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COMPENSATION FOR PSYCHOLOGICAL INJURIES ARISING FROM DISMISSAL

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Compensation for Psychological Injuries Arising From Dismissal

Ben Gibson*

Introduction

This paper will seek to establish that a duty of trust and confidence of the kind envisaged by Lord Nicholls in *Malik v Bank of Credit and Commerce International SA ('Malik')*[1] ought not be implied at law into contracts of employment, so as to allow compensation for employees who suffer psychological injuries as a result of the manner in which they are dismissed.

Part one of the paper argues that the duty of trust and confidence, owed to an employee by their employer, should not be implied into contracts of employment so as to prescribe the manner in which an employee is dismissed, as the implication of such a term would run contrary to fundamental principles of contract law and would undermine the statutory system for unfair dismissals established by Parliament. Part two argues that such a term is not necessary where the employment contract either explicitly considers the manner of an employee's dismissal,[2] or where such a term can be incorporated by reference to the employer's disciplinary procedures.[3] In such cases, it is argued, there is no principled basis for prohibiting the award of damages for mental harm suffered as a result of the manner in which an employee is dismissed in a claim for breach of contract, notwithstanding the decision of the House of Lords in *Addis* which may purport to create a special rule to the contrary for contracts of employment.

Part three of the paper considers why neither the rule in *Addis*, the general rule that damages should not be available for distress associated with a breach of contract,[4] or the common law test of remoteness should bar the award of compensation for psychological harm caused by a breach of the contract of employment, in light of the special nature of the employment relationship. Part four examines why implying a duty of trust and confidence is not necessary where an employee suffers psychiatric harm as a result of a course of conduct by their employer which precedes the employee's dismissal. Finally, part five considers the other remedies that may be available both at law and under Commonwealth and State statutory schemes, including workplace relations, occupational health and safety and workers'

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[1] [1997] 3 All ER 1.

[2] Compared to the term governing disciplinary procedures in *Johnson v Unisys Ltd* [2001] 2 All ER 801.

[3] *Giliberto v Kenny* (1983) 48 ALR 620.

[4] *Hamlin v Great Northern Railway* (1856) 156 ER 261 cited in *Baltic Shipping v Dillon* (1992) 176 CLR 344 at 361.

compensation schemes, where an employee suffers psychological harm as a result of the manner in which they are dismissed.

Part One: Extending the Duty of Trust and Confidence to Include the Manner of an Employee's Dismissal: *Malik* and *Johnson v Unisys*

One barrier preventing an employee seeking compensation for suffering arising from the manner of his or her dismissal is that Australian courts continue to apply the rule in *Addis v Gramophone Co Ltd* ('*Addis*')[5] (discussed in detail below) that damages are not available in a breach of contract claim for mental distress arising from the manner of an employee's dismissal.[6]

A recent attempt to overcome this obstacle was rejected by the House of Lords in *Johnson v Unisys*,[7] in which the plaintiff sought to recover damages for loss of earnings suffered as a result of a psychiatric illness caused by having been wrongfully dismissed in a manner that was inconsistent with the disciplinary procedures outlined in his contract of employment. In that case, the plaintiff had already been compensated for being unfairly dismissed and was claiming, amongst other things, that the manner of his dismissal also amounted to breach of the term of trust and confidence the House of Lords found may be implied into all employment contracts in *Malik*.[8] In framing this claim as a breach of the duty of trust and confidence, the plaintiff was hopeful that if the damage could be said to flow not from the dismissal itself, but from a breach of another implied term of the contract, then *Addis* would not preclude compensation. This concept was later described as an anterior breach.[9]

Since *Johnson v Unisys*, there have been many subsequent attempts, both in the United Kingdom and Australia, to frame claims for damages in respect of psychological injuries arising from the manner of an employee's dismissal, in terms of a breach of this implied duty of trust and confidence.[10]

In order to determine whether it is appropriate to apply the duty of trust and confidence in this manner, it is first necessary to consider the substance of the duty of trust and confidence and the rationale for implying this duty into contracts of employment.

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[5] [1909] AC 488.

[6] *Aldersea v Public Transport Corporation* (2001) 3 VR 499; *Del Borrello v Friedman & Lurie (a firm)* [1999] WASC 17; *B v Store X* (1995) 35 AILR 9-015; *Tucker v Pipeline Authority* (1989) 3 IR 120.

[7] *Johnson v Unisys Ltd* [2001] 2 All ER 801.

[8] [1997] 3 All ER 1. Note: By reversing the decision of the Court of Appeal [1995] 3 All ER 545 (and of Evans-Lombe J at first instance ([1994] TLR 100)) that the pleadings in question did not disclose a reasonable cause of action, the House of Lords in *Malik* left it open for parties to plead the existence of an implied duty of trust and confidence in the employment context. The House did not resolve the substantive questions or articulate fully the scope of the duty in this case.

[9] *Johnson v Unisys Ltd* [1999] 1 All ER 854 at 861 per Lord Woolf MR (with whom Hutchinson and Tuckey LJJ agreed); c.f. *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 806 per Lord Steyn.

[10] See, e.g., *Eastwood v Magnox Electric Plc; McCabe v Cornwell County Council* [2004] 3 WLR 322; *NSW v Paige* [2002] NSWCA 235; *Heptonstall v Gaskin (No 2)* [2005] NSWSC 30. See also *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 at [141].

The Decision in Malik v Bank of Credit and Commerce International SA[11]

The implied duty of trust and confidence was first articulated by the House of Lords in *Malik.* In *Malik* the House of Lords was asked to consider a circumstance in which an employer was conducting a corrupt and fraudulent business, and where the plaintiffs (ex-employees) were not involved in the corruption, but nevertheless suffered financial losses and harm to their reputations and employment prospects when the employer's fraudulent practices were exposed.

In considering the nature of the relationship created by the employment contract, Lord Nicholls and Lord Stein (with whom Lords Goff, Mackay, and Mustill agreed) held that, in agreeing to work for an employer, an employee cannot be taken to have agreed to work in furtherance of a dishonest business, and must therefore be entitled to leave that employment immediately.[12] In order to give effect to the right of the employee to leave without him or herself breaching the contract of employment, the House of Lords found that there must be a correlative obligation (term) implied in the employment contract that the employer does not conduct a corrupt business. A breach of this term would be considered a repudiation of the employment contract that would entitle the employee to terminate the contract.[13] In other words, the House of Lords considered that an implied term that the employer not conduct a corrupt or fraudulent business was necessary to facilitate the proper functioning of the employment contract and to allow the parties to enjoy the rights conferred by the contract of employment.[14] More specifically, this term was necessary to ensure that the employee enjoyed the benefit, promised by the employment contract, of employment by an honest employer.

Lord Nicholls further considered that this obligation not to conduct a corrupt business was merely one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.[15] It is this general obligation that is referred to as the duty of trust and confidence.

The House of Lords considered that if this duty was breached compensation would be available, subject to proof of causation and satisfying the principles of remoteness and mitigation, for continuing financial losses including those stemming from premature termination provided it is the breach of this duty that brings the contract to an end prematurely.[16] According to Lord Nicholls, damages were to be calculated in accordance with ordinary contractual principles,[17] and recoverable for any harm that was a foreseeable consequence of a breach.[18] Lord Nicholls chose not to consider whether this would include compensation for losses resulting from injured feelings or anxiety.[19]

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[11] [1997] 3 All ER 1.
[12] [1997] 3 All ER 1 at 5 per Lord Nicholls of Birkenhead, at 17 per Lord Steyn.
[13] [1997] 3 All ER 1 at 5 per Lord Nicholls of Birkenhead.
[14] [1997] 3 All ER 1 at 6 per Lord Nicholls of Birkenhead.
[15] [1997] 3 All ER 1 at 5 and 11 per Lord Nicholls of Birkenhead; at 17 per Lord Steyn.
[16] [1997] 3 All ER 1 at 7 per Lord Nicholls of Birkenhead, at 17 per Lord Steyn.
[17] [1997] 3 All ER 1 at 9 per Lord Nicholls of Birkenhead.
[18] [1997] 3 All ER 1 at 8 per Lord Nicholls of Birkenhead.
[19] Ibid.

Despite the fact that *Malik* was not a case involving an actual dismissal, Lord Nicholls nevertheless considered that damages would be recoverable for any foreseeable financial losses suffered by an employee as a consequence of the employer breaching the implied duty of trust and confidence, whether or not the breach occurred before or in connection with dismissal. His Lordship did not consider this to be inconsistent with the decision in *Addis*, as his Lordship clearly distinguished between compensation recoverable as a result of a breach of the duty of trust and confidence and compensation for harm suffered as a result of being wrongfully dismissed.[20] According to Lord Nicholls, in the absence of a breach of the duty of trust and confidence, damages would not be available for wrongful dismissal, whatever the manner, as losses that would have been suffered if due notice was given would not derive from the *wrongful* element of the dismissal, and therefore would not be recoverable. His Lordship considered that it was difficult to see how the mere fact of a wrongful dismissal, rather than dismissal after due notice, could itself cause any harm.[21] By contrast, his Lordship considered that the manner and circumstances of the dismissal, as governed by the implied trust and confidence term, could give rise to such harm (specifically handicap the employee in the labour market).[22]

Likewise, Lord Steyn considered that the true ratio of *Addis* was that damages for breach of contract could only be awarded for losses *caused* by the breach, and not for loss caused by the manner of the breach. In that case, the employee's loss of reputation could not be compensated because it was not caused by the failure to give proper notice. The case stands for the further proposition that an employee cannot recover exemplary or aggravated damages for wrongful dismissal.[23] His Lordship considered that whilst *Addis* would exclude a claim for loss due to the manner and nature of an employee's wrongful dismissal, it would not exclude a claim based on a breach of contract that was separate and independent of the termination of the contract of employment. Lord Steyn further considered that the implied mutual obligation of trust and confidence only applies where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

The Applicability of the Duty of Trust and Confidence to the Manner of an Employee's Dismissal

As *Malik* involved financial losses arising from harm to an employee's reputation and future employment prospects as a consequence of an employer's conduct generally, and not psychological injury suffered by an employee as a result of the manner in which they were actually dismissed, their Lordships' comments regarding the application of the duty of trust and confidence to the act of dismissal must be considered obiter.

