CITATION:	*Barnett v Northern Territory of Australia* [2010] NTMC 070
PARTIES:	ROBERTA BARNETT V NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20716768
DELIVERED ON:	7 September 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	2-5 June, 9-11 June, 7-11 December, 14-18 December & 21 December 2009 Final Submissions Received 1 July 2010
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH – EXTENSION OF TIME (s 182(3)) – DEEMED ACCEPTANCE OF CLAIM – REASONABLE ADMINISTRATIVE AND DISCIPLINARY ACTION – FAILURE TO OBTAIN A PROMOTION OR BENEFIT – BULLYING AND HARASSMENT

Workers Rehabilitation and Compensation Act (NT) ss 3, 87, 182

Rivard v Northern Territory of Australian [1999] 129 NTR 1 followed

Swanson v Northern Territory of Australia [2006] 204 FLR 392 applied

Tracy Village Sports Club v Walker (1992) 111 FLR 32 applied

Van Dongen v Northern Territory of Australia (2005) 16 NTLR 169 considered

Re Brady and Australian National Railways Commission (1987) 13 ALD 187 followed

REPRESENTATION:

Counsel:

Worker:	Ms S Gearin
Employer:	Mr P Barr QC

Solicitors:

Worker:	Morgan Buckley
Employer:	Ward Keller

Judgment category classification:	B
Judgment ID number:	[2010] NTMC 070
Number of paragraphs:	713

CONTENTS

TOPIC	PAGE NUMBER
PRINCIPAL ISSUES	1
THE LIMITATION ISSUE	12
DEEMED ACCEPTANCE OF THE CLAIM	37
THE RECRUITMENT OF THE WORKER AND THE WORKER'S PSYCHOLOGICAL PROFILE	51
THE MEANING OF THE STATUTORY EXCLUSIONS	53
THE CONCEPTS OF BULLYING AND HARASSMENT	70
THE MEDICAL EVIDENCE	73
ANALYSIS AND CHARACTERISATION OF THE CAUSES OF THE WORKER'S INJURIES	80
1. The alleged sexual proposition	81
2. The Foley Involvement	82
3. The October 2002 Genesweep operation and Curyer matter	85
4. The contextual significance of the early incidents	87
5. The conversation between Senior Sergeant Kerr and the worker	88
6. The Police College meeting on 11 June 2003	104
7. The meeting on 12 June 2003 between the worker and Commander Owen	111
8. The worker's complaints against Sergeant Foley, Senior Sergeant Kerr and Commander Owen	126
9. The mediation process and outcome	139

10. Alleged denial of natural justice 144

11. The investigation by the Professional Responsibility Division 153

12. Lack of resolution with Commander Owen 156

13. The worker's failure to obtain a promotion or benefit 163

14. The return to work management plan 169

THE COMPENSABILITY OF THE WORKER'S INJURIES 200

THE WORKER'S INCAPACITY AND CALCULATION OF COMPENSATION 203

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20716768

BETWEEN:

ROBERTA BARNETT
Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR JUDGMENT

(Delivered 7 September 2010)

Dr John Allan Lowndes SM:

THE PRINCIPAL ISSUES

1. The worker filed an application in the *Work Health Court* seeking payment of weekly benefits of compensation in respect of two injuries suffered by her and arising out of or in the course of her employment with the Northern Territory Police Force.

2. The worker alleged that from on or about 15 September 2004 until about 31 January 2005 she was diagnosed with a work related stress injury (the first injury). The worker alleged that her first injury occurred as a result of the failure of the employer to investigate her complaints of bullying and harassment as particularised in the Amended Substituted Statement of Claim.[1]

[1] See [19] – [61] of the Amended Substituted Statement of Claim

3. The worker opened her case as follows:

> It is our submission that the worker was denied procedural fairness in the way her complaints were dealt, and our ultimate submission, we will be saying that a denial of procedural fairness in disciplinary or administrative actions is unlawful and any unlawful action cannot be reasonable.
>
> The employer was provided with numerous medical reports from 2003 onwards advising that the worker was suffering from a psychological illness which would not be resolved until the various complaints were finalised; she made complaints which are identified in the pleadings about the behaviour of various police officers. The medical reports were ignored and the matter was not resolved in a timely and professional manner...
>
> As a result of the non-resolution of the workplace issues in a timely and professional manner the worker suffered psychiatric injury resulting in her incapacity to perform her duties...
>
> The worker believed that when these workplace issues were resolved then she would be able to continue her career as a police officer. This belief was well founded.
>
> If we go to the chronology you will see, on page 3, that the real issues started in June 2003 and 16 June there was a formal written complaint made by the worker which, we submit, was never dealt with in relation to Commander Owen and not dealt with appropriately, although mediation was set up in October 2003, mediation did not occur in relation to Owen and it did not occur in relation to Kerr. And by March 2004 my client received a lengthy email from Assistant Commissioner, Graham Kelly, saying that he would "discuss the matters raised by you with Mr Owen" and then on 17 August 2004 we get another lengthy email from Assistant Graham Kelly advising that the matter is still not progressing for various reasons. So we've gone from June 2003 to August 2004 with these matters unresolved.
>
> Given the context of the medical advice that these people were getting, the necessity for a proper and professional resolution of these disputes, these actions were unprofessional and they were unlawful. They were unlawful under the guidelines that are published by the defendant and they are unlawful on the basic principles of administrative law.[2]

4. The worker also alleged a second mental injury – adjustment disorder with anxious and depressed mood – in about April 2006, said to have been suffered as a result of bullying and inappropriate behaviour on the part of the employer.

[2] See pp 27 -28 of the transcript.

5. The worker alleged that as result of the first injury and/or the second injury she has been totally or in the alternative partially incapacitated for employment as a police officer from and including 13 April 2006 to date and continuing.

6. However, it is noted that in her opening counsel for the worker stated (at page 29 of the transcript):

> ...the issues that Your Honour is required to determine: firstly, did my client suffer an injury arising out of or in the course of her employment such as to incapacitate her for employment secondly, what if any employment is she capable of earning now. My client is physically a very fit woman. The psychiatric evidence is guarded; some say that she can return to some part-time work, others say she can go and work in the normal sorts of jobs, such as driver or waitressing or a worker of that nature, and we don't say that she can't work but we say that she's entitled to the difference to what she would be able to earn in accordance with section 65(3) of the Work Health Act.

7. The worker bears the onus of proving that she suffered an injury arising out or in the course of employment, and such injury materially contributed to an incapacity for work. The worker bears the legal as well as the evidentiary burden of establishing the level of her incapacity, both in the physical sense and in the sense of the amount of compensation to which that level of incapacity entitled her.[3]

8. In essence, the employer's case is that:

- Any injury that occurred on 10 September 2004 was as a result of reasonable disciplinary action taken by the employer against the worker and/or reasonable administrative action taken in connection with the worker's employment, or both;[4]

- Further and in the alternative any injury that occurred on 10 September 2004 was materially contributed to by, or was a result of, the injuries sustained by the worker on 12 June 2003 and/or 24 October 2003, or both. The injuries sustained on 12 June 2003 and/or 24 October 2003 were themselves a result of reasonable disciplinary action taken against the worker, or

[3] See *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 383-4 and the authorities cited therein. See also *Work Social Club Katherine v Rozycki* (1998) 143 FLR 224.
[4] See [23.5] of the Amended Defence.

reasonable administrative action taken in connection with the worker's employment or both; [5]

- Further and in the alternative any injury that occurred on 10 September 2004 was a result of the worker's failure to obtain a promotion or benefit, namely her designation as a detective;[6]

- Further and in the alternative any injury that occurred on 10 September 2004 was contributed to by ongoing issues relating to complaints against Kerr, Foley and Commander Owen (as pleaded in paragraph 22 of the Defence) which constituted reasonable administrative action taken in connection with the worker's employment and/or reasonable disciplinary action taken against the worker, or both;[7]

- Any injury suffered by the worker was sustained on or before 13 April 2006 and was materially contributed to by, or was a result of, the injuries sustained by the worker on 12 June 2003, 24 October 2003, 10 September 2004, or any combination of the three. The injuries sustained on 12 June 2003, 24 October 2003 and 10 September 2004 were themselves a result of reasonable disciplinary action taken against the worker, or reasonable administrative action taken in connection with the worker's employment or both;[8]

- Further and in the alternative any injury suffered by the worker was sustained on or before 13 April 2006 and was a result of the matters pleaded in paragraphs 34.4, 34.5 and 34.13 of the Defence, all or some of which were reasonable administrative action taken in connection with the worker's employment or reasonable disciplinary action taken against the worker, or both;[9]

- To the extent that the Notice of Alleged Serious Breach of Discipline contributed to the worker's injury or the extent of her injury as sustained on or before 13 April 2006, it was reasonable administrative action taken in connection with the employer's employment or reasonable disciplinary action taken against the worker, or both.[10]

---

[5] See [23.6] of the Defence.
[6] See [23.7] of the Defence.
[7] See [23.8] of the Defence.
[8] See [34.18 (a)] of the Defence.
[9] See [34.18(b)] of the Defence.
[10] See [34.19] of the Defence.

9. At [100] of the worker's written submissions dated 27 January 2010 the following submissions were made in relation to the administrative or disciplinary action taken against the worker:

> The actions by NT Police which Mrs Barnett alleges were unreasonable and resulted in injury and subsequent incapacity for employment by the NT Police are:
>
> a. The "meeting" held on 11 June 2003 of which Mrs Barnett was not given notice or advised of the purpose of the meeting or the allegations made against her and during which she was confronted by four senior officers all of whom had been provided with the Foley memorandum (the bullying meeting);
>
> b. The "meeting" held on 12 June 2003 of which Mrs Barnet was given no notice or advised of the purpose of the meeting or the allegations that had been made against her to Commander George Owen;
>
> c. The conduct of Commander Owen during the "meeting" which was the subject of the formal complaint on 16 June 2003;
>
> d. Harassment by Commander Owen being verbal abuse and threats by Commander Owen contrary to 8.3 of the *Code of Conduct and Ethics*;[11]
>
> e. Commander Owen failing to provide Mrs Barnett with procedural fairness by failing to provide Mrs Barnett with particulars of the allegations against her and failing to provide Mrs Barnett with any opportunity to respond to the allegations, before threatening her contrary to 8.3 of the *Code of Conduct and Ethics*;
>
> f. Commander Owen exceeding his authority by ordering Mrs Barnett to attend at anger management counselling and threatening to dismiss her from the detectives course contrary to sections 12.1, 13.2 and 8.3 of the *Code of Conduct and Ethics*;
>
> g. Commander Owen exceeding his authority by having Mrs Barnett's locker searched and obtaining personal possessions and other official notebooks and diaries and refusing to return them;
>
> h. The failure of NT Police to properly investigate the complaint of 16 June 2003 and accord Mrs Barnett procedural fairness in that alleged investigation;
>
> i. The failure to accord Mrs Barnett procedural fairness in making a decision to mediate all the complaints;

[11] See Exhibit W9.

j. The cancellation of the mediation process without any explanation to Mrs Barnett;

k. The failure to commence disciplinary action against Commander Owen when the PA Act required action be commenced against him;

l. The failure to resolve all the complaints of bullying and harassment by Commander Kerr;

m. The failure to accord Mrs Barnett procedural fairness prior to AC McAdie making the decision of 31 March 2004 and the failure to provide reasons for that decision; and

n. The inappropriate and inadequate actions by AC Grahame Kelly, wherein he sought to blame the victim for her complaints, albeit in an ad hoc and haphazard manner. As a senior police officer he should have conducted a proper investigation of the complaints against all concerned.

10. To put the employer's case in statutory context, "injury" is defined in section 3 of the *Workers Rehabilitation and Compensation Act* as follows:

Injury in relation to worker means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his or her employment and includes:

a) a disease; and

b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease,

but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

11. It is clear from the exclusionary elements of the definition of "injury" that if a work related injury is the result of reasonable administrative or disciplinary action taken against a worker or the result of a failure by a worker to obtain a promotion transfer or benefit, then the injury is not compensable. As the employer has pleaded and relies upon the exclusionary elements of the definition of "injury", it bears the onus of proving that any

injury suffered by the worker was a result of reasonable disciplinary or administrative action or a failure to obtain a promotion, transfer or benefit.[12]

12. As stated by Martin (BR) CJ in *Swanson v Northern Territory of Australia* [2006] 204 FLR 392 at 417, the phrase " as a result of ", as appears in the statutory definition of "injury", is to be given its ordinary and natural meaning, and a causal link is required to be established between the administrative or disciplinary action and the injury.[13]

13. The exclusionary elements of the definition of "injury" were considered by the Court of Appeal of the Supreme Court of the Northern Territory in *Rivard v Northern Territory of Australia* [1999] 129 NTR 1.

14. In that case a probationary police auxiliary failed to have his employment confirmed after a probationary period of 12 months. The Work Health Court found that the worker's stress related illness was a result of her failure to obtain a promotion or benefit. On appeal, in the Court of Appeal, Priestley J (with whom Martin CJ and Thomas J agreed) held that the injury was the result both of the worker's failure to obtain a promotion or benefit and of other materially contributing factors which fell outside of the exclusionary elements of the definition of "injury". As pointed out in the employer's submissions, "there had been instances of 'unreasonable administrative action' on the part of the employer during and after the probationary period, such as not providing counselling, allowing the worker to find out from the Police Gazette she had not gained confirmation without first notifying her and then returning her to another police station for a 28 day period of assessment without putting arrangements in place for her supervision".[14]

15. Priestley J stated:

---

[12] See *Swanson v Northern Territory of Australia* [2006] 204 FLR 392 at 414.
[13] It would seem to follow that there must also be a causal link between the failure to obtain a promotion, transfer or benefit and the injury.
[14] See [34] of the employers submissions Part 1 dated 10 March 2010.

> In my opinion the finding that some events outside any of the three exclusions made some contribution to the worker's injury excludes in law the conclusion that the injury was "a result of…failure by the worker to obtain a promotion… or benefit.[15]

16. In the course of his judgment Priestly J provided the following analysis of the relationship between the three statutory exclusions:

> It seems clear that administrative action taken in connection with the worker's employment, the third exclusion in the NT Act, could overlap with administrative action in the promotion process in the wide application given to it by the Chief Magistrate and Bailey J in the present case. This position is avoided if what seems to be a straightforward reading is made of the NT Act's exclusions, namely that the first applies to mental stress injury resulting from disciplinary action, the second applies to such injury resulting, as it says, from failure by the worker to obtain promotion or benefit, and the third to such injury resulting from reasonable administrative action connected with the worker's employment, this last exclusion being well adapted to include events in the promotion process and other administrative events connected with the employment, but not mental stress injury resulting from the failure itself by the worker to obtain promotion or benefit.

That this is the most straightforward reading of the second of the three exclusions seems to me to be apparent if an effort is made to state the "promotion process" construction in terms as close as possible to the words of the second exclusion itself. The result must be something like:

> does not include an injury…suffered by a worker as a result of…failure (including events before and after and connected with that failure) to obtain a promotion…or benefit.

In my view, when the second exclusion is read bearing in mind the third, the events referred to in brackets fall much more easily into the third exclusion than the second. Adoption of the construction I favour does not involve the addition of any words to the second exclusion (or the third), except perhaps the word "only" after "result" in the second exclusion.

In summary, in my view the foregoing approach gives a clear operation to each of the three exclusions, in each case by means of an unforced and obvious meaning. The meaning of the second exclusion is that if a worker suffers mental stress injury as a result of the non-obtaining of a promotion or benefit, then the injury is not compensable; because of the presence of the third exclusion, in

[15] [1999] 129 NTR 1 at [30].

considering whether the injury resulted from failure to obtain promotion or benefit, the tribunal or court would not take into account either matters leading up to the employer's decision not to promote or benefit the worker or actions of the employer consequent upon the employer's decision not to promote or benefit the worker. Whether the last mentioned matters and actions had the effect of excluding a worker from compensation would depend upon their assessment by the tribunal under the third exclusion.[16]

17. Priestley J made the following addition:

> I would add that if my interpretation of the exclusion part of the definition of "injury" is wrong, and the "promotion process" construction should be adopted, then a version of the conjunctive construction submission for the worker would need to be considered. If the second exclusion is to be read as encompassing events before and after the worker's failure to obtain promotion or benefit, these events would necessarily include events in the nature of administrative action; in view of the insistence in the first and third exclusions upon reasonable disciplinary action in the one case and reasonable administrative action in the other, I would be of the opinion that the second exclusion in referring to (on this hypothesis) the "promotion process" must have been contemplating a proper or regular promotion process, not one involving, as here, unreasonable administrative processes.[17]

18. The employer made the following submission in relation to the effect of the decision in *Rivard v Northern Territory of Australia* (supra):

> The decision of the Court of Appeal thus established the principle that, for the injury to be non-compensable as resulting from one of the exclusions, that exclusionary element had to be the sole cause of the injury. It should follow that the principle thus stated would be applicable to all of the exclusions.[18]

19. The Court respectfully agrees with and adopts that analysis of the decision in *Rivard* (supra).

20. It is noted that the employer contends that *Rivard* was wrongly decided.[19] However, the employer rightly concedes that "until and unless the Full Court of the Northern Territory Supreme Court (or the Northern Territory

[16] [1999] 129 NTR 1 at [29].
[17] [1999] 129 NTR 1 at [32].
[18] See [36] of the employer's submissions Part 1 dated 10 March 2010.
[19] See [37] to [46] of those submissions.

Court of Appeal) overrules *Rivard* the Work Health Court is bound by that decision".[20]

21. Although all of the medical evidence is to the effect that the worker suffered a mental injury that resulted in an incapacity for work, [21] the causation of that injury - and hence its compensability – is in dispute.

22. On the one hand, the employer asserts that the worker's first injury was "caused by one or more of the exclusionary elements of the definition of "injury" in section 3 of the Act".[22] In relation to the worker's second injury, the employer says that that injury was:

> a) an accumulation of the previous "insults" and the continuing effects of the 2004 injury; and
>
> b) precipitated by events or actions that are properly characterised as reasonable administrative action or reasonable disciplinary action by the employer.[23]

23. On the other hand, the worker alleges that her first injury was caused by the employer's failure to investigate her complaints of bullying and harassment and that her second injury was the result of bullying and inappropriate behaviour. It is implicit in the worker's case that the actions of the employer did not fall within any of the exclusionary elements to the definition of "injury".

24. Whether or not the worker is entitled to compensation depends upon the cause or causes of her injuries and the application of the legal principles articulated in *Rivard* (supra) to the established facts. It is only if the worker's injuries are found to be compensable, in accordance with the

---

[20] See [46] of those submissions.
[21] See the medical reports of Drs Epstein, McClaren, Geise, Vveti and Jenkins.
[22] See [47] of the employer's submissions Part 1 dated 10 March 2010. See also [31] and [48] of those submissions where the employer contends that all or most of the significant and material causes of the worker's injury come within the exclusionary elements of the definition of "injury".
[23] See [3] of the employer's submissions Part 11 dated 10 March 2010.

principles in *Rivard* (supra), that the Court needs to proceed to determine the worker's incapacity.

25. The present proceedings also give rise to two further issues.

26. The first is a limitation issue. The worker failed to make a claim for compensation within the six month period as required by s 182 of the *Work Health Act* (as it then was).

27. The worker submits that this is not a bar to the maintenance of the proceedings, as the delay in making a claim falls within one of the grounds specified in section 182(3) of the *Work Health Act*, namely "other reasonable cause". Accordingly, the worker seeks an order in respect of the first and/or second injury extending the time in which the worker could make a claim for compensation.

28. The employer denies that the worker is entitled to an extension of time pursuant to section 182(3) of the Act to make a claim in respect of the first and/or second injury.

29. The second issue concerns the operation of s 87 of the Act.

30. The worker seeks a ruling that the employer is deemed to have accepted liability for compensation in respect of the claim pursuant to section 87 of the *Work Health Act* from the date of the first injury, or in the alternative the second injury to such date as the Court might determine. The worker relies upon the matters pleaded in paragraphs 87- 91 of the Amended Substituted Statement of Claim. The employer denies that it is deemed to have accepted liability.

THE LIMITATION ISSUE

31. It is convenient to deal with the employer's limitation defence first because unless the worker obtains an extension of time pursuant to section 182 (3) of the *Workers Rehabilitation and Compensation Act* the present proceedings are not maintainable, and the worker is not entitled to the relief sought, or indeed any relief at all, in relation to the injuries alleged in the Amended Substituted Statement of Claim.

32. With respect to the first injury in 2004 the worker failed to make a claim for compensation within the statutory six month period. Furthermore, in relation to the second injury in 2006, the worker also failed to make a claim within time. It was not until 31 January 2007 that the worker made a claim for compensation.

33. The claim which was dated 26 January 2007 was sent to the employer under cover of letter from the worker's solicitors dated 31 January 2007. That letter was hand delivered on that date. The claim form recorded the date of injury as 13 April 2006. The relevant incident was described in the claim as "culmination of workplace harassment over period of 3 – 5 years". The claim form also recorded the worker having suffered from a similar injury that occurred on 12 September 2004.

34. In my view, the claim made in January 2007 purported to cover both the alleged first injury and second injury; and should be treated as a claim in respect of both injuries. However, even if there were some doubt about whether the claim was also in respect of the first injury, the claim cannot be properly considered to be referable to the first injury, and the absence of any claim does not preclude the exercise of the Court's discretion under section 182(3) of the Act: see *Prime v Colliers International Pty Ltd* [2006] NTSC 83 at [27] – [29].

35. Section 182(3) of the *Work Health Act* (as it then was) provided as follows:

> The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance of the proceedings if it is found that the failure

> was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause.[24]

36. The worker submitted that the delay in making a formal claim falls within the "other reasonable cause" ground specified in section 182(3).

37. The worker relies upon the consideration of the meaning of "other reasonable cause" in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 :

> Amongst other factors which may be classed as a reasonable cause as a matter of law is a "hope and expectation that a worker might make a complete recovery".[25]

38. The worker also seeks to rely upon the following exposition of "reasonable cause" in *Commonwealth v Connors* (1989) 10 AAR 398 where Northrop and Ryan JJ approved the judgment of the Full Court of the Victorian Supreme Court in *Black v City of South Melbourne*:

> A cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man." [26]

39. It was submitted on behalf of the worker that:

> In the present case the worker was determined to remain with the Police Force, and subject to certain accommodations being made was optimistic of her ability to do so and manage her injury within the scope of her employment. The worker "always intended to return to work" (T193 – T 194, T 205, T 230). The worker's hope and expectation was always to return to unrestricted duties. The worker's intention was to make her career within the Police Force. A formal claim was not made because the worker did no want to jeopardise her career and always hoped she would make a complete recovery.[27]

[24] The equivalent provision of the subsequently enacted *Workers Rehabilitation and Compensation Act* is in identical terms.
[25] See [81] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[26] See [84] of those submissions.
[27] See [82] of those submissions.

40. The worker submitted that "the matter should also be seen in respect of the second injury in the context of her return to work program (T214, W69, T215, T487, T488 and T489)".[28]

41. The following submission was made on behalf of the worker:

> The worker was apprehensive that submitting a claim for compensation would result in further victimisation and harassment (given the evidence of Dr Tracey at T664) and would create an administrative nightmare. The alternative of unlimited sick leave and dealing with the injury in–house is consistent with a reasonable standard of conduct. The worker ensured there were open channels of communication regarding her injury, the management of the injury and the scope of her employment. Given the worker's fears and the lack of prejudice to the employer it was reasonable that submitting a formal claim was not necessary.
>
> It was only after the worker was forced to leave her employment of the Police Force that she submitted a claim. The formal claim for compensation was submitted because the worker felt safe from the harassment and victimisation of the employer. Submitting a claim whilst still employed would have placed the worker in a more vulnerable position, and the employer was still involved in the treatment of her injury (see T195, T230, T326-T327)…
>
> Regardless of the lack of formal claim for compensation the employer still had notice and was intimately involved in the treatment of the worker's injury.[29]

42. By way of opposition to the worker's submissions, the employer pointed out that "Dr Tracey had recommended to the worker that she make a claim in November 2003, when she was in a distressed state during the mediation process, after she had become "aware of the CAP file over the investigation of the dog complaint – see Exh W94, page 136." [30]

43. The employer relied upon Dr Tracey's explanation why the worker did not make a claim following that recommendation. The doctor explained that it was more economically advantageous for police officers to go on sick leave (which was unlimited) than to go on worker's compensation which might result in reduced pay after a few months.[31]

---

[28] See [83] of those submissions.
[29] See [84] – [86] of those submissions.
[30] See [154] of the employer's submissions Part 11 dated 10 March 2010.
[31] See [154] of those submissions.

44. However, the employer conceded that Dr Tracey had also explained that "the compensation process is very stressful, so it would just be an added stress for her".[32] It also conceded that Dr Tracey was of the opinion that the reason why a claim for compensation was not made was due to fear of loss of income and the added stress.[33]

45. The employer relied upon the following evidence given by Dr Tracey at page 664 of the transcript:

> Fear of loss of income and additional stress that may – of course, if somebody did make a worker's comp claim, Doctor, they can then be managed in a different way, can't they? Well, theoretically, yes but…
>
> Yes. In practice with stress cases they can be – and with the Police they can be subjected to just as much bullying as whether they've got a worker's comp claim or being managed in house, and the HR department in the Police, in fact, try to manage many of these situations in –house. And this was the case with Roberta with her return to work plan, which was exactly the same or very similar to what would have happened with the worker's, because you're then subject to the worker's comp claim.[34]

46. The employer made the following submissions:

> From 2004 onwards the employer was severely constrained in its ability to obtain a diagnosis of the worker's condition, pursue medical or other treatment for the worker, or assess the worker's capacity and suitability for work. The rights and obligations which operate between employer and worker in the management of a compensation claim were noticeably absent. This was at a great cost to the employer.
>
> The employer sought to have the worker medically examined in 2004 after the first injury. The worker strongly resisted being examined, as evidenced by the exchange of emails between the worker, the Police Association and Assistant McAdie in late 2004 (Exh E 165).[35]

47. The employer relied upon the following evidence given by Assistant Commissioner Kelly regarding his observations of the worker in April 2005:

> As a personal observation I got the distinct impression from Michael Grant that he genuinely believes that Roberta has an illness that may include a persecution complex. I wonder whether Roberta is getting the necessary and appropriate treatment by a doctor, or whether she is being treated as a person who has a

[32] See [154] of those submissions.
[33] See {154] of those submissions.
[34] See [154] of those submissions.
[35] See [155] and [156] of those submissions.

> genuine grievance because the treating doctor believes what he is being told by her (exh W 150).[36]

48. The employer made this submission:

> If the worker had submitted a work health claim, the employer would have been at liberty to pursue that possibility without being dependent on the worker's consent to do so. With the benefit of hindsight, it can be said that identification of that question could have avoided any further injury being sustained by the worker in 2006 and could have resulted in medical treatment and rehabilitation that actually resolved the worker's condition.
>
> The employer was only able to secure the worker's return to work in June 2005 under the terms of an agreement which provided for her placement in a CIB unit. Working as a detective was critical to her. The employer had no way of directing the worker to work in any alternative setting without facing the worker refusing outright to return.[37]

49. In submitting that the worker did not make a claim for economic reasons the employer relied upon the following evidence given by the worker at page 560 of the transcript:

> You considered at various time putting in a work health claim? It was raised, probably by my Doctor. But, because I knew that we had unlimited sick leave and I always intended to go back to work, I didn't want it to be an option.
>
> But you agree on several occasions, Dr Tracey suggested to you that it would be appropriate to put in a work health claim? I don't know what he suggested. It was discussed and I said that I didn't want to.[38]

50. The employer also submitted that a further likely reason for not submitting a claim was because of a risk of being transferred to another section and in that regard relied upon the worker's evidence at pages 560- 561 of the transcript.[39]

51. In that regard the worker gave the following evidence:

> So, you're telling us that you had no idea that there was a connection between your making a work health claim and the possibility that you could be moved away from your detective's work. No, because I'd made work health claims

[36] See [157] of those submissions.
[37] See [157] -[158] of those submissions.
[38] See [158] of those submissions.
[39] See {159] of those submissions.

> before for physical injuries and that didn't take me off the road, so why would it be any different. I have no idea what they did.[40]

52. It was submitted by the employer that the worker's claimed ignorance was "transparently false".[41]

53. The employer went on to deal with the employer's inability to "manage the worker's situation in the way that it could have if it was a work health claim".[42] The employer relied upon the emphasis placed by Mildren J in *Maddalozzo v Maddick* (1992) 108 FLR 59 on the importance of injury prevention and appropriate rehabilitation as part of the legislative scheme.[43] The employer relied upon His Honour's observations and comments therein as providing "guidance in considering the underlying policy reasons for the requirement to submit a claim form within the time limited by the Act".[44]

54. The employer submitted that the worker had failed to bring herself within one of the statutory excuses contained in section 182(3) of the Act. In particular the employer relied upon the decision in *Van Dongen v NT of Australia* (2005) 16 NTLR 169.[45]

55. In that case the worker had failed to make a claim within the statutory six month period. The worker argued that during the relevant period he had suffered no loss of earnings nor had he incurred medical and other compensable expenses. As pointed out by the employer, "unlike in the present case …the worker in that case continued working whereas here, the worker stopped working but utilised her unlimited sick leave entitlements".[46]

56. In rejecting the worker's application for an extension of time under section 182(3) of the *Work Health Act* (as it then was) Martin (BR) CJ held at [173]:

---

[40] See {159] of those submissions.
[41] See [160] of those submissions.
[42] See [161] of those submissions.
[43] See [163] of those submissions.
[44] See [164] of those submissions.
[45] See [165] of those submissions.
[46] See [166] of those submissions.

