HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ADAM ELISHA**
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

Appeal ground 2: contractual damage not too remote

2. The Court of Appeal observed that "it may be correct to state (as the judge did) that there was a 'possibility' of some psychological impact": **CA [188]** (**CAB 229**). In the preceding paragraphs, the Court recited evidence from each of the Respondent's witnesses demonstrating that at least several of them recognised this possibility: **CA [180]–[187]** (**CAB 227–9**). Thus, read in context, the Court correctly affirmed the finding that there *was* a *possibility* of psychological impact, and that this possibility was recognised by individuals within the Respondent: *cf* **RS [15]**. The matters enumerated at **RS [16]** do not controvert this; they reflect the Court of Appeal's erroneous focus upon whether the parties contemplated the precise *extent* of any harm: see **AS [39]** *cf* also **CA [190]** (**CAB 230**). The Respondent's reference (at **RS [17]**) to *Koehler* is inapposite given the facts here: this is not an "overwork" case. And, contrary to **RS [17]**, Mr Elisha does not seek to elevate factual findings in other cases to principles of law: *Nikolich* simply exemplifies the point made by the evidence here that, in the face of a stressful event in the workplace, "a link between workplace stress and health problems could come as no surprise to anyone

with significant management experience and surely not to a human resources manager".[1]

Appeal ground 2: *Addis* and the (supposed) preclusionary rule

3. At **AS [24]–[31]**, Mr Elisha analysed in detail the various speeches in *Addis*. Nothing said at **RS [18]–[19]** controverts that analysis.

4. The dissection of the *Addis* headnote rule into three aspects — submitted at **RS [20]** without reference to authority — should not divert from the central issue (*cf* also, e.g., **RS [24]**). **RS [20]** subtly passes over that Mr Elisha's claim is for damages *for psychiatric injury*. Thus, the Respondent is wrong that this appeal concerns only compensation for the manner of dismissal: it as much concerns recovery for contractual breach causing psychiatric injury.

5. Again, the correct analysis should begin and end with ordinary contractual principles, as analysed in, for instance, *Baltic Shipping Co v Dillon*. As the Respondent concedes — even specifically citing *Baltic* — recoverability on these principles is subject of ongoing development: **RS [22]**. It is that very development which falls for determination in this case. In any event, the exception ought not be confined to those types of contracts upon which the respondent relies.

6. Contrary to **RS [27]**, this Court in *Baltic* did not "refuse to reconsider" whether *Addis* precludes recovery for psychiatric injury consequent upon wrongful dismissal. Obviously enough, that case was not the opportunity for this Court so to do — it did not even concern the law of employment, much less wrongful dismissal.

7. Turning to statute, much of what has been said at **AS [50]–[56]** applies equally to the contractual claim and undercuts what is advanced at **RS [28]–[30]**. It is conspicuous that the Respondent cites this Court's admonition that judicial decisions from other common law jurisdictions must be inspected at the border to determine their adaptability to native soil (**RS [29]**) while devoting a considerable length of submissions to United Kingdom decisions concerning a different statutory topography: see **AS [54]–[55]**.

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[1] [2007] FCAFC 120 at [49] (Black CJ, with whom Marshall J agreed) (not reported in 163 FCR 62).

8. The common law does not develop blind to changing societal expectations (*cf* **RS [31]**); this point has been made in many cases, not least *Johnson v Unisys*.[2] Acceptance of Mr Elisha's contentions would not frustrate contractual certainty nor hinder the conduct of commercial enterprise: *cf* **RS [32]**. Contracting parties can choose to negotiate express terms limiting any contractual liability. The submission that existing employers and employees might have refrained from doing so on the strength of *Addis* is pure, and unlikely, assertion. "If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law."[3]

Appeal ground 1: recoverability in tort

9. At **AS [21]**, it was noted that the employer owes to the employee a non-delegable duty to provide a safe system of work; at **AS [22]**, it was noted that the non-extension of this duty to discipline and termination was arbitrary, incoherent and irrational. The Respondent's attempts at **RS [34]** exhaustively to define the "system of work" — or, more precisely, what it is not —only further reveals that this is so. A narrow approach (confined to it would seem performance of workplace tasks) to what constitutes a system of work in the modern working environment ought be rejected. To term Mr Elisha's approach "a radical departure" ignores both the reality of the modern workplace and cases like *Hayes*: see **AS [47]**. The artificiality in the Queensland Court of Appeal's attempt to distinguish *Paige* has been dealt with at **AS [47]**. Nothing said by the Respondent clarifies it.

10. As to **RS [36]**, the contention that the duty should not extend because it would render tort incoherent with contract is wrong. It is obviously wrong if Mr Elisha succeeds on ground 2. But, in any event, there is nothing incoherent about concurrent, though not coextensive, liabilities in tort and contract. The breaches of contract here depended not merely on an obligation to provide a safe system of work but the precise terms of the contractual policies and procedures concerning due process in discipline and termination. The examples proffered at **RS [36]** pass over the egregious breaches

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2 [2003] 1 AC 518.

