HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M22/2024
File Title:	Elisha v. Vision Australia Limited
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	22 Apr 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ADAM ELISHA**
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. Can an employer's duty of care to its employees extend to provision of a safe system of investigation and decision-making as to discipline and termination?

3. Does *Addis v Gramophone Co Ltd* [1909] AC 488 preclude recovery of damages for psychiatric injury consequent upon wrongful dismissal from employment? If so, should it no longer be followed?

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS OF THE COURTS BELOW

5. The decisions of the Court of Appeal of the Supreme Court of Victoria have not been reported; their medium neutral citations are *Vision Australia Ltd v Elisha* [2023] VSCA 265 (**CA**) and *Vision Australia Ltd v Elisha (No 2)* [2023] VSCA 288. The decision of the primary judge is not reported; its medium neutral citation is *Elisha v Vision Australia Ltd* [2022] VSC 754 (**PJ**).

PART V: MATERIAL FACTS

6. On about 27 September 2006, the Respondent entered an employment contract with the Appellant, Mr Elisha. It provided that the employment would be governed by *inter alia* an industrial award, as well as regulatory requirements and certain of the Respondent's policies and procedures: **CA [7]–[11]** (**CAB 190–191**), **CA Appendix 1** (**CAB 245–6**). Mr Elisha's work and responsibilities involved him assisting vision-impaired clients in their homes and workplaces: **CA [14]** (**CAB 191**)

7. On 23 March 2015, during a hotel stay while performing his work duties, Mr Elisha was involved in an incident with a Ms Trch, one of the hotel proprietors. Ms Trch considered Mr Elisha to have been aggressive and intimidating. The ultimate unchallenged finding made by the primary judge was that Mr Elisha was not objectively aggressive, threatening or frightening: **CA [18]–[19]** (**CAB 193**).

8. Mr Elisha then went on holiday. While away, two other employees of the Respondent stayed at the hotel and became apprised of Ms Trch's account: **CA [20]** (**CAB 193**). They reported it to their manager. It was then reported to Mr Elisha's manager, Ms Hauser: **CA [20]** (**CAB 193**). Thereafter, various of the Respondent's employees became involved in investigating the matter: **CA [21]–[24]** (**CAB 193–4**).

9. Upon returning from leave, on 19 May 2015, Mr Elisha was asked to, and did, attend Ms Hauser's office where he was presented with a letter. It alleged "serious misconduct" in that Mr Elisha had breached the Respondent's policies concerning a particularised complaint which had been received: **CA [25]** (**CAB 194**). It required Mr Elisha to attend a meeting at which he would be asked to respond. It asserted (**CA [27]** (**CAB 195**)): "this meeting is being conducted in accordance with the Due Process Clause (47.5) of the Vision Australia Unified Enterprise Agreement 2013 (refer Appendix 1). Please note that disciplinary action up to and including summary dismissal may be an outcome of this meeting." Clause 47.5 was annexed, as was the Respondent's "disciplinary procedure": **CA [28]** (**CAB 195**). The letter also recorded that Mr Elisha was not to speak with any staff member regarding the matter (unless that person would be his support person at the meeting), that this instruction was "to ensure procedural fairness applies to the proceedings and to all involved in the matter" and that if Mr Elisha failed to adhere to this instruction he would be

subject to summary dismissal: **CA [26]** (**CAB 195**). It also recorded that, due to the seriousness of the complaint, it had been decided to stand him down. The letter did not suggest — much less did it allege — that Mr Elisha had conducted himself aggressively on any prior occasions: **CA [31]** (**CAB 196**).

10. Mr Elisha prepared a written response in detail denying any such misconduct: **CA [32]** (**CAB 196**).

11. On 26 May 2015, there was a meeting with various persons, including Mr Elisha, a union representative named Mr Nunns, Ms Hauser and Ms Eagle from the Respondent's "People and Culture" team: **CA [33]** (**CAB 196**). Ms Eagle and Ms Hauser's typed file note recorded that, at the close of the meeting, Ms Eagle had said that "she would get back to [Mr Elisha and Mr Nunns] after speaking with [Mr Gow-Hills, General Manager of the Respondent's 'People and Culture' department]". It also recorded observations of Ms Hauser and Ms Eagle that Mr Elisha "showed no remorse": **CA [33]** (**CAB 196**).

12. Ms Eagle provided documentation "for meeting tomorrow" to several other employees of the Respondent, including the file notes from the earlier meeting: **CA [34]** (**CAB 196**).

13. The evidence of Ms Eagle was that on the next day, 27 May 2015, she made "findings" concerning the incident and a further meeting took place between Ms Eagle, Mr Gow-Hills, Ms Hauser and others — but not Mr Elisha or Mr Nunns. At this meeting, Ms Eagle's "findings", including that Ms Trch's account of events should be accepted, were adopted. The primary judge found the decision to terminate was likely made by Mr Gow-Hills. This finding was accepted by the Respondent below: **CA [35]** (**CAB 196–7**).

14. On 28 May 2015, Mr Nunns emailed Ms Eagle a letter concerning the meaning of "serious misconduct" and stating that the union would notify the Respondent's management of a dispute under the enterprise agreement in the event Mr Elisha was not returned to normal duties. Ms Eagle forwarded this to Mr Gow-Hills and Mr Van Dyk (the Respondent's human resources manager), suggesting they discuss it, asking "does this change our proposed strategy?": **CA [37]** (**CAB 197**). Mr Nunns also sent

a letter to Mr Van Dyk, relating to representation at the earlier meeting: **CA [36]** (**CAB 197**).