[20] This was described by Lord Woolf MR (with whom Hutchinson and Tuckey LJJ agreed) as an "anterior breach" in *Johnson v Unisys Ltd* [1999] 1 All ER 854 at 861; c.f. *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 806 per Lord Steyn.
[21] [1997] 3 All ER 1 at 9-10 per Lord Nicholls of Birkenhead.
[22] Ibid.
[23] [1997] 3 All ER 1 at 20 per Lord Steyn.

Putting aside, for the moment, the question of whether an implied duty of trust and confidence would conflict with statutory unfair dismissal schemes (discussed below),[24] and the fact that the duty of trust and confidence as formulated in *Malik* has yet to receive unambiguous judicial acceptance in Australia,[25] there are good reasons why the duty of trust and confidence should not be implied into contracts of employment generally or apply in relation to the manner of an employee's dismissal specifically.

First, it is well established that a term should only be implied in law where the term is both applicable to a particular class of contract, and is necessary to protect the enjoyment of the rights conferred by that class of contract.[26] A term will only be considered necessary, in the relevant sense, if a party's ability to enjoy the rights conferred by the contract could or would be rendered nugatory or worthless, or would be seriously undermined, in the event that the term in question were not to be implied.[27] It does not necessarily follow that because an employer must be under a contractual obligation not to conduct a dishonest or corrupt business in order for an employee to terminate his or her employment without notice, rather than work in furtherance of such a business, that a broader duty of trust and confidence is necessary for the parties to enjoy the full benefits conferred by the contract of employment.

According to Wilcox CJ, von Doussa and Marshall JJ in *Burazin v Blacktown City Guardian*, even if the existence of an implied duty of trust and confidence were to be conceded, it is at least arguable that to permit an action for damages arising from a breach of that term, during the currency of the employment relationship, would be antithetical to the reason for implying the term (to bolster an ongoing relationship) as the action itself would presumably cause a further deterioration in the relationship.[28]

Even if a trust and confidence term is necessary to ensure that parties to an employment contract enjoy the full benefits of that contract, it is not clear that such a duty is necessary in the context of a dismissal. To require an employer to dismiss an employee in a manner that is not likely to undermine the trust and confidence required for the employment relationship to continue in the manner envisaged by the contract, would seem patently unnecessary where the act of dismissal itself terminates the employment relationship and the employment contract does not envisage that the relationship will continue in any manner from that point. In these circumstances, it is difficult to see how the absence of a term regulating the manner of an employee's

[24] *Johnson v Unisys Ltd* [1999] 1 All ER 854 per Lord Woolf MR upheld by the House of Lords in *Johnson v Unisys Ltd* [2001] 2 All ER 801; contrast M Irving, 'Damages Arising From the Manner of an Employee's Dismissal' (2003) 16 *Australian Journal of Labour Law* 99.

[25] *Heptonstall v Gaskin (No 2)* [2005] NSWSC 30 at [18]-[23] per Hoeben J; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 per Kirby J; *Sea Acres Rainforest Centre Pty Ltd v State of New South Wales* (2001) 109 IR 56 at 66 per Haylen J; *Gambotto v John Fairfax Publications Pty Ltd* (2001) 104 IR 303 at 309–311 per Peterson J; *Aldersea v Public Transport Corporation* (2001) 3 VR 499 at [67] per Ashley J; *Jager v Australian National Hotels Ltd* (1998) 7 Tas R 437 at 457; *Hollingsworth v Commissioner of Police* (1999) 47 NSWLR 151 at 190; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 at 141. See also J Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *Australian Journal of Labour Law* 28; Irving, above n 24.

[26] J Paterson, A Robertson and P Heffey, *Principles of Contract Law* (2005) 286-287.

[27] *Breen v Williams* (1996) 186 CLR 71 per Gaudron, McHugh and Gummow JJ; *Byrne v Australian Airlines Ltd* (1985) 185 CLR 411 at 450 per McHugh and Gummow JJ.

[28] *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 154.

dismissal would seriously undermine the enjoyment of the rights conferred under the contract of employment or render them nugatory or worthless.[29]

Moreover, employment contracts usually explicitly protect the right of either party to terminate the contract without regard to manner and without cause, provided appropriate notice is given. Alternatively, an employer may have policies or procedures regulating the manner in which employees are disciplined or dismissed which may also be incorporated into the employment contract either expressly or by reference (terms implied by reference are considered in part two of this paper). As terms will generally not be implied into a contract where they are inconsistent with the express terms of the contract,[30] there is arguably no scope for the implication of a duty of trust and confidence in such cases. It was for this reason that Lord Hoffman in *Johnson v Unisys* considered that only Parliament should override these express terms.[31]

Whilst in some cases courts have been willing to take into consideration community expectations when implying contractual duties,[32] the scope of such duties has been limited to instances where a party has performed its obligations for a purpose that is unfair or in bad faith,[33] or for a purpose or in a manner that is inconsistent with loyalty to the contract itself.[34] Of significance in these cases is the fact that it is the motive for the conduct, and not the consequences of it, that is at issue. By contrast, an implied duty of trust and confidence that would oblige an employer not to act in a manner that was likely to undermine the trust and confidence required for the employment relationship to continue would require the court to have regard to the consequences of the employer's actions and whether these undermine the trust and confidence necessary for the relationship to continue, rather than just to the employer's motive for the dismissal.[35] As such, this approach would run counter to the approach taken by the courts with respect to other implied duties.[36]

As the duty of trust and confidence formulated in *Malik* was reasoned to exist as a means by which an employee could leave his or her employment immediately rather than work in furtherance of a dishonest business,[37] then this term must be either a

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[29] *Byrne v Australian Airlines* (1995) 185 CLR 411 at 450; *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391 at 402; *Australis Media Holdings Pty Ltd v Telstra Corporation* (1988) 43 NSWLR 104 at 124.

[30] *Castlemaine Tooheys Ltd v Carlton & United Brewers Ltd* (1989) 10 NSWLR 468; *Devefi v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225; *Byrne v Australian Airlines Ltd* (1985) 185 CLR 411.

[31] [2001] 2 All ER 801 at 816-817 per Lord Hoffman, contrast the view of Lord Steyn at 812-813.

[32] Notably with regard to a duty to act fairly and in good faith other than in a fiduciary relationship: see *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266 per Preistly LJ; c.f. *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903.

[33] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266-267 per Priestly LJ; see also NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contract* (2002) 422.

[34] *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541 at 426 per Finn LJ; c.f. Seddon and Ellinghaus, above n 36 423 (especially fn 287).

[35] *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 426 per Finn J; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.

[36] e.g. duty of good faith, see *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 393 per Finn J.

[37] [1997] 3 All ER 1 at 5 per Lord Nicholls of Birkenhead, at 17 per Lord Steyn.

condition, any breach of which gives rise to the right to terminate the contract, or an innominate term, a substantial failure in the performance of which may give rise to the right to terminate.[38] As the duty of trust and confidence is extremely wide in scope, providing for the recovery of damages, according to ordinary contractual principles, for any foreseeable[39] financial losses suffered by an employee as a consequence of the employer engaging in conduct that was likely to undermine the trust and confidence required for the employment relationship to continue in the manner the employment contract implicitly envisaged,[40] it is more likely that this term would be characterised as an innominate term rather than a condition. Otherwise, even a minor infringement of this term would give the employee the right to terminate his or her employment without notice. The difficulty with implying an innominate term such as this, in the employment context, is that the most serious breaches of this term by an employer would amount to a repudiation of the contract of employment by the employer, and to a constructive dismissal.[41] As constructive dismissals clearly fall within the purview of the State and Commonwealth statutory unfair dismissal regimes then, assuming *Johnson v Unisys* were to apply in Australia (discussed below), a common law claim for breach of the implied trust and confidence term could only arise in circumstances where the alleged breach was sufficiently minor that it did not amount to a constructive dismissal, or in instances where the statutory scheme did not operate. This was arguably the case in *Malik* where the employees were made redundant by the liquidator, and only became aware of the employer's conduct at a later date. This would necessarily lead to the absurd result of providing a common law cause of action, without statutory limitations, in cases of minor misconduct by the employer, where no such cause of action would be available in cases of serious misconduct that amounted to a constructive dismissal.

For these reasons it is arguably inappropriate to imply a duty of trust and confidence into employment contracts generally and, in particular, in relation to the manner of an employee's dismissal.

The Decision in Johnson v Unisys Ltd[42]

In addition to the reasons already outlined, the decision of the House of Lords in *Johnson v Unisys*, if applied in Australia, would also preclude the implication of a trust and confidence term into all employment contracts. In *Johnson v Unisys* the House of Lords held that an employee should have no implied right of action at common law to recover damages for the manner of dismissal as a remedy founded on general contractual principles would be inconsistent with the intention of Parliament to create a statutory system of reviewing unfair dismissals that attempts to balance fairness to employees against other economic interests.[43] Specifically, it was thought

[38] See *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 562 approving the tripartite classification in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; [1962] 1 All ER 474.
[39] [1997] 3 All ER 1 at 8 per Lord Nicholls of Birkenhead.
[40] [1997] 3 All ER 1 at 5 per Lord Nicholls of Birkenhead.
[41] Arguably all that prevented *Malik* from being a constructive dismissal case was that the employer had gone into liquidation and the employee was not aware of the employer's conduct until after the employment relationship had ended. For constructive dismissal see *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; *Isle of Wight Tourist Board v Coombs* [1976] IRLR 413.
[42] [2001] 2 All ER 801.
[43] [2001] 2 All ER 801.

that to create a common law right would unnecessarily replicate a statutory right in some cases, would provide a remedy in excess of the statutory limits set by Parliament or to excluded categories of employees in other cases and, in all cases, would allow determination by courts rather than specialist tribunals.[44] It was thought that such a system would circumvent the statutory unfair dismissal system and would make the area of employment law incoherent by effectively removing the statutory limits on compensation for unfair dismissal.[45]

For the reasons outlined by Spigelman CJ in *NSW v Paige*, these considerations are no less relevant in Australia.[46] In each case, Parliament has provided for the creation of specialist tribunals to hear unfair dismissal cases, the tribunals have access to broad remedies and mechanisms to settle disputes, there are limitations on the class of applicants who can bring an action and the maximum amount of compensation available and there are limitations on the timeframes within which an application can be made.[47] By contrast, in the case of a common law claim, the courts in each jurisdiction have unlimited scope with respect to the class of applicants,[48] the amount of compensation available, and have much longer limitation periods within which an application may be lodged.[49] In addition, in both the UK and Australia, the Parliaments can be taken to have expressed a desire to balance the interests of different parties in a manner not open to the courts.[50] Thus, it would seem that a remedy founded on common law principles would be no less inconsistent in Australia, and that *Johnson v Unisys* should apply here.

