CONTRACTUAL DAMAGES FOR PSYCHIATRIC INJURY: LESSONS FROM THE HIGH COURT'S DECISION IN *ELISHA V VISION AUSTRALIA LTD*

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INTRODUCTION:

On 11 December 2024, *the High Court in Elisha v Vision Australia Ltd* [2024] HCA 50; (2024) 99 ALJR 171 ("**Elisha**") found that an employee was not precluded from recovering damages for psychiatric illness in a breach of contract claim. The High Court upheld the $1.44 million in damages awarded at first instance to former Vision Australia adaptive technology consultant Adam Elisha.

Elisha marks a significant development in the law concerning an employee's ability to claim damages associated with the manner of their termination. Historically, damages for breach of employment contracts in Australia had been limited to the direct financial loss arising from the breach.

BACKGROUND

In March 2015, Mr Elisha was an employee of Vision Australia Ltd ("**Vision Australia**"). He was staying at a hotel on a work-related trip, when there was an incident involving a noise complaint. The hotel proprietor alleged that Mr Elisha had been aggressive during that incident. Mr Elisha was told by Vision Australia that an investigation would take place, in line with its 2015 Disciplinary Procedure and the Company's registered Enterprise Agreement (both providing that Vision Australia would follow a number of due process and procedural fairness obligations). Although Mr Elisha was given an opportunity to respond to the proprietor's allegation, Vision Australia also took into account allegations that Mr Elisha had displayed a "pattern of aggression" earlier in his employment, and this alleged pattern was never put to Mr Elisha. Ultimately, Vision Australia terminated Mr Elisha's employment for "serious misconduct".

Mr Elisha was later diagnosed with a serious psychiatric illness, which was found to be caused by both the botched disciplinary procedure resulting in unlawful termination of his employment and the unlawful termination itself.

Mr Elisha commenced unfair dismissal proceedings in the Fair Work Commission in June 2015, which were resolved by the payment of compensation to him under a settlement deed that provided for a release that applied to the "employment, proceedings and the termination".

Five years later, Mr Elisha commenced proceedings in the Supreme Court of Victoria, alleging Vision Australia had breached his employment contract and was negligent in the show cause process, causing psychiatric injury. At first instance, Vision Australia submitted that the settlement deed precluded any further claim. This was rejected by the primary judge, relying on the approach taken by the High Court in *Grant v John Grant & Sons Pty Ltd* (1954) as to the construction of releasing words of a "general kind". The judge found that the terms of the deed should not be construed as having affected a release of claims beyond those made in the unfair dismissal proceeding. This does not appear to have been challenged before the High Court.

At first instance, the Court then held that the disciplinary process was "unfair, unjust and wholly unreasonable" and "nothing short of a sham and a disgrace". It was found that both the Enterprise Agreement and the 2015 Disciplinary Procedure had been incorporated into Mr Elisha's employment contract, and that Vision Australia's process breached the due process requirements set out in those two instruments. The Court found that if a proper process had been undertaken, Mr Elisha would have had an opportunity to address his alleged "pattern of aggression",

and a proper consideration of the hotel incident would have led to the conclusion that the events probably involved no element of harassment or bullying. Vision Australia was ordered to pay damages of $1.44 million for breach of the employment contract.

Vision Australia appealed to the Victorian Court of Appeal, which held that damages for psychiatric injury were not available for the breach of contract. The Court of Appeal also held that an employer owes no duty of care in tort to avoid injury to employees in the implementation of processes leading to and resulting in the termination of employment.

Mr Elisha then appealed to the High Court of Australia, where he was successful in having the original decision in his favour restored (though the High Court did make a finding on whether there was a duty). A key issue for the High Court was whether an earlier English decision (*Addis v Gramophone Co Ltd*, in 1909 ("**Addis**")), long applied in Australia, precluded an employee from recovering damages for serious psychiatric illness arising from the employer's breach of contract.

The High Court held as follows:

1. the particular contract did incorporate the employer's disciplinary policies as terms of the contract;
2. subject to the particular terms and context of any particular contract, liability for psychiatric injury is not beyond the scope of a contractual duty concerned with the manner of dismissal; and
3. liability for psychiatric injury was not too remote, particularly in the serious circumstances of breach that were found by the primary judge (and unchallenged on the appeal).

INCORPORATION OF POLICIES INTO THE CONTRACT

Mr Elisha's contract of employment stated that his employment with Vision Australia would be in line with its policies and procedures, and that breach of those policies and procedures "may result in disciplinary action". The High Court held that the existence of clear language with sufficient emphasis upon the need for compliance with the terms of a company policy indicated an intention that such terms will be contractually binding and thus found that it was "*[t]he common intention of the parties that Vision Australia's policies and procedures would be contractually binding*". In particular, the contract of employment was found to incorporate Vision Australia's 2015 Disciplinary Procedure, which required Vision Australia to:

1. Provide employees with an outline of the allegations against them in writing;
2. Arrange a disciplinary meeting between employees and a management representative (or two management representatives) of the company; and
3. Give employees an opportunity at the disciplinary meeting to respond to the allegations, before deciding whether to take any action, including terminating their employment.

