HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 22 May 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

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

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ADAM ELISHA
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

RESPONDENT'S SUBMISSIONS[1]

PART I: CERTIFICATION

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

PART II: STATEMENT OF THE ISSUES

2. Were the relevant parts of the 2015 Disciplinary Procedure incorporated as terms of the 2006 Contract?

3. Was Mr Elisha's damage too remote to be compensated by an award of damages in contract?

4. Can an employee recover damages for breach of an employment contract for the manner of his or her dismissal?

5. Does the duty of care owed by an employer to its employees extend to the incidents of the employment contract?

PART III: NOTICE OF CONSTITUTIONAL MATTER

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

---

[1] The respondent (**Vision**) adopts the definitions used by Mr Elisha in his submissions (**AS**).

PART IV: MATERIAL FACTS

7. The parties entered into a contract of employment dated 27 September 2006 (**2006 Contract**), which included the following clauses (**CA [8]–[11], [13]; CAB 190–1**):

> **Conditions of Employment**
>
> Your engagement will be governed by the terms of this letter and the Community Employment, Training and Support Services Award 1999.
>
> …
>
> **Termination**
>
> Either party may terminate this contract by giving one (1) month's written notice. The Organisation reserves the right to require you to work out the notice period, pay you out in lieu of working or a combination of both.
>
> **Other conditions**
>
> In addition, Employment Conditions will be in accordance with regulatory requirements and Vision Australia Policies and Procedures. Breaches of the Policies and Procedures may result in disciplinary action.
>
> …
>
> **ACCEPTANCE:**
>
> This contract may be amended from time to time by mutual agreement between the parties.
>
> I have read and fully understand the terms and conditions of employment detailed in this contract. I agree to comply with these terms and conditions of employment and all other Company Policies and Procedures.
>
> …

8. Mr Elisha sued Vision on the 2006 Contract, and in the tort of negligence, for damages in respect of a psychiatric injury he sustained as a consequence of the termination of his employment on 29 May 2015. At trial, he succeeded in contract but not in tort.

9. The trial judge found that the 2006 Contract contained terms that were incorporated from two extraneous documents — namely, a "Disciplinary Procedure" of Vision dated April 2015 (**2015 Disciplinary Procedure**) and the *Vision Australia Unified Enterprise Agreement 2013* (**2013 EA**). Neither of those documents existed when the 2006 Contract was made. The 2015 Disciplinary Procedure relevantly stated that, where a concern of a serious nature was raised in relation to the performance or conduct of an employee, a formal disciplinary meeting would occur; that the employee would be provided with a letter containing a written outline of the allegations; and that the employee would be given an opportunity to respond to the allegations at the formal disciplinary meeting. Clause

47.5 of the 2013 EA was substantially similar to the relevant parts of the 2015 Disciplinary Policy.

10. The trial judge found that Vision had breached the 2006 Contract because, contrary to both the 2015 Disciplinary Procedure and clause 47.5 of the 2013 EA, it had not provided Mr Elisha with notice of an allegation that he had a history of aggression and excuse making or given him an opportunity to respond to that allegation.

11. Vision appealed against the trial judge's decision (**CA [47]; CAB 199**). Mr Elisha filed a notice of contention in respect of his claimed cause of action in tort (**CA [48]; CAB 199–200**), which elicited cross contentions from Vision. The Court of Appeal allowed the appeal and rejected the notice of contention (**CA [256]–[258]; CAB 244**).

12. As to the case in contract, the Court of Appeal accepted Vision's submission that the 2013 EA was not incorporated into the 2006 Contract but rejected Vision's submission that the relevant parts of the 2015 Disciplinary Procedure were not incorporated (**CA [111]; CAB 214**). The Court went on to accept Vision's submission that Mr Elisha's damage was too remote to be compensated by an award of damages in contract (**CA [170]–[191]; CAB 226–30**). Further, in obiter dicta, the Court considered that the decision in *Addis v Gramophone Co Ltd*[2] also precluded the recovery of damages in contract in the circumstances of the present case (**CA [192], [197]–[217]; CAB 230–6**).

13. As to the case in tort, the Court of Appeal followed a well-established line of authority at the intermediate appellate court level to the effect that an employer's duty of care does not extend to the incidents of the contract of employment, such as the conduct of disciplinary processes (**CA [245]–[255]; CAB 241–4**).

PART V: ARGUMENT ON THE APPEAL

Ground of appeal 2: Damage was too remote

14. Ground of appeal 2 does not arise for consideration if the Court upholds ground 1 in Vision's notice of contention. The notice of contention is addressed in Part VI below.

---

2 [1909] AC 488 (***Addis***).

15. Contrary to **AS [39]**, the Court of Appeal did not affirm the trial judge's finding that there was a possibility of some psychological impact as a result of Vision's failure to put the allegation to Mr Elisha. Having reviewed the evidence, the Court considered that the trial judge *might* have been correct to make that finding, but it immediately went on to acknowledge that "the existence of such a remote possibility is insufficient, having regard to the degree of relevant knowledge of Vision at the requisite time" (**CA [188]; CAB 229**).

