

## Article Information

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# When workplace policies become enforceable legal obligations with significant risk: Lessons from the High Court's decision in *Elisha v Vision Australia*

**The recent High Court decision in *Elisha v Vision Australia* [2024] HCA 50 highlights critical points of risk for employers to consider when terminating employment, including the enforceability of workplace policies, the scope of contractual duties, and liability for psychiatric injury. This case serves as a clear reminder of the importance of procedural fairness in disciplinary actions, the significant risks associated with failing to comply with employment contract terms, and ensuring that workplace policies are not inadvertently given contractual force.**

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## Background

The background facts to this case are fascinating, and reflect common situations that can arise in the management of employees.

Mr Elisha commenced employment with Vision Australia Limited (**Vision**) in 2006 as an adaptive technology consultant. His employment contract required compliance with "Vision Australia Policies and Procedures" as a condition of employment, and noted that any breaches of workplace policies "may result in disciplinary action". Importantly, there was no express provision within Mr Elisha's contract clarifying that policies and procedures were not incorporated into and did not form part of his employment contract.

Commencing in December 2014, Mr. Elisha started to receive treatment for anxiety and depression related to noise sensitivity, stress, and interpersonal difficulties with colleagues. Despite this, he continued to carry out his work responsibilities, which required him to travel.

In March 2015, while on a business trip at a hotel in rural Victoria, Mr. Elisha allegedly interacted with the hotel proprietor in a manner the hotel proprietor considered to be aggressive and intimidating.

Following this incident, while Mr. Elisha was on a pre-planned holiday, two Vision employees stayed at the same hotel and were informed of the hotel proprietor's account of the events. The employees reported the complaint back to Vision and it was escalated to Mr. Elisha's manager.

Upon returning from leave in May 2015, Vision initiated a disciplinary process against Mr. Elisha alleging he had engaged in "a serious breach" of Vision's behavioural requirements. Although Vision undertook an investigation and show cause process, the process and outcome was flawed. In particular, there was evidence Vision preferred the hotel proprietor's version of events, and terminated Mr. Elisha's employment, because it had formed the view Mr. Elisha had a history of past "aggressive behaviour" and made "excuses" for this conduct. However, relying on this conduct was problematic because these past incidents and behavioural concerns were not put to Mr. Elisha during the disciplinary process and he was not given any opportunity to respond in respect of those additional matters before his employment was terminated on 29 May 2015.

The disciplinary process was ultimately described by the primary judge as "nothing short of a sham and a disgrace".

Following the termination, Mr. Elisha's mental health deteriorated further, exacerbating his existing anxiety and depression.

Despite Mr. Elisha's employment ending in May 2015, he commenced proceedings against Vision over 5 years later, claiming damages for his psychiatric injury arising out of Vision's breach of his employment contract and negligent handling of the disciplinary process.

Interestingly, back in 2015 Mr. Elisha had commenced an unfair dismissal claim against Vision, which was settled for the maximum compensation amount. Mr. Elisha entered into a deed with Vision to record the settlement. The deed provided for Mr. Elisha to release Vision from all claims (broadly defined) "arising out of or incidental to his employment, proceedings and the termination."

The primary judge found the deed did not prevent Mr. Elisha from pursuing his claim and awarded him just under \$1.5 million in damages.

Vision appealed to the Court of Appeal of the Supreme Court of Victoria and was successful. Thereafter Mr. Elisha sought leave to appeal to the High Court.

### **Deed of Settlement**

Before looking at the High Court's decision, it is worthwhile considering the impact (or lack thereof) of the earlier deed of settlement between Vision and Mr. Elisha. It would no doubt be a matter for concern for employers that Vision was subject to these proceedings, despite entering into a deed of settlement with Mr. Elisha purporting to release Vision from all claims arising out of or incidental to his employment, proceedings (being the unfair dismissal proceedings), and the termination.

Vision's submissions that the deed barred Mr. Elisha from pursuing his claim were rejected by the primary judge who interpreted the release narrowly and found that any claims arising out of the employment and the termination, were "linked" to the unfair dismissal proceedings, thereby limiting the release in respect of claims beyond those made in the unfair dismissal proceedings (which did not include any claim in respect of psychiatric injury). The court interpreted the use of the word "and" as limiting the release to matters directly connected to the unfair dismissal proceedings.

The court concluded that Mr. Elisha's claims for breach of contract and negligence fell outside the scope of the release. Therefore, he was not restricted from pursuing these claims against Vision.

### **Breach of contract**

In relation to breach of contract, the questions that arose for the High Court were:

- whether the particular contract of employment incorporated the employer's disciplinary policies as terms of the contract;
- 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
- whether liability for psychiatric injury was too remote in the circumstances of the particular contract.

#### *Incorporation of Vision's disciplinary policies into terms of employment contract*

The High Court held that the employment contract incorporated Vision's policies as terms of the contract. Policy documents can be incorporated as binding terms of an employment contract where there is clear contractual intent. The High Court found this was reinforced by the fact there was an "acceptance" clause on the last page of the contract, by which Mr Elisha agreed to "comply with ... all other Company Policies and Procedures". The ruling aligns with *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*, where the Federal Court held that clear language requiring compliance with company policies suggests an intention the policies be contractually binding.<sup>[1]</sup>

Vision had argued that its policies did not create enforceable obligations, but merely provided guidelines to follow. The High Court rejected this view, affirming that employment contracts establish reciprocal obligations. If an employer disciplines an employee based on its contractual policies, it must also adhere to those policies in a binding manner.

