

The Dynamics of Common Law Evolution

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In Commonwealth Bank of Australia v. Barker [2014] HCA 32 (Barker) the High Court of Australia held that the implied term of mutual trust and confidence was not part of the law of the employment contract in Australia. This article considers the impact that the decision will have on the position of employees at common law and on the way that the law is likely to develop. It suggests that the impact of Barker may be marginalised marginalized by the ever increasing importance of good faith in the law of contract and that in assessing the extent to which the common law affords protection for the interests of employees it is imperative to take account of the obligations imposed by the law of tort. Finally, the article explores the dynamics of common law evolution more generally through the prism of Barker. It is suggested that two key factors in determining the manner in which the law develops are the values espoused by the common law and the extent to which statute is allowed to act as a constraint rather than treated as a catalyst.

1 INTRODUCTION

Historically the common law has not been regarded as the friend of the worker. Where collective relations are concerned, developments in the law of the economic torts have been seen as inimical to the interests of labour.¹ At the level of the individual relationship, the adoption of the obligations of the law of master and servant by the employment contract through the medium of implied terms has been the subject of trenchant criticism.²

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¹ *Rookes v. Barnard* [1964] AC 1129 being but one example.

² A. Bogg, *Good Faith in the Contract of Employment: A Case of the English Reserve*, 32 *Comp. Lab. L. & Pol'y J.* 743 (2010–2011).

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However, over the last thirty years or so, the courts have adopted a somewhat different and markedly more enlightened approach to the law of the employment contract. The judiciary now recognise-recognize that a worker's interest in the employment relationship is more than a purely financial one:

Employment often plays a central part in determining whether individuals are able to achieve many of their aspirations. Equally important for many people, a job is closely linked to feelings of self-worth and dignity.³

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They have also become cognisant of the existence and significance of the stark imbalance of power that is the hallmark of that relationship: 'History tells us that in the absence of any organisation-organization there is too great a risk of inequality of bargaining power, of exploitation of workers, and of damage to the social fabric.'⁴ The Canadian courts have been particularly eloquent and persistent in depicting a contemporary vision of employment relations that is more accommodating to the position of the employee. Of late, for example, in *Potter v. New Brunswick* the Supreme Court of Canada referred to their earlier decision in *Reference re Public Service Employee Relations Act*⁵ and reaffirmed their view that work is now considered to be 'one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society.'⁶ The values embodied in the latter dictum have been influential in the development of the common law in a variety of jurisdictions including Australia and the UK.⁷ The recognition of the non-pecuniary benefits of employment was significant in *Potter* itself and it was held that, at common law, where the employer is not under a general

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³ Sir Ivor Richardson, *The Role of the Courts in Industrial Relations*, 12 NZJLR 113 (1987).

⁴ *Ibid.*

⁵ *Reference re Public Service Employee Relations Act* [1987] 1 S.C.R. 313, 368.

⁶ *Potter v. New Brunswick* [2015] 1 SCR 500.

⁷ The impact of such high-level statements in Canada itself is discussed by C. Mumme in this issue.

obligation to provide work, the employer may not withhold work in bad faith or without justification. Any decision to the contrary 'would undermine the non-monetary benefit all workers may in fact derive from the performance of their work'.²

One of the most significant instances of a refashioned common law regime has been the emergence of the implied obligation of mutual trust and confidence in the UK.⁸ For a number of years the Australian courts appeared to be edging towards adoption of the term but in 2014, in *Commonwealth Bank of Australia v. Barker* (*Barker*), the High Court held, utterly unequivocally, that it was not part of the law of the employment contract in Australia.⁹ By way of contrast, in the UK the Supreme Court has been consistent in its endorsement of mutual trust and any reversal of this position would greatly diminish the protection afforded by the common law. In particular in *Eastwood v. Magnox* the House of Lords (as was) made clear that the *Johnson v. Unisys* exception should not be seen as an impediment to the natural evolution of mutual trust in situations other than dismissal.¹⁰ Were the position in the UK to change, the wider ramifications would be weighty, since there would be an impact on statutory rights as it would be more difficult to demonstrate that constructive dismissal had taken place. It is also important to appreciate that the emergence of mutual trust was an exemplar of a changed judicial view of the employment relationship in the UK and any reversal might be seen as heralding, or even encouraging, a return to traditional values.

⁸ *Malik v. BCCI* [1998] AC 20.

⁹ *Commonwealth Bank of Australia v. Barker* [2014] HCA 32. *Swindells v. State of Victoria* [2015] VSC 19 raised the question whether mutual trust or good faith might be implied as a term in fact on a case-by-case basis, which would ameliorate to some extent the impact of *Barker*. However, in *State of New South Wales v. Shaw* [2015] NSWCA 97, it was held that the fact that employment was probationary does not provide a meaningful point of distinction.

¹⁰ *Eastwood v. Magnox* [2005] 1 AC 503; *Johnson v. Unisys* [2003] 1 AC 518. And see D. Brodie, *Protecting Dignity in the Workplace: The Vitality of Mutual Trust and Confidence*, 33 ILJ 349 (2004).

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A key question for Australia is whether *Barker* represents a rejection of the more progressive approach that has come to the fore in recent years or whether it can be viewed more narrowly. There is certainly cause for concern. Jessup J, who was in the minority in the court below but vindicated by the High Court, remarking that he would:

— not regard a distinction between the master-servant relationship and the employer-employee relationship as particularly illuminating, or as helpful in explaining the doctrinal justification for the emergence of the implied term. In this country, these two identifiers have for years been recognised as referring to one and the same thing.²¹¹

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— Moreover, he thought that considerations such as ‘the provision of job satisfaction, a sense of identity, self-worth, emotional well-being and dignity’ should not inform the content of the employment contract. The High Court were also anxious to dissociate themselves from being party to a ‘transformative approach’ to the law of the employment contract.

This article seeks to assess the impact of *Barker*. It does so, in part, by trying to gauge the extent to which the outcome in individual cases will be different given that the common law may afford an alternate basis of claim. It also analyses the significance of the decision from a doctrinal perspective. The article goes on to suggest that the impact of *Barker* may be marginalized by the ever increasing importance of good faith in the law of contract and that in assessing the extent to which the common law affords protection for the interests of employees, it is imperative to take account of the obligations imposed by the law of tort. Finally, the article explores the dynamics of common law evolution more generally through the prism of *Barker*. It is suggested that two key factors in determining the manner in which the law develops are the values espoused by the common law and the extent to which statute is allowed to act as a constraint rather than treated as a catalyst.

²¹¹ *Commonwealth Bank of Australia v. Barker* [2013] FCAFC 83, para. 227.

