Who sounds like a broken record? Addis v Gramophone!

Introduction

Damages is one of the major remedies available for breach of contract. The way damages are calculated are by reference to the test enunciated in the early case of Hadley v Baxendale (1859, 156 ER 145 at 181) ("Hadley"):

> "The measure of damages…is such loss as may fairly and reasonably be considered as arising according to the usual course of things or may reasonably be supposed to have been in the contemplation of the parties at the time of the making the contract as the probable result of the breach"

The test for damages was also stated in the case of Hamlin v Great Northern Railway Co (1856, 158 ER 126 at 1262) ("Hamlin") three years earlier as follows:

> "The plaintiff is entitled to nominal damages…and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of the contract…generally in actions upon contracts no damages can be given which cannot be stated specifically…the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract"

These tests are important because they were the basis for the decision of the House of Lords in Addis v Gramophone Co Ltd [1909] AC 488 ("Addis").   That case held that damages for breach of contract cannot include compensation for frustration, mental distress, injured feelings or annoyance occasioned by the breach.

For almost a century, Addis has served as an impediment to damages for loss other than direct financial loss caused by breach of contract, and in particular in respect of mental distress, anguish, frustration or injured feelings for wrongful dismissal. It appears to be an unnecessary restriction not to allow for the award of damages for the conduct of an employer in the manner of dismissal of an employee.

Addis has been seen to bind the Court of Appeal in the United Kingdom in Bliss v South East Thames Regional Health Authority [1987] 1 ICR 700 ("Bliss") and Malik v Bank of Credit and Commerce International [1997] 3 All ER 1 ("Malik") to disallow damages for the manner of dismissal. The High Court of Australia has considered itself constrained by Addis in Baltic Shipping. The Full Court in Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 99 ("Burazin") felt similarly confined, both Courts indicating that until the High Court overrules Addis, damages for manner of dismissal are unlikely to be available in Australia.

In Many cases decided since Addis, Courts have generally declined to award damages for the manner of dismissal, as opposed to the fact of dismissal and whether or not it is wrongful. This is despite the pronouncement in Hadley that damages should be recoverable if they 'may reasonably be supposed to have been in the contemplation of the parties at the time of the making the contract as the probable result of the breach'. It seems reasonable to suppose that a terminated employee may suffer injured feelings, anguish or mental distress if the manner of dismissal was oppressive or high-handed.

Similarly, if the damage arises 'according to the usual course of things' (Hadley), then it may be recovered. Again, there appears to be no reason in principle why distress or psychological injury may not occur in the 'usual course'.

In Hamlin, the Court held that damages could be recovered if they 'naturally result from the breach of contract'. Distress, anguish or mental distress would seem to be a natural result of dismissal in an inappropriate manner.

All of these interpretations may be ways of allowing damages for manner of dismissal resulting from wrongful dismissal. However, generally the Courts have felt bound by Addis in being unable to take such an interpretation of these earlier cases (Cox v Phillips Industries was the exception).

One exception is holiday cases. Where the object of such contracts is enjoyment, relaxation or freedom from molestation, then damages for distress and disappointment are recoverable (Mason CJ in Baltic Shipping Co v Dillon, and Jarvis v Swan Tours).

However, employment jurisprudence has developed a number of implied terms which apply to all contracts of employment regardless of the intentions of the parties. Such terms are said to apply because they are necessary, as well as reasonable (MOSW p.95), and the numerous criteria for implying a term set out in BP Westernport need not be met. These terms are imposed as a matter of policy in an attempt to equalise the relationship between employer and employee (Gray J in Byrne v Australian Airlines Ltd (1994) 120 ALR 274 at 335), and as a matter of justice. They are 'said to be an incident of all contracts of employment' (p.15, Malik).