Whilst it has been suggested that remuneration caps limiting those who can bring a claim for unfair dismissal in Australia mean that the tension between implying a term of mutual trust and confidence at common law and the statutory unfair dismissal regime is not so apparent in Australia,[51] there are several reasons why this is unlikely to be the case. First, if the trust and confidence term were to be implied into employment contracts, it would likely be implied at law into all employment contracts rather than be implied in fact into a particular contract of employment. Therefore, there would continue to be tension between the implied term and the statutory schemes so long as any person that is subject to a contract of employment falls within a statutory scheme. Secondly, the remuneration cap in the Workplace Relations Act 1996 (Cth) ('WR Act') (and equivalent State legislation) does not purport to exclude employees from the operation of the Act in its entirety, or even from the operation of the termination of employment provisions of the Act.[52] Instead, the remuneration cap precludes particular classes of employees, who are covered by the scheme, from applying to the Commission for relief that they would otherwise have been entitled to

[44] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at [80] per Lord Millett; [37] per Lord Hoffman with whom Lord Bingham agreed, at [2] per Lord Nicholls of Birkenhead.
[45] c.f. Judgement of Ansell J in *Johnson* at first instance; c.f. *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 820-821 per Lord Hoffman.
[46] [2002] NSWCA 235 at [135]-[155].
[47] Spigelman CJ considers the applicable Commonwealth (and Victorian) and NSW legislation and makes some reference to the legislation in other States.
[48] Subject to there being a "matter" and the party having "standing".
[49] Subject only to the relevant Statute of Limitations.
[50] *NSW v Paige* [2002] NSWCA 235 at [150]-[154] per Spigelman CJ.
[51] R Jackson, 'Executive Employment and Drafting Executive Contracts', *Workplace Relations Section Newsletter*, Law Institute of Victoria (July 2005) 15.
[52] WR Act Division 3.

in respect of termination of their employment.[53] In this context, the exclusion should be seen as a bar from access to a remedy, or an absolute limit on compensation, rather than an exclusion from the operation of the statutory scheme itself. To interpret this exclusion as if there is no statutory scheme in place in respect of this class of employees would lead to the absurd result of allowing higher income earners to seek unlimited compensation at law, whilst limiting the compensation available to lower income earners to that which is available under the statutory schemes.

It has also been argued that because section 170HA of the Workplace Relations Act purports not to limit any rights that a person may have to secure orders relating to the termination of employment, Parliament intended to create parallel systems rather than to limit the availability of contractual rights.[54] That Parliament may have intended the statutory scheme to run in conjunction with the common law as it existed at the time of drafting, or to protect the gamut of contractual rights that existed at that time, cannot however be taken as support for the judicial creation, or extension of, new contractual rights that would circumvent the limitations on compensation expressly imposed by Parliament under the statutory regime. For the same reason, the suggestion that the courts may be faced with a choice between maintaining coherence with the statute or coherence with the intention of Parliament may also be misguided.[55]

Likewise, the suggestion that the lower maximum level of compensation available under the WR Act is evidence that the Australian Parliament had less of an intention to cover the field than did its UK counterpart, where the statutory limit is higher,[56] is unconvincing. The differences in statutory limits are more likely to evidence a different balancing of policy considerations in each jurisdiction, rather than an attempt by Parliament to provide for recovery for the manner of an employee's dismissal by other means. Were this not the case, Parliament would effectively be making its own Act redundant; the more restrictive the limitations on compensation for unfair dismissal imposed under the Act, the greater the proportion of employees that would seek remedies at law. By this logic, the Government's recent Work Choices amendments, which exclude employees of businesses with less than 100 employees from applying to the Commission for relief in respect of unfair dismissal, and which increase the qualifying period before which employees can avail themselves of statutory protections for unfair dismissal, would result in even more employees moving out of the statutory scheme and seeking remedies under the common law, taking with them any of the purported benefits to the economy, real or perceived, of these amendments.[57]

Other criticisms of *Johnson v Unisys*, relating to the endorsement of a special rule for mental harm associated with the manner of dismissal, are more properly criticisms of *Addis*, which have arguably been resolved by *Johnson v Unisys* and *Malik* which may be seen as limiting and re-defining the rule in *Addis* so as to make it consistent with

[53] WR Act s 170CBA; see also headings for Division 3 and the various subdivisions of Division 3.
[54] Irving, above n 24.
[55] Irving, above n 24 at 7-8.
[56] Ibid.
[57] WR Act s 170CE(5E), s 170CE (5B)(a) (discussed further below).

ordinary contract principles.[58] That double recovery of damages would not be an issue in the event that the duty of trust and confidence and the statutory schemes were to run in parallel[59] is therefore a moot point.

Part Two: Where the Employment Contract Explicitly or Implicitly Provides for the Manner of Dismissal

Malik may be seen as an application of the general principle that a duty should be implied at law where it is necessary for the efficient operation of contracts of a particular type. Whereas *Johnson v Unisys* may be seen as standing for the proposition that it would be improper, as a matter of policy, for the courts to imply a duty at law that would undermine a statutory scheme operating in the same field, neither *Johnson v Unisys* nor *Malik* consider terms implied in fact, or expressly provided by the parties to an employment contract.[60]

As employers become increasingly process focussed, it is more likely that a contractual term regulating the manner in which an employee can be terminated or disciplined may be included or implied by reference to company policies into an employee's contract of employment.[61] Where such a term is included nothing in *Johnson v Unisys*, *Malik*, or the statutory unfair dismissal schemes[62] would stand in the way of an employee seeking damages for emotional harm caused by a breach of a term of their employment contract, according to normal principles of contract law. Nothing that is, except the decision of the House of Lords in *Addis*, which has stood, for over a century, as a bar to damages for mental harm and loss of employment prospects arising from the manner of an employee's dismissal, and the general rule that non-pecuniary damages cannot be awarded in an action for breach of contract.[63]

This paper will seek to demonstrate that not only do these rules run contrary to the fundamental principle upon which damages are awarded at common law, that an injured party should be restored to the position (not merely financial position) that they would have been in had the actionable wrong not taken place,[64] but that these rules ought not apply as a bar to compensation for psychological injuries sustained as a result of a breach of a term of an employment contract governing the manner of an employee's dismissal.

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[58] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 807-810 per Lord Steyn; at 817 per Lord Hoffman; at 823 per Lord Millett (with whom Lord Bingham agreed).
[59] Irving, above n 24, 8.
[60] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 812 [24] per Lord Steyn.
[61] *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 per Lindgren, North and Mansfield JJ; if not by reference c.f. *Byrne & Frew v Australian Airlines* (1995) 185 CLR 410.
[62] WR Act ss170HA, 170HB, s170HC.
[63] *Hamlin v Great Northern Railway Co* (1856) 1 H&N 408 158 ER 126; *Fink v Fink* (1946) 74 CLR 127 at 142-143 per Dixon and McTiernan JJ; *Mann v Capital Territory Health Commission* (1982), 148 CLR 97, at 103; *Baltic Shipping v Dillon* (1993) 176 CLR 344 at 360; c.f. *Kemp v Sober* (1851) 1 Sim (NS) 517 at 520, [61] ER 200 at 201; *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 360.
[64] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 362 per Mason CJ.

Part Three: Recovery of Damages for Psychological Harm Arising From a Breach of Contract

The Decision in Addis v Gramophone Co Ltd[65]

Whilst the decision in *Addis v Gramophone* has been seen by some as an attempt to create a special rule relating to the contract of employment that is to the disadvantage of the employee,[66] there is contrary evidence to suggest that *Addis* ought to be considered as merely one application of the general principles of causation and remoteness in the employment context.[67]

For example, Lord Loreburn LC stated in *Addis* that it signified nothing whether the claim in that case was to be treated as for wrongful dismissal or not, as in either case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages would be exactly the same.[68] The majority instead applied the general rule for breach of contract that the vendor who fails to perform his or her contract is bound to place the purchaser, so far as money will do it, in the position he or she would have been in had the contract been performed.[69] Only Lord Gorell expressly considered the general rule that damages in contract must be such as to flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach. His Lordship determined that the latter branch was inapplicable to the facts of the case as it was not even suggested that there were any consequential damages within the contemplation of the parties.[70] The same may be implicit in the decisions of the other Lords.

In this context, the ratio in *Addis* that damages for mental harm caused by the manner of dismissal are not recoverable, may be seen as turning not on the act of wrongful dismissal per se, but on the application of the general principles of remoteness and causation. That is, damages would not be available for injured feelings associated with a breach of a commercial contract as these are likely to be so remote as to be beyond the contemplation of the parties at the time of entering into the contract (remoteness)[71] and losses arising from the manner of an employee's dismissal are not compensable where the contractual terms governing dismissal only provide for a minimum period of notice (causation).