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2 EVALUATING THE IMPACT OF BARKER

Given the significance that mutual trust has assumed in the UK, it would be easy to conclude that *Barker* is a decision of great magnitude. This may be fallacious, and one way to assess the impact of the decision is to focus on the range of workplace situations where employees are now denied a right against the employer. I would hazard that the employee's position will in fact be diminished to a limited extent. Joellen Riley has highlighted that a breach of the term

may be evidenced by various kinds of conduct, depending on the circumstances of the employment. The following are examples of the kind of conduct which may be found to destroy trust and confidence: unwarranted carping criticism; demotion; capricious withdrawal of employment benefits; pointed disregard of policy-based entitlements; precipitate or unreasonable discipline without prudent and careful investigation of complaints.¹²

As is clear from this passage the open-textured nature of the term addresses a wide range of situations that are likely to crop up in the workplace and, for this very reason, can be immensely valuable to the employee. Nevertheless, I would suggest that claimants will, in a significant number of cases, be able to look to other forms of common law claim to secure protection. Moreover, it will be argued that further grounds of claim will continue to emerge. It is also important to remember that in the UK mutual trust can be viewed as a synthesis of a number of related developments. As a corollary some of the protection afforded would have continued to exist had the term not emerged. It is helpful to view the denial in *Barker* in this light and one should also contemplate the possibility of a synthesis emerging on a different basis in other jurisdictions. Good faith may be one such 'organizing' principle.

¹² J. Riley, *Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts*, 36 Melbourne University Law Review 521 (2012).

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Without seeking to be exhaustive two instances will be explored where a claim that might fall under the rubric of mutual trust may be brought on another basis. In particular I will explore the employer's obligations in respect of procedural fairness and the exercise of discretionary powers.

3 NATURAL JUSTICE

The obligation of mutual trust and confidence can be seen as 'an application of natural justice to contemporary industrial relations'.¹³ The impact of *Barker* is diminished to the extent that those principles are embodied more generally in the common law. Australian administrative law provides that whenever a statute gives a public official the power to do something affecting a person's rights or interests, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of legislative intention. *Jarratt v. Commissioner of Police* is an application in the employment context of this general approach.¹⁴ There the Deputy Commissioner of Police was dismissed without a hearing and the court had to decide whether there was a legal requirement on the part of the Commissioner to afford an opportunity to be heard before a recommendation went to the Governor-in-Council. This involved construing the legislation to determine whether the exercise of the power of removal was conditional upon the observance of natural justice and it was observed that where 'Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain.' *Jarratt* held that there was nothing in the statutory language to displace that intention. The approach in *Jarratt* dictates that a number of public sector employees will

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¹³ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 and see D. Brodie, *Mutual Trust and the Values of the Employment Contract*, 30 ILJ 84 (2001).

¹⁴ (2005) 224 CLR 44.

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benefit from the common law's insistence on procedural fairness; an element of mutual trust is thereby provided by another route.¹⁵ It is important to note that *Jarratt* placed far greater emphasis on procedural fairness than previous cases and can be seen as contributing to the emergence of contemporary judicial values in the employment context.¹⁶

What of employees in the private sector? Traditionally, a few exceptional categories apart, natural justice did not play a part in the life of the employment contract. In *Ridge v. Baldwin* Lord Reid said that 'the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract' and that position continued to hold sway for quite some time.¹⁷ In Canada and the UK the position has evolved considerably since then, and one can now claim that natural justice is one of the core values of the employment contract. There are 'few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty'.¹⁸ In Canada *Potter* dealt with suspension and demonstrates that a general concept of good faith (rather than the employment-orientated obligation of mutual trust) may require that an employee be given reasons for a decision to suspend.¹⁹ It is striking that the common law has developed to the extent that it now imposes requirements not dissimilar to those required by the statutory law of unfair dismissal in the UK.²⁰ Such

¹⁵ *Swindells*, n. 9 above.

¹⁶ See G. Carabatta, *Going, Going... Gone? The Demise of the Dismissal at Pleasure Doctrine in Public Sector Employment*, 19 AJLL 283 (2006).

¹⁷ [1964] AC 40.

¹⁸ *Marlborough Harbour Board v. Goulden* [1996] 1 NZLR 484, 492.

¹⁹ *Potter*, n. 6 above.

²⁰ In *Reininger v. Unique Personnel Canada Inc.* (2002), 21 C.C.E.L. (3d) 278 (Ont. S.C.J.), it was said that: '-1) The onus is on the employer to demonstrate to the court on a civil standard of proof that a reasonably serious and immediate risk to the employer's legitimate interests exists. The employer must establish that the nature of the charge is such as to be potentially harmful to the employer's reputation or product, or that it will render

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developments take strength from their consistency with general contractual principles. The landmark Canadian Supreme Court decision in *Bhasin v. Hrynew* has placed good faith at the very centre of Canadian contract law.²¹ At ‘a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright’ and *Potter* is a good example in the employment context.

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In the UK *Gogay v. Hertfordshire CC* held that the punitive exercise of prerogative powers may be a breach of mutual trust in the absence of due process: the employer would not have lost in that case had they taken the trouble to establish that there was reasonable cause to suspend.²² *Stevens v. University of Birmingham* is a recent application of *Gogay* where the failure to allow the employee to be accompanied to an investigation constituted a breach of contract.²³ *Stevens* reminds us that mutual trust is sensitive to the vulnerabilities of employees (particularly where there is a threat to the existence of the relationship):

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‘The person best placed to provide the evidence in support of the employee’s case is usually the employee himself, but he may not always appreciate the significance of a particular piece of information. A union representative is likely to be experienced in safeguarding the interests of members in these circumstances, and should be able to help the employee to identify the significant features, and ensure that they are mentioned.’²⁴

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It may be claimed that:

the employee unable properly to perform his duties, or that it will have a harmful effect on its employees or customers. 2) The employer must show that it made a genuine attempt to assess the risk of continuing employment, including making its own investigation or inquiry...3) The employer must also show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position. 4) There is a continuing onus on the employer during a period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances that may come to its attention.’

²¹ [2014] 3 SCR 495.

²² [2000] IRLR 703.

²³ [2015] EWHC 2300.

²⁴ *Ibid.* at para 95.

