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Mental Health and Employment: Issues for Lawyers

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Abstract

Economic pressure and a 'hyper competitive' work environment has intensified working hours and work stress across Australian business and industry – and perhaps no more acutely than in the professions. Lawyers – particularly those in private practice – know well that the stress induced by the tyranny of billable hours and client demands can induce or exacerbate mental ill-health. In this paper I would like to consider Dawson's proposition that a "growing awareness of occupational stress... foreshadows an accelerating spiral of claims by workers for related injuries and diseases" in the light of some very recent Australian case law dealing with common law claims for psychiatric harm suffered as a result of employment conditions. The two cases I propose to examine – *Koehler v Cerebos (Australia) Ltd*, (*Koehler*) and *Nikolich v Goldman Sachs J B Were Services Pty Ltd* (*Nikolich*) – tell a somewhat unsatisfying story about the potential for the common law to adequately address the very real problems that Dawson identified so long ago.

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‘Mental Health and Employment: Issues for Lawyers’

Joellen Riley*

Mental health as an employment law problem

In a study of employers’ legal liability for mental illnesses induced by workplace stress conducted almost 20 years ago, Robert Dawson predicted:

[A] growing public awareness of occupational stress (which itself seems to be increasing in times of economic difficulty, hyper competitiveness and some breakdown of traditional social supports) foreshadows an accelerating spiral of claims by workers for related injuries and diseases.¹

Dawson acknowledged that when he was writing there was not yet any body of successful common law occupational stress cases (although there had been a number of statutory workers’ compensation claims for illness induced by occupational stress). He said, however, that such cases were ‘potential winners’ at common law.²

In this paper I would like to consider Dawson’s proposition in the light of some very recent Australian case law dealing with common law claims for psychiatric harm suffered as a result of employment conditions. The two cases I propose to

* Associate Professor, Law Faculty, University of New South Wales. I would like to thank Dr David Rolph at the University of Sydney, and Associate Professor Prue Vines at the University of New South Wales, for illuminating conversations about the issues raised in this paper, and for reading an earlier draft.

¹ Robert Dawson *Stress: Employers Liability* (Work Health Co, Sydney, 1987) at p 7.

² *Ibid.*

examine – *Koehler v Cerebos (Australia) Ltd*, (*Koehler*)³ and *Nikolich v Goldman Sachs J B Were Services Pty Ltd* (*Nikolich*)⁴ – tell a somewhat unsatisfying story about the potential for the common law to adequately address the very real problems that Dawson identified so long ago. Economic pressure and a ‘hyper competitive’ work environment has certainly intensified working hours and work stress across Australian business and industry⁵ – and perhaps no more acutely than in the professions. Lawyers – particularly those in private practice – know well that the stress induced by the tyranny of billable hours and client demands can induce or exacerbate mental ill-health. Although Dawson identified a real problem, it is not at all clear that the common law has offered a satisfactory solution. Interestingly, when Dawson was writing his paper, I was working as a journalist on the *Australian Financial Review*, covering the legal round. I recall investigating a claim that Australian business was under threat from an explosion of US-style litigation for stress-related illnesses (though at the time, the chief concern was stress-induced heart attacks rather than depression and other psychiatric disorders). If *Koehler* and *Nikolich* are a fair indication of this risk, time has proved these claims to be considerably exaggerated.

Tort, contract and statute at work

In examining two common law cases I do not wish to suggest that there are no other legal avenues for addressing work-induced mental harm.⁶ Workers’ compensation laws do recognise claims for work-induced psychological injuries, defined as psychological or psychiatric disorders,⁷ and occupational health and safety laws do impose obligations on employers to take precautions against hazards to psychological health caused by work practices.⁸ Discrimination statutes have also provided an

³ (2005) 222 CLR 44.

⁴ [2006] FCA 784.

⁵ See Barbara Pocock *The Work/Life Collision: What work is doing to Australians and what to do about it* (Federation Press, Sydney, 2003), pp 22-23.

⁶ Comprehensive studies of legal responses to mental health issues have been published in other jurisdictions: see for example R J Bonnie and J Monahan (eds) *Mental Disorder, Work Disability and the Law* (University of Chicago Press, Chicago, 1997); W J Koch, K S Douglas, T L Nicholls and M L O’Neill *Psychological Injuries: Forensic Assessment, Treatment, and Law* (Oxford University Press, New York, 2006); J Stranks *Stress at Work* (Oxford Boston Elsevier, 2005) especially Chapter 8, which traces developments in English case law.