> On one view, it might seem odd that a worker who has suffered an injury in the course of the worker's employment resulting in an inability to carry out properly the terms of employment, but who has not thereby suffered a compensable loss, should be required to make a claim within the six month period or run the gauntlet of establishing that the failure to make the claim within that period was occasioned by reasonable cause. However, the interpretation for which the appellant contended would leave the employer without notice of the inability brought about by injury sustained in the course of employment until such time as the worker sees fit to inform the employer of that inability. In the meantime the worker is recompensed by full salary notwithstanding that the worker is unable to carry out properly the terms of the worker's employment. In addition, the employer is denied the opportunity of placing the worker in appropriate conditions of employment and of both avoiding exacerbation of the injury and arranging appropriate rehabilitation." [47]

57. The employer pointed out that in the present case the worker had in fact suffered a compensable loss in that she ceased to be paid salary and was paid sick leave from 19 September 2004 onwards. The employer submitted:

> The employer did have notice of an inability brought about by illness, but was unable to obtain further information to confirm the situation until after the worker had been seen by its doctor in January 2005 under the inability provisions of the *Police Administration Act*.[48]

58. The employer went on to submit:

> Even if the availability of sick leave meant that the worker did not suffer a compensable loss, that does not excuse her from the requirement to lodge a claim for compensation within the relevant time period. Mildren J held (*Van Dongen* at [178]) that "it is well established that if the failure to be able to comply was due to the fault of the person whose responsibility it was to comply, the failure cannot be excused".[49]

59. Reliance was also placed on Riley J's observations in *Van Dongen* (supra) as to the circumstances relevant to determining whether the worker in that case had reasonable cause for failing to make a claim within the statutory six months.[50] The relevant circumstances were:

1. the worker was familiar with the work health scheme;

2. he was aware, within the relevant period, that he had suffered a mental injury as a consequence of the first incident in 1996;

[47] See [167] of those submissions.
[48] See [168] of those submissions.
[49] See {168] of those submissions.
[50] See [169] of those submissions.

3. in pursuing a crimes victims assistance claim made in November 1996 which related to the first incident as well as a second incident the worker sought to identify part of his claim as relating to a mental injury;

4. despite that knowledge he made no work health claim for mental injury in respect of either incident;

5. during the relevant period the worker knew that he was unable to fulfil all of his operational duties and that if he disclosed that state of affairs to his employer, he would probably be taken off such duties with a consequent loss of income.[51]

60. The employer sought to rely upon Riley J's conclusion in that case:

> This is not a case where the appellant was without the information necessary to enable him to make a reasoned decision or where there was some aspect of his mental condition which contributed to his failure to make a claim. He failed to make a claim and later, well outside the relevant period, changed his mind. His reasons for the failure were not those to be expected of a reasonable person and were not consistent with a reasonable standard of conduct which might be expected to cause such delay. In this case there was no reasonable cause for the failure to make a claim within time.[52]

61. It was submitted on behalf of the employer that "those observations apply with equal force where, as here, the worker had in fact obtained medical treatment and, notwithstanding advice received from her doctor to make a work health claim at a much earlier stage (November 2003, Exh W 94, p 136), the worker deliberately delayed in submitting a claim for compensation for her own reasons during which time her condition deteriorated to the point of total incapacity for an extended period of time".[53]

62. The worker made a number of submissions to the effect that the employer had not been prejudiced by the worker's failure to make a claim within the prescribed six month period.[54] The worker made the following specific submissions:

---

[51] See [169] of those submissions.
[52] See [170] of those submissions.
[53] See [171] of those submissions.
[54] See [87] - [98] of the worker's submissions in response to the employer's submissions dated 1 July 2010.

- The employer was never "severely constrained "from being involved in the treatment of the worker's injury or rehabilitation. The worker pointed out that the worker was assessed by independent medical practitioners, Dr Meadows and Dr Giese (Exh W66 and W99) at the employer's bequest in 2004. The worker was also on a return to work management program (RTWMP) in relation to the 2004 injury. That program was created in consultation with the employer and the worker and was "designed to reintroduce the worker to the workplace and to provide a psychologically supportive work environment";[55]

- The employer was unable to meet its obligations under the return to work program. The employer failed to meet "its obligations under the RTWMP in providing a psychologically supportive workplace and providing weekly reports to the worker as required". The RTWMP and the involvement of Bilato in overseeing the worker's re-entry into the Police Force "demonstrate the employer had full knowledge of the particulars of claim and was managing the injury, albeit problematically";[56]

- The employer's submissions have failed to "identify how the organisation would have differently responded if a formal claim by the worker had been made";[57]

- If the worker had submitted a formal claim in respect to the injury she could have been required to be independently assessed. But this occurred in 2005. The allegations that the worker strongly "resisted being examined are of no consequence given that she was examined";[58]

- A secondary step if the worker had submitted a formal claim would have been a return to work under the guide of a RTWMP. In fact this occurred , and "it was the employer's own actions which created the circumstances for the failure of the RTWMP";[59]

- The employer's submission that further injury could have been avoided if a formal claim had been made in relation to the 2004 injury is also without basis. The worker was on a RTWMP in

[55] See [87] of those submissions.
[56] See [88] of those submissions.
[57] See [89] of those submissions.
[58] See [89] of those submissions.
[59] See [90] of those submissions.

respect to the 2004 injury. The injury that the worker sustained in 2006 was due to "a failure to meet the requirements of the RTWMP and Heath's desire to remove the worker from the unit";[60]

- The employer's submission that "the worker's failure to submit a formal claim was for economic reasons is a mischaracterisation". Firstly, all "the necessary notification and information was given to the employer by the worker". Secondly, "the worker submits that the answers given at T560 are not in relation to any economic reasons. Instead it is a nuanced appreciation of the workplace reality within the Police Force; that while a worker's compensation claim for physical injury is accepted within the workplace that a worker's compensation claim for a psychological injury would be detrimental to her career and advancement within the Police Force. This is especially the case given that the worker 'always intended to go back to work'";[61]

- *Van Dongen* is distinguishable from the present case. In *Van Dongen* the employer had no notice of the psychological injury and hence was "denied the opportunity of placing the worker in appropriate conditions of employment and of both avoiding exacerbation of the injury and arranging appropriate rehabilitation". This is clearly not the case in the present case where the employer had full knowledge of the worker's injury. The employer and worker had agreed to a RTWMP, which was implemented to manage the 2004 injury. There can be "no suggestion that the employer was in the same position as in *Van Dongen* where the employer had no knowledge of the psychological injury until a significant period of time had elapsed since the injury was sustained". In the present proceeding the channels of communication were open and the employer had extensive knowledge of the injury and the worker's inability due to that injury; [62]

- The RTWMP was a facade "behind which the employer had the appearance of facilitating the worker's re-entry into the Police Force. It is clear from Heath's evidence that having a member of the unit on a RTWMP was disruptive to the managerial efficiency of the Palmerston CIB and he attempted, and succeeded in removing the worker from the unit. Heath was

[60] See [92] of those submissions.
[61] See [93] of those submissions.
[62] See [94] -[96] of those submissions.

disingenuous at best in his attempts to achieve the goals of the RTWMP";[63]

- The employer in fact facilitated the worker's failure to submit a claim in relation to her injuries. The "internal structures of the employer's organisation meant that the worker was never aware of the necessity of lodging a claim given that the process was handled 'in –house'". Reasonably, the worker had notified the employer of the injury and steps had been put in place to deal with the injury and to facilitate the worker's rehabilitation. In fact the underlying substance of the Act was complied with".[64]

63. Section 182(3) provides that the failure to make a claim within six months after the occurrence of an injury shall not be a bar to the maintenance of proceedings if it is found the failure was occasioned by mistake, ignorance of disease, absence from the Territory or other reasonable cause.

64. The issue between the parties is whether the failure of the worker to make a claim for compensation within six months of the occurrence of her injury was occasioned by "other reasonable cause".

65. Riley J in *Van Dongen v NTA* (2005) 16 NTLR 169 at [27] - [28] discussed "other reasonable cause":

> In *Black v City of South Melbourne* [1963] VR 34 the Full Court compared the expression "reasonable cause" with the concept of mistake under s34(1) of the *Limitation of Actions Act 1958* (Vic). The Court noted (at 38) that the inquiry in relation to reasonable cause justifies "a more liberal attitude" being adopted to its interpretation compared with "mistake" and went on to observe that the expression refers to "some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable."
>
> Some further observations regarding the expression can be made. The test of reasonableness is an objective one: *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 41 It is a "cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man": *Quinlivan v Portland Harbour Trust* [1963] VR 25 at 28. A hope or expectation that a worker may make a complete recovery may amount to reasonable cause and may more readily do so where the injury is latent, difficult

[63] See [97] of those submissions.
[64] See [98] of those submissions.

> of diagnosis or possibly, difficult of prognosis: *Fenton v Owners of Ship "Kelvin"* [1925] 2 KB 473 at 482; *Butt v John W Eaton Ltd* (1920) 29 CLR 126."

66. Riley J went on to observe at [30]:

> It is clear that each case must be assessed upon its own facts and circumstances… the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the worker must be considered in order to determine whether reasonable cause is established. It would be an artificial exercise to do otherwise.

67. Martin (BR) CJ in *Van Dongen v NTA* (supra) at [6] stated: "While a delay beyond six months occasioned by the hope of recovery might amount to reasonable cause in appropriate circumstances, if a worker fails to disclose to the employer an inability to carry out properly the terms of employment caused by injury in the course of employment, the absence of compensable loss will not necessarily amount to reasonable cause"

68. As stated in *Re Scutts and Department of Defence* (1998) AATA 13085 "the test as to whether there was … a reasonable cause is an objective one but one which takes into account the subjective circumstances of the applicant in each case".

69. In a similar vein in Re Willis and Australian Telecommunications Commission and Commonwealth (1989) 19 ALD 665 at 675 the Tribunal stated at [34]:

> …the consideration of the facts in each case against those principles shows that each has applied the test by looking at what was a reasonable course of conduct for the plaintiff in the circumstances in which he found himself. They have not judged the plaintiff by reference to some hypothetical man in hypothetical circumstances. It is an objective test taking into account the subjective circumstances of the plaintiff in each of those cases.

70. In *Bear v State of South Australia* (1981) 48 SASR 604 Judge Russell QC said:

> The word "reasonable" is, of course, a relative term. The facts of the case must therefore be considered before determining whether or not the cause is reasonable. Furthermore, the word "reasonable" has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the

> actor, called on to act reasonably, knows or ought to know: *Re a Solicitor* [1945] KB 368 at 371.

71. It is clear law that the relevant period for the purposes of s 182(3) is the initial six months period following the injury on or about 10 September 2004: see *Murray v Baxter* (1914) 18 CLR 622; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Van Dongen v NTA* [2005] 16 NTLR 169.

72. Furthermore, once "reasonable cause" is found to exist for failure to make a claim within the prescribed period, the fact that no claim was made when the period of "reasonable cause" came to an end does not bring the proviso back into play.[65]

73. In terms of determining whether there or not reasonable cause has been established, the present case presents some difficulties due to the nature of the injuries and the circumstances under which those injuries were sustained, as well as the conduct of both the employer and the worker at all material times.

74. The starting point is to identify the injuries that the worker says that she suffered during the course of her employment and the date of the occurrence of those injuries.

75. On 15 September 2004 Dr Tracey wrote to the Commissioner of Police to the following effect:

> You will recall our meeting about 16 months ago when I expressed my concern about a number of matters including the matter involving Senior Constable Roberta Barnett and Commander George Owen. There appears to have been no final closure as yet.
>
> Recently there was a meeting between Mrs Barnett and Assistant Commissioner Graham Kelly when she was advised that this would be resolved before Mr Owen went on leave but this did not eventuate.
>
> She feels that having this matter unresolved and without closure (regardless of whether this is in her favour or against her) is having an adverse effect on her

[65] See *Re Brady and Australia National Railways Commission* (1987) 13 ALD 187 at 194.

> performance and she is beginning to have negative thoughts of her future in the organisation.
>
> I think that it is fairly imperative for Mrs Barnett's general health and well being that this matter reach some form of final resolution as soon as possible.
>
> She is currently on sick leave.

76. The worker relied upon this correspondence as constituting notice of injury to the employer. [66] The employer denied the worker's allegation, asserting that it would refer to Dr Tracey's letter for its proper interpretation.[67]

77. According to the Amended Substituted Statement of Claim "from or about 10 September 2004 until about 31 January 2005 the worker was diagnosed with a work related stress injury and utilised her sick leave and continued to hope that her complaints would be dealt with".[68] The employer denies those allegations, claiming that any injury that occurred on 10 September 2004 was the result of reasonable disciplinary or administrative action or a result of the worker's failure to obtain a promotion or benefit.[69]

78. As a consequence of the pleadings the date of the first injury should be treated as about 10 September 2004. Indeed this was the date on which sick leave commenced.[70] The worker did make not make a claim for compensation in respect of the 2004 injury within the six month period after the occurrence of that injury as required by section 182(1)(a) of the *Work Health Act*. The issue, therefore, is whether the claim for compensation was not made within the relevant period through "other reasonable cause".

79. On or about 13 January 2005 the Chief Medical Officer (Dr Meadows) prepared a report wherein he expressed the opinion that the worker was suffering from the medical condition of "anxiety/depression".[71] Dr Meadows

---

[66] See [60] of the worker's Amended Substituted Statement of Claim
[67] See [24] of the employer's Amended Defence to the Substituted Statement of Claim. However, the employer did not seek to argue at the hearing that notice of the injury had not been given pursuant to section 82 of the Act.
[68] See [59] of the Amended Substituted Statement of Claim.
[69] See [23.5] – [23.8] of the employer's Amended Defence.
[70] See Exhibit W65.
[71] See Exhibit W65.

considered that the worker was medically fit to resume all duties of her current position. As to whether a further period of sick leave was recommended he stated: "only if situation cannot be satisfactorily resolved". He also made the following comment or recommendation:

> That in the event of any conflict, requirement to explain actions, disagreement – immediate mediation by independent person.

80. Although Dr Meadow's report dated 14 April 2005 did not come into existence until after the relevant six month period, that report documents the antecedent interpersonal relationships between the worker and the employer as well as throwing light on the relationship between the worker's injury and her return to work. The following is extracted from the doctor's report:

> I interviewed Detective Barnett on 13 January 2005. During this long session it became clear that there were many issues of significant conflict within the police that Detective Barnett had become embroiled in, and which, if handled more appropriately by both sides, would not have escalated to the level they did…
>
> Allegations made by Detective Barnett are obviously recorded without my being privy to the "other person's" version of events, but the nature and genuineness of the testimony deserves to be taken on merit as it points to a known problem within many male-dominated service entities.
>
> What became apparent was the inability of the force to adequately deal with a confrontation of that culture with an individual who was not prepared to back down. Instead of acquiescing and keeping quiet, as she was "supposed to do" in that system, she has challenged the authority process, in effect demanding some personal justice, and as a result has been (and still is) under severe stress, which has led to the periods off work, and a perception of continuing harassment by certain sections of the police.
>
> Her return to work is predicated on resolving these extensive issues, which involves some degree of acceptance that problems do exist within the hierarchical system…

81. Despite the worker's allegation that after the Chief Medical Officer's report of 13 January 2005 she had ceased to be incapacitated for work, the evidence shows otherwise. The worker's treating doctor certified the worker unfit to work from September 2004 until her eventual return to work on 31 May 2005 on a return to work management plan – and even then he

restricted the worker's hours to 3 days per week in the initial stages of the return to work program.[72]

82. In Exhibit W67 the worker demonstrated her continuing illness, preventing her from returning to work:

> I have been on sick leave, stress leave, since 10 September 2004 as a result of the unresolved harassment complaint that I made in regard to Commander Owen, Supt Kerr and Sgt Foley. Unfortunately the whole matter came to a head in September and I took it out on Sgt Sodoli which I am deeply sorry for. Since then I have been too ill to return to work.
>
> I would like to return to work but I feel very angry and distressed about this whole matter. I feel thus far that the current outcomes are inadequate as nothing has been resolved in my favour at all. I do not expect everything to be in my favour but I expect justice to be seen to be done. I am the victim in this matter and feel that I continue to be victimised. If you as my employer are satisfied that what has occurred is the best that will be achieved, then I shall accept the decision and endeavour to get on with it.[73]

83. It is important not to overlook Dr Tracey's evidence. Although he had recommended the worker to make a claim for compensation he pointed out that as police officers have unlimited sick leave, and if they go on worker's compensation they are liable to suffer a reduction in pay after the first 26 weeks; " it's a general feeling amongst members that they don't go on worker's compensation". Dr Tracey went on to say:

> Now, the Commissioner of Police has discretion to top up their pay and in my experience members who have a physical injury or sustain a physical injury in the line of duty, unquestionably have their pay topped up. However, it's also my experience dealing with other members that if they take worker's compensation for stress leave and they're not the flavour of the month, which is usually the case in stress cases, the Commissioner refused to top them up.[74]

84. Dr Tracey was sure that the worker was aware of that practice.

85. However, he did not identify that as the sole reason for the worker not making a claim:

---

[72] See [6] of the employer's submissions Part 11 dated 10 March 2010.
[73] Exhibit W 67 was the worker's letter to the Commissioner dated 22 March 2005.
[74] See p 664 of the transcript.

> Well that would be one of the things and the other thing is the worker's compensation process is very stressful, so it would jut be an added stress for her.[75]

86. Dr Tracey gave the following evidence at page 664 of the transcript::

> …if somebody did make a worker's compensation claim… they can be managed differently? Well, theoretically yes, but in practice with stress cases they can be – and with the Police they can be subjected to just as much bullying as whether they've got a worker's compo claim or being managed in-house, and the HR Department in the Police, in fact, try to manage many of these situations in house. And this was the case with Roberta with her return to work plan, which was exactly the same or very similar to what would have happened with the worker's, because you're then subject to the worker's comp claim.

87. The worker gave the following evidence at page 560 of the transcript:

> You considered at various times putting in a work heath claim? It was raised, probably by my doctor. But, because I knew that we had unlimited sick leave and I always intended to go back to work, I didn't want that to be an option.

88. She said that the prospect of making a claim was discussed with Dr Tracey; however, she said that she didn't want to make a claim.[76]

89. The issue is, were the reasons for the worker failing to make a claim within the relevant six month period those to be expected of a reasonable person and consistent with a reasonable standard of conduct which might be expected to cause such delay: see *Van Dongen v NTA* (supra) at [39] per Riley J.

90. This is not a straightforward case. It requires a very careful analysis of "the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of worker". In applying the requisite objective test it is important to take into account the subjective circumstances of the worker.

91. Although the worker was aware that she could have made a claim for compensation, she made a conscious decision not to do so. She decided not

[75] See p 664 of the transcript.
[76] See p 560 of the transcript.

to make a claim because she had unlimited sick leave and always intended to go back to work.

92. Although the employer submitted that the reason why the worker did not make a claim was for purely economic reasons – in effect considering that this was where her best interests lay[77] - I consider that this represents a far too simplistic analysis of the worker's conscious decision not to make a claim.

93. First, it appears to have been common practice within the NT Police Force for police officers to go on sick leave rather than make a claim for compensation. The worker's decision must be viewed within the context of that pervading practice.

94. Secondly, there was another reason for the worker not making a claim and taking sick leave in lieu – and that was an intention to return to her employment as a police officer. In my opinion, that intention was fully genuine, and entirely consistent with a hope and expectation on the part of the worker that she may make a complete recovery.

95. Although the worker did not, in explicit terms, express a hope and expectation of full recovery, I consider that it is reasonable, on the whole of the evidence, to impute that mental outlook to the worker. It is clear on the evidence that the worker's mental condition was engendered by her perception that her various complaints had not been adequately dealt with by the employer. It is equally clear that she hoped that those complaints would ultimately be appropriately dealt with. Dr Meadows was of the view that the worker's return to work was predicated on resolving the conflict issues between the worker and the employer. I think that it is reasonable to infer from those circumstances that the worker had a hope and expectation that she may make a full recovery from her injury, and thus be able to return to her employment.

96. Furthermore, it strikes me that the worker's decision to take sick leave, rather than to become embroiled in the compensation process, was consistent with her intention to return to work, such return being dependant upon the resolution of the conflict issues between herself and the employer.

97. In my opinion, it is important to bear in mind that a worker need only establish that the failure to make a claim was occasioned by "reasonable cause". The word "occasioned" connotes causing or bringing about something. In order to establish "reasonable cause" a worker need only establish that the postulated "reasonable cause "materially contributed to the failure to make a claim. Although the worker's decision to opt for sick leave for economic reasons could not by itself excuse the worker' failure to make a claim, I am satisfied that the worker's intention to return to work predicated upon an expectation or hope of recovery materially contributed to her failure to make a claim in relation to the first injury.

98. In my opinion, reasonable cause for failing to make a claim in relation to the first injury within the specified time has been established. In reaching that conclusion I draw comfort from the fact that in *Re Brady and Australian National Railways Commission* (1987) 13 ALD 187 at 191 the Tribunal held that the applicant had reasonable cause for failing to make a claim within six months of his injury because sick pay paid to him was more than compensation and he hoped to get back to work.

99. Paying due regard to the need to examine the whole of the circumstances as they impact upon the reasonableness or otherwise of the worker's conduct in the present case, the following is duly noted:

- the worker notified the employer of her injury;
- the worker was independently medically examined by Dr Meadows; and

[77] See for example *Banks v Comcare* (1996) FCA 1490.

- a return to work management problem was created on 26 May 2005 in relation to the 2004 injury on an "in house" basis (rather than in the context of a managed compensation claim), resulting in the worker's return to employment on 1 June 2005.

100. This is not a case where the worker was not managed with a view to facilitating her rehabilitation and return to the work force. Although the worker did not return to her employment within the relevant six month period, the trigger for that process did occur during that time frame. The outcome on 1 June 2005 was entirely consistent with the worker's expressed intention to always return to work. In my opinion, those matters form part of the whole set of circumstances that bear upon the reasonableness or otherwise of the worker's conduct, and which must be considered in order to determine whether reasonable cause has been established.

101. When considering the reasonableness of the worker's failure to make a claim within time it is important to bear in mind the legislative regime that applies to police officers – via the *Police Administration Act* - who suffer from medical incapacity.

102. Police officers are entitled to unlimited sick leave, with a certificate from a medical practitioner certifying the police officer is unable to perform their duty.[78] However, if Northern Territory Police wish to determine the nature of a member's illness, then it is entitled to have that member medically examined by an approved medical practitioner in accordance with s 91 of the *Police Administration Act*.[79] As pointed out in the worker's submissions, that statutory procedure enables the Northern Police to determine if a police officer:

- is unfit to perform the duties of his or her present position but may be able to perform efficiently in the same or similar position with modified duties, or in another job;

[78] See [5] of the worker's submissions dated 27 January 2010.
[79] See [6] of those submissions.

- if alternate placements are recommended then the medical practitioner specifies the type of duties suitable or not suitable to be performed by the police officer; and

- alternatively, the medical practitioner may recommend a program of vocational assessment, rehabilitation or retraining.[80]

103. It is relevant that the worker was referred to the Chief Medical Officer, Dr Meadows, in January 2005 - still inside the relevant six month period - to determine if she was fit to perform her duties.

104. It is important to take into account the internal legislative structure and procedure for dealing with police officers, suffering from a medical incapacity, as a circumstance relevant to the determination of whether the worker had a reasonable cause for failing to make a claim within six months of the date of occurrence of the first injury. That regime appears to provide an alternative to the worker's compensation process. It amounts to an "in house" regime, applying what might be best described as a policy of "early intervention".

105. In my opinion, the existence of that internal regime impacts upon the reasonableness of the worker's conduct, and, indeed, supports the finding that the worker has established "reasonable cause" for failing to comply with s182(1(a)) of the Act with respect to the first injury.

106. The worker's counsel suggested that there were two explanations for the worker's failure to make a claim within time that would qualify as "reasonable cause". However, I consider that neither was reasonably supported by the evidence.

107. Dr Tracey gave evidence that had the worker made a claim for compensation, then that would probably have caused her added stress. However, there is no evidence, or insufficient evidence, that the worker did

[80] See [6] of those submissions. See also Exhibit W65.

not make a claim for that reason. Had there been greater evidential support, then that might have qualified as "reasonable cause".

108. It was submitted that the worker was apprehensive that submitting a claim for compensation would result in further victimisation and harassment (given the evidence of Dr Tracey at page 664 of the transcript). However, the evidence does not sufficiently impute such a state of mind to the worker. Again, had the evidence been more cogent, then such a state of mind might have qualified as "reasonable cause" within the meaning of s 182(3) of the Act.

109. It now remains to consider the failure of the worker to make a claim within time in relation to the second injury in 2006.

110. The second injury is particularised as "adjustment disorder with anxious and depressed mood". This injury is alleged to have been sustained on or about 13 April 2006 (not at all clear) as a result of the bullying and inappropriate behaviour of Acting Superintendent Andrew Heath.

111. Again the relevant period for the purposes of s 182(3) is the initial six months period following the injury in April 2006.

112. The fact that the worker only made a claim for compensation after she decided to leave her employment as a police officer is a critical circumstance for the purposes of the Court's consideration of "reasonable cause".

113. At the time of the second injury the worker was on a return to work program. Although the worker again went off on sick leave, it is clear from Ms Bilato's report of 18 May 2006 that the return to work program had not been abandoned by the employer:

> Ms Barnett's return to work under A/Superintendent Andrew Heath is untenable and would be strongly challenged on medical grounds.

> Whilst Ms Barnett has not yet received a medical clearance it is recommended that consideration be given to facilitating Ms Barnett's return to Darwin Investigation Unit, where she was stationed prior to her placement on the Supervised Management Plan.

114. In her subsequent report dated 22 May 2006 Ms Bilato wrote:

> As outlined in the Progress Report Ms Barnett's case is reasonably complex and requires sensitivity and commitment from all parties. In recent times Ms Barnett has cooperated fully with her treatment providers however it appears that it is her behaviour that is again being scrutinised and questioned rather than the reasonableness of A/Superintendent Heath's actions.
>
> Whilst I will continue to work closely with your staff on the particulars of this case I would appreciate the opportunity to meet with you to discuss the more systemic issues surrounding supervised management plans and rehabilitation management.

115. In her next report dated 30 August 2006 Ms Bilato made the following observations in relation to the worker's treatment intervention and rehabilitation :

> Ms Barnett has continued with regular psychological intervention under the treatment of clinical psychologist, Jan Isherwood-Hicks. Dr Isherwood – Hicks confirms that Ms Barnett has been committed to active participation in treatment, including implementing strategies in impulse control.
>
> Ms Barnett has expressed strong motivation to return to work for several months. Her preference is to be able to resume her substantive duties as a Detective within Darwin Investigation Unit and this option was raised with Commander Kate Vanderlaan at a meeting attended by Vicki Lewfatt and the writer on 27 June 2006.
>
> Whilst off work Ms Barnett has initiated and maintained a high level of activity and fitness with the intention of enhancing work capacity. Her attitude towards her rehabilitation has been very positive and she has demonstrated a strong commitment towards achieving her return to work goal. Ms Barnett has developed a good awareness of the triggers that have negatively impacted her work relationships in the past. She and her treating psychologist have expressed confidence in her ability to manage such stressors in the future.

116. Ms Bilato provided the following summary and recommendation:

> As outlined in previous correspondence Ms Barnett had adhered to medical and rehabilitation guidelines with respect to the management of her depression symptoms and was making progress prior to receiving a copy of A/Superintendent Andrew Heath's Internal Memorandum.

> It is recommended that Ms Barnett be given an opportunity to trial a return to work at the Darwin Investigation Unit under the direction of Commander Kate Vanderlaan and Superintendent Kris Evans.

117. In her next report dated 2 November 2006 Ms Bilato stated:

> Uncertainty surrounding her future employment is understandably causing Ms Barnett some worry and following receipt of the NT Medical Officer's report it is important that Ms Barnett receive clear information and advice about her employment and entitlements.
>
> Ms Barnett has developed a good level of awareness of those factors that exacerbate her symptoms of depression and is finding effective ways to reduce their impact on her as well as other family members. However, at this time ongoing psychological and medical management is imperative to maintain the gains she has made.

118. In his report dated 16 October 2006 Dr Giese provided his medical assessment of the worker. In that report he stated:

> Constable Barnett has had depression and anxiety due to ongoing issues with management and interpersonal relationships with other members of the NT Police Force which are contributing to her continuing symptoms and the failure to resolve her work issues.
>
> I recommend she return to her GP, a psychologist and rehabilitation provider to continue to examine all possible avenues to return her to a meaningful, responsible position in the work force.

119. In his report dated 13 December 2006 Dr McLaren observed:

> At present, she is not receiving assertive treatment but, in any event, I feel the chances of a successful return to work are now close to zero. There is no question that, in these types of cases, the earlier assertive treatment is instituted, the better the outcome. This matter has been going on for years and she has now had something like 18 months off work in all. I do not believe there is any reasonable chance of reinstatement to her former post or, indeed, of rehabilitation to a post with similar responsibility in the NT Police Dept.

120. In light of the evidence of both Ms Bilato and Dr McLaren, I am satisfied as to the following:

- At the time of her second injury the worker was on a return to work program;
- While the worker went off on sick leave, both the worker and the employer continued to pursue the worker's return to her employment as a police officer;

- During that period until the receipt of Dr McLaren's report the worker demonstrated a very positive attitude towards her rehabilitation and a strong commitment to achieving her return to work goal;

- It was not until Dr McLaren's December report (which only appeared after the six months from the date of the second injury) that the prospects of a return to work became "close to zero";

- It was not until Dr McClaren's report that the worker accepted that she could not return to her former employment;

- That at least up until Dr Giese's report the employer actively supported, and was working towards, the worker's return to work.