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— a golden thread through the case law on fair treatment is that those liable to be affected by a decision must be given prior notice of it so that they can make representations. A corollary is that any representations must be taken into account by the decision-maker. The greater detriment a decision is likely to cause the more demanding these duties.²⁵

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It must be said that Lord Reid's dictum in *Ridge* appears to have had greater longevity in Australia:

— in deciding what conduct of an employer will damage or destroy mutual trust and confidence, the employee cannot complain that he or she was denied natural justice. To hold otherwise would be to create a duty to afford natural justice in all contracts of employment, thus creating by the back door a duty which the common law has consistently held to be absent from the relationship between employer and employee.²⁶

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The position is though far from being without hope and, prior to *Barker*, the Supreme Court of New South Wales had been prepared to assume in *Russell v Trustees of the Roman Catholic Church* that a defect in process might constitute a breach of mutual trust.²⁷ However, 'the respondents did not demonstrate any element of bad faith, or act in such a way as to seriously damage mutual trust and confidence, in conducting a telephone interview of a principal witness rather than a face-to-face interview'.²⁸ A key question to pose is whether it would now be futile for an Australian claimant to argue that some form of a right to a hearing should be implied before a detriment could be imposed. I do not believe this to be the case. Such an implication would have to satisfy the necessity test, but it may be argued that it is essential to proper decision-making that the employer is fully

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²⁵ *Yapp v FCO* [2013] IRLR 616. On appeal (*Yapp v FCO* [2015] ICR D13) the commitment to procedural fairness was diluted as it was found that whilst the process adopted by the employer breached the claimant's contractual obligations that was only because it fell out with the range of reasonable responses. *Yapp* would seem to be inconsistent with *Bournemouth University v Buckland* [2011] 1 QB 323 which denies that the band of reasonableness test has a role to play in determining whether a breach of mutual trust and confidence has arisen.

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²⁶ *Morton v Transport Appeal Board (No 1)* [2007] NSWSC 1454.

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²⁷ [2008] NSWCA 217.

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informed; necessity could be said to exist on the basis that action detrimental to the parties' relationship might otherwise occur. It is not in the employer's interests to act against the employee erroneously and damage a hitherto fruitful relationship. It is worth recalling that *Jarratt* recognized that it is not only employees who stand to benefit from a requirement of procedural fairness. Callinan J drew attention to the beneficial effects on morale that can occur and, as a result, employers may gain as efficiency in the workplace may be enhanced.²⁸ I would also suggest that should an implied obligation of good faith be recognized by the general law of contract in Australia it would be likely that a right to hearing would be viewed as incidental to that obligation.²⁹ It is difficult to see that detrimental action in breach of the latter right is compatible with a relationship informed by good faith.

There is a clear tendency across a range of jurisdictions to place greater emphasis on procedural fairness. For instance, in the recent New Zealand case of *Rodkiss v. Carter Holt Harvey*, it was said the:

—problem with that explanation, however, is that the issues identified were all matters that reflected adversely on Mr Rodkiss' performance and, as such, in terms of CHH's basic obligations of fairness and good faith, they should have been discussed with him and he should have had an opportunity to comment upon them before Mr Adams made his decision to implement the PIP [performance improvement plan].³⁰

—Australia has already gone down this road in public law and private law may well follow.

4 CONTROLLING DISCRETION

²⁸ *Jarratt*, n. 14 above.

²⁹ Such an implication would not be permissible in the event of conflict with a statutory scheme.

³⁰ [2015] NZEmpC 34.

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In the UK an intriguing feature of the endorsement of mutual trust and confidence by the House of Lords in *Malik v BCCI* was that commercial law (and indeed contract law as a whole) would not at that point have countenanced an obligation of that type.³¹ Judicial recognition of the particular needs of the employment relationship appeared to be leading to the formation of a self-contained body of rules which stood apart from the general principles of contract law: ‘The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing.’³² The law of that ‘special relationship’ began to exhibit significant differences. For instance, discretionary powers were regulated by the law of the employment contract much more closely: an employer’s discretion should ‘be exercised in good faith and not arbitrarily, capriciously or irrationally.’³³ The position has moved on considerably since then, and contract law as a whole appears to be moving to a common position on the role of norms of good faith and fair dealing.³⁴ Mutual trust may have acted as a catalyst in this process.³⁵

In Australia the development of the law of contract has been very different and the law of commercial contracts has made considerable progress towards an obligation of fair dealing, whilst the rate of progress towards recognition of mutual trust and confidence has been unspectacular and ultimately that journey proved futile. Developments in a number of areas including commercial law have meant that common law controls over discretionary powers are increasingly prevalent and indeed are now very wide ranging. For instance, in *Far Horizons Pty v McDonald’s Australia* the court proceeded on the basis that franchise agreements contain an

³¹ *Malik*, n. 8 above.

³² *Telecom South v Post Office Union* [1992] ERNZ 116.

³³ *Horkulak v Cantor Fitzgerald International* [2005] ICR 402.

³⁴ See D. Brodie, *Fair Dealing and the World of Work*, 43 ILJ 29 (2014).

³⁵ See D. Brodie, in M. Freedland (ed.), *The Contract of Employment*, (M. Freedland ed., OUP: 2016).

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implied term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably, and not capriciously or for some extraneous purpose.³⁶ It has been judicially observed that obligations of this sort now permeate many areas of law apart from contract law, including property law, administrative law, the law of trusts, and insolvency law.³⁷ It is also the case that certain types of contract are seen by some judges as more appropriate vessels for obligations of the fair dealing or good faith type:

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—most of the cases where a result was determined by a finding of both an existence and a breach of the implied obligation of good faith were cases involving franchise, distribution and licence agreements. Franchise relationships, of course, have a well-recognised historical capacity to manifest an imbalance of bargaining power between the parties.³⁸

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—The relationships of franchise and employment are decidedly analogous and might be thought to merit a similar approach. Against that backdrop, I would suggest that whilst, for the moment, there may not be an overarching obligation of good faith in Australian contract law, discretionary powers are increasingly likely to be subject to an implied restriction and it seems reasonable to assume that such controls will operate in the employment context. Cases drawn from commerce show that good faith will often achieve very similar outcomes to mutual trust and confidence. In *Barker* it was said that:

—The above conclusion should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts. Nor does it reflect upon the related question whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in the sphere of public law.²

³⁶ [2000] VSC 310.

³⁷ *Sino Iron Pty v Mineralogy Pty* [2014] WASC 444.

³⁸ *Caratti Holdings v Coventry Group* [2014] WASC 403.

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-Australian cases since then suggest that, the caution expressed in the foregoing dictum notwithstanding, courts will regulate discretionary powers in the employment context on the basis of fair dealing. One such instance is *Romero v. Farstad Shipping* where it was said that the employer's:

power to change its policies, or to introduce new policies, from time to time would be constrained by an implied term that it would act with due regard for the purposes of the contract of employment... so it could not act capriciously, and arguably could not act unfairly towards the respondent... It might also be a power which, by implication, must be exercised reasonably having regard to the nature of the contract and the entitlements which exist under it.³⁹

UGL Rail Services v. Janik and *James v. Royal Bank* provide further examples.⁴⁰ Despite *Barker* the approach is in line with that taken in earlier cases such as *Mallone v. BPB Industries* in the UK⁴¹ and, in Australia, *Silverbrook Research Pty Ltd v. Lindley*.⁴² In my view it is almost certain that, where this dimension of contract law is concerned, *Barker* will prove to be an irrelevance.