⁷ See for example, *Workers Compensation Act 1987* (NSW) s 11A(3).

⁸ See for example the *Occupational Health and Safety Regulation 2001* (NSW) reg 9(2)(b).

avenue for redress of some kinds of psychiatric harm, when it has been induced by bullying, racial vilification or sexual harassment.⁹ Any disorder, illness or disease which affects a person's 'thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour' is itself classified as a disability for the purposes of protection from discrimination under the *Anti-Discrimination Act 1977* (NSW),¹⁰ and the *Disability Discrimination Act 1992* (Cth).

Arguably these statutory schemes for compensating and rehabilitating those affected by work-created harm, promoting compliance with workplace health and safety standards, and protecting the vulnerable from exclusion and harassment, are more appropriate regulatory tools for addressing the mental health issues arising in the workplace. Common law litigation is reactive, not preventative, and has always been a highly expensive tool for dealing with any kind of harm to individuals. (Indeed, involvement in long and complex litigation is rarely a satisfying strategy for a person of robust mental health, let alone a person who suffers a depressive illness.)

I am interested in examining the common law's response to the problem of work-induced mental illness, because it unveils some underlying assumptions about how we perceive the employment relationship in contemporary Australian society, and what responsibilities we now ascribe to employers and employees in that relationship. I want to examine this problem within the context of the new contractualism – the emergent view that employment should be treated as a commercial relationship and is best regulated by contract law. As Richard Johnstone and Richard Mitchell explain,¹¹ the focus on the regulation of employment as a private bargain, according to principles of contract law, is a relatively recent phenomenon: '... private ordering of employment relations through contract law has remained largely subdued and subordinated to the more or less continuous regulatory involvement of the state in this field since the thirteenth century.'¹² Instrumental

⁹ See *Sex Discrimination Act 1984* (Cth) s 28A. Employers can be vicariously liable for sexual harassment committed by other employees: s 106. Breach of federal discrimination legislation may lead to an order for damages by the Federal Court, under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PO(4)(d). See also *Anti-Discrimination Act 1977* (NSW) s 22A (sexual harassment); s 20C (racial vilification); s 108(2)(a) allows compensation orders of up to \$40,000 for breach of this Act.

¹⁰ See s 4 definition of 'disability', and s 49B.

¹¹ See R Johnstone and R Mitchell 'Regulating Work' in C Parker, C Scott, N Lacey and J Braithwaite *Regulating Law* (Oxford University Press, Oxford, 2004), p 119.

¹² For further analysis of the evolution of the modern employment contract see also A Merritt 'The Historical Role of Law in the Regulation of Employment – Abstentionist or Interventionist' (1982) 1 *Australian Journal of Law & Society* 56-86; S Deakin 'The Many Futures of the Employment

public regulation has proved considerably more influential in shaping labour law in the past, and is likely to prove a more efficacious tool in the future, particularly in promoting labour law's protective agenda.

Through an examination of *Koehler* and *Nikolich*, I am going to suggest that conception of the employment relationship as a contract made between robust autonomous individuals *seriously limits* the scope for the development of any recognition at common law of an employer's duty of care in respect of work-induced mental illness. I shall argue that the new contractualism does not well serve a protective agenda for workplace law, because it depends upon presumptions of equal bargaining between well-informed, free agents. Contract law allows parties to bargain away protections.¹³

In one respect at least, the status-based conception of the old 'master and servant' relationship may have offered a paradigm more conducive to the development in contemporary society of a duty for employers to shoulder more responsibility for work induced psychological harm.¹⁴ It may seem a strange – perhaps even offensive – proposition, to applaud the paternalism of master and servant law. It does seem, however, that the evolution of a contractual conception of the employment relationship has imported into contemporary employment law an assumption that workers bear greater responsibility for any risks inherent in the work they undertake. This is a consequence of treating the employment relationship primarily as a private bargain in which the parties themselves determine the boundaries of their own liability. The scope for development in the common law of an employer's duty to ensure that work does not cause or exacerbate psychiatric harm would seem surer if such a duty were to arise principally in tort or under statute, with no scope for contracting out. Before I unravel this argument through a discussion first of *Koehler*, and then of *Nikolich*, I should place these cases in context.

