstances. The fundamental principles of contract damages are (1) that they should, in monetary terms, put the innocent party in the position he/she would have been in had the contract been properly performed; and (2) that this measure is subject to the doctrine of remoteness of damage, so that compensable losses are only those which (a) flow naturally from the breach, or (b) flow from special circumstances known to and in the contemplation of the parties at the time of entering into the contract.[124] *Addis* and the pre-*Addis* cases can be seen merely as representing the opinion of the courts of the time that injured feelings and mental distress did not flow naturally from the breach nor flow from special circumstances. The *Jarvis* line of contracts were ones to provide peace, enjoyment etc by means of, for example, holiday arrangements. Clearly, a degree of 'distress' will flow naturally from breach of the provisions of such a contract. There is thus nothing *exceptional* in these cases; they are merely an application of basic principle to the particular facts. In *Cox*, Lawson J found that distress flowed naturally from the breach in question. He may have been wrong that the distress was a natural outcome of a demotion, which the employer ought therefore to have had in contemplation as the result of the breach. But the finding of what is a natural outcome

[121] [1985] IRLR 308, 316.

[122] *Jarvis v Swan Tours* [1973] QB 233.

[123] Just as *Malik* and *Johnson* confined the applicability of the *Addis* principle, to the extent it remained authority, to wrongful dismissal cases.

[124] Butterworths, above n 89, [110-11050] to [110-11110].

of a particular clause does not mean that the category of contract is not one to which the fundamental principles apply. On that analysis, the question should be whether distress is a natural outcome of a particular course of conduct that amounts to breach of the trust and confidence duty. If so, then on basic principles, it should be compensable.

The issue of mental distress damages for breach of the implied trust and confidence duty was examined by the Full Court of the Industrial Relations Court in *Burazin*.[125] As mentioned earlier, this was a case of compensation under the *Industrial Relations Act 1988* (Cth) and also for damages for wrongful dismissal and for breach of the trust and confidence duty. Counsel for Burazin argued that the damages should include compensation for 'distress, humiliation and disappointment'. The Full Court noted that counsel had submitted that *Addis* should no longer be regarded as good law in Australia, following the High Court decision in *Baltic Shipping Co v Dillon*.[126] He also submitted that *Addis* did not apply to breach of the trust and confidence duty. The Court began its consideration of the damages issue by setting out basic principles. It referred to aggravated damages, and to the traditional view that the measure of damages for breach of contract is unaffected by the manner of the breach. It was consistent with this view that damages for distress would not *ordinarily* be available in contract - as not arising in the ordinary course of things from a breach, nor reasonably to be supposed as in the contemplation of the parties. This, the Court argued, was all the House of Lords decided in *Addis*. Their Honours went on to refer to the later recognition in the 'holiday' cases that there were some types of contract in which distress is a natural and probable consequence of a breach. The question for the High Court in *Baltic Shipping* was whether to uphold those cases and on what basis. The High Court upheld them on the ground that, in the particular circumstances of those cases, the distress was a naturally-flowing loss. But 'it refrained from propounding any wider rule'.[127] While it did not deal specifically with employment contracts, it accepted the general principles in *Addis*, and categorised the exceptions in terms inappropriate to include breach of terms in employment contracts. The Full Court concluded that none of the judgments in *Baltic Shipping* were

[125] (1996) 142 ALR 144.
[126] (1993) 176 CLR 344.
[127] (1996) 142 ALR 144, 149.

> broad enough to cover distress resulting from a wrongful dismissal. If such damages are to be awarded, it must be after rejection, at High Court level, of the *Addis* conclusion that employment contracts are to be treated like other commercial contracts for the purposes of the rules in *Hadley v Baxendale*.[128]

The Full Court accepted that there was ample English authority for the implied duty in relation to trust and confidence, but denied that the English authority 'supports the view that damages are available for breach of the implied term', noting that Dillon LJ in *Bliss* had found that the awarding of distress damages for breach of employment contracts was not open until the House of Lords had reconsidered *Addis*. Of Lord Justice Dillon's apparent assumption that *Addis* applied to all breaches of employment contracts, and not merely to wrongful dismissals, the Full Court suggested that:

> As the very purpose of the implied term is to protect the employee from oppression, harassment and loss of job satisfaction, it is difficult to see why it should not be regarded as a term designed 'to provide peace of mind or freedom from distress', just as much as the contracts in the holiday cases.[129]