121. Owing to the mindset of both the employer and the worker and their mutual goal to achieve a return to work during the relevant six month period, I consider that the worker has established a "reasonable cause" for not making a claim in relation to the second injury within time.

122. Pursuant to s 182 (3) of the Act I make an order extending the time within which the worker could make a claim for compensation in respect of the first and second injuries.

123. In the event that the Court has erred in finding that the worker had "reasonable cause" for failing to make a claim in relation to the first injury within the prescribed six month period, the second injury (even if it be an aggravation, exacerbation, recurrence or deterioration of the first injury) is distinct from the earlier injury and is, for the purposes of the Act, to be regarded as an injury itself. As the Court has found that the worker has established a reasonable cause for failing to make a claim in relation to the second injury there is no bar to the maintenance of proceedings seeking payment of worker's compensation with respect to that injury.

DEEMED ACCEPTANCE OF THE CLAIM

124. The following was pleaded in paragraphs 88 to 90 of the Amended Substituted Statement of Claim:

> [88] The Territory Insurance Office on behalf of the employer disputed the claim by Notice of Decision and Rights of Appeal dated 15 February 2007 which was posted on an unknown date to the worker c/- Ward Keller Lawyers GPO Box 330 Darwin and received in the ordinary course of post by Ward Keller on behalf of the worker on 26 February 2007 ("the Notice of Decision").
>
> [89] The Notice of Decision stated the employer disputed liability for the worker's claim pursuant to Section 85 of the Act, but did not state that the employer was deemed to have accepted liability for compensation payable in accordance with Section 87 of the Act, or payments of such compensation would only cease 14 days after the date on which the employer notified the workers of its decision.
>
> **Particulars**
>
> > The worker will rely on the form and content of the Notice of Decision and Rights of Appeal signed by L Jackson on behalf of the Territory Insurance Office for the employer and dated 15 February 2007 for its full force and effect.
>
> [90] The Notice of Decision was dated and served more than 10 working days after service of the claim on the employer and the employer is deemed pursuant to section 87 of the Act to have accepted liability for compensation payable under Subdivisions B and D of Division 3 of the Act from 12 September 2004 to date and continuing, or alternatively from 12 September 2004 until 12 March 2007 inclusive being 14 days after the day on which the Notice of Decision was served on Ward Keller on behalf of the worker.

125. In its Amended Defence to the Amended Substituted Statement of Claim the employer responded as follows:

> [45] The employer denies the allegations contained in paragraph 87 and says that the claim form was not accompanied by a current medical certificate as required by section 82(6) of the Act. The worker first served a current medical certificate upon the employer on 8 March 2007 and that date is the deemed date of delivery of the claim form to the employer.
>
> [46] The employer admits that it disputed the claim by Notice of Decision and Rights of Appeal dated 15 February 2007 but otherwise denies the allegations contained in paragraph 88.
>
> [47] The employer admits the allegations contained in paragraph 89 and says that by reason of the matters pleaded in paragraphs 42 and 43 above, the Notice of Decision was provided to the worker within the time required under the Work Health Act.

[48] The employer denies the allegations contained in paragraph 90 and says

1. Further and in the alternative, if the employer did notify its decision to the worker within 10 days after service of the claim on the employer by the worker (which is denied) then any deemed acceptance of liability persists for the period from the date the claim form was served on the employer and the date 14 days after the day on which the notice of its decision was given to the worker, pursuant to section 87(1) (a) of the *Workers Rehabilitation and Compensation Act*.

2. Further and in the alternative for the period of any deemed acceptance of liability the worker was in any event in receipt of sick leave payments which were in excess of her entitlements to weekly payments under the Act (if any), and accordingly any liability for weekly payments of compensation (which is denied) has been fully met.

126. The primary argument made by the employer is that the claim form was not accompanied by a current medical certificate as required by section 82(6) of the Act.[81] The employer says that the worker first served a current medical certificate on it on 8 March 2007 and that is the deemed date of delivery of the claim form to the employer.[82] The worker's claim form was delivered to the employer under covering letter from the worker's solicitors (Exhibit W76).[83] The covering letter refers to a medical certificate of Dr Wal Tracey dated 5 December 2006.[84] Although the letter and claim form are in evidence (Exhibit W76) the medical certificate is not.[85]

127. The employer relies upon section 82(1) (b) of the Act (WRCA) which provides that a claim form must be "accompanied by a certificate in the form approved by the Authority from a medical practitioner or other prescribed person".[86] The employer also relies upon section 82(6) of the Act which provides that "a certificate referred to in subsection 1(b) has effect only for the prescribed period".[87] The prescribed period is set out in Regulation 12 of the *Workers Compensation and Rehabilitation Regulations*:

[81] See [1] of the Employer's submissions on deemed acceptance of the claim dated 30 July 2010.
[82] See [1] of those submissions.
[83] See [2] of those submissions.
[84] See [2] of those submissions.
[85] See [2] of those submissions.
[86] See [3] of those submissions.
[87] See [4] of those submissions.

> (2) For section 82(6) of the Act, a certificate referred to in section 82(1)(b) of the Act has effect for the following period:
>
> a. if it is from a medical practitioner – 14 days[88]

128. The employer submits that at the time the worker made her claim, the medical certificate was not current, and therefore had no effect.[89]

129. The employer points out that the next medical certificate was obtained from Dr Tracey on 8 March 2007. The employer submits that by that date the employer had already issued its section 85 Notice and therefore the deemed acceptance does not arise.[90]

130. The employer submitted that an expired certificate is not "a defect, omission or irregularity for the purposes of section 82(3):

> Section 82(3) provides that a "defect, omission or irregularity in a claim form or certificate shall not affect the validity of the claim and the claim shall be dealt with in accordance with this Part unless the defect, omission or irregularity relates to information that which is not within the knowledge of or otherwise ascertainable by the employer or his or her insurer.
>
> The medical certificate in this case is not saved by section 82(3). There was no defect, omission or irregularity in the document. It had ceased to have effect. There is a difference between a defect, omission or irregularity in a document on the one hand and a document which is legally ineffective on the other hand. A certificate which has become stale is in the latter category.[91]

131. After referring to the rationale for the insertion of Section 82(6) into the Act,[92] the employer made the following submission:

> The enactment of s 82(6) combined with the making of Regulation 12 limited the "effect" of a medical certificate to 14 days, after which a medical certificate had a "nil" effect. A certificate which has no effect is – relevantly – not a certificate for the purposes of s 82.[93]

---

[88] See [4] of those submissions.
[89] See [5] of those submissions.
[90] See [6] of those submissions.
[91] See [7] – [8] of those submissions.
[92] See [9] – [11] of those submissions. In particular, the employer refers to the Second Reading Speech which states: "The Bill will ensure early medical review of claims by limiting the currency of the initial medical certificate to 14 days".
[93] See [12] of those submissions.

132. In making that submission the employer relied upon the joint judgment of the Court of Appeal in *Johnston v Paspaley Pearls* (1996) 133 FLR 456:

> The primary obligation under s 82 when making a claim for compensation is to serve on the employer a claim in the prescribed form and, where required, an accompanying prescribed medical certificate. It is service of such a claim that triggers the obligations on the employer under s 85.
>
> Given that the 28 day time limit was inserted by an amendment, it would seem strange for it not to have been the intention of the legislature that that time limit should be strictly complied with, such that a failure to give the second document (in this case the medical certificate), within that time limit did not render the claim invalid.[94]

133. The employer went on to make these submissions;

> Similarly, here, subsection 6 was inserted by an amendment for a specific purpose. If an "expired" or "stale" medical certificate was "a defect, omission or irregularity", capable of being ignored because of subsection (3), then, subsection (6) would be unnecessary and, in fact, pointless. Any certificate could be used to accompany a claim. Such a result would be at odds with the clear purpose of the amendment.
>
> The correct position must be either that (a) the fact of expiry of the certificate is a specific "defect, omission or irregularity", for which the separate provision in subsection (6) has been written and thus overrides subsection (3) or (b) that the expiry of the certificate renders it to be of no effect at all. In either case the outcome is the same.
>
> The result is that the medical certificate dated 5 December 2006 had no effect because a period greater than the prescribed period had elapsed from the date of its issue. The obligations on the part of the employer under s 85 were thus not "triggered" in the sense explained by the Court of Appeal in *Johnston v Paspaley Pearls* (1996) 133 FLR 456 at 460.[95]

134. The employer made an alternative submission as to the effect of a failure to notify the worker of the employer's decision to dispute the claim within 10 working days.

135. In response to paragraph 89 of the Amended Substituted Statement of Claim the employer submitted that there is no requirement under s 87(1)(a), read with s 87(3)(b), read with s85(8) of the *Workers Rehabilitation and Compensation Act* for the Notice of Decision to state (1) that the employer is

[94] See [13] of those submissions.
[95] See [14] – [16] of those submissions.

deemed under s 87(1) to have accepted liability for compensation and (2) that payments of weekly benefits to the worker will continue until the expiry of 14 days after the date of notification of the employer's decision.[96] In support of that submission the employer relied upon the decision of former Chief Magistrate Blokland in *Dunkel v Northern Territory of Australia* [2009] NTMC 048 at [66] and [68] where her Honour stated:

> I agree the principles of compliance underlying both s 69 and s 87 are similar in that they are derived from the need to ensure employers meet their obligations under the Act and that workers will not be prejudiced. The fact remains the two regimes differ markedly in terms of the requirements and consequences of non-compliance. There is no requirement under s87 read with s 85 to state that payments of weekly benefits would continue until the expiry of 14 days after the date of notification of the employer's decision.[97]

136. Again with respect to paragraph 89 of the Amended Substituted Statement of Claim, the employer made the following submissions:

> Paragraph 89 raises an issue directed to the extent of liability which the employer would be deemed to have accepted under s87 which the worker says was "liability for compensation payable under Subdivisions B and D of Division 3 of the Act from 12 September 2004 to date and continuing, or alternatively from 12 September 2004 until 12 March 2007 inclusive being 14 days after the day on which the Notice of Decision was served on Ward Keller on behalf of the worker".
>
> The employer submits that the employer's "default liability" under s 87(1)(a) would be for compensation payable in the period starting 10 working days after the receipt of the claim for compensation, ie the date by which notification of a decision had to be given under s 85(1) of the Act; alternatively, compensation payable in the period starting from the date of service of the claim on the employer under s82(1)(c); in either case ending on a date 14 days after the day on which the Notice of Decision is served. That would be consistent with an assumed legislative intent to provide for interim payment of compensation consistent with the situation where the employer deferred accepting liability for the compensation under s 85(1) (b).
>
> There is no warrant to read into s 87(1)(a) a liability on the part of an employer for what might be 3, 5 or 10 years (depending on when the injury was sustained) of past compensation.[98]

---

[96] See [19] of those submissions.
[97] See [20] of those submissions. The employer further submitted at [21] that "the suggested need to state that the employer is deemed under s87(1) to have accepted the claim, or words to that effect, was not argued and decided in *Dunkel* but is disposition would, on the application of her Honour's reasoning, have gone the same way as the other argument".
[98] See [22] – [24] of those submissions.

137. Further or in the alternative the employer submitted that the Court had a discretion under s 87(1) (b) to relieve the employer of deemed acceptance of liability for compensation, both for the past and the future.[99] In that regard the employer relied upon what was said in *Schell v Northern Territory Football League* (1995) 5 NTLR 1, where the Court dealt with legislation very similar to the present s 87(1)(b):

> Counsel for employer, Mr Walsh QC, submitted that the Court had a wide discretion, and could, in an appropriate case, relieve the employer of its deemed acceptance upon proof by it of matters sufficient to justify the Court, acting judicially, to take that course; and he submitted that the sort of factors which the Court should consider would be the same as those upon which a Court might set aside a default judgment…
>
> We consider that the words used in the section, viz, "until such time as the Court orders otherwise" are apt to confer the widest possible discretion upon the Court…
>
> In our opinion the effect of the amendments to s 87 was not confined to clarification of whether or not the deeming effect of the section was conclusive. As we have already observed, the words inserted into the section were appropriate to confer upon the Court the widest possible discretion. They were clear and unambiguous.[100]

138. Accordingly, the employer submitted that it should be relieved of any liability, except, in the court's discretion, of liability for a limited period in accordance with its earlier submission.[101]

139. After referring to the provisions of s 82 of the *Worker's Rehabilitation and Compensation Act* – which require a claim for compensation to be in the approved form and unless it is a claim for compensation under sections 62, 63 or 73, to be accompanied by a medical certificate in the approved form – the worker submitted that while the certificate referred in section 82(1)(b) of the Act has effect only for the prescribed period, "the period referred to is that of the period of incapacity to which that medical certificate refers" and

[99] See [25] of those submissions.
[100] See [26] of those submissions.
[101] See [27] of those submissions.

"it is not the case that such a medical certificate loses efficacy, as the employer's submissions appear to require".[102]

140. The worker submitted that "the provision in subsection 82(6) of the Act is a temporal requirement in respect to the period of incapacity in which the certificate is to relate but which is not extinguished after the period concludes".[103]

141. The worker went on to submit:

> Given that a claim form may be served up until 6 months after the occurrence of the injury (sub-section 182(1) of the Act), it cannot have been the intention of the Legislature that only so called "current" medical certificates can found a claim. Indeed, the Legislature does not use the word "current" but uses the words "effect' and "prescribed period". The employer's submissions have conflated the notion of "currency" with "effect".[104]

142. The worker submitted that extrinsic material such as the Second Reading Speech was of "no assistance in interpreting the clear words of the Act and the Regulations.[105]

143. In relation to the employer's submissions regarding the application of *Johnston v Paspaley Pearls* to the facts of the present case, the worker made these submissions;

> …the reference in the employer's submissions to *Johnston v Paspaley Pearls* is inapposite in interpreting the clear words of the Act and the Regulations. The words "such a claim'" in *Johnston's* case refers to the claim form. The Court of Appeal noted that the obligation, when making a claim, is to serve on the employer a claim in the prescribed form and where required, an accompanying prescribed medical certificate.
>
> The certificate here fitted the description of the certification required by the legislation. It did not seek to overreach its validity past the prescribed 14 days nor did it purport to do so.
>
> The claim form therefore was a claim within section 82 of the Act.[106]

[102] See [3] of the worker's submissions on deemed acceptance dated 10 August 2010.
[103] See [4] of those submissions.
[104] See [5] of those submissions.
[105] See [6] of those submissions.

144. The worker submitted that the Notice did not comply with subsection 87(3) of the Act, and "only if there is strict compliance with subsection 85(8) of the Act is there a notification referred to in paragraph 87(1)(a) of the Act".[107]

145. The worker submitted that the employer had failed to comply with the requirements of s 85(8) in the following respects:[108]

> 1. The employer failed to give the claimant a statement in the approved form to the effect that if the claimant is aggrieved by the decision to dispute liability, the claimant may, within 90 days after receiving the statement apply to NT WorkSafe to have the dispute referred to mediation;
>
> 2. The employer failed to give the claimant a statement in the approved form to the effect that, if mediation is unsuccessful in resolving the dispute, the claimant may commence a proceeding before the Court for the recovery of compensation to which the claimant believes that she is entitled;
>
> 3. The employer failed to give the claimant a statement in the approved form to the effect that if the claimant wishes to commence a proceeding the claimant must lodge an application with the Court within 28 days after receiving a certificate issued by the mediator under section 103(j) (ii) of the Act ;
>
> 4. The employer failed to give the claimant a statement in the approved form to the effect that the claimant may only commence the proceeding if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful.

146. The worker says that although the Notice was accompanied by a document headed "Workers Compensation- Mediation Board WH 13.0.09, "The Notice does not refer to such a document and it is the Notice itself that must comply with subsection 85(8) of the Act".[109]

147. The worker made the following further submissions at [17] –[19] of the written submissions:

---

[106] See [7] – [9] of those submissions.
[107] See [11] –[12] of those submissions.
[108] See [13] – [15] of those submissions.
[109] See [16] of those submissions.

> The Notice, far from complying with subsection 85(8) is a conflation, confusion and medley of various concepts, some of which, if cobbled together might constitute part of what is required under subsection 85(8) of the Act but does not comply with the words of that subsection as required by subsection 87(3) of the Act.
>
> Given the importance of the mediation process and the time limits involved, strict compliance and clear advice is required as is made clear in subsection 87(3).
>
> Accordingly, the Notice dated 15 January 2007 (Exh W87) is not a notification pursuant to section 87.

148. With respect to the wording of s87, which the worker says is clear, the worker submitted that "there is no occasion to import a period of the deeming commencing 10 working days after the receipt of the claim for compensation or the period commencing from the date of service of the claim on the employer under 82(1) (c) of the Act".[110] The worker's submission is that "the section deems acceptance for the compensation payable until a certain period: the starting point is the period for which compensation is payable".[111]

149. Finally, although the worker conceded that the employer's remedy is to obtain an order to the contrary pursuant to s 87(1)(b) the worker says that there is no evidence before the Court to justify the deeming to be set side.[112]

150. The employer made the following submissions in reply to the worker's submissions.[113]

151. The employer submits that the worker has raised new allegations of defects in the Notice that have not been pleaded and should not be permitted to rely upon those defects at this late stage.[114] In any event the employer argues that the defects are not defects at all.

---

[110] See [21] of those submissions.
[111] See [21] of those submissions.
[112] See [22] of those submissions.
[113] See the employer's submissions in reply dated 11 August 2010.
[114] See [2] of those submissions.

152. The employer submits that the notice does in fact comply with section 85(8)(b) in that it states " You have 90 days from receipt of this Notice of Decision and Rights of Appeal form to apply for mediation (at page 2.2)".[115]

153. The employer also submitted that the notice complied with section 85 (8) (d) by stating:

> NOTE: Before making an application to the Work Health Court, except for an application for interim benefits, the worker MUST first apply for and complete the mediation process.
>
> If you wish to contest the decision in the Work Health Court you must make an application to the Court within 28 days of receiving a certificate of completion of mediation.[116]

154. The employer submitted that the Notice does not contain any reference to the document entitled "Mediation Board WH 13.0.09".[117]

155. The employer submitted that although the Notice did not contain a statement to the effect that if mediation is unsuccessful in resolving the dispute the claimant may commence a proceeding in the Work Health Court, "advice to the effect that worker is entitled to commence proceedings if the mediation is unsuccessful is implicit in the statement reproduced in paragraph 2.2 above and further in the following statement:

> Mediation is a requirement before an application can be made to the Work Health Court, however, an application for interim benefits may be made to the court under section 107 of the Work Health Act as soon as you have lodged a mediation request with WorkSafe (at page 2.3)[118]

156. At paragraph 3.4 of its submissions the employer contended that the combined effect of those statements is to inform the worker of a right to commence proceedings if the mediation is unsuccessful for the following reasons:

---

[115] See [3.1] of those submissions.
[116] See [3.2] of those submissions.
[117] See [3.3] of those submissions.
[118] See [3.4] of those submissions.

a) The notice tells a worker that they have a right to commence proceedings, but only after the mediation process is completed;

b) Logically, if the mediation process was successful the worker would not have any need or wish to pursue court proceedings;

c) The statement that "before making an application to the Work Health Court…the worker MUST first complete the mediation process" only makes sense if it is understood that the worker has the right (at some time) to commence proceedings in the Work Health Court;

d) It is not necessary that the notice use the precise words contained in the Act. The Act requires that the statement have the effect of informing the worker of their rights;

e) The notice when viewed as a whole properly focuses on the worker's rights to mediation as a prerequisite first step in a process culminating in court proceedings. It accords with the scheme itself. A worker reasonably informed would understand the effect of the notice that the worker may commence proceedings in the Work Health Court but must complete the mediation process first. In *Newton v Masonic Homes* [2009] NTSC 54 Mildren J, when considering the requirements of a notice issued under s 69(1) (for present purposes an identical notice to the one under consideration), observed:

> The learned magistrate decided that the test as to whether or not the statement complied with s 69(1)(b) was "an objective test with a subjective element. That is, the employer is required to provide detail to make the Notice understandable for the ordinary person such that the particular worker should have understood the notice". In my opinion, the test is an objective one and does not depend on the level of education or intelligence of the worker. Nor is it invalid if written in English where the worker is unable to read, either at all, or in the English language. An objective test recognises that there will be many occasions where workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled, particularly as the provisions of the Act are complex and likely to be difficult for a layman to comprehend (at [16]).

157. With respect to the Court's discretion to make an order overriding the effect of any deemed acceptance of the claim, the employer made the following submission:

> The Court is in the position of having heard and determined the merits of the entire claim. In those circumstances the worker cannot maintain that there is no evidence that would justify the Court setting aside the deeming. The evidence that justifies setting aside the deeming effect of any late issue of the notice is all of the evidence that provides the employer with a substantive defence to the claim. In short, if the employer has a defence to the worker's claim on its

> merits, then it should not be held liable for the claim on the basis of a mere technicality.[119]

158. Having considered the employer's submission that the claim made by the worker was not valid owing to the fact that the accompanying certificate was not current, I find myself unable to agree with that submission. In my opinion there is no statutory, or other, requirement that a claim for compensation be accompanied by a current medical certificate (as defined by the Act and Regulations). A claim form which is accompanied by a stale or expired certificate (as in the present case) does not render the claim invalid for the reasons advanced by the worker:

- The certificate attached to the claim form had not lost its efficacy due to the effluxion of time;
- The requirement imposed by s 82(6) of the Act is a temporal requirement in respect of the period of incapacity to which the certificate relates, but is not extinguished after the period expires;
- It cannot have been the intention of the legislature that only so called "current" certificates can found a claim;
- The certificate that was attached to the claim form conformed to the description of the certificate required by the Act and Regulations. The certificate did not seek to overreach its validity past the prescribed 14 days nor did it purport to do so; and
- Therefore the claim form was a valid claim within s 82 of the Act.

159. It is clear that it could not have been the intention of the legislature to insist on only so called "current" certificates to found a claim under s 82 of the Act. A worker may only seek to claim compensation for a relatively short period – say 14 days – which has expired at the date of the claim. In other words, a worker may only seek to make a claim for a closed period in the past. The construction of s 82 advanced by the employer would require a

[119] See [4] of those submissions.

claimant to obtain another certificate bearing a current date, but referring back to an earlier period. Surely, that could not have been the intention of the legislature.

160. As pointed out in the worker's submissions, a claim form may be served up until six months after the occurrence of the injury. Consider the following scenario. Towards the very end of the six months period - say a day before - a worker may decide to lodge a claim for compensation. But he or she only has a certificate for a period that is no longer current. If the employer's construction is correct, then the worker would have to get another certificate with the prospect of not being able to make the claim within time. To require the worker to obtain a so called "current" certificate under those circumstances would, in my opinion, impose a burden on the worker which the legislature did not intend to impose via s 82 of the Act.

161. In my opinion, the decision in *Johnston v Paspaley Pearls* (supra) does not compel the conclusion that, in order to be a valid claim within s 82 of the Act, a claim form must be accompanied by a "current" certificate.

162. The claim form having been found to be valid, with the result that the employer's statutory obligations were triggered, it now remains to consider the employer's deemed acceptance of the claim.

163. It is clear that the employer's decision to dispute the claim was not notified to the worker within 10 working days after the employer had received the claim.

164. Having considered the submissions made by both parties, I prefer the submissions made by the employer, and therefore conclude that the employer's decision to dispute the claim complied with subsection 87(3) of the Act.

165. Having found the Notice of Decision to have been valid, the extent of liability for compensation which the employer is deemed to have accepted is governed by the provisions of s 87(1) of the Act, which provides:

> If an employer fails to notify a person of his or her decision within the time specified in section 85(1), the employer is deemed to have accepted liability for compensation payable under Subdivisions B and D of Division 3 until:
>
> a) the expiry of 14 days after the day on which the employer notifies the person of his or her decision in pursuance of that section; or
>
> b) the Court otherwise orders.

166. As the Notice of Decision has been found to have been valid, the employer is deemed to have accepted liability for compensation payable until the expiry of 14 days after the day on which the employer notified its decision.

167. There are other issues raised by the parties, namely the extent of liability which the employer is deemed to have accepted under s 87[120] and the exercise of the Court's discretion to relieve the employer of the deemed liability pursuant to s 87(1)(b) of the Act.[121]

168. In my opinion, the worker's construction of the extent of the employer's liability is correct. As regards the exercise of the Court's discretion under s87, it is noted that the employer did not formally seek relief from the deeming provisions of s 87, and it should have done so, setting out the grounds for the relief: see *Carlsen v AAT Kings Tours Pty Ltd* [1998] 8 NTLR 114 at 120. Can the employer still seek relief?

169. Should it become necessary following the determination of the worker's claim on the merits I will hear the parties in relation to this issue.

---

[120] See [21] of the worker's submissions in relation to deemed acceptance of the claim dated 10 August 2010 and [22] – [24] of the employer's submissions on deemed acceptance of the claim dated 30 July 2010.
[121] See [22] – [23] of the worker's submissions dated 10 August 2010 and [25] – [27] of the employer's submissions dated 30 July 2010. See also [4] of the employer's submissions in reply dated 11 August 2010.

THE RECRUITMENT OF THE WORKER AND THE WORKER'S PSYCHOLOGICAL PROFILE

170. The circumstances under which the worker was recruited as a member of the Northern Territory Police Force received a considerable amount of attention at the hearing and was the subject of extensive evidence.

171. As set out in the workers written submissions dated 27 January 2010, at the time the worker was recruited certain procedures were in place to ensure the physical and psychological integrity of the recruitment process so that unsuitable applicants were not recruited.

172. The evidence shows that the worker failed the psychological test for the March 1998 intake. The reasons why she failed the test are set out in the psychological report dated March 1998 (Exhibit 120 Tab 3). The report identified many issues that would be a problem for the worker as a police officer in a service academy and the recommendation was "do not advance". That psychological report was forwarded to the Director of Recruitment, Dr Phil Hartman, psychologist.[122]

173. The evidence shows that the worker was invited to reapply, and did so on 17 March 1999.[123] This time the worker passed the psychological test.

174. The worker was interviewed. However no questions were asked about the apparent change in her psychological profile in the three month period between the first and second psychological tests, despite there being a specific section in the interview pro forma relating to the COPS (Candidate and Officer Personnel Survey) testing.[124]

175. Based on the evidence received by the Court, the worker made this submission:

[122] See p 1042 of the transcript.
[123] See Exhibits W2 and W3.
[124] See pp 1181 -1202 and Exhibit E167.

> …the psychological testing component of the recruitment process ought to have raised and or alerted NT Police that there were likely to be real and serious issues with Mrs Barnett in her employment as a police officer. Instead NT Police chose to ignore the very process they had in place to identify problem candidates. One wonders why NT Police would go through the process at all if they ignored, as they did in this case, the results of testing. This was confirmed by Dr Byrne in his evidence as something which any competent psychologist should have picked up.[125]

176. Dr Byrne described the personality profile in the second test as "dramatically different" to the first.[126] At page 1394 of the transcript Dr Byrne said "I'd have said that when the person took the test a second time it's very likely she lied".

177. I agree with the observation made by the employer in its submissions that the difference between the results of the two tests cannot be explained by the elapse of time between March 1998 and June 1998, a relatively short interval".[127]

178. In my opinion the worker was recruited to the Northern Territory Police in circumstances where there should have been very serious doubts about her suitability to become a police officer on account of the discrepancies between the results of the two psychological tests.

179. The significance of that is twofold.

180. The worker appears to have entered the Northern Territory Police Force with what was described by the employer as "an unusual and difficult personality".[128] However, as properly conceded by the employer, the fact that the worker's mental injury may have been contributed to by her personality is not to the point in determining whether she suffered such an injury.[129]

181. The second significant aspect is encapsulated in the following observation made by Dr Epstein in his report dated I June 2009:

---

[125] See [50] of the worker's submissions dated 27 January 2010 and pp 1379 -1380 of the transcript.
[126] See [8] of the employer's submissions dated 10 March 2010. See also p 1384 of the transcript.
[127] See [8] of those submissions.
[128] See [1] of those submissions.
[129] See [28] of those submissions.

> I am uncertain as to the relevance and meaning of [the] of the psychological assessment. My reasons for saying that is that whatever value was given to this psychological assessment nevertheless she was made a member of the Northern Territory Police Force and after that her employer had to take her as they found her.[130]

182. Consonant with the submission made by the worker,[131] the employer must take Mrs Barnett as she is and was at the time of the various actions taken by it in connection with her employment. The worker's personality (including any psychological profile), inter alia, is a factor that must be taken into account by the court when considering the reasonableness or otherwise of administrative or disciplinary action taken against her in connection with his or her employment.[132] Furthermore, the issue of what was reasonable in the circumstances is a question of fact and involves the decision maker in a judgment based upon the facts as were known or ought to have been known at the relevant time.[133] The worker's personality (any psychological profile) falls within the category of known facts or facts ought to have been known.

THE MEANING OF THE STATUTORY EXCLUSIONS

183. As the employer contends that the injuries suffered by the worker were the result of reasonable administrative or disciplinary action or the result of the failure to obtain a promotion, transfer or benefit, the Court needs to consider what is meant by each of the statutory exclusions set out in s 3 of the Act.

184. It is helpful to begin by considering the policy underlying the statutory exemptions. In *Swanson v Northern Territory* (supra at 96-98) Martin (BR) CJ made the following observations regarding the "reasonable administrative action" exclusion:

---

[130] See Exhibit W 96.

