



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M36 / 2021

BETWEEN:

ZAGI KOZAROV
Appellant

and

STATE OF VICTORIA
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

2. The appellant makes the following submissions in reply to the respondent's submissions dated 6 August 2021.
3. As to the second issue identified in RS, [3], lest there be any doubt, the appellant contends that the Court of Appeal erroneously limited itself to rotation as being the only means of preventing or reducing her exposure to explicit material. The appellant's case was¹ – at trial and on appeal² – that any of the alternative, or cumulative, mechanisms available – namely altering work allocation, arranging time out, or rotating to another role – would have prevented the appellant's severe and chronic PTSD. That case is, of course, maintained in this Court. The respondent's focus on the trial judge's Reasons at [742]³ overlooks the express finding – earlier expressed at [733]⁴ – that the screening and notification to the employer would have prompted “the taking of steps to reduce a staff member's exposure to trauma by altering work allocation, or arranging time out, or rotation to another role, if required”. As explained in AS, [27], the respondent's reading of the trial judge's reasons is both unfair, and, critically for the purposes of this appeal, simply not open.

¹ cf. RS, [42]: it is simply erroneous to describe this submission as “belated”.

² See, especially, the exchange between Beach JA and counsel for the appellant on the appeal at T84.4-28: Respondent's Book of Further Materials, 1466.

³ [CAB / Tab 1 / 243-244].

⁴ [CAB / Tab 1 / 240-241].

4. And, if offered the option of altering work allocation, or arranging time out, or rotation to another role, armed with the knowledge of her diagnosis of PTSD, and for the reasons explained in AS, [30]-[35], there is no error in the trial judge's conclusion that that option would have been accepted by the appellant. Indeed, quite simply, it is contrary to common sense to conclude otherwise. In those circumstances, the respondent's submission at RS, [4], ought be rejected. Indeed, the respondent's attempt to support the Court of Appeal's analysis (see also, RS, [21], [39]) suffers from the very same vice as that of the reasoning of that Court, namely that, on receipt of a proper diagnosis, one ought proceed on the basis that the appellant, at very significant risk to her own health, would nevertheless have continued to expose herself to trauma and would not have accepted steps to reduce her exposure: see further, AS, [35], [37], especially the reference to the evidence of Professor McFarlane. As to the fact that the appellant had applied for promotion in the SSOU,⁵ that, too, suffers from the vice that the appellant's decision-making at the time did not have regard to the fact that she was suffering PTSD, a matter that the Court of Appeal had earlier accepted⁶ (and which is not challenged⁷), and by which the counterfactual is to be analysed. Once that is understood, no assistance can be gained from this fact to support the (impermissible) reasoning in which the Court of Appeal engaged on the question of causation.
5. As to the contract of employment, the simple answer to the respondent's attempt to justify what was otherwise a breach of duty is that, at trial, the respondent placed no reliance on the contract of employment for the purpose for which was ultimately invoked by the Court of Appeal at [106].⁸ Rather, it was only tendered, and referred to, for the purpose of the (now irrelevant) questions of the appellant's workload and for the respondent to contend, as it ultimately did, that there was no power to force a person to undergo a medical evaluation and assessment.⁹ In those circumstances, it was not open to the Court of Appeal to conclude that that the discharge of its duty was somehow relevantly informed by an (alleged) contractual inability to compel the appellant to rotate to another role. Indeed, for the reasons set out at AS, [44], there was a positive duty on the respondent, as the appellant's employer, to establish and maintain a safe system of work.

⁵ VSCA Reasons, [109]: [CAB / Tab 5 / 328]; RS, [35].

⁶ VSCA Reasons, [105]: [CAB / Tab 5 / 327].

⁷ AS, [32].

⁸ [CAB / Tab 5 / 327].

⁹ T1154.29-1155.6: Appellant's Further Book of Materials (AFBM), Tab 2.

And, here, that involved, in respect of the appellant, altering work allocation, or arranging time out, or rotation to another role within the OPP.¹⁰ It fell to the employer to demonstrate it was unable to secure compliance with that safe system of work. The respondent did not – because it could not – do so, and the Court of Appeal’s reasoning, based on an (unargued) alleged contractual inability, cannot stand in the way of the proper discharge of the respondent’s duty of care. Not only was this point not argued, but it stands in sharp contrast with – and is antithetical to both: – (a) the pleaded contributory negligence defence run at trial by the respondent, which particularised the appellant’s failure to request alternative duties;¹¹ and the respondent’s concession at trial that there was nothing in the employment contract to prevent steps being taken to avoid injury.¹²

Part III: Response to Notice of Contention

6. By its notice of contention,¹³ the respondent contends that the Court of Appeal erred in finding that the respondent had been placed on notice of a risk to the appellant’s well-being from the end of August 2011, so as to require by way of a reasonable response, steps including a supportive welfare inquiry, offer of referral for occupational screening and adjustment of work.
7. This issue was the subject of the respondent’s first ground of appeal in the Court of Appeal. That ground of appeal was rejected by the Court of Appeal in its Reasons at [69]-[84].¹⁴ It was right to do so, and the appellant respectfully adopts that reasoning in answer to the notice of contention.
8. The invitation to this Court to re-visit a factual finding, the submissions in support of which include a Book of Further Materials of 1470 pages, should be rejected for the same reasons.
9. Properly analysed, as the trial judge and the Court of Appeal did, there is no doubt that the “evident signs” identified were such that, by reason of the events preceding, and on, 29 August 2011, the kind of harm to the appellant was reasonably foreseeable.

¹⁰ While the appellant was, indeed, first employed by the OPP to work in SSOU, it is not right to say that she was not employed in the OPP at large: cf. RS, [10]. Her employer was always the OPP, as the contract specifically states: RBFM, 1292. See also, the respondent’s Amended Defence dated 3 May 2019, paragraph 3: AFBM, Tab 1.