5 THE IMPOSITION OF DOCTRINAL LIMITATIONS

Two dimensions of *Barker* may prove troublesome for employees: the view taken on the nature of the implied duty of co-operation and the retreat to the business efficacy test. It is important to note that, in the UK, whilst mutual trust may well be derived from the general duty of co-operation, it is a positive version of that obligation and that has been a factor of the first

³⁹ [2014] FCAFC 177.

⁴⁰ *UGL Rail Services v. Janik* [2014] NSWCA 346. In *James v. Royal Bank* [2015] NSWSC 243 the employer had discretion over whether to make a redundancy payment but was held to be under an obligation to consider the issue in good faith. On the facts a breach arose given that the employer had fettered that discretion: 'the decision was dictated by the blanket policy formulated on 7 November 2008 not to make any ex gratia payments on account of bonus to departing employees.'

⁴¹ [2002] ICR 1045.

⁴² [2010] NSWCA 357.

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importance in terms of the development of the employer's obligations to meet contemporary expectations.⁴³ An expansive version of the obligation has resulted in new duties being placed on the employer in respect of, for example, disclosure of information and prevention of harassment.⁴⁴ *Barker* accepts that the duty applies in the employment context but, in the circumstances, it was found to have no application as it was held that there was no relevant contractual benefit (such as an entitlement to redeployment) with which the implied term could engage.⁴⁵ It was said that the duty of cooperation 'is anchored upon the need for one party to take a positive step without which the other party is unable to enjoy a right or benefit conferred upon it by the contract'.⁴⁶ I would suggest that a narrower approach to the duty of cooperation – compared to the UK – is likely to be one of the most significant elements of *Barker*: 'whatever the historical basis in the United Kingdom for the implied duty of mutual trust and confidence, it cannot be supported in this country as an expression or development of the implied duty of cooperation'.⁴⁶ It is my contention that a number of the outcomes achieved by mutual trust are realizable by other common law means but a positive version of the duty of co-operation remains important if the common law is to insist on 'good' behaviour. At the core of *Barker* may be a concern with a potential expansion of the law that a focus on the 'psychological conditions which are essential to the performance by an employee of his or her part of the bargain' may lead to. It is this somewhat amorphous dimension of mutual trust that a conservative court may be afraid of.

⁴³ Lord Steyn in *Malik*, n. 8 above, 15 adopting the view of B.-A. Hepple, *Employment Law* 134–135 (4th ed., 1981).

⁴⁴ *Scally v. Southern Health Board* [1992] 1 AC 294; *Waters v. Commissioner of Police* [2000] 4 All ER 934.

⁴⁵ *Secured Income Real Estate (Australia) Ltd v. St Martins Investments Pty Ltd* (1979) 144 CLR 596.

⁴⁶ *Barker*, n. 9 above.

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Regulski v. State of Victoria provides a demonstration of the diminished extent of common law protection afforded by adopting a narrower conception of the obligation of co-operation. In *Regulski* the applicant argued that a breach of that duty arose by virtue of the employer failing to comply with their Anti Bullying and Workplace Conflict Policy.⁴⁷ It was ruled that the policy was non-contractual and could not found a claim. Mutual trust would have been doubly relevant in a case of this sort. First, it might have provided a route to incorporation if publication of the policy could have been viewed as giving rise to legitimate expectations on the part of the employee.⁴⁸ Previously, in *Thomson v. Orica Australia Pty Ltd*,⁴⁹ Allsop J had regarded mutual trust as the basis for finding that an employer had breached the employment contract by refusing to honour its own human resources policy:

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It is unnecessary to decide the question whether the policy was contractually binding. There is much to be said for the proposition that it was... However, whether or not contractually binding in terms, it was plainly company policy and if the company conducted itself in breach of it in a serious way, that would be a matter assisting in the conclusion as to whether or not Orica had behaved in a manner in breach of the implied term.⁴⁹

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Second, and in any event, mutual trust and confidence of itself may have required the same action of the employer. In contrast to *Barker* mutual trust posits the existence of an obligation of co-operation unrelated to any specific term of the applicant's contract.

The benefits to employees of a duty of co-operation with a positive dimension can be seen in recent Canadian litigation. In *Baroch v. Canada Cartage* the plaintiff alleged that the employer, as a matter of policy, only paid overtime if the ~~60~~^{sixty}-hour threshold imposed by statute was

⁴⁷ [2015] FCA 206.

⁴⁸ *French v. Barclays Bank* [1998] IRLR 646.

⁴⁹ [2002] FCA 939.

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exceeded; that it had no written overtime policy, no directives for its human resources staff, and no centralized record-keeping system; that overtime eligibility determinations were made on a case-by-case basis in disregard of applicable law.⁵⁰ The plaintiff submitted that in doing so, the employer failed to act in good faith and breached a duty of care by failing to take reasonable steps (such as having appropriate record-keeping systems in place) to ensure that employees were compensated at appropriate rates of pay for all hours worked. It was said that good faith – as with mutual trust and confidence – required the employer to co-operate in a positive manner. As a result the following omissions were seen as founding a relevant claim that the employer had a policy or practice of avoiding or disregarding its overtime obligations: (1) Canada Cartage had no written overtime policy. There was no Canada Cartage document that employees could consult to learn how their overtime entitlement would be calculated. (2) Canada Cartage never issued any written directives to managers, supervisors or the payroll department about how to apply the various overtime rules and thresholds. There was no Canada Cartage document or directive that persons responsible for calculating an employee’s overtime could consult to ensure that they do so in a consistent fashion.

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Similarly in *Fulawka v. Bank of Nova Scotia* it was found that the duty of good faith could include a requirement that the employer take active measures to ensure that employees are not required or permitted to work overtime in breach of Canadian Labour Code in order to perform the usual duties of their employment.⁵¹ The employees were seen as particularly vulnerable ‘as they do not have the protection of a union and they are not members of management’.² Moreover, the system of work added to this concern:

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⁵⁰ 2015 ONSC 40.

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⁵¹ 111 OR(3D) 346.

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“The nature of their work, which requires that they respond to the unpredictable demands of customers, makes the necessity to work overtime a real possibility. The understandable need for managers to control overtime costs and the pre-approval requirement in the policy create institutional impediments to claims for overtime pay.”²

A more traditional approach would have left it to the claimants to establish that the employer was in breach on a case-by-case basis. The imposition of general obligations which require the employer to have effective systems in place makes it more likely that employees will receive the full benefit of the work-wage bargain. Twentieth century authority, such as the seminal case of *Wilsons & Clyde Coal v. English*, imposed a set of general rules to ensure that employers had systems in place to ensure the physical safety of workers.⁵² In the twenty-first century the courts are beginning to build a similar regime which encompasses the employee’s financial and psychological interests.

