IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B51 of 2017

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

BETWEEN:

TONI MAREE GOVIER
(Appellant)

and

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q)
(ABN 25 548 385 225)
(Respondent)

APPELLANT'S REPLY

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The respondent concedes there was no evidence at trial of any written contract of employment.[1] Thus the respondent does not contest, as submitted in paragraph 26 of the appellant's submissions, that there was no evidence of any contractual terms relating to the respondent's investigative or disciplinary procedures which may have entitled the respondent to submit, for example, that its conduct and timing in sending the two letters in the circumstances then known to it, and containing such terms and in the manner that it did, was permissible conduct under the contract.

3. The respondent submits there is relevance in the appellant's failure to contest, on appeal, that the respondent was entitled (impliedly) under the contract of employment to require an account from its employee about the employee's conduct, and to stand the appellant down on full pay during the investigation, pending its decision about the appellant's employment.[2] The request for an interview with the appellant, and the decision to stand her down on full pay during the investigation, were matters contained in the first letter dated 3 December 2009, prepared by the respondent (Ms Evans) after Mr Blackett had reported to and discussed the incident with her, which letter was delivered to the appellant in hospital at about 4.30pm on that date.[3]

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[1] Respondent's submissions at [5].
[2] Respondent's submissions at [5], [20].
[3] Appellant's chronology entry for 3 December 2009.

Filed on behalf of the Appellant
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4. The respondent accepts the accuracy of the findings of fact by the learned trial judge that at all material times from 12.27pm on 3 December 2009, the respondent knew, or ought to have known:

   4.1. that the appellant had alleged that she had been the victim of an attack by MD;

   4.2. that the client had corroborated the appellant's account;

   4.3. that the appellant had been injured and hospitalised as a result of the incident; and

   4.4. that the appellant's injuries and hospitalisation may have been through no fault of her own.[4]

5. Subject to acting reasonably, and despite the respondent's knowledge of the appellant's likely innocence in respect of the incident prior to drafting and sending the first letter, the appellant does not contest that the respondent was entitled to require an account from the appellant as to the appellant's actions prior to and during the incident as part of the respondent's right to investigate the incident. That is precisely what Herron J meant in *Associated Dominion* when he said that the request of the employee had to be made "at a proper time and in a reasonable manner."[5]

6. Despite being stood down on full pay pending the investigation, the appellant also received workers' compensation payments in respect of her work-related absence from the date of the incident to 11 May 2012.[6] It was never an issue at trial, and there was no evidence to the effect that, the respondent's standing down of the appellant on full pay had any causal relevance to the appellant's ultimate psychiatric injury. Dr Curson's unchallenged evidence[7] accepted by the learned trial judge[8] focussed upon the causal relevance of the respondent's conduct in relation to "the timing, manner and content of the letters", which blamed her for the assault and accused her of unprofessional behaviour, and on the respondent's "incomplete investigation" into the matter, in the circumstances then known to the respondent. These matters were the subject of the appellant's pleaded case,[9] but the learned trial judge made findings only in respect of the negligent delivery of the letters and (inexplicably) not in respect of the incomplete investigation.[10]

7. Recourse to *Sullivan v Moody* does not assist the respondent. It is clear from the passage extracted at [7] of the respondent's submissions that:

   7.1. there can co-exist a statutory obligation and a duty of care;

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[4] Appellant's submissions at [9].
[5] Respondent's submissions at [13].
[6] Appellant's chronology entry for 4 December 2009.
[7] Report Dr Curson 11 December 2014, Court of Appeal Record 646-651.
[8] Trial Judge's Reasons [132], [133], [172].
[9] Amended Statement of Claim subparagraphs 6 (a), (c), (o) and (p) (Court of Appeal Record 816-818).
[10] cf Trial Judge's Reasons [133].

7.2. but the duty of care might be excluded if there are inconsistent obligations.

8. The statute in *Sullivan*, summarised by the Court at [62], clearly sets out the purposes for which it was established.

9. That can only be contrasted with the relatively meagre intervention of statute here.

10. The respondent now submits that the provisions of s 83 of the *Industrial Relations Act* 1999 (Qld) purportedly conflict with the putative duty of care owed by the respondent to the appellant.[11] This legislative provision was not referred to by either party at trial, but was a product of the learned trial judge's own research. Had his Honour invited a submission from the appellant in relation to the relevance of this legislation, it would have been submitted that had the appellant later been unlawfully dismissed by the respondent in circumstances where, as here, an order for her reinstatement or reemployment pursuant to s 78 would have been impracticable, the compensation which the respondent may have been ordered by the Industrial Relations Commission to pay to the appellant pursuant to s 79 would have been arbitrarily limited to no more than the equivalent of 6 months' loss of wages (approximately $17,000.00), including any sum which might have been awarded for the appellant's hurt, humiliation and distress.

11. This very modest intervention into the employment relationship is to be contrasted with the "extensive statutory modification" of a "contract of employment" referred to by Spigelman CJ in *Paige* at [155] referred to at [10] of the respondents' submissions.

12. But the appellant's employment was never unlawfully terminated, and the appellant did not sue for damages for injury caused by the termination of her employment.[12] There was no statutory scheme or principle of law which conflicted with the respondent's duty of care.

13. The respondent now submits that in the event the appeal is successful, the appellant will recover only 15% of the assessed damages, the consequence of which would still be judgment for the respondent.

14. This argument was previously advanced by the respondent at trial.[13] In response, the applicant submitted that this argument was without merit, in that pursuant to s 271 of the *Workers' Compensation and Rehabilitation Act* 2003,[14] the amount of workers' compensation payments to be deducted from the appellant's award of damages would inevitably have been assessed by the trial judge in the light of his findings as being 15% of the total workers' compensation payments; namely, in the same proportion as that proportion of

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[11] Respondent's submissions at [12], [19], [20], [29].
[12] Her employment was not terminated until more than two years later on 28 March 2012 (Trial Judge's Reasons [128]).
[13] Defendant's trial submissions [167].
[14] Reprint No 3G as in force from 3 November 2009.

the appellant's overall assessed damages found to be attributable to the sending of the letters.[15]

15. The respondent did not submit otherwise in its submissions in reply at trial. Nor did the respondent advance any such argument on appeal. Nor did the respondent pursue this argument on the application for special leave to appeal by way of opposition to the grant of leave. Nor did it seek leave to argue this matter on this appeal. The respondent having abandoned this argument, neither the trial judge, the Court of Appeal, nor this Court dealt with it, and it is now too late to argue same.

10 16. The respondent does not contest the orders sought by the appellant in relation to interest and costs, should the appellant succeed on the appeal.

Dated: 29 November 2017

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[15] See *Fechner v Yerkovich* [1993] 1 Qd R 249 (which construed s 9A(1)(a) of the *Workers' Compensation Act* 1916 (as amended), a relevantly indistinguishable precursor to ss 270 and 271, and which remains good law in relation to their construction. What has to be deducted to achieve the reduction required by s 270 is the amount of workers' compensation properly paid by WorkCover in respect of the injury for which the employer is held legally liable to pay damages. The amount to be deducted at the end of the trial is to be assessed by the Court objectively, using factual findings in the action, and assessing the compensation to be deducted in a robust way.