[131] See [97] of the worker's submissions dated 27 January 2010. The worker also submitted that "it is not necessary to embark on the issue of whether Mrs Barnett's response to the various actions of NT Police was reasonable in some objective sense: see *Westgate v Australian Telecommunications Commission* 14 ALD 367, 371".

[132] See *Mitsubishi Motors Australia v Lupul* [204] SAWCT 130. This point was also made in the worker's counsel opening at pp 26 – 27 of the transcript: "They knew that she had this propensity and…it was reasonable for people who

Prior to 1991, the definition of "injury" in the Act did not contain an exemption from liability to pay compensation where an injury sustained in the course of employment was the result of reasonable administrative action. That exception was introduced by an amendment in 1991. In the second reading speech, the Minister for Lands and Housing identified the policy of the amendment in the following terms:

> Also, a constraint is placed on the definition of "injury and disease" to exclude an injury or disease suffered by a worker as a result of reasonable administrative action taken in connection with his or her employment. This would ensure that managers are able to manage their workers effectively without a worker being able to take compensation leave because he or she is stressed by being disciplined for a misdemeanour or for missing out on a job promotion. This section is modelled on a similar clause in the Commonwealth Act.

The legislature plainly recognised that it was putting in place a restriction on the right to compensation for injuries sustained in the workplace. It is not uncommon for beneficial legislative schemes to include express restrictions or constraints. As Heydon J observed in Victims Compensation v Brown in the context of a legislative scheme providing compensation for victims of crime (at [29]):

> The introduction of caps and limitations upon recovery, usually justified by reference to supposed affordability, has been a relatively common feature of Australian compensation legislation in recent times.

While affordability may have been an influencing factor, it appears that the legislature recognised that employers must be able to manage their businesses and employees and implement administrative and disciplinary decisions affecting their employees without necessarily being placed at risk of liability for compensation should an injury be suffered as a consequence of administrative or disciplinary action. However, the exemption does not apply to every act of an employer. It applies only to "administrative" and "disciplinary" acts. However, workers are given a degree of protection by the primary requirement that the administrative or disciplinary action be "reasonable".

185. A similar policy underpins the non–compensability of injuries occurring as a result of a failure by a worker to obtain a promotion, transfer or benefit.

186. Having identified the rationale underpinning the exclusions it now remains to determine the nature and scope of the three exclusions.

---

were managing her to know about that and to factor that into the way that they managed her. They did not do so. There's certainly no evidence that anybody who ever dealt with her knew about that".

[133] See *Norah Price v The Corporation* [A.45/1994].

187. Unlike the exclusionary provisions of the *Safety Rehabilitation and Compensation Act* 1998 (Cth) there is no definition of "reasonable administrative action" under the Northern Territory Act.[134] In the absence of a statutory definition, the following opinion expressed by the Chief Justice in *Summers* (1995) 65 SASR 243 provides some guidance as to the meaning of "administrative action":

> …I consider that the expression "administrative action" is probably intended to apply to decisions or actions by the employer which are in some way related to the workings or functioning of the workplace rather than the actual tasks performed by the worker…

188. What is clear is that there is a wide range of actions taken by employers that are capable of being regarded as "administrative action": see *Re Steuregger* [2009] AATA 757.

189. Although section 5A(2) of the Commonwealth Act provides some guidance as to the type of actions or conduct that might be regarded as "administrative action" it is important to note that at the Commonwealth level there is only one statutory exclusion – namely "reasonable administrative action – and the Commonwealth definition of "reasonable administrative action" includes actions or conduct that would be more appropriately regarded as falling within the other two exclusions in s 3 of the Northern Territory Act.

190. It is clear that bullying and harassment – however that might be defined – would not come within the "reasonable administrative action" exclusion.

191. "Disciplinary action" has been considered at the Commonwealth level in a number of cases.

---

[134] Section 5A (2) of the Commonwealth Act says that "reasonable administrative action" is taken to include the following:

(a) a reasonable appraisal of the employee's employment;
(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
(c) a reasonable suspension action in respect of the employee's employment;
(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
(e) anything reasonable done in connection with an action mentioned in paragraph (a),(b), (c) or (d);

192. In *Comcare v Chenhall* (1992) 109 ALR 361 the Federal Court, in addressing the extant "reasonable disciplinary action" exclusion, held that the Act does not "contemplate that as part of the process of determining an entitlement to compensation, the applicant or its delegate is required to make a determination as to the guilt or innocence of the employee of alleged misconduct where it is alleged that the injury resulted from disciplinary action". The Court held that the two issues that need to be determined are (1) whether the action which resulted in the injury was "disciplinary action and (2) if so, was that disciplinary action reasonable.[135]

193. In *Comcare v Chenhall* (supra) at [30] Cooper J considered the "reasonable disciplinary action" exclusion in its statutory context:

> In the context of the definition of "injury" in s 4(1) of the Act, the phrase "disciplinary action" means no more than reasonable action lawfully taken against an employee in the nature of or to promote discipline. The relevant discipline is constituted by the body of duties and such rules or behaviour as are applicable to and enforceable against the employee by virtue of his or her employment (at 37 FCR 83).

194. The Court held that "action taken to determine whether or not disciplinary action will be taken against an employee, although it might be characterised as part of a system or process to maintain discipline, is not action within the meaning of the definition …(at [40])".[136]

195. Disciplinary action need not result in the infliction of punishment or the imposition of a sanction: see *Re Rizkallah and Australian Postal Corporation* (1991) and *Re Scalzo and Australian Postal Corporation* (1991).[137]

196. In *Re Rizhallah v Australian Postal Corporation* (1996) 23 ALD 572 the issue was whether or not an employee who was counselled in relation to her

---

(f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer, or benefit or to retain a benefit, in connection with his or her employment.

[135] See J Ballard, P Sutherland and A Anforth *Annotated Safety Rehabilitation and Compensation Act* 1988 The Federation Press 2003 at [4.19].

[136] See Ballard, Sutherland and Anforth, n 135 at [4.19].

[137] These two cases are discussed in Ballard, Sutherland and Anforth n 135 at [4.19].

poor work performance, and who consequently developed a mental injury, had been subject to disciplinary action. Disciplinary action was held to include "all aspects of the system of rules for the conduct of employees and enforcement of those rules by any means".

197. A narrower view was taken in *Comcare v Chenhall* (1992) 109 ALR 361, Cooper J noting that disciplinary action included only the action itself, not the steps which led to the decision of such disciplinary action.[138]

198. A broader view was taken in *Choo v Comcare* (1995) 39 ALD 399 where it was held that counselling sessions formed part of disciplinary action.[139]

199. In *Re Inglis and Comcare* (1997) the Tribunal held that a "performance review interview" was disciplinary action.

200. It is clear from the existing authorities that it is no easy task to define "disciplinary action", and that the distinction between "administrative action" and "disciplinary action" is often blurred. However, for the purposes of applying the statutory exclusions in the Northern Territory, it matters little whether the actions or conduct of an employer amount to "administrative action" or "disciplinary action", because a single test of "reasonableness" applies to both. All that matters is that the actions or conduct can be properly regarded as either "reasonable administrative action" or "reasonable disciplinary action".

201. The next matter that needs to be considered is what is meant by "reasonable disciplinary action" and "reasonable administrative action" within the context of the statutory exclusions set out in the definition of "injury" in s 3 of the *Workers Rehabilitation and Compensation Act* (NT).

202. It warrants noting that s 5A of the *Safety Rehabilitation and Compensation Act* 1988 (Cth) excludes the payment of compensation in relation to an

[138] This view was adopted in *Re Quarry v Comcare* (1997) 47 ALD 113 and *Arthur v Comcare* (2004) AATA 241. In both cases it was held that counselling sessions were not part of the disciplinary process.

injury suffered "as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment".[140] The wording of the Commonwealth legislation is to be contrasted with the wording of the exclusions in s 3 of the Northern Territory legislation, which merely refers to "reasonable disciplinary action taken against the worker" and "reasonable administrative action taken in connection with the worker's employment". Is there any material difference between the exclusionary provisions of the two compensation schemes?

203. In my opinion that question should be answered in the negative.

204. Prior to the 2007 amendments, the Commonwealth Act rendered injuries occurring as a result of reasonable disciplinary action or the failure by a worker to obtain a promotion, transfer of benefit non compensable. There was no "reasonable administrative action" exclusion, as there currently is under the Northern Territory Act. The explanatory memorandum identified the problem as being the hitherto narrow interpretation of "disciplinary action". It was considered that it was not the intention of the Act that claims for injuries arising in circumstances such as management counselling and the annulment of probationary appointment be allowed on the basis that they were not "disciplinary action". The remedy was, therefore, to amend the exclusionary provisions to the effect that an injury occurring as result of "reasonable administrative action" be non compensable, while at the same time providing a broad statutory definition of "reasonable administrative action".

205. It is noteworthy that prior to the 2007 amendments there was some uncertainty as to whether the earlier exclusionary provisions – in particular the failure to obtain a promotion etc exclusion – was to be viewed objectively or subjectively.[141] Since the decision in *Gilbert and Comcare*

---

[139] See also *Wierzbicki and Comcare* (1999) AATA 123.
[140] Section 5A was inserted as a result of the 2007 amendments to the Commonwealth Act.
[141] See *Wiegand v Comcare* (2002) 72 ALD 795.

[2009] AATA 24, which applied the amendments to the exclusionary provisions, it is now clear that determining whether the exclusionary provisions apply is an objective test. The likely purpose of the "reasonable administrative action taken in a reasonable manner" amendment was to make it abundantly clear that a reasonableness test must be applied.

206. However, it should be noted that prior to the 2007 amendments, in *Re Inglis and Comcare* (AAT 12155, 27/8/1997) the Tribunal held that a performance review interview did not amount to reasonable disciplinary action because of the way in which it had been conducted. Amongst other things, no prior warning of an allegation of serious misconduct was given and the employee was required to respond to the allegation immediately.[142] Therefore, there were cases determined prior to the amendments that pointed to not only the need to look at the reasonableness of the disciplinary action itself, but also the reasonableness of the manner in which it was taken. In my opinion that was an appropriate approach to the then current exclusionary provisions.

207. In my opinion, the "reasonable disciplinary action" and "reasonable administrative action" exclusions contained in s 3 of the *Workers Rehabilitation and Compensation Act* are to be objectively tested. In applying that test, it is necessary to look at the reasonableness of an employer's actions in all the circumstances. That requires not only an examination of the reasonableness per se of any administrative or disciplinary action taken by an employer, but also an examination of the reasonableness of the manner in which the action was taken or implemented. The submissions by both counsel in the present proceedings are predicated upon that view of the exclusionary provisions. Neither counsel sought to argue a contrary construction of the exclusionary provisions.

[142] See also *Re Bartlett v Comcare* (1996) 40 ALD 709 where an employee who was suspended from her duties as a result of accessing confidential data was not given a chance to respond to allegations of misconduct. It was held that the employer had acted unreasonably.

208. Something further needs to be said about the objective test, and to that end it is useful to consider the recent decision of the Administrative Appeals Tribunal in *Gilbert and Comcare* (supra).

209. The facts in that case were that the applicant was employed as a personal adviser at Centrelink. The applicant's problems began when steps were taken to absorb her role into the existing role of Custom Service Adviser. She experienced significant difficulties in adjusting to the new role and complained that her difficulties were the result of her employer not providing adequate training. The applicant reacted to her supervisors providing her with direction on the errors she was making in the performance of her role and the length of time she was spending with customers. The applicant considered that the interaction with management amounted to bullying and harassment, and resulted in her ceasing work due to an adjustment disorder. The applicant claimed compensation on the basis that the adjustment disorder was caused by bullying and harassment and the lack of adequate training provided for her new role. Comcare denied liability on the grounds that both these causes fell within the definition of "reasonable administrative action taken in a reasonable manner", and was accordingly excluded under section 5A of the *Safety Rehabilitation and Compensation Act* (1988).

210. The Tribunal was called upon to determine whether in assessing the reasonableness of the relevant events it was an objective or subjective assessment.

211. The Tribunal found that what the applicant perceived to be bullying and harassment clearly fell within the definition of "reasonable administrative action", as it amounted to reasonable reappraisal, counselling or informal disciplinary action which was conducted reasonably. The effect of the Tribunal's decision is that whether the exclusionary provisions apply is an objective test: if the actual events amount to reasonable action and

objectively it is found that action was taken in a reasonable manner, the alleged injury will not be compensable, even if it was caused by the applicant's perception that the action constituted bullying and harassment.

212. Although in *Gilbert and Comcare* (supra) the Administrative Appeals Tribunal was dealing with section 5A of the Commonwealth Act, in my opinion the Tribunal's explanation of the objective test applies equally to the exclusionary provisions set out in s 3 of the Northern Territory Act. There is no material difference between the exclusionary provisions in the two statutes that would justify a different approach.

213. Before leaving the "reasonable administrative action" and "reasonable disciplinary action" exclusions, there are a number of authorities that provide some guidance as to how the reasonableness of an employer's actions is to be assessed. Although the following cases deal with other statutory regimes, the observations contained in those cases have general application, and are apposite in the context of the Northern Territory legislation.

214. In *Norah Price v The Corporation* [A .45/1994] the Workers Compensation Appeal Tribunal stated:

> …the issue of what was reasonable in the circumstances was a question of fact. It involved the decision maker in a judgment based upon the facts as were known or ought to have been known at the relevant time and without the benefit of hindsight…Moreover, it means "reasonable" given all the circumstances…It is an objective test.

215. In *Keen v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 42 at 46, on the topic of administrative action, Lander J said, when discussing whether "the administrative action was reasonable and, if reasonable, whether it was taken in a reasonable manner by the employer":

> Both of these further matters will be an inquiry of fact to be determined objectively. Whether the administrative action is reasonable is simply a matter of fact. Whether the administrative action was taken in a reasonable manner by the employer will depend upon the administrative action, the facts and circumstances giving rise to the requirement for the administrative action, the

> way in which the administrative action impacts upon the worker and the circumstances in which the administrative action was implemented and any other matters relevant to determining whether the administrative action was taken in a reasonable manner by the employer.

216. In order to be reasonable, disciplinary action must be "relative or related to the conduct or behaviour giving rise to that action": see *Re Pandos and Commonwealth of Australia* (1991) 22 ALD 784 at 785. Unlawful conduct, such as threats of assault, cannot be regarded as reasonable: see *Schmid v Comcare* (2003) 77 ALD 782. Similarly, in order for disciplinary action to be reasonable it must not contain any element of bullying and harassment.

217. In *Kalogiannidis v The Corporation* [A.72/1995] the Appeal Tribunal said:

> The concept of reasonableness requires an employer to deal with its employees fairly and honestly.

218. In *Burner v Serco Australia* (J.D 39/1999) the Full Bench of the Tribunal observed:

> There is no doubt that the worker had the right to expect that he would be afforded natural justice in connection with the disciplinary proceedings. In general terms, we respectfully adopt the summary of natural justice provided … in *University of Samon v Fernando* (1960) 1 WLR 223 at 232: -
>
> First I think that the person charged should know the nature of the accusation made; secondly, that he should be given the opportunity to state his case; and thirdly of course that the Tribunal should act in good faith. I do not think that there is really anything more.

219. Hence, lack of procedural fairness in disciplinary action resulted in action being held to be not reasonable in *Re Inglis and Comcare* (supra).

220. As stated by Mason J in *Kioa v West* (1985) 159 CLR 550:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

221. Whether or not particular administrative or disciplinary action on the part of an employer is reasonable will often come to down to the question of

whether the worker has been afforded procedural fairness. The question that needs to be asked is whether the worker has been treated fairly in a manner which is regarded as procedurally correct.

222. In *Whicker v WorkCover (SA) Ltd (Signcraft Pty Ltd)* (J.D. 37/1999) Deputy President Gilchrist stated:

> The proper and effective management of human resources requires much more than a clinical application of established industrial principles to a particular state of affairs. It also involves the careful reflection of the particular circumstances of each case. A rigid adherence to the principles declared in judgments and decisions of Courts and Tribunals without an appropriate consideration of the particular facts of the matter can lead to inappropriate action being taken.
>
> Moreover, despite what has been said in the decisions of the Court and Commission, it is not the case that an employer is obliged in every meeting involving an employee at which poor work performance is discussed, to issue a warning about potential dismissal. One should not lose sight of the fact that the ultimate objective of disciplining and counselling an employee in respect of poor work performance is to improve the worker's performance at work, not to have his or her employment terminated.

223. It was held in *Department of Education &Training v Sinclair* [2004] NSW WCC 90 that action taken by the employer to prohibit contact by the worker with students of a school and failure to provide details of the allegations it was investigating was unreasonable. On appeal this decision was overturned on the basis that in determining whether the employer's actions were unreasonable it was necessary to consider the entire process rather than to single out a particular "blemish" in the process: *Department of Education & Training v Sinclair* [2005] NSWCA 465 at [97].[143]

224. In a similar vein, in *Wilson and Comcare* [2010] AATA 396 28 May 2010 the Tribunal observed that some of the interactions between the employer and employee would not be reasonable on their own. However, in the circumstances, and given that reasonable action does not have to be perfect provided that it was "tolerable and fair", the Tribunal did not find that these

[143] See R Guthrie, M Ciccarelli and A Barbic "Work –Related Stress in Australia: The Effects of Legislative Interventions and the Cost of Treatment", International Journal of Psychiatry 33 (2010) 101 at 105.

issues were an unreasonable manner of undertaking various administrative actions against the employee. The Tribunal concluded that the administrative action taken in relation to the employee was reasonable administrative action, being lawful and appropriate in the circumstances, and was not taken in an unreasonable manner.

225. In *Dimitriou v Australian Postal Corporation* (unreported, AAT, No V91/383, 14 January 1993 the Tribunal held that what constitutes reasonable disciplinary action would depend upon the nature of the worker's duties, his or her conduct and the laws regulating the worker's duties.[144]

226. In a similar vein, in *Mitsubishi Motors Australia v Lupul* [2004] SAWCT 130 it was held that the reasonableness of an employer's actions must be considered in the light of certain factors, for example, the worker's history, age, personality and legitimate expectations.[145]

227. The case of *Rukavian v Bridgestone Australia Ltd* [2005] SAWCT 79 is also helpful in identifying the circumstances under which administrative action taken by an employer may be regarded as unreasonable. The case highlights the substantial burden that employers carry in terms of dealing sensitively with "difficult" or "unreasonable" workers to ensure that any administrative action taken is seen as reasonable. The case highlights the need for employers to put in place reasonable conflict management procedures.

228. In *Rukavian* the employer claimed that any interactions between it and the worker causing a psychiatric injury were the result of reasonable administrative action. The worker contended otherwise.

229. Although the Commission dismissed the bulk of the worker's claims, it found that the employer had acted unreasonably in one major respect.

[144] See Guthrie, Ciccarelli and Barbic, n 143 at 105.
[145] See Guthrie, Ciccarelli and Barbic, n 143 at 105.

230. The laboratory where the employee worked was sometimes short staffed. At some stage the employer and the union had brokered an agreement concerning how work was to be managed during periods of short staffing. The employee and the employer had different interpretations of the agreement. The Commission summed up the situation thus:

> I consider that it was a major failing of the respondent's supervisors not to address this conflict over the manner in which the agreement should be implemented. The continuing difference as to the effect of the agreement was what underpinned much of the ongoing disputation between the parties.
>
> I consider the negotiation of an agreement concerning workload with a view to implementation of the same in the workplace for the benefit of management and employees was reasonable administrative action. However, I cannot accept that such action was taken in a reasonable manner in circumstances where the worker vehemently maintained and persisted in acting upon an interpretation of the agreement which appeared to be at odds with the understanding of the respondent. Some action should have taken in my view, to seek a resolution with respect to this ongoing difference. The failure of the respondent to take action to defuse the ongoing tension between the worker and the respondent in relation to the implementation of the agreement…was a failure by the respondent to take action of a nature which could give it the benefit of the disqualifying provisions of s 30 A(b) of the Act.
>
> Both Mr Cicchello and his immediate superior, Mr Mullins, found the worker very difficult to deal with in relation to what they saw as a continuing deterioration in the worker's level of performance. I consider that the unsuccessful and frustrating attempt …to engage in a formal counselling process with respect to a failure by the worker to follow instructions caused Mr Cicchello and Mr Mullins to be reluctant to embark on a similar process with respect to conflicts over the period from April to June 2003. This is regrettable, as it allowed the stress resulting from continuing confrontations to spiral out of control and to culminate in the altercation with Mr Botei.

231. It now remains to consider the third statutory exclusion in the definition of "injury" in section 3 of the Act – "failure to obtain a promotion, transfer or benefit".

232. There is a significant body of law that deals with comparable versions of this exclusion under other statutory regimes.

233. The words "failure to obtain" in the context of the exclusionary provisions of s4 of the *Safety Rehabilitation and Compensation Act* 1988 (Cth) (as it then was) were considered in *Re Davill and Australian Postal Corporation*

(1995) AATA 10629, 22 December 1995. In that case the employee suffered a major depressive illness which was largely contributed to by the prospect of the downgrading of his position as part of a business restructure. The Tribunal held that this fell outside the exclusionary provision on the basis of the following reasoning:

> It cannot be said that the downgrading of the applicant's position was the failure to obtain a benefit. The Tribunal does not see how the word "obtain" can be extended so as to include the retaining of a benefit (ie the maintenance of his existing position) and thus the applicant's claim cannot be defeated on the ground that he failed to obtain a benefit.

234. This approach finds support in the obiter remarks of Finn J in *Comcare v Ross* (1996) FCA 680, 2 August 1996. [146]

235. In *Nicklason and Comcare* [1999] AATA 736 and *Kelly v Comcare* [2006] AATA 700 the Tribunal held that a failure to retain employment in a business was a detriment and not a failure to obtain a benefit.

236. However, in *Re Patrick and Comcare* (1997) AATA 11609, 12 February 1997 the Tribunal held that a failure to obtain one of three available positions at the same level in a restructure of the employer attracted the exclusionary provisions. [147]

237. It is noted that as a result of the 2007 amendments to the Commonwealth Act a "failure to retain a benefit" has been added to the list of exclusionary factors, presumably to overcome the effects of such cases as *Re Davill and Australian Postal Corporation* (supra) and *Nicklason and Comcare* (supra) and *Kelly and Comcare* (supra).

238. The notion of a "promotion" was considered in *Re Parker and Comcare* (1996) AATA 11298, 11 October 1996. In that case the Tribunal considered that post promotion counselling could form part of the promotion process, especially if it were a compulsory requirement. However, on the facts of the

[146] See Ballard, Sutherland and Anforth, n 135 at [4.20].
[147] See Ballard, Sutherland and Anforth, n 135 at [4.20].

case the Tribunal was of the view that the post promotion counselling had deteriorated into a hostile career counselling session, and therefore fell outside the ambit of the exclusionary provision. [148]

239. In *Re Barber and Comcare* (1998) AATA 12776 6 April 1998 the Tribunal held that a failure to allow the employee to change from full- time to part-time employment amounted to a failure to obtain a benefit. [149] The Tribunal based this finding on the fact that the applicant "saw a change from full-time employment to part-time employment as being beneficial to his family situation".

240. In *Comcare v Mooi* (1996) 69FCR 439 the Federal Court found a number of circumstances which brought the employee within the ambit of the failure to obtain a benefit. They were (1) the employee's complaints that his skills and capacities were not being fully utilised by the employer so as to allow him to demonstrate his fitness for a more highly paid position; (2) the employee's complaints that he was not receiving training which would equip him for a higher position and (3) the refusal by the employee's supervisors to approve his application for a higher duties allowance.[150] The Court added that "if it is impermissible to take account of each individual factor because each is caught by the exclusionary provision, it is also impermissible to have regard to the 'concatenation (linkage, joining together) of those three circumstances".[151]

241. In *Re MacFarlane and Comcare* (1998) 58 ALD 304 the Tribunal considered the situation where a worker had been taken out of her substantive position and was unsuccessful in seeking reappointment to that position. The Tribunal said:

[148]For a full discussion of that case see Ballard, Sutherland and Anforth n 135 at {4.20].
[149] See Ballard, Sutherland and Anforth, n 135 at [4.20].
[150] See Ballard, Sutherland and Anforth, n 135 at [4.20].
[151] Ballard, Sutherland and Anforth, n 135 at [4.20].

> The word "transfer" connotes a transfer to a position in the relevant organisation, and that meaning gains strength from its association with the word "promotion' and the principles of interpretation to which we have referred."[152]

242. It was suggested by the Tribunal in *Re Stanisfield and Comcare* (1996) 43 ALD 30 that the exclusion of the employee from a field trip and the opportunity it presented to make a profit on travelling allowance could amount to a failure to obtain a benefit.[153]

243. In *Re Sutherland and Comcare* (1996) AATA 10935, 16 December 1996 the facts were that the employee refused to transfer to a rural area unless an office with appropriate personal security features was provided. The Tribunal held that the latter were "rights and entitlements of employees and not a 'benefit'".[154]

244. The Federal Court has held that a failure to obtain a permanent position attracts the exclusionary provision and that the exclusion applies even where the benefit could be characterised as a "right": see *Trewin v Comcare* (1998) 84 FCR 171.[155] In that case Heerey J stated:

> The question then arises whether the Tribunal erred in treating permanency as a "benefit' in connection with her employment. Obviously permanency was something desirable, good or beneficial from the applicant's point of view… In my opinion the term "benefit" in s 4 is not restricted to something which is a matter of charity or gratuity. The Macquarie dictionary gives two relevant meanings for the noun"benefit": "1. An act of kindness. 2. Anything that is for the good of a person or thing". To some extent the meanings overlap, with the latter being broader. I think that the word is used in s 4 in the latter sense, which does not necessarily exclude something obtained as a matter of right.[156]

245. In *Re Wierzbicki and Comcare* (1999) AATA 123, 9 March 1999 the Tribunal held that removal from popular seagoing duties, in the circumstances of the case, did not constitute a failure to obtain a benefit.[157]

---

[152] Ballard , Sutherland and Anforth, n 135 at [4.20].
[153] Ballard, Sutherland and Anforth, n 135 at [4.20].
[154] Ballard, Sutherland and Anforth, n 135 at [4.20].
[155] This case is discussed at length in Ballard, Sutherland and Anforth, n 135 at [4.20]. *Trewin v Comcare* was followed by Cooper J in *Golds v Comcare* (1999) FCA 1481.
[156] This extract appears in the employer's submissions Part 1 dated 10 March 2010 at [243].
[157] See Ballard, Sutherland and Anforth, n 135 at [4.20].

246. In *Re Nicklason and Comcare* (1999) AATA 736 14 October 1999 it was held by the Tribunal that loss of a position in the restructure of an organisation did not amount to a failure to obtain a benefit:

> We do not think that the applicant's failure to retain his employment with ANR at the time of the restructuring of Tasrail was a failure to obtain a benefit for the purposes of the definition of "injury"…nor do we think that his failure to obtain appointment to the new position that superseded his old position constituted a failure to obtain a benefit. On the contrary we consider that the abolition of his position and his retrenchment constituted detriments…. Such an approach to the meaning of the word "benefit" is consistent with the established principle that worker's compensation legislation is beneficial legislation, and that, all other things being equal, a provision in such legislation ought to be interpreted in the way most favourable to the worker: see *Wilson v Wilson's Tile Works Pty Limited* (1960) 104 CLR 328 at 335.[158]

247. The phrase "as a result of a failure to obtain a promotion" was considered by the Tribunal in *Re Gelbak and Comcare (1995) AATA 10169, 5 May 1995.* This case demonstrates the need to analyse "the actual effects on the employer of the failure to obtain promotion". [159] The Tribunal found that the employee's anxiety condition arose from "how he was treated at work following the difference he had with his supervisor, his resulting loss of self-esteem and the consequences for him of his perception as to how he was perceived at work, rather than any failure by him to gain promotion". The "critical factor was his perception that he had been set up by his supervisor to fail to gain the promotion, rather than the actual failure itself".[160]

248. In *Re Myers and Comcare* (1997) AATA 11756, 14 March 1997 the Tribunal held that because the employee's stress condition had manifested itself before she failed to obtain a new position, the exclusionary provision did not apply.

[158] See Ballard, Sutherland and Anforth, n 135 at [4.20].
[159] See Ballard, Sutherland and Anforth, n 135 at [4.20].
[160] See Ballard, Sutherland and Anforth, n 135 at [4.20].

THE CONCEPTS OF BULLYING AND HARASSMENT

249. Although the worker alleges that her first injury occurred as a result of the failure of the employer to investigate her complaints of bullying and harassment and that her second injury was suffered as a result of bullying and inappropriate behaviour on the part of the employer, no attempt was made by the worker to define the concept of "bullying", nor to explain how the events or incidents that the worker relies upon as constituting bullying come within that concept.[161]

250. Section 55 of the *Workplace Health and Safety Act* 2007 imposes a duty of care on employers to ensure that workers and others are not exposed to risks to heath or safety arising from the conduct of the employers business. As mentioned in the NT WorkSafe Bulletin 15.01.12, these risks include unacceptable activities such as bullying.

251. According to that bulletin, "workplace bullying" is defined as:

> Bullying at work can be defined as repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety.

252. That definition of workplace bullying accords with generally accepted definitions of bullying in the workplace.

253. For the purposes of considering the allegations made by the worker the Court adopts the NT Workplace definition of "bullying".

254. Bullying can assume a variety of forms and can be covert as well as overt, as described in the NT WorkSafe Bulletin 15.01.11:

> Examples of overt, or obvious bullying include:
>
> - abusive, insulting or offensive language;
> - behaviour or language that frightens, humiliates, belittles or degrades, including criticism that is delivered with yelling and screaming;

[161] This point was made in the employer's submissions in reply dated 15 June 2010 at [3] and [4].