The High Court differentiated between aspirational statements, such as general commitments to workplace fairness, and specific procedural promises, which were contained in Vision's policies. Vision's disciplinary procedure outlined steps for

formal disciplinary meetings, written notice of allegations, and opportunities for employee responses. Given the policies were held to be incorporated into the employment contract, they were given contractual effect as creating clear rights and obligations rather than general commitments, meaning Vision was required to comply with those obligations.

#### Scope of employer's contractual duty in relation to liability for psychiatric injury

The High Court stated that contractual duties must be understood in the context of the agreement between employer and employee. If an employment contract includes provisions governing dismissal procedures, those provisions may create enforceable rights, including protections against psychological harm, if breached. In this regard, an employer's contractual duty regarding dismissal, may extend to liability for psychiatric injury suffered by an employee.

The High Court dismissed Vision's reliance on previous legal authority (now overturned) which held that damages for mental distress were generally not recoverable in employment disputes.

In reaffirming that psychiatric injury is equivalent to physical injury when assessing damages for breach of contract, the High Court noted that mental distress resulting from a contractual breach is not inherently excluded from being compensable, particularly when the injury arises from an employer's failure to follow agreed-upon dismissal procedures.

#### Extent of remoteness of psychiatric illness

The primary judge accepted that the termination could have caused psychiatric injury, noting that the "sham" nature of the disciplinary process reasonably created a foreseeable risk distress and psychiatric injury.<sup>[2]</sup>

The High Court agreed and said that, in assessing the remoteness of damage, the key consideration is whether the general type of injury, and the manner in which it occurred, were within the reasonable contemplation of the parties at the time of contract formation.

An important distinction was made by the High Court between general emotional distress and psychiatric illness. While mental distress is a common reaction to adverse workplace experiences, psychiatric injury is a diagnosable medical condition and constitutes a separate category of damage. As such, the High Court determined that the risk of psychiatric illness was foreseeable given the circumstances of Mr. Elisha's termination.

The High Court found that Vision's breach directly contributed to Mr. Elisha's psychiatric injury. Specifically, if the employer had not engaged in a procedurally unfair and unfounded dismissal process, Mr. Elisha would not have suffered the psychological harm that resulted, meaning the "causal element was entirely predictable in light of the nature of [Vision's] breach".<sup>[3]</sup>

The fact that Vision had formal policies in place, including disciplinary procedures and support mechanisms such as counselling to mitigate the risks of psychiatric injury associated with termination, indicated that both parties understood, at the time of the employment contract, that dismissal could lead to psychological harm if not handled properly.

#### Breach of duty of care - Negligence

Mr. Elisha also argued that his employer owed him a duty of care to ensure a safe system for conducting investigations and making decisions regarding disciplinary actions and termination of employment. The High Court deemed it unnecessary to address this ground of appeal due to Mr. Elisha's success in respect of the breach of contract claim. This issue remains open to being raised by an employee in a future claim. However based on the Court's brief consideration of this issue, it would need to be demonstrated that such a general duty, in order to exist, must be coherent with the broader statutory context.

#### Summing Up

Beyond the legal considerations, the High Court highlighted the particularly egregious nature of Vision Australia's actions, noting that Mr. Elisha had been employed for nearly a decade and was dismissed under circumstances that lacked procedural fairness. The Court ruled that, even though the exact nature of his psychiatric condition may not have been foreseeable, it was reasonable to expect that he would suffer a serious psychological impact from the manner of his dismissal.

In acknowledging the important role that employment plays in people's lives, the High Court noted:

*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." An unfair process of termination for alleged misconduct could affect all three of those interests;*

*i.e., a person's livelihood, identity, and self-esteem.*<sup>[4]</sup>

Of course, employers have a right to lawfully bring an employee's employment to an end, in accordance with the terms of the contract, and in consideration of the overriding statutory obligations all employers have. However, employers may be liable for psychiatric injury arising from the circumstances of the dismissal (depending on the contract terms and the facts). Accordingly, it is important for employers to exercise care and remain cognisant of the terms of the contract and the important role procedural fairness plays in a termination process.

## **Lessons for Employers**

This case has undoubtedly created a significant development in the law concerning an employee's ability to seek damages associated with the manner of their termination. However, readers should be mindful that this case turned very much on its own facts. As this article has demonstrated, the Court stopped short of deciding whether there is a general tortious principle that imposed a duty on all employers relating to dismissal-related decisions.

What this means is that for now, only employers who incautiously incorporate terms into their employment contracts (and consequently breach them) are likely to be immediately affected by the decision in Elisha. Nevertheless, there are some useful steps employers can take to minimise the risks in these areas:

- Employers should ensure their employment contracts are not drafted in such a way as to inadvertently incorporate workplace policies and procedures (unless this is intended). If policies are meant to be binding, this should be expressly stated and the legal risks carefully assessed. If not, contracts should specify that policies and procedures do not form part of, and are not incorporated into, the contract of employment. Consider a review of your contracts if unsure about this.
- Psychiatric injuries are not automatically excluded from contractual claims arising from dismissal. Employers must be mindful that if their employment contracts include specific disciplinary or termination procedures, failure to adhere to these procedures may expose them to liability for resulting psychological harm.
- A procedurally fair termination process remains critically important. Employers should ensure that employees have a fair opportunity to respond to allegations, and that the outcome of a disciplinary meeting is not predetermined, or based on additional matters not put to the employee.
- Ensure that reasons for termination are clearly documented and communicated to employees. Failing to provide clear grounds for dismissal can lead to legal challenges.

<sup>[1]</sup> Discussed by the High Court in *Elisha v Vision Australia Limited* [2024] HCA 50 [40].

<sup>[2]</sup> *Elisha v Vision Australia Limited* [2022] VSC 754 [462].

<sup>[3]</sup> Above no. 1 [67].

<sup>[4]</sup> Above no. 1 [67].