15. On the morning of 29 May 2015, Mr Gow-Hills emailed Mr Van Dyk stating (**CA [38]** (**CAB 197**)):

> We will argue that [Mr Elisha's] aggression in Bairnsdale is serious in itself and contributes to our assessment of ongoing risk to health and safety of others and to reputation. *It is the latest example in a pattern of aggression that [Ms Hauser] can attest to*. We do *need to get those previous examples and patterns on the record*. In addition [Mr Elisha] demonstrates no awareness that he was/is aggressive. Which adds to the unacceptable risk.
>
> *ASU will argue we can't expand the matters we are considering but that is our choice not theirs*.
>
> We need to organise a phone meeting with them today to hear them out on our 'pattern of aggression' judgement. *Phone meeting because [Mr Nunns] will declare himself unavailable to attend a in person meeting*. He may also try that with a phone meeting. *I guess if they dodge the meeting we should terminate without their response*. [emphasis added]

16. Later that day, without further notice, Ms Eagle wrote to Mr Elisha terminating his employment. Among other things, it said that the Respondent had concluded Mr Elisha behaved as described by Ms Trch and this had "resulted in our loss of trust and confidence in your ability to undertake the role of Adaptive Technology Consultant": **CA [39]** (**CAB 197**); **PJ [39] (CAB 16)**.

17. Mr Elisha subsequently developed "a 'very severe psychiatric illness in the nature of at least major depressive disorder'": **CA [174]** (**CAB 226**). The primary judge found that, absent his dismissal, Mr Elisha would not likely have developed this illness or any similar psychiatric condition: **PJ [629]** (**CAB 175**). There was no challenge to this factual finding in the Court of Appeal. Nor is there in this Court.

18. In 2020, Mr Elisha sued for damages, including for the depressive disorder. He claimed in contract, relevantly alleging breaches of the due process provision contained in clause 47.5 and the Respondent's "disciplinary procedure". He also claimed in negligence, alleging the Respondent's duty of care extended to discipline and termination procedures: **CA [42]–[43]** (**CAB 198–9**).

19. At trial, Mr Elisha failed in negligence with the primary judge finding the common law did not recognise the duty alleged; he succeeded in contract, with the Respondent ordered to pay Mr Elisha damages in the sum of $1,442,404.50: **CA [46]** (**CAB 199**). The breach found by the primary judge lay in the fact that, as the allegation of a pattern of aggressive conduct was never put to Mr Elisha but was in fact the critical allegation upon which the Respondent acted, he was never afforded an opportunity to respond to the allegations actually made against him and acted on by the Respondent: **CA [129]** (**CAB 218**). The primary judge found that "there was really never anything of substance" to Ms Hauser's "slurs" concerning Mr Elisha's prior behaviour, but that this had had a "prejudicial and pernicious effect … planted, as it was, in the minds of the decision makers in [Mr Elisha's] absence and without ever giving him an opportunity to respond to it": **PJ [181]–[182] (CAB 55–6)**, **[242] (CAB 71)**. His Honour concluded there was a "gang of four" that conspired to act on a "secret" and consciously "hidden" reason to terminate; and that the course the Respondent followed was a "sham" and "a disgrace": **PJ [203]** (**CAB 60**), **[236]–[238]**, **[243]**, **[246]** (**CAB 70–2**), **[462]** (**CAB 131–2**); **CA [126]** (**CAB 217–8**), **[131]** (**CAB 219**). The Respondent appealed. Mr Elisha filed a notice of contention. As to contract, the Court of Appeal affirmed the primary judge's findings that the employment contract relevantly incorporated certain of the Respondent's policies and procedures — including as to due process in disciplinary and termination procedures (**CA [47]** (**CAB 199**)**, [108], [110]** (**CAB 213–4**)) — and that the Respondent relevantly breached them: **CA [155]–[156]** (**CAB 223**). However, it held that damages for Mr Elisha's psychiatric injury were unavailable for a breach as to the mode of dismissal, following the (asserted) principle in *Addis v Gramophone Co Ltd*[1] and also because they were too remote: **CA [191]** (**CAB 230**), **[216]** (**CAB 236**).[2] As to tort, the Court of Appeal held that the common law does not recognise the duty alleged by Mr Elisha: **CA [48]** (**CAB 199–200**), **[256]** (**CAB 244**).

20. Following a subsequent set of reasons on costs, the Court of Appeal ordered that leave to appeal be granted with the appeal allowed and the orders for damages set

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1 [1909] AC 488.

2 It rejected in *obiter* a sub-ground of appeal — advanced on the counterfactual hypothesis that the Respondent would otherwise have terminated Mr Elisha's employment on notice — that the "least burdensome performance rule" applied so as to limit any contractual damages to one month's remuneration: **CA [218]**, **[227]** (**CAB 236–7**). That contention is not renewed by the Respondent in this Court.

aside. Mr Elisha was ordered to make restitution of the damages award with interest, and to pay costs at first instance and 80% of the costs of the appeal (**CAB 255–6**).