16. Importantly, Mr Elisha does not challenge the Court of Appeal's factual findings at **CA [188]** (**CAB 229**) that, as at 2006:

    (a) Vision had no knowledge of any vulnerability on the part of Mr Elisha;

    (b) there was no basis upon which any Vision employees had cause to be concerned about the impact on Mr Elisha's physical or psychological wellbeing of a potential breach of disciplinary procedures; and

    (c) Vision had not otherwise acknowledged the specific risk of psychological damage from any failure to put allegations to Mr Elisha or any other employee.

    In view of those unchallenged findings, the Court of Appeal was correct to conclude that, as at the time of the making of the 2006 Contract, the type of damage suffered by Mr Elisha as a result of the breaches identified by the trial judge could not reasonably have been in the contemplation of the parties (**CA [190]; CAB 230**).

17. Mr Elisha's reference to *Goldman Sachs JBWere Services Pty Ltd v Nikolich*[3] does not advance his case. It is wrong to elevate findings of fact made in other cases to a principle of law.[4] In any event, there was no reason to impute to the parties knowledge that distress "notoriously" leads to psychiatric injury. The evidence adduced below was to the contrary (**CA [182]–[187]; CAB 228–9**). Further, the plurality in *Koehler v Cerebos (Australia) Ltd* observed that, while it is now a matter of general knowledge that some recognisable psychiatric illnesses might be triggered by stress, "[i]t is … a further and much larger step

---

3 [2007] FCAFC 120 (***Nikolich***).

4 See, eg, *Teubner v Humble* (1963) 108 CLR 491, 503–4 (Windeyer J, McTiernan J agreeing at 499); *Bus v Sydney County Council* (1989) 167 CLR 78, 89 (Mason CJ, Deane, Dawson and Toohey JJ).

to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work."[5]

Ground of appeal 2: Damages for the manner of dismissal are unavailable

18. The headnote correctly recorded the ratio of *Addis*. The ratio was stated by Lord Loreburn LC (at 490–1) as follows:

> 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 in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. … 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. …
>
> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity 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.

19. Each of Lords James (at 492.3, 492.9), Atkinson (at 493.1), and Gorrell (at 502.5, read with the comments at 501.7 and 502.1) expressed their concurrence in firm and comprehensive terms. While not specifically expressing concurrence, the opinion of Lord Shaw sat on all fours with that of Lord Loreburn LC (see at 504.2, 504.7–.9, 505.1), and his Lordship directly disagreed with the dissenting opinion of Lord Collins (at 502.8–503.2).

20. There are three aspects to the rule in *Addis*. Damages for dismissal cannot include: (1) compensation for the manner of dismissal; (2) compensation for injured feelings; or (3) compensation for any loss the employee may sustain from the fact that the dismissal of itself makes it more difficult to obtain fresh employment. Each of these aspects of the rule was specifically identified by Lord Loreburn LC.

21. The second and third aspects of the rule in *Addis* can be dealt with briefly as they do not arise for determination in the present case.

---

[5] (2005) 222 CLR 44, 57 [34] (McHugh, Gummow, Hayne and Heydon JJ).

22. The second aspect of the rule was simply an application of the existing law to the particular facts of the case.[6] This second aspect of the rule is subject to some exceptions, which have been identified in the United Kingdom and Australia.[7] One of the exceptions concerns contracts whose objects are to provide pleasure, peace of mind or freedom from molestation and the like.[8] That exception is the subject of ongoing development,[9] but it has no relevance to contracts of employment (**CA [203]; CAB 233**).[10] Another exception permits damages for injured feelings where the breach causes physical injury.[11] Contrary to Vision's submission below, which was accepted by the Court of Appeal at **CA [205]–[206] (CAB 234)**, both Mason CJ (with whom Toohey and Gaudron JJ agreed) and McHugh J considered that physical injury included psychiatric injury. The fact that this particular exception extends to psychiatric injury, however, says nothing about the first or third aspect of the rule. The exception concerns only the second aspect of the rule.[12]

23. The third aspect of the rule directly overturned the earlier decision of the English Court of Appeal in *Maw v Jones*.[13] Damages are not available for any stigma arising from the dismissal.

24. The present case concerns only the first aspect of the rule in *Addis*. Contrary to **AS [27]**, the comment of Lord Loreburn LC (at 490.9) to the effect that the result would be the

---

6 *Hamlin v The Great Northern Railway Co* (1856) 1 H & N 408, 411; 156 ER 1261, 1262 (Pollock CB for the Court). See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 360–1 (Mason CJ) (***Baltic Shipping***).

7 In the United Kingdom, see *Watts v Morrow* [1991] 1 WLR 1421, 1445F–H (Lord Bingham); *Johnson v Gore Wood & Co* [2002] 2 AC 1, 37D–38D (Lord Bingham); 42A–C (Lord Goff). In Australia, see *Baltic Shipping* (1993) 176 CLR 344, 362–3 (Mason CJ), 381 (Deane and Dawson JJ), 405 (McHugh J).

8 *Baltic Shipping* (1993) 176 CLR 344, 362–3 (Mason CJ), 381 (Deane and Dawson JJ), 405 (McHugh J).

9 In the United Kingdom, see *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344; *Farley v Skinner* [2002] 2 AC 732. In Australia, see *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326; *Young v Chief Executive Officer (Housing)* (2023) 97 ALJR 840.

10 See also *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 187 [44] (Kiefel CJ, Keane and Edelman JJ) (***Personnel Contracting***) and the prescient observations of Jessup J in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450, 519–20 [310] (dissenting, upheld in this Court).

