

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

ADAM ELISHA

APPELLANT

AND

VISION AUSTRALIA LIMITED

RESPONDENT

Elisha v Vision Australia Limited
[2024] HCA 50
Date of Hearing: 16 October 2024
Date of Judgment: 11 December 2024
M22/2024

ORDER

- 1. Appeal allowed with costs.*
- 2. Set aside orders 2 to 6 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 28 November 2023 and, in their place, order that the appeal be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation

P D Herzfeld SC with E Makowski and S D D Puttick for the appellant
(instructed by Arnold Thomas & Becker Lawyers)

P M O'Grady KC and S E Gladman SC with L R Howard for the respondent
(instructed by IDP Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Elisha v Vision Australia Limited

Damages – Assessment – Breach of contract – Scope of contractual duty – Remoteness – Where appellant employed by respondent – Where incident involving appellant occurred during travel for appellant's work duties – Where appellant provided with "stand down letter" outlining allegations arising from incident – Where previous reports of appellant's aggressive behaviour – Where disciplinary meeting held for appellant to respond to allegations in stand down letter – Where employment terminated – Where decision to terminate employment based upon allegations of previous aggressive behaviour not put to appellant contrary to respondent's disciplinary procedure – Where appellant diagnosed with major depressive disorder – Whether liability for psychiatric injury caused by employer's breach beyond scope of employer's duty concerned with manner of dismissal – Whether rule in *Addis v Gramophone Company Ltd* [1909] AC 488 precludes recovery of damages for breach of contract in respect of psychiatric injury caused by manner of dismissal – Whether damage too remote.

Contract – Incorporation of terms – Employment contracts – Policies and procedures – Where employer's disciplinary procedure in enterprise agreement and policy document – Where contract of employment required employee to agree to comply with employer's policies and procedures – Whether disciplinary procedure incorporated as term of employment contract.

Negligence – Duty of care – Whether employers owe duty to employees to provide safe system of investigation and decision-making with respect to discipline and termination of employment.

Words and phrases – "common intention of the parties", "duty of care", "general manner in which the damage occurred", "general type of damage", "incorporation", "manner of dismissal", "mental distress", "on the cards", "psychiatric injury", "reasonable contemplation of the parties", "remoteness of damage", "safe system of work", "scope of contractual duty", "serious possibility", "willing to accept".

Introduction

1 This appeal concerns the availability of damages for psychiatric injury to an employee in circumstances where the employee was dismissed following a disciplinary hearing that was described by the primary judge as a "sham". The issues concern damages for breach of a contractual term concerning the conduct of the disciplinary hearing and for the tort of negligence. In relation to breach of contract, the questions that arise are: (i) whether the particular contract of employment incorporated the employer's disciplinary policies as terms of the contract; (ii) whether liability for psychiatric injury caused by the employer's breach of that contract is beyond the scope of the employer's contractual duty concerned with the manner of dismissal; and (iii) whether liability for psychiatric injury was too remote in the circumstances of the particular contract.

2 The answers to each of those questions are: (i) the particular contract did incorporate the employer's disciplinary policies as terms of the contract; (ii) 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 (iii) liability for psychiatric injury was not too remote, particularly in the serious (and unchallenged on this appeal) circumstances of breach that were found by the primary judge.

3 For the reasons below, the appeal should be allowed and orders should be made restoring the primary judge's orders for damages for the psychiatric injury suffered by the employee. It is unnecessary to consider the further issue raised on this appeal concerning the liability of an employer for psychiatric injury of an employee based on the tort of negligence.

Background facts and procedural history

4 From 2006, the appellant, Mr Elisha, was employed by the respondent, Vision Australia Limited ("Vision Australia"), as an adaptive technology consultant. Mr Elisha's employment with Vision Australia was governed by a written employment contract signed on 27 September 2006. That contract was referred to on appeal as the "2006 Contract". Mr Elisha's employment duties involved setting up or assisting with software and hardware systems for the vision impaired. In the performance of his employment duties, Mr Elisha visited homes and workplaces across Australia.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

2.

5 Between December 2014 and July 2015, Mr Elisha was treated by a general practitioner and a psychologist for anxiety and depression. The psychologist considered that Mr Elisha had "significantly heightened sensitivity to particular sounds", "chronic workplace stress" and "interpersonal difficulties with particular staff members". On 23 and 24 March 2015, Mr Elisha was involved in an incident while he was staying in a hotel in rural Victoria during travel for his work duties. The incident concerned one of the hotel's proprietors, Ms Trch. The circumstances of the incident were disputed but the essence of the incident involved allegations that Mr Elisha had telephoned the reception of the hotel at around 12.30am and complained of a noise emanating from outside his room. Mr Elisha was moved to another room at around 1am.

6 Mr Elisha subsequently went on a family holiday. While Mr Elisha was away, two other employees of Vision Australia stayed at the same hotel and were informed of Ms Trch's account of the incident. Ms Trch alleged that Mr Elisha had been aggressive and intimidating during the incident, including while checking out of the hotel the next morning. The two employees reported the matter to their manager, Ms Deshayes. The matter was then escalated to Mr Elisha's manager, Ms Hauser.

7 Since 2011 or 2012, Mr Elisha's relationship with Ms Hauser had been strained. Mr Elisha's evidence was that Ms Hauser had been "micromanaging" and "in general unpleasant to communicate with". On 8 May 2015, after being informed of the hotel incident, Ms Hauser informed the Human Resources Manager of Vision Australia, Mr Van Dyk, and a member of Vision Australia's "People and Culture" department, Ms Eagle. In informing the others, Ms Hauser's email included the following:

"Unfortunately, whilst this should surprise me, it doesn't. I have had verbal reports to me about [Mr Elisha's] aggressive behaviour in the past, and I have had conversations with him over the years, but he has always managed to make excuses and explain his actions. Most recently, I sent him an email requesting that he stop parking in the visitors car park, and he responded to me very aggressively. However, in this instance, there is no excuse."

8 On 10 May 2015, following an earlier conversation between Ms Deshayes and Ms Trch, which Ms Deshayes related to Ms Hauser and Ms Eagle, Ms Hauser emailed Mr Garwood, the General Manager of Vision Australia, informing him of the incident and saying:

"I have been aware for some time that [Mr Elisha's] behaviour has deteriorated (and I have addressed minor issues with him as they arose), but

3.

this is something else entirely. [Mr Elisha] is on annual leave until the 18th May, and [Ms Eagle] is happy that she has some time to speak with [Ms Trch] and decide what action to take. I feel that this is gross misconduct and should be addressed accordingly."

9 On 12 May 2015, Ms Eagle interviewed Ms Trch. This interview was followed by a letter to Ms Trch from Ms Deshayes and Ms Hauser asking Ms Trch to accept their "sincere apologies" and undertaking that Mr Elisha would not stay at the hotel for Vision Australia business in the future.

10 On 19 May 2015, the day that Mr Elisha returned from annual leave, Ms Hauser met with Mr Elisha and told him that there was a "serious" complaint against him. Ms Hauser gave him a letter, which was described at trial and on appeal as the "stand down letter". The stand down letter told Mr Elisha a decision had been made to stand him down and required Mr Elisha to attend a meeting two days later, on 21 May 2015, to respond to "a complaint ... alleging your serious misconduct". Mr Elisha said that he "begged [Ms Hauser and] said 'this is just not true, none of this happened'" and asked to sort it out with Human Resources. But Ms Hauser replied "it doesn't matter, you have to go home, you'll have a meeting and you can respond to it then".

11 The allegations in the stand down letter were that Mr Elisha had breached a number of Vision Australia's policies which were annexed to the stand down letter. The allegations were confined exclusively to misconduct during the hotel incident. It was alleged that during the hotel incident Mr Elisha intimidated and humiliated Ms Trch. Mr Elisha was said to have used aggressive and loud tones and said words to Ms Trch to the effect of "[y]ou're the Manager you have to fix it, are you not able to do your job, are you not able to do any job, are you incapable of doing anything". When Mr Elisha was moved to a different room he was alleged to have said "goodnight" but not thank you. It was also alleged that on checking out of the hotel he had thrown the room keys on the reception desk in a rude and dismissive manner and left without saying anything. The stand down letter alleged that Ms Trch had felt humiliated by this behaviour.

12 The stand down letter explained that at the upcoming meeting ("the discipline meeting") Mr Elisha would be asked to respond to these allegations. Mr Elisha was told that he must not speak with any staff member regarding the matter, unless that person was his "support person" at the meeting. He was told not to approach any person in any way whatsoever if he believed that the person may also be involved in the matter. The consequence of violating these instructions would be summary dismissal. The instructions were said "to ensure procedural

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

4.

fairness applies to the proceedings and to all involved in the matter". The stand down letter concluded:

"Please note that this meeting is being conducted in accordance with the Due Process Clause (47.5) of the Vision Australia Unified Enterprise Agreement 2013 (refer Appendix 1). Please note that disciplinary action up to and including summary dismissal may be an outcome of this meeting."

13 Clause 47.5 of the Vision Australia Unified Enterprise Agreement 2013 ("the Vision EA") was "in very similar terms"¹ to those contained in a policy entitled "Vision 2015 Disciplinary Procedure" ("the 2015 Disciplinary Procedure"), said to be effective from April 2015, and enclosed with the stand down letter.

14 Prior to the discipline meeting, Mr Elisha provided a written response to the allegations in the stand down letter in which he said that he "vigorously" denied any of the alleged misconduct, that he "never behaved in any verbally aggressive nor intimidating manner" and that he never raised his voice.

15 The discipline meeting was held on 26 May 2015. Under the 2015 Disciplinary Procedure, Mr Elisha chose Mr Nunns, a branch organiser with the Australian Services Union, to attend as his support person. Ms Eagle and Ms Hauser also attended. Mr Elisha read out his written response. Ms Eagle asked Mr Elisha why Ms Trch would complain and Mr Elisha referred to a potential discrepancy in the bill arising from his previous stay at the hotel. There was discussion about "serious misconduct". Mr Elisha and Mr Nunns were told that they would be advised of the result of Vision Australia's deliberations.

16 A file note of the discipline meeting was prepared by Ms Eagle and Ms Hauser. It included the statement "[Mr Elisha] made further statements along the lines of he's been here 9 years without any history of aggressive behaviour". The file note ended with the following:

"[Ms Hauser's] observations

[Ms Hauser] thought [Mr Elisha] presented himself very arrogantly and showed no remorse. [Ms Hauser] thought [Mr Elisha] seemed shocked to

1 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [414].

5.

be told that we would be considering the matter further and he wouldn't be going back to work.

[Ms Eagle's] observations

[Ms Eagle] agrees that [Mr Elisha] showed no remorse because in [Ms Eagle's] opinion [Mr Elisha] truly doesn't think he has done anything wrong. He appears quite comfortable with the idea that the staff member has fabricated it all because 'people do things others don't understand'. He seems to be quite confident that as it can't be proven nothing will happen. Of course [Mr] Nunns is supporting him."

17 On 26 May 2015, at 6.08pm, Ms Eagle emailed the General Manager of Victorian client services, Mr Gow-Hills, and the General Manager, Mr Garwood, and also Mr Van Dyk and Ms Hauser. The email provided "documentation" for their meeting the next day to consider Mr Elisha's fate. The documentation included the file note prepared by Ms Hauser and Ms Eagle.

18 On 27 May 2015, a meeting was held between Ms Hauser, Ms Eagle, Mr Van Dyk and Mr Gow-Hills. Ms Eagle recommended that Ms Trch's account of the events on 23 and 24 March 2015 be preferred over Mr Elisha's account. That recommendation was accepted. It was determined by Mr Gow-Hills, together with Mr Van Dyk, Ms Eagle and Ms Hauser, that Mr Elisha's employment should be terminated. One of the reasons for the decision was, as Ms Hauser put it, that Mr Elisha "was extremely aggressive" during the hotel incident and Ms Trch's account "needs to be honoured"; it was not "something that you can say, oh, that's not the case, *that's exactly what [Mr Elisha] does*" (emphasis added). Mr Gow-Hills also relied upon what he had "previously heard in relation to Mr Elisha's behaviour".

19 On 29 May 2015, in email correspondence between Mr Van Dyk and Mr Gow-Hills, it was determined that Vision Australia would "argue that [Mr Elisha's] aggression [on 23 and 24 March 2015] is serious in itself" and that:

"It is the latest example in a pattern of aggression that [Ms Hauser] can attest to. We do need to get those previous examples and pattern on the record. In addition [Mr Elisha] demonstrates no awareness that he was/is aggressive. Which adds to the unacceptable risk.

[The Australian Services Union] will argue we can't expand the matters we are considering but that is our choice not theirs.

We need to organise a phone meeting with them today to hear them out on our 'pattern of aggression' judgement. Phone meeting because [Mr Nunns] will declare himself unavailable to attend a in person meeting. He may also try that with a phone meeting. I guess if they dodge the meeting we should terminate without their response.

[Mr Van Dyk] do you think you need to step in and take over from [Ms Eagle]? She clearly wants 'out' and she might go to pieces."

20 No phone meeting occurred. Instead, Mr Elisha's employment was terminated on the same day by a letter which was described at trial and on appeal as the "termination letter". The termination letter included the statement that "Vision Australia considers that on the balance of probability you did behave in the manner described by [Ms Trch]. [Ms Trch] reported this behaviour caused her to feel intimidated and humiliated. Vision Australia considers this behaviour to be serious misconduct". The letter explained that "[i]n accordance with Clause 47.2.5 of the Vision [EA] payment in lieu of notice will not apply in the case of serious misconduct".

21 Following the termination of his employment, Mr Elisha was diagnosed with a major depressive disorder, as well as an adjustment disorder with depressed mood.² He was found to have no capacity for work in the foreseeable future. One of Mr Elisha's treating psychiatrists gave evidence that Mr Elisha "had not given any indication of issues with anger and frustration prior to the termination of his employment". Another psychiatrist, called by Vision Australia, observed that there had been "a very obvious and significant change in [Mr Elisha's] demeanour and his way of relating and his behaviour" since his termination.