The Full Court then went on to examine the Court of Appeal decision in *Malik*.[130] They interpreted that decision as having treated *Addis* as applicable to all breaches of employment contracts, and as excluding all 'intangible' claims. Their Honours referred briefly also to Canadian cases declining to follow *Addis* in relation to wrongful dismissals, and to *Whelan v Waitaki Meats Ltd*[131] where damages were awarded for a 'peremptory' dismissal, a decision that the Full Court found to some extent 'unconvincing'. Turning from the authorities to their own conclusions, the Full Court identified two questions to be addressed:

> [W]hether breach of the trust and confidence term is capable of giving rise to a liability for damages, as distinct from founding a right to repudiate the contract; and, if so, whether the damages are limited by the rule in *Addis*.[132]

They found little difficulty in proposing that, if available, damages would not be limited. Since distress is a natural and probable effect of

[128] Ibid 151.

[129] Ibid 152.

[130] *Burazin* preceded the House of Lords decision in *Malik* by five months.

[131] [1991] 2 NZLR 7.

[132] (1996) 142 ALR 144, 153.

the breach, *Addis* should not apply. However, they doubted whether damages were available:

> [t]o permit an action for damages during the currency of the employment relationship, it might be argued, would be antithetical to the reason for implying the term; the action itself would presumably cause a further deterioration in the relationship. That argument would not apply in a case like *Malik*, where the relationship had already come to an end.[133]

This is a rather bizarre conclusion, for their Honours start by asking if the breach is capable of giving rise to an action for damages, and then hold that it is not because of an argument not applicable to a large proportion of instances of a claim. Moreover, if the claim for damages while the relationship is ongoing is barred as antithetical to the reasons for the term, how much more antithetical would be the rescission that they accept as an employee right founded by the breach?

The question of mental distress damages was raised also in *Alderslea v Public Transport Corp.*[134] The case is not absolutely on point, because it was not based on the trust and confidence duty, but (inter alia) on an implied duty to terminate in good faith, alleged to be derived from the particular nature of the employment. However, in dealing with - and rejecting - that duty, Ashley J considered both *Baltic Shipping Co v Dillon*[135] and *Johnson v Unisys Ltd.*[136] His Honour's consideration of *Johnson* is directed largely, however, to whether damages would be available for breach of the term constituted by the harsh manner of a dismissal, rather than to the availability of *distress* damages for breach of that term however constituted.[137] As to that issue, his Honour saw the matter as being covered by *Baltic Shipping*, whereby distress damages in employment contracts would be too remote.[138]

The situation thus remains unresolved. It is clear that to allow damages for disappointment and humiliation in such cases, quite divorced from a damage to reputation that can be shown to have financial repercussions, is to place the courts at the top of a very slippery slope. Such 'feelings' are arguably too intrinsically individual specific to be

[133] Ibid 154.

[134] (Unreported, Supreme Court of Victoria, Common Law Division, No BC200102731, 9, 10 and 28 May 2001).

[135] (1993) 176 CLR 344.

[136] *Johnson v Unisys Ltd* [2001] 2 WLR 1076.

[137] *Alderslea v Public Transport Corp* (Unreported, Supreme Court of Victoria, Common Law Division, No BC200102731, 9, 10 and 28 May 2001) 10.

[138] Ibid.

coped with in contracts. There is a genuine difference from the 'holiday' cases, where the measure of the 'distress' can be, to an extent, derived from the price the injured party was prepared to pay for the promised peace, enjoyment etc. On the other hand, there has been a trend to recognise job satisfaction as deserving of some legal protection. For example, in cases like *Powell v Brent London Borough Council*[139] and *Reilly v State of Victoria*,[140] the loss of job satisfaction has been seen as a factor in favour of an interlocutory injunction against a dismissal, in that mere damages, which will not take it into account, are inadequate. But here again, damages will not take it into account because, inter alia, it is not capable of assessment. My own feeling is that, on balance, 'mere' distress should not be compensable in damages for breach of the trust and confidence duty. There are, however, other developments that may lessen the effect of such a limitation on available heads of damage.

Assessing 'Intangible' Damage

The century since *Addis* has seen not only a development in contractual terms and remedies, but also a development in understanding in the field of psychiatric disturbance. The law has responded to this latter development in many areas. Personal injury damages can be awarded for psychological as well as physiological harm. A mental illness is as much an illness for legal purposes as is a physical one. 'Mental illness' no longer has the connotation of lunacy or 'weakness' or 'unsoundness of mind' - with all the derogatory nuances - that it once had. Emotional disturbance, anxiety and depression are recognised as mental illnesses.[141] Thus a breach of contract resulting in such conditions can give rise to damages, subject only to the rules as to remoteness of damage. In cases of breach of the trust and confidence duty, where the employer's conduct has the effect of precipitating a condition in the employee such that the employee incurs the cost of medical treatment and is unable to work as before for a finite period or indefinitely, there is an obvious right for the employee to claim compensation in damages, providing the onset of the condition can be seen to be a natural result of the conduct. I would suggest that in many of the instances of conduct found to be in breach of the im-

[139] [1988] ICR 176.