Contract' in J Conaghan, M Fischl and K Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP, Oxford, 2002); J Howe and R Mitchell 'The Evolution of the Contract of Employment in Australia: A discussion' (1999) 12 *Australian Journal of Labour Law* 113.

¹³ See for example the observation of the majority in *Koehler* (above n 3) at par [31], that parties who have stipulated a requirement to perform more work than an industry standard will have done so on the basis of greater reward – and that the law of negligence should not inhibit such economically beneficial deals.

¹⁴ See Morrison, W (ed) *Blackstone's Commentaries on the Laws of England*, 1765-69, (Cavendish, London, 2001), Book I, Chapter the Fourteenth, 'Of Master and Servant'.

Some general propositions

Lest this paper be criticised for focusing on a narrow set of cases, involving relatively weak claims, let me first acknowledge some established principles. An employer does owe a non-delegable duty to take reasonable care to avoid exposing employees to unnecessary risks of injury.¹⁵ ‘Injury’ does include mental injury, and in Australia, it is not necessary that the mental injury result as a consequence of some physical harm.¹⁶ (English law is less clear on this point.¹⁷) In some cases, plaintiffs have recovered substantial damages for psychiatric harm caused by some aspect of their work, as a result of their employer’s neglect of a duty to take reasonable care to avoid unnecessary risk of such harm.

*State of NSW v Seedsman (Seedsman)*¹⁸ is a notable example. This case concerned a claim by a young female police officer who suffered Post Traumatic Stress Disorder as a result of her work dealing with horrendous child abuse cases. Her employer had failed to provide debriefing or rotation of duties. It was held – most emphatically as far as Meagher JA was concerned¹⁹ – that the employer ought to have foreseen the risk of this kind of harm and taken reasonable steps to prevent it.

*Patrick Stevedores (No 1) Pty Ltd v Vaughan (Vaughan)*²⁰ is another example. That case was part of the legacy of the notorious waterfront dispute of 1998,²¹ when the Patricks group of companies took on the Maritime Union of Australia in a particularly acrimonious industrial dispute. Mr Vaughan was a supervisor on the docks who had worked his way up the ranks in the industry over many years, and had in the past been a loyal union member. He was also a loyal employee. When his employer insisted that he break the picket lines during this dispute, his loyalties were brought into conflict. The employer’s insistence that he cross the picket lines, on at least one occasion without any escort, exposed him to abuse and threats of violence from the strikers. He suffered severe stress and consequent psychiatric illness. The New South Wales Court of Appeal had no difficulty in finding that the employer had

¹⁵ *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1, at par [276] per Hayne J.

¹⁶ See *State of NSW v Seedsman* (2000) 217 ALR 583, at par [155] per Mason P.

¹⁷ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 which overruled *Frost v Chief Constable of South Yorkshire Police* [1998] QB 254.

¹⁸ Above n 16.

¹⁹ *Ibid* at par [175].

²⁰ [2002] NSWCA 422.

²¹ *Patricks Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.

breached its duty to take care of the employee's physical and psychological well-being. The court held that this duty arose as a necessary corollary of the employer's prerogative to command obedience to its workplace orders, and its capacity to exercise control over employees' lives by determining the nature and conditions of their work.²²

Seedsman and *Vaughan* were cases where horrendous experiences and exceptional circumstances caused severe stress to persons who were deemed to be normal in their susceptibility to psychiatric illness.²³ What, however, of the more commonplace stresses of contemporary working life? What of the stresses induced by the 'economic difficulty' and 'hyper competitiveness' identified in Robert Dawson's study? What, for instance, of the risks of mental illness brought about by the exhausting 'all-nighters' commonly worked by young lawyers in the big law firms during major transactions? Or the stress created by the perpetual need to deal with distraught and demanding clients with urgent needs? This brings us to an examination of *Koehler*.

The case of the overworked merchandiser

Nuha Jamil Koehler's claim against her employer, Cerebos (Australia) Ltd, concerned psychiatric illness induced by overwork.²⁴ Koehler had been employed by Cerebos as a full-time sales representative between November 1994 and April 1996. While a full-time sales representative selling Cerebos products to supermarket chains, she had the assistance of a merchandiser, who set up displays of the products in the supermarkets.

In March 1996, Cerebos retrenched her from that position, but offered to re-employ her as a part-time merchandising representative, effective from 29 April 1996. Her new letter of appointment identified that she was to work for 24 hours, from Monday to Wednesday, but did not stipulate the duties she was to perform. As soon as she commenced the work, and saw the size of the geographical territory she was required to cover, she began to complain that there was too much work for three days. She complained frequently – both orally and in writing – and her complaints were

²² Above n 20 at par [16].

