

ALERT

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We'll be the judge – High Court to decide on mutual trust and confidence duty

The High Court has granted leave for the Commonwealth Bank of Australia (CBA) to appeal the Full Court of the Federal Court's watershed decision that a term of mutual trust and confidence is implied into all Australian employment contracts.

As reported in our September newsletter (<http://cornwalls.com.au/sharing-knowledge/legal-updates/employment--industrial-relations-newsletter,-september-2013.aspx>), the Full Court's judgment was significant because there were various conflicting decisions regarding the existence of the term, and this was the first time an appellate court in Australia had supported the implication of the term (which prohibits employers and employees from engaging in conduct that is likely to destroy or seriously damage the relationship of confidence and trust between them).

Among other things, the existence of these conflicting authorities lent support to the CBA's position that clarity was needed on the existence of the term, and the High Court granted the appeal. It is hoped that the High Court will also provide further guidance on

what is required by employers to comply with the duty.

The appeal is likely to be heard around mid-next year. Until such time as the High Court makes a definitive ruling on the implication of the term, the Full Court's decision stands and a term of mutual trust and confidence is implied into all Australian employment contracts.

For employers

We have found that a claim for breach of the implied term typically arises in circumstances where the employee has been dismissed and is not otherwise eligible to bring an unfair dismissal claim (for example, because they have not satisfied the minimum employment period or their income exceeds the high income threshold). Although the term does not operate at the point of dismissal (ie terminating an employee's employment does not breach the term), employers should be cautious in the way they treat employees in the lead up to dismissal.

We recommend that employers ensure they observe their own policies and procedures when dealing with employees, particularly if termination of the employee's employment is likely.



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