22 In June 2015, Mr Elisha commenced unfair dismissal proceedings against Vision Australia in the Fair Work Commission. The proceedings settled on 9 July 2015 after Vision Australia agreed to pay Mr Elisha \$27,248.68, being the maximum amount to which he was entitled in respect of an unfair dismissal proceeding.³ Mr Elisha commenced these proceedings on 27 August 2020 in the Supreme Court of Victoria.

2 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [256].

3 Compensation for unfair dismissal is capped at 26 weeks' pay: *Fair Work Act 2009* (Cth), s 392(5)-(6).

7.

The primary judge's findings

23 The primary judge (O'Meara J) made findings in favour of Mr Elisha concerning the hotel incident. The primary judge noted the inconsistencies in the different accounts of the hotel incident given by Ms Trch and described Mr Elisha as "doing his level best to give honest evidence, and in often extremely difficult circumstances".⁴ At the time of the hotel incident Mr Elisha had a sensitivity to noise and symptoms of anxiety and depression and Mr Elisha had "spoke[n] in tones of annoyance fuelled by a fear that if the problem were not fixed he would not be able to get any sleep and would spend the night awake and unwell". Nevertheless: Mr Elisha had not yelled or shouted; he was not aggressive or threatening during the incident; and when leaving the hotel Mr Elisha did not throw the room key towards the desk in an aggressive or threatening manner.⁵

24 The primary judge found that prior to the discipline meeting Ms Trch's account of the hotel incident had already been accepted by Ms Hauser and Ms Eagle. The primary judge also found that, apart from Ms Hauser (who had a strained relationship with Mr Elisha), the other people at the meeting where it was decided to terminate Mr Elisha's employment had "rarely if ever dealt with" Mr Elisha but that they had been told by Ms Hauser that Mr Elisha "was aggressive and apt to engage in untenable excuse making".⁶ Further, "the claimed history of [Mr Elisha's] aggression and excuse making" was the "real reason" that Mr Elisha's employment was terminated⁷ although that claimed history "lacked any proper foundation or real substance",⁸ "was all hopelessly vague and insubstantial" and was "most likely exaggerated by Ms Hauser for the purposes of initially seeking to blacken [Mr Elisha] and subsequently seeking to defend her actions in the context of the present proceeding".⁹ Mr Elisha was not given any notice of, or opportunity to respond to, the allegation of a history of aggression and excuse

4 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [67].

5 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [145].

6 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [182].

7 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [214], [234].

8 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [235].

9 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [241]; see also at [242].

making and was not told of the role of that allegation in the decision to terminate his employment.

25 The primary judge held that the process which led to Mr Elisha's termination was "unfair, unjust and wholly unreasonable" and that "from the point at which Ms Hauser became involved to the sending of the termination letter by Ms Eagle on 29 May 2015, the process adopted by [Vision Australia] was nothing short of a sham and a disgrace".¹⁰ This conclusion was found to be underlined by the events of the unfair dismissal proceeding before settlement with Mr Elisha for the maximum amount, including the email on 29 May 2015 in which Mr Gow-Hills sought to "get the examples of previous aggression referred to by Ms Hauser 'on the record' in order to establish that there had been a 'pattern'". Nevertheless, the conduct of the unfair dismissal proceeding by Vision Australia "continued to guard and therefore compound the secret at the heart of why [Mr Elisha] had really been dismissed from his employment".¹¹

26 The disciplinary process conducted by Vision Australia was found to breach cl 47.5 of the Vision EA and the 2015 Disciplinary Procedure, both of which were held to have been incorporated into the 2006 Contract. Vision Australia failed to comply with the due process requirements set out in cl 47.5.2 of the Vision EA and paragraph 2 of the 2015 Disciplinary Procedure by failing to provide Mr Elisha with a letter, prior to the discipline meeting, containing the allegations made against him (including the allegation as to a pattern of aggressive behaviour) upon which Vision Australia ultimately acted in terminating his employment.¹²

27 The primary judge found that if a proper process had been undertaken then: "Ms Hauser would not have made the secret slurs against [Mr Elisha]" concerning his alleged aggression and excuse making; those slurs would not have prejudiced the conduct of the discipline meeting; and Mr Elisha's employment would not have been terminated. Even if those slurs had been expressed at the discipline meeting, Mr Elisha would have "had an opportunity to expose their essentially insubstantial nature"; a proper consideration of the hotel incident would have led to the conclusion that the events probably involved no element of harassment or bullying; whether or not the slurs were articulated by Ms Hauser, Mr Elisha's employment

10 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [226], [236].

11 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [238]-[240], [243].

12 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [428]-[430].

would not have been summarily terminated; and Mr Elisha would not have developed the serious psychiatric injury from which he suffers.¹³

28 As to the effect of the disciplinary process on Mr Elisha, the primary judge referred to Mr Elisha's evidence that "without any exaggeration, it's been catastrophic, there's been not one single aspect of my life that hasn't been either destroyed or obliterated"¹⁴ and found that "[t]here was a quality of acute bewilderment" in Mr Elisha's evidence about the disciplinary process as Mr Elisha could not "understand what had really occurred to him and why" despite ruminating over the details of the events and seeking to interpret and to make sense of them.¹⁵ The primary judge held that:¹⁶

"It was very clear that the unfathomable nature of what had occurred contributed very significantly to the disturbance of [Mr Elisha's] mind and, consequently, the chronic psychiatric illness of which various medical witnesses gave evidence ...

[T]he psychiatric illness and disability of [Mr Elisha] likely built as time passed and as he continued to ruminate over what had occurred."

29 The primary judge concluded that the possibility that termination could result in distress or even psychiatric injury was acknowledged "certainly by the relevant witnesses at trial" and that "there is nothing to suggest that the position would have been any different in September 2006". Further, Vision Australia had "anticipated that risk by providing access to counselling and support".¹⁷ The primary judge thus concluded that the parties should "be taken reasonably to have had in contemplation that distress and potential psychiatric illness was a risk that was a 'serious possibility', 'not unlikely' or 'on the cards' in the event that the protective processes directly contemplated by the terms of the contract were not followed and [Mr Elisha's] employment was therefore wrongly terminated".¹⁸ For

13 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [536].

14 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [248].

15 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [250].

16 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [250]-[255].

17 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [567(d)]-[567(e)].

18 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [568].

those reasons, the primary judge held that Mr Elisha succeeded in his claim for damages for breach of contract. Vision Australia was ordered to pay damages of \$1,442,404.50. Mr Elisha's alternative claim for damages for breach by Vision Australia of a duty to take reasonable care was said to rest upon a duty of care that was "not presently recognised by the common law".¹⁹

The Court of Appeal

30 Vision Australia's grounds for leave to appeal relevantly included claims that: (i) cl 47.5 of the Vision EA and the 2015 Disciplinary Procedure were not incorporated as terms of the 2006 Contract; (ii) if those terms were incorporated, Vision Australia had not breached them; (iii) damages were not available for any psychiatric injury suffered by Mr Elisha; and (iv) damages for the psychiatric injury suffered by Mr Elisha were too remote. Mr Elisha filed a notice of contention in the Court of Appeal contending that the primary judge had erred by holding that Vision Australia did not owe a duty of care to Mr Elisha "to take reasonable care to avoid injury to [Mr Elisha] in its implementation of the processes leading to and resulting in the termination of [Mr Elisha's] employment".

31 The Court of Appeal (McLeish, Kennedy and Macaulay JJA) granted leave to appeal and allowed the appeal. The Court held that cl 47.5 of the Vision EA had not been incorporated into the 2006 Contract but the relevant terms of the 2015 Disciplinary Procedure had been incorporated, and that Vision Australia had breached an incorporated term by failing to give Mr Elisha notice of, and afford Mr Elisha the opportunity to respond to, the allegations of patterns of aggressive behaviour and excuse making.

32 Nevertheless, the Court of Appeal held that damages for psychiatric injury were not available for the breach of contract by Vision Australia for two reasons. First, the Court of Appeal held that damages for psychiatric injury were unavailable for a breach of contract other than where the psychiatric injury was consequent upon physical injury caused by the breach of contract or where the very object of the contract was to provide enjoyment or relaxation.²⁰ Secondly, the Court of Appeal held that damages for Mr Elisha's psychiatric injury could not be recovered because the psychiatric injury was too remote from the breach of

19 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [529]-[532].

20 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 344-346 [204]-[217].

contract by Vision Australia.²¹ The Court of Appeal dismissed Mr Elisha's notice of contention on the basis that an employer owes no duty of care to avoid injury to employees in the implementation of processes leading to and resulting in the termination of employment.²²

The grounds of appeal and notice of contention in this Court

33 Mr Elisha relies on two grounds of appeal in this Court, broadly corresponding with his claim based on breach of contract and his claim based on the tort of negligence. The ground concerning breach of contract compendiously asserted that the Court of Appeal erred in concluding that damages for the psychiatric injury suffered by Mr Elisha were not recoverable in a claim for breach of contract. The ground of appeal concerning the tort of negligence asserted that the Court of Appeal erred in concluding that Vision Australia did not owe a duty to take reasonable care to avoid injury to Mr Elisha in the implementation by Vision Australia of the processes leading to and resulting in the termination of his employment.

34 Vision Australia initially relied upon three grounds of contention, which, at the hearing before this Court, were reduced only to a contention that the 2015 Disciplinary Procedure was not a term of the 2006 Contract. Vision Australia abandoned a contention that any duty of care in tort to provide a safe system of work was not engaged because the risk of recognised psychiatric injury was not foreseeable, or that any such duty had not been breached.

The incorporation of the 2015 Disciplinary Procedure

35 It is necessary to begin with the contention that the 2015 Disciplinary Procedure was not incorporated as a term of the 2006 Contract. There was no dispute as to the principles to be applied in determining whether the 2006 Contract had incorporated terms by reference. There was no challenge in this Court to the conclusion of the Court of Appeal that neither the Community Employment, Training and Support Services Award 1999 ("the 1999 Award") nor the Vision EA was incorporated by the term of the 2006 Contract which provided that Mr Elisha's engagement was governed by the 1999 Award.²³ The issue concerning the subject

21 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 340 [190].

22 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 353 [253], 354 [255].

23 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 322-323 [92]-[96].

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

12.

matter of the terms incorporated was confined in this Court to whether the Court of Appeal was correct to conclude that the "Other Conditions" clause of the 2006 Contract had incorporated the 2015 Disciplinary Procedure. The issue concerned only the interpretation of the terms of the 2006 Contract and whether those terms gave contractual effect to the 2015 Disciplinary Procedure.

The meaning of the terms of the 2006 Contract

36 The 2006 Contract by which Vision Australia employed Mr Elisha took the form of a letter of offer executed by Vision Australia which included, on the last page, provision for acceptance by Mr Elisha. The letter relevantly provided:

"Conditions of Employment

Your engagement will be governed by the terms of this letter and the [1999 Award].

...

Other Conditions

In addition, Employment Conditions will be in accordance with regulatory requirements and Vision Australia Policies and Procedures. Breach of the Policies and Procedures may result in disciplinary action."

37 The acceptance on the last page of the letter was as follows:

"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.

I certify that the details in my application/curriculum vitae are true and correct; and that I have no knowledge of any fact or circumstance, which may prevent fulfilment of the terms of this contract."

38 The meaning of the terms of the 2006 Contract, like any other contractual term, "is to be determined by what a reasonable person would have understood [the

terms] to mean".²⁴ This requires consideration of the common intention of the parties by reference to the object and text of the provision as well as the surrounding circumstances.²⁵ The common intention of the parties is "to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement".²⁶

39 Contrary to the submissions of Vision Australia, the "addition[s]" to the "Employment Conditions" contained in the "Other Conditions" clause would be understood by a reasonable person in the position of the parties as creating contractually binding obligations, particularly since the clause provided that breach by Mr Elisha of the "addition[al]" policies and procedures "may result in disciplinary action". Further, as the primary judge and the Court of Appeal held, at the time of entry into the 2006 Contract the expectation of the parties was that employees would be required to act in accordance with certain values and would be subject to disciplinary action under existing written policies if they did not.²⁷

40 The common intention of the parties that Vision Australia's policies and procedures would be contractually binding to the extent to which they imposed obligations is further reinforced by the terms of Mr Elisha's "Acceptance", by which he undertook, in promissory terms, to "comply with ... all other Company Policies and Procedures". As the Full Court of the Federal Court of Australia said in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*,²⁸ the existence of clear language with sufficient emphasis upon the need for compliance with the terms of a company policy indicates an intention that such terms will be contractually binding.

41 Also contrary to the submissions of Vision Australia, the commercial object of the 2006 Contract was not to create an employment relationship with a "one-sided obligation on Mr Elisha" to obey lawful directions from Vision Australia. Rather, as the Court of Appeal held, "the object of the 2006 Contract was to

24 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

25 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22].

26 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

27 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 324 [100]; see also *Elisha v Vision Australia Ltd* [2022] VSC 754 at [375].

28 (2014) 231 FCR 403 at 420 [55].

regulate the employment relationship in connection with Mr Elisha's position".²⁹ This included the creation of rights for, and the imposition of obligations on, both parties. It would "defy both logic and common sense" to suggest that an employer who was subjecting an employee to disciplinary action according to contractual policies would not similarly be bound by those policies.³⁰

42

Vision Australia submitted that an interpretation of the 2006 Contract that incorporated Vision Australia's policies and procedures as binding on both parties would undermine the contractual goal of certainty since those policies and procedures could change from time to time. But the loss of some certainty is not a reason to deny the clearly expressed intention of the parties that those things that answer the description of a policy or a procedure, from time to time, will have contractual effect.³¹ A reasonable person would understand the intention to incorporate into an employment contract those policies and procedures as they might change from time to time, instead of requiring formal amendment to the contract every time those policies or procedures are varied. More difficult questions might arise if the power of unilateral amendment of a policy by Vision Australia were exercised to create substantially new or onerous obligations. But no question of the extent of such a power of unilateral amendment, or of any constraint (such as reasonableness) in the exercise of the power,³² arises because the relevant obligations in the 2015 Disciplinary Procedure are imposed upon Vision Australia, not Mr Elisha, and the primary judge found that there was nothing to suggest that the applicable disciplinary procedures in the 2006 Contract

29 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 322 [90]; see also at 326 [110].