PART VI: ARGUMENT

21. The "ruling principle"[3] is incontrovertible: as its employee, the Respondent owed to Mr Elisha a duty to provide a safe system of work. The duty is "governed by the same rules and [has] the same content, irrespective of the kind of injury or damage that can reasonably be foreseen … whether they are risks to the employee's psyche, person or property."[4] This duty "extends beyond the period of work to every situation in which the master sustains the character of master towards the servant", even to when the employee is travelling, "[so long as] the master is master in relation to the journey".[5] It is a duty "not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system … [taking into account] the power of the employer to prescribe, warn, command and enforce obedience to his commands."[6]

22. Yet, supposedly, the duty in tort does not extend to processes and decision-making as to discipline and termination from that very employment; such processes and decision-making being solely within the employer's power to enforce and directed to ensuring obedience. And in contract, there is supposedly a special preclusion on recovery of damages for breach of terms concerning such processes. Both these arbitrary, incoherent and irrational limitations are wrong. It is convenient to address contract first (appeal ground 2), as this was the question that divided the courts below.

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3 *Tame v New South Wales* (2002) 211 CLR 317 at [140] (McHugh J), quoting *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 165 (Lord Keith).

4 *Tame* (2002) 211 CLR 317 at [140] (McHugh J); and see also at [185] (Gummow and Kirby JJ).

5 *ACI Metal Stamping & Spinning Pty Ltd v Boczulik* (1964) 110 CLR 372 at 378–9 (Kitto J).

6 *McLean v Tedman* (1984) 155 CLR 306 at 313 (Mason, Wilson, Brennan and Dawson JJ), quoted in *Kozarov v Victora* (2022) 273 CLR 115 at [83] (Gordon and Steward JJ).

Appeal ground 2

The ratio of Addis

23. The Court of Appeal treated *Addis* as stating a rule precluding availability of damages for psychiatric injury consequent on wrongful dismissal. This involves a misreading of the decision.

24. *Addis* concerned a plaintiff manager of the defendants' business in Calcutta. The plaintiff's employment terms included provision for dismissal with six months' notice. The defendants gave the plaintiff notice but simultaneously effectively removed him from his position in a clear breach of contract.[7] As a result, he lost standing in the commercial community of Calcutta and experienced pain and distress; he ultimately returned to England two months later.[8] At trial, the plaintiff was awarded six months' salary and commission, as well as damages "in respect of the harsh and humiliating way in which he was dismissed".[9] In the House of Lords, the issue was whether, in assessing damages for wrongful dismissal, the jury was permitted to take into account "circumstances of harshness and oppression accompanying the dismissal and any loss sustained by the plaintiff from the discredit thus thrown upon him".[10]

25. A majority of the House answered this question in the negative.[11] The Law Reports headnote records the *ratio* in the following terms: "Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment." Australian courts, including the Court of Appeal here, have cited *Addis* as authority for this proposition: **CA [201]** (**CAB 232–3**).

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7 [1909] AC 488 at 504 (Lord Shaw).

8 [1909] AC 488 at 489 (Lord Loreburn LC). 493 (Lord Atkinson), 504 (Lord Shaw).

9 [1909] AC 488 at 493 (Lord Atkinson).

10 [1909] AC 488 at 497 (Lord Collins).

11 [1909] AC 488 at 490–1 (Lord Loreburn LC), 492 (Lord James), 496–7 (Lord Atkinson), 502 (Lord Gorell), 504–5 (Lord Shaw).

26. In *Johnson v Unisys Ltd*,[12] Lord Steyn said: "The headnote is arguably wrong". His Lordship understated the position. Properly seen, the Law Lords in *Addis* disposed of the case on the basis that *non-compensatory* damages — that is, exemplary or punitive damages — are unavailable for breach of contract.[13] That is an entirely unremarkable holding.[14] It is a holding that does not preclude recovery in contract in this case.

27. Only Lord Loreburn LC's speech (at 491) contains a statement close to the reported holding: "[damages] 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." However, immediately prior to this statement, the Lord Chancellor had said: "To my mind *it signifies nothing* in the present case *whether the claim is to be treated as for wrongful dismissal or not*. In any case there was a breach of contract" (emphasis added). It is therefore immediately difficult to comprehend — *contra* the headnote — that the Lord Chancellor was laying down any limitation on recoverability peculiar to the dismissal context. His Lordship continued: "I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case." This is reference to the unremarkable proposition that a contumelious breach of contract does not supply a basis for a non-compensatory award. That this is what his Lordship was here conveying is further indicated by his immediate criticism of Lord Coleridge CJ's reasons in *Maw v Jones*.[15] It was there said that a false charge of misconduct against an employee may increase the damages in a case of wrongful dismissal, on the basis of an expectation that the employee might find it harder to obtain employment elsewhere but where there was no proof of actual loss of that kind.

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[12] [2003] 1 AC 518 at [3] and see also at [15]–[17] (Lord Steyn), [44] (Lord Hoffman), [69] (Lord Millett). See also particularly *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 148 (Wilcox, von Doussa and Marshall JJ) and *Shaw v New South Wales* [2012] NSWCA 102; (2012) 219 IR 87 at [118] (Barrett JA, with whom Beazley, McColl and Macfarlan JJA and McLellan CJ at CL agreed). See generally J Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Edition, 2021) at [5-032]–[5-035].