²³ See also *State of New South Wales v Napier* [2002] NSWCA 402, concerning psychiatric illness suffered by a worker in a prison factory who was subjected to 'distressing and depraved threats'.

²⁴ For a more thorough analysis of the case, see D Rolph "No Worries? Employers' Duty of Care for Negligently Inflicted Stress" (2005) 18 *Australian Journal of Labour Law* 344.

ignored. Her suggestions as to how to rationalise the work were also ignored. Nevertheless, she continued to try to meet the employer's demands. Consequently, she became ill with a 'complex fibromyalgia syndrome' (a disorder resulting in the amplification of physical pain) and a major depressive illness. By the time the case reached the High Court it was no longer in contention that overwork was a cause of her illness. Causation was not an issue in the appeal, however 'foreseeability' was, and it was an issue ultimately decided against her. In the result, the High Court (agreeing with the Full Court of the Supreme Court of Western Australia) held that the employer could not reasonably have foreseen stress induced by onerous duties would result in psychiatric illness.²⁵

The real interest in this case as far as our enquiry is concerned, is the High Court's consideration of the question of the employer's duty of care to employees. The High Court stated categorically in this case that an employer's duty of care to employees could not be considered purely according to principles of tort law, without first taking account of the terms of the contract of employment between the parties:²⁶ '... questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties.'²⁷ In this case, the High Court held that Koehler had herself 'agreed to perform the duties which were a cause of her injury'.²⁸ Evidently she had done this by agreeing to accept the part-time position, and by continuing to try to perform the duties, albeit under constant protest. The Court held that her agreement to undertake the work was not consistent with 'harbouring, let alone expressing, a fear of danger to health'. If she herself had not foreseen such serious harm from continuing to work (for if she had, surely she would have resigned), then how could the employer be expected to foresee such harm? Such, at least, was the High Court's logic. Evidently, in the world inhabited by High Court judges, people who are themselves concerned that overwork will harm their health resign their jobs promptly, before suffering any harm.

The Court held that 'within the bounds set by applicable statutory regulation, parties are free to contract as they choose about the work one will do for the other'.²⁹

²⁵ Above n 3 at par [5].

²⁶ *Ibid* at par [21].

²⁷ *Ibid* at par [22].

²⁸ *Ibid* at par [27].

²⁹ *Ibid* at par [31].

Consequently, insistence upon performance of the terms of that contract ‘cannot be in breach of a duty of care’.³⁰ This is reminiscent of the defence of ‘voluntary assumption of risk’ – except that here, the employee’s acceptance of the risk, implied from the terms of an employment contract, is effective to defeat any finding that there was a breach of a duty of care in the first place.

The Court’s reasoning implies that the employee must be sufficiently astute to assess the health risks inherent in the terms of a work contract, and must also take responsibility for informing the employer of any such risks, upfront, before any harm eventuates. So by taking on a job, the employee is taken to have given a warranty as to their physical and mental competence to undertake the duties without suffering harm.³¹ If the duties prove impossible to perform, then the employee has no option but to resign the position. If the employee stays, works and suffers illness or injury, it is on their own head, and at their own expense.

Following *Koehler*, has the High Court left any room for imposing a duty of care on employers, even in the circumstances of cases such as *Seedsman* and *Vaughan*? Is it not equally true that the young policewoman in *Seedsman* was simply performing the duties under her contract, and should have taken responsibility herself for booking herself into therapy, and if it proved ineffective, resigning her job before it caused irreparable harm? Is it not the case that Mr Vaughan should have taken the decision to resign rather than follow the harmful instructions of his employer? The Court provides a narrow opening for cases such as *Seedsman* and *Vaughan*, in the concession that an employer’s duty of care may be activated if the employer exercises a discretion to vary duties during the term of the employment contract:

The exercise of powers under a contract of employment may more readily be understood as subject to a qualification on their exercise than would the insistence upon performance of the work for which the parties stipulated when making the contract of employment.³²

With respect, this view of the employment relationship as a commercial contract, where all the terms are set out in an initial deal agreed between the parties, is highly unrealistic. In the real world of work, employment relationships are typically very fluid, evolving relationships. Rarely are all the contours of duties and responsibilities spelled out with precision at the outset. Finding the bright line between the terms

³⁰ *Ibid* at par [29].