30 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 325 [104], quoting *Foggo v O'Sullivan Partners (Advisory) Pty Ltd* (2011) 206 IR 87 at 119 [116]. See also *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 at 213 [106]; *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 at 420 [56].

31 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 at 199 [39].

32 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 at 223 [152].

15.

were "qualitatively any different" from the applicable procedures in the 2015 Disciplinary Procedure.³³

The 2006 Contract incorporated the 2015 Disciplinary Procedure with contractual effect

43 In applying the meaning of the terms of the 2006 Contract, the remaining issue concerns the "Policies and Procedures" that were incorporated into the 2006 Contract.

44 Vision Australia submitted that even if the 2015 Disciplinary Procedure was incorporated into the 2006 Contract, the terms of the 2015 Disciplinary Procedure would not be understood by a reasonable person in the position of the parties as intended to be contractually binding. Vision Australia further submitted that the 2015 Disciplinary Procedure should be taken only as intended to "facilitate compliance with the [Vision] EA".

45 It is necessary to set out the 2015 Disciplinary Procedure in full:

"Disciplinary Procedure

Vision Australia recognises that during the employment relationship, there may be occasions where an employee's behaviour or work performance requires disciplinary action.

Vision Australia is committed to communicating the expectations and standards regarding workplace behaviour and work performance, and seeks to emphasise the corrective and educative role of disciplinary action.

Vision Australia is committed to a fair, equitable and consistent approach to disciplinary action, and to act in accordance with this procedure, as well as all relevant industrial instruments and contract provisions, for all employees who have completed the minimum employment period as defined in the *Fair Work Act 2009*.

33 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [381]; see also *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 338 [176].

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

16.

When is Disciplinary Action appropriate?

Disciplinary action may occur where there is a concern with respect to an employee's performance or conduct in the workplace.

Examples of behaviour that may lead to disciplinary action include, but are not limited to, issues of under performance, lack of punctuality, failure to adhere to the policies of Vision Australia, failure to model Vision Australia's values at all times, and failure to adhere to lawful and reasonable directions.

Serious Misconduct

Disciplinary action should occur in cases of serious misconduct.

Serious misconduct is defined in accordance with the *Fair Work Act 2009* and includes:

- Wilful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- Conduct that causes imminent, and serious, risk to the health, or safety, of a person, or to the reputation, viability or profitability of the employer.

Depending on the facts, summary dismissal may be justified in situations such as, but not limited to:

- The employee committing theft, fraud or assault (for example, stealing the property of the employer or another employee, or intentional abuse of a customer or other employee).
- The employee being affected by drugs or alcohol while at work.
- The employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.
- Persistent failure to comply with occupational health and safety policies.

Disciplinary Procedure

1. Where there is a concern with an employee's performance or conduct, the first step, if appropriate, will be an informal counselling session between the employee and their immediate manager. The employee will be advised of the concern, and an agreed strategy for dealing with the concern will be negotiated. The situation will be reviewed within an agreed timeframe.
2. Where informal counselling is not appropriate or where the concern is of a more serious nature, a formal disciplinary meeting will occur. Prior to the meeting, the employee will be provided with a letter containing a written outline of the allegations. The letter will request that the employee attend a meeting to respond to the allegations, and indicate that the employee may have a support person present. The letter will also indicate that disciplinary action up to and including termination may occur if the response is not satisfactory.
3. The meeting will be attended by up to two management representatives (one of whom may be a legal or industrial representative of Vision Australia). One of these parties will act as note-taker to record events. At the meeting, a discussion will occur and the employee will be given an opportunity to respond to the allegations.
4. Following the meeting, Vision Australia will make a decision as to whether the employee should be issued with a formal written warning, a final warning or termination of employment, or whether other appropriate action should be taken (ie training), or whether no action should be taken at all.
5. Vision Australia will advise the employee of their decision. A written record of the decision will [be] placed on the employee's file. If a formal written warning is given, the employee will be informed that any further instance of poor performance or unacceptable behaviour/conduct in the workplace may result in further disciplinary action up to, and including, termination of employment.

Investigations

In some cases, it may be necessary for Vision Australia (at any time) to arrange for an investigation into the allegations. The investigation will be conducted in accordance with the principles of natural justice. During an investigation an employee may be placed on leave with pay if necessary in the circumstances."

46 It can be accepted that some parts of the 2015 Disciplinary Procedure are merely aspirational and do not purport to have contractually binding effect. For instance, the opening paragraphs are effectively recitals of the broad commitments, recognitions, and goals of Vision Australia in implementing the disciplinary procedure. But, as both the primary judge and the Court of Appeal correctly concluded,³⁴ those broad recitals do not detract from the very specific assurances and promises made by Vision Australia in the 2015 Disciplinary Procedure, including, in particular, the provisions in numbered paragraphs 2 and 3 that "where the concern is of a more serious nature" a specific procedure *will* be followed, including convening a "formal disciplinary meeting" prior to which "the employee will be provided with a letter containing a written outline of the allegations" and, subsequently, "[a]t the meeting, a discussion will occur and the employee will be given an opportunity to respond to the allegations".

47 The provisions of the 2015 Disciplinary Procedure cannot be reasonably understood as merely designed to ensure compliance with the Vision EA. It is unnecessary to set out some of the similar provisions of the Vision EA because even accepting that there are some similar terms in the 2015 Disciplinary Procedure and the Vision EA, the 2015 Disciplinary Procedure must have been intended by the parties to have separate contractual effect for three reasons. First, as explained earlier, the 2015 Disciplinary Procedure was not qualitatively any different from the applicable procedures at the time of the 2006 Contract, which predated the Vision EA. Secondly, the 2015 Disciplinary Procedure makes no reference to the Vision EA and the relevant terms are expressed as independent promises. Thirdly, the 2015 Disciplinary Procedure is not expressed to be confined to, or co-extensive with, the coverage of the unfair dismissal regime under the *Fair Work Act 2009* (Cth).

34 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [420]; *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 325-326 [109]-[110].

Damages for a breach of contract concerning the manner of termination

Limits to liability based on the scope of contractual duties

48 A central strand of Vision Australia's submissions was that, independently of considerations of remoteness of damage, an employee is "precluded" from recovering damages for breach of a contractual duty concerning the manner of their dismissal. Unlike issues of remoteness of damage, the scope of a defendant's contractual duty does not depend upon the damage that might reasonably have been contemplated by the parties but rather upon the nature of liability that, in light of the parties' agreement, the parties might fairly be regarded as having contemplated and been "willing to accept".³⁵

49 Vision Australia relied on the principle that treats mental distress as generally unrecoverable as a head of damages.³⁶ Even where the circumstances known to the parties are such that mental distress is likely to occur as a result of a breach of a contractual obligation, without express provision to the contrary the mental distress suffered is not generally recoverable as a separate head of damages unless the duty that was breached had the object "to provide enjoyment, relaxation or freedom from molestation".³⁷ The reason for this is that without express provision otherwise, the liability of one contracting party for the mental distress of another upon breach, even if that mental distress is a likely result, is one that is "not ... part of the business risk of the transaction".³⁸ As Mason CJ said in *Baltic Shipping Co v Dillon*,³⁹ because "anxiety is an almost inevitable concomitant of

35 *Wenham v Ella* (1972) 127 CLR 454 at 466; *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 368.

36 See *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 374 and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 37, both citing *Addis v Gramophone Company Ltd* [1909] AC 488.

37 *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208 at 235 [69], quoting *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365.

38 *Fidler v Sun Life Assurance Co of Canada* [2006] 2 SCR 3 at 16 [36], 20 [46]. See also *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208 at 235 [70].

39 (1993) 176 CLR 344 at 362, quoting Treitel, *The Law of Contract*, 8th ed (1991) at 878.

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

20.

expectations based on promises ... a contracting party must be deemed to take the risk of it".

50 The submissions by Vision Australia were not put on the basis that the avoidance of psychiatric injury was beyond the scope of Vision Australia's contractual duties due to the particular terms and context of the 2006 Contract. Instead, Vision Australia's submission, adopting the reasoning of the Court of Appeal, was effectively that, like damages for mental distress, there was a rule that damages for psychiatric injury were generally beyond the scope of any contractual term concerning the manner of termination of an employment contract.

51 The submissions by Vision Australia, and the reasoning of the Court of Appeal on this point,⁴⁰ were substantially based upon the decision of the House of Lords in *Addis v Gramophone Company Ltd* ("*Addis*").⁴¹ The reliance upon that decision was misplaced for three reasons. 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. Secondly, 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 and Australia. Thirdly, four members of this Court in *Baltic Shipping Co v Dillon*⁴² held that damages for psychiatric injury were available for breach of contract without any suggestion of an exception for employment contracts.

52 *Addis* was a case involving a jury award to a plaintiff manager of £600 for wrongful dismissal and £340 for excess commission that the plaintiff would have earned, above the commission earned by the plaintiff's successor as manager, if the plaintiff had remained acting as manager. The House of Lords set aside the award of £600 on the basis that part of that award may have included a "head of damages [that] cannot be allowed to stand".⁴³ In the leading speech of Lord Loreburn LC, with whom Lord James, Lord Atkinson, Lord Gorell and Lord Shaw concurred, his Lordship said⁴⁴:

40 See *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 342-346 [197]-[217].

41 [1909] AC 488.

42 (1993) 176 CLR 344 at 362 fn 95, 383, 387, 405.

43 *Addis v Gramophone Company Ltd* [1909] AC 488 at 491.

44 *Addis v Gramophone Company Ltd* [1909] AC 488 at 490-491.

21.

"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."

53

Vision Australia sought to identify three independent strands to the ratio decidendi of *Addis* precluding the recovery of damages for a breach of contract by dismissal of an employee: (i) where the damages concerned the manner of dismissal; (ii) where the damages were for hurt feelings; and (iii) where the damages were for any loss that the employee sustained from the fact that their dismissal made it more difficult to obtain fresh employment. This appeal does not concern strand (ii) or (iii) (the latter of which may no longer be the law in England and Wales,⁴⁵ as conceded by Vision Australia in oral argument). And it is doubtful whether the Lord Chancellor in *Addis* should be taken to have been expressing any rule as suggested in strand (i) independently of strand (ii). The concern of the Lord Chancellor, reflecting the argument in the case, related only to a head of damages for "hurt feelings" or "difficulty in finding employment" following wrongful dismissal or wrongful refusal to permit the discharge of employment duties.⁴⁶ The focus upon hurt feelings rather than what is today recognised as an independent claim for psychiatric injury is also evident from the description of the claim by Lord James as "aggravation of the injury in consequence of the manner of dismissal",⁴⁷ and by Lord Atkinson as "the shape of exemplary damages".⁴⁸

45 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 546 [70], referring to *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20.

46 *Addis v Gramophone Company Ltd* [1909] AC 488 at 489.

47 *Addis v Gramophone Company Ltd* [1909] AC 488 at 492.

48 *Addis v Gramophone Company Ltd* [1909] AC 488 at 493; see also at 496.

54 In any event, over the last century a great deal of water has passed under the bridge of *Addis* in the United Kingdom. As Lord Nicholls observed in *Eastwood v Magnox Electric plc*,⁴⁹ the Parliament of the United Kingdom acted in 1971 to give effect to the recommendations of the Donovan Commission⁵⁰ by establishing legislation to protect employees against unfair dismissal.⁵¹ This prompted a development in the common law to recognise an implied contractual term that an employer will not, without reasonable and proper cause, act so as to destroy or seriously damage the relationship of confidence and trust between employer and employee.

55 The subsequent focus in the United Kingdom has generally been upon the boundaries of the implied duty of trust and confidence rather than upon the scope of the decision in *Addis*. Hence, in *Johnson v Unisys Ltd*,⁵² the House of Lords refused recovery for any psychiatric injury due to the limited scope of the implied term, although Lord Hoffmann expressed the ratio decidendi of *Addis* in terms that did not include psychiatric injury: "an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the manner of dismissal". Lord Nicholls later said of that refusal to further develop the implied term at common law that, "however desirable [that development] may be", it could not "co-exist satisfactorily with the statutory code regarding unfair dismissal".⁵³ The restriction upon recovery for breach of the implied term, known as the "*Johnson* exclusion area", was described by Lord Nicholls as a restriction that "produces ... strange results" and which "merits urgent attention by the Government and the legislature" due to the "interrelation between the common law and statute having ... awkward and unfortunate consequences".⁵⁴

49 [2005] 1 AC 503 at 521-522 [2]-[6].

50 United Kingdom, *Royal Commission on Trade Unions and Employers' Associations 1965-1968: Report* (1968) Cmnd 3623 at 141-154 [520]-[567], 268-269 [1056]-[1060].

51 *Industrial Relations Act 1971* (UK); for the present law see *Employment Rights Act 1996* (UK), Pt X.

52 [2003] 1 AC 518 at 541 [44].

53 *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at 524 [12].

54 *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at 528 [27], 529 [32]-[33].