In the latter case, harm suffered as a result of the manner of the employee's dismissal will not be compensable as it is not caused by the wrongful dismissal per se, being the failure to give proper notice, but rather derives from the act or manner of the dismissal. In such a case, the harm cannot be said to have been caused by the breach of contract as this harm would have been suffered even had the employee been

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[65] [1909] AC 488.
[66] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 808 per Lord Steyn.
[67] See *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 380-381 per Deane and Dawson JJ; c.f. *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 150 per Wilcox CJ, von Doussa and Marshall JJ.
[68] [1909] AC 488 at 490, [1908–10] All ER Rep 1 at 3 per Lord Loreburn LC with whom Lord James and Lord Atkinson agreed, in *Johnson v Unisys Ltd* [1999] 1 All ER 854 at 859 per Lord Woolf MR.
[69] [1909] AC 488 at 494 per Lord Atkinson, at 491-492 per Lord Loreburn LC (with whom Lord James of Hereford agreed), at 501 per Lord Gorell, at 504 per Lord Shaw of Dunfermline.
[70] [1909] AC 488 at 501 per Lord Gorell.
[71] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 823 [70] per Lord Millett.

lawfully dismissed (i.e. had proper notice been given).[72] *Addis* may also be seen as standing for the proposition that aggravated or exemplary damages, that may be available in tort, cannot be recovered in an action for breach of contract (including wrongful dismissal).[73]

If *Addis* is seen as an application of the general rules of remoteness and causation, and a statement on the availability of exemplary damages for breach of contract, rather than a separate rule with a questionable conceptual basis, then it will not necessarily apply where the contract of employment contemplates the manner of dismissal or prescribes disciplinary conduct in a way that the employment contract did not in *Addis*. In such cases, psychological harm may result from a breach of a term of the employment contract, and such harm cannot necessarily be said to be so remote as to be beyond the contemplation of the parties at the time of entering into the contract.

In fact, *Malik* may be seen as positive proof that *Addis* does not bar a claim for the recovery of (financial) losses flowing from the manner of a dismissal, albeit constructive dismissal, provided these losses are caused by a breach of an express or other implied term of the employment contract. *Malik* may arguably also be taken to overrule *Addis* to the extent that *Addis* purports to operate as a special rule contrary to ordinary principles of contract law.[74]

The General Rule Against Non-Pecuniary Damages for Breach of Contract

It has long been held that as a general rule, non-pecuniary damages are not available for breach of contract. This would include compensation for mental harm suffered as a result of a breach of a contract of employment. This general rule is based on two propositions,[75] namely:

- as mental suffering in the form of hurt feelings or disappointment necessarily results from any and every breach of contract, the risk is deemed to be assumed by the contracting parties and any associated losses are therefore not compensable; and
- in the case of commercial contracts, mental suffering is assumed not to flow naturally from a breach of contract, and is not reasonably supposed to be within the contemplation of both parties at the time of making the contract,[76] and therefore is too remote to be compensable at law.

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[72] *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1 at 9-10 per Lord Nicholls of Birkenhead; *Addis v Gramophone Co Ltd* [1909] AC 488 at 493 per Lord Atkinson, at 501-502 per Lord Gorell, at 504 per Lord Shaw of Dunfermline.

[73] [1909] AC 488 at 493-494, 496 per Lord Atkinson, at 492 per Lord James of Hereford, at 501 per Lord Gorell, at 503-504 per Lord Shaw of Dunfermline, c.f Lord Collins at 497-501; *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1 at 20 per Lord Steyn.

[74] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 810 per Lord Steyn, at 817 [44] per Lord Hoffman; *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1 at 19-20 per Lord Steyn; contrast *Johnson v Unisys Ltd* [1999] 1 All ER 854 per Lord Woolf MR – considered *Malik* to merely distinguish rather than overrule *Addis*.

[75] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 359-367 per Mason CJ; *Johnson v Unisys* [2001] 2 All ER 801 at 823 per Lord Millett.

[76] *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145; *Butler v Fairclough* (1917) 23 CLR 78 at 89 per Griffith CJ.

For the reasons outlined below, these propositions do not hold in the employment context, where mental suffering is more likely to arise naturally or to have been within the contemplation of the parties at the time of making the contract than would be the case with other kinds of commercial contracts, or where the harm suffered is a recognised psychological injury, which cannot be said to inevitably flow from every breach of contract.

The general proposition that damages for mental distress of any kind occasioned by a breach of contract ought not be compensable at law,[77] is over simplistic. This proposition fails, as did many of the earlier cases, to distinguish between anxiety, disappointment and mere distress of a kind that ought to be expected to flow from any breach of contract, and psychological injuries of a more serious nature which would not ordinarily be expected to result from a breach of contract.[78] Lord Steyn states in *Johnson v Unisys*, for example, that "what could in the early part of the last century be dismissively treated as mere 'injured feelings' is now sometimes accepted as recognised psychiatric illness".[79]

In *Hamlin v Great Northern Railway Co*,[80] for example, the court considered "disappointment of mind",[81] in *Hobbs v London & South Western Railway Co* the distress was in the form of "mere inconvenience such as annoyance and loss of temper or vexation",[82] and in *Addis*, damages were found not to be recoverable for "injured feelings" resulting from the humiliating manner of dismissal.[83] In these cases of mere anxiety, distress or disappointment, it does follow that, as some degree of anxiety is inevitable whenever a person's expectations are not met or a promise made to them has not been kept, to award damages for such losses would be to inflate the amount of damages awarded in all contract cases.[84] With contracts being central to all commerce there are policy reasons why such an approach would be undesirable, and the contracting parties should be assumed to have taken on this risk when entering into the contract.[85] Were this not the case, and were the natural mental reaction to a breach of contract and the resultant harm to be considered a head of damage, then the liability of a party in breach would be both indeterminate and dependant upon the personal situation of the allegedly wronged party. According to Brennan J in *Baltic Shipping Company v Dillon ('Baltic Shipping')*,[86] if a promisor were exposed to such an indefinite liability in the event of breach, the making of commercial contracts would be inhibited,[87] and trade and commerce would be seriously impeded.[88]

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[77] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 360 per Mason CJ.
[78] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 359-365 per Mason CJ.
[79] [2001] 2 All ER 801 at 809 [19] per Lord Steyn.
[80] Approved by Dixon and McTiernan JJ in *Fink v Fink* (1946) 74 CLR 127.
[81] (1856) 156 ER 1261 at 1262 per Pollock CB; c.f. *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 360.
[82] (1875) LR10QB 111 at 122 per Mellor J; c.f. *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 360.
[83] [1909] AC 488 at 491 per Lord Loreburn.
[84] *Hayes v James & Charles Dodd (A Firm)* [1990] 2 All ER 815 at 823 per Staughton LJ cited in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 362 per Mason CJ.
[85] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 362 per Mason CJ.
[86] (1993) 176 CLR 344.
[87] *Addis v Gramophone Co Ltd* [1909] AC 488 at 495 cited in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 369 per Brennan J.
[88] *Hayes v James & Charles Dodd (A Firm*) [1990] 2 All ER 815 at 823 cited in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 369 per Brennan J.

However, this rationale clearly does not apply to instances where serious psychological injuries are sustained, if only because such consequences do not naturally or even typically flow from a breach of promise.

That this general rule does not adequately deal with circumstances in which non-pecuniary losses are not so remote as to be beyond the contemplation of the parties and not so common that the risks are assumed to have been accepted by the parties, has resulted in a number of exceptions having been made to the general rule. These exceptions include awarding compensation in circumstances where pain and suffering has been sustained as a result of a physical injury[89] or physical inconvenience[90] caused by the defendant's breach of contract. As a consequence of these exceptions, Mason CJ pointed out in *Baltic Shipping* that not only are the conceptual and policy foundations of the general rule not to award damages for emotional suffering unclear, but the scope of exceptions to this rule are such that the authority of the general rule itself is somewhat uncertain.[91]

Furthermore, there is specific authority for the proposition that unlike mere disappointment, significant emotional trauma should be compensable. As psychiatric illnesses constitute personal injury,[92] and as damages for personal injury may be recovered in an action for breach of contract,[93] then so too should damages associated with psychiatric illnesses[94] that result from a breach of contract be recoverable.[95] This was the approach taken by the English Court of Appeal in *Gogay v Hertfordshire County Council*[96] in which an employee was awarded damages for the development of a psychiatric condition which resulted from the manner of her suspension from work. This suspension was held to be a breach of the implied duty of mutual trust and confidence.

In Australia, the view that this line of authority should not extend to psychiatric damage has been proposed by Ashley J in *Aldersea v Public Transport Corp*,[97] but was not adopted by Spigelman CJ in *State of New South Wales v Paige*,[98] who did not consider it necessary to determine whether this represents the law in Australia.[99] Whilst this point is yet to be finally decided in Australia, what is clear from recent cases is that the rationale for not awarding damages purely on the basis that the injury sustained takes the form of mental anguish is no longer sustainable. This is especially

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[89] *Godley v Perry, Burton & Sons (Bermondsey*) [1960] 1 WLR 9 at 13; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; c.f. *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 632 per Mason CJ.

[90] *Hobbs v London & South Western Rly Co* (1875) LR10QB 111 at 116 per Cockburn CJ, at 24 per Archibald J; *Bailey v Bullock* [1950] 2 All ER 1167 at 1171-1172; *Athens-MacDonald Travel Service Pty Ltd v Kazis* [1970] SASR 264 at 274-275 per Zelling J; and see *Watts v Morrow* [1991] 4 All ER at 954-955 per Ralph Gibson LJ, at 1445, 959-960 per Bingham LJ; c.f. *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 633 per Mason CJ.

[91] (1993) 176 CLR 344 at 361 per Mason CJ.

[92] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

[93] *Woolworths Ltd v Crotty* (1942) 66 CLR 603; *Cullen v Trappell* (1980) 146 CLR 1.

[94] Including associated mental anguish.

[95] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 405 per McHugh J.

[96] [2000] IRLR 703.

[97] (2001) 183 ALR 545 at [58] and [96]-[98].

[98] [2002] NSWCA 235 at [133].