- inappropriate comments about a person's appearance, lifestyle or their family;
- teasing or regularly making someone the brunt of pranks or practical jokes;
- interfering with a person's personal effects or work equipment;
- harmful or inoffensive initiation practices; and
- physical assault or threats.

Covert or more subtle behaviour that undermines, treats less favourably or disempowers others is also bullying, for example:

- unreasonably overloading a person with work;
- setting timelines that are difficult to achieve or constantly changing deadlines;
- setting tasks that are beyond a person's skill level;
- ignoring or isolating a person;
- deliberately denying access to information, consultation or resources; or
- unfair treatment in relating to accessing entitlements such as leave or training.

255. It is difficult, as a matter of commonsense, to argue against the characterisation of any of the above unreasonable or inappropriate conduct as "bullying". However, it is important to bear in mind that this is not intended to be an exhaustive list of bullying conduct.

256. The bulletin also contains a commonsense view of what does not amount to "bullying":

> All employers have a legal right to direct and control how work is done, and managers have a responsibility to monitor workflow and give feedback on performance. If a worker has obvious performance problems, these should be identified and dealt with in a constructive and objective way that does not involve personal insults or derogatory remarks. In situations where a worker is dissatisfied with management practices, the problems should also be raised in a manner that remains professional and objective.
>
> There should be grievance or complaint procedures that can be utilised to resolve such matters.

257. NT Work Safe does not appear to define "harassment" in the workplace.[162] However, the Northern Territory Police Code of Conduct and Ethics (Exhibit W9) defines "harassment" in these terms:

> For the purposes of this Code, harassment is not limited to sexual harassment and is used in a broader sense. Some examples of the broader use of the term harassment and discrimination include:
>
> - verbal abuse or threats;
> - unwelcome remarks, jokes, innuendos or taunting about a person's body, attire, marital status, sex, pregnancy, ethnic or national origin, sexual lifestyle or disability;
> - displaying sexually suggestive, racist or other offensive or derogatory material such as posters or cartoons;
> - physical intimidation;
> - practical jokes which may cause awkwardness or embarrassment;
> - persistent and unwelcome invitations, requests or intimidation;
> - leering and/or offensive gestures; and
> - persistent and/or unwelcome physical contact such as patting, pinching, punching or touching.
>
> Harassment includes any conduct that results in a person feeling threatened, uncomfortable or unable to cope in his/her work environment.[163]

258. For the purposes of considering the allegations made by the worker the Court adopts the definition of "harassment" set out in Exhibit W9.

259. Having developed the concepts of bullying and harassment, it is, however, important to bear in mind that although the worker's case is primarily based on allegations of bullying and harassment, a failure to prove those allegations would not be fatal to the worker's claim for compensation. If the

[162] See, however, the definition of "harassment in the workplace" which appears on the Workplace Health and Safety Queensland Department of Justice and Attorney General – http://www.deir.qld.gov.au/workplace . Workplace harassment is defined there as "repeated, unwelcome and unsolicited behaviour that an employee considers to be offensive, intimidation, humiliating or threatening and that a reasonable person would consider to be of that nature".
[163] See paragraph 8 of the Code. It is noted that the Code does not define "bullying".

Court were to find that any of the actions taken by the employer against the worker that were causative of the worker's mental injury fall outside the exclusionary elements to the definition of "injury" in s3 of the Act (for a reason other than that they constituted bullying or harassment), then the worker's injury is compensable.

THE MEDICAL EVIDENCE

260. Proof of an injury is central to the worker's claim. As the alleged injury is a psychological one the medical evidence adduced in the present proceedings assumes critical importance. It is, therefore, necessary for the Court to carefully examine all of the medical evidence and to consider the diagnoses proffered therein in order to determine whether there is a compensable condition.

261. In his Medical Assessment (Fitness for Continuing Duty or Resumption of Duty) dated 13 January 2005 Dr Meadows diagnosed the worker's condition as "Anxiety/Depression".[164]

262. As previously noted, in his subsequent medical report dated 14 April 2005 Dr Meadows reported as follows:

> During this long session it became clear that there were many issues of significant conflict within the police that Detective Barnett had become embroiled in, and which, if handled more appropriately by both sides, would not have escalated to the level they did…
>
> Allegations made by Detective Barnett are obviously recorded without my being privy to the "other person's version of events", but the nature and genuineness of the testimony deserves to be taken on merit as it points to a known problem within many male-dominated service entities.
>
> What became apparent was the inability of the force to adequately deal with a confrontation of that culture with an individual who was not prepared to back down.
>
> Instead of acquiescing and keeping quiet, as she was supposed to do in that system, she has challenged the authority process, in effect demanding

[164] See Exhibit W65.

> some personal justice, and as a result she has been (and still is) under severe stress, which has led to the periods off work, and a perception of continuing harassment by certain sections of the police…
>
> My overall assessment is that Detective Barnett is a very competent, but self opinionated and direct speaking police officer who has fallen foul of the system because she was not willing to keep quiet when she believed there was favouritism and harassment going on.
>
> She has argued against the methods used to investigate her and the fact that a personality clash has prevented her from achieving her rightful status.
>
> Detective Barnett is demanding an apology from a senior police officer over these perceived injustices and has paid the price for her continual and merciless attacks on the very system she is trying to work within.
>
> As I stated before it is not my place to judge the accuracy of Detective Barnett's claims, and I am aware that I do not have privy to the other side's position in relation to these claims.
>
> However, it is clear that Detective Barnett is under severe stress and that she believes that she is fighting a just cause.
>
> Her return to work is predicated on resolving these extensive issues, which involves some degree of acceptance that problems do exist within the hierarchical system, and that an instance of aberrant behaviour such as that under report has a causation that does not reflect on the obvious abilities this officer has.[165]

263. In his report dated 27 June 2009 Dr Jenkins proffered the following opinion concerning the worker:

> She is currently suffering from significant anxiety and depression. These conditions commenced while she was employed by the Northern Territory police Department as a result of events which are currently the subject of legal proceedings.[166]

264. As previously noted, in his report dated 16 October 2006 Dr Giese stated:

> Constable Barnett has been experiencing problems with management issues in the police force since 2003. This has involved complaints of bullying and harassment against her and various disciplinary proceedings surrounding this. There have been some interpersonal problems with colleagues following this…

[165] See Exhibit W 66.
[166] See Exhibit W 174.

> Constable Barnett has had depression and anxiety due to ongoing issues with management and interpersonal relationships with other members of the NT Police Force which are contributing to her continuing symptoms and the failure to resolve her work issues.[167]

265. In his report dated 21 March 2007 Dr Tracey provided the following history:

> In 2002 she was sexually propositioned by a female police officer at sports training. She rejected this advance in her forthright manner and states that she was subsequently harassed by this member and another female officer and others for an extended period of time over this and another matter.
>
> In June 2003 she was subjected to humiliating and inappropriate treatment by a senior police officer after she had retaliated against the two female officers continuing harassment. She was ordered by her senior officer to undergo anger management counselling. I referred her to Dr Jan Isherwood – Hicks and registered my protest with the officer concerned…
>
> The matter remained unresolved until 2005 when after a prolonged period on sick lave she commenced a negotiated graded return to work under the supervision of Ms Louise Bilato. This was complicated by some inept interpersonal management incidents at the hands of some senior officers on at least two occasions and finally a serious act of administrative bullying was perpetrated by her senior officers in April 2006. This person seriously undermined the rehabilitation process. He breached the medical confidentiality of Louise Bilato and also questioned my medical diagnosis and management of her condition.[168]

266. Dr Tracey drew the following conclusion:

> In summary, Roberta has been subjected to ongoing bullying and harassment in the workplace since 2002 and her current condition is due solely to work related factors.
>
> I believe that the events up to April 2006 provide sufficient evidence to support a claim for work related stress, however the report by her senior officer in April 06 was so appallingly insensitive that this had a devastating effect on her rehabilitation and any chance of success was destroyed.[169]

267. According to the medical certificates dated 4 and 5 December 2006 provided by Dr Tracey in relation to the worker's second injury in 2006 the diagnosed injury was that of anxiety depression.[170] The worker's description of the

[167] See Exhibit W99.
[168] See Exhibit W94.
[169] See Exhibit W94.
[170] See Exhibit W94.

cause of the injury was recorded in the certificates respectively as "three years of bullying and administrative bullying and failure to provide a psychologically supportive work place" and "long standing harassment and bullying in the work place".[171]

268. In his report dated 13 December 2006 Dr McLaren expressed the following opinion:

> On her account, these symptoms began as a direct result of work related problems. There is nothing in her history to indicate that her present mental disorder arose as the result of factors outside the work environment. The relationship between the work environment and her present mental symptoms is causative, not coincidental.[172]

269. Later in his report Dr McLaren provided the following diagnosis of the worker's condition:

> ...there is clear evidence in her history of quite a severe mental disturbance when she ceased work earlier this year. She would have then met criteria for a formal diagnosis of Adjustment Disorder with Anxious and Depressed Mood.[173]

270. Dr McLaren went on to say that "based on the material available to me, her previous psychiatric disorder was directly caused by work –related factors" and that "the association between the work environment and her mental disorder was causative not coincidental". He added:

> The direct connection between her mental disorder and the circumstances of employment was a constant sense of bullying and harassment and, in particular, her perception of deliberate attempts to denigrate her and damage her reputation as a reliable officer.[174]

271. In his further report dated 17 September 2007 Dr McLaren reported that "at present this officer shows features of a mental disorder characterised by moderately severe depressive symptoms associated with frequent intrusive bouts of agitation and anxiety which significantly affect her capacity to

[171] See Exhibit W94.
[172] See Exhibit W95.
[173] See Exhibit W95.
[174] See Exhibit W95.

function in her daily life".[175] He went on to say that "at present, the formal diagnosis is Adjustment Disorder with Anxious and Depressed Mood".[176] Dr McLaren continued to maintain that her present symptoms were the direct result of her former work environment.[177]

272. In his report dated 20 April 2009 Dr Epstein expressed the following opinion:

> Roberta Barnett appears to have developed a chronic adjustment disorder with anxious and depressed mood as a consequence of what she perceived as ongoing harassment by senior officers in the Northern Territory Police Force. She appears to be an assertive person who refused to be bullied and in the context of standing up for herself believes that she was treated very unfairly and it was in that context that her condition occurred…
>
> The impression gained is that her condition arose out of her perception about the way she was treated by her senior officers with the Northern Territory Police Force. Her current work incapacity appears to relate to her condition. …
>
> Her condition is only partly related to the failure to promote her to the position of Detective in February 2004. This appears to have been one of a series of events that led to her becoming distressed.[178]

273. In his report dated 30 April 2009 Professor Whiteford stated that the worker did not meet the DSM IV diagnostic criteria for any mental disorder at the time he examined her. However, he went on to say:

> From the description of her symptoms and the medical reports available it is likely that she had several episodes of adjustment disorder in the past in response to life stressors. I would agree with Dr McLaren that this disorder was most likely present at the time she ceased work in April 2006. It also appears to have been present in the latter part of 2007…
>
> From the information available to me, the interpersonal conflict in the workplace, specifically the interactions between Mrs Barnett and the three senior officers (Detective Sergeant Foley, Detective Acting Senior Sergeant Kerr and Commander Owen) were triggers for an exacerbation in symptoms which were present (and for which Ms Barnett was receiving treatment) prior to her transfer to the Criminal Command in August 2002.

[175] See Exhibit W95.
[176] See Exhibit W95.
[177] See Exhibit W95.
[178] See Exhibit W96.

> Ms Barnett experiences anxiety symptoms when there are triggers which cause her to re-experience emotions which she previously felt whilst working in the Northern Territory Police Service. However away from that Service she functions reasonably well.[179]

274. In his report dated 27 May 2009 Professor Whitford noted the following:

> In August 2002 Ms Barnett transferred to the Crime Command where she reports being exposed to bullying and harassment from August 2002 until June 2003. After making a complaint about this alleged bullying and harassment, Ms Barnett reported a period of extended conflict with her employer which ultimately led her to ceasing work in April 2006 (despite attempts to place her in an alternative workplace within the Northern Territory Police Service).[180]

275. Professor Whiteford went on to say:

> I believe Ms Barnett was likely to have had an adjustment disorder at the time she ceased work in April 2006…
>
> I reviewed the reports of psychiatrist, Dr Michael Epstein, dated 20 April and 12 May 2009. As Dr Epstein notes, we are mostly in agreement. The divergence in opinion is around whether Ms Barnett's symptoms remain sufficient to meet the threshold for a diagnosis of adjustment disorder. [181]

276. In my opinion, the medical evidence adduced in these proceedings establishes, on the balance of probabilities, that the worker suffered a mental injury or injuries which arose out of or in the course of her employment. I am satisfied on the balance of probabilities that she suffered two injuries during the course of her employment – the first on or about 10 September 2004 and the second in about May 2006 (which was more likely than not an aggravation or exacerbation of the first injury).

277. The following can be distilled from the medical evidence:

- Dr Meadows related the worker's mental condition to interpersonal conflicts within the workplace, problems within the hierarchical system within the Northern Territory Police Force and the worker's perception that she had been subjected to workplace harassment and been the victim of injustices during the course of her employment up until April 2005;

[179] See Exhibit E98.
[180] See Exhibit E98.
[181] See Exhibit E98.

- As at June 2009, Dr Jenkins related the worker's mental condition to the events which are currently the subject of the proceedings;

- In October 2006, Dr Giese related the worker's mental condition to problems with management issues in the Police Force since 2003, interpersonal problems with colleagues, her subjection to bullying and harassment, disciplinary proceedings surrounding this and lack of resolution of work issues;

- As at March 2007 Dr Tracey related the worker's mental condition to ongoing bullying and harassment in the workplace since 2002 and failure to provide a psychologically supportive work place;

- In December 2006, Dr McLaren related the worker's diagnosed condition to work related factors, in particular, the worker's constant sense of bullying and her perception of deliberate attempts to denigrate her and damage her reputation as a police officer;

- As at April 2009 Dr Epstein related the worker's diagnosed mental condition to the worker's perception of bullying and harassment by senior officers in the Northern Territory Police Force and her perception that she had been treated very unfairly. He also related her condition partly to her failure to obtain promotion to the status of detective. The doctor identified this as one of a series of events contributing to her mental condition;

- In April and May 2009 Professor Whiteford related the worker's mental condition to interpersonal conflict in the workplace, specifically the interactions between the worker and the three senior officers (Detective Sergeant Foley, Detective Acting Senior Sergeant Kerr and Commander Owen) and exposure to bullying and harassment from August 2002 until June 2003, together with a period of extended conflict with the employer until the cessation of work in April 2006.

ANALYSIS AND CHARACTERISATION OF THE CAUSES OF THE WORKER'S INJURIES

278. The lines of contention between the worker and the employer are clearly drawn.

279. The employer contends that all or most of the material and significant causes of the worker's injuries come within the exclusionary elements of the definition of "injury", whereas the worker alleges that the first injury was caused by the employer's failure to investigate her complaints of bullying and harassment and the second injury was caused by bullying and inappropriate behaviour on the part of the employer. As noted earlier, it is implicit in those allegations that the employer's actions did not come within the exclusionary elements.

280. It therefore becomes necessary for the Court to carefully analyse and characterise the causes of the worker's injuries to determine which of those fall within or outside the exclusionary elements of the definition of "injury". In undertaking that task the Court must carefully scrutinise the conduct of the worker and employer during their interpersonal relationships and interaction in the work place.

281. It is proposed to undertake the relevant inquiry and analysis under the following headings:

- The alleged sexual proposition;
- The Foley involvement;
- The October 2002 Genesweep operation and the Curyer matter: alleged bullying against the worker by Kerr;
- The contextual significance of the early incidents;
- The telephone conversation between Acting Senior Sergeant Jeannette Kerr and the worker on 11 February 2003 and aftermath;

- The Police College meeting on 11 June 2003, involving Detective Sergeant Martin, Detective Senior Constable Annette Cooper, Detective Sergeant Joanne Foley and the worker;

- The meeting on 12 June 2003, involving Commander George Owen, Detective Sergeant Martin and the worker;

- The worker's complaints against Sergeant Foley, Acting Senior Sergeant Kerr and Commander Owen and the employer's response;

- The mediation process and outcome;

- The alleged lack of natural justice or procedural fairness;

- The investigation by the Professional Responsibility Division of the complaint over the handling of the dog complaint;

- Lack of resolution with Commander Owen;

- The action taken by Assistant Commissioner Kelly;

- The worker's outburst on 19 September 2004 and the failure to obtain detective designation; and

- The behaviour of Acting Superintendent Andrew Heath during the return to work management plan.

The alleged sexual proposition

282. A considerable amount of evidence was heard in relation to an alleged sexual proposition made by Acting Senior Sergeant Kerr to the worker in 1996. However, it is ultimately unnecessary for the Court to determine what actually happened on that occasion.

283. The only finding that the Court need make is that the worker, given her personality, attempted to find some reason for Kerr's behaviour in singling her out and victimising her.[182] This led to a perception in the mind of the

[182] See [8] of the worker's submissions in response dated 1July 2010.

worker that she had been sexually propositioned by Kerr and her (the worker's) rejection of that advance explained why Kerr had singled her out and victimised her. As submitted on behalf of the worker, "it is clear the only explanation she could comprehend for the harassment and bullying was the alleged sexual proposition".[183]

The Foley involvement

284. In April 2001, while working at Darwin Police station on general duties, the worker was tasked to investigate a matter involving Michael Foley, the father of Sergeant Joanne Foley. Michael Foley had alleged to police that he had been the victim of an assault. The worker conducted an investigation into the allegation following which she concluded that Mr Foley was very possibly the aggressor, and the perpetrator of the assault.

285. The worker made the following submission in relation to that investigation:

> Foley was a good friend of Kerr. Mrs Barnett believed Foley had a grudge against her as a result of the investigation and also lacked impartiality by siding with Kerr and seeking her assistance to harass and bully Mrs Barnett. That perception was reinforced by their behaviour at the detectives' training course and by Foley's subsequent behaviour in seeking out Kerr on 11 and 12 June 2003 to concoct a "dirt bag" memorandum to provide to Commander Owen.[184]

286. The employer responded with the following submission:

> The worker's submissions do not correspond with the facts. It is true that Foley and Kerr were good friends. But despite that friendship, the worker's counsel was unable to point to any evidence that suggested any collusion between Kerr and Foley to bully and harass the worker. The submission thus makes reference to Mrs Barnett's belief that Foley held a grudge against her "as a result of the investigation and also lacked impartiality by siding with Kerr and seeking her assistance to harass and bully Mrs Barnett". There is no evidence that Foley ever sided with Kerr (except after the event, when Kerr submitted Foley's memorandum with her own to Commander Owen). There is no evidence of Foley seeking Kerr's assistance with anything remotely connected with her dealings with the worker. The worker did not give any evidence about having such a perception before she started the detective training course.

[183] See [7] and [8] of those submissions.
[184] See [54] of the worker's submissions dated 27 January 2010.

> The submission goes on: "That perception was reinforced by their behaviour at the detective training course". Whose behaviour? Kerr had no involvement in the training course. It was Annette Cooper and Foley who were concerned about the worker's behaviour and demeanour in the detective training course. Annette Cooper had had nothing to do with the worker before that point.[185]

287. The employer went on to submit that "the worker was simply unable to point to any evidence at all that Foley had harassed and bullied her".[186] The employer submitted that in her evidence in chief the worker could only offer the following postulation of Foley's behaviour towards her:[187]

> And what happened with Sergeant Foley? As I walked out of the interview room so did – I walked out first and then my friend walked out. Sergeant Foley said "Bobby, is that Wayne" and I said "Yes". She said "You fucking told him" – excuse me. "You F-ing told him, didn't you" and I said "I don't know what you are talking about". She said "Bullshit" and then she walked outside, out the back door.
>
> And what did you understand why she behaved that way? She was accusing me of- of breaching confidentiality and telling Wayne that his son was being investigated for a sexual assault and I did not tell him at all. I followed her out…
>
> And do you know if she had any basis for doing that? No. Not that I'm aware of.
>
> Do you know what basis she had for speaking to you like that? No.
>
> Had you had other dealings with her other than the ones you identified that were not of this nature? Only one.
>
> And when was that? That was – that was February of that year. That particular matter that I had previously said that Sergeant Kerr rang me about, the man that made the threats to the police, that matter as taken from me and given to Sergeant Foley. I think that I had it for one day. Then that – the night that I was given it something else had occurred which made it a more serious matter. It was then taken from me and given to Joanne Foley. I was required to give her a verbal briefing at the CIB office with a whole heap of other members.
>
> And you did that? And I did that.
>
> And there was no other problem? There was no problem.
>
> Did you have any – what is – do you have an understanding as to why Sergeant Foley behaved towards you in the way that she did on the occasions you identified here? I don't know why she does it. She just does, that's the way she speaks to me, that's the way she speaks to many female members.

[185] See [30] and [31] of the employer's submissions in reply dated 15 June 2010.
[186] See [32] of those submissions.
[187] See [32] of those submissions and p 58 of the transcript

288. The employer then made the following submission:

> Foley gave quite a different account of the nature of the discussion with the worker about the Curyer information, both in her memorandum (Ex E 109) and in cross examination (T945-6). It is apparent that the worker has embellished her version of the interchange between Foley and her to make Foley appear nasty, whereas Foley was just doing her job in unpleasant circumstances. Foley's version should be preferred to the worker's.[188]

289. The employer went on to make this submission:

> …when Jo Foley levelled an accusation at the worker that she had leaked confidential information to Curyer, Foley was on the spot. She witnessed an unfolding of events (over a few minutes) that gave her strong grounds for a suspicion that the worker had passed the information to Curyer. It was entirely appropriate for Foley, a superior officer to the worker, who had carriage of the investigation, to confront the worker about her suspicion. If Foley had wanted to she could have pursued disciplinary action against the worker based on her suspicions. But as an experienced detective she knew that, the worker having denied the leak, there was no prospect of proving her suspicions and nothing to be gained from taking that course.[189]

290. The employer submitted that the worker's submission that Foley sought out Kerr on 11 and 12 June 2003 to concoct a "dirt bag" memorandum to Commander Owen is not supported by the evidence.[190]

291. I fully accept that the worker may have had the perception that Foley had bullied and harassed her. However, in light of all of the evidence – and taking into account the submissions of both the worker and the employer – I cannot be satisfied on the balance of probabilities that Foley had in actual fact bullied and harassed the worker. Nor can I be satisfied that Foley had sought out Acting Senior Sergeant Kerr on 11 and 12 June 2003 "to concoct a 'dirt bag' memorandum to Commander Owen".

---

[188] See [33] of the employer's those submissions.
[189] See [16] of those submissions
[190] See [54] of the Schedule of incorrect assertions attached to the employer's submissions dated 15 June 2010. See pp 946, 963 and 978 of the transcript of Foley's evidence. Foley's evidence is that she reported the worker's leaking of confidential information to Kerr on the day of the incident. Foley said that the memorandum dated 21 June 2003 was the first time that she had written down the incident. Furthermore, Foley said that she went to Kerr because she was not happy with the response she received from command structure at the College. Foley also stated that she never lectured again after the incident because she felt that the College did not support her in viewing the worker's conduct seriously enough.

The October 2002 Genesweep Operation and the Curyer matter: alleged bullying against the worker by Kerr

292. The worker asserts that in October 2002 Acting Detective Sergeant Jaci Grant, without the knowledge of the worker, made an allegation of serious criminal conduct against her.[191] The worker also asserts that although then senior officer Jeanette Kerr was allegedly informed at the time the alleged incident occurred, no mention was ever made of the allegation until a memorandum from Kerr referred to it after an unsuccessful mediation in early 2004.[192] It was claimed that that memorandum was never shown to the worker.[193] The worker sought to rely upon this set of circumstances as amounting to bullying behaviour against her by Kerr.

293. The worker made the following submissions in relation to Kerr' s behaviour in connection with the genesweep operation :[194]

> There were no contemporaneous notes, documents or reports relating to this event despite the seriousness of the allegations. It did, however, become part of the "dirt bag" that Kerr had commenced compiling against Mrs Barnett. No credible explanation was proferred by Kerr as to why the criminal allegations were not investigated. Jaci Grant was unable to provide any explanation as to why nothing had been done by Kerr or indeed by her at the time.[195]
>
> It beggars belief that a serious allegation of this nature was treated in such a cursory and indifferent manner but yet other minor transgressions were treated as sufficiently serious to constitute disciplinary proceedings under s 87 of the *Police Administration Act.*
>
> The incident however went into Kerr's "dirt bag" for later use in her memorandum to Owen on 12 June 2003.

294. The worker further asserts that in or about February 2003 Acting Senior Sergeant Kerr accused the worker of leaking confidential information (the Curyer matter); however, no formal action was taken against Mrs Barnett.[196] The worker submitted that "this accusation was added to the tirade of

[191] See [55] of the worker'ssubmissions dated 27 January 2010 and Exhibit W138.
[192] See [55] of those submissions and Exhibit W107.
[193] See [55] of those submissions.
[194] Paras [56] – [57] of the worker's submissions dated 27 January 2010.
[195] The worker relied upon the evidence of Jaci Grant at pp 1336-1338 of the transcript.
[196] See [58] and [59] of the worker's submissions dated 27 January 2010.

complaints by Kerr in her memoranda, consistent with harassment and bullying behaviour".[197] The worker sought to rely upon these circumstances as further evidence of bullying behaviour on the part of Kerr.

295. In its submissions the employer responded thus:

> …the worker's counsel documents bullying said to arise from Kerr saving for a "dirt bag" a catalogue of instances of unlawful, improper or problem behaviour by the worker that should have either been formally raised and addressed with the worker or forgotten entirely.
>
> The submission ignores the simple fact that most fair employers will overlook an indiscretion of an employee, particularly a junior or inexperienced one, if it happens once, twice or even a few times. On its own, the worker's behaviour at the search warrant could have been simply an overzealous, inexperienced officer who was otherwise showing promise as a detective. Her leaking of the Curyer information, on its own, may have been a misjudgement, a mistake again borne of inexperience.[198]

296. It was submitted on behalf of the employer that the worker's assertion that the October 2002 Genesweep Operation incident remained unbeknown to the worker until the hearing, being first mentioned in a memorandum by Kerr after the unsuccessful mediation in early 2004, and that it went into Kerr's "dirt bag" for later use in her memorandum to Owen on 12 June 2003 suffers from an inconsistency:

> The details of the incident were not documented in any memorandum and no action was ever proposed to be taken against the worker in relation to it. It was documented after the mediation had been resolved on the basis that the worker would submit a written response to the Kerr memorandum which could be placed onto a headquarters file. Contrary to the direction given by Mr McAdie, the worker submitted her memorandum via Kerr. Kerr sought only to document the incident by way of response to the worker's assertion at 24.3 that "I surmise that no such report exists and that this is just another example of harassment and bullying by D/Sgt Kerr in an attempt to have me removed from Crime Command. Kerr did not ask for any action to be taken in relation to her memorandum of February 2004.[199]

297. The employer took issue with the worker's assertion that around February 2003 Kerr accused Mrs Barnett of leaking confidential information:

---

[197] See [60] of those submissions.
[198] See [34] and [35] of the employer's submissions in reply dated 15 June 2010.
[199] See [55]-[57] of the employer's schedule of incorrect assertions, attached to the employer's submissions in reply dated 15 June 2010.

> This is incorrect. Foley questioned the worker "on the spot" because she had formed a belief that the worker had leaked confidential information. She did not take any further action in relation to it because she made an assessment that she did not have proof, she could not pursue it but she reported her suspicions to her (and the worker's) OIC as was appropriate.[200]

298. I consider that the employer's view of the evidence, and its interpretation of the evidence, is to be preferred over the worker's account and interpretation of the evidence. In my opinion, the worker's allegations of bullying and harassment on the part of Kerr, in the context of the Genesweep Operation and the Curyer matter, have not been established on the balance of probabilities. However, the worker may well have had a perception that she was the subject of bullying and harassment.

The contextual significance of the early incidents

299. The early incidents discussed above provide the contextual background to the real issue identified in the worker's opening, namely, the non-resolution of the worker's complaints and workplace issues in a timely and professional manner.

300. What needs to be borne in mind is that the worker does not allege that her first injury was caused by bullying and harassment in the workplace per se, but rather was the result of the employer's failure to investigate her complaints of bullying and harassment. That point was made very clear by the worker's counsel in her opening, as well as by the worker's pleadings.

301. When examining the various actions of the employer the focus must be on the alleged employer's failure to investigate her complaints – which is asserted to be the cause of the first injury.

[200] See [58]-[60] of that schedule.

The Conversation between Senior Sergeant Kerr and the worker and aftermath

302. On 11 February 2003 Detective Senior Sergeant Jeanette Kerr, acting as Officer in Charge of the Northern Crime Section, and the worker had a telephone conversation concerning the worker's telephone contact with two suspects in two separate investigations. In order to put that conversation in proper perspective it is important to examine the events leading up to that conversation.

303. At the relevant time Kerr was responsible for approximately 70 officers under her command in various squads. She not only acted as an investigator, but was responsible for allocating all investigations, ensuring the quality of those investigations, and developing and mentoring those officers who were under her command.

304. It was part of her function to check the PROMIS records (running sheets) on a weekly basis for all jobs tasked to individual officers to ensure that all investigations were being properly conducted and reports were being appropriately written up. In the event of a problem, Kerr would generally speak to the officer concerned and provide some assistance or guidance.

305. Kerr explained that in carrying out this supervisory role, and for the purpose of efficient communication, she would deal with those immediately below her in the chain of command.