³¹ *Ibid* at par [36].

³² *Ibid* at par [37].

‘fixed at the time of the contract’ and further duties undertaken on request as the relationship evolved would be an extremely difficult task in many jobs.

Lessons from *Koehler*

The clearest lesson from *Koehler* is that conceiving the employment relationship as a commercial contract entered into by equally robust parties leaves the vulnerable worker in a perilous position indeed. Impecunious people who must find work to feed themselves and cannot afford to reject any job offer are at the mercy of employers’ ‘take it or leave it’ terms. The facts in *Koehler* reveal a person desperate to keep a job – albeit one requiring her to continue her full-time duties on a part-time salary. Only where there is some statutory obligation, will the employer bear any duty to regard any risks the work poses to employees.

In the current industrial relations climate in Australia, the chances of workers enjoying the protection of a collectively bargained industrial instrument restraining the employer’s prerogative to dictate workload are becoming more and more remote. The federal *Workplace Relations Act 1996* (Cth), as it has been amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices*), enables employers to make individual Australian Workplace Agreements (AWAs) to avoid any collectively bargained conditions. Clauses in collectively bargained agreements purporting to restrict an employer’s prerogative to bargain individually are ‘prohibited content’.³³ These AWAs can now be made without passing a no-disadvantage test. This means that terms in an AWA can undercut any industry-wide award or collective workplace agreement that would otherwise apply to the work. The only safety net now available is a minimalist set of conditions provided by the Australian Fair Pay and Conditions Standard.³⁴

Also prohibited from any workplace agreement are any clauses restricting forms of engagement.³⁵ Employers are to be free to engage as many casuals, labour hire workers, and contractors as they wish – all in the interests of liberating employer enterprises to compete more effectively in a competitive market. Individual contracting is the ideal option for the employer who wants to push down the price of

³³ See *Workplace Relation Act 1996* (Cth) s 356 and *Workplace Relations Regulations 2006* (Cth) reg 8.5(8).

³⁴ See *Workplace Relations Act 1996* (Cth) Pt 7.

³⁵ See *Workplace Relations Regulations 2006* (Cth) reg 8.5(1)(h) and (i).

labour, and shift more enterprise risk to workers. Women like Nuha Koehler are especially vulnerable to these pressures.³⁶

The individual contract is particularly adept at protecting the employer's interests while the common law maintains the fiction that an employment contract is a freely negotiated agreement made by robust autonomous parties. If we instead conceptualised the employment relationship as a status-based relationship, in which a stronger party dictated terms to a more vulnerable party, we may be more ready to accept the primacy of a tort-like duty of care, which could not be derogated from by private contract.

This was the view adopted by a majority of the bench in the English case of *Johnstone v Bloomsbury Health Authority*³⁷ (a case not cited in *Koehler*). In that case, a young doctor became ill from working punishingly long double shifts in a hospital. The employer sought to avoid responsibility for causing his illness, by claiming that his contract of employment allowed the hospital to require him to work a certain number of hours over a period of time, and he had not exceeded these hours (albeit that he had worked the hours back to back without regular breaks). A majority of the court rejected the employer's contract-based defence, holding that the employer's duty to take reasonable care not to expose the employee to unnecessary risks was an overriding obligation, determining the interpretation of express contract terms. The express terms regarding hours must be read so that the employer could not require the hours to be worked in a pattern which would cause harm. Surely this is a more appropriate conception of the employer's duty of care under an employment contract. It ought to be impermissible to contract out of this duty.

Following *Koehler*, however, employers may be encouraged to include more detailed stipulation of oppressive workloads in the documentation of their employment relationships, so that they can benefit from the presumption that their employees – as robust, free agents – have warranted their own physical and psychological fitness to perform to order.

I have already seen, in a letter of appointment issued to newly recruited law graduates, a clause similar to the following:

³⁶ See the collection of essays in J Fudge and R Owens *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms* (Hart, Oxford and Portland Oregon, 2006).

³⁷ [1992] 2 All ER 293.

In the light of the professional nature of the firm's business and the need to meet the requirements of clients, as a member of the professional staff you agree to work such hours as are reasonably necessary to carry out your duties to the satisfaction of the firm, without further remuneration.

The only apparent restraint on the firm's prerogative to require long hours (beyond the 24 hours a day fixed by the laws of nature), is that the hours must be 'reasonably necessary' to carry out the duties – but the duties are unlimited. Following *Koehler*, would a young law graduate who had accepted such an offer have any entitlement to compensation for illness suffered as a result of the typically long, weekend-less working hours endured during some major corporate transaction?

A case of workplace bullying

A decision of the Wilcox J in the Federal Court in June 2006 has prompted some speculation that the common law of employment is moving towards greater recognition of a right to be treated respectfully at work, which may potentially sound in damages. *Nikolich v Goldman Sachs J B Were Services Pty Ltd (Nikolich)*³⁸ is currently under appeal, so even what it says on its face ought not be relied upon too heavily just yet. Even so, in my view the case reinforces the essential lesson from *Koehler's* case: employees claiming damages for breach of an employer's duty of care will first have to address the content of any employment contract governing their relationship. To the extent that the employer has simply required performance of the terms of the contract, there will be no duty.

Nikolich occurred in a very different environment from *Koehler*. The brokers and financial advisers employed by the investment bank were no doubt considerably more able to negotiate their own terms than a part-time supermarket merchandiser like Ms Koehler. Peter Nikolich was employed as an investment advisor and earned his remuneration from a combination of base salary and performance-based incentives. The employer instituted some working arrangements that encouraged advisors to work in teams, to better service clients. Nikolich teamed up with two others to form a

³⁸ [2006] FCA 784.

'partnership' which shared clients. The three partners agreed among themselves that if any of them left, the clients would be shared between the two who remained.

Problems occurred when one of the members of the partnership did in fact leave the company, and the remaining two expected to continue to service her clients. The branch manager (Sutherland) who was ultimately responsible for allocating clients to advisers decided instead to reallocate a considerable number of the clients to other teams of advisers. The team of which Sutherland himself was a member benefited from the reallocation. Nikolich was aggrieved by this decision and complained, but his complaint was ignored, and Sutherland behaved in a hostile manner towards him thereafter.

Nikolich took his complaint to the human resources management team, however (to cut a detailed story short) the HR person delayed in responding to him, did not investigate the problem adequately, and gave him a cursory and negative response. Nikolich's sense of injustice and resentment grew into a full-blown depressive illness. He took a great deal of time off sick, and ultimately his employment was terminated. He sued his employer on a number of grounds. He brought claims for breach of contract, unlawful dismissal under the *Workplace Relations Act*,³⁹ and misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth). The *Trade Practices* claim was fruitless, so we will not consider it here. We will consider the common law claim, and also the unlawful dismissal claim, because it allows us an insight into the limitations of a statutory protection from discrimination on the grounds of mental illness.

The contract claim

Mr Nikolich succeeded in his contract claim, and was awarded a sum of more than half a million dollars, comprised of past loss of earnings, loss of future income, and general damages in the amount of \$80,000. The amount of \$80,000 was calculated on the basis that his injury was deemed not to be permanent. Following resolution of the matter it was expected he would be able to begin recovering his health.⁴⁰

³⁹ Nikolich's claim was brought under former s 170CK(2)(f) which prohibited dismissal for discriminatory reasons including, *inter alia*, mental disability. This prohibition is now contained in s 659(2)(f).

⁴⁰ Above n 38 at par [341].

What was the breach of the employment contract giving rise to this substantial award of damages? Nikolich was held to have had no contractual entitlement to have the team's clients allocated in any particular way upon resignation of a team member. The deal between the team partners themselves did not bind the employer.⁴¹ The employer had authorised Sutherland to make all decisions about servicing clients, and he had done so. Nikolich's claim was based on breach of a human resources policy document, called *Working With Us*, which was provided to Nikolich along with his letter of appointment, and with which he was told he was expected to comply. This document contained a number of commitments concerning professional conduct, preventing discrimination, and treating people with respect and courtesy. Justice Wilcox held that these commitments formed part of his contract of employment, for a number of reasons.

First, the language of the document was promissory: it reiterated 'we will . . .' before each of its commitments.⁴² It also contained many matters that are routinely included in employment contracts, such as leave entitlements.⁴³ Employees were warned that non-compliance with the policies in the document would have potentially serious consequences, including termination of the employment contract, indicating that commitments in the policy were to be treated as fundamental terms of the employment contract.⁴⁴ Timing also favoured treating the document as part of his contract: it was provided at the same time as his letter of appointment, and he was told to familiarise himself with it.⁴⁵ In the result, it was held that the commitment to respectful treatment was a contractually binding promise and that the employer had breached it, through the agency of Sutherland and his antagonistic treatment, and through the HR department's dismissive response to Nikolich's legitimate grievance that aspects of the policy had been flouted.