11 *Baltic Shipping* (1993) 176 CLR 344, 362 (Mason CJ), 405 (McHugh J).

12 Ibid 362 n 95 (Mason CJ, Toohey J agreeing at 383, Gaudron J agreeing at 387), 405 (McHugh J). *Baltic Shipping* relevantly concerned only damages for mere distress. Ms Dillon's award of damages of $35,000 in respect of her psychiatric injury was not the subject of the appeal to this Court. See the table of damages at 373 (Deane and Dawson JJ). See also *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, 25–6 (Kirby P).

13 (1890) 25 QBD 107.

same even if *Addis* were not a dismissal case does not detract from the force of the principle that damages cannot include compensation for the manner of dismissal. That principle was regarded as settled law in the United Kingdom when the Donovan Report[14] recommended that, in the face of the "strictly limited" protection at common law, legislation should be introduced to safeguard employees against unfair dismissal. In referring to the "strictly limited" protection at common law, the Donovan Report specifically cited the decision in *Addis*. The recommendation in the Donovan Report resulted in the introduction of a statutory unfair dismissal regime in the United Kingdom in 1971.[15]

25. The House of Lords firmly rejected later attempts to overturn the rule in *Addis*.[16] The claims in both *Johnson v Unisys Ltd* and *Eastwood v Magnox Electric plc* were for damages in respect of psychiatric injury arising from the manner of dismissal. In each case, the House of Lords held that damages could not be awarded for a breach of the implied term of trust and confidence connected with the dismissal because any such development of the common law could not co-exist satisfactorily with the statutory unfair dismissal code.[17] Thus, "[f]or the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in

---

[14] *Report of the Royal Commission on Trade Unions and Employers' Associations 1965–1968*. The relevant part of that report was set out in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22, 34 [19] (Lord Dyson JSC) (***Edwards***).

[15] See *Edwards* [2012] 2 AC 22, 34–5 [19]–[21], 42 [43] (Lord Dyson JSC); *Eastwood v Magnox Electric plc* [2005] 1 AC 503, 521–2 [1]–[3] (Lord Nicholls) (***Eastwood***).

[16] *Johnson v Gore Wood & Co* [2002] 2 AC 1, 37D–38D (Lord Bingham), 42A-C (Lord Goff), 56A (Lord Hutton), 68C (Lord Millett); *Johnson v Unisys Ltd* [2003] 1 AC 518, 541 [44] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]), 546–8 [68]–[72], 548–9 [76] (Lord Millett, Lord Bingham agreeing at 526 [1]); *Eastwood* [2005] 1 AC 503, 521–2 [1]–[3] (Lord Nicholls, Lord Hoffmann agreeing at 537 [52], Lord Rodger agreeing at 537 [53], Lord Brown agreeing at 537 [54]); *Edwards* [2012] 2 AC 22, 35 [21], 35–6 [24], 41–2 [41]–[43] (Lord Dyson JSC), 51–2 [80]–[82] (Lord Phillips PSC), 53–4 [91], 56–7 [102] (Lord Mance JSC).

[17] *Johnson v Unisys Ltd* [2003] 1 AC 518, 542–4 [50]–[58] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]), 546–8 [69]–[76] (Lord Millett, Lord Bingham agreeing at 526 [1]); *Eastwood* [2005] 1 AC 503, 521 [1]–[3], 524 [12]–[14] (Lord Nicholls, Lord Hoffmann agreeing at 537 [52], Lord Rodger agreeing at 537 [53], Lord Brown agreeing at 537 [54]).

application and extent."[18] By extension, it was held that the employer's duty of care in tort did not extend to cover the manner of dismissal for the same reasons.[19]

26. In *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*, the Supreme Court of the United Kingdom held that the rule in *Addis* precluded an award of damages for breach of an express term that incorporated a disciplinary procedure into the contract of employment, at least where the damage in question was inextricably linked to the fact of dismissal.[20]

27. In Australia, despite being given the opportunity to reconsider the decision in *Addis*, the High Court in *Baltic Shipping* refused to do so. Intermediate appellate courts have applied *Addis* (**CA [201]; CAB 232–3**).

28. The origins of the statutory unfair dismissal regimes in Australia were similarly influenced by the Donovan Report.[21] By pt 3-2 of the *Fair Work Act 2009* (Cth), the Commonwealth Parliament has established a specialist tribunal to hear claims, limited the categories of employee who can make a claim, limited the considerations that are relevant to determining whether the dismissal was unfair, and limited the available remedies to either reinstatement (the primary remedy) or an order for the payment of compensation (capped at six months' remuneration). In *New South Wales v Paige*,[22] Spigelman CJ (with whom Mason P and Giles JA agreed) conducted a careful and comprehensive analysis of the House of Lords' decision in *Johnson v Unisys Ltd* and applied the reasoning in that case to the statutory unfair dismissal regimes in Australia. In doing so, his Honour applied the rule in *Addis* and refused to extend the duty of care

---

18 *Johnson v Unisys Ltd* [2003] 1 AC 518, 544 [58] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]).

19 Ibid 544 [59] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]), 550 [81] (Lord Millett, Lord Bingham agreeing at 526 [1]); *Eastwood* [2005] 1 AC 503, 523 [10] (Lord Nicholls, Lord Hoffmann agreeing at 537 [52], Lord Rodger agreeing at 537 [53], Lord Brown agreeing at 537 [54]).