56 These developments in the United Kingdom illustrate the extent to which the reasoning in *Addis* has been overtaken over the last century by legislation and case law. But the United Kingdom case law cannot be transplanted to Australia. In *Commonwealth Bank of Australia v Barker*⁵⁵ this Court held that no generalised implication should be made of a duty of trust and confidence in employment contracts in Australia, particularly where the statutory circumstances were not the same as those in the United Kingdom, and the introduction of such an implied term would "intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity".⁵⁶

57 The decision of the Supreme Court of the United Kingdom in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*,⁵⁷ upon which Vision Australia placed much reliance, was based upon the different legislative and case law context in the United Kingdom. In that case, a majority of the Supreme Court held that damages for loss of reputation and inability to secure alternative employment could not be recovered for a breach, in relation to the manner of dismissal, of an express term of an employment contract. The reasoning of all the judgments was based upon the scope of the *Johnson* exclusion area,⁵⁸ a consideration which does not apply in Australia. In dissent, Baroness Hale confined the *Johnson* exclusion area to the implied term of trust and confidence and, with the benefit of an express rather than an implied term, would have permitted the recovery of damages by the claimant employees.⁵⁹

58 Once it is appreciated that an analysis of the scope of contractual duties in an employment contract in Australia is unaffected by questions concerning the relationship between a generalised implied term developed by the common law and particular statutory provisions, the scope of the contractual duty falls to be considered by reference to the usual considerations of the nature of the liability

55 (2014) 253 CLR 169 at 195 [41], 216 [115].

56 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 217 [118].

57 [2012] 2 AC 22.

58 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 30 [2], 44-45 [49]-[51], 46-48 [55]-[61], 50 [74], 53 [88], 54 [94], 69-71 [148]-[156].

59 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 62 [121]-[122].

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

24.

that, in light of the parties' agreement, the parties might fairly be regarded as having been willing to accept.

59 In *Baltic Shipping Co v Dillon*,⁶⁰ in the context of discussing liability of a defendant for mental distress consequent upon a repudiation of a contract with an object of providing enjoyment and relaxation, Mason CJ⁶¹ (with whom Toohey J and Gaudron J agreed on this point⁶²) and McHugh J⁶³ recognised psychiatric injury as part of a class of physical or personal injury for which damages were recoverable. There was no suggestion that there was any class of contract for which recovery of physical or personal injury lay beyond the scope of contractual duties. And, absent the authority of *Addis*, Vision Australia did not suggest that there is any justification to impose upon every express term concerning the manner of dismissal in every employment agreement an assumption that recovery for psychiatric injury falls beyond the liability that the parties might fairly be regarded as having been willing to accept.

Remoteness of damage

Remoteness of damage is separate from scope of duty

60 At some points in its submissions Vision Australia conflated questions of remoteness of damage with the scope of the contractual duty. So too, at points in its reasoning concerning remoteness of damage, the Court of Appeal relied upon issues concerning the scope of contractual duty, such as the suggestion that a contractual term designed to ensure fair process was not "inherently designed to prevent psychological injury".⁶⁴ But remoteness of damage in contract is separate from the scope of a contractual duty.

The test for remoteness of damage in contract

61 The test for when a loss will not be too remote to be recovered as damages for breach of contract contained two limbs in the original expression of the test

60 (1993) 176 CLR 344.

61 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362 fn 95.

62 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 383, 387.

63 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 405.

64 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 338 [180].

given by Alderson B in *Hadley v Baxendale*.⁶⁵ That test starts with the facts of the breach of contract that occurred and asks whether, assessed at the date of contract, it could be said that the damage from that breach arose "according to the usual course of things" or whether the damage could "reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". In *European Bank Ltd v Evans*,⁶⁶ this Court referred to the reasons of Mason CJ and Dawson J in *The Commonwealth v Amann Aviation Pty Ltd*⁶⁷ and said:

"the two limbs of the rule in *Hadley v Baxendale* represent the statement of a single principle and ... the application of that principle may depend on the degree of relevant knowledge possessed by the defendant in the particular case. Lord Reid had used the expression 'on the cards'".

62 Two issues arise in the application of the principle in *Hadley v Baxendale* by reference to circumstances which the defendant knows or must be taken to know. First, at what level of generality should the damage, and the process by which it occurred, be described for the purposes of assessing whether the damage could reasonably have been contemplated as "on the cards"? Secondly, how demanding is the requirement that the degree of relevant knowledge or contemplation be that the damage is "on the cards"?

63 As to the first issue, since the issue of remoteness is assessed by looking forward from the date of the contract, not looking back from the date of breach,⁶⁸ it is well established that the precise damage and the precise manner of occurrence of the damage need not be contemplated.⁶⁹ However, the more particular the description of the type of damage and the manner of its occurrence, the more likely

65 (1854) 9 Ex 341 at 354 [156 ER 145 at 151].

66 (2010) 240 CLR 432 at 438 [13].

67 (1991) 174 CLR 64 at 92.

68 *European Bank Ltd v Evans* (2010) 240 CLR 432 at 438 [13]; *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 98 ALJR 719 at 743 [114]; 418 ALR 304 at 332.

69 *South Coast Basalt Pty Ltd v R W Miller and Co Pty Ltd* [1981] 1 NSWLR 356 at 364; *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365-366; *Romero v Farstad Shipping (Indian Pacific) Pty Ltd [No 3]* [2017] FCAFC 102 at [87].

it will be that the damage arising from the breach will be found to be too remote, so that the plaintiff will be required to bear that loss.⁷⁰

64 As to the second issue, the expression "on the cards" was used by Lord Reid in *Koufos v C Czarnikow Ltd*,⁷¹ where his Lordship observed that there is a "wide gulf" between, on the one hand, a test of whether an event is "not unlikely" or "quite likely to happen" and, on the other hand, whether the event is "a serious possibility", "a real danger", or "on the cards". His Lordship explained that most people would consider the possibility of a nine of diamonds being the top card in a pack ("the odds are ... 51 to 1 against") as a "serious possibility" or a "real danger", even though most people would not consider this event "likely".⁷² The expression "on the cards" has been criticised for being colloquial and imprecise.⁷³ There is force in that criticism, although when used in this context the phrase is not meant to convey anything other than that damage of the kind that occurred is a "serious possibility";⁷⁴ that is the better formulation. Although some authorities might be understood as supporting an assimilation between the degree of likelihood of damage in the test for remoteness of damage for breach of contract and the reasonable foreseeability limit in the law of torts,⁷⁵ the present law treats

70 Compare *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 801, 804 with 812-813. See also Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 94-95.

71 [1969] 1 AC 350 at 390. For earlier use, see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 540.

72 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390.

73 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 399, 415, 425; *Wenham v Ella* (1972) 127 CLR 454 at 471. See also Cartwright, "Remoteness of Damage in Contract and Tort: A Reconsideration" (1996) 55 *Cambridge Law Journal* 488 at 494 fn 23, preferring the expression "realistic level of foreseeability" (at 494, 496).

74 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 233, 234; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 540; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653 at 657-658; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365; *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2021] AC 23 at 35 [29], 36 [32].

75 See *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516 at 523; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653 at 672-673.

the requirement of a serious possibility as something that is more stringent than merely a reasonably foreseeable possibility that is not far-fetched or fanciful.⁷⁶

Application of the test for remoteness of damage

65 The starting point in applying the test for remoteness of damage is to identify the circumstances of the breach. Given those circumstances, the test of remoteness considers the general type of damage that occurred and the general manner in which the damage occurred. That general type of damage and general manner of occurrence must have been within the reasonable contemplation of the parties, at the time of contract, as a serious possibility. The circumstances of breach, as found by the primary judge and upheld by the Court of Appeal, were serious. As explained above, the discipline meeting was described as a "sham" and a "disgrace". The decision to prefer Ms Trch's account of the hotel incident had been made by Ms Hauser and Ms Eagle prior to the discipline meeting. The real reason for Mr Elisha's dismissal was not mentioned at the discipline meeting. That real reason was based on allegations by Ms Hauser that had been shared with Ms Eagle, Mr Van Dyk and Mr Gow-Hills, who had rarely dealt with Mr Elisha. And, although those allegations lacked any foundation, they were never raised with Mr Elisha.

66 The type of damage that was required to have been reasonably contemplated at the time of the 2006 Contract as a serious possibility arising from such a breach of duty is psychiatric injury. Contrary to Mr Elisha's submissions in this Court, psychiatric injury is an illness which is a different type of damage from mere mental distress. As Rix LJ said in *Essa v Laing Ltd*,⁷⁷ albeit in dissent, "injury to feelings is a common-day experience and is something distinct from illness". A psychiatric illness, by contrast, is a diagnosable medical condition.⁷⁸ An assessment of its severity "is a statement about the extent of the injury, not its type".⁷⁹

76 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365. See also *Astley v Austrust Ltd* (1999) 197 CLR 1 at 27-28 [60].

77 [2004] ICR 746 at 780 [117].

78 See *Tame v New South Wales* (2002) 211 CLR 317 at 382-383 [194].

79 *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [74], quoting *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 at

67 Although the precise manner in which the breach by Vision Australia caused Mr Elisha's psychiatric injury need not have been contemplated by the parties, an important element in the causal sequence by which Mr Elisha's psychiatric injury occurred was that without Vision Australia's breach, Mr Elisha would not have been dismissed for alleged misconduct. This causal element was entirely predictable in light of the nature of Vision Australia's breach. That causal element is significant. As Lord Millett said in *Johnson v Unisys Ltd*,⁸⁰ "[m]any people build their lives round their jobs and plan their future in the expectation that they will continue. For many workers dismissal is a disaster." It has been described as a "social reality" that a person's employment "is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem."⁸¹ An unfair process of termination for alleged misconduct could affect all three of those interests; ie, a person's livelihood, identity, and self-esteem.

68 That social reality was reflected by the existence of the 2015 Disciplinary Procedure and its requirements for due process (which did not differ substantially from the policies applicable at the time of the 2006 Contract) and in the provision for a support person to attend any discipline meeting with Mr Elisha. Further, as the primary judge found, Vision Australia had also established processes of support, including counselling for employees, to anticipate and address risks of psychiatric injury, including in relation to the process of dismissal.⁸² The risk that termination may result in psychiatric injury was acknowledged by the relevant witness called by Vision Australia.

69 The psychological impact of the breach that could reasonably be supposed to have been in the parties' contemplation included not only the grave effect of Mr Elisha's wrongful dismissal for alleged misconduct, but also the "unfathomable nature" of what occurred. The precise psychiatric injury suffered by Mr Elisha need not have been contemplated at the time of the 2006 Contract, but it was reasonable to expect that Mr Elisha would have been so distressed by the manner in which Vision Australia breached the 2006 Contract and by the consequences of

[330]. See especially *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 402, 413-414.

80 [2003] 1 AC 518 at 547 [72].

81 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 539 [35].

82 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [457].

the breach for him, including his dismissal for alleged misconduct from the employment that he had held for nearly a decade, that there was a serious possibility that Mr Elisha would suffer a serious psychiatric injury.

70 In reaching the opposite conclusion, the Court of Appeal erred in two respects. First, the Court of Appeal was critical of the manner in which the primary judge relied upon evidence from Associate Professor Doherty. The Court of Appeal considered that that evidence supported a conclusion that Mr Elisha's psychiatric injury was too remote to give rise to damages for Vision Australia's breach of contract.⁸³ The evidence of Associate Professor Doherty set out by the Court of Appeal was that Mr Elisha's response to what he perceived to be an unlawful termination of his employment was "extraordinary and not in keeping with the reasonable and ... understandable effect of a sense of being terminated wrongly".⁸⁴

71 The evidence of Associate Professor Doherty, however, was based upon the premise that the breach of contract by Vision Australia was wrongful termination of Mr Elisha's employment, without regard to the breach of procedure in the circumstances found by the primary judge. Further, the primary judge had only referred to the evidence of Associate Professor Doherty relied on by the Court of Appeal in the context of Mr Elisha's claim under the tort of negligence, where reasonable foreseeability of psychiatric injury was to be assessed at the date of breach, not at the time of the 2006 Contract.⁸⁵ The relevant reasoning by the primary judge was:⁸⁶

"To conduct a sham process in which a worker is, in effect, convicted by reference to insubstantial secret slurs, and in a manner such that the worker perceives that something below the surface is 'wrong' but is therefore unable to be combatted, does seem to me to present an acute position of powerlessness in the worker that could well be at reasonably foreseeable risk of precipitating more than the usual degree of distress and even psychiatric injury."

83 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 339-340 [186]-[187], [189].

84 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 339 [185].

85 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [450].

86 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [462].

72 Despite the misplaced reliance upon the evidence of Associate Professor Doherty in relation to the breach of contract claim, the Court of Appeal did otherwise focus upon the correct breach of contract by Vision Australia. But the second respect in which the Court of Appeal erred was that its focus upon the breach was abstracted from the circumstances of the breach as found by the primary judge. The Court of Appeal correctly accepted "that there was a 'possibility' of some psychological impact as a result of a failure to put allegations to an employee" but reasoned that it could not "reasonably have been supposed to have been in the contemplation of the parties, at the time of the making of the 2006 Contract, that psychological or psychiatric injury to Mr Elisha would be 'on the cards' if Vision [Australia] failed to put allegations to him".⁸⁷ It is correct that, without more, there is no serious possibility of psychiatric injury resulting from a breach of contract by Vision Australia in merely failing to put some allegations to Mr Elisha. But that description omits the relevant detail of the breach that actually occurred and the manner by which it caused psychiatric injury.

73 The ground of appeal concerning breach of contract by Vision Australia should be upheld.

The appeal ground concerning the tort of negligence

74 Since Mr Elisha's ground of appeal concerning breach of contract succeeds it is strictly unnecessary to go further to consider Mr Elisha's other ground of appeal, concerning the tort of negligence. That ground of appeal raises very different issues. The duty of care alleged by Mr Elisha was upon employers to provide "a safe system of investigation and decision-making with respect to discipline and termination of employment". Unlike the duty that arose from the 2006 Contract by agreement between Vision Australia and Mr Elisha, a duty that is imposed by law can be shaped by, and must be coherent with, relevant legislation.⁸⁸

75 In *New South Wales v Paige*,⁸⁹ the New South Wales Court of Appeal held that an employer was not under a general common law duty of care "to provide a safe system of work encompass[ing] the provision of a safe system of investigation

⁸⁷ *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 340 [188].