[13] And see, e.g., *Quinn v Gray* [2009] VSC 136; (2009) 184 IR 279 at [11] (Byrne J).

[14] See particularly, e.g., *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [12]–[13] (Gleeson CJ, McHugh, Gummow and Hayne JJ), quoting *Butler v Fairclough* (1917) 23 CLR 78 at 89 (Griffith CJ).

[15] (1890) 25 QBD 107 at 108.

28. Thus, Lord Loreburn LC's speech does not provide authority for the *ratio* as reported in the Law Reports. Each of Lord James, Lord Atkinson, Lord Gorell and Lord Shaw expressed concurrence with Lord Loreburn LC. However, all gave additional reasons each of which are even further away from the reported holding.

29. It is convenient first to take Lord Collins's dissent, it being very clearly based on the availability of exemplary damages (at 497): "This contention goes the length of affirming that in cases of wrongful dismissal it is beyond the competence of a jury to give what are called exemplary or vindictive damages, and it was this point that I desired to consider further." His Lordship reasoned that exemplary damages should be available in contract, as in tort, so as not "to curtail the power of the jury to exercise … a salutary power, which has justified itself in practical experience, to redress wrong" (at 500). It is on this that his Lordship dissented.

30. Turning then to the majority, Lord James based his concurrence on the footing that exemplary damages are irrecoverable — though his Lordship deployed the language of "aggravation",[16] that his Lordship was referring to *exemplary* damages is made clear having regard to his comparisons to recoverability in tort and his avowed disagreement with Lord Collins. The same is so of Lord Shaw's concurrence. Likewise, Lord Atkinson very clearly analysed the issue before the House as about recovery for exemplary damages and concurred on that basis, observing that "[m]uch of the difficulty which has arisen in [the] case is due to the unscientific form in which the pleadings, as amended, have been framed, and the loose manner in which the proceedings at the trial were conducted", then turning to survey the jurisprudence for any authority that some form of punitive damages might be available, before concluding: "exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present" (at 496–7). Lord Gorell reasoned that the damages awarded were not referable to any *loss* but that (at 501–2) "[t]he plaintiff has attempted to suggest that the manner of his dismissal has cast a slur upon his character, and has really endeavoured to claim damages for defamation and to turn the action for the loss of the benefit of the contract into an action of tort, with the result of attempting to give the jury a discretion uncontrolled by the true

[16] In a modern sense, aggravated damages are compensatory: *Lamb v Cotogno* (1987) 164 CLR 1 at 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

consideration, namely, what is the money loss to the plaintiff of losing the benefit of the contract?" That is, his Lordship was referring to giving to the jury an uncontrolled discretion to award sums *other than as compensation*. This is made clear by his Lordship's earlier reference to the "[t]he general rule … that damages in contract must be such as 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" (at 501).

31. *Addis* may otherwise be treated as having been disposed of on the basis that the claim was really one for defamation. Each of Lord Atkinson (at 493) and Lord Gorell (at 501–2) expressly said this. Likewise, Lord James (at 492) and Lord Shaw (at 502–3) each observed that the action was better brought in tort. Sir Frederick Pollock explained *Addis* on this basis.[17]

32. It may be accepted that, in reliance upon *Addis* as well as other cases, this Court in *Baltic Shipping Co v Dillon*[18] proceeded on the basis that, exceptional cases aside, damages for breach of contract will not compensate for *mere* disappointment or *mere* distress or *mere* injury to feelings. That is not a proposition unique to damages for breach of terms concerning processes for dismissal in employment contracts. It is also not a proposition relevant here, given that Mr Elisha suffered a recognised psychiatric injury. Plainly, understanding of the distinction between mere injury to feelings and psychiatric injury has increased dramatically since *Addis* was decided in 1909.[19] *Addis* ought to be put aside.

The correct analysis

33. In any event, there are further reasons why: this Court should not follow *Addis*; this Court should reject the artificial and incoherent preclusion accepted by the Court of Appeal; and recovery should be assessed in accordance with ordinary principles, including ordinary rules on remoteness.[20]

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17 Sir F Pollock, 'Notes' (1910) 26 *Law Quarterly Review* 1 at 2.

18 (1993) 176 CLR 344.

19 See also *Johnson v Unisys* [2003] 1 AC 518 at [19] (Lord Steyn).

20 See similarly in New Zealand: *Rowlands v Collow* [1992] 1 NZLR 178; *Ogilvy v Mather (NZ) v Turner* [1996] 1 NZLR 641; *Raddock v Air New Zealand Ltd* [1997] ER NZ 517; *Castle v Rongotai College* [1997] ER NZ 505. See similarly in Canada: *Honda Canada Inc v Keays* [2008] 2 SCR 362; *Bohemier v Storwal International Inc* (1982) 142 DLR (3d) 8; *Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3d) 378; *Wallace*

34. As observed Mason CJ in *Baltic*,[21] "the fundamental principle on which damages are awarded at common law is that the injured party is to be restored to the position (not merely the financial position) in which the party would have been had the actionable wrong not taken place." At base, there is nothing inherent about wrongful dismissal that means this fundamental compensatory principle should yield; rather, there is everything inherent in the employment relationship — vulnerability; dependency; one's employment inexorably tied to one's livelihood, self-identity and the financial security upon which one makes other major life decisions (such as purchasing a house); and at least in many cases the employer's assumption of responsibility, express or implied, to prevent psychiatric harm[22] — underscoring that no special preclusion should be imposed.

