

### IMPLIED TERM TO ACT FAIRLY AND IN GOOD FAITH

Intico (Vic) Pty Ltd v Walmsley  
(2004) VSCA 90

Maddocks

At common law, an employer is under an implied duty to act fairly and in good faith (also called the duty of trust and confidence) towards its employees. Two recent decisions, one from the Supreme Court of Victoria, Court of Appeal, and the other from the United Kingdom, House of Lords, each examine whether this duty applies when dismissing an employee.

#### SUPREME COURT DECISION IN INTICO

The Victorian Court of Appeal has held that employers are under no obligation to accord employees procedural fairness when terminating their employment under contract at common law. This means that when terminating employees who do not have access to the unfair dismissal statutory regime, employers must provide them with the appropriate amount of notice under their contract, but do not have to provide reasons for their decision or give employees an opportunity to put their case.

The case involved the summary dismissal of the general manager of operations of a group of companies following three alleged incidents of sexual harassment. The general manager sought damages for breach of contract. The trial judge held that as the general manager was denied the opportunity to respond to the allegations made against him, he could not be summarily dismissed.

The employer successfully appealed to the Court of Appeal, which held that the trial judge's conclusion that the employer was obliged to accord natural justice to the general manager was contrary to law. Buchanan JA stated:

The rules of natural justice must be observed by those making judicial and administrative decisions which affect the

rights, interests, livelihood and reasonable expectations of others ... There is no like obligation which must be observed by an employer who dismisses an employee. The employer is exercising a contractual right in dismissing an employee for misconduct. The employer is not bound to act reasonably, or to give reasons or accord the employee an opportunity to be heard. The question whether the employer is contractually entitled to dismiss his employee depends on whether the facts emerging at trial demonstrate breach of contract; it does not depend on whether the employer has heard the employee in his own defence.

The Court of Appeal held that the duty of good faith does not qualify an employer's right to summarily dismiss an employee for misconduct.

When considering terminating an employee who has access to the unfair dismissal jurisdiction, procedural fairness and a valid reason are both essential. However, in the case of an employee who is excluded from being able to make an unfair dismissal claim (such as a non-award employee earning over the jurisdictional limit, currently \$90,400), employers need only provide employees with the appropriate amount of notice under their contract of employment. In the case of serious misconduct, immediate dismissal without making any further enquiry of the employee may be appropriate.

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