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6 BUSINESS EFFICACY

The mere denial of mutual trust may be of less significance than might have been assumed, but the approach to implication taken by the High Court appears to be more ominous. Implied terms allow for an expression of the judicial view as to the appropriate obligations in a relationship, and policy aims may be furthered in the process. Through this medium the employment contract can be developed in a more socially progressive way. *Barker* espouses a clear reluctance to embrace any such opportunity and holds to a very traditional approach whereby terms are only to be implied on the basis of ‘business efficacy’. In the court below Jessup J had said that there is ‘a real question whether the courts should take it upon themselves, by the development of the common law, to engage in law reform for a better social

⁵² [1938] AC 57.

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order'.⁵³ The manner in which the business efficacy test is applied varies over both time and jurisdictions but, at the moment, some Australian courts are applying it very strictly: 'the criterion of necessity is to be applied at a meaningful and rigorous level'.⁵⁴ I have written elsewhere that such a rigorous test for implication is favoured as a means of excluding consideration of the policy concerns that have informed the development of the implied term of mutual trust in other jurisdictions.⁵⁵ Reliance on business efficacy makes it easier to cleave to the position that, at some level at least, the contract functions perfectly adequately in the absence of terms of this sort. Such an approach is also said to accord with the proper scope of judicial law-making which should 'only be exercised as an incident of the adjudication of particular disputes'.⁵⁶ *Barker* may point to the dawning of a period of conservatism where attempts to advance terms such as mutual trust and confidence which take a more reciprocal view of the obligations pertaining to the employment relationship (and in the process impose additional obligations on employers) are likely to be rebuffed.

Reliance on the business efficacy test is however likely to offer an unreliable barrier to judicial creativity should a court be inclined to innovate. As Riley has pointed out, the test in practice may well operate differently where default rules are in issue.⁵⁷ Certainly earlier authority had been to the effect that 'considerations of policy can, and do, have a part to play in determining whether *or not* it is necessary that a contractual obligation should be implied in law in a given class of contract'.⁵⁸ It is not

⁵³ *Barker*, n. 11 above, para 324.

⁵⁴ *Caratti Holdings v. Coventry Group* [2014] WASC 4031.

⁵⁵ D. Brodie, in *M. Freedland (ed.), The Contract of Employment*, (M. Freedland ed., OUP: 2016).

⁵⁶ *Barker*, n. 9 above, 19.

⁵⁷ In *Energy Fundamentals v. Veresen* (2015) ONSC 692 it was said that it 'is worthy of note that good faith informs what is necessary.'

⁵⁸ *University of Western Australia v. Gray* [2009] FCAFC 116. It may be noted that in *Byrne v. Australian Airlines Ltd* (1995) 185 CLR 410 the High Court approved the decision of the House of Lords in *Liverpool CC v. Irwin* [1977] AC 239 where the approach was clearly policy orientated.

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beyond the bounds that there will be a reversion to the latter approach. It is after all probably impossible to exclude questions of reasonableness from decisions on implication. In *Energy Fundamentals v. Veresen* it was said that:

“it is plainly the case that the implied terms must themselves be reasonable. One would not expect a court to imply terms into an agreement that it considered to be unreasonable. Further, keeping in mind that the implied in fact term rests on the presumed intentions of the parties, courts quite understandably presume intentions of the parties that are reasonable.... although necessity appears to be the threshold that must be met before engaging in the exercise of implying the term, the formulation of the term to be implied is very much an exercise that rests on a concept of reasonableness.”⁵⁹

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7 THE COUNTERVAILING IMPACT OF GOOD FAITH

Attention has been drawn to the richness of the common law and the fact that claimants may be able to look to an alternative ground of claim in circumstances which, in other jurisdictions, might be brought as mutual trust cases. Success need not be contingent upon the existence of mutual trust and confidence. This compels us to take a broad view of relevant doctrine before arriving at any assessment of the state of the law. Admittedly, renewed allegiance to the business efficacy test, and a traditional approach to the operation of the duty of co-operation, suggest that there is a real danger that the common law will develop in a manner that would not be in the interests of employees. There are however powerful countervailing tendencies. In particular it appears that norms of fair dealing and good faith are becoming more firmly embedded in contract law as a whole and may diminish the

⁵⁹ *Energy Fundamentals v. Veresen* 2015 ONCA 514 citing J.D. McCamus, *The Law of Contracts*, 2nd ed. 781 (2d ed., Toronto: Irwin Law, 2012).

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impact of *Barker*. Indeed it is more than arguable that they will prove to be more influential.

In Australia there has been considerable judicial recognition of the concept of a relational contract which might be defined as a ‘contract that involves not merely an exchange, but also a relationship between the contracting parties.’⁶⁰ Nevertheless, it was argued in *Barker* that the term ‘advances analysis not at all, not merely only a little way, but not at all. All contracts create a relation between the parties to it...’⁶¹ The High Court appeared to see some merit in this submission. They noted that the implied obligation of mutual trust and confidence ‘appears, at least in part, to be informed by a view of the employment contract as “relational”, a characteristic of uncertain application in this context ...’⁶² This scepticism is a little surprising given that in Australia relational contract scholarship has been influential in the way in which the law of commercial contracts has developed in recent years. The Australian courts were much quicker to move in this direction than their British counterparts. The extent to which *Barker* proves to be a restraining influence will depend in part on the stance taken in subsequent cases on relational contracts. The employment contract is a paradigm instance of a contract of that nature and categorization as relational, in the eyes of some courts, facilitates implication of a term of good faith given the values which such contracts are said to espouse.⁶³ Again it can lead to the sorts of changes associated with a positive version of the duty of co-operation. *Dunkin’ Brands* provides a recent Canadian example:

⁶⁰ M.A. Eisenberg, *Relational Contracts*, in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* 296 (J. Beatson and D. Friedmann eds., Oxford: OUP, 1995).

⁶¹ [2014] HCA Trans 73.

⁶² *Barker*, n. 9 above, para. 37.

⁶³ The Supreme Court took the view that an employment contract is relational in nature in *Braganza v. BP* [2015] ICR 449.

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—It was thus appropriate...for the judge to infer that the Franchisor had implicitly agreed to undertake reasonable measures to help the franchisees, over the life of the arrangement, to support the brand. This included a duty to assist them in staving off competition in order to promote the on-going prosperity of the network as an inherent feature of the relational franchise contract.⁶⁴

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Interwoven to some extent with the acceptance of the concept of relational contracts has been the growing recognition in Australia of an implied obligation of good faith. A definitive statement of the current position is problematic in the absence of an authoritative High Court judgment; whether or not there is a general obligation to act in good faith in the performance of contracts generally, or employment contracts in particular, was again left undecided in *Barker*. However, as we have seen, the existing line of good faith case law allows for many of the developments associated with mutual trust and confidence, such as implied restraint on the exercise of prerogative powers, to operate. In *Braganza* Lord Neuberger found ‘it difficult to accept that trust and confidence would require more than what in a normal commercial context would be expected’ where discretion will be ‘limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality’.⁶⁵ Contract law in a number of jurisdictions is moving towards a position whereby good faith stands centre stage, and commercial law cases in Australia have been very much part of this. This may represent the ‘new commercial morality’. In Canada the Supreme Court in *Bhasin v. Hrynew* recognized that good faith constituted an overarching principle in the general law of contract, and this allows more specific developments within the employment contract to be mainstreamed.⁶⁶ Thus the obligation on the employer in Canada (emerging from cases such as *Shah v. Xerox Canada*) to treat an employee with

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⁶⁴ (2015) QCCA 625.