One such development in the last three decades is the mutual obligation of trust and confidence between the employer and employee. The employee owes the employer duties of fidelity and good faith. The employer agrees that it will not, without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

We will look at the developments in Australia and compare them with overseas jurisdictions; we will then contrast the Common Law with the statutory compensation scheme under the Workplace Relations Act 1996 (Cth) and then look at how Courts have avoided the shackles of Addis. The central thesis of this paper is that the High Court ought to over-rule Addis, primarily because of the changes to the employment relationship since it was decided, including the implied term of trust and confidence. Even if the High court will not be so bold, it is submitted that there is sufficient authority for damages to be awarded for manner of dismissal, primarily based on the breach of the implied term. This would then bring the common into line with statute law.

The Workplace Relations Act 1996 (Cth) ("WR Act")

The decision of the Court in Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 99 ("Burazin") makes it clear that damages are available under the WR Act for manner of dismissal. In that case, an employee was forcibly removed from her employment premises by police, in circumstances where such action was not

warranted. The Court awarded her compensation under the WR Act for distress suffered as a result of her treatment in the course of termination.

Although the legislation has changed since that decision, the general provisions are of similar effect. An award of compensation 'in lieu of reinstatement' should take into account matters including the length of service of the employee, attempts by the employee to mitigate his or her loss, and 'any other matter that the Commission considers relevant' (s.170CH (6) & (7)).

The decision in Burazin canvasses the conflicting views of Judges as to whether damages for distress are available under the WR Act. It is submitted that the approach adopted by the Court in that case permitting an award for distress suffered due to the manner of dismissal of the employee is correct.

It was common ground between the parties in Aldersea that the authorities support the view that compensation is available under the statutory unfair dismissal scheme for mental distress, emotional suffering and inconvenience for breach of the employment contract (p.506 VR). Ashley J observed that "under the Commonwealth legislation operative since 1994, then, there has been an availability of compensation for distress (not injury) in the event of harsh, unjust or unreasonable dismissal in the situations to which the legislation has from time to time applied" (p.515). The particular authorities His Honour relied on were Burazin, Brackenridge v Toyota Motor Corp Australia Ltd (1996) 142 ALR 99 and Clunne v Nambucca Shire Council (1995) 63 IR 304. (Contrast this with the view expressed by Acton D-P that compensation is not appropriate for distress for manner of dismissal – talk at Monash Uni to Law of Employee Relations class, 14 August, 2003).

Decisions from the United Kingdom regarding damages for manner of dismissal

In 1975, Lawson J in Cox v Phillips Industries awarded damages to the Plaintiff who in breach of his employment contract was demoted to a position of lesser responsibility and on lower wages than promised. The Judge based his decision of the holiday case of Jarvis v Swan Tours. His Honour said:

> "it was in the contemplation of the parties in all the circumstances that, if that promise of a position of better responsibility without reasonable notice was not breached, then the effect of that breach would be to expose the Plaintiff to the degree of vexation, frustration and distress which he in fact underwent" (p.644)

His Honour was following the dicta in Hadley. Interestingly, no implied term of trust and confidence was invoked in Cox. However, Lawson J's decision has generally not been followed, although it was cited in the High Court of Australia decision of Mann v Capital Territory Health Commission (1982) 148 CLR 97, without apparent disapproval.

A development which has been adopted in Australian Courts has been the recognition of the implied term of trust and confidence. Bliss v South East Thames Regional Health Authority [1987] 1 ICR 700 was regarded as an important decision of the Court of Appeal in confirming that the employer had an obligation to not act in a

manner which would destroy or seriously damage the relationship of trust and confidence between the itself and the employee. This was held to be an implied term of every employment contract which operated regardless of the parties intentions, unless it was expressly excluded.

Dr. Bliss was requested to undergo a psychiatric examination due to vitriolic correspondence that passed between him and a colleague. When he refused, he was suspended from duty. A later investigation showed that the allegation that he was mentally unstable was largely baseless, that proper procedures were not followed in requiring him to undergo the examination, and that he should never have been suspended. He was offered his old position, which he declined to accept. He resigned from the hospital, and brought a claim for damages against his former employer.

The Court found that the Hospital had acted in serious breach of their obligation of confidence and trust. It had repudiated the employment contract by requiring Dr. Bliss to undergo the psychiatric examination, and also in suspending him from duty. These actions fundamentally damaged and undermined the employment relationship. Dr. Bliss by resigning had accepted the Hospital's repudiation, and was entitled to sue for damages.