[99] [2002] NSWCA 235 at [135] per Spigelman CJ.

so as courts have generally accepted that they must act in accordance with the best medical insights of the day.[100]

The Test of Remoteness in Contract Law

Where a recognised psychological injury has been sustained in a particular case, and causation can be established, the availability of damages should only be limited by the test of remoteness. The test for whether a plaintiff may recover damages for a particular loss caused by a breach of the contract is whether harm of that kind may reasonably be considered to either arise naturally (according to the usual course of things) from the breach of contract, or may reasonably be supposed to have been within the contemplation the parties at the time of making the contract as the probable result of its breach.[101]

As such, cases in which damages have been awarded for mental anguish suffered for breaches of contract have been largely concerned with contracts which themselves promise freedom from mental suffering.[102] For example in *Kemp v Sober* the purpose of a negative covenant on a property was held to be to free the plaintiff from the anxiety associated with the act against which the covenant protected, namely the building of a school on the property. Accordingly, when a school was built on the property in breach of this covenant the associated anxiety was compensable.[103]

Likewise, in *Baltic Shipping* the High Court held that damages for disappointment and distress alone are recoverable where the object of the contract is to provide pleasure, entertainment, enjoyment, relaxation, or freedom from molestation or vexation.[104] In that case Brennan J couched his decision in the following terms: "if a contract contains a promise that the promisor will provide the promisee with relaxation of the mind and refreshment of the spirits, then tension of the mind and depression of the spirit resulting from a breach of the contract is not too remote to be compensable".[105]

Consequently, the only circumstances in which serious emotional distress would naturally arise from a breach of the contract itself, or would have been in the contemplation of the parties at the time of making the contract, would be where the contract itself contemplates the emotional state of a party, such as in *Baltic Shipping*, or where the contract was of a particular type that such harm would naturally arise from a breach. There is no principled reason why this approach ought to apply

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[100] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 809 [19] per Lord Steyn.
[101] (1854) 9 Exch 341; 156 ER 145; *Burns v Mann Automotive (Aust) Pty Ltd* (1986) 161 CLR 653.
[102] "If a contract promises protection from disappointment of mind, it cannot be said that disappointment of mind resulting from breach of the promise is too remote": per Brennan J in *Baltic Shipping Company v Dillon* (1993) 111 ALR 289 at 308.
[103] (1851) 61 ER 200 at 201; c.f. *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 360 per Mason CJ.
[104] (1993) 176 CLR 344 per Mason CJ, Brennan, Dawson, Deane, Gaudron, McHugh, Toohey JJ. Whilst there were several judgements the reasoning was broadly the same.
[105] (1993) 176 CLR 344 at 370-371 per Brennan J; see also *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71; *Kemp v Sober* (1851) 1 Sim (NS) 517; *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408; 156 ER 1261; *Cox v Philips Industries Ltd* [1976] 1 WLR 638; *Watts v Morrow* [1991] 1 WLR 1421; *C Czarnikow Ltd v Koufos* [1969] AC 350; *Heywood v Wellers* [1976] QB 446; *Silberman v Silberman* (1910) 10 SR(NSW) 554.

differently with regard to the manner of an employee's dismissal.[106] One failure of many early wrongful dismissal cases was the assumption that, in the absence of an express term contemplating the manner of dismissal, employment contracts were simply another form of commercial contract.[107] As a consequence, it was often assumed that, as was the case for commercial contracts, emotional or psychological harm would not naturally arise from a breach of an employment contract, irrespective of the circumstances in which the breach occurred.[108]

As outlined above, in *Addis*, for example, the majority (except Lord Gorell)[109] did not even consider whether distress was a loss that might fairly be considered as arising according to the usual course of things, or might reasonably be supposed to have been in the parties' contemplation when they made the contract,[110] as likely to arise from the employee being dismissed in a harsh and publicly humiliating manner.[111] Instead, the majority appears to have assumed that, in all cases of wrongful dismissal, damage of this type is too remote.[112] It was for this reason, Deane and Dawson JJ considered the rule in *Addis* to represent "an essentially pragmatic and judicially imposed assumption (for the purposes of the second limb of the rule in *Hadley v Baxendale*) that disappointment or distress flowing from the breach of contract would not have been in the contemplation of the parties at the time they made the contract as a likely result of breach."[113]

Consequently, there is no principled reason why the general rule precluding compensation for non-pecuniary losses or the rule in *Addis*, should preclude compensation for mental injuries or distress sustained as a consequence of the breach of a contract of employment by wrongful dismissal provided, in the particular circumstances, the loss suffered is of a kind that might fairly be considered as arising according to the usual course of things or might reasonably be supposed to have been in the parties' contemplation when they made the contract.

Remoteness in the Employment Context

Moreover, there are several reasons why a psychological injury might fairly be considered as arising according to the usual course of things from a breach of a term of an employment contract governing the manner of discipline or dismissal of an employee. First, the personal nature of the employment relationship, including its significance to a employee's life, livelihood, identity, self-esteem and personal well-being, [114] as well as to the high incidence of stress-related psychiatric and

[106] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 810 [21], 813 [27] per Lord Steyn.
[107] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 815 [35] per Lord Hoffman.
[108] See discussion of *Hamlin v Great Northern Railway Co* (1856) 158 ER 126 at 162 per Pollock CB in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 148 per Wilcox CJ, von Doussa and Marshall JJ.
[109] [1909] AC 488 at 501 per Lord Gorell who found that "the latter branch of the rule is inapplicable to the facts of this case, for it was not even suggested that there were any consequential damages within the contemplation of the parties".
[110] *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 148.
[111] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 808 [16] per Lord Steyn.
[112] [1909] AC 488 at 501 per Lord Gorell.
[113] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 380-381 per Deane and Dawson JJ; c.f. *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 150 per Wilcox CJ, von Doussa and Marshall JJ.
[114] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 815 [35] per Lord Hoffman.

psychological problems of employees,[115] are suggestive that the employment contract is a particular type of commercial contract, a breach of which will more usually result in mental suffering than would be the case under other commercial contracts.[116] Secondly, where the employment contract expressly or implicitly provides for the manner in which an employee may be disciplined or dismissed, rather than merely providing notice, this may be seen as tacit acceptance, at the time of entering into the contract, that these acts are of particular significance to the parties and that the manner of exercising these rights could have material adverse consequences to the employee's well-being. Thirdly, as the unfair dismissal provisions of the Industrial Relations Act 1971 (UK), which influenced the development of the Australian unfair dismissal jurisdiction,[117] were prompted by a recognition of the "social reality"[118] that people build their lives around their jobs and plan for their futures on this basis,[119] it would follow that if the legislature can recognise the possible adverse consequences of dismissal, then it is reasonable to assume that these consequences would not have been beyond the contemplation of the parties personally affected at the time of entering into the employment contract.[120] Finally, it may also be argued that where detailed disciplinary procedures are incorporated into a contract by reference, the employer is, in effect, promising not only procedural fairness,[121] but also freedom from the anxiety or mental harm that may be suffered as a result of being dismissed in a manner that lacks procedural fairness. Accordingly, mental harm suffered as a result of a breach of these procedures may also not be so remote as to preclude compensation.[122]

For the above reasons, there should be no general bar to an employee seeking damages for psychological injuries sustained as a result of the manner in which they were dismissed, provided the manner of their dismissal is a breach of an express or implied term of their employment contract.

Part Four: Eastwood v Magnox Electric

If the recent decision of the House of Lords in *Eastwood v Magnox Electric plc* ('*Eastwood*')[123] were to be applied in Australia, then where an employer's actions leading up to an employee's dismissal give rise to a common law cause of action, be it for breach of contract or otherwise, and this cause of action precedes and is independent of the employee's dismissal, then that cause of action will remain unimpaired by the employee's subsequent unfair dismissal and any statutory rights

[115] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 809 [19] per Lord Steyn.
[116] Particularly in the case of termination.
[117] *Termination, Change and Redundancy Case* (1984) 8 IR 34, 9 IR 115.
[118] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 815 [35] per Lord Hoffman.
[119] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 823-824 [72-73] per Lord Millett.
[120] This notion, that the contract of employment could be considered differently from other commercial contracts by virtue of the interpersonal relationship it creates or the fact that a breach of an employment contract by an employer may have a substantial effect on the employee's emotional well-being and self-esteem, was considered in the Australian context by a Full Bench of the Industrial Relations Court in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 148-151 per Wilcox CJ, von Doussa and Marshall JJ.
[121] *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193.
[122] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 370-371 per Brennan J. Note: Of course it would still need to be established, as a matter of fact, that the mental harm suffered was caused by the *manner* of the dismissal and not the dismissal itself.
[123] [2004] 3 All ER 991.

that arise from it. As a consequence, where an employee suffers a psychiatric injury as a result of a course of conduct by his or her employer leading up to the employee's dismissal, the employee will have a right to seek damages at common law, including for breach of the implied duty of trust and confidence, in addition to any statutory rights that may arise as a consequence of his or her actual dismissal.[124] This will be so even if the decision in *Johnson v Unisys* were to limit the scope of the duty of trust and confidence so as not to extend to the manner of an employee's dismissal.

Nevertheless, disputes involving both an actual dismissal and pre-dismissal conduct may pose substantial difficulties for courts, not least of which include determining the point at which an employee's common law contractual rights and remedies end, and the statutory unfair dismissal scheme begins. This will be particularly difficult in cases where the conduct of the employer may also amount to a constructive dismissal.[125] Courts will also be faced with the unenviable, if not impossible, task of determining in each case whether it was pre-dismissal conduct or the dismissal itself which caused the psychological injury. In the words of Lord Nicholls of Birkenhead in *Eastwood*, "[j]udges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed."[151] The consequence of such an approach may be, as his Lordship points out, that an employer may have an incentive to dismiss an employee rather than suspend or discipline him or her, whereas an employee may have an incentive to identify events preceding dismissal that give rise to a common law claim for breach of the implied duty of trust and confidence so as to avoid the statutory unfair dismissal limits.[126] Clearly this is a difficult position, and one that may best be resolved by Parliamentary intervention.