⁶⁵ *Braganza*, n. 63 above.

⁶⁶ *Bhasin*, n. 21, above.

civility, decency, respect and dignity can be seen as an instance of good faith and is rendered more secure as a result.⁶⁷

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Good faith serves as a means of ~~rationalisation~~ rationalization of the existing law but also functions as a powerful catalyst:

“The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.”⁶⁸

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A law of contract where good faith played a central role would undoubtedly prompt further evolution in the law of the employment contract and would lead to the sort of specific changes that ~~materialise~~ materialize through the adoption of mutual trust. For instance, in the UK, *Scally v. Southern Health Board* modified the law on provision of information and *Bhasin* might be thought to have taken Canadian law closer to a general requirement of disclosure but the courts have not yet gone this far.⁶⁹ The Canadian case of *Trillium Motor World v. General Motors* suggests that disclosure would be more likely to be required where a relationship of employment or franchise was concerned.⁷⁰ The scope for a general obligation of good faith to enhance the content of the employment contract is almost without limit. In the UK mutual trust has become, in practical terms, entrenched relatively quickly though given its status as a default rule there remains a possibility that the employer may seek to contract-out. By way of contrast Canadian experience suggests that the centrality of good

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⁶⁷ *Evans v. Avalon* (2015) CanLII 41499; *Shah v. Xerox Canada Ltd.* (2000) CanLII 2317(ON CA).

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⁶⁸ *Rodd v. Alberta Health Services* 2015 ABQB 320.

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⁶⁹ *2176693 v. Cora Franchise* (2015) ONSC 1265 noted that “parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance.”

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⁷⁰ (2015) ONSC 3824.

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faith leads much more directly and decisively to a prohibition on contracting out: ‘Viewed in this way, the entire agreement clause in... the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it...’⁷¹ It would appear that a Canadian court would prohibit exclusion on the basis of public policy.⁷² It should be noted that unconscionability is unlikely to provide an alternative route and is viewed as restrictively in Canada as elsewhere.⁷³

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Good faith has the capacity to tackle other fundamental issues including ones going to the duration of the relationship. *Data & Scientific v. Oracle* flags up the possibility that the scope of fair dealing might extend to regulate the employer’s discretion where renewal of a contract was in issue.⁷⁴ This is an area of employment relations where employees can be very vulnerable and there is considerable scope for abuse. Employees might be placed on a succession of contracts to prevent the acquiring of statutory rights to give but one example. *Evans v. Avalon* cogently demonstrates the impact that good faith can have on doctrine where resignation is concerned. In a situation where it is ambiguous whether the employee has resigned, the

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⁷¹ *Bhasin*, p. 21, above, 75.

⁷² The general approach is to be found in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* [2010] 1 S.C.R. 69: ‘The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed ... the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy.’

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⁷³ *Cain v. Clarica Life Insurance Company* 2005 ABCA 437 provides that the four elements which are necessary for a finding of unconscionability are as follows: (1) a grossly unfair and improvident transaction; (2) victim’s lack of independent legal advice or other suitable advice; (3) overwhelming imbalance in bargaining power caused by victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (4) other party’s knowingly taking advantage of this vulnerability.

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⁷⁴ (2015) ONSC 4178. And see *Transco v. O’Brien* [2002] ICR 721.

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courts will resolve those doubts in favour of continued employment.⁷⁵

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However, the obligation of fair dealing goes further and suggests that in some circumstances an employer may be obliged to allow an employee the opportunity to withdraw what was undoubtedly intended and understood as a resignation.⁷⁶ This perspective acknowledges the impact that loss of employment may have on the employee and that, on occasion, a resignation may be proffered in the heat of the moment:

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—where, for an example, an employee who the employer knows to be emotionally distraught and financially vulnerable has made a statement of resignation, it would be unreasonable for the employer, objectively and reasonably considering all the circumstances, to disregard both the emotional distress and the financial vulnerability of that employee.⁷⁷

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Fair dealing requires the party with superior bargaining power and resources to make allowance for this in the interests of preserving the relationship.

8 A HOLISTIC VIEW OF THE COMMON LAW

Employees are likely to be among the beneficiaries of the increased role for good faith/fair dealing which is occurring across a range of contracts and jurisdictions. Common law reform of this nature may more than outweigh the denial of mutual trust and confidence. It is also important to have regard to protections afforded by the Australian courts which other systems may lack. The common law provides a code which dictates how the parties ought to behave towards one another: the laws of contract and tort both play a part. The way in which the employer's obligations are split between those two branches of the law of obligations varies between jurisdictions. There are, for instance, significant differences in the stance taken by the courts in UK and Australia and this extends to the nature of the obligations undertaken.

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⁷⁵ *Bru v. AGM Enterprises* 2008 BCSC 1680.

⁷⁶ *Evans*, n. 67 above.

⁷⁷ *Bru*, n. 75 above.

Where the former is concerned the existence of mutual trust and confidence might be said to point towards greater commitment to contemporary values. The dicta of Jessup J referred to earlier would now be unthinkable in a British context. However, in the UK a restricted view is taken over the employer's responsibilities should an employee suffer psychiatric harm in the course of his employment.⁷⁸ By way of contrast, the Australian law of negligence tends to operate in an unadulterated way, thereby both facilitating recovery and promoting in a different way progressive values.

For instance, the restrictions imposed by the House of Lords in *White v Chief Constable* have not been adopted.⁷⁹

In the UK where occupational stress is concerned the judiciary (in *Hatton v Somerset CC*) have provided a set of guidelines (styled 'practical propositions') which assist the court in determining whether a breach of the employer's duty of reasonable care has taken place and, in practice, make it more difficult for employees to recover.⁸⁰ The guidelines emerged as an embodiment of common law policy on employer responsibility for occupational stress. The value judgment is made that 'some things are no one's fault.' The judiciary strive to achieve an acceptable balance between safeguarding the wellbeing of employees and not burdening employers with some of the risks which are inherent in working life. It regarded as fair that some such risks are borne by employees since:

“There is no such thing as a pressure-free job. Every job brings its own set of tasks, responsibilities and day-to-day problems, and the pressures and demands these place on us are an unavoidable part of working life. We are, after all, paid to work and to work hard, and to accept the reasonable pressures which go with that.”⁸¹

⁷⁸ *Yapp*, n. 25 above.

