CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00402
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 5 FEBRUARY 2020; WRITTEN SUBMISSIONS 9 MARCH, 18 MARCH, & 3 APRIL 2020
DELIVERED	**:**	THURSDAY, 9 JULY 2020
FILE NO.	**:**	B 9 OF 2020
BETWEEN	**:**	DAVID WEHR Applicant AND QUBE PORTS PTY LTD Respondent

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Catchwords	**:**	Industrial Law (WA) - Employee stood down during safety investigation - Alleged breach by employer of implied terms of contract - Whether terms implied at common law based on law and fact - Principles applied - - No basis to imply terms contended - Application dismissed
Legislation	**:**	Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	**:**	Application dismissed

Representation:

Applicant	**:**	Mr L Edmonds as agent
Respondent	**:**	Ms J Flinn of counsel

Case(s) referred to in reasons:

Avenia v Railway & Transport Health Fund Ltd [2017] FCA 859; (2017) 272 IR 151

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 52 ALJR 20

Byrne & Frew v Australian Airlines Ltd (1995) 131 ALR 422

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor [2007] NSWSC 104

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

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

State of New South Wales v Shaw [2015] NSWCA 97; (2015) 248 IR 206

Walker v Citigroup Global Markets Pty Ltd (2005) 226 ALR 114

Wesoky v Village Cinemas International Pty Ltd [2001] FCA 32

White v Australian and New Zealand Theatres Ltd (1943) 67 CLR 266

Case(s) also cited:

Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647

Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337

Langston v Amalgamated Union of Engineering Workers [1974] 1 WLR 185

Mann v Capital Territory Health Commission (1981) 54 FLR 23

Marbe v George Edwardes (Daly's Theatre) Limited [1928] 1 KB 269

Montreal Public Service Co v Champagne (1917) 33 DLR 49

Turner v Sawdon & Co [1901] 2 KB 653

William Hill Organisation Ltd v Tucker [1999] ICR 291

Reasons for Decision

1 The applicant is an employee of the respondent employed in the position of a Guaranteed Wage employee under the *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016.* The respondent engages in stevedoring operations at various port locations around Australia. The location for present purposes is the Port of Dampier.

2 The applicant commenced his employment on 20 September 2017 as a Supplementary Employee under a written contract of employment of the same date. The applicant then commenced employment as a Guaranteed Wage employee on 21 May 2018 under a contract of employment dated 9 May 2018. The terms of the applicant's contract of employment provided that, under the Agreement, he would be offered work on a "totally irregular basis" (Monday to Sunday, day evening or night shift) according to the company's requirements which varied each day; the applicant had to make himself available under the Agreement; and his ongoing employment was conditional on work being available, his availability to work and meeting the Company's performance standards. In return, the applicant was paid a minimum guarantee of 28 hours of work per fortnight at the rate of $49.23. Additional remuneration payable to the applicant depended upon him being offered and accepting work beyond the minimum guarantee per fortnight.

3 On 1 April 2019, the applicant was stood down from work following a safety incident and was subject to a workplace investigation at the respondent's Dampier port operations. On 17 May 2019, the applicant returned to work and resumed allocation of work under his contract of employment. During the time of the stand-down, the applicant continued to receive his minimum guarantee payment under the Agreement.

4 The applicant maintains that it was an implied term of his contract of employment that the respondent would provide the applicant with the opportunity to work and earn remuneration and would not act in a manner to deprive him of the benefit of his contract of employment. The applicant contended that from him being stood down and/or the respondent refusing to allocate him work between 1 April and 17 May 2019, the respondent breached the implied terms of the applicant's contract of employment and is liable for any loss or damage suffered by him. The respondent objects to and opposes the applicant's claim and maintains that no such terms can be implied into the applicant’s contract of employment.

5 By the agreement of the parties, the Commission has been invited to determine as a preliminary issue, whether the terms asserted by the applicant constituted implied terms of employment.

Contentions of the parties

6 The applicant made several submissions. It was contended that three implications could be made into his contract of employment as a matter of common law. The first is that he contended it was an implied term of his contract that the respondent had to cooperate with him. This duty included further duties not to prevent him from performing his contract; to do all things necessary to facilitate the performance of his contract; to do all things necessary for him to have the benefit of his contract; and that the respondent would not do anything that may deprive the applicant of his contractual benefits.