⁸⁸ *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50]; *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 967 [37]; 418 ALR 639 at 649.

⁸⁹ (2002) 60 NSWLR 371.

and decision making" in respect of employees who are considered to be in breach of their terms of employment.⁹⁰ A central factor in the reasoning of Spigelman CJ (with whom Mason P and Giles JA relevantly agreed) was the incoherence with employment law legislation and with administrative law that would arise if the duty of care to provide a safe system of work were to include disciplinary proceedings.⁹¹

76 On this appeal, in Mr Elisha's submissions about coherence between the scope of the duty of care to provide a safe system of work and employment law, the decision in *New South Wales v Paige* was distinguished on the basis that the decision was concerned with incoherence between the scope of the duty of care and specific legislation and regulations such as the *Teaching Services Act 1980* (NSW)⁹² and the *Teaching Services (Education Teaching Service) Regulation 1994* (NSW). Although the terms of the duty of care formulated by Mr Elisha would extend to both public and private employers, there were no submissions made about the relationship between the asserted duty of care and administrative law in instances where employment may be regulated by statutes other than the *Fair Work Act*.

77 On this appeal, the only general legislative regime examined in relation to this issue of coherence was the *Fair Work Act*. But no detailed consideration was given to the authorities concerning the scope and availability of compensation for psychiatric injury under the *Fair Work Act*, including in relation to the operation of provisions concerning adverse action,⁹³ or the history and purpose of relevant provisions of the *Fair Work Act* insofar as they relate to the proposed scope of the duty of care to provide a safe system of work. Further, in oral submissions, issues were also raised by this Court concerning the coherence of the proposed duty with State workplace health and safety regimes.⁹⁴ There was also little consideration given to whether the alleged duty of care was coherent with the employer's contractual power to dismiss the employee.

90 *New South Wales v Paige* (2002) 60 NSWLR 371 at 376 [22], 391 [97], 395 [131], 400 [154]-[155].

91 *New South Wales v Paige* (2002) 60 NSWLR 371 at 387-388 [78].

92 Now the *Teaching Service Act 1980* (NSW).

93 *Fair Work Act 2009* (Cth), s 340.

94 See, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

Gageler CJ
Gordon J
Edelman J
Gleeson J
Beech-Jones J

32.

78 In the absence of comprehensive submissions on these issues of coherence, and in circumstances in which it is unnecessary on this appeal to consider the scope of an employer's duty to provide a safe system of work, the issues raised by this ground of appeal need not be further addressed.

Conclusion

79 The appeal should be allowed with costs. Orders 2 to 6 of the orders of the Court of Appeal made on 28 November 2023 should be set aside and in their place it should be ordered that the appeal to that Court be dismissed with costs.

80 STEWARD J. Save in relation to two issues, which have led me to conclude that this appeal should be dismissed, I respectfully agree with the reasons of Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ, and I gratefully adopt their description of the relevant facts and the curial history of this appeal.

Remoteness

81 I respectfully differ with Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ in relation to the application of the principles of remoteness of damage in contract articulated by their Honours to the facts here – remoteness being itself a question of fact.⁹⁵

82 A useful starting point is to remember what Walsh J observed in *Wenham v Ella*: the rules concerning remoteness are not "rigid" but are "prima facie rules".⁹⁶ Those rules:⁹⁷

"may be displaced or modified whenever it is necessary to do so in order to achieve a result which provides reasonable compensation for a breach of contract without imposing a liability upon the other party exceeding that which he could fairly be regarded as having contemplated and been willing to accept."

83 Of fundamental importance is the observation made by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ that the classification of the subject matter of damages, including the level of generality with which the damage is described, is critical to the issue of remoteness.⁹⁸ Parties are more likely to have in contemplation broadly characterised categories of damage than categories of damage that are more precisely confined. As McHugh JA observed in *Alexander v Cambridge Credit Corporation Ltd*,⁹⁹ a case cited by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ:¹⁰⁰

"The most difficult question in determining the relevant kind of damage concerns the level of classification of the damage which the parties

95 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 223; *Wenham v Ella* (1972) 127 CLR 454 at 466.

96 (1972) 127 CLR 454 at 466.

97 *Wenham v Ella* (1972) 127 CLR 454 at 466.

98 Reasons of Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ at [62], [63].

99 (1987) 9 NSWLR 310 at 366.

100 At [63], footnote 69.

must have contemplated. Clearly the level must not be so high that the parties are required to contemplate the very loss in question or the precise manner of its occurrence. Nor must it be so low that any loss or damage, no matter how unusual in nature or occurrence, would fall within the classification."

84 So, a middle course must be taken. But where that leads in a given case can give rise to different conclusions, reasonably held. Here, Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ classify the relevant type of damage as being "psychiatric injury".¹⁰¹ With very great respect, that is too broad, in the same way that the classification of "physical injury" would be too broad. The sheer number of different kinds of psychiatric injury that might be suffered – for example, from mild depression to acute schizophrenia – justifies its rejection as an appropriate classification of damage, both generally and in the circumstances here, for the test of remoteness.

85 In *Cambridge Credit Corporation*, a case about, amongst other things, the issue of remoteness in contract law, McHugh JA referred to¹⁰² an earlier decision of the Court of Appeal of the Supreme Court of New South Wales which supports the foregoing conclusion: it is the decision in *Rowe v McCartney*.¹⁰³ Whilst this was a negligence case, McHugh JA referred to it when considering the issue of remoteness as addressing a "similar problem".¹⁰⁴ In *Rowe*, an analogous issue arose for consideration concerning the reasonable foreseeability of a psychiatric injury. In that case, the owner of a car reluctantly permitted her friend to be its driver. The driver crashed the car. The owner recovered damages from the driver for her resulting physical injuries. However, she did not recover damages for loss arising from a "depressive neurosis" caused by feelings of guilt in letting the friend drive the car. In dissent, Glass JA decided that it was sufficient to ask whether it was reasonably foreseeable that "mental disturbance of some kind" might be a possible outcome of careless driving.¹⁰⁵ Samuels JA, with whom Moffitt P agreed, in a passage not concerned with the issue of causation, considered that this category of injury was too wide. His Honour observed:¹⁰⁶

101 At [66].

102 (1987) 9 NSWLR 310 at 366.

103 [1976] 2 NSWLR 72.

104 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 366.

105 *Rowe v McCartney* [1976] 2 NSWLR 72 at 79.

106 *Rowe v McCartney* [1976] 2 NSWLR 72 at 90.

"Granted that the harm suffered might be designated as mental illness and that mental illness was foreseeable, I take the view that, in this case, it is necessary and legitimate to penetrate the categories more closely. The plaintiff's agreement to let the defendant drive was a relevant cause of the harm in fact suffered, but was, or would have been, causally irrelevant to the mental damage which the defendant ought to have foreseen. The harm suffered was, in my opinion, of an entirely different kind from that to which the defendant ought reasonably to have had regard as a likely consequence of his negligence."

86 The same approach should be applied here. I would classify the type of harm which needed to be in the contemplation of the parties in 2006, when the employment contract was entered into, as being "*serious* psychiatric injury" as distinct from merely "psychiatric injury". Given that in 2006 – and, as it happens, thereafter – the respondent had no knowledge of any kind concerning the mental health of the appellant, and could not reasonably have acquired such knowledge, it cannot be said that the occurrence of a serious psychiatric injury, arising from the manner of terminating the appellant's employment, could have been considered *in 2006* to be a "serious possibility" or "a real danger", to use some of the various expressions used in this area of law. The appellant's mental health was a "special circumstance", about which the respondent must have known before or at the time of entry into of the contract of employment, in order for the damage suffered by the appellant not to be too remote.¹⁰⁷

87 The decision of the House of Lords in *Johnson v Unisys Ltd*¹⁰⁸ supports the foregoing conclusion. In that case, the plaintiff sued his former employer for wrongful dismissal, claiming that he had consequently suffered a mental breakdown. His employer had been aware over the years that the plaintiff suffered from work-related stress, and that the plaintiff was psychologically vulnerable. The plaintiff alleged that his employer had breached an implied term of his contract of employment requiring the employer to maintain trust and confidence between the parties.¹⁰⁹ The plaintiff claimed that he had thereby suffered loss and damage. At first instance, the plaintiff's claim was struck out on the basis that it did not disclose a reasonable cause of action. An appeal to the House of Lords was dismissed.

88 Only one Law Lord expressly addressed the question of remoteness. Lord Steyn held that "there [was] no realistic prospect that the employee" would

¹⁰⁷ See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Kollman v Watts* [1963] VR 396.

¹⁰⁸ [2003] 1 AC 518.

¹⁰⁹ No such implication arises from a contract of employment in this country: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

be able to demonstrate that his loss was not too remote.¹¹⁰ His Lordship agreed with the reasons below of Lord Woolf MR in the Court of Appeal for England and Wales. In those reasons Lord Woolf MR said:¹¹¹

"I would regard the prospects of the plaintiff establishing that the loss which he claims is not too remote, both in contract and tort, as being unreal. If there had not been the history of psychological problems the damages (in excess of £11,000) claimed would clearly be too remote."

89 The decision of the Full Court of the Federal Court of Australia in *Goldman Sachs JBWere Services Pty Ltd v Nikolich*¹¹² compels no contrary conclusion. In that case, an employee successfully sued his employer for loss and damage arising from breach of his employment contract. The loss and damage was psychiatric injury. Black CJ, with whom Marshall J agreed, found no error in the primary judge's reasoning on the issue of remoteness,¹¹³ which was in these terms:¹¹⁴

"It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability. It may be unusual for disturbance of mind to lead to a psychological condition as severe as that suffered by Mr Nikolich; there is no evidence on the point. However, that is a statement about the extent of the injury, not its type. This is not a case, as in *Rowe v McCartney*, of a mental disability arising out of irrational guilt feelings that had only a tenuous connection with the plaintiff's cause of action. This is a case of a mental disability that was a particularly severe manifestation of the very type of detriment that the [relevant contractual] promises were designed to prevent."

90 For the reasons already given, it is one thing to contemplate that an employee might become "upset, stressed and disturbed" as a result of an employer's breach of an employment contract. It is quite another to contemplate that they would suffer a "severe" psychiatric disability. In that respect, the categorisation of the type of damage which must be in the contemplation of the parties when the contract is entered into may be distinguished from the extent and seriousness of

110 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 537.

111 *Johnson v Unisys Ltd* [1999] ICR 809 at 817.

112 [2007] FCAFC 120.

113 [2007] FCAFC 120 at [74].

114 *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 at [330].

any damage within that category. The latter need not have been reasonably contemplated by the parties.

91 It follows that the Court of Appeal of the Supreme Court of Victoria correctly concluded that the damage suffered here was too remote.

Duty of care

92 The only issue for consideration is whether the respondent owed the appellant a duty of care concerning the incidents of his contract of employment – that is, a duty of care to provide a safe system of work that extends to investigation and decision-making with respect to discipline and the termination of employment. This was the appellant's alternative case. That duty of care relevantly includes, here, the manner in which the appellant's employment was terminated. The proposed duty of care, including its coherence with existing law, was sufficiently argued before this Court such that it is appropriate to address it here. This potential duty of care is to be distinguished from the well-established duty of care which an employer owes to an employee to provide a "safe system of work". That "system" is concerned with the performance by an employee of their work. The decision of this Court in *Kozarov v Victoria*¹¹⁵ is a recent example of an application of that duty of care.

93 The decision of the Court of Appeal of the New South Wales Supreme Court in *New South Wales v Paige*¹¹⁶ in 2002, discussed below, is dispositive of this issue. Nothing has happened since that might cast doubt upon its enduring authority. The Victorian Court of Appeal in the present case was thus correct to conclude that the respondent did not owe to the appellant a duty to take reasonable care in its implementation of the processes leading to, and resulting in, the termination of his employment.

94 The reason why there is no duty of care of the kind claimed by the appellant is the need for coherence of the law. A duty of care may not exist where it would otherwise "cut across other legal principles [so] as to impair their proper application"¹¹⁷ or where it "would subvert ... other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms".¹¹⁸

¹¹⁵ (2022) 273 CLR 115.

¹¹⁶ (2002) 60 NSWLR 371.

¹¹⁷ *Sullivan v Moody* (2001) 207 CLR 562 at 580 [53].

¹¹⁸ *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42].

95 In *Sullivan v Moody*¹¹⁹ the issue was whether certain medical practitioners, amongst others, owed a duty of care. It was alleged that these practitioners had negligently diagnosed certain children as having been sexually abused. This led, generally speaking, to each person accused of abuse suffering "shock, distress and psychiatric harm".¹²⁰ Each child was diagnosed against the background of a statutory scheme, established by the *Community Welfare Act 1972* (SA), for the promotion of the welfare of the community, including children. The scheme required certain individuals, including medical practitioners, to report a suspicion, held on reasonable grounds, that an offence had been committed against a child. It also provided that where such reporting had taken place in good faith, the practitioner incurred no civil liability. This Court held that no duty of care was owed to each person accused of abuse. It said:¹²¹

"The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm."

96 The need for coherence of the law explains the decision in *Paige*. In that case, the teacher of a State school claimed to have suffered psychiatric injury as a result of negligently performed disciplinary proceedings into his conduct. He sought damages. No duty of care was found to exist due to the presence of inconsistent and conflicting statutory regimes. Like the duty contended for by the appellant here, the duty of care alleged in *Paige* was not directed at the need to provide a "safe system of work" but to the incidents of the contract of employment itself, including the disciplinary procedures in issue. Spigelman CJ observed that such a duty was "novel" and would involve "an extension of employers' duties".¹²² Amongst other things, it would result in incoherence with the law of employment.¹²³

119 (2001) 207 CLR 562.

120 (2001) 207 CLR 562 at 568 [6].

121 (2001) 207 CLR 562 at 582 [62].

