Is it time that the High Court recognises an employer's duty of care to prevent psychiatric injury in investigative and disciplinary processes?

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For well over 100 years, common law courts have denied workers a right to recover damages for psychiatric injury suffered as a result of wrongful dismissal from employment[1] - a rule which has persevered despite exceptional cases succeeding. But with changed community expectations around rights to psychological safety at work and the destigmatisation of psychological injury, it would seem that the scene is well and truly set for the High Court to finally recognise the existence of an employer's duty of care to avoid foreseeable risks to psychological health in the course of investigative and disciplinary processes.

Barring settlement, sometime in the next year the High Court will deliver its decision in *Elisha v Vision Australia Limited*[2] – a case involving a psychiatric injury suffered by an employee whose employment was unfairly terminated without regard to proper process. Despite finding that there had a been a breach of duty, the trial judge found that damages for psychiatric injury were not available because they were too remote, citing the principle in *Addis* [3]. On appeal to the Victorian Court of Appeal, the decision was upheld and from there, the plaintiff sought, and was granted, special leave (by 5 judges) to appeal to the High Court. Given the incremental developments in both common law and statute in recent years, it must surely be a case of "now or never"? For reasons outlined below, we feel that it is likely that the High Court will recognise the existence of a duty of care to avoid risks of psychiatric harm on the part of employers, in their management of investigative and disciplinary processes – because otherwise, there will be no congruence between community standards, legislated obligations (at least in Queensland) and common law principles.

A bit of history

In *State of New South Wales v Paige*[4] it was found that an employer does not owe an employee a duty of care to take reasonable care to avoid psychiatric harm in the conduct of workplace investigations. In *Paige*[5], the Court decided that the allegations related to the employer's right under contract to investigate an alleged incident and to make decisions about the plaintiff's contract of employment. The court found that as a result of this contractual entitlement, it was outside of the scope of the duty owed by the employer to provide a safe system of work to avoid psychological injury.

Some years later, the Queensland Court of Appeal considered a broadly analogous set of circumstances in *Govier v The Uniting Church in Australia Property Trust.*[6] There, the appellant had suffered psychiatric injury which she alleged was caused by two letters being issued by her employer, when the employer had been given a medical certificate saying she

[1] *Addis v Gramophone* [1909] AC 488.
[2] [2023] VSCA 288.
[3] [1909] AC 488.
[4] [2002] NSWCA 235.
[5] [2023] VSCA 288.
[6] [2017] QCA 12.

was unfit for work (she had been hospitalised because of an injury suffered in a workplace assault). Initially the worker had been stood down on full pay pending an investigation, but some two weeks later, the second letter indicated that the plaintiff had refused to attend an interview and called upon her to show cause why she should not have her employment terminated. She psychologically decompensated as a result. In the District Court, the plaintiff was unsuccessful, and this decision was upheld in the Court of Appeal, following the rationale in *Paige.*[7] The plaintiff was successful in obtaining a grant of special leave to the High Court – showing the court's interest in the issue – but this grant of leave was subsequently revoked when the court realised that the contract of employment had not been put into evidence and it was thought that this case was no longer the right vehicle for the issue to be considered.

Superimposed on this decision was the High Court's later decision in *Koehler v Cerebos*[8] - where the court found that an employer does not owe an employee a duty of care to take reasonable care to avoid psychiatric injury where it wasn't foreseeable that an employee may decompensate due to their workload. The court found that as the appellant had agreed to complete the tasks specified under the contract of employment, was being paid to do so, and had declined to have their duties modified, the employer could not have breached its duty of care – despite complaints by the employee about an excessive workload and an inability to cope.

In more recent times however, there have been some developments. In *Kozarov v State of Victoria*[9] - the court found the employer was dutybound to exercise reasonable care to protect employees, such as the plaintiff, against psychological injury, where an employee's mental state is known to the employer. The High Court found that the State of Victoria had been placed on notice that the plaintiff was at risk of suffering psychiatric injury due to the work that she was performing. The court overturned the Court of Appeal's findings on causation and found that expert evidence led at trial and the plaintiff's prior conduct showed that with appropriate advice and rotation of duties, the plaintiff would have transferred out of the Specialist Sexual Offences Unit ("SSOU") and her injury would have been avoided.

On the broader issue of duty of care to prevent psychological injury, the Queensland Court of Appeal recently recognised in *AAI Limited v Caffrey*[10] that a duty of care is owed to first responders. The court found that it is reasonably foreseeable that a first responder, such as a police officer, may suffer psychiatric and/or physical injury while performing the duties of their employment, such as attending the scene of a crash caused by a negligent driver. This was arguably just another incremental step in aligning the common law with community expectations around mental health.