20 [2012] 2 AC 22, 41 [39] (Lord Dyson JSC, Lord Walker JSC agreeing, Lord Mance JSC agreeing at 53 [89]), 71 [156] (Lord Kerr JSC, Lord Wilson JSC agreeing). See also *Johnson v Unisys Ltd* [2003] 1 AC 518, 545–6 [60]–[66] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]).

21 *Termination, Change and Redundancy Case* (1984) 8 IR 34, 37–40, 89. The first unfair dismissal law was introduced by the South Australian legislature in 1972, about four years after the Donovan Report: Andrew Stewart et al, *Creighton and Stewart's Labour Law* (2016, Federation Press, 6th ed) 770 [23.26]. Unfair dismissal regimes still exist at State level for non-national system employees: see *Industrial Relations Act 1979* (WA) s 23A; *Industrial Relations Act 1984* (Tas) s 30; *Fair Work Act 1994* (SA) pt 6; *Industrial Relations Act 1996* (NSW) pt 6; *Industrial Relations Act 2016* (Qld) ch 8, pt 2.

22 (2002) 60 NSWLR 371 (***Paige***).

in tort. His Honour concluded that it was not for the common law to undermine the "carefully calibrated balancing of conflicting interests … between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand."[23]

29. The invitation at **AS [33]** to follow the development of the law in Canada and New Zealand should be rejected. In each of those jurisdictions, the common law has developed differently and in a different statutory context. In *Commonwealth Bank of Australia v Barker*, French CJ, Bell and Keane JJ warned that judicial decisions about employment contracts in other common law jurisdictions must be "subject to inspection at the border to determine their adaptability to native soil."[24] In Canada, the weakness of statutory protections for employees has provided more fertile ground for jurisprudential innovation of employment law.[25] In 2008, the Canadian Supreme Court recognised an obligation of good faith and fair dealing on the part of employers in dismissing employees and held that damages for a breach of that obligation could include compensation for mental distress that was not too remote.[26]

30. In New Zealand, the application of the rule in *Addis* to the manner of dismissal was the subject of debate until 1991.[27] The rule became irrelevant in practice upon the enactment of the *Employment Contracts Act 1991* (NZ), which extended the statutory unjustifiable dismissal remedy to all employment contracts.[28] The subsequent decisions cited at **AS [33] n 20** turned on the statutory provisions, not the common law. The law in New Zealand was further developed by the enactment of the *Employment Relations Act 2000* (NZ), which implied into all employment contracts a statutory obligation of good faith on the part of employers.

---

[23] Ibid 400 [154], quoted in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 217 [118] (Gageler J) (***Barker***).

[24] (2014) 253 CLR 169, 185 [18].

[25] See Claire Mummé, "A Comparative Reflection from Canada — A Good Faith Perspective" in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 295, 298, 307–9.

[26] *Honda Canada Inc v Keays* [2008] 2 SCR 362, 390 [57] (Bastarache J for McLachlin CJ, Bastarache, Binnie, Deschamps, Abella, Charron and Rothstein JJ), 413–14 [114] (LeBel J for LeBel and Fish JJ).

[27] *Brandt v Nixdorf Computer Ltd* [1991] 3 NZLR 750, 761–2 (Greig J).

[28] *Air New Zealand Ltd v Johnston* [1991] 1 NZLR 159, 165 (Cooke P, Casey and Jeffries JJ agreeing at 169). See also Gordon Anderson, "The Common Law and the Reconstruction of Employment Relationships in New Zealand" (2016) 32 *International Journal of Comparative Labour Law* 93, 113.

31. The attempt at **AS [37]** to deploy Spigelman CJ's comments in *Paige* about the creative development of the implied term of mutual trust and confidence in the United Kingdom does not take matters far. That term is not part of the common law of Australia, and in any event, it would not intrude upon the rule in *Addis*.[29] It is of no assistance to have regard to whatever sentiments a particular employee may attach to his or her employment: cf **AS [38]**. The common law governing the employment relationship is concerned with the legal rights and duties of the parties, not their social or psychological expectations.[30] The law of contract does not make one party responsible for another party's "identity and self-esteem".[31]

32. The Court of Appeal was correct to hold that the rule in *Addis* precludes the recovery of damages for psychiatric injury for the manner of dismissal. A conclusion to the contrary would frustrate the ability of contracting parties to secure certainty over the extent of their liabilities in the event of default. It would retrospectively disturb the allocation of risk in every existing contract of employment. Such an outcome would have significant consequences for the conduct of commercial enterprises.

Ground of appeal 1: No extension of the employer's duty of care to the incidents of the contract of employment

33. By this ground of appeal, Mr Elisha contends that Vision's "duty to provide a safe system of work" extended to the conduct of the disciplinary procedure that led to the termination of his contract of employment.

34. It is well known that an employer has a duty to take reasonable care to avoid exposing its employees to unnecessary risks of injury and that one aspect of that duty relates to the provision of a reasonably safe system of work.[32] Mr Elisha's reference to Vision's

---

[29] See the discussion of the "Johnson exclusion area" in *Eastwood* [2005] 1 AC 503, 528 [27]–[28] (Lord Nicholls of Birkenhead, Lord Hoffmann agreeing at 537 [52], Lord Rodger agreeing at 537 [53], Lord Brown agreeing at 537 [54]).