122 *New South Wales v Paige* (2002) 60 NSWLR 371 at 388 [78].

123 *New South Wales v Paige* (2002) 60 NSWLR 371 at 395 [132], 400 [154]-[155].

97 Spigelman CJ considered the decision in *Johnson v Unisys Ltd*,¹²⁴ where the House of Lords decided that there was no cause of action either in contract or in tort for loss flowing from psychiatric injury caused by the manner in which an employee was dismissed. That was, as Spigelman CJ observed, because of four identified factors. The first was the "creation of specialist tribunals as part of the United Kingdom's legal system to hear and determine unfair dismissal cases".¹²⁵ The second was "the limitation of the class of applicants who could bring"¹²⁶ such an action, which was an "attempt to balance fairness to employees against the general economic interests of the community".¹²⁷ The third was a limitation on the size of the awards that may be made.¹²⁸ The fourth was "the limitation on time for making an application ... and the workability of the duty or obligation contended for, in that causation would be almost impossible to establish with any certainty and would result in generalised awards, infringing the rule that there are no damages for dismissal per se".¹²⁹ The last observation is no longer applicable in this country, for the reasons given by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ.¹³⁰

98 Spigelman CJ then applied this reasoning to the *Industrial Relations Act 1996* (NSW) and the *Workplace Relations Act 1996* (Cth) ("the WR Act"). It is sufficient to set out his Honour's reasoning in relation to the WR Act. Spigelman CJ said:¹³¹

"The Commonwealth legislation ... is ... very similar in terms.

- **Tribunals** — s 8 of the Act creates the Australian Industrial Relations Commission, its membership and operation. Section 170CE provides that applications in relation to unfair dismissals are to be made to the Commission.

124 [2003] 1 AC 518.

125 *New South Wales v Paige* (2002) 60 NSWLR 371 at 397 [142].

126 *New South Wales v Paige* (2002) 60 NSWLR 371 at 397 [143].

127 *New South Wales v Paige* (2002) 60 NSWLR 371 at 397 [144], citing *Johnson v Unisys Ltd* [2003] 1 AC 518 at 543 [54].

128 *New South Wales v Paige* (2002) 60 NSWLR 371 at 397 [143].

129 *New South Wales v Paige* (2002) 60 NSWLR 371 at 397 [145].

130 At [50]-[51].

131 *New South Wales v Paige* (2002) 60 NSWLR 371 at 398-399 [151].

- **Class of applicants** — Under s 170CB the general application of the Act in relation to unfair dismissals is to Commonwealth public sector employees, Territory employees, Federal award employees in a constitutional corporation and Federal award employees engaged in various occupations, the governance of which is within Commonwealth legislative power pursuant to s 52 of The Constitution. Section 170CC and reg 30B limit the class of applicants by excluding those employed for a specified time period, a specified task, on probation of 3 months or less, a casual employee or trainee. Additionally, non-award employees earning above the specified rate (presently \$64,000) are excluded from making applications.
- **Size of award** — The Act provides for a process of mandatory conciliation (s 170CF), followed (if unsuccessful) by an election of arbitration or court proceedings (s 170CFA). The awards of amounts in lieu of reinstatement as a remedy in arbitration (under s 170CH) and orders of payment made pursuant to court proceedings (s 170CR) are both limited by s 170CH(8) and (9). These amounts are limited to, in essence, the value of 6 months' salary but not exceeding, in the case of non-award employees, \$32,000.
- **Time for making applications** — As in the New South Wales legislation, the requirement is to make an application within 21 days after the dismissal (s 170CE(7)) subject to the Commission's capacity to permit an application outside the time limit."

99 Spigelman CJ concluded that the statutory regulation of unfair dismissals constituted "a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand".¹³² It followed that matters concerning the creation and termination of a contract of employment should be left to the law of contract and statute, and no additional duty of care should be imposed over this extensive legal regime.¹³³

100 Nothing has occurred since the decision in *Paige* that would compel any different conclusion today, save that, relevantly, the WR Act has been replaced by the *Fair Work Act 2009* (Cth) ("the FW Act"). But nothing in the FW Act contradicts the reasoning of Spigelman CJ. Applying the same factors considered by Spigelman CJ above:

132 *New South Wales v Paige* (2002) 60 NSWLR 371 at 400 [154].

133 *New South Wales v Paige* (2002) 60 NSWLR 371 at 400 [155].

- Part 5-1 of Ch 5 of the FW Act established the Fair Work Commission ("the Commission"). An application for a remedy for unfair dismissal can be made to the Commission: s 394(1). Pursuant to Div 4 of Pt 3-2 of Ch 3 of the FW Act, the Commission can order reinstatement or the payment of compensation.
- A "national system employee" may bring an action for unfair dismissal against a "national system employer": s 380 of the FW Act. These terms are defined in Div 3 of Pt 1-2 of Ch 1 of the FW Act. As with the previous WR Act, the class of employees who may sue is limited.
- There remains a cap on the amount of compensation that can be paid to a person for unfair dismissal: s 392(5) and (6) of the FW Act. Pursuant to s 392(4), any order to pay compensation to a person must not include a "component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the *manner* of the person's dismissal" (emphasis added).
- An action for unfair dismissal must be commenced within 21 days after the time when the dismissal took effect or within such further period as the Commission allows: s 394(2) of the FW Act.

101 The Explanatory Memorandum which accompanied the *Fair Work Bill 2008* (Cth) is instructive when explaining s 392(4) of the FW Act. It states:¹³⁴

"Under subclause 392(4), any compensation ordered by [the Commission] must not include a component by way of compensation for shock, distress or humiliation caused by the manner of the person's dismissal. This reflects the common law position that shock, distress or humiliation resulting from the dismissal is not compensable (*Addis v Gramophone Co Ltd* [1909] AC 488 and *Baltic Shipping Co v Dillon* (1993) 176 CLR 344)."

102 That Parliament has enacted complex legislation on the basis, at least in part, of an apparent understanding of a prior decision of the House of Lords (namely *Addis v Gramophone Co Ltd*¹³⁵) – which understanding is now considered by this Court to be incorrect – makes it all the more compelling that the duty of care to provide a safe system of work should not be extended in the way sought by the appellant.

¹³⁴ Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 249 [1564].

¹³⁵ [1909] AC 488.

103 Here, as found by the primary judge, the appellant did pursue an action for
unfair dismissal in 2015.¹³⁶ That proceeding was settled shortly after it was
commenced for the maximum amount payable under the FW Act (being an amount
equal to 26 weeks of pay).¹³⁷

104 For the foregoing reasons, the respondent owed no duty of care of the kind
contended for by the appellant.

Disposition

105 This appeal should be dismissed with costs.

136 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [42].

137 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [43].

JAGOT J.

The appeal

106 An employer botches its own disciplinary procedures by not informing an employee of key allegations that the employer ultimately considers in deciding whether to terminate the employee's employment and, therefore, fails to give the employee any opportunity to respond to those undisclosed allegations or a real opportunity to respond to the allegations in fact notified to him. In so doing the employer breaches terms of the employment contract. The employer unlawfully summarily dismisses the employee. The employee develops a serious psychiatric illness, which it is found was caused by both the botched disciplinary procedure leading to the unlawful termination of the employment and that unlawful termination. Does *Addis v Gramophone Co Ltd*¹³⁸ preclude the employee from recovering damages for the serious psychiatric illness that the employer's breaches of contract caused? Alternatively, are those damages too remote from the contractual breaches to be recoverable?

107 The primary judge in the Supreme Court of Victoria (O'Meara J) answered those questions in the negative, with the consequence that the employee was entitled to recover contractual damages for the serious psychiatric illness and the losses which the illness had caused and would cause the employee.¹³⁹ The Court of Appeal of the Supreme Court of Victoria (McLeish, Kennedy and Macaulay JJA) answered those questions in the affirmative, with the consequence that the damages award in favour of the employee was set aside.¹⁴⁰

108 The Court of Appeal's answers to the two questions involve error. Accordingly, the appeal must be allowed, and the orders of the Court of Appeal set aside.

Key facts

109 The appellant, Mr Elisha, entered a contract of employment with the respondent, Vision Australia Limited ("Vision"), in 2006. For the reasons given by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ, the contract of employment incorporated Vision's 2015 Disciplinary Procedure insofar as, relevantly, that document said:

"2. Where informal counselling is not appropriate or where the concern is of a more serious nature, a formal disciplinary meeting will occur.

138 [1909] AC 488.

139 *Elisha v Vision Australia Ltd* [2022] VSC 754.

140 *Vision Australia Ltd v Elisha* (2023) 328 IR 299.

Prior to the meeting, the employee will be provided with a letter containing a written outline of the allegations. The letter will request that the employee attend a meeting to respond to the allegations, and indicate that the employee may have a support person present. The letter will also indicate that disciplinary action up to and including termination may occur if the response is not satisfactory.

3. The meeting will be attended by up to two management representatives (one of whom may be a legal or industrial representative of Vision Australia). One of these parties will act as note-taker to record events. At the meeting, a discussion will occur and the employee will be given an opportunity to respond to the allegations.
4. Following the meeting, Vision Australia will make a decision as to whether the employee should be issued with a formal written warning, a final warning or termination of employment, or whether other appropriate action should be taken (ie training), or whether no action should be taken at all."

110 By these incorporated contractual terms, where Vision held a concern of a more serious nature than appropriate for informal counselling about an employee's performance or conduct Vision was required to: (a) provide the employee with an outline of the allegations against the employee in writing; (b) arrange a meeting between the employee and a management representative (or two management representatives) of Vision; and (c) give the employee an opportunity at that meeting to respond to the allegations, before deciding whether to take any action, including terminating the employee's employment.

111 The primary judge found that, in breach of these requirements, Vision: (a) provided Mr Elisha with a document outlining only those allegations against him that concerned alleged misconduct while staying at a hotel for the purpose of his employment ("the hotel incident"); (b) arranged a meeting between Mr Elisha and management representatives; and (c) gave Mr Elisha a purported opportunity to respond to the allegations concerning the hotel incident, but in so doing failed to appreciate that if, as was the case, the management representatives were aware of other allegations of similar misconduct against Mr Elisha and intended to use that knowledge to evaluate both the fact of the occurrence of the alleged misconduct at the hotel and the seriousness of that misconduct, then Mr Elisha was not being given: (i) a real opportunity to respond to the allegations of misconduct of which he was aware (relating to the hotel incident); or (ii) any opportunity to respond to the other allegations of which he was unaware (of similar misconduct). In further breach of its contractual obligations, Vision then unlawfully terminated Mr Elisha's employment without Mr Elisha being given a real opportunity to respond to the allegations of misconduct of which he was aware (relating to the

hotel incident) or any opportunity to respond to the other allegations of which he was unaware (of similar misconduct).

112 The primary judge characterised this process as "unfair, unjust and wholly unreasonable"¹⁴¹ and "nothing short of a sham and a disgrace",¹⁴² concluding that it was "staggering" that Vision's management representatives had not realised the unfairness of the process.¹⁴³ From the perspective of Vision's management representatives, one of whom had been dealing with what she considered to be Mr Elisha's deteriorating conduct over several years, this may seem unduly harsh. This is particularly so in circumstances where: (a) Mr Elisha's alleged misconduct at the hotel was reported to Vision as resulting in the hotel manager, who was dealing with a complaint by Mr Elisha about unacceptable noise in his hotel room in the middle of the night while wearing her pyjamas, being "clearly distressed", "really humiliated", and having "felt intimidated" by Mr Elisha; (b) Mr Elisha's manager at Vision, who had dealt with what she considered to be Mr Elisha's deteriorating conduct over several years, had also experienced conduct by Mr Elisha that she perceived to be "aggressive" and which had left her feeling "very threatened"; and (c) seemingly unbeknownst to any of Vision's management representatives, in the months leading up to the hotel incident and the termination of Mr Elisha's employment Mr Elisha's doctor recorded that he was experiencing sensitivity to noise, worsening anxiety, irritability, and poor sleep, resulting in Mr Elisha being prescribed an anti-depressant and receiving a referral to a psychologist. That psychologist treated Mr Elisha for anxiety and depression and noted that Mr Elisha's experience of increased noise sensitivity was a factor predisposing him to anxiety, "chronic workplace stress", and "interpersonal difficulties with particular staff members" at Vision.

113 Unduly harsh from the perspective of Vision's management representatives or not, the primary judge was right that Vision's conduct objectively breached its contractual obligations in a way that was seriously unfair to Mr Elisha. This was not a case that a reasonable person would view as involving some mere trivial or procedural non-compliance with Vision's contractually binding disciplinary procedures. A fundamental purpose of those procedures was to ensure that an employee who was to be disciplined, including by termination of employment, was made aware of the misconduct of concern to the employer and given a real opportunity to put their side of the story to the employer before the taking of any disciplinary action. Not only did that not occur, but what occurred involved ensuring that Mr Elisha was not aware of a key reason why his version of events concerning the hotel incident was not accepted (being the earlier events

141 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [226].

142 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [236].

143 *Elisha v Vision Australia Ltd* [2022] VSC 754 at [226]-[228].

experienced by Mr Elisha's manager and the impressions she had formed of him) or the part that that reason played in the decision to summarily dismiss him. That Mr Elisha's manager was one of Vision's management representatives at the meeting and was part of the decision to summarily dismiss him exposes the impossible position in which the disciplinary process placed Mr Elisha and its serious unfairness to him.

114 The primary judge found (and it is not now subject to challenge) that but for the breaches of its own contractually binding disciplinary procedures Vision would not have summarily terminated Mr Elisha's employment and Mr Elisha most likely would not have developed the serious psychiatric illness he in fact developed.

115 The primary judge also found (and it is not now subject to challenge) that both the manner of the unlawful termination of Mr Elisha's employment (that it was done without Mr Elisha knowing why his account of the hotel incident had not been accepted, being that Vision's management representatives were relying on earlier alleged misconduct by Mr Elisha involving one of those representatives) and the fact of the unlawful termination caused his serious psychiatric illness.