3 *Ha v New South Wales* (1997) 189 CLR 465 at 503–4 (Brennan CJ, McHugh, Gummow and Kirby JJ with whom Dawson, Toohey and Gaudron JJ agreed) (citations omitted), quoted in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [55] (Kiefel CJ, Bell, Keane and Gordon JJ).

of contract found at trial and affirmed on appeal in this case. Conversely, if the contract were silent, there is no incoherence in a tortious duty being owed which could be excluded by express contractual terms.

11. As to **RS [37]–[40]**, the Respondent's arguments concerning coherence with statute have been dealt with at paragraph 7 above and **AS [50]–[56]**.

12. As to **RS [41]–[42]**, it is entirely unclear why an employer's discharge of its duty of care to one employee ought to accommodate — much less necessitate — it breaching its duty to another employee. Indeed, *Hayes* stands to the contrary: that the duty *can extend* to providing adequate support to avoid psychiatric injury caused by the *conduct of other employees* while an investigation is ongoing.[4] The respondent fails to recognise that no tension would arise as long as there was no breach of the duty for which Mr Elisha contends, which can readily be achieved by employers acting reasonably towards *each* employee.

Notice of contention ground 1: 2015 Disciplinary Procedure was incorporated

13. At **AS [41]**, it was noted that the Respondent challenges concurrent conclusions of the primary judge and the Court of Appeal. Now, at **RS [43]**, the Respondent also concedes (correctly) that the principles were not even in dispute. The inquiry is heavily fact-based: **CA [89]** (**CAB 210**). The Respondent's arguments bear a striking resemblance to those run below. They can be dealt with by reference to the Court of Appeal's reasons.

14. As to the fact that incorporation of the 2015 Disciplinary Procedure meant that, from time to time, the parties' contractual obligations would change with changes to the policy so incorporated, this is fully met by the elementary proposition that a contract may incorporate a document as varied from time to time. This was expressly considered at **CA [103]–[104]** (**CAB 212**):[5] *cf* **RS [43]–[44]**, **[49]**, **[51]**.

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[4] See particularly [2017] 1 Qd R 337 at [125] (Dalton J): "… Nor was there any inconsistency between the duty of care alleged by the appellants and the employer's duty … to investigate the complaints made by one group of employees against another group of employees…"

[5] See also particularly, e.g., **PJ [318]–[345]** (**CAB 94–102**), **[356]** (**CAB 106–7**), **[401]** (**CAB 114–5**) and the cases there considered, including *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 and *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889; (2000) 177 ALR 193 (on which the Respondent here places emphasis at **RS [51]**).

15. As to the breadth of the references across the contractual clauses, the Court of Appeal correctly construed it having regard to various of categories of instrument to which reference was made: **CA [98]–[102]** (**CAB 211–2**) *cf* **RS [46]**. It was not necessary to consider each and every external source: *cf* **RS [46]**.[6]

16. As to the existence of the statutory unfair dismissal regime, this was expressly considered at **CA [106]–[107]** (**CAB 213**) with the Court of Appeal disposing of the argument by reference to *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*,[7] where a similar (if not the same) argument was also rejected.[8] In so doing, the Court also noted the limits on the coverage of that regime: *cf* **RS [47]**, **[54]**–**[56]**.

17. As to the supposed "one-sided" nature of the obligation to "comply", this was also expressly considered and rejected, with the Court of Appeal describing the Respondent's contention as "'defy[ing] both logic and common sense'": **CA [104]** (**CAB 212**) *cf* **RS [48]–[50]**, **[53]**, **[55]**. On the same theme, the Court rejected that the clause operated only as a lawful direction, again by reference to *Romero* where a similar argument was "readily rejected": **CA [105]** (**CAB 212–3**) *cf* **RS [49]–[51]**.

18. As to the supposed non-contractual quality of certain of the language used, this was rejected with the Court considering closely various aspects of that language and finding "significant parts … contain assurance or promises" with those parts dealing with disciplinary procedural steps "very much in this category": **CA [92]–[97]** (**CAB 210–1**), **[109]** (**CAB 213**)[9] *cf* **RS [52]**.

Dated: 7 June 2024

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6 Nothing said in *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* (2005) 93 SASR 179 controverts the Court of Appeal's approach: *cf* **RS fn 52**.

7 (2014) 231 FCR 403.

8 (2014) 231 FCR 403 at [55] (the Court).

9 See also particularly, e.g., **PJ [388]–[390]** (**CAB 112–3**), **[396]–[409]** (**CAB 114–6**), **[411]–[423]** (**CAB 116–9**).