[30] *Personnel Contracting* (2022) 275 CLR 165, 187 [44] (Kiefel CJ, Keane and Edelman JJ).

[31] See *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450, 520 [310] (Jessup J).

[32] *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, 307–8 (Mason, Wilson and Dawson JJ), quoting *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, 25 (Dixon CJ and Kitto J, Fullagar J agreeing at 32). The employer's duty of care is conventionally described as having a "threefold sub-division" relating to premises, plant and system: see, eg, *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, 759 (Lord

obligation to provide a "safe system of work", however, conceals the novelty of the proposed extension of the duty in the present case. As Spigelman CJ observed in *Paige*, the body of case law dealing with a "system of work" is concerned with the performance of workplace tasks.[33] Thus, in *Speed v Thomas Swift & Co Ltd*, Lord Greene MR said that a "system of work" includes "such matters as the physical lay-out of the job — the setting of the stage, so to speak — the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions."[34] While his Lordship was not purporting to set down a definition, it is apparent that matters unrelated to the performance of workplace tasks would fall outside the "system of work". The acceptance of the proposed extension of the duty would therefore involve a radical departure from what is currently understood to constitute a "system of work".

35. More fundamentally, as this Court recognised in *Sullivan v Moody*, the law of negligence should not be developed so as to "subvert … other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."[35] The proposed extension of the duty should be rejected because:

(a) it would lead to incoherence between the law of tort, on the one hand, and the law of contract and the statutory law of unfair dismissal, on the other; and

(b) it would be incompatible with the existing duty of care owed by employers to other employees.

36. *Incoherence with contract*: If the duty of care owed by an employer to its employee were extended to what Spigelman CJ in *Paige* called "the incidents of the contract of employment" — such as the employer's right to discipline or dismiss the employee — there would be incoherence between the law of tort and the law of contract.

Denning); *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672, 680 (Mason J, Deane J agreeing at 694, Dawson J agreeing at 695).

[33] (2002) 60 NSWLR 371, 387–8 [78] (Mason P agreeing at 416 [330], Giles JA agreeing at 419 [358]). By way of example, see *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316, 319 (Windeyer J, McTiernan J agreeing at 317, Kitto J agreeing at 317, Taylor J agreeing at 317, Owen J agreeing at 324); *Czatyrko v Edith Cowan University* (2005) 214 ALR 349, 353 [12]–[13] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ).

[34] [1943] 1 KB 557, 563, cited in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424, 447 n 93 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

[35] (2001) 207 CLR 562, 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

The incoherence would arise because the employer's exercise of its contractual rights would become subject to an overarching duty of care imposed by the law of tort. In the present case, for example, each party had the contractual right to terminate the 2006 Contract on giving one month's written notice to the other. At common law, Vision was not bound to act reasonably in the exercise of that right; nor was it bound to give reasons to Mr Elisha or otherwise to accord him procedural fairness.[36] If the proposed extension of the duty were accepted, however, Vision would have been obliged to take reasonable care in the exercise of its contractual right of termination if it knew, or ought reasonably to have foreseen, that Mr Elisha was at risk of suffering psychiatric injury. In addition, the same obligation would have been imposed on Vision in the exercise of its contractual right to take disciplinary action against Mr Elisha for any alleged breach of its policies and procedures. In each case, the law of tort would have interfered with the exercise of the parties' contractual rights.

37. *Incoherence with statute*: Legislation and the common law exist in a "symbiotic relationship". They are not separate and independent sources of law.[37] For the reasons explained at [24] to [28] above, the proposed extension of the duty would lead to incoherence between the law of tort and the statutory law of unfair dismissal.

38. In *Johnson v Unisys Ltd*, Lord Hoffmann concluded that "the grounds upon which … it would be wrong to impose an implied contractual duty [with respect to the manner of dismissal] would make it equally wrong to achieve the same result by the imposition of a duty of care."[38] Lord Millett similarly concluded that "it would not be appropriate to attempt to achieve the same result by taking the novel course of subjecting an employer's contractual rights to a tortious duty of care."[39]

39. In *Paige*, Spigelman CJ said that the arguments and factors accepted in *Johnson v Unisys Ltd* were directly applicable to the statutory unfair dismissal regimes in Australia such

---

[36] *Johnson v Unisys Ltd* [2003] 1 AC 518, 540 [40] (Lord Hoffmann, Lord Bingham agreeing at 526 [1]), quoting *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1581 (Lord Reid); *Intico Pty Ltd v Walmsley* [2004] VSCA 90, [3] (Ormiston JA), [17] (Buchanan JA), [27] (Eames JA).

[37] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31] (Gleeson CJ). See also *Barker* (2014) 253 CLR 169, 185 [19] (French CJ, Bell and Keane JJ).

[38] [2003] 1 AC 518, 544 [59].