Why did Nikolich succeed where Koehler failed? Nikolich had the benefit of an express contract guaranteeing him protection from this kind of harm. He was not relying on any *implied* duty that the employer should take reasonable care not to expose him to unnecessary harm. He was not making a claim in tort that was being

⁴¹ *Ibid* at par [209].

⁴² *Ibid* at par [215].

⁴³ *Ibid* at par [223].

⁴⁴ *Ibid* at par [225].

⁴⁵ *Ibid* at par [247].

undermined by a niggardly employment contract. He was making a claim in contract, to enforce the employer's explicit, voluntarily assumed obligation.

Following publication of this case, I am convinced that letters of legal advice to employer enterprises have already been despatched in multitudes, warning employers to retract all of their HR policy documents which make any kind of commitment to provide a harassment-free workplace. Arguably, without the express commitment in the HR policy document, Nikolich's claim would have failed, as Koehler's did.

Overcoming Addis?

One of the very interesting aspects of *Nikolich* – and one that will possibly be addressed at length in the appeal – is whether general damages for psychological harm can be awarded for the kind of harm suffered by Nikolich where the claim is based in contract. The old case of *Addis v Gramophone Co Ltd*⁴⁶ is said to stand as an obstacle in the path of the recoverability of damages for any hurt or distress attendant upon a breach of contract. This *Addis* 'rule' (if it is a rule) is explained by the proposition that all contracts are economic bargains, and while an element of disappointment and possibly even distress is inherent in every breach of contract,⁴⁷ it is not the role of contract law to compensate for non-economic harm.⁴⁸

The *Work Choices* amendments to the unfair and unlawful dismissal provisions in the *Workplace Relations Act* have entrenched the *Addis* rule in the federal statutory scheme. A new s 654(9) forbids any award of compensation in respect of 'shock, distress, humiliation or any analogous hurt, caused to the employee by the manner of terminating the employee's employment'.⁴⁹ This provision applies only to claims for statutory compensation for the fact of termination, and does not speak at all to claims for psychiatric injury resulting from other breaches of

⁴⁶ [1909] AC 488

⁴⁷ See also *Reynolds v Southcorp Wines Pty Ltd* (2002) 122 FCR 301.

⁴⁸ For criticism of the *Addis* rule, see P Gray 'Damages for Wrongful Dismissal: Is the Gramophone Record Worn Out?' in R McCallum, G McCarry and P Ronfeldt (eds) *Employment Security* (Federation Press, Sydney, 1994); M Spry 'Damages for Mental Distress and the Implied Contractual Term of Confidence and Trust' (1997) 10 *Australian Journal of Labour Law* 292, and 'Unfair Dismissal and Breach of Implied Contract' *Law Institute Journal*, July 1998 Issue, 68.

⁴⁹ Under the earliest federal unfair dismissal provisions (see *Industrial Relations Act* 1988 (Cth) s 170EE), damages for hurt and humiliation had been awarded in some cases. See for example *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

employment contracts, nevertheless it indicates a resistance to any development recognising the real damage caused by humiliating treatment.

In *Nikolich*, however, Wilcox J relied on *Baltic Shipping Company v Dillon*⁵⁰ to find that the very object of the particular contract in question (the HR policy commitment to respectful treatment) was to provide employees with ‘peace of mind’. ‘It was foreseeable that, if the employer’s promises were broken in relation to a particular employee, that employee might suffer distress.’⁵¹ On this basis, Wilcox held that the mental distress and consequent psychiatric disorder were a foreseeable consequence of a breach of the employment contract, and could therefore sound in damages. Before we become too enthusiastic about the prospects of a sound burial for the *Addis* principle we must remember, all this depends upon finding that there was an express contractual commitment to providing a harassment-free, respectful workplace. That commitment was contained in an HR policy document, determined unilaterally by the employer. In this regard, this contract was no more a negotiated deal than Ms Koehler’s contract. What employers have given – perhaps in ignorance of the legal ramifications of their gifts – employers can just as easily take away. As the common law currently stands, it appears that an employer bears no implied duty to avoid exposing employees to psychologically toxic work environments, so long as that exposure comes about in the course of the ordinary performance of work under the contract. Employees will be held responsible to shield employees from that harm only if they give an express commitment to that effect.