116 The primary judge further accepted evidence (that is not now subject to challenge) that the serious psychiatric illness Mr Elisha developed, principally major depressive disorder, was "chronic", without "sustained remission", and complicated by a "poor response" to anti-depressant therapy (Mr Elisha being "unfortunately in a small percentage of individuals that are resistant to conventional treatment", so that a possible next step would be electro-convulsive therapy). As a result, Mr Elisha's illness left him "totally impaired in his social functioning" and unable to work, his prognosis being "realistically not good".

Addis v Gramophone Co Ltd

117 The headnote to the decision in *Addis* is expressed at a level of generality that the reasons for the decision do not support. The headnote says:¹⁴⁴

"Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment".

144 *Addis v Gramophone Co Ltd* [1909] AC 488 at 488.

The contract at issue in *Addis* involved payment by way of salary and on commission and was terminable on six months' notice.¹⁴⁵ The employer gave the employee six months' notice but, at the same time, effectively replaced the employee in his position as manager and took steps to prevent him from discharging his functions as manager,¹⁴⁶ the effect of which was to deprive him of his salary and the opportunity to earn commissions.¹⁴⁷ The jury awarded the employee damages for contractual breach for lost salary and commissions, as well as damages in respect of "the harsh and humiliating way in which he was dismissed".¹⁴⁸ Lord Loreburn LC said that damages were properly awarded for lost salary and commissions but not for the "manner of dismissal", on the basis that "[i]f 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".¹⁴⁹ Lord James and Lord Atkinson agreed,¹⁵⁰ the latter observing the general principle that contractual damages are compensatory and not punitive so that, subject to confined exceptions, damages are not increased and exemplary damages are not payable by reason of the breach also involving other misconduct.¹⁵¹ Lord Gorell also agreed with Lord Loreburn LC,¹⁵² relevantly observing that the "general rule is clear that damages in contract must be such as flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach" and concluding that neither limb was satisfied in respect of "damages for the manner in which" the employee was peremptorily dismissed.¹⁵³ Lord Shaw, who also agreed with Lord Loreburn LC,¹⁵⁴ acknowledged that "wrongful dismissal may be effected in circumstances and accompanied by words and acts importing an obloquy and causing an injury, any reasonable estimate of which in

145 [1909] AC 488 at 489.

146 *Addis v Gramophone Co Ltd* [1909] AC 488 at 489.

147 *Addis v Gramophone Co Ltd* [1909] AC 488 at 490, 493.

148 *Addis v Gramophone Co Ltd* [1909] AC 488 at 493.

149 *Addis v Gramophone Co Ltd* [1909] AC 488 at 491.

150 *Addis v Gramophone Co Ltd* [1909] AC 488 at 492, 493.

151 *Addis v Gramophone Co Ltd* [1909] AC 488 at 494-497.

152 *Addis v Gramophone Co Ltd* [1909] AC 488 at 502.

153 *Addis v Gramophone Co Ltd* [1909] AC 488 at 501.

154 *Addis v Gramophone Co Ltd* [1909] AC 488 at 505.

money would far outreach the balance of emolument due under the contract",¹⁵⁵ but considered that contractual damages for such a wrong would exceed the limits of the contract.¹⁵⁶ Lord Collins (in dissent) conceived of the case as raising the question whether "exemplary or vindictive damages" could be awarded for wrongful dismissal,¹⁵⁷ concluding that such damages could be awarded.¹⁵⁸

119 It may be taken that the contract of employment in *Addis* contained no provision governing the manner of dismissal other than that providing for termination on six months' notice. This would reflect the historical orthodoxy that:¹⁵⁹

"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

120 Language evolves, and common law orthodoxy is subject to statutory intervention and new perspectives. In the United Kingdom, the common law developed to include a term implied into contracts of employment that "the employer and employee may not, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them".¹⁶⁰ This implied term, however, does not extend to the manner of dismissal of the employee (reflecting, in part, the reasoning in *Addis* and otherwise a legislative intention that the statutory provisions for unfair dismissal embody the available remedies).¹⁶¹ In the United Kingdom, the resulting so-called "*Johnson* exclusion area" has been held not to apply to any accrued cause of action, for breach of contract or otherwise, that has arisen before the fact of

155 *Addis v Gramophone Co Ltd* [1909] AC 488 at 502-503.

156 *Addis v Gramophone Co Ltd* [1909] AC 488 at 503.

157 *Addis v Gramophone Co Ltd* [1909] AC 488 at 497.

158 *Addis v Gramophone Co Ltd* [1909] AC 488 at 500-501.

159 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1581; [1971] 2 All ER 1278 at 1282.

160 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 30 [1], citing *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20.

161 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 30 [1], citing *Johnson v Unisys Ltd* [2003] 1 AC 518.

dismissal.¹⁶² Further, although initially conceptualised as a limit on the extent of the implied term of mutual trust and confidence, the "*Johnson* exclusion area" has been held to apply to express contractual terms regulating disciplinary procedures against employees.¹⁶³ The consequence is that, "unless [the parties] otherwise expressly agree", a failure to comply with contractually binding disciplinary procedures will not give rise to a common law claim for damages.¹⁶⁴

121 The resulting doctrines in the United Kingdom have yielded cases such as *Yapp v Foreign and Commonwealth Office*.¹⁶⁵ Mr Yapp was appointed British High Commissioner in Belize. He was subsequently withdrawn from the post by the Foreign and Commonwealth Office ("the FCO") with immediate effect and suspended pending investigation of allegations of misconduct.¹⁶⁶ While suspended he developed depression. As his employment was not terminated,¹⁶⁷ the "*Johnson* exclusion area" was irrelevant.¹⁶⁸ In the High Court, Cranston J held that the withdrawal of Mr Yapp from his post constituted a breach of the FCO's common law duty of care,¹⁶⁹ and a breach of contract because the withdrawal decision involved a failure to fulfill "the obligation of fair treatment which the FCO owed him under his contract of employment",¹⁷⁰ with the result that Mr Yapp was entitled to damages for the depressive illness he developed and its consequences.¹⁷¹ The Court of Appeal allowed an appeal by the FCO on the issue of remoteness of

162 *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at 528 [27].

163 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 30 [2], 44-45 [49]-[51], 46-48 [55]-[61], 50 [74], 53 [88], 54 [94], 69-71 [148]-[156].

164 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22 at 41 [39], 54 [94].

165 [2015] IRLR 112.

166 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 114 [1].

167 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 112.

168 *Yapp v Foreign and Commonwealth Office* [2013] IRLR 616 at 629-630 [96].

169 *Yapp v Foreign and Commonwealth Office* [2013] IRLR 616 at 636 [143].

170 *Yapp v Foreign and Commonwealth Office* [2013] IRLR 616 at 634 [125].

171 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 114 [3]-[4]. See also *Yapp v Foreign and Commonwealth Office* [2013] IRLR 616.

Mr Yapp's claim for psychiatric injury,¹⁷² finding that Cranston J was "wrong to find that it was reasonably foreseeable that the FCO's conduct in withdrawing [Mr Yapp] from his post ... might lead him to develop psychiatric illness".¹⁷³

122 The analysis of Underhill LJ in the Court of Appeal (with whom Davis LJ and Patten LJ agreed¹⁷⁴) reflects the evolution of the law in the United Kingdom concerning claims for psychiatric injury caused by a failure to afford fair treatment to an employee as part of, in effect, a disciplinary process. Specifically, where a claim is founded on a breach of an employer's common law duty of care to take reasonable care of an employee's safety (such a duty generally arising in tort but also, in some cases, contract¹⁷⁵), such injury "will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some particular problem or vulnerability on the part of the employee",¹⁷⁶ albeit that Underhill LJ subjected that general principle to the caveat that "[e]ach case depends on its own facts, and in principle the employer's conduct in a particular case might be so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result".¹⁷⁷ This caveat accords with the position in the United Kingdom that where a claim for such injury is purely contractual, in that it is founded only on a breach of an implied term of mutual trust and confidence or any other express term, the usual contractual test for remoteness will apply,¹⁷⁸ being whether the loss "at the time of contracting ... was within [the parties'] reasonable contemplation as a not unlikely result of that breach".¹⁷⁹ The Court of Appeal ultimately concluded in Mr Yapp's case that the losses attributable to his psychiatric injury failed the test of remoteness in tort – on account of the absence "of any sign of special vulnerability"¹⁸⁰ – from which it

172 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 132 [148].

173 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 129 [124].

174 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 132 [149], 133 [158].

175 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 118 [42].

176 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 128 [119(1)].

177 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 129 [123].

178 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 129 [119(5)].

179 *Bristol City Council v Deadman* [2007] IRLR 888 at 894 [45], quoting *Chitty on Contracts*, 29th ed (2004), vol 1 at 1450 [26-047] and citing *Koufos v C Czarnikow Ltd* [1969] 1 AC 350.

180 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 130 [127].

followed that those losses were "also too remote to be recoverable in [a] claim for breach of contract".¹⁸¹

123 The law in Australia has taken a different course. In *Commonwealth Bank of Australia v Barker*,¹⁸² this Court rejected the implication of a term of mutual trust and confidence into contracts of employment. The logic of the "*Johnson* exclusion area" also has not commended itself in Australia, involving as it does remedies dependent on the fact of dismissal or non-dismissal and not on the fact of contractual breach and its consequences. Moreover, the test for the recovery of contractual damages in Australia for breach of contract causing psychiatric injury and illness is not aligned with the test for recovery of damages for the tortious infliction of such injury and illness.¹⁸³

124 The different course of the development of the law in Australia applies also to the relevance of *Addis*. In *Baltic Shipping Co v Dillon*, Mason CJ characterised the reasoning in *Addis* as expressing only the "general rule that damages for anxiety, disappointment and distress are not recoverable in actions for breach of contract", which, in any event, was subject to exceptions.¹⁸⁴ Mason CJ explained that the general rule was said to arise from the fact that "damages for breach of contract are in essence compensatory and ... are confined to the award of that sum of money which will put the injured party in the financial position the party would have been in had the breach of contract not taken place. On that approach, anxiety and injured feelings do not, generally speaking, form part of the plaintiff's compensable loss which flows from a breach of contract."¹⁸⁵ In identifying the exceptions to the general rule enabling the recovery of damages for "injured feelings", Mason CJ said "it is beyond question that a plaintiff can recover damages for pain and suffering, including mental suffering and anxiety, where the defendant's breach of contract causes physical injury to the plaintiff", noting in the related footnote (fn 95) that the "class of physical injury for which damages are available includes nervous shock".¹⁸⁶ In respect of that last proposition, Mason CJ

181 *Yapp v Foreign and Commonwealth Office* [2015] IRLR 112 at 130 [133].

182 (2014) 253 CLR 169.

183 eg, *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 361, 365-366.

184 (1993) 176 CLR 344 at 361.

185 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 361 (footnote and emphasis omitted).

186 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362. See also Toohey J agreeing at 383 and McHugh J to the same effect at 405.

referred to *Mount Isa Mines Ltd v Pusey*.¹⁸⁷ In that case, an employee had developed "a profound psychiatric disability broadly comprehended in the term 'schizophrenia'"¹⁸⁸ some weeks after coming to the aid of other employees who had been badly burned by a short-circuiting switchboard.¹⁸⁹ Barwick CJ, for example, said that it was not and could not be contended that the "shock" of seeing the immediate aftermath of the accident, if it caused the schizophrenia, "was not an injury for which damages could be given".¹⁹⁰ Similarly, Windeyer J stated that while mere "[s]orrow does not sound in damages", it had become recognised that "nervous shock" or "severe emotional distress can be the starting point of a lasting disorder of mind or body" for which damages may be recoverable.¹⁹¹

125 In other words, it is not the law in Australia that the decision in *Addis* precludes an employee from recovering damages for "injured feelings" if, by "injured feelings", what is meant is an "injury" of the type formerly described as "nervous shock" and its sequelae of ongoing psychiatric illness. The questions in Australia remain those of breach, causation of harm, and remoteness of damage in the contractual context. The Court of Appeal erred in concluding to the contrary.¹⁹²

Remoteness of damage

126 The rule in *Hadley v Baxendale*¹⁹³ continues to govern questions of remoteness of damage for breach of contract. Leaving aside knowledge by the parties of special circumstances, the first limb of the rule permits recovery for damage for breach of contract as "may fairly and reasonably be considered [as] arising naturally, ie, according to the usual course of things, from such breach of contract itself".¹⁹⁴ The second limb of the rule permits recovery for damage "as may reasonably be supposed to have been in the contemplation of both parties, at

187 (1970) 125 CLR 383.

188 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 387.

189 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 409.

190 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 389. See also Windeyer J at 394-395, Walsh J at 409-410.

191 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394.

192 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 346 [216].

193 (1854) 9 Ex 341 [156 ER 145].

194 *Hadley v Baxendale* (1854) 9 Ex 341 at 354 [156 ER 145 at 151].

the time they made the contract, as the probable result of the breach of it".¹⁹⁵ As the Court of Appeal noted in this case, it was not suggested that Mr Elisha's psychiatric illness would arise "according to the usual course of things",¹⁹⁶ the relevant issue being what would have been within the "contemplation of the parties" at the time at which the contract was entered. The degree of "contemplation of both parties" of the kind of damage satisfying the second limb has been expressed in a variety of terms,¹⁹⁷ but one description that has not found favour in Australia or (ultimately) in the United Kingdom is that the kind of damage caused merely be "on the cards".¹⁹⁸ The formula that best expresses the requisite degree of contemplation is that, at the time of entry into the contract, the parties should reasonably have contemplated as a "serious possibility" that breach of the relevant term could result in the kind of damage claimed.¹⁹⁹ Importantly, as McHugh JA said in *Alexander v Cambridge Credit Corporation Ltd*:²⁰⁰

"An important matter in ascertaining whether the loss or damage is too remote is the extent to which the parties may be taken to have contemplated the events giving rise to that loss or damage. The parties need not contemplate the degree or extent of the loss or damage suffered ... Nor need they contemplate the precise details of the events giving rise to the loss. It is sufficient that they contemplate the kind or type of loss or damage suffered.