Other cases in which the court has recognised a duty of care being owed by an employer, because they were on notice of a psychiatric injury being reasonably foreseeable include *Bersee v State of Victoria (Department of Education and Training).*[11] There, the trial judge found that the duty of care became engaged when there were "evident signs warning of the possibility of psychiatric injury". [12] On appeal, the Court of Appeal found that psychiatric injury was reasonably foreseeable from the start of 2014, but agreed with the view of the trial judge that the respondent took reasonable steps to avoid psychiatric injury being sustained.

[7] [2002] NSWCA 235.
[8] (2005) 222 CLR 44.
[9] [2022] HCA 12.
[10] [2019] QCA 293.
[11] [2022] VSCA 31.
[12] Ibid.

More recently, in *Gairns v Pro Music Pty* Ltd[13] Rosengren DCJ in the District Court distinguished *Govier*[14] in finding for a plaintiff who suffered psychiatric injury which was suffered following a meeting with the managing director and which resulted in a demotion. The court found that it was foreseeable that the plaintiff might decompensate because the defendant was aware that the plaintiff was "an emotional person and that his personality was such that he could quite easily become stressed and anxious".[15] In the circumstances of that case, the court found:

> "Whether or not a duty of care arises is a question of fact. There can be an overlap with facts informing the nature and scope of duty and whether there has been a breach. That is because the nature and scope of an employer's duty may itself vary depending upon what the employer knows or should reasonably have foreseen regarding the employee in question. The nature and extent of steps an employer is required to take in exercising reasonable care to avoid injuries to employees may be broader in respect of a particular employee, where circumstances raise the foreseeability of psychiatric injury to that employee." [16]

Contemporary Standards

In an employment context, psychological injury is undeniably on the rise. It is an issue not just for employers but also for their insurers. According to WorkCover Queensland's 2022-2023 Annual Report, the number of psychological injury claims increased both in number and cost. Psychiatric injury claims accounted for 6.8% of claims (up from 6.1% in the previous year) and represented about 12.3% of total statutory payments. This is significant because the total cost of $173.6million meant that psychological injury claims cost more than double the average time loss for physical injuries. In the 2022/23 year, the average cost of a psychological claim was $68,136.00. Perhaps alarmingly, psychological and psychiatric injury claims represented 13.9% of all common law claims made – despite representing only 6.8% of statutory claims. The rate of common law claims for pure psychiatric injury has also increased – from 391 in 2021/2022 to 486 in 2022/2023 year.

In what could be seen as a significant departure from the environment at the time that the High Court considered *Koehler v Cerebos,*[17] employers in Queensland now have a legislated obligation to manage psychosocial hazards in the workplace[18]. When the High Court handed down its decision in *Koehler*[19] in 2005, it was acknowledged that stress can bring about psychological injury and that workplaces can of course be stressful, but the law didn't then impose an overarching obligation on employers to recognise that their employees could be at risk of psychiatric injury caused by workload related stress. Now, the Worksafe Code of Practice[20] imposes a duty on a person conducting a business or undertaking, to manage psychosocial risks. By definition, a "psychosocial hazard" is a hazard that:

> (a) Arises from or relates to –
>
> (i) The design or management of work; or
>
> (ii) A work environment; or

[13] [2024] QDC 118
[14] [2017] QCA 12.
[15] *Gairns v Pro Music Pty Ltd* [2024] QDC 118 at [2].
[16] *Ibid* at [53].
[17] (2005) 222 CLR 44.
[18] *Managing the risks of psychosocial hazards at work Code of Practice* 2022 (Qld).
[19] (2005) 222 CLR 44.
[20] *Managing the risks of psychosocial hazards at work Code of Practice* 2022.

(iii) Plant at a workplace; or

(iv) Workplace interactions or behaviours; and

(b) May cause psychological harm, whether or not the hazard may also cause physical harm." [21]

Significantly, the Code of Practice requires control measures to be implemented, having regard to workplace interactions or behaviours and the information, training, instruction and supervision provided to workers. Against this statutory background, how is it possible to deny the existence of the common law duty of care to manage the same risks, at least in in Queensland? The provision likely won't be found to provide a cause of action for breach of statutory duty, but it certainly makes it plain that psychosocial hazards exist in workplaces and that employers are obliged to manage them.