⁷⁹ [1999] 2 AC 455. It was held that the law does not recognize a duty to guard employees against psychiatric harm suffered as a result of witnessing injury to others.

⁸⁰ *Hatton v Sutherland* [2002] ICR 613.

⁸¹ *Ibid.* at.

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Recently, in *Yapp v. FCO* the claimant developed a psychiatric condition following a defective process of suspension and the application of the guidelines was extended to cover a situation of that sort.⁸² This is very much open to challenge as the ‘practical propositions’ do not address situations where the employer can be said to be at fault or guilty of inappropriate behaviour. It seems likely that *Hatton* would also be found to apply in bullying or harassment cases. Furthermore, in *Yapp*, when it came to the question of remoteness, the standard tests in contract and tort were said to apply but there was a reticence to let fundamental principles apply in the courts below without direction: ‘it will in my view be exceptional that an apparently robust employee, with no history of any psychiatric ill-health, will develop a depressive illness as a result even of a very serious setback at work’.² The claim in *Yapp* itself failed because it was held not to be foreseeable, in the absence of any sign of special vulnerability, that the claimant might develop a psychiatric illness. It seems likely that future claimants will find litigation just as arduous.

In Australia a different view is taken over risk allocation and it is recognized that the employer has a duty to take reasonable care to protect an employee against bullying and harassment at work and to provide a safe workplace. The position is the same where claims are based on stress arising from an excessive or unreasonable workload. These are mainstream obligations imposed by the law of tort and merely subject to the limitation that the harm suffered must be psychiatric before recovery will take place. The courts have not imposed policy informed restrictions of the sort seen in *Hatton* or *Yapp* which are highly favourable to the employer, though demonstrating that the harm should have been foreseen can be challenging for claimants. In evaluating the law in Australia it should be borne in mind that tort law appears to be much more protective of an employee’s interests

⁸² *Yapp*, n. 25 above.

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than the UK. Matters are though never entirely clear as *Koehler v. Cerebos* demonstrates.⁸³ There the High Court held that by entering into the employment contract the employee warrants (in the same way that they warrant that they possess the requisite skills) that they are mentally fit for the job. *Koehler* operates on the premise that the employee accepts that he cannot complain should he be adversely affected by the normal pressures and stresses of the employment chosen. It appears that the employer is benefiting from a defence along the lines of *volenti non fit injuria*. Subsequent cases suggest that *Koehler* does not allow the employer to deny responsibility where harm was reasonably foreseeable and appropriate action was not taken and, viewed in the round, the position is clearly more progressive than that pertaining in the UK.⁸⁴ *Koehler* also reminds us that the interaction of the laws of contract and negligence is far from straightforward.

9 COHERENCE WITH STATUTE

Statute may act as a catalyst or constraint for common law expansion but perhaps presents the biggest challenge to the vitality of the common law in any jurisdiction.⁸⁵ Analysis of the relationship between common law and statute is rendered more difficult as ‘no satisfying overarching principle has been identified to explain the relationship between statute and common law’.⁸⁶ A recent instance of statute acting as a catalyst is provided by *Romero* where the employer argued that the existence of legislation dealing with bullying militated against incorporation of a policy on ‘Workplace Harassment and Discrimination’ as employees were already adequately protected.⁸⁷ However, the legislation was seen as embodying the values of

⁸³ *Koehler v. Cerebos* (2005) 222 CLR 44.

⁸⁴ C. Sappideen et al., *Macken’s Law of Employment*, 190 (7th ed.).

⁸⁵ See G. Golding this issue.

⁸⁶ S. McLeish, *Challenges to the Survival of the Common Law* [2014] MULR 818.

⁸⁷ *Romero v. Farstad* n. 39, above.

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the employment relationship and incorporation was favoured: the parties should be encouraged to adopt ‘a specific method as to the manner in which those statutory obligations are to be observed’. This approach is consistent with that taken to the action on the statute where industrial health and safety legislation is concerned. The courts have never regarded judicial intervention to install a right to damages as inappropriate and the employee’s action for breach of statutory duty thrives despite the fact that statute will already have provided a remedy: ‘the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach’.⁸⁸ The position has changed in the UK of late where section 69 of the Enterprise and Regulatory Reform Act 2013 has removed the right to sue for damages where an employee is injured at work if a breach of health and safety regulations was a cause of their injury. It is notable that the justification for removal of the action on the statute does not lie in the constitutional proprieties of judicial strengthening of the legislative scheme but instead goes to the perceived burden of EU legislation.

The traditional approach to actions on the statute is symptomatic of a tendency to regard legislative intervention as only partially pre-empting the scope for common law development. Where health and safety is concerned, the courts can be seen as furthering legislative policy by creating a remedy which will render the legislation more effective. A similar approach to common law evolution can also be seen in a number of decisions in the US which have been arrived at by gauging the merits of a claim for judicial innovation against the demands of public policy as expressed in the relevant statute. Thus common law remedies have been devised to supplement those contained in discrimination legislation: further exceptions to the

⁸⁸ *X v. Bedfordshire* [1995] 2 AC 633, 731.

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employment-at-will doctrine are justified as discrimination is ‘obnoxious to the interests of the state and contrary to public policy and sound

It is not disputed that common law evolution must have regard to the constitutional dimension:

—the objection is made that the analogical use of statute violates the doctrine of Parliamentary sovereignty to the extent that it involves the operation in some way of a statutory regime or a regime modelled on a statutory regime notwithstanding Parliament’s legislative decision that the text of the statute was to be limited, for example to a particular context or to a particular period of time.⁸⁹

—It is undoubtedly clear that the nature of a particular legislative measure may preclude further common law activity. Glanville Williams in a seminal article noted that ‘Occasionally the statute may be plainly inconsistent with a remedy in tort. For example, here the statute gives a civil remedy which is hedged about by restrictions, it would not be permissible to ignore the restrictions by implying an unrestricted right of action in tort.’⁹¹ It may be argued that decisions such as *Johnson v. Unisys* and *NSW v. Paige* can be explained on this basis though the view that the claimants’ position was ‘plainly inconsistent’ is heavily contested. However, it is easy to overstate the constitutional difficulties and ‘hobble’ the common law. In *British Railways Board v. Herrington*, Lord Wilberforce, with reference to the Occupiers’ Liability legislation, put forward a much more nuanced position which displays appropriate deference to the legislature but allows for common law development:

—[I] can see no sense in supposing that when Parliament left the law alone as regards trespassers the intention was to freeze the law as, or as it was

⁸⁹ *City of Moorpark v. Superior Court* 959 P.2d 752.

⁹⁰ J. Beatson, *The Role of Statute in the Development of Common Law Doctrine*, 117 LQR 247, 249 (2001).

⁹¹ G. Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MLR 233, 24 (1960)

4. *Chadwick v. Pioneer Private Telephone* [1941] 1 All ER 522 was said to provide an example.