306. A criminal investigation (the "Richards" matter) was allocated to the worker on 3 February 2003. On 4 February 2003 the worker contacted Richards by phone and asked him to attend the Palmerston Police Station. Richards attended the station, at which time the worker informed him that she was investigating threatening phone calls allegedly made by him to another police officer. The worker asked him to participate in an interview, which he declined, saying that he wished to speak to a solicitor first. Richards then left the station.

307. On or about 10 February 2003 Kerr re-assigned the investigation to Detective Sergeant Foley due to her concern about the potential seriousness of the threats, and the delay on the part of the worker in dealing with the matter.

308. On 11 February 2003 Kerr learnt that the worker had also made telephone contact with Richards to have him attend for an interview.

309. Senior Sergeant Kerr gave the following evidence in relation to the Richards matter:

> …it was really a worrying incident because this fella had started with low level threats, had escalated over a month. He was a convicted drug dealer, he had a personal vendetta against a member. He had made threats to kill him. He'd shown a propensity for violence and thought that there was a real risk that he could carry out that violence, so I was concerned that given all of these things there was no investigation, there was no risk assessment and no action taken over the period of another seven days after the job had already been transferred.

310. The "Kitsos" investigation had been assigned to the worker on 10 February 2003. It came to Senior Sergeant Kerr's attention through the PROMIS records that the worker had telephoned Kitsos – a suspect in an assault case – leaving a message for him to contact her for an appointment to be interviewed. Kerr then emailed the worker to contact her.

311. Kerr gave evidence that, in investigation matters, it is rarely appropriate to make telephone contact with suspects.[201]

312. It is against that background that on 11 February 2003 Senior Sergeant Kerr received a telephone call from the worker in response to her email. During the conversation Kerr noted from the PROMIS records that the worker had telephoned the two suspects – Richards and Kitsos – for interviews and explained to her that such contact did not accord with best practice and undermined the success of an investigation. The worker argued that there was no other way to contact the suspects. Kerr stated, "regardless, we

[201] See p 770 of the transcript. See also [58] of the employer's submissions Part 1 dated 10 March 2010.

continue an investigation until conclusion and then locate and speak with the suspects face to face".[202]

313. The worker was not accepting of Kerr's remarks, stating that she had spoken to her sergeant and that "there wasn't enough evidence to arrest them". Kerr replied: "Roberta we don't do business like that around here". The worker said "whatever". Kerr responded, "Don't fucking whatever me". The worker then hung up on Kerr. Sergeant Huysse, who was listening to the conversation at the worker's end, heard the worker say "yeah whatever. Don't swear at me. If you want to say anything to me speak to my sergeant", before hanging up. [203]

314. Although the worker agrees that she said "Yeah whatever" to Kerr, she denies that she said it in a petulant and dismissive tone, but rather said those words flippantly. The worker attributed her behaviour to Kerr having sworn at her. She described her state of mind at the time as being one of "controlled anger".[204]

315. On 11 February 2003 Sergeant Huysse wrote to Kerr, saying:

> …I am amazed at her lack of respect, especially from a junior member to the OIC. This was a real eye opener for me. I'll be keeping a closer watch on her and start jumping down her throat if she starts this shit again. I'm sorry this happened. Told her that if she had spoken to me that way she would be copping it."[205]

316. Senior Sergeant Kerr was subsequently provided with the workers' memorandum (Ex W8), in which the worker claimed that she behaved badly only in response to "the aggressive and angry way in which she (Kerr) spoke to me", and in which the worker claimed that the only contact details she had for Richards was his mobile phone "as all avenues to locate his

[202] See [80] of those submissions.
[203] See [81] – [83] of those submissions.
[204] See [85] of those submissions.
[205] See [88] of those submissions.

residential address were exhausted". The worker also claimed that she had discussed both investigations with Sergeant Huysse and that it was agreed that there was insufficient evidence and/or not appropriate to arrest the alleged offender, in either matter, until they participated in an interview.[206]

317. Senior Sergeant Kerr expressed particular concern in relation to the latter claim:

> This paragraph clearly compounds difficulties with PCSC Barnett's behaviour. Firstly, Richards was located by her subsequent investigators on Power and Water indices, he is also a business owner and this was known. This case at this stage was very strong… I discussed this matter with Det Sgt Huysse and he states he did not have this conversation with Barnett in relation to the Richard's investigation. I would have been extremely surprised if a detective sergeant of his experience had given advice such as this. The above comments leave me with the belief that PCSC Barnett acted negligently in this investigation or is lacking competence in basic investigative skills. I suspect this is another example of poor attitude toward clients on a job that she didn't believe was too serious.[207]

318. Kerr submitted that the worker's conduct on 11 February 2003 was a Breach of Discipline under 76 of the *Police Administration Act* and requested that the worker be charged with improper conduct. Kerr sought a low level penalty, namely a formal counselling with all documentation placed on the worker's personal file. She made an additional request that the Superintendent counsel the worker about several other specified matters, including the worker's attitude and professionalism.[208]

319. The result of the disciplinary process instigated by Kerr was that the worker was dealt with by Detective Superintendent Evans who made the decision not to formally charge the worker.[209] That decision was made because the matter had been "presented" to him well after the event. Nonetheless, Evans

[206] See [90]-[91] of those submissions.
[207] Kerr's memorandum of 23 February 2003 (Ex E101).
[208] See [94] of the employer's written submissions dated 10 March 2010.
[209] See [97] of those submissions and Ex W104.

cautioned the worker "to be careful of temper outbursts, show deference to rank and that her behaviour would be monitored". [210]

320. The telephone conversation between Kerr and the worker on 11 February 2003 and the subsequent disciplinary process are very significant events or incidents in the context of these proceedings. The worker asserts that during that conversation Kerr behaved towards her in a bullying and intimidating manner, which continued during the aftermath of the conversation.

321. The worker gave evidence that the episode involving Kerr In February 2003, combined with the complaint of a superior officer, was "upsetting to her".[211]

322. The issue between the worker and the employer is clearly defined. What the worker alleges was bullying behaviour is asserted by the employer to be, in fact, reasonable administrative action and /or reasonable disciplinary action. The two are mutually exclusive, for each is the antithesis of the other. Bullying behaviour can never amount to reasonable administrative or disciplinary action. Conversely, reasonable administrative or disciplinary action can never be regarded as bullying behaviour. However, it is acknowledged that certain action (whether it be administrative or disciplinary) although it may not amount to bullying, may still not meet the description of reasonable administrative or disciplinary action. Some actions may be considered to be so improper or inappropriate to prevent them from being characterised as reasonable administrative or disciplinary action.

323. The conduct of the employer, by and through the actions of Kerr, must be examined and assessed through the lens of that dichotomy.

324. The worker made the following submissions in relation to the telephone conversation between Kerr and the worker and aftermath.

[210] See [97] of those submissions.
[211] See [98] of those submissions and p 364 of the transcript.

325. In response to the employer's contention that the scenario on 11 February 2003 was "the point in time when the organisation started to make the worker accountable for her bad behaviour", the worker submitted that "what the employer does not say … and which is implicit in such a submission is that the worker was taken to task for displaying the characteristics of her personality … it is thus no surprise that the worker considered this to being singled out and as amounting to bullying and harassment".[212]

326. In response to the employer's submission that there is no formal requirement under the *Police Administration Act* that administrative action be formal, the worker submitted that the Act "outlines the guidelines for all administrative action in this context, formal and informal".[213] The worker submitted as follows:

> The employer's reference … to *Swanson v Northern Territory of Australia* [2006] NTSC 88, [2007] NTCA 4 and whether the Acting Principal's action in that case were considered reasonable administrative action cannot assist the employer. The department did not have regulations by which the conduct of its teachers is prescribed by statute unlike the Police Force.[214]

327. With respect to the language used by Senior Sergeant Kerr during the conversation the worker made this submission:

> It is agreed by the employer and the worker that Kerr told the worker "don't fucking whatever me". The worker contends and submits that this language and attitude was unreasonable. The word "whatever" can just as easily be described as a word to pacify the situation without accepting either person's point of view. It is a widely used word in contemporary society to express acceptance, indifference or complacency; it is often an idle word and almost redundant to the meaning of a conversation. To be harshly criticised and disciplined over the use of a word cannot be reasonable administrative action. It added to the worker's belief she was being bullied and harassed.
>
> Interestingly, Kerr did not discipline the worker over what she considered were "inappropriate" investigations conducted in the Richards matter, only with respect to her deemed lack of respect for her superiors.[215]

---

[212] See [13] of the workers written submissions dated 1 July 2010 in response to the employer's submissions filed on 12 March 2010.
[213] See [14] of those submissions.
[214] See [14] of those submissions.
[215] See [15] and [16] of those submissions.

328. In answer to the employer's submission that "the worker's insubordination on 11 February 2003 was a Breach of Discipline under s 76 of the Act, the worker pointed out that Kerr subsequently requested the worker be charged with improper conduct and that "at no point did Kerr concede the worker was merely displaying characteristics as predicated by the COPS testing and which Kerr knew or ought to have known".[216]

329. In support of the contention that the exclusionary elements of the definition of "injury' are not applicable to the February 2003 scenario, the worker made this submission:

> The unreasonableness of Kerr's request is demonstrated by the decision of Detective Sergeant Evans not to press formal charges because "the matter had been 'presented' to him well after the events".
>
> It makes the request by Kerr unreasonable. Kerr's direct supervisor judged that Kerr's request for the worker to be disciplined to be outside the reasonable time –frame to begin any action. It was thus unreasonable administrative action.
>
> If the action taken by Kerr was reasonable, a request for formal charging would have been made on the day of the offending action by the worker or soon thereafter. 31 March 2004 was too late. By that stage it was clear Kerr was collecting a "dirt file" on the worker.[217]

330. The worker made the following submissions in relation to the February 2003 telephone conversation and aftermath:[218]

> As a result of a mixed message through the chain of command Mrs Barnett was given inconsistent instructions on how to proceed regarding an investigation…
>
> Her immediate superior and supervisor Sgt Huysse told her one thing and Acting Snr Sgt Kerr when advised of those instructions swore at Mrs Barnett in a bullying and intimidating manner.[219] As a result of this behaviour Mrs Barnett not surprisingly hung up the telephone. This incident occurred about six weeks after Mrs Barnett commenced her employment in the chain of command with Kerr.
>
> Despite Kerr's ongoing attempts to continue to raise this incident as part of her ongoing bullying of Mrs Barnett[220] no formal disciplinary proceedings were ever instituted. Apparently, there was a counselling session of Mrs Barnett by Sgt

[216] See[17] of those submissions.
[217] See [18] – [20] of the submissions.
[218] See [61] – [66] of the worker's submissions dated 27 January 2010.
[219] See Exhibit W103.
[220] See Exhibit W104.

> Huysse, but no record of that session appears to exist. Indeed there does not appear to be a source of power for records of this informal nature to be kept.
>
> However, Kerr made sure the incident was not forgotten and put in the past.[221] It became part of her "dirt bag" to continue to harass and bully Mrs Barnett. No action or investigation was taken against Kerr despite her documented probable prohibited disgraceful or improper conduct[222] and clear breach of the *Code of Conduct and Ethics* (8.3, 8.4, 9, 12 and 13).[223]
>
> As a result of this incident Mrs Barnett was stressed as she could not understand why the rules were not being followed in relation to Kerr's behaviour yet she was being counselled for not putting up with it.
>
> This matter also went into Kerr's "dirt bag" to be used in the memorandum to Commander Owen of 12 June 2003.

331. The employer submitted that 11 February 2003 was probably "the first occasion for which the worker was taken to task by a senior officer for the worker's aggressive manner in dealing with people, in particular in responding to criticism…that date marked a point in time when the organisation started to make the worker accountable for her bad behaviour".[224]

332. The employer made the following submission:

> The employer says that Kerr's contact with the worker and the events which ensued as a consequence constituted "reasonable administrative action taken in connection with the worker's employment", that is reasonable administrative action in terms of the management of the worker. There is no requirement under the Act that the administrative action be formal, or specifically prescribed or provided for by or under any statute, regulation or (in the case of Police) General Order. It may be noted that in *Swanson v Northern Territory* [207] NTCA 4, the action of an assistant school principal who simply relayed to a teacher complaints of alleged misconduct on the part of that teacher made by some female students was considered to be administrative action.[225]

333. It was submitted by the employer that the purpose of the telephone contact on 11 February 2003 was as follows:

> The Kerr contact with the worker on 11 February 2003 was intended by Kerr to be the occasion for some advice and mentoring as to best investigative practice

[221] See Exhibit E101.
[222] *Police Administration Act* s 76(a).
[223] See Exhibit W9.
[224] See [49] - [50] of the worker's submissions Part 1 dated 10 March 2010.
[225] See [51] of those submissions.

> in relation to the two matters in which the worker had made telephone contacts with suspects. As such it was reasonable administrative action by a senior officer to manage, advise, counsel and correct the methods of a very junior investigator serving under her command. There can be no merit to the worker's argument that chain of command principles made the communication inappropriate.[226]

334. The employer submitted that the telephone contact to question the worker as to the method of her investigation on a matter was well within Kerr's managerial discretion to make contact with investigating officers about aspects of their investigations, as she reviewed case note entries on a daily basis.[227]

335. The employer submitted that the worker's mistake on the two files "the subject of the phone conversation in February 2003 required simple direction and correction only, but her reaction was inappropriate".[228]

336. The employer took issue with the worker's submission that her immediate superior and supervisor Sergeant Huysse told her one thing and Acting Senior Sergeant Kerr when advised of those instructions swore at Mrs Barnet in a bullying and intimidating manner, and therefore as a result of Kerr's behaviour it was not surprising that the worker hung up the telephone:

> This is a misrepresentation of the acknowledged facts of the interchange between the worker and Kerr. Kerr swore after the worker argued with her and would not follow her (Kerr's) direction and the worker said "whatever" in a petulant tone. The worker did not immediately hang up the phone after Kerr swore but had an angry outburst directed at Kerr, which was subsequently described with incredulousness by Huysse.[229]

337. It was submitted by the employer, "irrespective of the result it was reasonable for Kerr to take the matter further because, subsequent to 11 February 2003, further matters had surfaced (eg the events of 17 February

[226] Para [89] of those submissions.
[227] See [15] of the employer's submissions in reply dated 15 June 2010.
[228] See [35] of those submissions.
[229] See [61]-[66] of the employer's schedule of incorrect assertions attached to those submissions

2003 and the other reports of similar behaviour referred to at page 3.5 of Ex E101)".[230]

338. The employer also submitted that "the writing and sending of Kerr's memorandum of 23 February 2003 was reasonable administrative action taken in connection with the worker's employment", and that "it was also reasonable disciplinary action in the sense that Kerr was seeking to have the Superintendent initiate formal disciplinary action under s 76 *Police Administration Act*.[231]

339. The employer's conduct relating to the conversation between the worker and Senior Sergeant Kerr on 11 February 2003 and the aftermath falls to be considered under the following heads:

- The purpose of the conversation;
- The conduct of Senior Sergeant Kerr and the worker during the conversation;
- The action initiated by Kerr following the conversation;
- The outcome of that action; and
- The relationship between the conflict with Kerr and the first injury.

(a) The purpose of the conversation

340. In my view, it was completely reasonable for Senior Sergeant Kerr to establish contact with the worker regarding her conduct of the two relevant investigations. Her concerns regarding the manner in which the worker had conducted those investigations were well founded.[232] In fact, had Kerr not made contact with the worker regarding her investigative practices, then I

[230] See [95] of the employer's written submissions dated 10 March 2010.
[231] See [96] of those submissions.
[232] See [58] – [79] of the employers submissions Part 1 dated 10 March 2010.

think she could properly be considered to have been in dereliction of her duty.

341. I consider that in making contact with the worker Kerr took appropriate and reasonable administrative action. The action that Kerr took was consistent with "reasonable administrative action by a senior officer to manage, advise, counsel and correct the methods of a very junior investigator serving under her command".

342. In my opinion, there is no merit in the argument advanced by the worker that the administrative action taken by Kerr was unreasonable because it was not initiated in accordance with the guidelines for administrative action as outlined in the Police Administration Act. What guidelines is the worker referring to? The Court was not taken specifically to any provisions of the Act governing administrative action in the present context. The Court is unable to identify any provision under either the Act or the General Orders prescribing the manner in which Kerr should have acted on the occasion in question.

343. Furthermore, there is no merit to the worker's argument that chain of command principles made Senior Sergeant Kerr's communication with the worker inappropriate. Quite to the contrary, Kerr's supervisory role made it entirely appropriate for her to communicate with those immediately below her in the chain of command with respect to matters within her bailiwick.

(b) The conduct of the worker and Kerr during the conversation

344. As is usual in cases involving administrative and disciplinary action taken by an employer against a worker, it is necessary to look very closely at the evidence to establish both sides of the story in order to determine whether administrative or disciplinary interaction with the worker was reasonable.

345. What falls for consideration is the manner in which Senior Sergeant Kerr took administrative action against the worker. Was the manner in which

Kerr raised her concerns with the worker about her investigative practices reasonable?

346. Looking at both sides of the story, I make the following findings:

- The manner in which Kerr raised her concerns with the worker and addressed her responses was appropriate and reasonable;

- By her "whatever" exclamation the worker responded to Kerr's concerns and correction of her practices in a dismissive and disrespectful manner such as to amount to insubordination.[233] I reject the submission made on behalf of the worker that the worker's use of the word should be construed otherwise. I consider that the use of the word "whatever" in the context of the conversation between the worker and Kerr was offensive and clearly fell within the ambit of paragraph 9 of the *Code of Conduct and Ethics* (Exh W9): "You must not use language that another person may find offensive". In my opinion, the worker's use of the word "whatever" met the description of offensive language. It should be noted that Sergeant Huysse expressed amazement at the worker's apparent lack of respect for Kerr;

- However, Senior Sergeant Kerr's response – "don't fucking whatever me" – was inappropriate and uncalled for. Although Kerr only swore after the worker had argued with her and responded in a petulant tone there was no warrant for Kerr's response. It lacked professionalism and was unbecoming of a senior police officer. It is debatable whether Kerr's response contravened paragraph 9 of the *Code of Conduct and Ethics.* However, it is clear that the manner in which she dealt with the worker, who was presenting as a difficult employee, was inappropriate and not reasonable;

- The worker's petulant conduct and insubordination continued after Kerr's swearing, with the worker saying words to the effect of "Yeah whatever. Don't swear at me. If you want to say anything to me speak to my sergeant". She then hung up;

- Despite Senior Sergeant Kerr's inappropriate response to the worker's attitude and behaviour I do not consider that Kerr behaved in a bullying and intimidating manner towards the worker. Her response was in the heat of moment in an attempt

[233] See [93] of the employer's submissions Part 1 dated 10 March 2010.

to deal with a difficult employee, and with the benefit of hindsight the worker could have been managed more appropriately and more effectively. Had Senior Sergeant Kerr had knowledge of the worker's personality – indeed psychological profile – then Kerr's approach may well have been different. The problem was that Senior Sergeant Kerr did not have such knowledge in circumstances where that knowledge should have been made available to her in order to manage the worker in an appropriate and more effective manner;

- Although Senior Sergeant Kerr did not engage in bullying behaviour the manner in which she took administrative action against the worker in connection with her employment was, for the above reason, in part unreasonable; and therefore the administrative taken against the worker was partly unreasonable.

(c) The action taken by Kerr following the conversation.

347. The question that needs to be answered is whether Senior Sergeant Kerr was justified in writing and sending her memorandum dated 23 February 2003. Did that action amount to reasonable administrative action taken in connection with the worker's employment? Did it amount to "reasonable disciplinary action in the sense that Kerr was seeking to have the Superintendent initiate formal disciplinary action under s 76 of the *Police Administration Act*"?

348. On the face of things, the worker had behaved in an insubordinate manner, which in the normal course of events, would warrant disciplinary action. Seen in that light, Kerr's memorandum of 23 February 2003 was intended to make the worker accountable for her unacceptable behaviour. At that level the administrative action taken by Kerr was reasonable administrative action.

349. However, that presents as a very superficial analysis of the situation. There is a ring of truth in the worker's submission that "the worker was taken to task for displaying the characteristics of her personality "as predicated by

the psychological testing that been conducted prior to the worker's induction into the Northern Territory Police, and which ought to have been known to Kerr".

350. In my opinion, the employer had to take the worker as she was at the time of her induction into the police force, and at the time of the various actions taken by the employer in connection with her employment. Recent authorities in this area of the law stress the need for courts to take into account a variety of factors, including a worker's history and personality when considering the reasonableness or otherwise of administrative or disciplinary action taken by an employer against a worker.

351. As there is a clear connection between the administrative action taken by Senior Sergeant Kerr leading up to and during her conversation with the worker and Kerr's consequential administrative action in form of her memorandum to the Superintendent, requesting the initiation of disciplinary action, it is difficult to see how Kerr's consequential action could be considered to be reasonable in all the circumstances. The manner in which Kerr managed the worker during their conversation was not reasonable in light of the worker's history and personality which ought to have been known to Kerr. The inappropriate language used by Kerr was a trigger for the conversation ending with nothing but a negative outcome. Although the worker had acted in a dismissive and petulant tone, she ended the conversation in any angry outburst (which she described as "controlled anger") because Kerr had sworn at her.

352. In my opinion administrative action other than dispatching the memorandum of 23 February could have been taken. It should be noted that in that memorandum, as part of the proposed disciplinary process, Senior Sergeant Kerr recommended that the worker receive formal counselling. All things considered Kerr's request that the worker be the subject of disciplinary proceedings was premature, and the matter could have been more

appropriately dealt with by way of some informal counselling or cautioning without initiating the disciplinary process under Part IV of the *Police Administration Act.* In my opinion, there was no formal or legislative impediment to that occurring. Indeed the evidence suggests that a counselling session of the worker by Sergeant Huysse took place, even though the disciplinary process did not eventuate. Furthermore, Superintendent Evans cautioned the worker outside the formal disciplinary process. As conceded by the employer that was a reasonable course of action.

353. As made clear in *Rukavian v Bridgestone Australia Ltd* (supra) employers carry a substantial burden in terms of dealing sensitively with difficult or unreasonable employees to ensure that any administrative action taken is seen as reasonable, and in fact reasonable. That case highlights the need for employers to institute appropriate and reasonable conflict management processes and procedures.

(d) The outcome of the action

354. As disclosed by the evidence Detective Superintendent Evans decided not to formally charge the worker because the matter had been presented to him well after the event. Although that was a reasonable decision, the earlier steps taken to initiate disciplinary proceedings by way of the Kerr memorandum were not.

355. The request to take disciplinary action was not only inappropriate and unreasonable in all the circumstances, but it was untimely as concluded by Superintendent Evans. I agree with the worker's submission that "the unreasonableness of Kerr's request is demonstrated by the decision of Superintendent Evans not to press formal charges because the matter had been presented to him well after the event".

356. The mischief caused by the Kerr memorandum was that it added to the worker's perception that she was being bullied, although the reality was that she was simply not being managed in a manner appropriate to her unusual and difficult personality.

(e) The relationship between the conflict with Kerr and the first injury

357. As conceded by the employer, "it is clear, however different from reality the worker's perception and recollection of events may be, that the conflict with Kerr in February 2003 marked the worker psychologically" and that "the impact of the conflict with Kerr was a relevant cause of the worker's injury"[234]

358. Although no part of the action taken by Senior Sergeant Kerr during the telephone conversation and afterwards can be considered to have amounted to bullying and harassment, the administrative action taken by Kerr was in some respects unreasonable, and the disciplinary process initiated by her was misconceived, and therefore unreasonable.

359. However, the question that inevitably arises is how does one accommodate the conflict with Kerr (as a relevant cause of injury) within the general framework of the worker's assertion that the first injury was a result of the employer's failure to investigate her complaints of bullying and harassment.[235]

360. In my opinion, the real significance of the conflict between the worker and Senior Sergeant Kerr in February 2003 is that it reinforced the worker's perception that she was being bullied by Kerr, and that it formed a significant part of her ultimate complaint that Kerr was engaging in bullying behaviour that she says the employer failed to investigate and resolve – such failure ultimately resulting in the first injury.

---

[234] See [100] of the employer's submissions Part 1 dated 10 March 2010.
[235] See [59] and [60] of the Amended Substituted Statement of Claim and [94] of the worker's submissions dated 27 January 2010. See also the worker's counsel opening at pp 26-27 of the transcript.

361. What the worker perceived to be bullying and harassment at the hands of Senior Sergeant Kerr was in fact a combination of unreasonable administrative and disciplinary action. I put the relationship between the conflict with Kerr and the first injury no higher than that.

362. However, that analysis in no way diminishes the relevance of the psychological impact of the conflict with Kerr on the worker. In my opinion, the psychological effect of the telephone conversation between the Senior Sergeant Kerr and the worker and its aftermath became enmeshed in the ultimate mental distress suffered by the worker as a result of the employer's failure to resolve her complaints against Senior Sergeant Kerr.

The Police College meeting on 11 June 2003

363. In May 2003 the worker commenced an eight week Detective Training Course at the Police College at Berrimah.

364. According to Exhibit W152 the teaching sessions that were conducted by Sergeant Foley and Detective Senior Constable Cooper were considered by the class of detective trainees as less than satisfactory.

365. As pointed out by the employer in its submissions, "the essential fact is that as a result of the worker's behaviour in class, Cooper and Foley spoke to the course instructors Sergeants Davis, Martin and Brigg on 11 June, with a view to arranging a meeting with the worker to try to resolve the worker's problems (whatever they were) and ensure that the course continued smoothly for the worker and the other trainee detectives".[236]

366. Detective Senior Constable Cooper provided the following explanation in her memorandum (Exhibit E100):

> During the afternoon break Foley and I attended at CIDU and recounted to Davis Martin and Briggs what had occurred in class. We stated that Barnett

[236] See [104] of the employer's submissions dated 10 March 2010. See also Detective Senior Constable Cooper's memorandum dated 16 June 2003 (Exhibit E 100).

> should be spoken to now, to assuage any further disruption and to counsel her in relation to her behaviour and presentation to the other trainees. From my point of view I felt Barnett had a gripe with either myself or Foley, and as I work with Barnett at the Palmerston CIB I was disappointed in her whole attitude since I had started lecturing to this group. I wanted to know why she was behaving like this. Having worked for a period of time with Barnett I was familiar with her enough to know that she was a very determined member who said what she thought and could be very aggressive at times. However, I did not think that she had any justification at this time to act in this way in class, and that we (CIDU, Foley and myself) needed to stop this behaviour now rather than later. The CIDU instructors all agreed and Martin stated that he would also sit in on this counselling session. It was agreed that she would be recalled from class near the end of the day's session.[237]

367. The worker was directed to attend a meeting with both Sergeant Foley and Detective Senior Constable Cooper. Sergeant Steve Martin who was present at the meeting took notes. Those handwritten notes were the only contemporaneous notes of the meeting.[238]

368. According to Senior Constable Cooper's memorandum, the worker "behaved very badly at the meeting and displayed extreme hostility towards Foley".[239] To Cooper she said: "I don't have any problems with you Annette", but then to Foley she said: "but I fucking well hate you", pointing her finger at Foley.[240]

369. Sergeant Foley wrote a memorandum dated 12 June 2003 (Exhibit E87) in which she stated:

> During this counselling session PCSC Barnett worked herself into a rage. She lunged across the conference room table shaking her finger in my face and said words to the effect "I have a problem with you because of my husband" and continued with a tirade of abuse which included a personal attack which I found extremely offensive.[241]

370. Although Detective Cooper did not describe the worker's actions in such graphic detail, the worker agreed that she "certainly leaned forward and

---

[237] See [104] of the employer's submissions Part I dated 10 March 2010.
[238] See [69] of the worker's submissions dated 27 January 2010. See also Exhibit W176.
[239] See [105] of the employer's submissions Part 1 dated 10 March 2010.
[240] See [105] of those submissions.
[241] See [106] of those submissions. At p 942 of the transcript Sergeant Foley said that when the worker lunged across the table the worker's eyes were wide and she was swearing.

pointed at Foley".[242] The worker also agreed that she was "pretty angry at the time".[243]

371. Sergeant Martin was of the view that the worker was "completely out of order" at the meeting.[244] The rather brief notes taken by Sergeant Martin referred to (unsuccessful) attempts at the meeting by both Foley and Cooper to "find an amicable resolution to conflict in short term re remainder of the week".[245] The worker agreed that Detective Cooper's approach at the meeting was "to try to mend fences with a view to the course proceeding smoothly over the next few days".[246]

372. It is clear that the meeting had a psychological and emotional effect on the worker. Sergeant Martin recorded in Exhibit W87: "Barnett in tears since the time Foley and Cooper left and in great distress. Barnett agreed to go to her own (family) doctor to seek advice re above but did not wish to contact welfare at this time".[247] The worker's own evidence confirmed her tearful and distressed condition.[248]

373. In the worker's written submissions dated 27 January 2010 at [69] – [70] the worker submitted that the meeting was convened without warning or "opportunity to seek guidance or assistance or even the nature of the allegations against her". It was also submitted that the meeting was clearly meant to be "a disciplinary proceeding and no procedural fairness was accorded Mrs Barnett". It was further submitted that:[249]

> That the meeting was unlawful, bullying and intimidating in its form and as the notes of Sgt Martin reflect, caused Mrs Barnett significant distress. She subsequently sought medical assistance from Dr Tracey. This behaviour was unlawful, intimidating and bullying within the meaning of those words in the

[242] See [108] of those submissions. See also p 401 of the transcript.
[243] See [108] of those submissions.
[244] See [109] of those submissions.
[245] See [110] of those submissions and Exhibit W87.
[246] See [110] of those submissions. See also pp 402 and 404 of the transcript.
[247] See [113] of those submissions.
[248] See [114] of those submissions.
[249] See [69] of the worker's submissions dated 27 January 2010.

