Essay – Who sounds like a broken record? *Addis v Gramophone*!

Introduction

Damages is one of the major remedies available for breach of contract. The House of Lords in *Addis v Gramophone Co Ltd* [1] ('*Addis*') 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.

The High Court of Australia has considered itself bound by *Addis* in *Baltic Shipping v Dillon* [2] ('*Baltic Shipping*'). The Full Court of the Industrial Relations Court of Australia in *Burazin v Blacktown City Guardian Pty Ltd* [3] ('*Burazin*') felt similarly confined, both Australian Courts indicating that until the High Court overrules *Addis*, damages for manner of dismissal are unlikely to be available in Australia.

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 [4]. These terms are imposed as a matter of policy in an attempt to equalise the relationship between employer and employee [5], and as a matter of justice. They are 'said to be an incident of all contracts of employment'[6].

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. Conversely, 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. This term is implied into every employment contract and operates regardless of the parties intentions, unless expressly excluded.

Decisions from the United Kingdom ('UK') regarding damages for manner of dismissal

[1] [1909] AC 488.
[2] (1993) 67 ALJR 228.
[3] (1996) 142 ALR 144.
[4] Macken, J et al, *Law of Employment*, 2002, Law Book Company, p. 95.
[5] Gray J in *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274 at 335
[6] In *Malik v Bank of Credit and Commerce International* , [1997] 3 All ER 1, per Lord Steyn, 15.

Generally, UK Courts have not allowed damages for frustration or distress occasioned by termination of employment, following *Addis* [7]. There have been exceptions to this rule, one Court finding that such damage 'was in the contemplation of the parties' when they entered the contract [8].

In *Malik v Bank of Credit and Commerce International* [9] ('*Malik* '), the two leading judgments took slightly differing approaches. The House of Lords was agreed that the implied term of trust and confidence applied to the employment relationship, and that that term was not recognised when *Addis* was decided. Lord Nicholls said this about Addis:

> 'this House is not bound by the observations in *Addis v Gramophone Co Ltd* regarding irrecoverability of loss flowing from the manner of dismissal' [10].
>
> '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' [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' [12] from damages for breach of the contract, whether for manner of dismissal or otherwise.

The other leading judgment of Lord Steyn uses the implied term to found a claim for 'stigma compensation'. This, he held, covered damages for financial loss caused by any damage to his employment prospects' [13].

The other significant House of Lords decision was *Johnson v Unisys Ltd*. [14] ('*Johnson*'). Mr Johnson was summarily dismissed after a total of 20 years with the company. In accordance with his contract he was paid one month's salary in lieu of notice. After his dismissal, the Plaintiff suffered a major psychiatric illness which required hospitalisation, intensive treatment and medication.

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[7] See for example Bliss v South East Thames Regional Health Authority, [1987] 1 ICR 700.
[8] Lawson J in *Cox v Phillips Industries,* [1976] 1 WLR 638. The High Court of Australia decision of *Mann v Capital Territory Health Commission* considered *Cox* without apparent disapproval: (1982) 148 CLR 97.
[9] Above, n 6.
[10] Ibid, 11.
[11] Ibid, 9.
[12] Ibid, 10.
[13] Ibid, 17.
[14] [2001] UKHL 13 (22 March, 2001).

Mr Johnson sought special damages for financial loss due to breach of contract and breach of implied terms, including breach of trust and confidence. He 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. Lord Steyn found that Mr Johnson had a 'reasonable cause of action based on a breach of the implied obligation of trust and confidence' [15]. However, as was held in other leading judgments, questions of remoteness, damage and causation led to the dismissal of the appeal. The Court was also influenced by the claim the Plaintiff could – and did – bring for compensation under statute for wrongful dismissal, including manner of dismissal.

Decisions of Other Courts in the Commonwealth

In *Wallace v United Grain Growers Ltd* [16], 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's powerful minority judgment 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* [17] 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' [18] .

Other decisions favouring damages for manner of dismissal which depart from the decision in *Addis* include *Whelan v Waitaki Meats Ltd* [19] ('*Whelan'*) (which was cited in several of the High Court judgments in *Baltic Shipping* without apparent disapproval [20]) and *Vorvis v Insurance Corp of British Columbia* [21] ('*Vorvis'*). There are those cases which follow *Addis*: *Killorn v Healthvision Corp* [22]and *Brandt v Nixdorf Computer Ltd* [23].