Bliss's case was important also because the Court followed Addis and rejected the approach in Cox which allowed damages for frustration, mental distress injured feelings or annoyance. The Court stated that until Addis was overruled, it would not in employment cases allow such damages.

In Malik v Bank of Credit and Commerce International [1997] 3 All ER 1, the House of Lords had an opportunity to review the Addis decision. The two leading judgments took slightly differing approaches. The Court was agreed that the implied term of trust and confidence applied to the employment relationship, which term was not recognised in the more archaic times when Addis was decided.

However, Lord Nicholls of Birkenhead took the bolder approach. His Lordship stated that where the employer had breached the implied term, which included a promise not to conduct a dishonest or corrupt business, and if the financial loss was reasonably foreseeable and it is later sustained, then damages for the loss should be recoverable (p.7).

His Lordship stated:

> "Now that this term [of trust and confidence] exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time" (p.9)

His Lordship was quite prepared to overrule Addis because it was decided before the implied term of trust and confidence was recognised:

> "this House is not bound by the observations in Addis v Gramophone Co Ltd regarding irrecoverability of loss flowing from the manner of dismissal" (p.11)

Lord Nicholls suggests, it is submitted, that damages for manner of dismissal for breach of the implied term of trust and confidence are available, although this case did not concern a claim for injured feelings. He also indicated that it was a 'separate cause of action' (p.10) from damages for breach of the contract, whether for manner of dismissal or otherwise.

Lord Steyn in the other leading judgment after referring with approval to the 'sound development' of the 'implied obligation of mutual trust and confidence' (p.16) extended the ambit of damages available under the implied term: "…the employee ought on ordinary principles of contract law to be able to sue in contract for damages for financial loss caused by any damage to his employment prospects" (p.17) which he referred to as 'stigma compensation'.

Similarly to Lord Nicholls, he found that Addis was decided long before modern employment law and the implied term of trust and confidence (19g). The implied term evolved after the demise of the master and servant notion, and was a product of the duty of co-operation between contracting parties (15f). It is submitted that there is a close nexus between the implied term and the duty of fidelity also.

Lord Steyn held that stigma compensation was a recoverable head of damage for wrongful dismissal where financial loss could be shown. His Lordship construed the judgments in Addis as no bar to this claim, whilst acknowledging the fairly rigid constraints imposed by that decision in wrongful dismissal cases. Another constraint of Addis he noted was that 'it certainly enunciated the principle that an employee cannot recover exemplary or aggravated damages for wrongful dismissal' (p.20).

It is difficult to discern any common principle from Malik's case as the two judgments provide differing reasoning. Lord Mustill agrees with the narrower view of Addis in adopting the reasoning of Lord Steyn. Yet Lord Goff of Chieveley and Lord Mackay of Clashfern agree with the reasons of both Lord Steyn and Lord Nicholls.

[Stigma compensation for a breach of trust and confidence is a common principle. This may arise during the currency of the employment relationship, if an employee sought to be considered for another job, or more often after the employment has come to an end. Once an employee becomes aware that his or her employer is in fundamental breach of the contract, for example by conducting a corrupt business, it would make little sense to continue employment and seek damages. Otherwise the stigma simply causes further damage and the employer may be able to argue estoppel for loss arising after the employee became aware of the breach and elected to continue in employment.]

The other significant House of Lords decision was Johnson v Unisys Ltd. [2001] 2 WLR 1076 ("Johnson"). Mr Johnson was summarily dismissed after a total of 20 years with the Company. In accordance with his contract he was paid 1 month's salary in lieu of notice. After his dismissal the Plaintiff suffered a major psychiatric illness which led to him being admitted to a hospital for some six months, and thereafter intensive treatment including for alcohol dependency, and regular medication.

After obtaining an award of compensation under the statutory unfair dismissal scheme in the England, the Plaintiff sought 400,000 lbs for special damages for financial loss due to breach of contract or breach of implied terms, including an allegation of breach of trust and confidence. It was claimed that the breach of contract had led to his mental breakdown and consequent inability to find employment.