35. In the circumstance that Mr Elisha has established the requisite connection between his psychiatric injuries and the Respondent's breach of the employment contract, an *a priori* preclusion on his damages is diametrically at odds with the cardinal compensatory objective. This is the very point which Mason CJ was making in *Baltic*, including by specific reference to *Addis*, in his Honour's discussion of a rule generally excluding damages to compensate for mere injured feelings.[23]

36. The preclusion is also at odds with the exception to that rule that a plaintiff can recover for mental suffering where the breach causes physical injury.[24] As McHugh J observed, "because damage for personal injury may be recovered in an action for breach of contract and because psychiatric illness constitutes personal injury, damages for mental distress associated with a psychiatric illness or physical injury must also be recoverable in an action for breach of contract."[25] As Edelman J

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v United Grain Growers Ltd [1997] 3 SCR 701, all discussed in *Macken's Law of Employment* (Thomson Reuters, 9th Edition, 2022) at [10.330].

21 (1993) 176 CLR 344 at 362. See also, e.g., *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 (Mason CJ and Dawson J), 98 (Brennan J), 117 (Deane J), 134 (Toohey J), 148 (Gaudron J), 161 (McHugh J) and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (the Court), each following *Robinson v Harman* (1848) 1 Ex 850 at 855 (Parke B); 154 ER 363 at 365.

22 See, e.g., *Kozarov v Victora* (2022) 273 CLR 115 at [4] (Kiefel CJ and Keane J), [101] (Edelman J).

23 (1993) 176 CLR 344 at 361–3.

24 (1993) 176 CLR 344 at 362 (Mason CJ).

25 (1993) 176 CLR 344 at 405. See also *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 at [318] (Wilcox J) and *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [72] (Black CJ, with whom Marshall J agreed) (not reported in 163 FCR 62).

observed more recently in *Kozarov v Victoria*:[26] "the employer's duty to ensure the '[p]rotection of mental integrity from the unreasonable infliction of serious harm' is imposed by law … it is no different from the employer's duty to protect an employee's physical integrity from the unreasonable infliction of harm. It has long been recognised that psychiatric injury 'is just as really damage to the sufferer as a broken limb … [and] equally ascertainable by the physician'". Equating psychiatric with physical injury for the purposes of recovery also coheres with the approach of this Court in other contexts:[27] *cf* **CA [204]–[215]** (**CAB 233–6**).

37. That the preclusionary rule rests on fragile foundations is revealed also by incursions to get around it. Particularly, there has been, in the words of Spigelman CJ in *New South Wales v Paige*,[28] the "creative" use of implied terms, notably that of mutual trust and confidence.[29]

38. The result for which Mr Elisha contends does no more than place the employee on the same footing as any other contracting party. There is no reason a person should be denied compensation for a psychiatric injury flowing from a breach of their employment contract, simply because the breach was of a promise by their employer as to the manner in which their employment could be terminated. A preclusionary rule is contrary to the underlying compensatory objective. And it is contrary to the social realities of the modern-day employment relationship. As Lord Hoffman, speaking in the majority, succinctly expressed it in *Johnson v Unisys*:[30] "a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem."

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[26] (2022) 273 CLR 115 at [103], quoting *Tame* (2002) 211 CLR 317 at [185] (Gummow and Kirby JJ) and *Owens v Liverpool Corporation* [1939] 1 KB 394 at 400 (Mackinnon, Goddard and Du Parcq LJJ).

[27] See, eg, *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at [55]–[57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[28] *New South Wales v Paige* (2002) 60 NSWLR 371 at [134].

[29] See particularly, e.g., *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 and see generally *McGregor* at [33-031]–[33-032].

[30] [2003] 1 AC 518 at [35]. See also *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 50 (Lord Cooke).

Remoteness

39. As for remoteness and *Hadley v Baxendale*,[31] the issue is narrow and turns on the application of established principles. The error is disclosed in the Court of Appeal's affirming the primary judge's finding that there *was* a "possibility" of psychiatric impact as a result of a failure to put allegations to an employee, and that this possibility was recognised by the witnesses called on behalf of the Respondent, only for the Court then to reason that this was insufficient for the purposes of remoteness: **CA [180]**–**[188]** (**CAB 228–9**). This was despite the Court of Appeal expressly noting (correctly) that the parties need not have contemplated the precise extent of Mr Elisha's harm: **CA [174]** (**CAB 226–7**). Damage need only be "a serious possibility";[32] and damage of a kind within the reasonable contemplation of the parties is recoverable even if it occurs to an unanticipated degree.[33]

40. In any event, the primary judge's reasons at **PJ [552]–[568]** (**CAB 153–7**) — otherwise passed over by the Court of Appeal — are to be preferred. As in *Goldman Sachs JBWere Services Pty Ltd v Nikolich*,[34] it must have been within the contemplation of the parties that the breach of promises made by an employer to an employee concerning such sensitive topics as discipline and termination — egregious breaches as in this case — may result in the employee suffering disturbance of mind, which it is notorious may lead to a psychiatric illness. The harm suffered by Mr Elisha was a manifestation, albeit severe, "of the very kind that the promises made [in the employment contract] 'were designed to prevent'": **PJ [559]** (**CAB 155**). Disciplinary and termination processes are perhaps one of the most delicate aspects of the employer-employee relationship.

