HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ADAM ELISHA**
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS

2. ***Ground of appeal 2: Damage was too remote*:** Even if the "possibility" of psychiatric injury was acknowledged at **CA [188]** (**CAB 229**), it was correctly regarded as being so remote that it failed to meet the threshold of "serious possibility", "not unlikely" or "on the cards" required to establish that such damage ought reasonably to have been in the contemplation of the parties when they made the 2006 Contract: (**CA [190]**; **CAB 230**): **RS [15]–[16]**.

3. The unchallenged findings at **CA [188]** (**CAB 229**) were soundly based on the evidence below, which gainsays — rather than supports (cf **AR [2]**) — the proposition that the potential for psychiatric injury was recognised by individuals within the respondent. Those findings, fortified by the medical evidence of Associate Professor Doherty (**CA [185]–[187]**; **CAB 228–9**), deal with the appellant's assertion that stress at work "notoriously" leads to psychiatric injury: **RS [16]–[17]**.

4. ***Ground of appeal 2: No damages for the manner of dismissal in contract*:** The relevant part of the ratio decidendi in *Addis v Gramophone Co Ltd* [1909] AC 488 [**JBA vol 3, tab 18, 611**] is that an employee cannot recover damages for the manner of his or her dismissal in an action for breach of contract. That principle was clearly stated by Lord Loreburn LC with the firm concurrence of the other members of the majority: **RS [18]–[19]**. His Lordship was there addressing one of the two ways in which the jury could have determined the factual foundation for the award of damages.

5. The principle in *Addis* was regarded as settled law in 1968 when the Donovan Report recommended the enactment of unfair dismissal laws in the United Kingdom: **RS [24]**. By the ensuing statutory unfair dismissal code, the United Kingdom Parliament established a scheme that imposed limits on who could apply, the timing of any application, the grounds upon which any application could be made, and the remedies that would be available in the event of success. The scheme conferred exclusive jurisdiction on a specialist tribunal rather than a court: *Johnson v Unisys Ltd* [2003] 1 AC 518, 526 [2] (Lord Nicholls), 543 [54] (Lord Hoffmann), 550 [80] (Lord Millett) [**JBA vol 4, tab 26, 1127**].

6. The evident intent of the Parliament was to balance the interests of employees and employers, and the broader social and economic interests of the country as a whole, in cases of unfair dismissal: *Eastwood v Magnox Electric plc* [2005] 1 AC 503, 524 [13] (Lord Nicholls) [**JBA vol 3, tab 20, 720**]. Subsequent challenges to the principle in *Addis* in the United Kingdom were met with the insuperable difficulty that the Parliament had entered the field to remedy the perceived deficiencies of the common law and any intervention by the courts would therefore undermine the carefully calibrated balancing of interests intended by the Parliament: **RS [25]**.

7. In both *Johnson v Unisys Ltd* and *Eastwood*, Lord Steyn questioned the conventional interpretation of *Addis* as well as the adequacy of the statutory unfair dismissal code. His Lordship's views were obiter dicta. They were not accepted by any other member of the House of Lords in *Eastwood*. In so far as his Lordship questioned the adequacy of the statutory unfair dismissal code, his view amounted to little more than an expression of dissatisfaction with the policy choices made by the Parliament. Any submission advanced in reliance on those views should therefore be rejected: **AS [26]–[32]**.

8. Having subjected the position in the United Kingdom to appropriate inspection at the border, Australian courts have correctly eschewed any development of the common law that would undermine the carefully calibrated balancing of interests intended by the Commonwealth Parliament in enacting the statutory unfair dismissal code in Australia: **RS [28]**. Such an approach has been approved by members of this Court: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 210–11 [93]–[96] (Kiefel J), 217 [118] (Gageler J) [**JBA vol 2, tab 14, 358**].

9. ***Ground of appeal 1: No extension of the duty of care*:** The courts in both Australia and the United Kingdom have also correctly eschewed attempts to extend the employer's duty of care in tort to cover the incidents of the contract of employment: **RS [25], [37]–[40]**. Any such extension would lead to incoherence with the statutory unfair dismissal code as well as the law of contract. It would also give rise to tension with the existing duty: **RS [36], [41]–[42]**.

10. ***Ground of contention 1: The 2015 Disciplinary Procedure was not a term of the 2006 Contract*:** The legal framework governing employment relationships in Australia is defined by statute and by common law principles. That framework informs the content and construction of the contract of employment: *Barker* at 178 [1] (French CJ, Bell and Keane JJ) [**JBA vol 2, tab 14, 358**]. Properly construed, the relevant clause of the 2006 Contract (**RS [43]–[48]**) expressly recorded the basic contractual obligation imposed on the appellant to comply with the directions contained in the respondent's policies and procedures (**RS [49]–[50]**).

11. **CA [103]** (**CAB 212**) impermissibly re-writes the 2006 Contract to circumvent the express term in the acceptance clause governing variation. On the Court of Appeal's construction, the creation of a post-contractual policy or procedure would effect a variation of the 2006 Contract in the absence of "mutual agreement between the parties." The Court recognised that there had been no amendment by mutual agreement: **RS [49]**, **[51]**.

12. The 2015 Disciplinary Procedure mirrored the content of the 2013 EA: **RS [9]**. In addition, the statutory unfair dismissal code prescribes the same kind of considerations in determining the merits of a claim. In that context, the absence of contractual force in the 2015 Disciplinary Procedure does not result in any absence of mutuality of obligation: cf **CA [104], [106], [108]**; **CAB 212–13**. To the contrary, it would defy both logic and common sense to suggest that the parties intended that procedure to be enforceable by way of an action for damages at common law when relief was already available under pts 3-2 and 4-1 of the *Fair Work Act*: *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22, 54 [94] (Lord Mance JSC) [**JBA vol 3, tab 21, 755**]: **RS [53]–[54]**. The 2015 Disciplinary Procedure was intended to facilitate the respondent's compliance with the statutory unfair dismissal code and the 2013 EA: **RS [55]** (cf **CA[105]–[106]**; **CAB 212–13**).

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