The House of Lords unanimously rejected his claim for differing reasons set out in three leading judgments. Lord Steyn found that Mr Johnson had a 'reasonable cause of action based on a breach of the implied obligation of trust and confidence' (p.11). However, questions of remoteness of damage and causation led to the dismissal of the appeal.

First, the Plaintiff had a medical and psychological condition relating to depression from 1985. Thus, to assert that the manner of termination caused the Plaintiff's psychiatric condition was difficult to sustain. Second, even assuming the Plaintiff's psychiatric condition was related in some way to his termination, it would be very difficult to differentiate between such injury as was caused by the fact of dismissal (which is not recoverable) as opposed to the manner of dismissal (which he held was recoverable).

Lord Hoffman stated that "if such damage is loss flowing from a breach of another implied term of the contract [as opposed to an express term or the implied term requiring reasonable notice], Addis's case does not stand in the way. That is why in Mahmud's case itself, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied term of trust and confidence". (p.14).

A number of matters may confine the future application of this decision. Lord Hoffman was concerned about Plaintiffs such as Mr Johnson having 'a possible second bite' (p.17) at compensation and damages. Therefore, where a Plaintiff has no statutory claim, he or she may have a stronger argument for distress damages for manner of dismissal.

Further, as Lord Steyn observed, 'the separate question whether an employee may recover compensation for anxiety and mental stress arising from the manner of his dismissal was not raised' in the proceedings below or before the House of Lords and therefore 'it would be wrong to express any view on it' (p.5). The comments therefore regarding damages for breach of trust and confidence caused by the manner of dismissal are obiter.

Finally, the decision was based on industrial legislation in England at the time. Lord Hoffman noted "that if there was no relevant legislation in this area, I would regard the question of whether judges should develop the law by implying a suitable term into the contract of employment as finely balanced" (p.15). In a similar vein, Lord Millet concludes that "the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases, the new common law right would merely replicate the statutory right" (p.22).

It flows from these last observations that the dismissal of the appeal was tailored very much to the peculiar facts of this case, and the presence of a statutory framework which was an alternate means of redress for the Plaintiff. Nonetheless Ashley J in Aldersea v Public Transport Corporation (2001) 3 VR 499 ("Aldersea") found the observations of the House to be both considered and 'highly persuasive' (p.511).

Decisions of Other Courts in the Commonwealth

[There have been a number of cases from other Commonwealth jurisdictions that have added to the jurisprudence of the implied term and damages for manner of dismissal]

The case of Wallace v United Grain Growers Ltd (1997) 152 DLR (4th) 1 has been cited for the Minority judgment of McLachlin J as much as the majority. The Court rejected a claim for damages for mental distress and loss of reputation and prestige for an employee dismissed in brutal circumstances. McLachlin J found that there was an implied duty to exercise the power of dismissal in good faith.

In New Zealand, McGechan J in Stuart v Armourguard Ltd [1996] 1 NZLR 484 found that New Zealand authorities supported the implied term of trust and confidence, and a further implied term as to fair processes in the course of any dismissal. Mr Stuart was awarded $10,000 in general damages for breach of contract for the manner in which his employment was terminated. His Honour stated that "such damage, distress, and humiliation, not only happened, but were (and foreseeably) likely to happen" (p.502).

Other decisions favouring damages for manner of dismissal which depart from the decision in Addis include Whelan v Waitaki Meats (which was cited by several High Court members in Baltic Shipping without apparent disapproval p.47 Gray art.) and Vorvis (see also p.153 of Burazin for Canadian authorities). There are those cases which follow Addis: Killorn v Healthvision Corp (1997) 143 DLR (4th) 477 and Brandt v Nixdorf Computer Ltd [1991] 3 NZLR 750. Gogay v Hertfordshire…

Australian Decisions on Damages for Manner of Dismissal

Any analysis of Australian judicial decisions on this topic must begin with Burazin. Ms Burazin was terminated after a minor altercation with a fellow employee, who happened to be the sister of the General Manager of the company. Ms Burazin had been concerned about the company's failure to pay her commissions due to her, and had expressed that concern. As a result, she had been accused of bad work practices, and ultimately her hours were unilaterally reduced by the company. The General manager called the police who forcibly removed her from the premises, and she was terminated the next day.