The most difficult question in determining the relevant kind of damage concerns the level of classification of the damage which the parties must have contemplated. Clearly the level must not be so high that the parties are required to contemplate the very loss in question or the precise manner of its occurrence. Nor must it be so low that any loss or damage, no matter how unusual in nature or occurrence, would fall within the classification."

127 This observation about the test for remoteness of damage requires consideration of the relationship between the breach and the kind of loss or damage caused. What is required at the time of entry into the contract is that the parties

195 *Hadley v Baxendale* (1854) 9 Ex 341 at 354 [156 ER 145 at 151].

196 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 337 [172].

197 eg, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365.

198 *Wenham v Ella* (1972) 127 CLR 454 at 471; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390, 399, 414-415, 425.

199 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365.

200 (1987) 9 NSWLR 310 at 365-366.

should reasonably have contemplated as a serious possibility that the kind of breach that, in the event, occurred could cause the kind of injury, harm or loss that, in the event, occurred.

128 The relationship between the concepts of the kind of breach that occurred and the kind of resulting injury, harm or loss to the employee being in the reasonable contemplation of the parties as a serious possibility at the time of entry into the contract is critical. Assume, for example, a hypothetical case in which Vision considered that certain alleged employee misconduct was sufficiently serious to make informal counselling inappropriate. Assume Vision arranged a meeting under its disciplinary procedures but, instead of "up to two management representatives" attending the meeting in accordance with its disciplinary procedures, three management representatives attended the meeting. Whether or not the meeting results in summary dismissal of the employee, it would be impossible to conclude that, at the time of entry into the contract, the parties should reasonably have contemplated as a serious possibility that this kind of procedural breach of Vision's disciplinary procedures (in having three rather than two management representatives attend the meeting) could cause harm in the form of psychiatric illness. In a case in the United Kingdom, in part involving a claim of this kind, *Moore-Bick LJ* (with whom *Hallett LJ* and *Carnwath LJ* agreed²⁰¹) concluded that the parties to the employment contract in that case "would have been astonished" if, at the time of entry into the contract, it was suggested to them that the employee might suffer psychiatric illness because a disciplinary panel comprised two rather than three members,²⁰² three members being the required number under the disciplinary procedures in question.²⁰³

129 No doubt, absent some special circumstances known to the parties at the time of entering the contract, the same conclusion would apply to a similarly minor kind of breach of the contract of employment between Vision and Mr Elisha insofar as it incorporates aspects of Vision's disciplinary procedures. But that is not this case. In this case, the primary judge found that Vision's management representatives: (a) purported to notify Mr Elisha in writing of the allegations of an unacceptable type of conduct on his part, and (b) purported to give him an opportunity to respond to those notified allegations in purported compliance with its disciplinary procedures when, (c) in fact, Vision had not notified him and given to him an opportunity to respond to other allegations of earlier unacceptable conduct of the same type, in circumstances where (d) Vision proposed to and did use those other allegations to reject Mr Elisha's version of events regarding, and

201 *Bristol City Council v Deadman* [2007] IRLR 888 at 895 [51], [52].

202 *Bristol City Council v Deadman* [2007] IRLR 888 at 894 [46].

203 *Bristol City Council v Deadman* [2007] IRLR 888 at 894 [43].

explanation for, the notified allegations; and (e) summarily and unlawfully terminated Mr Elisha's employment on this improper basis.

130 This highlights that the relevant question in the present case is not whether, at the time they entered the contract, Vision and Mr Elisha should reasonably have contemplated as a serious possibility that Vision acting in breach of *any* contractual term of its disciplinary procedures in *any* manner could result in Mr Elisha suffering *any* psychiatric illness. The relevant question is whether, at the time they entered the contract, Vision and Mr Elisha should reasonably have contemplated as a serious possibility that Vision acting in serious breach of its disciplinary procedures in a way that worked a serious injustice to Mr Elisha could result in Mr Elisha developing a serious psychiatric illness.

131 This highlights also that the limit that the concept of remoteness of damage imposes on an employer's liability for breach of a contractual term (recalling that contractual causation requires only that the breach be a material cause of the loss, not the sole cause of the loss²⁰⁴) results from the relationship between the kind of event giving rise to the breach and the kind of resulting injury, harm or loss to the employee. Irrespective of whether the actions of Vision's management representatives appeared to them to be reasonable and fair at the time given the information they had about the hotel incident, their actions, objectively characterised, involved a serious breach of Vision's contractually binding disciplinary procedures. The actions fundamentally undermined the very purpose of those procedures – to enable an employee's side of the story to be heard and taken into consideration. The primary judge conveyed the reality of the resulting unfairness and its impacts on Mr Elisha in recording that Vision's management representatives: entered the meeting believing Mr Elisha had demonstrated a "pattern of aggression" based on the earlier allegations of his manager that were not notified to Mr Elisha before the meeting; and wrongly believed that they could use that belief of a "pattern of aggression", without having put the allegations on which that belief was based to Mr Elisha, to conclude that his version of the hotel incident was not to be believed. The management representatives then informed Mr Elisha that he was being summarily dismissed because of the hotel incident when that was but one part of the real reason for his summary dismissal. Mr Elisha, for his part, was left "shocked" and "confused" as to how what he considered to be "gossip" from the hotelier could have led to his summary dismissal, his evidence conveying, in the words of the primary judge, "acute bewilderment" at the "unfathomable nature of what had occurred".

132 The objective character of the actions involved in Vision's breach of its disciplinary procedures is such that, at the time of entry into the contract, the parties should reasonably have contemplated as a serious possibility that a serious

204 eg, *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 315, 357-358, 360.

breach of Vision's disciplinary procedures, involving serious unfairness to an employee, could cause the employee to develop a serious psychiatric illness. No doubt "injury to feelings is a common-day experience and is something distinct from [psychiatric] illness".²⁰⁵ Equally, the law of remoteness should recognise that there are differences in type and not merely degree between psychiatric illnesses. To do otherwise, as McHugh JA cautioned against in *Alexander v Cambridge Credit Corporation Ltd*, would pitch the type of damage which the parties should have contemplated at too "low" a level of classification.²⁰⁶ For example, the relevant type of damage in this case should be characterised as a "serious psychiatric illness" because that is the type of illness from which Mr Elisha in fact suffers and which was found by the primary judge to have been caused by the breach. Once it is accepted, as it must be, that the parties in this case should reasonably have contemplated as a serious possibility serious psychiatric illness resulting from the kind of breach of Vision's disciplinary procedures that occurred in this case, the test for remoteness is satisfied. That Mr Elisha's major depressive disorder has proved resistant to treatment cannot transform damage of a type that is not too remote into damage of a different type when in fact the difference is merely one of degree (for example, there is no difference in type between a "serious psychiatric illness" and a "refractory serious psychiatric illness", as the latter description reflects only the susceptibility of the psychiatric illness in the particular individual to effective treatment, not the type of the psychiatric illness). Doing otherwise would, as McHugh JA also cautioned against, pitch the "classification of the damage" at too "high" a level.²⁰⁷

133 There are many different forms of psychiatric illnesses, with different diagnostic criteria. The focus of the law of remoteness on the contemplation of the "type" of injury rather than the specific injury caused by the breach reflects a common-sense approach to the limited scope of human imagination and the unlimited scope of human experience. In the context of psychiatric illness caused by a breach of contract, it is one thing to accept that there is no difference in type between a serious psychiatric illness and a refractory serious psychiatric illness. It may be another, however, to accept no difference in type between, for example, contemplation of *any* diagnosable psychiatric illness, no matter how mild in nature (eg, a mild and transient anxiety disorder), and of a serious psychiatric illness (eg, major depressive disorder, schizophrenia). That parties to a contract should reasonably have contemplated the former as a serious possibility consequent on a kind of contractual breach does not, for the purposes of the test of remoteness, necessarily bring the latter within the parties' contemplation. The observation of Wilcox J in *Nikolich v Goldman Sachs J B Were Services Pty Ltd*, that it "may be

205 *Essa v Laing Ltd* [2004] ICR 746 at 780 [117].

206 (1987) 9 NSWLR 310 at 366.

207 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 366.

unusual for disturbance of mind to lead to a psychological condition as severe [or resistant to treatment] as that suffered ... However, that is a statement about the extent of the injury, not its type",²⁰⁸ should not be understood as proposing that reasonable contemplation of a serious possibility of *any* psychiatric illness resulting from a contractual breach necessarily encompasses reasonable contemplation of *every* resulting psychiatric illness.

134 Further, that Mr Elisha in fact (and unbeknownst to Vision) suffered from a less serious psychiatric illness for which he was treated with anti-depressant medication before his summary dismissal is also immaterial on the findings of the primary judge (that the manner and fact of the summary dismissal, which was unlawful and would not have occurred but for the breach of the employment contract, caused the serious psychiatric illness that Mr Elisha subsequently developed).

135 *Rowe v McCartney*,²⁰⁹ a negligence case – where the test of remoteness is the less stringent standard of reasonable foreseeability – is not comparable. It depended on findings about the cause of the plaintiff's psychiatric illness. The plaintiff had permitted another person (the defendant) to drive her car on the condition that the other person be careful. While driving the car that person had an accident that caused him serious life-changing injury and the plaintiff, a passenger in the car, less serious injury. The plaintiff also developed a depressive illness.²¹⁰ The cause of that depressive illness, however, was not the accident or the physical injuries that the plaintiff had suffered, but feelings of guilt for allowing the other person to drive the car with the result that he suffered a life-changing injury.²¹¹ In considering the test of remoteness of damage in that factual context, Moffitt P characterised the case as one in which the plaintiff's physical injury and presence in the car were irrelevant to the psychiatric illness she developed, as that illness "could equally have occurred if she had lent her car to the defendant and gone on a holiday".²¹² On that basis, Moffitt P considered that the plaintiff's psychiatric illness had to be placed in a more particular category than "physical damage inflicted by the negligent act, psychiatric damage which arises by reason of such physical damage, and psychiatric damage which arises by reason of relevant

208 *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [74], quoting *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 at [330].

209 [1976] 2 NSWLR 72.

210 *Rowe v McCartney* [1976] 2 NSWLR 72 at 77.

211 *Rowe v McCartney* [1976] 2 NSWLR 72 at 77, 89-90.

212 *Rowe v McCartney* [1976] 2 NSWLR 72 at 75.

nervous shock".²¹³ That more particular form of psychiatric illness was held to not be reasonably foreseeable. Translated to the circumstances of Mr Elisha's psychiatric illness, it would be as if his illness had been caused not by the manner and fact of his unlawful summary dismissal but by anxiety and distress at, say, his parents' reaction to his unlawful summary dismissal.

136 Given that remoteness of damage is a question of fact,²¹⁴ it is necessary to identify error in the reasoning of the Court of Appeal, not a mere difference of opinion about that fact. In the context set out above, two errors are apparent. First, the Court of Appeal considered that the evidence of Associate Professor Doherty (a psychiatrist), that it was "extraordinary" and not "reasonable" that Mr Elisha had responded to "a sense of being terminated wrongly" by developing a serious psychiatric illness, supported the conclusion that this form of damage was too remote.²¹⁵ On the findings of the primary judge, however, Mr Elisha's employment was in fact unlawfully terminated in circumstances where the wrong done to him meant that, at the time of termination and no doubt until at some time during the proceedings, he also did not and could not understand why he had in fact been terminated.²¹⁶ Accordingly, Associate Professor Doherty's opinion was not based on a proper characterisation of the nature of the contractual breach.

137 Second, the Court of Appeal also characterised the breach of the contract of employment as a "failure to put allegations to" Mr Elisha.²¹⁷ On that basis, their Honours concluded that the mere "possibility", at the time of entering the contract, that an employee could suffer "some psychological impact" because of that breach was insufficient to satisfy the test of remoteness of damage in contract.²¹⁸ This characterisation of the breach is also incomplete and inaccurate. Vision did not merely fail to put allegations of alleged earlier misconduct to Mr Elisha. As described, it purported to comply with its disciplinary procedures by putting allegations to Mr Elisha concerning one incident (the hotel incident) but intended to and did use other allegations of similar conduct at earlier times both to support its rejection of Mr Elisha's version of the hotel incident and to conclude that his employment should be summarily terminated. This process placed Mr Elisha in an impossible position in relation to the disciplinary procedure in respect of his

213 *Rowe v McCartney* [1976] 2 NSWLR 72 at 75. See also Samuels JA at 89-90.

214 See, eg, *Wenham v Ella* (1972) 127 CLR 454 at 466; *Rowe v McCartney* [1976] 2 NSWLR 72 at 78, citing *Richards v Victoria* [1969] VR 136 at 146.

215 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 339-340 [185]-[189].

216 See, eg, *Elisha v Vision Australia Ltd* [2022] VSC 754 at [250].

217 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 338 [176], 340 [188].

218 *Vision Australia Ltd v Elisha* (2023) 328 IR 299 at 340 [188].

alleged misconduct and involved serious unfairness to him. The degree of seriousness of the breach influences the likelihood of the resulting kind of damage that should reasonably be contemplated. Therefore, the characterisation of Vision's breach as a "failure to put allegations to" Mr Elisha is expressed at an impermissibly high level of generality. It is apparent that a serious breach of disciplinary procedures involving serious unfairness to an employee of a kind that occurred in this case involved a serious possibility of causing the development of a serious psychiatric illness, which should reasonably have been contemplated by the parties at the time they entered the contract.

Negligence

138 I agree with Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ that, given the conclusions about the contractual cause of action, no consideration should be given to the claim in tort.

Orders

139 I agree with the orders proposed by Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ.