HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M36/2021
File Title:	Kozarov v. State of Victoria
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondent
Date filed:	02 Dec 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

M36/2021

BETWEEN

ZAGI KOZAROV
Appellant

and

STATE OF VICTORIA
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

This Outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

Ground One

1 ***Facts***:

(a) the risk of harm of psychiatric injury was not reasonably foreseeable until at least the end of August 2011 (**VSCA [81]: CAB 317**) (on the respondent's case, February 2012) (**CAB 353; RS [50]-[56]**);

(b) the appellant was suffering from PTSD by at least April 2011 (**VSCA [94]: CAB 322**); and

(c) by late August 2011, only ceasing to work in the SSOU would have avoided the harm caused by the breach of duty (**VSCA [98]: CAB 323-324**; **VSC [733] CAB 241; RFM2: 211; RFM4: 117**)

2 ***Duty did not involve fixed-term rotation***: the safe system of work did not involve fixed-term rotations, but the option of temporary or permanent rotation from the SSOU (**VSC [689], [702]: CAB 226, 230**).

3 ***The contract did not permit compulsory rotation:*** the appellant was employed as a solicitor in the SSOU (**RFM4: 200-201; 293-294**). It was necessary for her to cooperate in her departure from that unit.

4 ***Counterfactual:*** it was necessary for the appellant to show that if the respondent had offered the appellant psychological screening by August 2011, this would have prevented the exacerbation of her PTSD from that date. The more probable inference was that she would not have accepted rotation out of the SSOU (**VSCA [106]-[110]: CAB 327-328**).

5 ***The appellant would not have accepted rotation out***:

(a) by late August 2011, the appellant was consulting with psychologist George Foenander and advising him that work-related stressors were contributing to her poor mental health (**VSC [263]: CAB 83**);

(b) the appellant had applied for promotion within the SSOU on 28 August 2011 (**VSC [46]: CAB 20; VSCA [109]: CAB 328**);

(c) on 29 August 2011, the appellant responded to a suggestion from her manager that she should be thinking about rotating out of the unit with vehement opposition (**VSCA [108]: CAB 328**);

(d) the appellant alleged in response that she was being discriminated against by her manager (**VSCA [46]: CAB 301**);

(e) the generalised evidence as to how people might respond to a diagnosis of PTSD did not rise so high as establishing that on balance, the appellant would have accepted a rotation out (**RFM2: 103-104**).

Ground two

6 ***Law:*** the principles are not in dispute (**RS [22]-[26], AR [9]**). The content of the duty must be considered in the context of other obligations owed between the parties, including statutory protections from discrimination. Insistence upon performance of a contract cannot be a breach of a duty of care: *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; *State of New South Wales v Paige* (2002) 60 NSLWR 371; *Equal Opportunity Act 2010* (Vic), ss 4(1), 6(e), 18.

7 ***No duty to require dismissal:*** the Court of Appeal was correct not to impose a duty requiring the respondent to forcibly remove the appellant from the SSOU. The common law would not impose a duty requiring an employer to breach a contract of employment.

Notice of contention

8 ***Law***: the duty of care that an employer owes an employee in respect of a risk that the employee might suffer psychiatric injury is engaged only if such injury to the *particular* employee is reasonably foreseeable: *Koehler* (2005) 222 CLR 44 at 57 [36]. An employer

engaging an employee to perform specified duties is entitled to assume the employee considers they are able to do the job for which they have been employed. There is no challenge to *Koehler* (**AR [9]**).

9 ***Risk of harm was not reasonably foreseeable until February 2012***: none of the thirteen matters at **VSC [578(a)-(m)]** (**CAB 187-190**), viewed prospectively and holistically, can reasonably be regarded to have put the respondent on notice of a risk of mental harm from the graphic nature of SSOU work.

10 The interaction with Mr Brown on 29 August 2011, viewed from the perspective of a reasonable non-expert, did not demonstrate such signs (but rather the opposite). The
10 appellant, with the assistance of a psychologist, had not recognised the effect her work was having until late 2011 or early 2012 (**VSC [333]: CAB 104**)

11 The duty imposed was inconsistent with privacy, autonomy, and freedom from discrimination: *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81-919 at 70,354 [47].

12 The appellant's reaction to inquiries into her mental health in February 2012 illustrates the legal incoherence in requiring an exertion of workplace discipline to intrude into the personal sphere and overcome ordinary rules of confidentiality in medical records (**RFM4: 32**).

Dated: 2 December 2021

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BRET WALKER
GLENN WORTH
NAOMI WOOTTON