Part Five: Alternative Remedies and Causes of Action

Even where there is no express or implied term governing the manner of an employee's discipline or dismissal incorporated into the employment contract, other remedies may be available to an employee who suffers psychological harm whilst at work, including as a result of the manner in which they were dismissed.

The Tort of Negligence

It is well established that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work.[127] In the employment context, the content of this duty of care will be informed by the contract of employment, equitable obligations arising from the employment relationship and applicable statutory provisions and instruments.[128]

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[124] *Eastwood v Magnox Electric plc* [2004] UKHL 35.
[125] *Eastwood v Magnox Electric plc* [2004] UKHL 35 at [31] per Lord Nicholls of Birkenhead.
[151] [2004] UKHL 35 at [31] per Lord Nicholls of Birkenhead.
[126] *Eastwood v Magnox Electric plc* [2004] UKHL 35 at [32]-[33] per Lord Nicholls of Birkenhead.
[127] See, e.g., *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; *Heptonstall v Gaskin (No 2)*[2005] NSWSC 30; *New South Wales v Seedsman* [2000] NSWCA 119; *New South Wales v Jeffery* [2000] NSWCA 171; *Mannall v New South Wales* [2001] NSWCA 327.
[128] *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15.

An employer who fails to exercise reasonable care, having regard to these factors, and by its acts or omissions causes an employee to suffer recognised psychiatric injury,[129] will be liable, in the tort of negligence, to compensate the employee for the injuries suffered, provided the injuries are of a kind that are reasonably foreseeable.[130] The main difficulty for an employee in succeeding in a claim for psychiatric injury lies in establishing that the injury was reasonably foreseeable.[131] An injury will be reasonably foreseeable in the relevant sense, notwithstanding that it may be unlikely to arise, provided it is not far-fetched or fanciful.[132]

Where the risk of injury is reasonably foreseeable, and a reasonable employer in the same circumstances would have foreseen that a "normal" employee subject to the same conduct could be psychiatrically impaired to some extent by it, then the employer will be required to take reasonable steps to prevent such an injury occurring.[133] It is not a precondition to recovery that the employee be a person of "normal" emotional and psychological fortitude.[134] Rather, where an employer has failed to discharge its duty of care, the employer will be liable for all adverse psychiatric consequences sustained by the employee, notwithstanding that the employee may have been unusually vulnerable to psychiatric illness.[135] This is consistent with the general approach to remoteness of harm in negligence and the view that a defendant must take the plaintiff as they find them.[136]

As outlined by Hoeben J in *Heptonstall v Gaskin (No 2)*,[137] the approach adopted by Australian courts[138] differs markedly from the approach in the United Kingdom in which the House of Lords has held that an employer's duty of care for the safety of employees does not extend to protecting them from psychiatric injury where there has been no breach of the duty to protect from physical injury, and that the general rules restricting the recovery of damages for pure psychiatric harm apply to claims by employees.[139] It is for this reason that Hoeben J considered that "there has been no need in Australia to rely upon a 'trust and confidence' term in the contract of employment to enable employees to succeed in claims against employers for purely

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[129] *Tame v State of New South Wales* (2002) 211 CLR 317 per Gaudron, Gummow and Kirby JJ.
[130] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v State of New South Wales* (2002) 211 CLR 317.
[131] See, e.g., *Koehler v Cerebos (Australia) Pty Ltd* [2005] HCA 15; *Wodrow v Commonwealth* (1993) 45 FCR 32; *Midwest Radio Ltd v Arnold* (1999) EOC 92-970; *Ilosfai v Excel Technik Pty Ltd* [2003] QSC 275; c.f. *NSW v Seedsman* (2000) 217 ALR 583; *NSW v Jeffery* [2000] NSWCA 171.
[132] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48; *Tame v State of New South Wales* (2002) 211 CLR 317 at [12] and [201].
[133] *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v State of New South Wales* (2002) 211 CLR 317.
[134] *Tame v State of New South Wales* (2002) 211 CLR 317 at [16], [90], [118], [199], [334] per Gleeson CJ, Gummow and Kirby JJ (McHugh and Callinan JJ dissenting).
[135] *Midwest Radio Ltd v Arnold* (1999) EOC 92-970; *Jaensch v Coffey* (1984) 155 CLR 549 at 556, 563, 566, 595; *Woodrow v Commonwealth* (1993) 45 FCR 52 at 76; *Gillespie v Commonwealth of Australia* (1991) 104 ACTR 1.
[136] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (Wagon Mound (No 1) Case) [1961] AC 388; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* (Wagon Mound (No 2) Case) [1967] 1 AC 617; *Hughes v Lord Advocate* [1963] AC 837; *Tremain v Pike* [1969] 3 All ER 1303; *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518*; Dulieu v White & Sons* [1901] 2 KB 669; *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152.
[137] [2005] NSWSC 30.
[138] *New South Wales v Seedsman* [2000] NSWSC 119; *New South Wales v Jeffery* [2000] NSWCA 171; *Mannall v State of New South Wales* [2001] NSWCA 327.
[139] *White v Chief Constable of South Yorkshire Police* (1992) 2 AC 455.

psychiatric injury suffered in the course of employment".[140] However, none of the cases cited by his Honour in *Heptonstall* as authority for the proposition that employees may be able to recover under the tort or negligence for psychiatric injury suffered in the course of employment[141] are cases in which the psychiatric injury was suffered by an employee solely as a result of the manner in which they were dismissed. In such cases it may be that *Johnson v Unisys* would operate in Australia to preclude a claim in tort, for the same reasons that it would preclude a claim in contract.[142]

However, even if this were the case, it is clear from the circumstances in *Eastwood*, *Koehler v Cerebos (Australia) Ltd*, [143] *Heptonstall v Gaskin (No 2),*[144] *New South Wales v Seedsman*,[145] *New South Wales v Jeffery*[146] and *Mannall v State of New South Wales*[147] that in the great majority of cases in which an employee suffers psychiatric harm, this harm arises as a result of a course of conduct by an employer which may or may not lead to an actual or constructive dismissal, rather than solely as a result of the manner of the employee's actual or constructive dismissal. Under such circumstances, for the reasons outlined by the House of Lords in *Eastwood*, *Johnson v Unisys* should not serve to bar a claim for compensation in tort.

On this basis alone it is arguable that there is little practical need for an implied duty of trust and confidence in Australia.

Workers' Compensation Legislation

In any event, an employee who suffers an injury, including mental injury,[148] during the course of his or her employment, may be eligible for compensation under a State or Commonwealth workers' compensation scheme.[149] This includes where the injury arises as a consequence of the manner in which the employee is dismissed. For example, under s 82(1) of the Accident Compensation Act 1985 (Vic), a worker is entitled to compensation for an injury arising out of or in the course of any employment. For the purposes of that Act an injury is taken to mean any physical or mental injury including inter alia a disease contracted by a worker in the course of the worker's employment, and a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease. [150] Moreover, the Accident Compensation Act implicitly contemplates that compensation will be available to a

[140] *Heptonstall v Gaskin (No 2)* [2005] NSWSC 30 at [21].
[141] *Tame v New South Wales* [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; *New South Wales v Seedsman* [2000] NSWSC 119; *New South Wales v Jeffery* [2000] NSWCA 171; *Mannall v State of New South Wales* [2001] NSWCA 327.
[142] [2001] 2 All ER 801 at [13] per Lord Steyn, at [81] per Lord Millett.
[143] [2005] HCA 15.
[144] [2005] NSWSC 30.
[145] [2000] NSWSC 119.
[146] [2000] NSWCA 171.
[147] [2001] NSWCA 327.
[148] It must be more than a mere emotional reaction; see for example *Re Frank and Comcare* (1996) 41 ALD 597; it must be a condition that is outside the boundaries of normal mental functioning and behaviour: *Comcare v Mooi* (1996) 69 FCR 439.
[149] See, e.g., Part II Division 1 of the Safety, Rehabilitation and Compensation Act 1988 (Cth), especially s 14 and s 16, and the definition of "injury" and "disease" in s 4(1); Accident Compensation Act 1985 (Vic) and definition of "injury" in s 5.
[150] Accident Compensation Act 1985 (Vic) s 5.

worker in respect of mental harm (an injury consisting of an illness or disorder of the mind caused by stress arising from the manner of an employee's dismissal),[151] provided the stress that caused the injury did not arise wholly or predominantly from reasonable action taken in a reasonable manner by the employer to dismiss the worker. Other exceptions exist in respect of reasonable action by an employer to transfer, demote, discipline, redeploy, retrench the employee, and to decisions taken on reasonable grounds not to promote, reclassify, transfer, or provide another benefit in connection with the employment to the worker.[152]

Similarly, under the Commonwealth scheme, Comcare is liable to pay compensation in accordance with Part II of the Safety, Rehabilitation and Compensation Act 1988 (Cth) ('SR&C Act') to a Commonwealth employee in respect of any injury suffered by the employee if the injury results in death, incapacity for work or impairment.[153] The definition of "injury" in the SR&C Act includes a "disease" suffered by an employee, which is defined as any ailment (or aggravation of any such ailment) that was contributed to in a material degree by the employee's employment by the Commonwealth. For the purpose of the SR&C Act, "disease" includes both physical and mental ailments, disorders or defects (whether of sudden onset or gradual development). To be a mental ailment of the kind compensable under the SR&C Act, it is not necessary for the psychological consequences to take the form of a recognised medical condition, provided the condition that is suffered can be demonstrated to be outside the boundaries of normal mental functioning and behaviour.[154]

If it can be demonstrated that an employee's employment contributed in a material degree to a mental ailment of this kind then, subject to the exclusions discussed below, compensation will be available. An employee's employment will be considered to have contributed to a disease, although not necessarily to a material degree, if some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed contributed to the disease.[155] An "employee's employment" will include any incident or state of affairs to which the worker was exposed in the performance of his duties and to which he would not otherwise have been exposed[156] including, it could be argued, the process surrounding the termination of his or her employment.