[140] (1991) 34 AILR 133.

[141] See Lord Steyn in *Johnson v Unisys Ltd* [2001] 2 WLR 1076, 1084: 'What could in the early part of the last century dismissively be treated as mere "injured feelings" is now sometimes accepted as a recognisable psychiatric illness'.

plied term in the cases examined, some such psychological disturbance would be readily seen as a natural, and not improbable, result by a 'reasonable' employer. In fact, this has been found to be so in several recent cases.[142]

In *Gogay*,[143] where the employee was suspended during an investigation into what the employer termed 'an allegation of sexual abuse', the damages upheld by the Court of Appeal included damages for loss resulting from clinical depression. Counsel for the employer had argued these damages were ruled out by *Bliss*.[144] The Court of Appeal pointed out that there is 'a clear distinction between frustration, mental distress and injured feelings, on the one hand, and a recognised psychiatric illness on the other'.[145] Further, in *Police Service of New South Wales v Batton*,[146] where the employer's conduct resulted again in a depressive illness that, in turn, resulted in the employee retiring on medical grounds, the retirement was held to amount to a constructive dismissal, a termination at the initiative of the employer, entitling the employee to make a statutory claim for unfair dismissal. Of course, in both cases, the facts amounted also to a breach by the employer of the duty to ensure reasonable care is taken not to expose the employee to unnecessary risk of injury, and the measure of damages for personal injury is the same whether the action is in contract or tort, and - I would suggest - whichever term of the contract a contractual damages claim is based on.

Conclusion

The cases surveyed show that the trust and confidence duty has established itself over the course of some 20 years. There is no doubt that such a duty exists, and the categories of conduct that will amount to a breach have been examined. These categories are not closed, of course. It is inherent in the essentiality of the circumstances of the case to the duty that the mapping of the categories will never be completed. However, the categorisation provides guidelines as to what conduct will be unacceptable and when. The 'contracting out'

[142] However, note that in *Alderslea v Public Transport Corp* (Unreported, Supreme Court of Victoria, Common Law Division, No BC200102731, 9, 10 and 28 May 2001) 10, Ashley J suggested that even 'real' psychological injury resulting from a termination would be too remote.

[143] *Gogay v Hertfordshire Council* [2000] IRLR 703.

[144] *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308.

[145] [2000] IRLR 703, 710.

[146] [2000] 98 IR 154.

issue has been expressed in orthodox terms by the judges of the House of Lords, if not to the satisfaction of all academic commentators.[147] The questions as to remedies have also been largely settled. The uncertainties and dissatisfactions created by the decision in *Addis v Gramaphone Co Ltd* have been all but eliminated. The only remaining question is in relation to mental distress or injured feelings not amounting to a recognisable psychological condition. While prediction is always dangerous, were I to take the risk I would predict that 'mere' distress will not be accepted as compensable in future cases. I would predict that the line will remain drawn at the boundary of recognisable conditions, but that it is not at all impossible that lesser degrees of anxiety or depression will ultimately be recognised as illnesses.

All that said, one must acknowledge that there is a tinge of 'adhocery' in the application of the new duty. There are some cases in which it could be seen as being pressed into service as a policy vehicle rather than as a still operative contractual duty. *Police Service of New South Wales v Batton* is one such case. There is little doubt that the lack of consideration for the whistle-blowing officer amounted to conduct constituting a breach. The depressive illness was clearly causally related to that lack of consideration. And the resignation clearly flowed from the illness. But it is not quite so clear that *therefore* the resignation was in its essence a termination at the initiative of the employer. What seems to be a powerful influence in the calling in aid of the implied duty in that case was a desire to give the officer an alternative remedy to a claim for common law damages for breach of the employer's duty of care. Application for an award of compensation for unfair dismissal under the statute is a far quicker and easier route to take than a common law claim - even though the amount of the award is limited. Nevertheless, the link made between the breach of the trust and confidence and an employer-initiated termination is not so weak that the ploy should be criticised, given its 'philanthropic' character. We can expect, however, that appellate courts shall be increasingly vigilant in order to keep the inevitable further expansion of the duty within reasonable limits.

[147] See Brodie, above n 30, discussed above at pp 50-2.