¹¹ Amended Defence, paragraph 11 and the particulars sub-joined thereto, esp paragraphs (e) and (f): AFBM, Tab 1.

¹² T1276.27-1277.10: AFBM, Tab 3.

¹³ [CAB / Tab 12 / 353].

¹⁴ [CAB / Tab 5 / 309-318].

That (correct) analysis had regard to “the nature and extent of the work being done by the particular employee and signs given by the employee concerned”, as required by the principles enunciated in *Koehler v Cerebos (Australia) Ltd.*¹⁵ As to that, the respondent is right to say that no challenge is made to those principles: RS, fn 61.

10. Those 13 signs, enumerated by the Court of Appeal in its Reasons at [74],¹⁶ were significant particularly as they included references to her hypervigilance and abnormally overprotective parenting practices as a result of her work¹⁷ and the multiple communications of the psychologically-based impacts caused by her work,¹⁸ including Mr Brown, the appellant’s manager, making a submission to the executive of the OPP, in June 2011, that referred to staff in the SSOU “reporting burn out” and “staff turnover is increasing”.¹⁹ To describe them as “innocuous” or of an “ordinary industrial nature”, as the respondent seeks to do at RS, [51], is to (plainly) overlook their significance to the appellant’s case.
11. As the Court below explained,²⁰ when viewed in isolation, each of the matters relied on by the trial judge might not individually constitute relevant notice to the defendant that the plaintiff was at risk of suffering psychiatric injury as a result of the nature of her work. However, the (undoubtedly) correct approach, which was taken by the trial judge, involved the analysis and consideration all of those matters in combination, rather than in a piecemeal manner. For the trial judge to have concluded otherwise, or for there to be appellate intervention, would be to countenance an artificial approach to the evidential findings required of a trial judge, both in this case and generally. There is simply no warrant to seek to pick apart, separately, each of the 13 signs. The abridged attempt to do so, set out at RS, [51], dealing with the same matters the subject of the reasoning in the Court of Appeal,²¹ ought be rejected.
12. As to the criticism made by the respondent at RS, [50] that the trial judge engaged in

¹⁵ (2005) 222 CLR 44 at 57 [35] per McHugh, Gummow, Hayne and Heydon JJ; see also, [36]. See VSCA Reasons, [69]-[70]: [CAB / Tab 5 / 309-310].

¹⁶ [CAB / Tab 5 / 311].

¹⁷ See, esp, VSCA Reasons, [74](b): [CAB / Tab 5 / 311].

¹⁸ See further, VSCA Reasons, [74]: [CAB / Tab 5 / 311-313], including, esp, [74](a) (the April 2011 memorandum); 74(d) (her “observable signs of emotional involvement in her cases”, [74](f) (Mr Brown’s knowledge of the appellant leaving work due to dizziness and not returning for a fortnight) [74](g) (Ms Robinson’s knowledge of the appellant’s distress at the complainant’s attempted suicide in one of her cases) and [74](i) (“the highly emotive and agitated reaction to her disagreement with Mr Brown on 29 August 2011”).

¹⁹ VSCA Reasons, [36]: [CAB / Tab 5 / 297]; VSC Reasons at [561](e): [CAB / Tab 1 / 182].

²⁰ VSCA Reasons, [76]: [CAB / Tab 5 / 315].

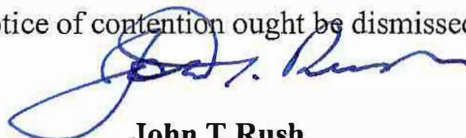
²¹ VSCA Reasons, [75]: [CAB / Tab 5 / 313-315].

“impermissible litigious hindsight”, that, too, was rejected by the Court of Appeal; their Honours noted that not only was the trial judge “alive” to that risk and that she “specifically addressed [it]”,²² but they did “not accept that her Honour, contrary to what she said in her reasons, engaged in any form of ‘litigious hindsight’”.²³ They were right to do so. Just by reason of the fact that the it transpired that the matters were correct, the respondent appears to criticise the conclusions reached by the trial judge. But her Honour specifically turned her mind to the fact that, *as at August 2011*, the behaviour and presentation of the appellant was “abnormal and out of character”,²⁴ and considered those matters against the backdrop of the evident signs that she concluded were there to be seen.²⁵ The criticism of “litigation hindsight” is without foundation.

13. Finally, as to the invocation (at RS, [56]) of the reasoning of Leeming JA in *State of New South Wales v Briggs*,²⁶ those broad statements of principle do not grapple with the earlier findings in this case that, unlike many circumstances where mental health or other issues are “wholly unconnected with their employment”,²⁷ the signs that were observed by the respondent²⁸ related to, and were inextricably linked with, the appellant’s employment, by reason of what the respondent knew as to the risk of psychiatric injury and vicarious trauma for this employee, and her co-employees.

14. For these reasons, the notice of contention ought be dismissed.

Dated: 27 August 2021.



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²² VSCA Reasons, [83]: [CAB / Tab 5 / 317]. See, specifically, VSC Reasons, [598]: [CAB / Tab 1 / 188].

²³ VSCA Reasons, [83]: [CAB / Tab 5 / 317].

²⁴ VSC Reasons, [598]: [CAB / Tab 1 / 188].

²⁵ VSC Reasons, [598]: [CAB / Tab 1 / 188].

²⁶ (2016) 95 NSWLR 467 at 497-498 [127]-[128].

²⁷ (2016) 95 NSWLR 467 at 498 [128].

²⁸ See further, paragraph 10 above and fn 15 thereto, all of which were canvassed by the Court of Appeal [74]: [CAB / Tab 5 / 311-313].