IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN

No. B51/2017

TONI MAREE GOVIER
(Appellant)

And

UNITINGCARE COMMUNITY (ABN 28 728 322 166)
(Respondent)

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

2. The issue on this appeal is whether the tortious or contractual duty of reasonable care owed by employer transcends application to the employee's performance of work, extending to the mode of investigation of an employment incident which could result in such employee's dismissal or suspension. That is: is psychiatric injury arising from disciplinary investigation actionable in negligence? Respondent's Submissions [2]; AB414-7, 453-4.

3. It is a common ground that an investigation was launched on the day of the altercation, and the events which ensued were part of that investigation. On 9 December 2009, a contrary version was furnished by the other employee. The offending conduct occurred in the course of investigation enquiry which the appellant concedes the respondent was contractually entitled to undertake. Submissions [4].

4. The principle in *Sullivan*, relevantly, is that the existence of any duty of care will be displaced where there is a "need to preserve the coherence of other legal principles, or a statutory scheme which governs certain conduct or relationships" (at [50]) or where the existence of a duty would "cut across other legal principles so as to impair their proper application" (at [53]). Submissions [7].

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5. In the context of disciplinary investigation initiated in consequence of workplace incident, *Paige* exemplifies such displacement on the footing that (at [132], [155]) imposition of duty of care is likely to spawn distortion in matters "concerning the creation and termination of a contract of employment as distinct from performance under the contract" and that such matters ought "properly be left to the law of contract" subject to "statutory modification". That position is indistinguishable from the case at hand. Submissions [10].

6. *Paige* is not distinguishable because the employment contract there was replete with statutory modification, and also that rights of administrative review were afforded. Submissions [11].

7. The content of an employer's duty of care was predicated by this court in *Czatyrko v Edith Cowan University* (2005) 215 ALR 349, 79 ALJR 839 (at [12]), namely a duty "to take reasonable care to avoid exposing [employees] to unnecessary risks of injury. If there is a real risk of injury to an employee in the performance of a task in the workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards."

8. The investigation initiated here did not bear on the appellant's performance of an employment task, but rather on whether her contract ought be terminated depending upon what was yielded by investigation (there being competing versions). Submissions [20].

9. Implied contractual and statutory obligations regulated the conduct of such investigation. These included the conceded entitlement of the respondent to require an account from the appellant about her conduct, the conceded entitlement to stand the appellant down on full pay, the *Associated Dominion*[1] implied duty of the appellant to furnish a response (or responses) to the respondent's enquiries about her conduct, and the statutory obligations in respect of dismissal under s 83 of the *Industrial Relations Act* 1999 (Qld). The fact that relevant contractual obligations were implied not express – in particular those deriving from trust and confidence – does not diminish their contractual moment. Submissions [12], [13].

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[1] when predicating that a request be made "at a proper time and in a reasonable manner" Herron J was identifying only that not to do so would obviate non-compliance as founding dismissal or suspension.

10. Cognate statutory provisions bore upon any dismissal which might emerge from the investigation, namely the provisions of the *Industrial Relations Act* pertaining to dismissal and remedy by reinstatement (ss 73 to 78) and remedies by way of compensation and recompense (ss 80 and 81). Submissions [29].

11. There were also competing third party rights and interests at play, and necessary to be addressed by the investigation, including those of the respondent itself, other employees (including MD) and clients (including their safety and contractual rights). Submissions [21].

12. A duty, if grounded, could not be confined logically to form and timing enquiry of the employee as to incident version. Pandora's box would be open. It would embrace all aspects of the investigation including affording natural justice and ultimate decision making concerning discipline (including of others). Indeed, the appellant complains here also that the respondent engaged in "incomplete investigation" (Reply Submissions [6]), that resembling the obligation eschewed in *Barker*. Further, such duty, in effect, may well distort unfair dismissal or reinstatement issues. And if a duty applies to disciplinary investigation why not also to promotion, pay increase (and disparity), leave, stand-down and redundancy decision making? Submissions [24], [26].

13. It is misleading to contend that the decision here stands as authority for the proposition that an employer "owes no duty not to injure an employee provided the injurious act is done in the course of investigation". Unfair dismissal rights aside, a remedy is available for intentional infliction of mental harm and defamation. This is consistent with the reasoning in *Barker*. Submissions [25], [29].

Dated this 13 April 2018.

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