Australian Decisions on Damages for Manner of Dismissal

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[15] Ibid, 11, para 28.
[16] (1997) 152 DLR (4th) 1.
[17] [1996] 1 NZLR 484.
[18] Ibid, 502.
[19] [1991] 2 NZLR 74.
[20] Gray, P, 'Damages for wrongful dismissal: Is the Gramophone Record Worn Out', in McCallum, McCarry and Ronfeldt, (eds) *Employment Security*, 1994, The Federation Press, 41 at 47.
[21] (1989) 58 DLR (4th) 193, and see *Burazin* above n 3, 153 for a number of similar Canadian decisions.
[22] (1997) 143 DLR (4th) 477.
[23] [1991] 3 NZLR 750.

In *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 she was due, and had expressed that concern. Shortly after, she was accused of bad work practices, and her hours were unilaterally reduced by the company. Ultimately, the General manager called the police who forcibly removed her from the premises, and she was terminated the next day.

Ms Burazin argued before the Full Court of the Industrial Relations Court of Australia that there was a term implied in her contract 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' [24].

The Court was attracted to the argument that damages was an available remedy for breach of the implied term of trust and confidence even including 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.

An issue which concerned the Full Court in *Burazin* 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' [25]. 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 [26]. Here, the Court treated the pre-dismissal breach and the act of dismissal as a continuum.

The High Court tackled the issue of whether damages could be awarded for distress due to breach of contract in *Baltic Shipping*. That case was an Australian example of the 'holiday cases'. 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' [27] .

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.

[24] Above n 3, 145.
[25] Ibid, 154.
[26] Above n 6, 6 and 8.
[27] Above n 2, 359.

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 [v Great Northern Railway Co]* or by the House of Lords in *Addis…*' [28].

The best opportunity in recent years for a Victorian Court to extend damages for distress due to wrongful dismissal was in *Aldersea*. 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 found the observations of the House of Lords in *Johnson* to be both considered and 'highly persuasive' [29]. After briefly referring to that 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'[30].

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 possibility of a 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 (as was the case in *Johnson*), the argument for a comparable common law right was less compelling.

Conclusion

Under the *WorkplaceRelations Act 1996 (Cth),* compensation is available for the manner in which an employment contract is brought to an end. It is appropriate that the High Court review and overrule *Addis*, as McHugh J contemplated in *Baltic Shipping v Dillon* and restore some consistency to the law.

A number of the cases cited above have recognised that employment law and the employment relationship has changed since *Addis* was decided [31].

A further matter the courts ought to acknowledge is the distinction between employment contracts and commercial contracts [32].

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[28] Ibid, 404-405.
[29] (2001) 3 VR 499, 511.
[30] Ibid.
[31] For example, in *Malik* , above n 6, Lord Steyn 3, Lord Hoffman 12, and McGechan J in *Stuart v Armourguard Ltd*, above n 19, 498.
[32] See *Burazin* above n 3, 149-150; for a contrary view see Mason CJ in *Baltic Shipping* who describes the distinction between commercial and non-commercial contracts as 'artificial', above n 2, 359.

The concerns expressed by Brennan J in *Baltic Shipping* [33] 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 in the event of a breach is not a valid concern in all areas of contract law. Questions of remoteness and causation in employment cases reduce the scope for such a claim considerably. Due to the personal nature of the employment relationship, it should be distinguished from other contracts.

Employment contracts are not contracts entered into by two parties of equal bargaining power, each with a view to maximising his or her profit. An interpersonal relationship exists. The breach of such a contract can have a substantial 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 strict application of *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* can be distinguished.
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 both parties' when the contract was made [34].
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' [35].
4. Argue that *Aldersea* should not be followed as the Court took too narrow a view as to the interpretation of *Malik* (2) and *Johnson*.

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 [36], and so it should allow a relaxing of strict contractual principles in the area of employment law.

[33] Above n 2, 368.
[34] *Burazin*, above n 3, 148.
[35] Ibid, 152.
[36] Gray J, in *Byrne v Australian Airlines*, above n 5, 334.