Where the requisite causal connection between the mental ailment and what the employee did in his or her employment can be established, there is no requirement, in order for the employee to seek compensation, that there be any fault on the part of the employer or any unusual stress or factor or special circumstance in the employment itself. It is also irrelevant whether the worker's response to what occurred was rational.[157] All that is necessary for the definition of disease to be fulfilled is that the

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[151] See, e.g., *Barneveld v Hume City Council* [2004] VSC 350.
[152] See, e.g., *State of Victoria v Blythman* [1999] VSC 498.
[153] SR&C Act s 14.
[154] Stress, disappointment, anxiety or other unusual behaviour will not usually constitute a disease for the purposes of the SR&C Act, as these can be said to fall within the range of behaviour that persons unaffected by mental disease or illness could be expected to exhibit under the same circumstances: Comcare v Mooi (1996) 69 FCR 439 per Drummond J.
[155] *Federal Broom Co v Semlitch* (1964) 110 CLR 626 per Windeyer J.
[156] *Federal Broom Co v Semlitch* (1964) 110 CLR 626 per Windeyer J per Kitto (with whom Taylor and Owen JJ agreed).
[157] *Westgate v Australian Telecommunications Commission* (1987) 14 ALD 367 per Davies J.

incident or state of affairs actually occurred and created a perception in the mind of the employee (whether reasonable or not) and the perception contributed in a material degree to the employee's ailment (or an aggravation of it).[158]

In order to demonstrate that the mental ailment was contributed to in a "material degree" by the employee's employment it would be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged; in this case, between the psychological injury and the termination of his or her employment. For the employment to have contributed to a "material degree" the termination must have been more than a mere contributing factor.[159]

As with the equivalent State legislation, the SR&C Act expressly excludes diseases, injuries or aggravations that are suffered by an employee as a result of reasonable disciplinary action taken against the employee or as a result of a failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.[160] However, it is unlikely that a psychological injury arising from the manner of an employee's dismissal will be excluded under the SR&C Act as resulting from a failure by the employee to obtain a benefit, being continued employment, in connection with his or her employment,[161] as such an injury is more likely to be categorised as having resulted from a failure to retain that benefit.[162]

Where an employee is dismissed for disciplinary reasons, mental injury arising from the manner of the employee's dismissal may be excluded under the SR&C Act on the basis that the mental injury is suffered as a result of reasonable disciplinary action. Where this is the case, the injury will not be compensable even where there may have been other (non-exclusionary) causes of the injury.[163] For the purpose of this exclusion, reasonable disciplinary action will not be limited to punitive measures taken in response to established wrongdoing, or to sanctions issued after a finding of guilt or culpability against the employee,[164] nor will it extend to all the processes for dealing with an employee's alleged misconduct, or all aspects of the system of rules for the conduct of employees and the enforcement of those rules by any means.[165] Rather, reasonable disciplinary action will be limited to reasonable actions that are lawfully taken against an employee in the nature of, or to promote, discipline. This will be determined, in any particular case, by reference to the regulatory rules applicable to the employee in question and not by reference to general notions of good

[158] *Wiegand v Comcare Australia* (2002) 72 ALD 795 per von Doussa J.
[159] *Comcare v Canute* [2005] FCAFC 262 per French and Stone JJ.
[160] SR&C Act s 4.
[161] See the definition of "injury" in s 4 SR&C Act; *Trewin v Comcare* (1988) 156 ALR 615.
[162] *Comcare v Ross* (unreported, Federal Court of Australia, 2 August 1996, Finn J); *Re Davill v Australian Postal Corporation* (1995) AATA 10629; *Re Nicklason v Comcare* (1999) AATA 736; *Re Wierzbicki v Comcare* (1999) AATA 123.
[163] *Hart v Comcare* [2005] FCAFC 16 per Branson, Conti and Allsop JJ.
[164] *Re Razkallah v Australian Postal Corporation* (1991) 24 ALD 83; *Re Scalzo v Australian Postal Corporation* (1991) 24 ALD 83; *Comcare v Chenhall* (1992) 37 FCR 75; *Rodriguez v Telstra Corporation Ltd* [1999] FCA 1400. Contrast *Re Harper and Commonwealth v Comcare* (1989) 17 ALD 569; *Re To Nga Quach v Australian Postal Corporation* (1991) 22 ALD 792.
[165] *Comcare v Chenhall* (1992) 37 FCR 75; *Rodriguez v Telstra Corporation Ltd* [1999] FCA 1400; compare *Re Razkallah v Australian Postal Corporation* (1991) 24 ALD 83; *Re Scalzo v Australian Postal Corporation* (1991) 24 ALD 83.

order and control.[166] Based on this approach, it is likely that only those activities which are provided for in the employer's disciplinary procedures, such as formal evaluations, counselling,[167] reprimands,[168] or dismissal, will attract the protection of this exclusion.

In comparison, general criticism of an employee's work,[169] performance management activities, [170] investigations into or interviewing the employee about possible misconduct,[171] and activities that are not in accordance with the employer's policies and procedures, will not be excluded. There also remains an overarching requirement that the action taken in accordance with an employer's policies or procedures be reasonable. For these reasons, the act of dismissing an employee even for disciplinary reasons will, in many cases, not attract the exclusion relating to reasonable disciplinary action.[172] Dismissal for other reasons, such as poor performance, will also not attract this exclusion.

Even where the act of dismissal in a particular case constitutes a failure to obtain a benefit or reasonable disciplinary action, it may be possible, as a matter of construction of the exclusions in s 4 of the SR&C Act, to separate the act of dismissal (failure to obtain a benefit or reasonable disciplinary action), from other events surrounding the dismissal.[173] For example, if it could be demonstrated that, as a matter of fact, the mental injury suffered was contributed to or aggravated by events surrounding the dismissal, rather than from the dismissal itself, then the resulting injury would arguably not be suffered as a result of the reasonable disciplinary action or failure to obtain a benefit per se, and would therefore be compensable. Conversely, if it could be demonstrated that the employee would not have suffered the injury as a result of the surrounding conduct had he or she not actually been dismissed then the relevant exclusion(s) would preclude compensation.

Accordingly, where it can be demonstrated that, in the performance of his or her duties, an employee was exposed to an incident which materially contributed to a mental ailment (or aggravation of a mental ailment) and that the ailment was *not* as a result of reasonable disciplinary action or a failure by the employee to obtain a promotion transfer or benefit in connection with his or her employment,[174] then the mental ailment (psychological harm) is likely to be compensable.[175]

Given the above, there is every likelihood that an employee who suffers psychological injury at work as a result of the unreasonable manner in which they were dismissed, will be able to seek compensation under the relevant State or Commonwealth workers' compensation scheme, without any need for an implied duty of trust and

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[166] *Comcare v Chenhall* (1992) 37 FCR 75; *Rodriguez v Telstra Corporation Ltd* [1999] FCA 1400.
[167] *Re Scalzo v Australian Postal Corporation* (1991) 24 ALD 83.
[168] *Re Razkallah v Australian Postal Corporation* (1991) 24 ALD 83.
[169] *Rodriguez v Telstra Corporation Ltd* [1999] FCA 1400.
[170] *Re To Nga Quach v Australian Postal Corporation* (1991) 22 ALD 792.
[171] *Comcare v Chenhall* (1992) 37 FCR 75.
[172] See, e.g., *Re Pandos v Commonwealth* (1991) 22 ALD 784.
[173] See consideration by the Full Federal Court of the failure to obtain a promotion in *Hart v Comcare* [2005] FCAFC 16 at [26].
[174] See the definition of "injury" in s 4 SR&C Act.
[175] Note: other restrictions apply where an injury is intentionally self inflicted or is caused by serious and wilful misconduct on the part of an employee: see s 14(2) and (3) of the SR&C Act.

confidence. Whilst the amount of compensation available under these schemes will be limited, this is likely to reflect a decision by the relevant Parliament to balance the rights of employees seeking compensation with other economic interests.

Other Legislation

State and Commonwealth Occupational Health and Safety regimes place additional obligations on employers to take all reasonably practicable steps to protect the health and safety at work of their employees.[176] An employer who breaches these obligations may be subject to civil action or a criminal prosecution.[177]

Similarly, other legislation such as State and Commonwealth anti-discrimination laws may provide an employee with further remedies where their mistreatment is related to certain prescribed characteristics such as age, sex, or race.[178]

Unlike the implied duty of trust and confidence, these schemes are intended to run concurrently with Commonwealth and State unfair dismissal legislation, and will not undermine the unfair dismissal provisions of the WR Act and the policy decisions implicitly embodied therein. Moreover, these schemes do not exclude claims for breach of contract or tort. For example, a breach by an employer of a statutory duty imposing a standard of care may also give rise to liability for negligence at common law (discussed above). Of course, double recovery is not permitted under any of the statutory schemes.

Commonwealth and State Unfair Dismissal and Unlawful Termination Laws

Whilst access to the various statutory regimes for unfair dismissal and unlawful termination is limited, as is the amount of compensation available under these schemes, certain classes of employees may nevertheless be able to rely on these schemes to obtain some compensation in the event that they are dismissed in a manner which causes psychiatric injury (provided of course the dismissal is also either unfair or unlawful). Such compensation, if awarded, is paid in lieu of reinstatement and is not, strictly speaking, compensation for psychological harm suffered as a result of the manner of the employee's dismissal.[179]

1. Unfair Dismissal Laws

State or Commonwealth unfair dismissal laws[180] will apply, in relation to specified classes of employees (as outlined below), in circumstances where the dismissal in question was "harsh, unjust or unreasonable".[181]

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[176] See, e.g., Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) s 16.
[177] See, e.g., Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) Schedule 2.
[178] See, e.g., Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Age Discrimination Act 2004 (Cth); Equal Opportunity Act 1995 (Vic); Anti-Discrimination Act 1977 (NSW).
[179] WR Act s 170CH(6); s170CR(1)(c).
[180] See, e.g., WR Act s170CE(1)(a) (also applies in Victoria, NT and ACT); Industrial Relations Act 1996 (NSW) Part 6.
[181] WR Act s 170CE(1)(a). Whilst the precise terms of the legislation in each State and the Commonwealth may differ, similar principles apply in each jurisdiction. As to what the phrase "harsh,

Prior to the Work Choices amendments to the WR Act in late 2005, State industrial relations legislation applied to most State public sector employees, employees whose conditions of employment were set by a State industrial instrument, and other employees whose annual remuneration was less than a prescribed level (as below). The Commonwealth legislation applied to Commonwealth public sector employees, Territory employees, Federal award employees who were employed by a constitutional (trading or financial) corporation, and Federal award employees who were waterside workers, maritime employees and flight crew officers employed in the course of, or in relation to, interstate or international trade or commerce. The Commonwealth provisions also applied (and continue to apply) to employees in Victoria.[182]

The Commonwealth Government's recent Work Choices legislation[183] purports to use the corporations power in the Australian Constitution to extend the Commonwealth scheme to all employees of constitutional corporations, the Commonwealth, Commonwealth authorities, and corporations that are incorporated in a Territory.[184] The amendments seek to exclude the operation of most State industrial and employment laws.[185] The government has said that these reforms will bring between 85 to 90 per cent of employees within the Commonwealth workplace relations system.[186] These reforms are currently the subject of legal challenge on constitutional grounds, with the proceedings listed to be heard by the High Court of Australia in early May 2006.