> Code of Conduct and Ethics in force at the time and constituting a General Order.[250] This conduct resulted in an injury within the meaning of the Act.

374. The worker went on to submit that "later statements taken from those involved (Martin, [251] Cooper[252]…). Were never used to conduct the investigation that was required to be conducted" and that "these statements were never provided to Mrs Barnett with an opportunity to respond to them".[253]

375. A previously noted, the worker submitted that the meeting convened on 11 June 2003 amounted to unreasonable administrative action in that the worker was not given notice nor advised of the purpose of the meeting or the allegations made against her, and during which she was confronted by four senior officers all of whom had been provided with the Foley memorandum.

376. With respect to the meeting on 11 June 2003 the worker submitted that the meeting could not be described as "reasonable administrative action" for the following reasons:

> This meeting was held in part to deal with what Foley viewed as the worker's disruptive behaviour during training for expressing a different view to the established one. It is not reasonable for a teacher to admonish a pupil for having views contrary to established opinion, simply because it may impact on the other pupils attending. In adult education it is to be expected that those attending will already hold opinions about various subjects. Any instructor who fails to allow these different views to be openly discussed is creating an environment which is not conducive to learning.
>
> The meeting, which was called quickly to deal with the alleged problem of the worker's behaviour, can be described as an extreme form of bullying. This meeting, therefore, was far from a reasonable administrative action. It cannot be reasonable for two instructors, whose teaching styles were criticised, to be allowed to attend a meeting designed to discuss a student's disrupting behaviour during the training.[254]

---

[250] See Exhibit W9.
[251] See Exhibit W180.
[252] See Exhibit W 100.
[253] See [70] of the workers written submissions dated 27 January 2010.
[254] See [23] and [25] of the worker's submissions in reply dated 1 July 2010. The worker noted the comments made by students at point 9 of the Student Evaluation on 19 June 2003 to the effect that instructors could be more receptive to the views of students without dismissing them outright, instructors appeared to be a bit confrontational if someone had a different view, and instructors need to be aware and understand that, listen to students comments/feedback and reply constructively and vice versa.

377. The employer submitted that the "Court can be satisfied that the contents of the internal memorandum of Annette Cooper dated 16 June 2003 (Exh E100) represent a substantially accurate and balanced account of the relevant events of Tuesday and Wednesday 11 June 2003".[255]

378. The employer submitted that the worker was cross examined on the contents of the Cooper memorandum and that there did not appear to be significant disagreement on the part of the worker with the matters put.[256]

379. The employer made this submission in relation to the 11 June meeting:

> The meeting was an administrative action taken with a view to resolving a problem – the worker's disgruntled, aggressive, argumentative, disruptive and disrespectful behaviour in class – which had the potential to adversely impact on the course. The holding of the meeting was reasonable administrative action taken in connection with the worker's employment, to try to find out the cause of the worker's behaviour and work out a resolution. The meeting had to be held as soon as possible after the worker's behaviour occurred, in order to correct that behaviour and thus enable the course to proceed. Not only was the holding of the meeting reasonable, but so was the timing.
>
> It is irrelevant to the issue whether the meeting was reasonable administrative action to enquire whether it took place pursuant to a formalised or statutorily enshrined process… There is a very wide range of possible administrative actions which can be taken in connection with a worker's employment, and this meeting was a relatively informal administrative action in response to the worker's problem behaviour.[257]

380. The employer submitted that "the impact of the meeting held after class on 11 June 2003 was another relevant cause of the worker's injury which comes within the exclusionary elements to the definition of 'injury' in s3 of the Act".[258]

381. The quite difficult issue that confronts the Court is whether the meeting which was convened on 11 June 2003 amounted to reasonable administrative action.

---

[255] See [101] of the employer's submissions Part 1 dated 10 March 2010.
[256] See [103] of those submissions.
[257] See [111] – [112] of those submissions.
[258] See [116] of those submissions.

382. In my opinion, the worker's allegation that the meeting was unlawful, bullying and intimidating in form is not established on the evidence. The Court is satisfied, on the balance of probabilities, that the meeting, which was both informal and ad hoc, was convened for the sole purpose of attempting to resolve a significant problem, namely the worker's unacceptable behaviour in the classroom. The worker's in class behaviour had a clear potential to adversely impact on the course being conducted at the Police College. Indeed, the worker agreed that Detective Cooper's approach, which I consider to typify the purpose and tone of the meeting, was conciliatory, and directed at "mending fences" to ensue the smooth running of the course over the ensuing few days. The meeting was directed at achieving an amicable resolution of a conflict situation that had the potential to affect the efficacy of the training course. That, in my opinion, was a reasonable objective in the context of administrative action.

383. In my opinion, the worker cannot complain about the meeting having been convened without warning, in circumstances where she was denied an opportunity to "seek guidance or assistance," or to be apprised of the nature of the complaint. In my opinion, it was imperative that the meeting be convened as soon as possible – at very short notice - to address the worker's behaviour in class, so as to enable the course to proceed in an orderly and proper fashion. In my opinion, not only was the meeting reasonable, but it was also timely.

384. Nor can the worker complain about the informal and ad hoc nature of the meeting. I fully agree with the employer's submission that it was not necessary for the meeting to have occurred pursuant to "a formalised or statutorily enshrined process", and that there is "a very wide range of possible administrative actions which can be taken in connection with a worker's employment", with particular reference to the Northern Territory Police. In my opinion, the worker's employment situation accommodated the relatively informal administrative action that was taken on 11 June 2003 in

response to the worker's problematic behaviour. In my opinion, the administrative action that was taken on 11 June 2003 was both reasonable and undertaken in a reasonable manner.

385. The worker complained that the meeting held on 11 June 2003 was clearly meant to be "a disciplinary proceeding and no procedural fairness was accorded to Mrs Barnett". I do not agree with that characterisation of the meeting. Both Detective Cooper and Sergeant Foley described the meeting as a "counselling session". In my opinion, that is an apt description of both the purpose and the nature of the meeting. Counselling sessions can occur – and commonly do - in lieu of disciplinary proceedings. Such sessions are often regarded as a more appropriate and effective alternative to disciplinary proceedings. That view conforms with the existing case law regarding the distinction between informal counselling and disciplinary action.

386. While one may insist upon the need for procedural fairness within the framework of disciplinary proceedings against a worker, procedural fairness assumes far less significance in the context of informal counselling of a worker, particularly in the circumstances of the present case. In my opinion the evidence discloses that the worker was treated fairly during the meeting on 11 June 2003. Despite that fair treatment the worker behaved badly, which one suspects to have been due to her unusual and difficult personality.

387. In my opinion, the meeting conducted on 11 June 2003 constituted reasonable administrative action. That action was reasonable notwithstanding that the participants were not aware of the worker's history, personality and psychiatric profile.

388. Although the worker suffered significant mental distress as a result of the meeting on 11 June 2003 that component of her mental injury was caused by reasonable administrative action.

389. Insofar as the meeting on 11 June 2003 is connected with the worker's contention that her first injury was the result of the employer's failure to investigate her complaints, the reasonableness of the administrative action taken on that occasion needs to be considered in determining the compensability of that injury.

The meeting on 12 June between the worker and Commander Owen

390. As a result of the worker's behaviour on 11 June 2003 Foley complained to Senior Sergeant Kerr and followed up with a written memorandum dated 12 June. The senior sergeant in turn sent her own memorandum to Commander Owen, also dated 12 June, enclosing Foley's memorandum.[259]

391. In Exhibit E102 Senior Sergeant Kerr referred to the worker's behaviour in the following terms:

> Of most concern is PCSC Barnett's explosive behaviour. I am aware that on this occasion she has blamed "stress" for her reaction. Unfortunately, I can document numerous incidents dating back to August 2002, where stress has not been a factor. This is an issue that has to be dealt with as a priority. PCSC Barnett refuses to take any responsibility for her behaviour, instead of blaming others for "picking on her" or "stress".[260]

392. Senior Sergeant Kerr went on to make some recommendations, including that the worker undertake and complete an anger management program.[261]

393. The evidence shows that Commander Owen arranged for the worker to come and see him with Sergeant Martin at a meeting held on 12 June 2003 at Commander Owens' office.[262] The employer relied upon the evidence given by Commander Owen at page 1098 of the transcript as to the purpose of that meeting:

> I just felt that it was something that could have been dealt with informally and that was the purpose of the meeting. The intention of the meeting was to talk about the role of instructors and the role of the student on the course. And while

[259] See [117] of those submissions and Exhibit E102.
[260] See [118] of those submissions.
[261] See [119] of those submissions.
[262] See [120] of those submissions.

> we encourage people to discuss issues and challenge them, there are ways and means in which you did that. If I could have convinced Mrs Barnett that that was the way that the issue should have been raised in the original lecture; if she had accepted that then and gone back to the course, I would have called Foley and Cooper in and said "Look I think this could have been resolved by Mrs Barnett making an apology… and the matter probably would have rested there, that was the purpose of the meeting.[263]

394. Both the worker and the employer made extensive submissions in relation to the meeting on 12 June 2003, which was clearly a critical event in the interpersonal relationship between the worker and the employer, and one which undoubtedly contributed to the worker's mental injury. On the one hand, that meeting was characterised by the worker as a bullying session. On the other hand, the employer viewed the meeting as nothing other than reasonable administrative action taken by the employer in connection with the worker's employment.

395. The worker made the following submissions in relation to the meeting:[264]

> The very next day Mrs Barnett was summoned to attend before Commander Owen. No proper notice of the meeting or its purpose was provided to Mrs Barnett. Commander Owen had available to him the dirt bag allegations of both Foley and Kerr of which Mrs Barnett had no knowledge.[265]
>
> No opportunity was accorded to her to seek to have a union representative or other appropriate support person present. In this meeting Mrs Barnett was threatened with removal from the course, advised that she would need to "suck up" to the Commander and ordered to attend anger management counselling. Mrs Barnett made handwritten notes at the conclusion of the meeting.[266] She also attended at Dr Tracey[267] and Dr Isherwood-Hicks for the anger management.[268]
>
> Unbeknown to Mrs Barnett, Foley and Kerr had written memorandums regarding the incident on 11 June 2003 and provided them to Commander Owen.[269] These allegations were not provided to Mrs Barnett to respond to either at that time or at any other time. No investigation was conducted as to what actually occurred. Kerr's memorandum of 12 June 2003 consisted of a diatribe of unsubstantiated allegations, personal opinions and conclusions of a personal nature regarding Mrs Barnett. Indeed at one point in the memo she proffered a psychiatric opinion. No mention was made in either of the Foley or Kerr memorandums of

[263] See [120] of those submissions.
[264] See [71] – [74] of the worker's submissions dated 27 January 2010.
[265] See Exhibit E102.
[266] See Exhibit W10.
[267] See Exhibit W11.
[268] See Exhibit W170, p 2.
[269] See Exhibit E102.

> 12 June 2003: that Kerr and Foley had met on the afternoon of 11 June 2003; they had a very close friendship; and Foley had gone to Kerr to seek assistance from her friend regarding the incidents of that day with Mrs Barnett. Kerr then used her position as a senior police officer to support in writing, her friend Foley, regarding an incident she had neither witnessed nor investigated.
>
> The actions of Commander Owen were unlawful in that he did not have the power to conduct a bullying or indeed any formal session of this nature in the way that he did. If he believed improper conduct or other breaches of discipline had, or may have, occurred then he had available to him appropriate statutory powers with proper procedures in accordance with the PA Act. He acted unlawfully in failing to follow those procedures.

396. In relation to the meeting on 12 June 2003 the worker submitted that the convening and holding of this meeting was unreasonable on a number of grounds:[270]

- The situation was biased against the worker. Given the formal procedures involved in reporting the worker's alleged insubordination it is entirely unreasonable for there to be no documentation of Commander Owen's receipt and consideration of Kerr's memorandum. In a similar fashion there is no record of Owen's first dealing with the issue...This lack of documentation at the higher level of the employer's organisation is in itself unreasonable;

- There was no good reason for the meeting;

- There was no good reason for the meeting to be considered or intended to be informal given the seriousness of the allegation;

- The worker was not provided with the memorandums written by Sergeant Foley and Senior Sergeant Kerr before the meeting and was expressly denied access to them during the meeting;[271]

- The worker was not offered an opportunity to have a support person present;

- Commander Owen failed to investigate bullying and harassment allegations made by the worker against Sergeant Foley and Senior Sergeant Kerr despite his undertaking to do so during the meeting (T1101.5 and T1103.1);

[270] See [26] – [28] of the worker's submissions in response dated 1 July 2010.
[271] See also [41] of the worker's submissions in response to the employer's submissions dated 1 July 2010.

- Commander Owen's obtaining the worker's diaries without her consent or knowledge. Owen's position allowed him the opportunity and ability to acquire the diaries with the worker's full knowledge, if not cooperation. Instead, Commander Owen chose to act covertly in a manner unbefitting his station; this was unreasonable administrative action; and

- Sergeant Martin's evidence does not support Commander Owen's action or the employer's;

397. As previously referred to, the worker submitted that the following actions by Northern Territory Police were unreasonable and resulted in injury;[272]

- The meeting on 12 June 2003 of which the worker was given no notice nor advised of the purpose of the meeting or the allegations that had been made against her to Commander Owen;

- The conduct of Commander Owen during the meeting which was the subject of a formal complaint on 16 June 2003;

- Harassment by Commander Owen being verbal abuse and threats by Owen contrary to 8.3 of the Code of Conduct and Ethics;[273]

- Commander Owen failing to provide the worker with procedural fairness by failing to provide her with particulars of the allegations against her and failing to provide the worker with any opportunity to respond to the allegations, before threatening her contrary to 8.3 of the Code of Conduct and Ethics; [274]

- Commander Owen exceeding his authority by having the worker's locker searched and obtaining personal possessions and other official notebooks and diaries and refusing to return them.[275]

398. The worker submitted that the meeting held on 12 June 2003 and the actions taken subsequent to it were "yet another significant relevant cause of the

[272] See [100] of the worker's submission dated 27 January 2010.
[273] See Exhibit W9.
[274] See Exhibit W9.
[275] See Exhibit W9.

worker's injury" and "the exclusionary elements to the definition of section 3 of the Act should not be applied".[276]

399. The employer sought to put a completely different complexion on the meeting held on 12 June 2003.

400. The employer began with the following submission:

> Although Owen would not have had the very detailed Cooper memorandum (Exh E100), it is probable that he had the Kerr memorandum and Foley complaint (Exh E102) prior to and at the meeting. Sergeant Martin noted that Owen referred to various reports at paragraph 18, folio 32 of Exh W87. On the assumption that Owen had those documents, and had already heard the verbal complaints of Cooper/Foley, it can be seen that he knew he had to take action against the worker for her extraordinary behaviour the previous day. Jeanette Kerr had argued very logically in her memorandum that the worker's behaviour towards Foley and Cooper, both experts in the area they were lecturing in, both officers who had earned credibility and respect, should not be tolerated and should be seen by others to have been be dealt with. However, it should still be noted that Kerr did not ask that the worker be removed from the Detective Training course – her recommendation (Exh E102) did not extend to that. On the other hand, Commander Grahame Kelly would have removed the worker from the course immediately, as he explained at T1420.[277]

401. The employer pointed to and relied upon the worker's response to Commander Owen's refusal of the worker's request to see documents which he had in front of him at the meeting.[278] Commander Owen's evidence, which appears at page 1099 of the transcript, was as follows:

> Well I told them to sit down and outlined the purpose of the meeting and I said that a complaint had been made by Cooper and Foley about her behaviour during Cooper's lecture… and I said that I had written memos from them outlining what occurred…
>
> And I think Mrs Barnett said "Can I see them?" and I said "No" As in No, I want to talk – I actually want her side of the story… and she just went "off"…
>
> I couldn't understand why she behaved like that with no provocation, just the word "No", without allowing me to say "Well no, look I'll get your side of the story, sort of thing".[279]

[276] See [32] of the worker's submissions in response dated 1 July 2010.
[277] See [121] of the employer's submissions dated 10 March 2010.
[278] See [122] of those submissions.
[279] See [122] of those submissions.

402. As pointed out in the employer's submissions, the evidence given by Commander Owen at pages 1099 – 1100 of the transcript shows that he listened to what the worker had to say and questioned her where appropriate.[280]

403. Relying upon the evidence, the employer made these submissions:

> Owen responded by saying that he had the utmost confidence in Kerr and Foley but that if the worker had substantiated accounts of bullying by them, Owen would look into it – see T1100.5. His notes (folios 80-81 of Exh W87) indicate that he also stated that he had never seen nor been advised of any bullying by either Foley or Kerr. He also said that he would not tolerate such behaviour. The worker agreed at T435.7 that Owen said that he would not tolerate bullying ("Yeah he said that"), even though she had denied it at T432.5.
>
> Owen explained at T1101.5 that he felt obliged to follow up the worker's allegations, which he considered serious allegations against a senior sergeant and a detective sergeant. He told the worker he would do something about it. He then asked her for corroboration. The worker claimed that she had made notes in her diary.
>
> Owen appreciated the importance of the diary entries. He explained (T1101.7):
>
> …if what she was saying was true and she made entries in her diary from time to time that Kerr had bullied her then we had a real problem… And it would have been pretty good evidence to support her claim.
>
> On the other hand, Owen explained that if what the worker alleged was not true, Owen did not want the worker to go away and make diary entries after the event ("she could have made those entries and none of us would have been the wiser…").[281]

404. By way of explaining Commander Owen's actions in obtaining the worker's diaries, the employer made the following submission:

> Owen therefore thought it would be fairer to all concerned if he obtained the diaries himself to see if what the worker said was true. This was a reasonable step to take for someone undertaking to investigate allegations and seeking to preserve the integrity of the evidence. Owen explained that diaries were NT Police property, given to detectives "to write in their diaries", intended to be kept in the police station. He therefore saw no problem with retrieving the worker's diaries. There has been no basis made out that he acted contrary to law

[280] See [125] of those submissions.
[281] See [126] – [129] of those submissions.

> in obtaining the diaries for the purposes of his inquiry (an inquiry which was in response to the worker's allegations).[282]

405. The employer also relied upon the evidence of Sergeant Martin (Exhibit W 87) that Commander Owen had asked the worker on 12 June 2003 to make the relevant diary entries available to him so that he (Owen) could investigate them.[283] The employer submitted that if that be true, then "any delay on the part of the worker to produce the relevant entries would have been a matter of concern".[284]

406. The employer pointed out that Commander Owen decided to leave the worker on the detectives course, despite her misbehaviour. It referred to the following evidence given by Commander Owen (at p 1103 of the transcript):

> …I thought I had no alternative but to send her back, because she was saying that her behaviour on the course was the result of bullying by Kerr and Foley, so I thought had no other alternative than to investigate those complaints she made…And until they were substantiated or not she could stay here because that was only fair.[285]

407. The employer submitted that Commander Owen had given the worker the benefit of the doubt.[286]

408. The employer went on to make the following submission regarding the reasonableness of the action taken by Commander Owen:

> …Owen had to do something and be seen to do something about the worker's angry outbursts, whatever the cause. In this situation he was the ultimate manager. He was called upon to manage a situation in which he had to reconcile the worker's bizarre, angry and aggressive behaviour (and the need to correct it or otherwise deal with it) with the possible exception or justification that the worker was being bullied by others. In the circumstances, the administrative

---

[282] See [130] of those submissions.
[283] See [131] of those submissions.
[284] See [131] of those submissions. In fn 19 to the submissions the employer stated: "From Exh W14 it appears that he accessed the worker's office on 13 June, but was unable to find the relevant diary or diaries. On 16 June, Owen sent Sergeant Lade to take the worker from the classroom to get the worker's diaries which had still not been provided – T108.9. The worker had to go home to get them; they were not at Palmerston Police Station at her ordinary place of work. The worker claimed that she was first asked for her diaries on 16 June. She denied in cross examination that she had previously been asked for her diaries - contrary to Sergeant Martin's note".
[285] See [132] of those submissions.
[286] See [133] of those submissions.

> action that he took was to leave the worker on then course, but to require her to get professional help for management of her anger.[287]
>
> The decision and its implementation constituted reasonable administrative action taken in connection with the worker's employment. It was a reasonable and just resolution, albeit interim, to reconcile the worker's rights with the rights, demands and proper management of the organisation.[288]

409. The employer pointed out that although the worker accused Commander Owen of spending a considerable period of time "criticising and bagging" the worker's husband,[289] there is "positive evidence (in the objective facts and the worker's admissions) that Owen did not criticise the worker's husband and was not seen by her at the time to have criticised him".[290]

410. As to the character of the meeting, the employer relied upon the note written by Sergeant Martin in Exhibit W87 folio 31 paras 23-24:

> The conversation between both Comd Owen and Barnett was frank and open.
>
> Barnett appeared to be relieved at the conclusion of the session and thanked the Commander for listening to her concerns and giving her the undertaking to investigate her concerns (Barnett stood at the end of the meeting and offered her hand to the Commander, which she shook).[291]

411. The employer submitted that Commander Owen's impression of the meeting was similar and referred to the following evidence given by the Commander:

> …I think I said to her, "look", I said to her, "that it seems – you go out to the course, I'll look into your allegations against Foley and Kerr and get yourself some help because you clearly need it… And she stood up, walked towards my desk… and stuck her hand out and she said "Thank you, sir" or something like that , "you're the first person that's ever listened to me". And like it was just – again it was just really strange, but I felt that she had felt that she'd got a reasonable hearing.[292]

412. The employer then took the Court to the worker's evidence. Although the worker agreed that at the end of the meeting she stood up and held out her hand to shake Commander Owen's hand she did not recall saying "Thank

---

[287] See [134] of those submissions.
[288] See [135] of those submissions.
[289] See p 438 of the transcript.
[290] See [139] of those submissions.
[291] See [140] of those submissions.
[292] See [141] of those submissions and p 1103 of the transcript.

you sir, you're the first person who's listened to me". Though she added that it was possible she had said that.[293] Then the worker said "I doubt very much I would have thanked him because he spent quite a considerable amount of time openly criticising and bagging my husband".[294]

413. In relation to that last statement by the worker, the employer made this submission:

> That last statement is significant in the Court's assessment of the true substance and nature of communications between the worker and Owen at this meeting. If the Court finds that the worker did thank Owen and held out her hand to him to shake – as Owen and Martin both said, and the worker at first conceded was possible, and later (T439.4) said she was not sure, then it is most unlikely that Owen had "criticised and bagged" the worker's husband or that the worker had understood him to have done that. The worker herself said that if Owen had done that, she doubted that she would have thanked him.[295]

414. The employer submitted that "if the worker stood up at the end of the meeting and offered her hand to the Commander and thanked him for listening to her, that would be inconsistent with his having caused her deep offence throughout the meeting".[296]

415. At paragraph 147 of its written submissions Part 1 dated 10 March 2010 the employer made the following submission:

> It is difficult in retrospect to understand why the worker – who had evidently felt grateful to Commander Owen at the end of the meeting – later became so belligerent towards the Commander, to the extent of making a complaint that Owen had caused her "extreme emotional distress and concern" (Exh W87, folio 51). From an objective viewpoint, it is not logical for the worker to have been so accusatory and critical of someone who, as explained in paragraphs 132-135 above, had treated her fairly and reasonably, and actually saved her from being taken off the very course which she desperately wanted to be on and which she subsequently successfully completed. Logically, she should be eternally grateful to Commander Owen.

[293] See [142] of those submissions.
[294] See [143] of those submissions.
[295] See [144] of those submissions.
[296] See [145] of those submissions.

416. After proffering several explanations for that apparent inconsistency in the worker's behaviour,[297] the employer made this submission:

> Whatever the explanation, the worker's apparent obsession with the injustice of the Owen meeting is lacking in any objective evidence. The facts establish reasonable administrative action taken in connection with the worker's employment, in a manner which arguably favoured the worker more than her "accusers". The employer says that the meeting held on 12 June 2003 and the actions taken as a result of that meeting were yet another significant relevant cause of the worker's injury which comes within the exclusionary elements to the definition of 'injury" in s 3 of the Act.[298]

417. The employer made the following submission in response to the worker's contention that the worker was denied procedural fairness at the meeting on 12 June 2003:

> Far from threatening removal from the course, the force of Commander Owen's actions was to save her from immediate removal from the course – see employer's submissions Part 1 paragraph 132 et seq. There can be no doubt that if Commander Owen had not decided to intervene on the worker's behalf she would have been immediately removed from the detective training course and would have been the subject of formal disciplinary action for her conduct in the meeting on 11 June. It is inevitable that if formal disciplinary action had been initiated, the worker would have been on notice that Kerr considered the worker to be unsuitable to be a detective and that she should be transferred away from Crime Command and back into General Duties. So much is apparent from Kerr's memorandum of 12 June 2003.
>
> No action was taken against the worker that was a denial of natural justice or procedural fairness to her. The memoranda by Kerr (in February and again in June) would have been put to the worker if formal disciplinary action was to be initiated against her. The worker would have been on notice of all the allegations levelled against her. Kerr would have been required to prove those allegations before any action could have been taken against the worker. The worker would have had the opportunity to respond.[299]

418. The question that arises is whether the meeting that took place between Commander Owen and the worker on 12 June 2003 amounted to reasonable administrative action. That requires consideration of two aspects. Was the convening of the meeting reasonable administrative action, and if so, was the meeting conducted in a reasonable manner.

---

[297] See [148] of those submissions.
[298] See [149] of those submissions.
[299] See [40] – [41] of the employer's submissions in reply dated 15 June 2010.

419. In my opinion, there can be no doubt that the convening of the meeting amounted to reasonable administrative action.

420. I reject the submission made by the worker that there was no good reason for the meeting. I also reject the worker's submission that there was no good reason for the meeting to be considered or intended to be informal.

421. Quite to the contrary, the circumstances required immediate intervention on the part of the employer, given the worker's behaviour at the meeting the day earlier. In my opinion, it was both appropriate and reasonable for Commander Owen to arrange for the worker to meet with him on 12 June 2003. The worker's behaviour in the classroom on 11 June 2003 was disruptive as well as inappropriate,[300] and the situation had not been made any better by the workers' behaviour during the meeting with Sergeant Foley and Detective Senior Constable Cooper on the previous day. The interpersonal issues arising out of the events at the College on 11 June 2003 needed to be resolved – and resolved swiftly. It was obvious that Commander Owen had to do something about the worker's behaviour. He had to do something and be seen to do something about the worker's outbursts. He therefore called the meeting to talk to the worker about the role of instructors and the role of the student on the course, no doubt with a view to resolving the matter. Ultimately he had to make a decision about the worker's continuing participation in the course.

422. Given the urgency of the matter and the need for it to be treated as a priority, Commander Owen cannot be criticised for convening the meeting at short notice and without indicating the purpose of the meeting. Nor do I think that any criticism can be levelled at the Commander for failing to

[300] Although students are encouraged to discuss issues and challenge opinions there are ways and means of doing that. In my opinion the worker went too far and acted inappropriately.

ensure the presence of a union representative or other support person at the meeting. Furthermore, under the circumstances no criticism can be levelled at Commander Owen for failing to provide the worker with the memorandums of Sergeant Foley and Senior Sergeant Kerr prior to the meeting (which in all probability he had prior to the meeting).

423. I am satisfied on the balance of probabilities that the convening of the meeting of the meeting at short notice was in all the circumstances reasonable and constituted reasonable administrative action.

424. However, assessing the conduct of Owen during the meeting presents a more difficult task.

425. The first question that arises is whether it was reasonable to deny the worker access to the memorandums of Sergeant Foley and Senior Sergeant Kerr.

426. Where the evidence of Commander Owen conflicts with the evidence of the worker, I prefer Owen's evidence. I accept that he outlined the purpose of the meeting, indicating that a complaint had been made by Detective Cooper and Sergeant Foley about the worker's behaviour during Cooper's lecture. Commander Owen further indicated to the worker that he had received written memorandums from them outlining what had occurred. That he raised the concerns about the worker's behaviour in class is supported by Sergeant Martin's memorandum dated 16 June 2003 (Exhibit W87, paragraph 18, Folio 32). In my opinion, Commander Owen gave adequate notice to the worker of the nature of the complaint made against her. [301]In the circumstances, I do not consider that Commander Owen's failure to provide the worker with access to the memorandums rendered the administrative action that he was undertaking unreasonable. Furthermore, I consider that Commander Owen afforded the worker the opportunity to respond to the complaint made against her.

[301] The steps taken by Commander Owen were similar to those taken by the school principal in *Swanson v Northern Territory of Australia* [2007] NTCA 4, and satisfied the requirements of reasonable administrative action.

427. The next issue that arises for determination is the interchange between the worker and Commander Owen during the meeting. This is of critical importance as the worker accuses the commander of having engaged in bullying and threatening behaviour during the course of the meeting. For reasons that will soon become apparent, determining what is more likely than not presents as no easy task.

428. One of the more serious allegations made by worker against Owen was that he had threatened the worker with removal from the course, told her that she would need to "suck up" to the Commander, and ordered her to attend anger management counselling. The worker also alleges that during the meeting Commander Owen criticised her husband.

429. Commander Owen denied all of those allegations, except for recommending her attendance at anger management. Who is to be believed?

430. What strongly favours the worker's version is the contemporaneous notes that she made, immediately following the meeting.[302] On the reverse side of the coin, the employer relies upon a body of evidence that militates against the likelihood that the worker was bullied and threatened in the manner alleged by her. In that regard the employer relies upon the apparent satisfaction of the worker with the outcome of the meeting.