Although her Counsel argued for a number of implied terms in her contract of employment which had been breached, only one was pursued at trial. That was a term similar to that pressed by the Plaintiff in Malik, that the employer "would not without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee" (p. 2).

The Full Court of the Industrial Relations Court of Australia considered a number of the authorities cited above in some detail, including Hamlin, Hadley, Addis, Bliss, Baltic Shipping and various Canadian and New Zealand cases.

The Court was attracted to the argument that damages was an available remedy for the breach of the implied term of trust and confidence even for mental distress caused by wrongful dismissal. It made no finding on this point however as it held that compensation for distress was available under Ms Burazin's statutory claim.

Although the New Zealand and Canadian cases cited by the Court provide a common law basis for damages for manner of dismissal, not all are based on a breach of an implied term, or the same term implied in Burazin. The implied term in Whelan v Waitaki Meats Ltd [1991] 2 NZLR 74 seems to provide a remedy for loss of reputation, rather than for distress.

In Vorvis v Insurance Corp of British Columbia (1989) 58 DLR (4th) 193 the Court said that aggravated damages might be awarded in appropriate cases for distress for wrongful dismissal. If this is to be accepted by Australian Courts, Lord Steyn's view in Malik that exemplary or aggravated damages for wrongful dismissal are expressly excluded by Addis will need to be rejected. However, this may be achieved by looking to the broader interpretation of Addis adopted by Lord Nicholls in Malik.

An issue which concerned the Court was that the purpose of the implied term was to 'bolster an ongoing relationship' and therefore to allow an action for damages, this would 'presumably cause a further deterioration in the relationship' (p.154). Lord Nicholls in Malik agreed with that proposition, however saw nothing 'unfairly onerous or unreasonable' in holding an employer liable for financial loss of a nature that was reasonably foreseeable (p.6,8). In reality, it is unlikely that employment will continue if the breach was so serious as to warrant the employee bringing a claim for damages.

The High Court tackled the issue of whether damages could be awarded for distress due to breach of contract in Baltic Shipping. This was the Australian example of the holiday case. The Courts have been prepared to find an exception to the strict rule imposed by Addis precluding distress damages for breach of contract. The exception was stated by Mason CJ:

"…damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation" (p.359).

McHugh J took a more liberal approach. His Honour stated that:

"It is still open to this court to declare that damages for distress and disappointment in contract cases are not subject to any special rules. However, I do not think that the step should be taken in this case …[although] this court should not accept everything that was said by Pollock CB in Hamlin or by the House of Lords in Addis…" (pp 404-405).

His Honour thought that if ‘pleasure or personal protection’ were an express or implied term of the contract, then damages are recoverable for distress or disappointment flowing from a breach.

A useful practical example of the breach of trust and confidence term was Maritime Union of Australia v Patrick Stevedores No. 1 Pty Ltd (1998) 153 ALR 602. North J was prepared to grant an injunction to the union on the basis that there was a serious issue to be tried on the question of Patricks acting to breach the implied term ‘not to act in a manner likely to destroy the relationship of confidence’ between themselves and the employees. It was argued that replacing the employers workforce with non-union labour constituted such a breach (p612-3). However, neither the High Court nor the Full Federal Court took this matter further in the Appeals of this case (citation 245 CB).

The best opportunity in recent years for a Victorian Court to extend damages for distress due to wrongful dismissal was in Aldersea v Public Transport Corporation (2001) 3 VR 499. In that case, Ashley J firmly applied Addis and the majority in Baltic Shipping to hold that it is not open to claim damages for distress or psychological injury occasioned by the wrongful termination of an employment contract, including by the manner of its termination.