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taken to be, in 1929. As this Act itself shows, what Parliament left alone in the case of trespassers, while displacing them in the cases of invitees or licensees, were the rules of common law. But the common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do.⁹²

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It is also inconsistent with the ‘courts fulfilling their time-honoured role of updating the common law and making it more suitable for modern circumstances.’⁹³

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Where the employment contract is concerned, the Australian courts appear wary of proceeding on the basis of partial pre-emption and this is likely to constitute a bigger threat to the ‘natural’ evolution of the common law than *Barker*. Prior to *Barker* the courts in the UK and Australia had excluded mutual trust and confidence when dismissal was in issue.⁹⁴ However, the Australian courts appear unduly anxious to defer to the legislature and the sheer extent of legislative intervention may be invoked to bar the common law from regulating a dimension of employment relations:

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‘The common law in Australia must evolve within the limits of judicial power and not trespass into the province of legislative action. This Court and, to a lesser extent, intermediate appeal courts have a law-making function. That function can only be exercised as an incident of the adjudication of particular disputes.’⁹⁵

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McDonald v. South Australia provides a good example where the Supreme Court of South Australia held that the respondent’s contract of employment did not contain an implied term of mutual trust and confidence.⁹⁶ Statutory regulation of employment in the field of education

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⁹² [1972] AC 877 and quoted by C. Barnard and L. Merrit, *Winners and Losers: Edwards and the Unfair Law of Dismissal*, CLJ 319 (2013).

⁹³ *New Testament Church v. Stewart* [2008] ICR 282, 301.

⁹⁴ *Johnson v. Unisys*, n. 10 above and *NSW v. Paige* [2002] NSWCA 235.

⁹⁵ *Barker*, n. 9 above.

⁹⁶ [2009] SASC 219. See R. White, *A Setback for Mutual Trust and Confidence* 23 AJLL 220 (2010). More recently, in *State of New South Wales v. Shaw*, n. 9 above it was said

meant that implication was not necessary: ‘statute... provides a variety of means by which employees may be protected from abuses of power by the employer, and provides means of redress to employees who are aggrieved by some conduct of the employer’.² The court in *McDonald* took the view that the protection of the common law would have been superfluous. It must be said that the degree of reticence evident in *MacDonald* is not always apparent in other areas of the common law. It may be that the tendentious nature of employment relations acts as a deterrent to judicial creativity. It should be borne in mind that, in a relationship where bargaining power is typically unequal, failure to intervene will play into the employer’s hands.

A further consideration which may be relevant is the extent to which a mooted development can be seen as specific to the employment contract: mutual trust and confidence can be viewed in this way. This may render it more vulnerable to the argument that it is inconsistent with a particular statutory regime. However, where the claimant asserts that a more wide-ranging development (e.g. that contract law as a whole contains an obligation of good faith) is merited, the nature of the argument changes. It is then much more difficult to claim that the common law is seeking to subvert the will of the legislature in the absence of a nexus with a specific statutory provision.

10 CONCLUSIONS: RESTORING TRADITIONAL VALUES?

By way of conclusion I would suggest that *Barker* tells us relatively little about how the employment contract might evolve. It may be that the open-textured nature of the ‘mutual trust’ term and the consequential capacity for wide-ranging judicial expansion of the employer’s obligations were sign as

obiter that it was not necessary that a term of good faith be implied in order to give the respondents’ probationary contracts effective operation in circumstances where a statutory and industrial regime regulated their employment contracts.

incompatible with the common law's commitment to incremental change. As a result the High Court were of the view that a 'transformative approach' to the contract of employment should not be embraced.⁹⁷ A different stance might have been taken had the term mooted possessed greater specificity. What might the future hold? I would contend that the two key factors which will inform common law development are, on the one hand, the set of values which the judiciary consider relevant to the relationship and, on the other, the extent to which statute acts as a catalyst or constraint. Where values are concerned the position will become more apparent over time but there is already some evidence from the case law that a more progressive attitude to employment relations continues to be displayed by the Australian common law. Incremental advances based upon a contemporary view of the employment relationship are likely to continue. *Barker* may deter more radical steps which are seen as within the gift of the legislature.

Romero, decided after *Barker*, provides a note of optimism.⁹⁸ One of the issues which arose in *Romero* was whether the employer's policy was contractual and two dimensions of the decision call for comment. First, it concerned bullying and harassment where the expectations placed on the employer have become weightier in recent years. The court in *Romero* recognized this and translated them into legal obligations. Second, where the legal status of the employer's policies is concerned, the courts now tend to subject the employer's drafting to close scrutiny to ensure that devices such as the use of aspirational language do not render the document non-contractual: key responsibilities should not be discretionary. In the court below, contractual status had been denied on the basis that the language was overly aspirational: 'there was some quasi contractual language in the Policy, in his Honour's opinion, it was insufficiently specific so as to amount to a binding contractual obligation'.² The Federal Court (Full Court)

⁹⁷ *Barker*, n. 9 above, para. 41.

⁹⁸ *Romero*, n. 39, above.

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took a different view, though a more traditional approach would have arrived at a conclusion to the contrary. Aspirational wording should not prevent obligations arising in law because:

—In the case of the policy here in question, it is evident that the contract could not operate reasonably and effectively without such an implied obligation. It would make nonsense of the employee's ongoing obligation to act in accordance with what the policy required of him or her from time to time, if the employer had no obligation to act in accordance with what the policy required of it.⁹⁹

The employer also argued that the policy was merely 'directive' and was simply an exercise of the employer's right to issue lawful and reasonable orders.⁹⁹ This second line of argument was also rejected: 'The wording of the letter of offer taken with the importance of the Policy terms, the education of employees to reinforce the terms of the Policy are all factors leading to that conclusion.' The employer's stance would have allowed for unilateral variation and contemporary courts are troubled by an unbridled power of this nature. Notions of reciprocity were also relevant: 'the employer's obligations in relation to dealing with serious complaints of sex discrimination and bullying were contractual promises given in exchange for employees being obliged to comply with the behavioural requirements imposed on employees by the Policy.' This conclusion should be seen not as an application of the law of consideration, but a statement of what decent employment now involves.

It is one thing to be confident about the continued impact of progressive values but the influence of statute is quite another matter given that, as we have seen, the Australian courts adopt a very deferential role in the face of legislative intervention. When these two factors are viewed in the round we may be left with a position whereby doctrinal innovations that are

⁹⁹ The employer's argument is reminiscent of the approach to the contractual status of the rule-book taken by the Court of Appeal in *Secretary of State for Employment v. Aslef (No2)* [1972] 2 QB 455.

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favourable to employees continue to emerge but are limited in number. Effective promotion of contemporary values requires the judiciary to be bold and take a more expansive view of what they can legitimately achieve.