7 The applicant maintained that the respondent had a general duty of good faith towards him, as did the applicant to the respondent. Finally, the applicant contended that it was an implied term of his contract that the respondent would provide him with the opportunity to work in order that he receive remuneration under his contract of employment and under that implied term, the respondent would not act in a way to deprive him of his contractual entitlements.

8 The first two implied terms were said by the applicant to be implied by law. The final implied term claimed was said to be implied as a matter of fact.

9 As to the duty to cooperate, the applicant relied upon the general duty to cooperate which applies in all contracts. The applicant submitted that the implied duty to cooperate has been held to apply under employment contracts: *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 per Merkel J at par 29; *Avenia v Railway & Transport Health Fund Ltd* [2017] FCA 859; (2017) 272 IR 151 per Lee J at pars 145-146. It was contended in reliance upon these cases, that the opportunity for the applicant to work and earn income was fundamental to the contract as was held by Lee J in *Avenia*. In standing the applicant down, it was submitted that the respondent breached the applicant's contract of employment.

10 As to the implied duty of good faith, the applicant submitted there has been some suggestion on the cases that courts are prepared to extend the good faith obligation that applies under commercial contracts, to employment contracts also. Reliance was placed on remarks of Rothman J in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor* [2007] NSWSC 104 at par 106. Reliance was also placed on a decision of the Federal Court in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 per Allsop J at pars 5-6 where the court held that in relation to a bonus clause of a contract of employment, the provisions of the contract should not be interpreted to enable the employer to withhold a bonus payment "capriciously or arbitrarily or unreasonably".

11 Finally, the applicant submitted that a term implied by fact, under the well-known principles discussed in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 may be found to apply. The term contended was to the effect that the applicant would be given the opportunity under his contract of employment to work to earn remuneration and the respondent would not behave in such a manner to deprive him of this benefit. Having regard to the terms of the applicant's contract of employment, and the provisions of the Agreement requiring him to live in Dampier; to make himself available to work for the respondent over others; to "repay" his minimum guarantee amount under the Agreement based on future earnings; where he would only accrue annual leave where work was allocated; and he would not receive compensation for remote living costs by payment of various allowances under the Agreement, all supported the implication of a term to satisfy the *BP Refinery* test. It was also contended that the situation was like those in *Wesoky*.

12 For the respondent it was contended that there was no substance to the assertions by the applicant that the implied terms could be held to exist on any basis. The respondent firstly noted the express terms of the applicant's contract of employment in particular at cl 7 to the effect that "You will be offered work on a totally irregular basis (Monday to Sunday, day evening or night shift) according to the Company requirements which vary each day". The respondent also referred to cl 9 of the contract in relation to the minimum fortnightly payment guarantee.

13 In relation to the implied duty to cooperate, the respondent submitted that such a duty can be implied into an employment contract on a mutual basis. However, this is subject to the terms of the contract and specifically, what is necessary to enable the other party to it to obtain the benefits of the contract. What is necessary to be done by each party to a contract will depend upon the circumstances of the case: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169 at par 30 per French CJ, Bell and Keane JJ; *Byrne & Frew v Australian Airlines Ltd* (1995) 131 ALR 422 at par 70.

14 The respondent distinguished the cases relied upon by the applicant, in particular *Wesoky* and *Avenia*, because those cases involved employees performing specialist tasks or having particular contract terms, in circumstances where continued performance of work was required to maintain status and skills and additionally, with *Avenia*, the opportunity to work and earn commission was held to be fundamental to the particular contract in issue. Here, the terms of the contract in particular at cl 7, clarify that there is no obligation on the employer to provide work to an employee and the express terms of cl 7 mean that the implication contended by the applicant would be contrary to it.

15 The respondent accepted that the implied duty of good faith will apply in relation to commercial contracts but is generally not one that will apply in an employment

setting: *Walker v Citigroup Global Markets Pty Ltd* (2005) 226 ALR 114 per Kenny J at pars 204-205.

16 Despite this line of authority, having regard to the principles governing implication of terms generally, it would need to be demonstrated on the respondent's submissions, that the duty of good faith would be necessary to imply into the applicant's contract of employment, in the sense that to not do so, would render the rights conferred by the contract "nugatory, worthless, or, perhaps, be seriously undermined": *Byrne* at 453. Applying this line of reasoning, the respondent contended that it could not be said that it was necessary to imply such a term as the standing down of the applicant did not deprive the applicant of the substance of the contract or render it nugatory or worthless. This is particularly so given the express terms conferring an entitlement to work only on an irregular basis and despite this, the payment of the minimum guarantee under the terms. Nor was loss suffered by the applicant because of the stand-down, according to the respondent.

17 Further, it was submitted by the respondent that notwithstanding these contentions, even if the good faith obligation was implied into the applicant's contract, the standing down of the applicant because of an investigation into a safety breach, establishes no basis for the conclusion there had been a breach of that implied term.

18 In relation to the implied obligation to provide an opportunity to work contended by the applicant, the respondent submitted that the implication of such an alleged term fails the test in *BP Refinery*. The respondent submitted that such a purported implication would contradict cl 7 of the contract in relation to work being offered on a "totally irregular basis". It was submitted that such a term would not be so obvious that it went without saying. In this respect, the respondent contended that the terms of the contract itself contemplate that the applicant may not be offered more work than the 28 hours compensated for under the guarantee payment structure and there would be a remuneration adjustment under the terms of the employment and the Agreement.

19 Finally, were the assertions of the applicant that the term would be implied because of the location of work at Dampier, that he had to prioritise work for the respondent, and had to repay his minimum guarantee during the stand-down period. The respondent referred to and relied upon various provisions of the Agreement, as being inconsistent with the applicant's submissions. This also applied to the contentions regarding accrual of annual leave and payment of the northwest allowance or northwest expense reimbursement allowance.

Consideration

20 The applicant faces several difficulties in establishing the existence of the claimed implied terms. Before dealing with the individual claims made, I will make some general observations.

21 In *Barker*, the High Court considered the ways a term may be implied into contracts. When commenting on terms implied by common law it was said that they "may be displaced by the express terms or by statute": par 21. Further, the Court also observed that terms implied by law may result from repeated implications in fact and that the term the subject of consideration in *Barker*, the trust and confidence term, "still needed to be 'necessary' ": par 28. "Necessity", in this sense, was expressed by McHugh and Gummow JJ in *Byrne* as being where "the enjoyment of rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps, seriously undermined", or the contract would be "deprived of its substance, seriously undermined or drastically devalued" (cited in *Barker* at par 29). The Court in *Barker* further concluded at par 29, that such terms can also be characterised as rules applicable to the construction of contracts (citing *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 per Mason J).

22 Thus, the focus must be on the contract terms in each case. Here, the most relevant terms are cls 7, 8 and 9. The terms of cl 7 have been set out above. By cl 8, the applicant had to make himself available "in accordance with the Agreement". The Agreement was not incorporated into the contract but governed the applicant's employment. As I have mentioned, the applicant was to receive a "fortnightly guaranteed payment" in cl 9 of the contract. Whilst both parties made reference to the terms of the Agreement to either support or oppose the implication arguments, it is not at all clear the extent to which this may legitimately be done in a case where implication of terms into a contract of employment is contended, as a matter of common law. As was held in *Byrne*, award or industrial agreement terms are not taken to be generally incorporated into a contract of employment, unless by the express intention of the parties, or in the more limited case of implication through custom and usage, not relevant in this matter. Whilst awards and agreements assume the existence of a contract of employment, and operate upon them, they are statutory instruments and the rights and obligations under them are the subject of statutory enforcement regimes, and not damages at common law. As the matter has not been raised in argument, however, I will assume without the need to decide the matter on this occasion, that some regard to the provisions of the Agreement is permissible.

23 It is tolerably clear from the terms, that the contract was not of a kind where the applicant was to be afforded the opportunity to work, as in the case of an actor or

an entertainer, separate to the obligation on the employer to pay wages and entitlements, as for example, in *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266. This distinction, which is important, was discussed by the Full Court of the Federal Court in *Ramsey Butchering Services Pty Ltd v Blackadder* [2003] FCFCA 20; (2003) 127 FCR 381, where Tamberlin and Goldberg JJ observed at pars 65-70:

> 65 At common law there is no obligation upon an employer under a contract of employment to provide work to an employee unless the contract specifically requires that such work be provided, or unless it is necessary for the employee to continue to be employed in order to maintain a particular profile, such as an actor, or unless the nature of the work for which the employee is employed is such that the employee's career and future prospects depend upon the employee working in a particular way, or unless the level of the employee's remuneration depends upon the extent of the work the employee is able to undertake. There is nothing in the legislation, nor in the accompanying Explanatory Memorandum or Second Reading Speech, which suggests that s 170CH(3)(a) is intended to furnish employees with a right to work which, prior to instituting a proceeding in respect of an unlawful termination of employment, they would not have.
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> 66 The common law position was explained in *Turner v Sawdon* [1901] 2 KB 653. AL Smith MR said at 657:
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> > "It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term. To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become au fait at his work."
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> 67 In *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 Asquith J said at 650:
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> > "It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity."
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> 68 The distinction between the two classes of employment contract, those which impose a duty to provide work and those that do not, was explained by Lawrence LJ in *Marbe v George Edwardes (Daly's Theatre) Limited* [1928] 1 KB 269 at 288 in the following terms:
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> > "Contracts of employment fall under two categories; first those in which the only obligation imposed upon the employer is the payment of the agreed remuneration, and no duty is cast upon the employer to give active occupation - this no doubt is the more usual form of contract; and secondly those in which the employer engages

> not only to pay the agreed remuneration but also to afford to the employee an opportunity of doing the work for which he is engaged. Whether a given contract falls within the first or second category depends primarily on the express words of the contract, but may also depend upon the character of the employment, and possibly upon the amount and nature of the remuneration."

69 An example of a contract of employment in which there was an express obligation imposed on the employer to provide the employee with work is found in *Montreal Public Service Co v Champagne* (1917) 33 DLR 49. There the employee was given the power under the contract to engage and dismiss all employees of the company and it provided that all the administration of the company's business was, subject to the direction and control of the directors, to be under the control of the employee.

70 There have been a number of cases in which courts have found that employers have an obligation to provide an employee with work where the employee has particular skills or talents which the employee needs to keep in regular activity, or where the employee occupies a particular unique position, or where an aspect of the employee's remuneration depends upon work being performed: ***White v Australian and New Zealand Theatres Ltd*** (1943) 67 CLR 266 at 273-274; *Langston v Amalgamated Union of Engineering Workers* [1974] 1 WLR 185 at 192; ***Curro v Beyond Productions Pty Ltd*** (1993) 30 NSWLR 337 at 342-343; *William Hill Organisation Ltd v Tucker* [1999] ICR 291. Such an approach was taken in *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 in which Merkel J found that a significant aspect of the promised remuneration depended on the employer providing the opportunity, or not depriving the employee of the opportunity, to earn it and that the employee had undertaken a specific and unique overseas posting. For a different approach in which the court refused to find an obligation to provide a specialist surgeon with work, see *Mann v Capital Territory Health Commission* (1981) 54 FLR 23 at 29-30.

24 Whilst the applicant submitted in reply that the terms of cl 7 of the contract should not be construed as enabling the employer to not offer work totally at its discretion, this is with respect, a distinction without a difference regarding the implied term asserted. This is because, to establish a breach of the duty to cooperate, the applicant must establish that the contract afforded him a benefit, such that the respondent was obliged to provide him with work, from the nature of the employment or some particular feature of it.

25 For example in the cases relied on by the applicant, such as *Wesoky*, cited by the Full Court in *Blackadder* above, a significant factor was the employee's remuneration package, which contained an entitlement to an equity interest, that could only be earned by the employee taking up a specific position overseas. There is no such situation here. In the other case cited, *Avenia*, the court found that the contract contained a commission payment clause, the operation of which depended on the employee in question being given work on an ongoing basis.

26 These cases differ on their facts to the present matter. Here, there is nothing in the applicant's contract to suggest that the employer would be under any

contractual duty to do other than pay the employee under the contract and the Agreement. Whilst it is unnecessary to do so for the purposes of this conclusion, the language used in cl 7 also tends against any such implied term. However, this is not decisive as even with a full time salaried employee under the Agreement, unless an employee's contract of employment contained a term supporting the necessity for the opportunity to work, in addition to the obligation on the employer to pay wages and entitlements, the same result would follow.

27 The difficulty facing the applicant in relation to the alleged breach of an implied duty of good faith by the respondent temporarily standing him down is more fundamental. It is the case that as submitted by the applicant, the High Court in *Barker* left open whether there may be a general implied obligation to act in good faith under contracts: *Barker* at par 42. There has not been further consideration of this issue by the High Court since then. Even as to commercial contracts, where there seems to be a greater willingness to imply such a term, resulting from decisions of superior courts, the issue has not yet been finally resolved by the High Court.

28 Given the approach of the High Court in *Barker* to the rejection of the implied term of trust and confidence, it would seem that for a term of good faith to be implied in law in an employment contract, it would still need to pass the test of "necessity": *Barker* at pars 28-29. In *Walker*, Kenney J expressed the view that no such term may be implied into contracts of employment at common law: at pars 204-205. More recently, the New South Wales Court of Appeal in *State of New South Wales v Shaw* [2015] NSWCA 97; (2015) 248 IR 206, did not accept the implication of an implied term of good faith by law, as a matter of necessity, in the case before it: per Ward JA at pars 128-136 (Beazley P and Gleeson JA agreeing).

29 It is not at all clear how such an obligation would be necessary to imply in this case. There is nothing evident in the terms of the applicant's contract that would be rendered "nugatory or worthless" without such a term. As pointed out by the respondent, on its construction of the clause, which approach to cl 7 I agree with, the respondent did not have to provide regular work to the applicant and he was not rostered under the Agreement, reflecting his position as a "GWE" employee. The applicant was able under the Agreement, to work for another employer, when not required by the respondent. The applicant was paid under his contract and the Agreement over the period of his stand-down. Therefore, it is difficult to see the basis upon which such a term would be implied. Even if an implied obligation of good faith did apply to the applicant's contract, it is not evident how a stand-down (on pay) whilst the employer investigated a workplace safety incident, would breach such a term.

30 One of the cases relied on by the applicant under this head of claim, *Silverbrook Research*, involved a specific situation where a remuneration arrangement involving the payment of a bonus under a contract of employment, was considered. In its decision, the court (Allsop P) did not rely on any general notion of good faith as an implied term, rather confined the issue to whether the non-payment of a bonus under the contract, where it was apparently discretionary, but where the applicant met the criteria for its payment, would be "arbitrary, capricious or unreasonable": at pars 5-6. The focus of the court's judgment was on the employer's refusal to pay the bonus in these circumstances as being "a denial of the very clause that had been agreed": par 6. Several similar cases dealing with discretionary pay schemes have adopted the same approach (See generally C Sappideen, P O'Grady and J Riley *Macken's Law of Employment* Eighth Edition par [5.230]). Not only are these cases distinguishable on their facts to the present case before the Commission, but also in my view, they do not stand for the proposition of the existence of a general duty of good faith being a feature of employment contracts as a matter of law.

31 The asserted implied term in fact is based on the *BP Refinery* test. The criteria are well known and include that the proposed term "(1) must be reasonable and equitable; (2) must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) must be so obvious that "it goes without saying"; (4) must be capable of clear expression; (5) must not contradict any express term of the contract": *BP Refinery* at p 376.

32 The term sought to be implied by the applicant is as follows:

> The Respondent would provide the Applicant with the opportunity to work in order to obtain remuneration and the Respondent would not act in (sic) manner to deprive the Applicant of the benefit of his contract of employment.

33 The applicant's position as a "GWE" classification under the applicant's contract, read with the Agreement, means he is not placed on the respondent's roster for the allocation of work. Thus, in this position, the applicant could not, under his contract with the respondent, expect to be allocated work on a regular basis. The fact that cl 7 of the contract refers to the applicant as a GWE employee being offered work on a "*totally* irregular basis", subject to the respondent's business needs (my emphasis), combined with the applicant's ability to work elsewhere, when not working for the respondent, conflicts with the term sought to be implied. The right to offer work rests with the employer, in accordance with its business needs. The ongoing employment of the applicant by the respondent, as set out in cl 8 of the contract, "is conditional on work being available..." The implied term would place an inconsistent gloss on the terms of cl 7 and arguably cl 8 too.

34 In my view, the term sought to be implied is contrary to the express terms. It is also difficult to see how such a term, given the engagement of a GWE employee, would be necessary to give business efficacy to the contract. It is not evident how the contract may not operate effectively without such a term. Where work is allocated to the applicant, he will receive the benefits set out in the contract and the Agreement. The benefits set out in the Agreement, include those specifically for GWE employees. The entitlements under the Agreement flow with a GWE employee being allocated work under its terms. Nor, for the same reasons, is it apparent how such a term would be so obvious as to go without saying.

35 The provisions of the Agreement relied on by the applicant to support the implication of the term in fact, as I have just mentioned, all operate on the footing of the limitations and the particular circumstances of GWE employment under the applicant's contract. They are all governed by the essentially sporadic nature of GWE employment and will only confer a benefit on the applicant where the applicant is allocated work by the respondent, under cl 7 of the contract.

Conclusions

36 The Commission is not persuaded that the applicant has established the existence of the implied terms as contended. The application must be dismissed.