[39] Ibid 550 [81].

that the duty of care in negligence should not be extended to provide an alternative cause of action for unfair dismissal. As his Honour suggested, the proposed extension of the duty might distort the carefully calibrated balance of conflicting interests secured by the unfair dismissal regimes.[40] The importance of protecting against the intrusion of the common law into that carefully calibrated balance of conflicting interests — albeit by the posited implied term of trust and confidence — was also emphasised by two members of the High Court in *Commonwealth Bank of Australia v Barker*.[41] The Court of Appeal correctly recognised that *Paige* had been applied in a number of subsequent cases at the intermediate appellate court level and that its ratio extended beyond the particular statutory regime applicable to teachers in New South Wales (**CA [250], [252]; CAB 242–3**). In particular:

(a) the Court of Appeal itself had applied *Paige* in *Lloyd v Healthscope Operations Pty Ltd*;[42]

(b) the New South Wales Court of Appeal had applied *Paige* in *Shaw v New South Wales*;[43] and

(c) the Queensland Court of Appeal had applied *Paige* in *Govier v The Uniting Church in Australia Property Trust (Q)*[44] and *Potter v Gympie Regional Council*.[45]

40. As to **AS [54]**, the minor differences between the statutory regimes in the United Kingdom and Australia are irrelevant. They simply reflect the different policy choices made in each jurisdiction to deal with the perceived inadequacies of the common law. As the Court of Appeal observed, the restriction in s 392(4) of the *Fair Work Act* on "compensation for shock, distress or humiliation, or other analogous hurt" was intended to reflect the common law position as stated in *Addis* and *Baltic Shipping* (**CA [249]; CAB 242**). The reference at **AS [54] n 51** is misplaced. In *Edwards*, the Supreme Court

---

40 (2002) 60 NSWLR 371, 400 [154]–[155].

41 (2014) 253 CLR 169, 210–11 [93]–[96] (Kiefel J), 217 [118] (Gageler J).

42 [2021] VSCA 327, [67] (Beach and Osborn JJA and Forbes AJA).

43 (2012) 219 IR 87, 115 [122]–[127] (Barrett JA, Beazley JA agreeing at 91 [1], McColl JA agreeing at 91 [2], Macfarlan JA agreeing at 91 [3], McClellan CJ at CL agreeing at 117 [136]).

44 [2017] QCA 12, [66]–[78] (Fraser JA, Gotterson JA agreeing at [87], North J agreeing at [88]).

45 [2022] QCA 255, [30]–[36] (Flanagan JA, Mullins P agreeing at [1], Williams J agreeing at [83]).

of the United Kingdom followed *Johnson v Unisys Ltd* notwithstanding the intervening decision in *Dunnachie v Kingston-upon-Hull City Council*.[46]

41. *Incompatibility with existing duty*: The employer's existing duty of care requires it to employ a reasonably competent workforce as an aspect of its broader obligation to provide a reasonably safe system of work. Thus, the employer can be liable in negligence for injury caused to one of its employees by its failure to discipline or dismiss a fellow employee who was a source of danger in the workplace.[47] The proposed extension of the duty would be incompatible with this aspect of the existing duty. A tension would arise between competing aspects of the duty. There would be a real risk that the employer's novel duty to take reasonable care to avoid causing psychiatric injury to one employee would impede its ability to discharge its existing duties to other employees who might be placed at risk of injury by the presence of the first employee. The tension would arise in any case where an employee's incompetence or misconduct (such as bullying or harassment) creates a source of danger to other employees in the workplace.

42. As to **AS [47]**, the Queensland Court of Appeal in *Hayes v Queensland* held that the employer's duty of care required it to provide support to four of its managers during an investigation of complaints made against them by other employees. With the support of their union, the complaining employees had embarked upon an industrial campaign to remove the managers, which included picketing and media coverage. The duty did not concern the conduct of the investigation or any decision-making in relation to the subject matter of the complaints. As such, the duty did not extend to the incidents of the managers' contracts of employment. The Queensland Court of Appeal applied *Paige* to excise from the duty the particulars that went to the manner of the employer's investigation, as opposed to the support that the employer should have offered to the managers on the commencement of that investigation.[48]

---

46 [2005] 1 AC 226.

47 *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348, 350–2 (Streatfeild J). See also Justice H H Glass, Michael H McHugh, Francis M Douglas, *The Liability of Employers in Damages for Personal Injury* (Law Book, 2nd ed, 1979), 48–9.

48 *Hayes v Queensland* [2017] 1 Qd R 337, 346 [7] (McMurdo P), 374–5 [121] (Dalton J, Mullins J agreeing at 369–70 [99]–[101]).

PART VI: ARGUMENT ON THE NOTICE OF CONTENTION

Ground of contention 1: The 2015 Disciplinary Procedure was not incorporated into the 2006 Contract

43. The principles applicable to the construction of the 2006 Contract were not in dispute (**CA [49]–[50], [89]; CAB 200, 210**). The importance of certainty, at the time of entry into the contract, informs the objective determination of the parties' rights and obligations by reference to the text, context and purpose of the contract. The relevant context includes the entire text of the contract as well as any document or statutory provision referred to in the text of the contract.[49]

44. It is in the application of those principles that the Court of Appeal wrongly concluded that, by the "Other Conditions" clause, the 2006 Contract incorporated the 2015 Disciplinary Procedure (**CA [97]–[108]; CAB 211–13**). The Court failed to construe the 2006 Contract in a way that would have enabled the parties to ascertain their rights and obligations with certainty at the time it was made.

45. The analysis should begin with the text of the "Other Conditions" clause in the context of the whole of the 2006 Contract. The prefatory phrase "In addition" suggests that the "Other Conditions" clause was intended to supplement something that preceded that clause. At the very least, the supplemented content included the "Conditions of Employment" clause, which stated that Mr Elisha's "engagement" would be governed by the terms of the 2006 Contract and the 1999 Award.