The unlawful dismissal claim

Before we leave *Nikolich*, we should reflect on the fate of his claim that he was unlawfully dismissed, contrary to the *Workplace Relations Act*’s prohibition on discriminatory dismissal, in former s 170CK(2)(f). He alleged that he was dismissed because he suffered a mental illness, and Wilcox J found on the facts that this was the case. Nevertheless, he could not recover any compensation for unlawful dismissal, because the employer successfully defended this claim on the basis that his mental illness rendered him unfit to perform the ‘inherent requirements of the job’. This is a defence provided in former s 170CK(3), and now in s 659(3). The inherent

⁵⁰ (1993) 176 CLR 344

⁵¹ Above n 38 at par [317].

requirements of the job were that he be able to ‘attend for work during usual hours, and carry out the duties attached to the position’.⁵² His failure to respond to the employer’s request that he do so rendered him susceptible to lawful dismissal, because his mental illness incapacitated him for these inherent job requirements.

Former s 170CK(2)(a) - now s 659(2)(a) - provides as a separate prohibited ground, dismissal for a temporary absence from work, however this excuse is hemmed around by specific regulations determining what constitutes a temporary absence, and what reporting requirements the employee must comply with to take the benefit of the provision.⁵³ Nikolich’s circumstances did not fit within those rules. This effectively means that a person whose mental illness causes them to be absent from duties is at risk of permanent exclusion from their position because they are unable to attend to duties, and their absences do not fit within the narrow frame determined by the ‘temporary absence’ provisions. Again, this demonstrates that employment law – even those aspects ostensibly designed to accommodate sufferers of mental ill-health and protect them from discriminatory exclusion – assume an individual who is sufficiently robust to meet the reporting requirements set out in regulations. The employee must take responsibility for knowledge of and compliance with these rules, notwithstanding the nature of the disability.

Conclusions

In the post *Work Choices* world of work, it appears that the High Court has decided that contract should trump tort in determining an employer’s common law duty of care to employees. The notion of employment as a freely bargained exchange of economic benefits disregards the often very personal nature of the relationship and the potential for psychological harm arising from callous or brutal treatment at work. The types of treatment apparent in these two cases – in *Koehler*, the ‘unfair or inappropriate allocation of work’, and in *Nikolich* the ‘aggressive management style’ – have been identified in the literature as contributors to stress-induced mental illness.⁵⁴ That a psychiatric injury cannot have been foreseeable unless the employee herself actually foresaw it and expressly articulated the potential risk to the employer,

⁵² *Ibid* at par [196].

⁵³ Currently, these are in *Workplace Relations Regulations* 2006 (Cth) reg 2.12. 8.

⁵⁴ See Stranks, above n 6 at p 169.

places an unrealistic and unreasonable burden on the employee who is susceptible to or suffering from mental illness. And yet that is what we are left with after *Koehler*.

The escape clause in *Koehler* rests in an important phrase: the High Court said that ‘*within the bounds set by applicable statutory regulation*’⁵⁵ parties are free to contract as they please over work. Here lies the solution. The common law of employment – firmly fixed as it now appears to be on the conception of the freely-entered contract – is unlikely to address the problem of work-induced mental illness. Public regulation – which is not shy of imposing mandatory duties on economic actors in the interest of public benefits such as environmental protection – is likely to produce more satisfactory outcomes. Not only can duties be imposed that cannot be contracted out of, but more appropriate, compliance-based approaches to regulation can be adopted. Prevention of harm is surely better than compensation of victims.

The anticipated explosion of US-style, multi-million dollar litigation over work-stress injuries does not appear to have occurred in Australia. Certainly a few horrendous cases have been addressed by the common law, but on the whole, it seems that the common law courts have turned a cold shoulder against such claims and have resisted the development of new protective principles.⁵⁶ This may be just as well. It may indeed be preferable to look to statutory solutions to address the problem of work-induced psychiatric harm. Fortunately, the *Work Choices* amendments that claim to override State laws have left in place State-based occupational health and safety laws.⁵⁷ For the time being at least, this is one important area of regulation remaining in State hands.

⁵⁵ *Koehler*, above n 3 at par [31].

⁵⁶ See also *State of New South Wales v Paige* (2002) 60 NSWLR 371.

⁵⁷ See *Workplace Relations Act* 1996 (Cth) s 16(3)(c).