Ultimately, the High Court found that Vision Australia had breached this incorporated disciplinary policy by not following the applicable procedure in its dismissal of Mr Elisha and accordingly had breached an incorporated term of the employment contract:

DAMAGES FOR BREACH OF CONTRACT CONCERNING THE MANNER OF TERMINATION

The 1909 decision in Addis had precluded recovery of damages for breach of contract in respect of psychiatric injury caused by the manner of dismissal from employment. The High Court held that reliance by Vision Australia on Addis was misplaced for three reasons:

1. First, the case did not decide that damages can never be recovered for psychiatric injury arising from the manner of termination of a contract of employment.
2. Second, the case was decided more than a century ago in a different social context and has been overtaken substantially by more recent decisions in the United Kingdom ("**UK**") and Australia.

3. Third, four members of the High Court in 1993 in *Baltic Shipping Co v Dillon* held that damages for psychiatric injury were available for breach of contract without any suggestion of an exception for employment contracts.

Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ found that over the last century, the reasoning in Addis has been overtaken by legislation and case law. The High Court held that the scope of contractual duties should be determined by reference to the usual considerations of the nature of liability that, in light of the parties' agreement, the parties might fairly be regarded as having been willing to accept. Therefore, damages for psychiatric injury could be part of a claim for damages arising from breach of contractual terms concerning the manner of termination of an employment contract.

REMOTENESS OF DAMAGE

The test of "remoteness" considers the general type of damage that occurred and the general manner in which the damage occurred. Notably, the general type of damage and general manner of occurrence must have been within the reasonable contemplation of both parties, at the time of contract formation, as a serious possibility. Applying the relevant test for remoteness of damage, the High Court found that it was reasonable to expect that Mr Elisha would have been so distressed by the manner in which Vision Australia breached his employment contract and by the consequences of the breach, including dismissal for alleged misconduct from employment he held for nearly a decade, that there was a serious possibility that Mr Elisha would suffer a psychiatric injury. The High Court held that a breach of disciplinary procedures of this kind, involving serious unfairness to an employee, had the real possibility of causing the development of a psychiatric illness, which should reasonably have been contemplated by the parties at the time they entered into the contract. It therefore rejected arguments that the damage was "too remote".

HAS A NEW DUTY OF CARE BEEN CREATED?

Mr Elisha had sought to argue that there was a duty of care under the tort of negligence owed by employers to ensure that employees do not suffer psychiatric injury when disciplined or terminated from employment, or in providing a safe system of investigation and decision-making relating to discipline and termination of employment. A majority of the High Court held that it was unnecessary to consider the scope of an employer's duty to provide a safe system of work. While that issue was not decided, neither was it rejected, so it remains an available argument for another time.

KEY TAKEAWAYS FOR EMPLOYERS:

Although the Elisha decision of course turned on its own facts, which may mean employers will seek to distinguish the decision, it still needs to be recognised that the decision involves a significant development in the law. Damages for psychiatric injury may now be available in a broader set of circumstances. Some steps employers can take to minimise risks in this area include:

EMPLOYERS SHOULD:

1. Undertake a review of employment contracts to ensure there are no forms of words (express or implied) that could suggest that policies, codes of conduct, or other instruments (including awards or enterprise agreements) have been incorporated into the contract of employment and have force as contractual terms, where a breach could give rise to a contractual claim. If contracts appear to raise this potential, seek advice. Unilateral variation of contracts is not possible in Australia.
2. Draft all future employment contracts to avoid the possibility that workplace policies and procedures have been incorporated as contractual terms.
3. Revise all disciplinary policies. Consider whether such policies are necessary, and ensure that any policies that do exist are not expressed in ways that suggest

obligations to follow particular forms of process. This may involve resorting to aspirational, or guiding, principles rather than strict disciplinary or termination procedures.

4. Similarly, examine all applicable industrial instruments, particularly enterprise agreements, to identify areas of potential exposure to claims for non-compliance, for example, with an enterprise agreement term under section 545 of the *Fair Work Act 2009* (Cth) ("**FW Act**").
5. Ensure that all termination processes are procedurally and substantively fair, and that the reasons for termination are documented and clearly communicated to employees. Without limiting the obligations of employers, ensure that employees have access to a support person, that all allegations are expressly communicated, that an opportunity to respond is provided, that those involved in the process are not biased or have a personal interest, and that the decision makers are made fully aware of the factual circumstances.
6. Ensure strict compliance with all obligations in polices or workplace instruments.
7. Review template settlement agreements or deeds to ensure that the language effectively bars employees from making subsequent claims; and use care if relying on standard form settlement agreements from the Fair Work Commission or elsewhere.
8. Stay attune to potential legislative changes that may result from this decision. In particular, section 392(4) of the FW Act may be repealed or amended because the rationale underpinning it (that the common law does not allow compensation for psychiatric injury resulting from breach of the contract of employment) no longer applies.

If you require legal advice or assistance in relation to this decision and its implications for your business, please contact our Harmers Workplace Lawyers team on +61 2 9267 4322.

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