46. The "Conditions of Employment" — and therefore the "Employment Conditions" — encompass more than just contractual terms. This is apparent from the 1999 Award and the nebulous "regulatory requirements" being identified as sources of "Employment Conditions". The undefined but capitalised "Vision Policies and Procedures" are also a source of "Employment Conditions". None of the language of the "Other Conditions" clause served to convert any of these sources into contractual terms. It would not make commercial sense to attribute to the parties any intention to do so. By their nature,

---

[49] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ).

"Policies and Procedures" and "regulatory requirements" would not ordinarily be understood as giving rise to contractually-binding rights and obligations.[50] Other than at **CA [98]** (**CAB 211**) when considering whether the 2013 EA was incorporated by reference to "regulatory requirements", neither the trial judge nor the Court of Appeal considered the entire scope of those external sources.[51] That is contrary to the common technique of reading the alleged incorporated material into the contract.[52]

47. The 2006 Contract permitted either party to terminate "this contract" by giving one month's written notice to the other. It did not address summary dismissal. The parties must therefore be taken to have intended the employer's right of summary dismissal to be governed by the common law.[53] When the 2006 Contract was made, there was a comprehensive statutory unfair dismissal regime (**CA [76]–[78]; CAB 206–7**).[54] The trial judge inferred that there were policies in place, including some form of disciplinary procedure, at that time (**CA [55]–[56]; CAB 201**). Viewed objectively, it would not make commercial sense to condition the exercise of an otherwise unconstrained right of summary dismissal in the express terms of the 2006 Contract by incorporating terms that replicated the kind of obligations that would have to be satisfied to meet a statutory unfair dismissal claim. The better construction is that the content of any such policies was intended only to facilitate compliance with the statutory unfair dismissal regime.

48. The "Acceptance" clause provides important context. By that clause, Mr Elisha acknowledged having read and fully understood "the terms and conditions of employment detailed in this contract." He agreed to comply with "these terms and conditions of employment", which must have been a reference to the terms and conditions of

---

50 See *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193, 199–200 [39]–[42] (Lindgren J, dissenting) (***Riverwood***).

51 See Respondent's Book of Further Materials at 19 and 22, where some of the various policies are identified.

52 See, eg, *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* (2005) 93 SASR 179, 185–6 [27]–[29] (Bleby J, Anderson J agreeing at 197 [89]).

53 See above [36].

54 See the historical account of the unfair dismissal provisions in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450, 527–8 [332]–[333] (Jessup J) and *Aldersea v Public Transport Corporation* (2001) 3 VR 499, 514–15 [83]–[89] (Ashley J). Throughout, a central feature has been the obligation to inform the employee of the allegation and to provide the employee with an opportunity to respond to the allegation before the decision to dismiss is made. The 2015 Disciplinary Procedure made direct reference to the minimum employment period for the purposes of the unfair dismissal provisions in the *Fair Work Act* and to the definition of "serious misconduct" in *Fair Work Regulations 2009* (Cth) r 1.07, which underpins the minimum notice provisions in ss 117 and 123(1)(b) of the *Fair Work Act*: see **CAB 245–6**.

employment "detailed in this contract". In addition, he agreed to "comply with all *other* Company Policies and Procedures." He did so, having been told in the "*Other* Conditions" clause that "[b]reaches of [those] Policies and Procedures may result in disciplinary action." The 2006 Contract said nothing about the consequences for Vision of failing to comply with the policies and procedures. In this context, contrary to the finding at **CA [102]–[104]** (**CAB 212**), the obligation to "comply" with the policies and procedures was directed only to Mr Elisha.[55]

49. Such a construction avoids uncertainty. Nothing in the express terms of the 2006 Contract protected Mr Elisha against a decision by Vision to impose further obligations on him by amending the company policies and procedures (or creating new ones), none of which could have been known to the parties at the time of the 2006 Contract. The better construction is that the "Acceptance" clause was simply an agreed record of the basic contractual obligation imposed on employees to comply with the lawful directions contained in Vision's policies and procedures. Such matters are not usually the subject of negotiation. The lawful directions contained in Vision's policies and procedures were applicable to all employees, and a failure on the part of an employee to comply with any of those directions would expose him or her to disciplinary action.[56]

50. The commercial object of the 2006 Contract was to create an employment relationship, which at its core compelled Mr Elisha to obey Vision's lawful directions. This commercial object informed the one-sided obligation on Mr Elisha — the duty to obey lawful orders is not mutual. It also informed why the obligation was immediately followed by a warning of disciplinary action — a refusal to obey gives rise to a right to discipline.[57]

51. The Court of Appeal's finding that the entirety of the policies and regulatory requirements as they might change from time to time were incorporated (**CA [102]–[104]; CAB 212**)

---

[55] An obligation to "comply" has been viewed in cases of incorporation as a one-sided obligation: *Riverwood* (2000) 177 ALR 193, 221–2 [146]–[147] (Mansfield J); *Nikolich* [2007] FCAFC 120, [289] (Jessup J); *Zafiriou v Saint-Gobain Administration Pty Ltd* [2014] VSCA 331, [82] (Osborn JA, Whelan JA agreeing at [145], Ginnane AJA agreeing at [146]).

[56] *Westpac Banking Corporation v Wittenberg* (2016) 242 FCR 505, 519–20 [77]–[80], 526 [108] (Buchanan J).