His Honour felt bound by Johnson v Unisys. After briefly discussing the decision, he noted “…putting to one side the possible significance of an implied term concerning the manner of dismissal, it seems to me that authority is against the recovery of damages for distress occasioned by the wrongful termination of an employment contract, in which I include the manner of termination”.(p.511).

Importantly, however, Aldersea was not a decision based on the implied term of trust and confidence, although the term was canvassed. This leaves open the claim for breach of the implied term based on the manner of dismissal. Also, given that that case involved Plaintiffs who had rights under the statutory scheme for a distress claim, the argument for a comparable common law right was less compelling.

Conclusion

Under the Workplace Relations Act, we have seen, compensation is available for the manner in which an employment contract is brought to an end. It is appropriate that the High Court review Addis – as McHugh J contemplated in Baltic Shipping v Dillon – to bring the Common Law in line with the Workplace Relations Act. Otherwise those with access to the statutory scheme have an unfair advantage over those dismissed employees left to the vagrancies of the common law.

Many of the cases cited above have recognised that employment law and the employment relationship have changed since Addis was decided (Malik eg Steyn, p.3, Hoffman p.12, McGechan J in Stuart …).

A further matter the Courts ought to acknowledge is the distinction between employment contracts and commercial contracts (see p6 Bura and Fink. Consid’ns relate to comm’l Ks). Mason CJ in Baltic Shipping stated in obiter that it was ‘artificial’ to justify an award of damages for distress for contract breach based on

distinctions between commercial and non-commercial contracts. Similarly, it is because of the increasingly large scale commercial environment that surrounds modern employment that Courts are more inclined to consider ordering specific performance (see Turner and Gray J in Bostik).

However the concerns expressed by Brennan J in Czarnikow Ltd v Koufos that 'trade and commerce would be seriously impeded' if a contracting party were exposed to the 'indefinite liability' of the distress or mental anguish of the other party is an extreme concern. The questions of remoteness and causation in employment cases reduce the scope for such a claim enormously. Further, it is the personal nature of the employment relationship which is the reason it should be distinguished from other contracts, and perhaps form another exception to the general rule in Addis.

Employment contracts are not contracts entered into by two parties of equal bargaining power, each with a view to maximising his or her profit. There is an interpersonal relationship occurring, and the breach of such a contract can have a major emotional impact on an individual. Dismissal can be devastating, and finding a new job is not often easy. So much needs to be recognised by the Courts today.

There are ways the Courts can avoid the shackles imposed by Addis:

1. Addis prevents damages for manner of dismissal for breach of contract. If the claim is for breach of the implied term of trust and confidence, then Addis does not apply.
2. Accept that distress and mental anguish are damages which 'naturally result from the breach of the contract', arise 'according to the usual course of things' or were 'in the contemplation of the parties' when the contract was made.
3. Accept that the 'very purpose of the implied term is to protect the employee from oppression, harassment and loss of job satisfaction' and therefore as in the holiday cases, it should be seen as a term 'designed to provide peace of mind or freedom from distress' (p.152 Bura).
4. Arguably, Ashley J took too narrow a view of Johnson and Malik. After the House of Lords decision in Malik, the constraint the Court in Burazin felt was imposed by the decisions of the Court of Appeal (UK) in Bliss and Malik were overcome.
5. The Court in Burazin saw the events breaching trust and confidence (when the police escorted the Applicant from her work premises) as a continuum with her termination the following day. Thus, although the breach occurs whilst the contract is on foot, the implied term enables an accumulation of events to constitute the repudiatory conduct by the employer, and hence you avoid the problem that the breach is not recoverable because it is for distress for breach of contract, which Addis says is not recoverable.

The High Court should recognise damages for the manner of dismissal in wrongful dismissal cases as a further exception to general contractual principles which apply because of the unique nature of the employment relationship. The law has recognised the reality of imbalances of wealth and power between contracting parties in other areas (p.334 Gray in Byrne), and so it should allow a relaxing of strict contractual principles in the area of employment law. It is very unlikely that the floodgates will

open – the problem of causation and remoteness will ensure that. Damages awards are likely to be modest. Bring it on!!