Notice of contention ground 1: 2015 Disciplinary Procedure a term

41. The analysis above proceeds on the basis that the 2015 Disciplinary Procedure was incorporated into the contract. That is challenged by ground 1 of the Respondent's notice of contention (**CAB 274**). The primary judge concluded that it was: **PJ [321]–**

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31 (1854) 9 Ex Ch 341; 156 ER 145.

32 *McGregor* at [8-176]; see, e.g., *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 365 (McHugh JA).

33 *McGregor* at [8-183], citing *Parsons (Livestock) td v Uttley Ingham & Co Ltd* [1978] QB 791 (CA).

34 [2007] FCAFC 120at [49], [74] (Black CJ, with whom Marshall J agreed) (not reported in 163 FCR 62).

[428] (**CAB 95–120**). The Court of Appeal rejected the Respondent's challenge to this conclusion: **CA [89]–[112]** (**CAB 210–14**). The concurrent conclusions of both courts below were correct, for the reasons they gave. Mr Elisha will otherwise deal in reply with the Respondent's arguments.

Appeal ground 1

42. To a considerable extent, what has been said in relation to appeal ground 2 applies with equal force to appeal ground 1. The duty of care in negligence must cohere with the contractual relationship between the parties.[35]

43. The Court of Appeal treated the decision of the New South Wales Court of Appeal in *Paige*[36] as authority denying the extension of the ordinary duty of an employer to its employees to encompass a safe system of investigation and decision-making with respect to discipline and termination of employment. Every step in the reasoning of the Court of Appeal below was predicated on the application and correctness of *Paige*: **CA [245]–[256]** (**CAB 241–4**). This involved error in two respects. *First*, *Paige* is not authority for such a wide proposition. *Secondly*, to the extent that it is, it is wrong and should be overruled. This Court should reject the artificial and incoherent preclusion; it should — consistently with other statements of this Court — hold that the duty can extend in a particular case, subject to the ordinary brakes on liability.

Coherence with the common law

44. As noted at paragraphs 21–22 above, it is incoherent that the employer's duty of care extends beyond the period of work to every situation in which the employer is properly regarded as responsible for the employee and having regard to the powers of the employer over the employee; yet it does not extend to processes and decision-making as to discipline and termination.

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35 See particularly *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [21] (McHugh, Gummow, Hayne and Heydon JJ), cited in *Kozarov v Victoria* (2022) 273 CLR 115 at [4] (Kiefel CJ and Keane JJ): "The fundamental proposition for which *Koehler v Cerebos* stands is that the content of the obligation of an employer to take reasonable care for the safety of employees at work cannot be determined in isolation from the obligations which the parties owe each other under their contract of employment…"; and see also at [100]–[104] (Edelman J).

36 *Paige* (2002) 60 NSWLR 371.

45. That incoherence is only compounded in that the common law of Australia has long recognised that the duty extends to psychiatric, not only physical, injury. The law may be traced from the seminal reasons of Windeyer J in *Mount Isa Mines Ltd v Pusey*,[37] through the authoritative decision of this Court in *Koehler v Cerebos (Australia) Ltd*[38] and to the more recent observations of this Court in *Kozarov v Victoria*.[39] That the employer's duty to provide a safe system of work extends to foreseeable psychiatric injury appears to have been common ground at all stages of the litigation leading to this Court's decision in *New South Wales v Fahy*.[40] It was even common ground in *Paige* itself, albeit it was not common ground that it extended to "duty of a character relevant to the [claim]".[41]

46. As observed by Crennan J in *Fahy*, Windeyer J in *Mount Isa Mines* deprecated "arbitrary and illogical restrictions" on claims for psychiatric injury.[42] The limitation upon the extent of the employer's ordinary duty of care accepted by the Court of Appeal in this case is precisely such an arbitrary and illogical restriction.

47. The fragility of the foundation upon which the denial of duty rests is further indicated by authorities which have accepted that the employer's ordinary duty extends to providing adequate support in the workplace while a disciplinary investigation is *ongoing*, including to avoid psychiatric injury to the employee being investigated. Perhaps the best example is the decision of the Queensland Court of Appeal in *Hayes v State of Queensland*,[43] where the Court expressly distinguished *Paige*: *cf* **CA [253]** (**CAB 243**). It is highly artificial to draw a distinction between the employer's responsibility *within* the investigation and the employer's responsibility in the workplace *as a consequence* of the investigation. Indeed, it is incoherent to say that an employer has a responsibility to ensure an employee has adequate support in the

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37 (1970) 125 CLR 383.

38 (2005) 222 CLR 44.

39 (2022) 273 CLR 115.

40 (2007) 232 CLR 486.

41 (2002) 60 NSWLR 371 at [77] (Spigelman CJ).

42 (2007) 232 CLR 486 at [244], citing *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 403–8.

43 [2017] 1 Qd R 337, see particularly at [6]–[13] (Margaret McMurdo P), [100] (Mullins J), [123]–[125] (Dalton J).

workplace to "cope" with an investigation but no responsibility in the conduct of the very investigation which gives rise to the need for the employee to "cope".

48. A like artificial distinction may be seen in the Court of Appeal's distinguishing of *Nikolich* on the basis that that was "a safe and healthy work environment" case and "not truly a manner of termination case at all": **CA [203]** (**CAB 233**). Any (supposed) differentiation between the working environment, in the (confined) sense of the systems by which an employee undertakes his or her tasks, and other aspects of the employment relationship, in the (confined) sense of the managerial processes of discipline and termination, is impossible to sustain. Such managerial processes are as much an incident of the employment relationship as are the systems on the "shop floor". The Respondent's observance of those managerial processes is as much an incident of its duties to Mr Elisha, as were Mr Elisha's observance of the policies he allegedly breached for which he was investigated and ultimately dismissed an incident of his duties to the Respondent.

49. Here, the Respondent owed a duty to provide a safe system of work, which extended to taking reasonable care so as not to cause reasonably foreseeable psychiatric injury in investigation and decision-making as to discipline and termination.

Coherence with statute

50. It remains to deal with coherence with statute. As is evident from *Paige*[44] and other decisions,[45] the statutory regulation of the modern-day employment contract has been treated as a significant matter curtailing the common law's extension into the field: *cf* **CA [248]** (**CAB 242**). A more precise analysis is required.

51. It is necessary to distinguish the general from the specific incursions of statute. The *former* is exemplified by the framework apparatus regulating the field of employment law: principally the *Fair Work Act 2009* (Cth). The *latter* includes statutes — for example, as in *Paige*, the *Teaching Services Act 1980* (NSW) — regulating some

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[44] See particularly (2002) 60 NSWLR 371 at [132]–[155] (Spigelman CJ).

[45] See, e.g., *Aldersea v Public Transport Corporation* (2001) 3 VR 499 at [61]–[66] (Ashley J); *Shaw v New South Wales* [2012] NSWCA 102; (2012) 219 IR 87 at [127] (Barrett JA, with whom Beazley, McColl and Macfarlan JJA and McLellan CJ at CL agreed); *Johnson v Unisys Ltd* [2003] 1 AC 518 at [2] (Lord Nicholls), [66] (Lord Hoffmann), [80] (Lord Millett).

specific employment contract — for example, the employment by the Government of New South Wales in service of the Crown of those providing teaching services. In cases involving statutes of the *latter* kind, there is greater scope for the recognition of any duty to be inconsistent with the statutory scheme. In such cases, an analysis of the kind recently discussed by this Court in *Electricity Networks Corporation v Herridge Parties*[46] will be necessary: and see **PJ [491]–[492]** (**CAB 139**).

52. As to *Paige*, the *ratio* is that the duty could not there extend to encompass the provision of a safe system of investigation and decision-making by the Department of Education — that is, *the Crown* and amenable to judicial review — under the *Teaching Services Act 1980* (NSW) and *Teaching Services (Education Teaching Service) Regulation 1994* (NSW).[47] Outside of that statutory context, *Paige* is not authority: *cf* **CA [250]** (**CAB 242–3**).

53. It is not suggested in this case that the contract was regulated in any equivalently precise or exhaustive way. Rather, the denial of any extension of the duty of care rests on the much more general statutory framework supplied by the *Fair Work Act*. Leading statements of that kind of approach may be found in *Johnson v Unisys*,[48] in which the principal justification for refusing to recognise an implied term to allow an employee to recover damages for loss arising from the manner of his or her dismissal, or a duty of care to the same effect, was that the UK statutory unfair dismissal system granted Mr Johnson the right to recover compensation for distress and psychiatric damage arising from unfair dismissal.[49]

54. *Johnson v Unisys* may be distinguished. *First*, at least as at the time of *Johnson v Unisys*, the UK unfair dismissal protections created a right to awards exceeding $100,000. In contrast, the maximum award under the *Fair Work Act* is six months remuneration (see s 392(6)), which for the average worker is far less than $100,000. It is also far less than the damages awarded to Mr Elisha at first instance. *Secondly*,

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46 (2022) 276 CLR 271.

47 See particularly (2002) 60 NSWLR 371 at [148]–[150], [156]–[177], [182] (Spigelman CJ), [330] (Mason P), [358] (Giles JA).

48 [2003] 1 AC 518.

49 See particularly at [2] (Lord Nicholls), [50]–[59] (Lord Hoffmann, with whom Lord Bingham agreed), [72]–[80] (Lord Millett, with whom Lord Bingham agreed). See also *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22.

at least as at the time of *Johnson v Unisys*, the UK unfair dismissal protections provided a statutory right to claim compensation to all employees irrespective of their seniority. In contrast, the *Fair Work Act* apparatus applies only to employees who have completed minimum periods of employment and are covered by a modern award, covered by an enterprise agreement, or who earn less than the regulated income threshold.[50] *Thirdly*, at least as at the time of *Johnson v Unisys*, the UK unfair dismissal protections were understood to provide a statutory right to compensation for mental distress or psychiatric injury resulting from the manner of dismissal.[51] In contrast, s 392(4) of the *Fair Work Act* expressly excludes from any award in unfair dismissal proceedings "compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal."

55. These distinguishing features mean that the unfair dismissal regime in the *Fair Work Act* is an unsound foundation upon which to conclude that the legislature has "covered the field" relevant to recovery for wrongful dismissal: *cf* **CA [249]** (**CAB 242**). The express exclusion from recovery in s 392(4) is simply an exclusion from recovery under the unfair dismissal regime. That regime is both narrower and broader than the common law. It is narrower, in that it only applies to certain employees. It is broader, in that it supplies a remedy in circumstances going beyond breach of contract. It should not be concluded that, by supplying such a regime, Parliament is to be taken to have impliedly endorsed an arbitrary exclusion from the employer's ordinary duty of care. There is further textual support for this. Sections 725 and 732 of the *Fair Work Act* together prohibit a person from making an unfair dismissal application or certain other statutory dismissal applications where an application or complaint has been made under another law of the Commonwealth or a law of a State or Territory. This indicates that the Parliament expressly contemplates that a person may have various rights of action, including at common law.

56. Finally, nothing in Mr Elisha's submissions is contradicted by the rejection by this Court, in *Commonwealth Bank of Australia v Barker*,[52] of the contention that there

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[50] See *Fair Work Act* ss 382 and 383; *Fair Work Act Regulations 2009* (Cth) reg 3.05.

[51] *Cf* the later development in *Dunnachie v Kingston-upon-Hull City Council* [2005] 1 AC 226.

[52] (2014) 253 CLR 169.

is implied in all employment contracts a term of mutual trust and confidence. Such an implication "involves the assumption by courts of a regulatory function defined by reference to a broadly framed normative standard".[53] It required a conclusion by this Court that the implication was "'necessary' in the sense that would justify the exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country".[54] The "complex policy considerations" said to justify the implication marked it "as a matter more appropriate for the legislature than for the courts to determine".[55] In that context, it is hardly surprising that Kiefel and Gageler JJ placed importance upon the fact that, if recognised in all employment contracts, the implied term would cut across the legislative judgments in fact made by the Parliament including in the unfair dismissal regime.[56] As Gageler J said: "the implied term would intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity".[57] The position for which Mr Elisha contends involves no intrusion of a common law policy choice. It involves merely the rejection of an incoherent limitation which the common law has imposed upon itself. Nor is the scope of the duty broad or uncertain. It is the same duty long imposed on employers: to ensure a safe system of work.

Notice of contention ground 2: risk of recognised psychiatric injury was foreseeable

57. Assuming the duty of care can extend as Mr Elisha submits, ground 2 of the Respondent's notice of contention is that the risk of a recognised psychiatric injury being suffered by a person in Mr Elisha's position was not reasonably foreseeable (**CAB 274**). That is to be assessed by reference to the undemanding test of whether the risk was far-fetched or fanciful.[58]

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53 (2014) 253 CLR 169 at [20] (French CJ, Bell and Keane JJ).

54 (2014) 253 CLR 169 at [36] (French CJ, Bell and Keane JJ).

55 (2014) 253 CLR 169 at [40] (French CJ, Bell and Keane JJ).

56 (2014) 253 CLR 169 at [93]–[96] (Kiefel J), [118] (Gageler J).

57 (2014) 253 CLR 169 at [118] (Gageler J).

58 See, e.g., *Koehler v Cerebos* (2005) 222 CLR 44 at [33] (McHugh, Gummow, Hayne and Heydon JJ). The "normal fortitude" test in s 72 of the *Wrongs Act 1958* (Vic) does not apply to workplace injuries such as this: see s 69(1)(b) and (c).

58. The primary judge found that Mr Elisha's injuries were relevantly foreseeable to a reasonable employer in the Respondent's position: **PJ [466]** (**CAB 132**). That finding followed a thorough consideration of all the evidence: **PJ [444]–[465]** (**CAB 126–132**). The Court of Appeal did not consider this issue. There was no error by the primary judge. Mr Elisha will deal in reply with the Respondent's arguments.

Notice of contention ground 3: duty of care was breached

59. Finally, ground 3 of the Respondent's notice of contention is that any duty of care was not breached. The primary judge found that, if the duty was owed, the Respondent breached it: **PJ [534]** (**CAB 148**). His Honour correctly reasoned that the Respondent's breach of duty (if it were owed) arose from the same matters which gave rise to breach of contract. The Court of Appeal correctly dismissed the Respondent's appeal as to breach of contract: **CA [139]–[156]** (**CAB 220–3**). Thus, once again, in effect, the Respondent seeks in this Court to overturn conclusions reached by both courts below. There was no error in either Court's analysis. Mr Elisha will otherwise deal in reply with the Respondent's arguments.

PART VII: ORDERS SOUGHT

60. The appeal should be allowed with costs. Orders 2–6 of the Orders of the Court of Appeal made on 28 November 2023 should be set aside. In their place, it should be ordered that the appeal to that Court be dismissed with costs.

PART VIII: ESTIMATED TIME

61. The Appellant estimates that up to 2.5 hours will be required for oral argument, including reply.

Dated: 22 April 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ADAM ELISHA**
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, Mr Elisha sets out below a list of the constitutional provisions and statutes referred to in his submissions.

No.	Description	Version	Provision(s)
1.	*Fair Work Act 2009* (Cth)	Current	ss 382, 383, 392, 725, 732
2.	*Fair Work Regulations 2009* (Cth)	Current	reg 3.05
3.	*Wrongs Act 1958* (Vic)	Current	ss 69, 72