[57] *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143, 151 (Isaacs ACJ), 155–6 (Gavan Duffy and Starke JJ); ibid 520 [80]–[81].

meant that the parties could not have ascertained their contractual rights and obligations as at the time of the 2006 Contract. The majority in *Riverwood International Australia Pty Ltd v McCormick* sought to address that uncertainty either by implying a term to constrain the employer's discretion to amend its policies or procedures (Mansfield J), or by construing the contract such that the employee was not obliged to abide by any alterations or additions unilaterally made by the employer (North J).[58] With respect, each approach is artificial. The former approach serves only to support the incorporation of extraneous material that gives rise to the very uncertainty that the term is said to be necessary to protect against. The latter approach ignores the fact that the same result could be achieved by issuing a lawful direction (cf **CA [103]; CAB 212**). Neither problem arises on Vision's construction. That construction makes commercial sense because it would have enabled the parties' contractual rights and obligations to be ascertained as at the time of the 2006 Contract. As Buchanan J observed in *Westpac Banking Corporation v Wittenberg*: "The great strength of the law of contract is its identification of certainty of obligations and corresponding rights — at the time the contract is made. Any incorporation must be no less certain — at that time."[59]

52. If, contrary to the above submission, the Court is of the view that the 2015 Disciplinary Procedure was incorporated into the 2006 Contract, in the context of the statutory unfair dismissal regime and the 2013 EA, the Court of Appeal was wrong to conclude that the parties intended the 2015 Disciplinary Procedure to be contractually enforceable (**CA [104]–[107]; CAB 212–13**).

53. The Court of Appeal identified Mr Elisha's obligations under the "Vision Policies and Procedures" and Vision's obligations under the 2015 Disciplinary Procedure (**CA [104]; CAB 212**) as "mutual obligations". In this context, the Court concluded that it "would defy both logic and common sense to suggest that the employer was not [contractually] obliged to take the steps which the policy provided for" and that "[a] reasonable person would readily understand that an employer would similarly be bound by any such policy".

---

[58] (2000) 177 ALR 193, 214 [111] (North J), 223 [152] (Mansfield J).

[59] (2016) 242 FCR 505, 527 [111]. See also ibid 199–200 [39]–[42], 201 [50]–[51] (Lindgren J, dissenting).

54. The 2013 EA imposed "substantially similar" obligations on Vision concerning the procedures to be followed prior to dismissal (**CA [29]–[30]; CAB 195–6**). Mr Elisha could enforce those obligations through the broad remedial provisions in s 50 and pt 4-1 of the *Fair Work Act*, which empower a court to make pecuniary penalty orders as well as orders for reinstatement and uncapped compensation. In April 2015, Vision unilaterally introduced the 2015 Disciplinary Procedure in the form of a mere "policy" rather than as a variation to the 2006 Contract.

55. There was no mutuality of contractual obligation in the terms described at **CA [104]** (**CAB 212**). There was a direct correlative relationship between the "substantially similar" procedural steps in the 2015 Disciplinary Procedure and clause 47.5 of the 2013 EA (which also bore a relationship with the matters to be considered under s 387 of the *Fair Work Act*). Viewed objectively, it made no commercial sense for the parties to replicate those procedural steps in the 2006 Contract so as to give rise to liability both in contract and under statute in the event of non-compliance. The better view is that the 2015 Disciplinary Procedure was intended to facilitate compliance with the 2013 EA rather than to impose contractually binding obligations on Vision.

56. Finally, the Court of Appeal erred in so far as it found that Vision was "implicitly" bound by a term of the 2006 Contract to apply the procedural steps in the 2015 Disciplinary Procedure (**CA [106]; CAB 213**). The requirement of necessity for the implication of any such implied term was not met.[60]

Grounds of contention 2 and 3

57. Vision abandons grounds of contention 2 and 3.

Disposition

58. The appeal should be dismissed with costs.

---

[60] *Barker* (2014) 253 CLR 169, 185–9 [21]–[29] (French CJ, Bell and Keane JJ).

PART VII: ESTIMATED TIME

59. 2.5 hours.

21 May 2024

.....
Paul M O'Grady
Level 21
Aickin Chambers
T (03) 9225 7786
E paul.ogrady@vicbar.com.au

.....
Shaun Gladman
Level 29
Aickin Chambers
T (03) 9225 6638
E sgladman@vicbar.com.au

.....
Leigh R Howard
Level 21
Aickin Chambers
T (03) 9225 7103
E leigh.howard@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **ADAM ELISHA**
Appellant

and

VISION AUSTRALIA LIMITED
Respondent

ANNEXURE

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, Vision sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provisions
1	*Fair Work Act 2009* (Cth)	Current	ss 50, 117, 123(1)(b), pt 3-2, pt 4-1
2	*Fair Work Regulations 2009* (Cth)	Current	r 1.07
2	*Industrial Relations Act 1979* (WA)	Current	s 23A
3	*Industrial Relations Act 1984* (Tas)	Current	s 30
4	*Fair Work Act 1994* (SA)	Current	pt 6
5	*Industrial Relations Act 1996* (NSW)	Current	pt 6
6	*Industrial Relations Act 2016* (Qld)	Current	ch 8, pt 2
7	*Employment Contracts Act 1991* (NZ)	As made	s 40
8	*Employment Relations Act 2000* (NZ)	Current	s 4