The Elisha Arguments

In *Elisha*[22]*,* the appellant has argued that the decision in *Paige*[23] is either is not of such broad application or should be overruled. In written submissions, it was said:

> "The Court of Appeal treated the decision of the New South Wales Court of Appeal in *Paige*[24] as authority for denying the extension of the ordinary duty of an employer to its employees to encompass a safe system of investigation and decision-making with respect to discipline and termination of employment. Every step in the reasoning of the Court of Appeal below was predicated on the application and correctness of *Paige:* CA [245]-[246] (CAB 241-4). This involved error in two respects. *First, Paige* is not authority for such a wide proposition. *Secondly,* to the extent that it is, it is wrong and should be overruled. This Court should reject the artificial and incoherent preclusion: it should – consistently with other statements of this Court – hold that the duty can extend in particular case, subject to the ordinary brakes on liability." [25]

Further, it was submitted:

> "That incoherence is only compounded in that the common law of Australia has long recognised that the duty extends to psychiatric, not only physical, injury. The law may be traced from the seminal reasons of Windeyer J in *Mount Isa Mines Ltd v Pusey,* through the authoritative decision of this Court in *Koehler v Cerebos (Australia) Ltd* and to the more recent observations of this court in *Kozarov v Victoria*. That the employer's duty to provide a safe system of work extends to foreseeable psychiatric injury appears to have been common ground at all stages of the litigation leading to this Court's decision in *New South Wales v Fahy*. It was even common ground in *Paige* itself, albeit it was not common ground that it extended to "duty of a character relevant to the [claim]."[26]

The appellant also points to the Queensland Court of Appeal decision in *Hayes & Ors v State of Queensland*[27] - a case where the plaintiff succeeded on the basis of a failure on the part of the employer to provide adequate support during a disciplinary investigation. The appellant submits:

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[21] *Work Health and Safety (Psychological Risks) Amendment Regulation*, 2022 (Qld) s 55.
[22] [2023] VSCA 288.
[23] [2002] NSWCA 235.
[24] Ibid.
[25] Elisha, 'Appellant's Submissions', Submission in *Elisha v Vision Australia Limited,* M22/2024, 22 April 2024, [43].
[26] Ibid at [45].
[27] [2016] QCA 191.

> "…it is highly artificial to draw a distinction between the employer's responsibility *within* the investigation and the employer's responsibility in the workplace *as a consequence* of the investigation. Indeed, it is incoherent to say that an employer has a responsibility to ensure an employee has adequate support in the workplace to "cope" with an investigation but no responsibility in the conduct of the very investigation which gives rise to the need for the employee to "cope"". [28]

On the other hand, the respondent in *Elisha*[29] submits that it was clear that the employer had no knowledge of any vulnerability on the part of the plaintiff and no basis to be concerned about the impact on the plaintiff's psychological wellbeing of a disciplinary process. The respondent makes the point that despite having the opportunity to reconsider the correctness of *Addis* in *Baltic Shipping*[30]*,* the High Court declined to do so.

Conclusion

Given the incremental "baby steps" taken by the High Court in *Kozarov,*[31] it seems to us, likely that the High Court will take the *Addis* opportunity to expand the extent of the employer's obligation to manage psychosocial risks in the workplace. Given developments in the law with respect to psychosocial hazards in the workplace, is difficult to see how *Addis* can remain good law against contemporary standards and expectations. In *Kozarov*,[32] Edelman J equated psychological injury with physical injury saying:

> "In this sense, it is no different from the employer's duty to protect an employee's physical integrity from the unreasonable infliction of harm. It has long been recognised that psychiatric injury "is just as really damage to the sufferer as a broken limb ... [and] equally ascertainable by the physician."[33]

As the appellant points out in *Elisha*,[34] "equating psychiatric with physical injury for the purposes of recovery also coheres with the approach of this court in other contexts" [35] As Bob Dylan observed back in 1964, "the times they are a-Changin'".

Come writers and critics who prophesise with their pen and keep your eyes wide, the chance won't come again.

[28] Elisha, 'Appellant's Submissions', Submission in *Elisha v Vision Australia Limited,* M22/2024, 22 April 2024, [47].
[29] [2023] VSCA 288.
[30] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344.
[31] [2022] HCA 12.
[32] Ibid.
[33] Ibid at [103].
[34] [2023] VSCA 288.
[35] Elisha, 'Appellant's Submissions', Submission in *Elisha v Vision Australia Limited,* M22/2024, 22 April 2024, [36]; See, eg*, Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at [55]–[57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).