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Almost a century ago, the House of Lords in *Addis v. Gramophone Co Ltd*<sup>1</sup> confirmed the proposition that a wrongfully dismissed employee cannot obtain damages for injured feelings or distress suffered as a result of a wrongful dismissal. In that time ‘ there has been a fundamental change in legal culture’<sup>2</sup> and in the nature of employment. Employment is no longer premised on the notion of ‘ master and servant’ but on an ongoing interpersonal relationship. The employment market is less secure and ‘ the pace of work has intensified’<sup>3</sup> to such an extent that ‘ the incidence of psychiatric injury due to excessive stress has increased’<sup>4</sup>.

Statutory regimes have been introduced, providing for specialist tribunals to hear disputes regarding employment relationships. These statutory regimes have emerged from a recognition of the changes in the nature of the employment environment and have sought to grant remedies that reflect current industrial and commercial reality<sup>5</sup>. Constrained by the historical evolution of the law of employment, in Australia, the common law has struggled to maintain its currency with regard to the damages available to an employee wrongfully dismissed, despite moves in other jurisdictions to cast away the shackles of *Addis*.

### *Addis v. Gramophone*

Mr Addis was employed as Gramophone Co Ltd’s manager in Calcutta. As stipulated in his contract of employment, Gramophone Co terminated his employment with six months notice, appointing another manager and preventing him from carrying out his duties as manager. Treating the contract as at an end, Mr Addis went back to London and commenced

proceedings for wrongful dismissal. At trial, Mr Addis was awarded damages which exceeded the amount of his salary for the period of notice to which he was entitled. 6 The case went on appeal before the House of Lords. Whilst there has been much debate as to the true facts and ration of Addis, 7 Addis is generally regarded to stand for the proposition that ‘ damages for wrongful dismissal are not awarded to compensate an employee for any loss arising from the manner of the wrongful dismissal’8. Compensation, Lord Loeburn LC stated, ‘ cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment’. 9

The effect of this decision by the House of Lords was that an employee could not claim compensation over and above the wages the employee had foregone within the relevant notice period<sup>10</sup>. The decision has been widely criticised as ‘ being in conflict with general principles of contract law’<sup>11</sup>, with the ratio of the case being confused and applied too broadly<sup>12</sup> .

Some have argued that Addis can be criticised for treating the employment contract the same as any other commercial contract without considering the ‘ interpersonal relationship that employment contracts establish’<sup>13</sup>. Others have argued that the House of Lords differentiated between employment and commercial contracts, ‘ importing incidents which the law has imposed on the master – servant relationship into the contract of employment’<sup>14</sup>.

Despite this criticism, the courts, in England and Australia, have been loath to tackle the inadequacies of Addis head on. Alternative methods have been

used by the courts to circumvent Addis to the point that it remains, in Australia, good law.

#### Burazin v. Blacktown City Guardian 15

In Burazin, the Full Court of the Industrial Relations Court was given the opportunity to consider the continuing application of the rule in Addis to Australian law. Ms Burazin was forcibly removed from the premises of her employment by two police officers, who had been called by the employer, after having her hours of work reduced. Ms Burazin argued that ‘ both in calling the police [and]... suffering them actually to remove a perfectly respectable employee, were unnecessary, humiliating and hurtful’. She claimed ‘ that the compensation payable..... for [wrongful dismissal] ought to include compensation for distress, humiliation and disappointment’<sup>16</sup>.

The Full Court approached the affirmation of Addis by upholding the principles and history of the award of damages by drawing on the principles of Hadley v. Baxendale<sup>17</sup> stated in Butler v. Fairclough<sup>18</sup> which stated per Griffith CJ<sup>19</sup>:

The measure of action for breach of contract is well settled. It is such loss as may fairly and reasonable be considered as arising according to the usual course of things or may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract as the probable result of the breach.’

They went on to state that on the basis of subsequent cases<sup>20</sup>, distress or disappointment of mind was not something ‘ arising according to the usual

course of things' from a breach of contract or damage that may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract<sup>21</sup>. This reflected the approach of the High Court, in affirming *Addis* (with some exceptions) in *Baltic Shipping Co v. Dillon*<sup>22</sup> when considering a similar issue in relation to contracts the purpose of which was 'enjoyment, relaxation or freedom from molestation'<sup>23</sup>.

In deciding on this issue the Full Court stated:

'As it seems to us, the High Court rejected the opportunity in *Baltic Shipping* to throw over the constraints imposed by *Hamlin and Hadley v. Baxendale* and their successors. It approved the awarding of damages for distress only in a limited range of cases. Although there was some difference in the precise formulations put forward by their Honours, none was broad enough to cover distress resulting from a wrongful dismissal. If such damages are to be awarded, it must be after rejection, at High Court level, of the *Addis* conclusion that employment contracts are to be treated like other commercial contracts for the purposes of the rules in *Hadley v. Baxendale*.'<sup>24</sup>

However, on *Addis*, the court did say this:

'If *Addis* is open to criticism, in our view it must be on the ground that the House failed to consider, whether, in the case of breach of contract of employment by a wrongful dismissal, distress was a loss that might fairly be considered as arising according to the usual course of things, or at least might reasonably be supposed to have been in the parties' contemplation when they made the contract. The House of Lords treated contracts of  
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employment as being the same as other commercial contracts, without reference to the interpersonal relationship that employment contracts establish or the fact that a breach of an employment contract, especially by an employer, may have a substantial effect in the other party's emotional well being and self esteem.'<sup>25</sup>

This remark by the Full Court could indicate that the application of Addis does not meet the needs of employees in the modern employment arena. Does it suggest that in light of the changed nature of the employment contract, with its underlying 'interpersonal relationship', and the increased reliance, by individuals, on employment for life fulfilment, that distress would, in some circumstances, now be likely to flow, according to the usual course of things, from the manner in which an employment contract is breached?

Implied term of mutual trust and confidence – a way around Addis?

In *Burazin* the Full Court also had to consider the issue of whether, in employment contracts, an implied term of mutual trust and confidence, if breached, operates to provide damages to an employee wrongfully dismissed. This implied term is an obligation that would appear to require an employer to treat its employees with fairness and respect. <sup>26</sup> The Full Court, in confirming the existence of this implied term in employment contracts in Australia, stated that a breach of the implied term does not give rise to liability in damages<sup>27</sup>.

The Full Court believed that the term 'is intended to bolster an ongoing relationship' and as such '[t]o permit an action for damages during the  
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currency of the employment relationship, it might be argued, would be antithetical to the reason for implying the term; the action itself would presumably cause a further deterioration in the relationship'.<sup>28</sup> Rather than providing an avenue for damages the Full Court preferred the use of the implied term for 'enabling the employee to improve his or her legal position by placing responsibility for the termination on the employer'<sup>29</sup>. In other words the implied term will enable the employee to repudiate the contract as a result of a breach by the employer but the rule in *Addis* prevented the award of damages for that breach<sup>30</sup>.

The decision of the Full Court of the Industrial Relations Court is in stark distinction to the House of Lords decision in *Malik v. Bank of Credit and Commerce International SA (in liq)*<sup>31</sup>. The House of Lords found that the breach of an implied obligation of mutual trust and confidence does give way to an award of damages for that breach. Like *Burazin*, *Malik* affirmed the existence of the implied term in all contracts of employment. However, unlike *Burazin*, the *Malik* decision reflects the 'development of employment law in this century'<sup>32</sup>. The House of Lords did not feel that *Addis* stood in the way of the claim before it as the claim relied on a breach of an implied duty of the contract not on a breach of the contract as a result of the wrongful dismissal. Lord Steyn indicated that as *Addis* was concerned with wrongful dismissal, the ratio of *Addis* could be restricted. In recognition of this distinction Lord Nicholls stated:

'*Addis v. Gramophone Co Ltd* was decided in the days before [the] implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in <https://assignbuster.com/bringing-the-common-law-into-line-with-the-position-under-the-workplace-relations-act-1996-essay-sample/>

accordance with ordinary contractual principles. This is as much true as if the breach occurs before or in connection with dismissal as at any other time.’<sup>33</sup>

Whilst the Full Court, in *Burazin* did acknowledge this distinction between a breach of contract arising out of wrongful dismissal and a breach of an implied term of the employment contract, it did not however recognise that damages should be awarded for the latter in line with contractual principles.

The approach of the House of Lords did not assuage the restrictions of *Addis* outright, it merely side stepped them. Lord Nicholls recognised that whilst it had been argued that allowing compensation in cases like this may ‘open the floodgates’ the circumstances leading to the proof of a breach of an implied term like the one in this case may be, in practice, difficult to prove. In addition the application of causation, remoteness and mitigation would potentially be principles which limit the availability of employees’ claims<sup>34</sup>. Hence, *Burazin* and *Malik*, have application to a limited range of circumstances where a term can be implied and causation proven. As can be seen below, these decisions allowed the courts to circumvent the principles they laid down and continue to apply the rule in *Addis*.

If the statutory regime provides for it, why should the common law?

Despite these advances in the award of damages surrounding the breach of the employment contract, the courts have avoided tackling the principles laid down in *Addis* adequately by circumventing them with additional contractual rights. Presented with another opportunity to revise *Addis*, the House of Lords in *Johnson v. Unisys Ltd*<sup>35</sup>, unanimously held that an

employee cannot claim damages for financial loss caused by the manner of  
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the employee's dismissal<sup>36</sup>. The House of Lords, in making its finding, did not rely on *Addis* or *Malik* but decided (in the majority) that 'a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right to be unfairly dismissed'<sup>37</sup>. The House dismissed *Malik* on the basis that it was not a wrongful dismissal case<sup>38</sup>. In dismissing the appeal, Lord Nicholls stated that (to which the majority agreed):

'A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matter such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not ordinary courts of law'.

Given the House of Lord's opportunity to revise *Addis*, the decision is a disappointing one. The speeches of the Lords' contain examples of the recognition that the employment relationship has changed. Lord Steyn stated that '[I]t is no longer right to equate a contract of employment with commercial contracts' and that '[o]ne possible way of describing a contract of employment in modern terms is a relational contract'. Recognition was also given by his Lordship of the notion that '[w]hat could in the early part of last century dismissively be treated as mere 'injured feelings' is now sometimes accepted as a recognisable psychiatric illness'. His Lordship even indicated that he would be willing to depart from the ratio of *Addis*, were it

not for the statutory regime<sup>39</sup>. The same belief can be evinced from the speeches of Lords Hoffman<sup>40</sup> and Millett<sup>41</sup>.

The decision of the House of Lords in *Johnson* has been applied in two cases in Australia: *Aldersea and Ors v. Public Transport Corporation*<sup>42</sup> and *State of New South Wales v. Paige*<sup>43</sup>. Further, *Aldersea* has been applied in *Reynolds v Southcorp Wines Pty Ltd*<sup>44</sup>.

In *Aldersea*, Ashley J considered whether damages could be sought as a result of a breach of an implied term in the contract of employment. The alleged term implied into the agreement was different to the usual mutual obligation of trust and confidence. It was phrased: 'that in the event an employment agreement was terminated the defendant would act in good faith and fairly in connection with its termination'<sup>45</sup>. His Honour cited *Burazin* and agreed with the Full Courts reliance on the High Court in *Baltic Shipping*. His Honour also cited *Johnson* and stated that :

'The fact that in Australia, unlike in England, the legislation regime has been construed to permit an award of compensation for distress provides a further reason why, more so than in England, the legislative regime might be considered to lead to a conclusion that a term such as [the one pleaded] should not be implied'<sup>46</sup>.

Ashley J, in refusing damages for injury arising out of termination indicated that such a right to damages would 'depend upon judicial acceptance of the proposition that employment contracts are - in some respects- unlike commercial contracts generally..... and that a critical point of distinction is

that in the case of employment contracts ...damage by way of personal  
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injury or distress resulting from wrongful termination should not be considered too remote<sup>47</sup>. His Honour conceded that there had been judicial pronouncements that have indicated this proposition but that ‘ no case appears to have squarely confronted that issue and to have so concluded<sup>48</sup>.

Ashley J also suggested that for damages to be awarded in this area , ‘ consideration of the impact of Australian industrial legislation, just as Johnson considered such legislation in the English context<sup>49</sup>.

In Paige the Chief Justice of the NSW Court of Appeal, after reviewing the Federal and NSW Industrial relations legislation in light of the considerations undertaken in Johnson, concluded:

‘ The area of unfair dismissals is heavily regulated in both the State and Commonwealth contexts. It represents a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand. The arguments and factors accepted in Johnson v Unisys are directly applicable to the legislation examined above and the same conclusion, namely a refusal to expand the duty of care in negligence to provide an alternative cause of action for unfair dismissals, should be the result.’<sup>50</sup>

The decisions in Aldersea and Paige present additional barriers to courts updating the rule in Addis by providing another means by which to refuse damages for the manner in which an employee is dismissed. Of concern, is the application of the principles in Johnson to the Australian industrial

legislative framework<sup>51</sup>. The criticism of the decision in Paige stems from <https://assignbuster.com/bringing-the-common-law-into-line-with-the-position-under-the-workplace-relations-act-1996-essay-sample/>

some fundamental differences between the perceived legislative policy underpinning the English Employment Rights Act 1996 (UK) (ERA) and that of the Workplace Relations Act 1996 (Cth)(WRA).

In his article titled ‘ Damages Arising from the Manner of an Employee’s Dismissal<sup>52</sup>, Mark Irving suggests there are a number of reasons why Johnson should be cautiously applied in Australia. He suggests that the ‘ statutory context operating in Australia is different to that examined in Johnson’s<sup>53</sup> and that ‘ the WR Act, unlike the ER Act (UK), does not evince a statutory intention to preclude the recovery of damages fro breach of the implied term of trust and confidence where the breach is caused by the manner of the employee’s dismissal’.

According to Irving, section 170HA of the WRA provides that ‘ the unfair dismissal provisions are not intended to limit any rights that a person...may have to...secure the making of awards or orders relating to the termination of employment’. He believes that the common law and statutory systems were designed to coexist alongside each other with the employee having the right to choose which path to take.

Irving also indicates that unlike the ERA, the WRA, has a relatively low cap on compensation and that it would be unlikely, in light of that cap, that the legislation in Australia intended to limit the recovery of damages in the common law<sup>54</sup>.

The application of Johnson in Australia is problematic from technical and theoretical perspectives. It does nothing to further the recognition by the common law of the change that has taken place over the last hundred years  
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in employee relations or incite judicial exploration on the real nature of employment contracts. Whilst the employment contract has been treated differently to commercial contracts throughout legal history, that treatment has been restrictive and at odds with legal principle. Johnson demonstrates another example of the different treatment of employment contracts by restricting the right for an employee to claim damages in common law because of the existence of statutory rights for that compensation.

The rule in *Addis* and the changing nature of employee relations

The notion of the employment relationship being one of 'master-servant' does not reflect the cultural or industrial aspects of employment in Australia. Employees are no longer the only party to an employment contract that must be faithful, loyal and fair. The relationship is no longer based on property and status and, unlike 100 years ago, employers now have obligations to their employees that extend beyond payment for their labour. The evolution of employment law has meant that the imposition of contract over the master-servant relationship has produced a contract that is inherently unbalanced, with the employer holding sway. The growth in recognition of implied terms within employment contracts has sought to counter that imbalance. The courts have begun to consider the underlying personal relationship that an employment contract manages and have, in some circumstances, treated it accordingly.

The protection of employees from harsh and unacceptable treatment by employers requires the implication of protective terms and different treatment to that of commercial contracts. This is even more so in recent

times with the ' progressive deregulation of the labour market, the privatisation of public services and the globalisation of product and financial markets'<sup>55</sup>. The increased pressure on employees in addition to the fact that ' work is one of the defining features of peoples lives' <sup>56</sup> means that losing a job is now, more than ever a distressing event. As Lord Steyn in Johnson suggested our medical knowledge has evolved to recognise that distress at the loss of employment may not just be ' mere injure feelings' but a recognised illness.

If this is so, the rule in Addis, could be challenged by judicial recognition of the fact that in modern times distress leading to psychiatric injury is something that could reasonably be considered as arising to the usual course of things or have been in the contemplation of the parties at the time of making the contract as the probable result' of an employer wrongfully dismissing an employee in a manner that is unreasonable or unfair. Alluded to by the Full Court in Burazin, such an approach would bring an action inline with the principles in Hadley v Baxendale.

The courts have swayed on whether employment contracts should be treated the same or differently from other commercial contracts. Indeed some academics have argued that the Addis decision itself treated employees differently by its ' unwillingness to recognize that an employee may suffer loss and damages in addition to wages foregone during the proper notice period as the natural and probable consequence of the wrongful termination'<sup>57</sup>. One jurist asserts that in reaching their decision in Addis the House of Lords imported ' incidents which the law has imposed on the master servant relationship into the contract of employment'<sup>58</sup>. Even as <https://assignbuster.com/bringing-the-common-law-into-line-with-the-position-under-the-workplace-relations-act-1996-essay-sample/>

recently as 2001, the House of Lords in Johnson treated employment contracts as a 'special case' by 'formulating a new rule and rationale for limiting the recovery of damages that is only applicable to employment contracts'<sup>59</sup>. Given the fact that an employment contract manages an interpersonal relationship it should be treated differently. However it should be treated in a way that reflects employment as a defining feature of an employee's life and that the distress that can result from the loss of that employment in an unfair and unreasonable manner can be injurious to an employee as their future employment prospects.

## Conclusion

The Australian Industrial Relations Commission has determined that it has the power to award compensation under s170CH(7) for 'shock, humiliation and distress'<sup>60</sup>. Courts in Canada<sup>61</sup> and New Zealand<sup>62</sup> have declined to follow Addis and have found that damages can be awarded for distress arising out of a breach of an implied term as a result of a wrongful dismissal. Despite this, 'employment law in Australia has remained curiously underdeveloped'<sup>63</sup> especially with regard to the common law availability of remedies. The availability of compensation in the common law is necessary to compensate those who are excluded from the statutory regime<sup>64</sup> and for those people who have suffered financial injury above the statutory capped amount by virtue of the distress their wrongful termination has caused<sup>65</sup>. When faced with the opportunity, the courts should remove the obstacles imposed by Addis almost one hundred years ago and ensure that the common law reflects a modern formulation of the nature and importance of employment in Australian Society.

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