Irrespective of the outcome of these proceedings, there are certain classes of employees that currently are, and will continue to be, excluded from accessing Commonwealth and most State unfair dismissal laws, including:[187]

- employees engaged under contracts of employment for a specified period of time;
- employees engaged under contracts of employment for a specified task;
- employees serving a period of probation;[188]
- employees engaged on a seasonal basis;
- employees who are not employed under awards or agreements and whose annual remuneration is more than an indexed amount;[189]
- casual employees engaged for a short period;[190]

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unjust or unreasonable" means, see WR Act s170CG(3) and 170CA(2); *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410.

[182] WR Act s 492.

[183] Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

[184] WR Act s 170CB(1). These categories are subject to exceptions (discussed below).

[185] WR Act s 7C.

[186] The Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, 'Where Do We Want Workplace Relations to be in 5 Years Time?', Speech to the Committee for Economic Development of Australia, 25 February 2005.

[187] See, e.g., WR Act s 170CBA; Industrial Relations Act 1996 (NSW) s 83; Industrial Relations (General) Regulations 2001 (NSW) reg 5-6.

[188] Usually no more than 3 months, or otherwise as is reasonable: e.g. s170CBA(1)(c) of the WR Act.

[189] WR Act s 170CBA(4).

[190] For details on what constitutes a casual employee for these purposes see, e.g., WR Act s 170CBA(3), (3A).

- trainees whose employment under a traineeship agreement is for a specified period or limited to the duration of the agreement; and
- employees who have not completed the qualifying period of employment with the employer.[191]

An employee who is excluded from the unfair dismissal provisions of the WR Act may still be eligible to apply for a remedy under a provision of a State law provided the State law is not an industrial or employment law of the kind specifically excluded under the WR Act.[192] State laws that are not excluded under the WR Act include State legislation that deals with, amongst other things, the prevention of discrimination, worker's compensation or occupational health and safety.[193]

As at 1 July 2005, the prescribed remuneration level (for access to unfair dismissal regimes) in most jurisdictions (including the Commonwealth) was $94,900[194] (the exceptions being Western Australia where the limit was $104,800[195] South Australia where the limit was $85,869[196] and Tasmania where there was no limit).[197]

As a result of the Work Choices reforms, further employees will be excluded from access to the Commonwealth unfair dismissal laws, including employees (other than trainees or apprentices) of businesses that employ 100 people or less,[198] employees whose employment has been terminated based on a genuine operational reason,[199] and employees who have been employed for no more than 6 months.[200] Whilst the Commonwealth reforms will notionally bring a much higher proportion of employees under the Commonwealth WR Act, many of these employees, up to 62% of all employees working in 99% of all businesses, will be exempt from accessing the unfair dismissal provisions of the Act (being employees working for businesses that employ less than 100 employees).[201]

Work Choices expressly precludes employees from obtaining compensation for shock, distress or humiliation or other analogous hurt caused to the employee by the manner of terminating the employee's employment.[202] However, as psychological injuries

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[191] Previously, usually for a period of 3 months, or another period if agreed in advance and reasonable. This has been increased to 6 months under the new Work Choices amendments: WR Act s 170CE(5A), (5B).
[192] WR Act note 2 to s170CBA(1), s 7C.
[193] WR Act s 7(C)(2) and (3).
[194] See, e.g., WR Act s 170CBA(5)(b), Workplace Relations Regulations 1996 (Cth) reg 30BB, reg 30BF; Industrial Relations Act 1996 (NSW) s 83(1)(b), Industrial Relations (General) Regulation 2001 (NSW) reg 5(1)(a).
[195] Industrial Relations Act 1979 (WA) s 29AA(3)(b), Industrial Relations (General) Regulations 1997 (WA) reg 5, reg 6.
[196] Industrial and Employee Relations Act 1994 (SA) s 105A.
[197] Industrial Relations Act 1984 (Tas).
[198] WR Act s 170CE(5E).
[199] WR Act s 170CE(5C).
[200] WR Act s 170CE(5A), (5B).
[201] This excludes persons employed by public trading and general government entities, and by businesses in the agriculture, fishing and forestry industries. Source: Australian Bureau of Statistics, *Year Book Australia 2003*, Industry Overview - Number of Businesses and Employment by Size of Business:
http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/3474CE916E52A361CA256CAE0010BBF6.
[202] WR Act s 170CH(7A), s170CR(1A).

may not be analogous to mere shock, distress or humiliation, it is arguable that these amendments may not prevent the ordering of compensation that includes a component for psychological harm caused to the employee by the manner in which the employee's employment was terminated. Compensation in the jurisdiction is, apart from this new rule, limited. Under the Commonwealth scheme, the maximum compensation that may be awarded in lieu of reinstatement, having regard to a number of factors including the efforts of the employee to mitigate his or her losses,[203] is limited to the total amount of remuneration received by the employee (or to which the employee was entitled) during the six months prior to the dismissal, or in the case of non-award employees, the lesser of this amount and (at present) $47,500.[204] Similar limits apply in all the State systems.

2. Unlawful Termination Laws

Unlike the State and Commonwealth unfair dismissal laws, the unlawful termination provisions of the WR Act[205] apply to all employees (excluding vocational placements and those engaged under a contract for services)[206] whose employment has been terminated for certain prohibited reasons including sex, race, colour, age or membership/non membership of a trade union (to name but a few).[207]

The exclusions relating to casual employees, probationary employees and employees that have not served a qualifying period etc, which apply to unfair dismissals, do not apply in relation to unlawful termination.[208] Instead, exemptions only apply where the termination is based on the "inherent requirements of the particular position", or on the basis of religious beliefs (in the case of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion).[209]

If the Federal Court is satisfied that an employer has contravened the unlawful termination provision, the court may award (in addition to reinstatement or penalties) compensation of such an amount as the court thinks appropriate, or make any other order that it considers necessary to remedy the effect of the termination and any other consequential orders.[210] However, the new rule introduced by Work Choices precluding compensation for shock, distress, humiliation or other analogous hurt applies in relation to unlawful termination, as does the limitation on compensation to six month's remuneration.[211]

Conclusion

If it can be established that an employee has suffered psychological injuries as a result of the manner in which they are dismissed and the manner of their dismissal amounts to a breach of an express or implied term of the employee's employment contract then

[203] WR Act s 170CH(7).
[204] WR Act s 170CH(6) to (9), Workplace Relations Regulations 1996 (Cth) reg 30BF – calculation as at 1 July 2005.
[205] WR Act s 170CK(2).
[206] WR Act s 170CB.
[207] WR Act s 170CK(2) for a complete list.
[208] Contra WR Act s 170CB(1), s 170CBA(1), s 170CE(5A) (Division C).
[209] WR Act s 170CK(3), (4).
[210] WR Act s 170CR(1).
[211] WR Act s 170CR(2), s 170CH(8),(9), (10).

the injuries sustained should be compensable by way of a claim for breach of contract. Concerns about potentially subjecting an employer to indeterminate liability based on the subjective mental reaction of the employee at the time of default,[212] and to liability in damages that may far exceed their degree of fault,[213] may be addressed by employers following their own procedures (or possibly not specifying them). Whilst affording some protection to injured workers, this approach would not open the floodgates to claims,[214] as plaintiffs would be required in each case to establish by expert evidence that the psychiatric consequences in question arose from the manner in which they were dismissed (and not from the dismissal itself).[215] This would pose a difficult obstacle in all but the most serious cases of unreasonable employer behaviour.

Where there is no reference in the employment contract to the manner of an employee's dismissal or discipline, the duty of trust and confidence ought not be implied to regulate the manner of an employee's dismissal unless to do so is necessary to give efficacy to the employment contract or to ensure that the parties receive the full benefit of the employment contract. As the act of dismissal necessarily brings an employment contract to an end there are few, if any, circumstances where such a term would be necessary. To imply the duty in any other circumstance would be to undermine the statutory unfair dismissal schemes established by Parliament.

There are various alternative statutory and common law remedies available to an employee who has suffered psychological injuries as a result of the manner in which they are dismissed, including in tort and contract, particularly where the employee has been subjected to mistreatment during the course of his or her employment leading up to the act of dismissal. The statutory remedies in particular are unlikely to undermine the statutory unfair dismissal schemes established to regulate the termination of employment. Accordingly, there is little need to misconstrue the duty of trust and confidence to apply to the manner in which an employee is dismissed.

These alternative statutory and common law remedies are likely to become increasingly important following the introduction of the Commonwealth's Work Choices amendments to the WR Act, which will result in many, if not most, employees being excluded from bringing claims for unfair dismissal.

[212] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 369-370 per Brennan J.
[213] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 818 [49] per Lord Hoffman.
[214] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 813 [27] per Lord Steyn.
[215] *Johnson v Unisys Ltd* [2001] 2 All ER 801 at 818 [48] per Lord Hoffman.