431. Although the worker vacillated in terms of her contentment with the outcome of the meeting, I was nonetheless left with the impression that she walked away from the meeting with a degree of satisfaction with the outcome. After all, the worker was allowed to remain on the course, and Commander Owen had undertaken to investigate her complaints about bullying by Sergeant Foley and Senior Sergeant Kerr. To an appreciable

[302] See Exhibit W10.

extent the worker's apparent satisfaction with the outcome of the meeting does not sit comfortably with her allegations that she had been bullied and harassed by Commander Owen, and that Owen had criticised her husband.

432. In the final analysis, I am unable, on the balance of probabilities, to determine where the truth lies in relation to the interchange between the worker and Owen during the meeting.

433. Although I consider that the undertaking given by Commander Owen to the worker to investigate her complaints about bullying by Sergeant Foley and Senior Sergeant Kerr, and his decision to keep the worker on the course, in light of her allegation that her behaviour was due to such bullying, amounted to reasonable administrative action, I do not believe that by requiring the worker to get professional help for management of her anger Commander Owen had acted in a reasonable manner. I find that the action he took in that regard did not accord with reasonable administrative action. Commander Owen's referral of the worker to anger management counselling was deprecated by Dr Tracey in his report dated 2 March 2007 (Exhibit W94). I find myself in full agreement with Dr Tracey.

434. Commander Owen decided to leave the worker on the course because she was saying that her behaviour on the course was the result of bullying by Senior Sergeant Kerr and Sergeant Foley. He considered that he had no alternative than to investigate the complaints that she had made. Commander Owen considered that until those complaints were determined she should remain on the course out of a sense of fairness. However, at the same time and by way of administrative action, Commander Owen required the worker to undertake anger management counselling while those investigations remained pending. One has to seriously question the wisdom or reasonableness – not to mention the efficacy – of referring the worker to counselling for anger management, suspected to be due to bullying and harassment in the workplace, before the completion of an investigation as

promised by Owen. Furthermore, Commander Owen's decision to refer the worker to anger management counselling was made without due regard to the worker's psychological profile which he ought to been provided with, and which ought to have been factored into the making of his decision. In my opinion, the employer has failed to satisfy the Court that Commander Owen's decision requiring the worker to attend anger management counselling amounted to reasonable administrative action.

435. The final aspect of the meeting held on 12 June 2003 that falls for consideration relates to Commander Owen's decision to obtain the worker's diaries without her consent and knowledge. The employer bears the onus of proving to the satisfaction of the Court that the obtaining of the worker's diaries amounted to reasonable administrative action. In my opinion, the action taken by Commander Owen did not amount to reasonable administrative action.

436. Although Commander Owen saw no problem with retrieving the worker's diaries as they were the property of the Northern Territory Police Force, and he was seeking to preserve the integrity of the evidence, I do not believe that the employer has reasonably satisfied the Court that Commander Owen's actions in relation to the diaries amounted to reasonable administrative action. On the whole of the evidence the employer has failed to persuade me that Commander Owen had neither "the opportunity nor ability to acquire the diaries with the full knowledge, if not cooperation" of the worker, as put by the worker in her submissions.

437. I am not satisfied that Commander Owen's actions in referring the worker to anger management and retrieving the worker's diaries amounted to reasonable administrative action. Based on the available medical evidence

and other evidence,[303] I consider it more likely than not that those actions in some way contributed to the worker's first mental injury.

438. As with the previous workplace incidents, it is necessary to put the meeting between the worker and Commander Owen on 12 June 2003 in the context of the worker's allegation that her first injury was the result of a failure on the part of her employer to investigate her complaints of bullying and harassment at the hands of senior police officers.

439. The meeting with Commander Owen and the worker's perception that during that meeting she was bullied and threatened – and the subject of unreasonable administrative action – laid the foundation for her complaint against Commander Owen. That was one of the complaints that the worker alleged that the employer had failed to investigate.

440. The Court needs to remain focused on the essential line of inquiry: did the employer fail to investigate the worker's complaint and, if so, did that amount to unreasonable administrative action.

The worker's complaints against Sergeant Foley, Senior Sergeant Kerr and Commander Owen and the employer's response

441. The worker's case, as pleaded in paragraph 58 of the Amended Substituted Statement of claim, is that "no effective action was ever taken by the employer to deal with the conduct of the police officers and no proper process was followed regarding the complaints of intimidation and bullying contrary to the *Police Administration Act* and General Orders".

442. As set in paragraph 60 of the Amended Substituted Statement of Claim, the worker alleges that the lack of resolution of issues between Commander

[303] See in particular the worker's letter to retired Commissioner Jim O'Sullivan (Exh W 87 folios 48-52) where, inter alia, the worker stated as follows:
"At the conclusion of the hearing Owen reiterated that I was on my last warning, but that he will allow me to continue on with the Detective Training Course on the condition that I provide him some evidence, within one week, that I am addressing my anger by way of receiving anger management counselling and that if I have any further concerns about

Owen and herself resulted in her psychiatric injury. However, it is clear that the worker's case has a much broader basis in that it incorporates as causative factors the non-resolution of the worker's complaints against Sergeant Foley and Senior Sergeant Kerr.[304]

443. The employer's case is set out at [152] of the employer's written submissions dated 10 March 2010 as follows:

> The employer's case is that, given (1) the subjective nature of the worker's complaints, (2) the circumstances in which the worker made those complaints: she was in trouble at that time; (3) the improbability of some of her allegations, (4) a lack of objective evidence to support the complaints, (5) the co-incidence of evidence on the part of those complained against and other witnesses contrary to and not supporting the worker's complaints and (6) the inability of the objective evidence to establish a case against those complained against, whether on the basis of criminal charges, disciplinary charges under the *Police Administration Act*, professional responsibility (PRD), anti-discrimination or any other guidelines regulating conduct, the most appropriate administrative managerial response to the worker's complaints and the counter-complaints elicited from (for example) Jeanette Kerr (after initial inquiries revealed the nature of the problems) was to try to resolve matters by mediation.
>
> The processes followed by the employer in response to the worker's complaints were reasonable administrative processes and constituted, individually and collectively, reasonable action taken in connection with the worker's employment.

444. The employer dealt with the individual actions of the employer in its detailed submissions.

445. The employer noted that with respect to the worker's complaints to Commander Owen about Kerr and Foley, Owen instructed Sgt Greg Lade to investigate the worker's allegations of bullying and harassment and to obtain the worker's diaries. The employer submitted that "the decision to investigate was a proper response to the worker's serious allegations of

---

being bullied then I am to see Superintendent Hofer. This behaviour caused me extreme emotional distress and concern. I do not believe that I am getting a fair go from Owen".

[304] See [151] of the employer's submissions Part 1 dated 10 March 2010.

bullying and harassment by Kerr and Foley".[305] The employer also submitted that "the manner of investigating the worker's allegations, particularly in relation to obtaining corroborative evidence from the worker's diaries was also reasonable".[306]

446. The employer noted that the worker's husband had submitted an internal memorandum to the OIC Professional Responsibility (Exh W87, folios 53-56) on 20 June 2003. That memorandum set out a hearsay version of the conversation between the worker and Commander Owen on 12 June 2003 and the worker being sent home to obtain the diaries on the day of the memorandum (see Exh W87, folio 55.9). The husband sought an investigation into the allegedly inappropriate behaviour by Owen towards the worker.[307]

447. The employer submitted that the employer's response to the worker's husband's memorandum was noted in a handwritten note at Exhibit W87, folio 56. It was recommended that the matter be investigated by a person at the rank of Assistant Commissioner, because of Commander Owen's rank. The Commander of Professional Responsibility, Commander Fields, said that he thought the complaint should not be investigated within PRD but should be given to Assistant Commissioner Smith "to attempt to resolve the matter, at least in the first instance". Fields categorised the behaviour of Owen (as complained of) as one of "management style".[308]

448. The employer noted that further to the recommendation of Commander Fields the investigation was allocated to Assistant Commissioner Smith.[309] The employer submitted that it was "apparent from the file created by Assistant Commissioner Smith that he made contact with Owen and took

[305] See [154] of those submissions.
[306] See [154] of those submissions.
[307] See [157] of those submissions.
[308] See [158] of those submissions.
[309] See [159] of those submissions.

over the carriage of the worker's allegations against Kerr and Foley"[310] and that "it would not have been appropriate for the employer to leave the investigation of those matters in Owen's hands after the worker had made allegations about him also, and it did not do so".[311] The employer noted that Assistant Commissioner Smith obtained notes that the worker had provided to Commander Owen on 19 June 2003 (Exhibit W87 folio 59), copies of the worker's diary entries (Exhibit W87 folios 62 -68) and the "medical – in-confidence letter which Dr Tracey had sent to Commander Owen on 12 June 2003 (Exhibit W87 folios 69-70).[312] The employer also noted that Assistant Commissioner Smith met with the worker at home on 13 July 2003 (Exhibit W87, folio 85) and that the worker prepared a further document outlining details of the alleged bullying and harassment by Senior Sergeant Kerr and Sergeant Foley (Exhibit W87, folio 61).[313]

449. The employer made the following submission:

> The decision to refer the worker's allegations of bullying and harassment by Kerr, Foley and Owen to Assistant Commissioner Smith was reasonable administrative action by the employer. It acted reasonably in the manner of receiving and allocating the complaint. It recognised that because of Commander Owen's rank, the allegations needed to be investigated at an appropriately senior level.[314]

450. The employer noted the fact that Assistant Commissioner Smith had to hand Senior Sergeant Kerr's memorandum of 23 February 2003 and Superintendent Evan's memorandum of 15 May 2003, reporting on the outcome of Senior Sergeant Kerr's request for disciplinary action to be taken against the worker.[315] It was further noted by the employer that the Assistant Commissioner also had Commander Owen's comments about the

[310] See [161] of those submissions.
[311] See [161] of those submissions.
[312] See [162] of those submissions.
[313] See [163] of those submissions.
[314] See [164] of those submissions.
[315] See [165] of those submissions.

lack of any evidence to substantiate the worker's allegations against Foley and Kerr.[316]

451. The employer also referred to the fact that Assistant Commissioner Smith had written his own response to Commander Owens' response at folios 86 - 87 of Exhibit W87and that the Assistant Commissioner needed to take up a number of matters with the worker.[317]

452. The employer made the following submission:

> There was nothing of any substance in the list of matters that the worker submitted to Commander Owen and Assistant Commissioner Smith (exh W87 folio 59). In fact, the list outlined instances of the worker coming into conflict with superior officers because of her own behaviour and failure to show deference to senior officers. The matters listed in that document appear to have been a response to matters identified in supporting documentation that Kerr provided with her memorandum (exh W87 folio 8):
>
> > Since the initial incident a number of reports have come to me of similar behaviour by PCSC Barnett. It is apparent that she will not take advice or direction where she does not believe it is warranted and she will not accept criticism. Given PCSC Barnett's limited experience and knowledge base this is just not acceptable if she wishes to remain in CIB. I have attached copies of reports on PCSC Personal file from previous supervisors where they allude to the same issues, as such I would submit that it is an ongoing pattern of behaviour. Additionally, I believe that PCSC Barnett has a poor attitude toward some clients and lacks professionalism to overcome this weakness…
> >
> > In regard to [the documented] other matters I suggest that these are areas of concern, particularly given that there is a requirement to often work with limited supervision in CIB and to respond as duty crew to a range of matters, including sex offences. I do not believe that PCSC Barnett has the requisite skills and attitude at this stage to undertake these duties. This is particularly in light of her unwillingness to accept advice and criticism. I further request that you counsel PCSC Barnett regarding the other matters and her attitude and the professionalism required to be a member of not only the CIB but the Northern Territory Police.[318]

[316] See [166] of those submissions and Exhibit W 87 folios 80-81 adopted by Owen as his document at p 1123 of the transcript.
[317] See [167] of those submissions.
[318] See [168] of those submissions

453. The employer submitted that "the language of the worker's notes prepared for Commander Owen and given to Assistant Commissioner Smith is defensive and exculpatory, and she does not make out any positive case of harassment or bullying".[319]

454. The employer went on to submit that the way in which Assistant Commissioner Smith went about the investigation was also reasonable.[320]

455. The employer noted that Assistant Commissioner Smith left the NT Police in August 2003 and referred to his belief that "there is going to be a resolution without the need for discipline type action".[321] On Assistant Commissioner Smith's departure the matter was transferred to Assistant Commissioner Mark McAdie.[322]

456. At paragraph 175 of the employer's submissions Part 1 dated 10 March 2010 the employer submitted:

> Between mid-August 2003 and early September, Assistant Commissioner McAdie decided to undertake mediation of the complaint rather than pursue it as an investigation. There appeared little substance to the worker's many complaints, and McAdie identified that it was a matter in which it was unlikely that he would ever reach a firm conclusion, having regard to the different versions alleged by the worker and by George Owen and Jeanette Kerr (T1254.8-1255.1):
>
> > I think even at a quite early stage I'd formed the opinion that a formal investigation followed by some form of disciplinary hearing was unlikely to be a sensible way to follow through, most particularly from the perspective of Senior Constable Barnett, because it seemed to me that the likely outcome was that the parties had different views on those events, about what had triggered them and what had occurred. It was unlikely that we'd be able to resolve which one of those views was going to be true because they were poles apart, and that a very likely outcome if we went through a formal process would be a determination that there was insufficient evidence that anybody had done anything seriously wrong, and that no further action would be taken. That would have likely resulted in a situation where I would have thought Senior Constable Barnett would have been in an untenable situation in the workplace and she would have had to have been moved out of the crime command,

[319] See [169] of those submissions.
[320] See [170] of those submissions.
[321] See [172] of those submissions.
[322] See [172] of those submissions

> because we had no basis to move the other people, and you simply chose, I guess it might be seen as the path of least resistance, but where you have a number of people involved in an incident and you need to separate the parties and there's one party on one side and several parties on the other side then you move the single party.

457. The employer went on to make the following submission:

> That was a reasonable conclusion to reach. An examination of the documentation that Assistant Commissioner Doug Smith had assembled (Exh W87) shows that much of the evidence that had been gathered confirmed Kerr's complaints about the worker's behaviour… there was no substance to the worker's allegations of bullying and harassment. What the worker called "bullying and harassment" was in fact correction, direction, guidance and/or the reasonable requirement that she rectify her own insubordinate, aggressive and disrespectful behaviour.[323]

458. At paragraph 177 of its submissions Part 1 dated 10 March 2010 the employer pointed out that the worker alleged in evidence that Assistant Commissioner McAdie forced her into mediation, and told her that if she did not go to mediation "he would just have me removed from crime command" (T135.4). The employer submitted that "the worker has probably inaccurately reported what was said by McAdie, just as she did in relation to comments made by Commander Owen in their meeting on 12 June 2003". The employer relied upon the following evidence given by Assistant Commissioner McAdie at pages 1258 – 1259 of the transcript:

> I don't recall the exact conversation. I think it's far more likely that what I said was that without the mediation it would be impossible for her to continue in the crime command, and my reasoning for that is simply that unless the matter was resolved to the satisfaction of the parties the end result would have to be that – essentially what I thought I was facing was that we'd reached, the situation had reached the point where there was not a workable relationship between Senior Constable Barnett and other members in the crime command. Unless we could return it to a workable relationship the resolution to the matter would inevitably be that we would have to remove her because the only other solution would be to remove all of those other members, and unless you can establish a substantial wrongdoing on the part of all of those other members it doesn't justify making that sort of change to the organisation. And it's regrettable that in some of these circumstances that sometimes a person who is a complainant in the matter is the one that has to be moved but that sometimes that's the only practical solution… ultimately we can't manage the force precisely in the manner in which the resolution of complaints might be best done. Sometimes we have to compromise on these issues.

[323] See [176] of those submissions.

459. The employer submitted that Assistant Commissioner McAdie gave a rational and logical explanation of what he said to the worker.[324] The employer also submitted that "the decision to pursue mediation as a means of resolving the situation was reasonable administrative action by the employer".[325] The employer made this submission:

> Although it had to do with management of the organisation as well as management of the worker, it was fairly directed at giving the worker the best opportunity of remaining a productive member of crime command. Mr McAdie's assessment and explanation as to the likely alternative outcome (Para 177 supra) was appropriate and fair.[326]

460. The worker did not agree that the employer took reasonable administrative action by way of response to the worker's complaints:[327]

> In August 2003 AC McAdie decided, alone or in concert with other senior police officers, that Mrs Barnett's complaints of bullying and harassment were to be dealt with by mediation. It is submitted there was no power to force any party to attend mediation[328] and given the nature of the complaints it was contrary to the General Orders, PA Act and in particular the Code of Conduct and Ethics.
>
> AC McAdie not only directed Mrs Barnett to attend this mediation he threatened that if she was unable to achieve a successful outcome then she would have to leave Crime Command.[329]

461. The worker made the following further submissions regarding the employer's response to the worker's complaints:

> There is no evidence submitted to the Court in relation to any independent investigation conducted regarding the worker's allegations of harassment and bullying by Foley, Kerr and Owen. Owen gave an undertaking to the worker that such an investigation would be conducted. No documents were discovered by the employer relating to such investigation. This demonstrates that the entire process was flawed as based on unreasonable administrative action.
>
> Paragraph 168 of the employer's submissions asserted that "the worker coming into conflict with superior officers [was] because of her own behaviour and failure to show deference to senior members". It should be recognised that these allegations, referred to as the worker's ongoing pattern of behaviour, are

[324] See [177] of those submissions
[325] See {178] of those submissions.
[326] See [178] of those submissions.
[327] See [90] – [91] of the worker's submissions dated 27 January 2010.
[328] See pp 790, 883, 1144 and 1274 of the transcript.
[329] See pp 1244 and 1250-1252 of the transcript.

> matters highlighted by Dr Byrne upon analysis of the COPS test results prior to the worker's recruitment in the Police Force. No further psychological testing was conducted to assess any possible changes which may have occurred within the worker's psychological make up since her employment. Nevertheless, the worker's conduct regarding her superiors including criticism from them up until 13 April 2006 speaks for itself.
>
> The main contention between the employer and the worker is in relation to the interpretation of the interaction between the worker and Foley, Kerr and Owen. An example of this conflict of interpretation is in paragraph 177 of the employer's submissions wherein it is asserted that it is not reasonable for the worker to interpret McAdie's comments that "without the mediation it would be impossible for her to continue in the crime command…" to mean the worker would be forced into mediation or the consequence would be she would be transferred out from crime command. That is a reasonable interpretation for an individual who feels constantly singled out, victimised, harassed and bullied. Additionally, the decision to pursue mediation as a means of resolving the situation between the worker and the employer was only reasonable administrative action if the mediations were organised in a timely fashion and were actually carried out. This was not the case.[330]

462. The employer responded to the worker's submissions regarding the lack of investigation of the complaints made by the worker by submitting that "the worker's submission overlooks the fact that the worker at no stage requested formal disciplinary action to be taken against Kerr, Foley or Owen".[331] The employer went on to submit:

> The worker had been satisfied that her complaints were being investigated by Assistant Commissioner Doug Smith. He had concluded that there was no substance to the worker's complaints of bullying and harassment. When Assistant Commissioner McAdie took over the investigation, it was obvious that no resolution favourable to the worker would be achieved. In the circumstances, mediation was a sensible and reasonable option.[332]

463. In response to the worker's submission that the worker was forced to take part in mediation under threat of being removing from Crime Command, the employer submitted :

> Assistant Commissioner McAdie gave a sound explanation of the things he said to the worker and the context in which they were said. The worker's counsel has sought to cast those discussions as "directing" and "threatening" but the Court can be satisfied that they were neither.[333]

---

[330] See [33]-[35] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[331] See [46] of the employer's submissions in response dated 15 June 2010.
[332] See [46] of those submissions.
[333] See [47] of those submissions.

464. The employer then made the following submission in relation to the alleged lack of investigation of the complaints and the worker's injury:

> The worker continued working throughout 2003 and 2004 (apart from a short period in October 2003 when the complaint against police investigation was occurring). She worked under Detective Sergeant Matt Sodoli who supported her application for detective designation. She was presumably an effective and valued member of his team. The mediation process was well behind the worker by the time she had the outburst towards Sodoli that saw disciplinary action taken against her. Kerr had transferred to Tennant Creek as a Superintendent and Foley and the worker had resolved their dispute. The outstanding issues at the time were the worker's continued demand for an apology from Commander Owen and the question of her detective status.
>
> It is most likely that any injury in October 2004 was due to events that occurred at the time (the outburst towards Sodoli that saw formal disciplinary action launched against her) or outstanding unresolved matters (the demand for an apology from Owen; the status of her detective designation). It is highly unlikely that the worker sustained an injury in October 2004 because her requests for Kerr, Foley and Owen to be investigated had not been acted upon, when in fact they had been, and there had been a resolution in respect of Foley and Kerr for 10 and 8 months respectively.[334]

465. The reasonableness of the employer's response to the worker's complaints stands at the core of the worker's claim, as she alleges that her first injury was the result of a failure on the part of the employer to investigate her various complaints against senior police officers.

466. The worker and the employer have assumed diametrically opposed positions in relation to the issue. On the one hand, the employer asserts that it took an appropriate and reasonable approach to the worker's complaints and that its response amounted to reasonable administrative action. On the other hand, the worker alleges that by reason of its failure to investigate her complaints, and by necessary implication, the employer failed to take reasonable administrative action. In other words, the administrative action taken by the employer in relation to the worker's complaints was unreasonable.

467. I propose to assess the reasonableness of the employer's response by examining the individual actions of the employer that constitute that response.

468. As previously found Commander Owen's obtaining of the worker's diaries did not amount to reasonable administrative action. So in that respect the employer's response to the investigation of the worker's complaints was not reasonable administrative action.

469. In contrast to that negative aspect of the employer's response was the employer's decision to refer the investigation of the worker's complaints to an Assistant Commissioner. That decision, in my opinion, constituted reasonable administrative action.

470. However, the employer's subsequent decision to resolve the worker's complaints by way of mediation did not, in my opinion, amount to reasonable administrative action.

471. First, it appears that the employer unilaterally made the decision to resolve the complaints through the mediation process. On the evidence it cannot be found that the worker consented to that process. Mediation was imposed on the worker. In other words, the worker was expected to participate in compulsory mediation. However, in coming to that conclusion, I do not believe that the state of evidence is sufficiently cogent to support a finding that the worker was forced into mediation under threat of being removed from Crime Command.

472. Secondly, the decision to resolve the worker's complaints by way of mediation appears, on the evidence as well as the submissions made on behalf of the employer, to have been prompted by a view on the part of the employer that the worker's complaints were without substance, when there does not appear to have been any independent comprehensive consideration and evaluation of the merits of worker's complaints. One gets the distinct impression that the employer somewhat hastily and summarily dismissed the

[334] See [48] – [49] of those submissions.

worker's complaints without a full investigation. That impression is reinforced by the employer's submissions.[335]

473. Thirdly, as a general observation, mediation works best when it is voluntary. Due to the unilateral decision to mediate the worker's complaints I cannot be satisfied that the worker's participation in the mediation process was voluntary.

474. Fourthly, the mediation process as embarked upon by the employer was misconceived because it failed to take due cognizance of the worker's personality and her psychological profile, which was reasonably capable of being gleaned from the results of her psychological testing prior to her recruitment. Had that vital information concerning the worker been made available to those involved in the investigation of the worker's complaints, then serious questions would have been raised concerning the wisdom and viability of subjecting the worker to a non –consensual mediation process, into which the worker's unusual and difficult personality had not been factored. Had the information been made available to the decision makers, then further psychological testing on the worker could have been conducted with a view to determining how best to resolve the worker's complaints, rather than to blindly pursue a protracted process of mediation of dubious efficacy. Indeed, the mediation process did not result in a resolution of the worker's complaint against Commander Owen.

475. Fifthly, and significantly, despite Commander Owen's undertaking to the worker that her complaints against Senior Sergeant Kerr and Sergeant Foley would be investigated, they were never investigated. The fact that there was some resolution in relation to the complaints against Foley and Kerr is beside the point, and does not detract from the employer's failure to do what it undertook to do. Furthermore, I think it is clear that what the worker

[335] See [152] of the employer's submissions Part 1 dated 10 March 2010.

really wanted was an acknowledgment of the legitimacy of all her complaints against Commander Owen.

476. Sixthly, and not least, mediation, as a process, is a form of alternative dispute resolution which aims to assist two or more disputants in reaching an agreement. Mediation in the workplace is directed at resolving immediate conflicts. Although the employer may have ultimately had in mind a resolution of the apparent conflict between the worker and the three senior police officers it lost sight of, or did not pay sufficient regard to, the worker's wish to have her complaints investigated. In deciding to deal with the complaints by way of mediation rather than through a traditional investigative approach the employer should have taken reasonable steps to explain to the worker why it was taking that alternative approach and to satisfy her that that was in her best interests. I do not consider that the employer has, on the evidence, satisfied the Court in that very important regard.

477. In my opinion the decision to mediate the worker's complaints against Commander Owen, Senior Sergeant Kerr and Sergeant Foley did not amount to reasonable administrative action.

478. The employer sought to attribute any injury suffered by the worker in October 2004 to the Sodoli incident, which resulted in formal disciplinary action being commenced against the worker, while at the same submitting that the employer's response to the worker's complaints against Senior Sergeant Kerr and Sergeant Foley were not causative of the worker's injury. I reject that submission. In any event, it is clear that the lack of resolution of the complaint against Commander Owen was a major causative factor, which fell outside the exclusionary elements to the definition of '"injury" in s 3 of the Act.

The mediation process and outcome

479. It is necessary to consider the timing, process and completion of the mediation process because the worker claims that the mediation process was unreasonable in two respects. First, it took an inordinately long time for the mediation to occur. Secondly, the worker was unfairly deprived of an opportunity to prepare for the mediation. The issue here is whether the mediation process was undertaken in a reasonable manner.

480. It was submitted on behalf of the worker that "the mediation was unsuccessful" and "Mrs Barnett's complaints of bullying and harassment against both Kerr and Owen were never investigated". [336] The worker went on to submit:[337]

> No reasons were ever provided despite many requests during 2003 and 2004 as to what was happening with her complaints and what was happening to her. The system failed her despite specific General Orders in place designed to provide a proper process for the investigation of complaints of this nature. [338]

481. The worker submitted that "as a result of that unlawful and inappropriate administrative action Mrs Barnett suffered a psychiatric injury of stress, anxiety and depression which resulted in her being unable to continue her duties as a police officer".[339] The worker submitted that this "is reflected in the CMO report of Dr Meadows (Exhibits W65 and W66) and in her medical certificates from Dr Tracey and his notes from early 2005 to 2006".[340]

482. The worker made the following submissions in relation to the timing and duration of the mediation process:

> The decision to proceed by way of mediation to resolve the differences between the worker, Foley, Kerr and Owen was made on 11 September 2003, many months after the complaint.

---

[336] See [92] of the worker's submissions dated 27 January 2010.
[337] See [92] of those submissions.
[338] See Exhibits W34-36, W39, W45,W47, W48, W51-61.
[339] See [93] of the worker's submissions dated 27 January 2010.
[340] See [93] of those submissions.

> Maria Di Ionno assumed conduct as the mediator on 27 October 2003. This is an unreasonable delay given the original complaint was made by the worker in June 2003.
>
> The mediation between the worker and Foley took place on or about 4 December 2003. Mediation between the worker and Kerr or Owen never actually occurred. By any standard this cannot be described as a positive outcome or indeed as reasonable administrative action (refer to the emails sent by the worker, at Exh 34-41 and 47-61 in relation to attempts to pursue the recommended course of mediation).
>
> To suggest she was elusive in this period is to try to ameliorate the obvious delays by the employer to properly deal with the worker's complaint.
>
> It is not sufficient to suggest that simply because McAdie had warned the worker of the consequence of a failure in the mediation (paragraph 186 of the employer's submissions), then the employer's actions could be considered as reasonable administrative action. It is clear the mediation between Kerr and the worker ended in a stalemate. The mediation between Owen and the worker never occurred and hence no resolution was reached.[341]

483. The worker made the following final submissions in relation to the mediation process:[342]

> AC McAdie was required to investigate the complaints of Mrs Barnett as outlined in her formal complaint of 16 June 2002. AC McAdie was assigned this task on or about 4 August 2003 when AC Smith resigned. AC Smith had been assigned to investigate Mrs Barnett's complaints in July 2003. Procedural fairness required Mrs Barnett be given an opportunity to be heard before any decision was made regarding Mrs Barnett "which affect rights interests and legitimate expectations". This was not done. The actions of AC McAdie to refer the matter to mediation, to subsequently cancel the mediation and to make a decision to not take any further action[343] were unlawful and therefore cannot be reasonable.[344]
>
> The decision of 31 March 2004 was inconsistent with the General Orders and contrary to law. The importance of giving reasons is referred to in the

[341] See [36] – [40] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[342] See [104] of the worker's submissions dated 27 January 2010.
[343] See Exhibit W47.
[344] See *Osmond v Public Service Board* [1984] 3 NSWLR 447; See also *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 668 per Gibbs CJ.

Rees case referred to above and more recently by the High Court.[345] The right to reasons is well established law.[346]

484. In response to the worker's submissions the employer submitted that "the mediation did take a lengthy period of time to complete, but not an unreasonably long time".[347] The employer submitted that "the timing of the mediation was not due to any failure on the part of the employer".[348] In that regard the employer provided a chronology of the lead–up to the mediation process and the timetable for the mediation to put the delays in context.[349]

485. It was submitted on behalf of the employer that the fact that the worker was off work for some of the relevant period with sick leave held up the mediation process because the mediator advised the worker that the mediation should not proceed while she was on sick leave.[350]

486. The employer made the following submission:

> Mediation between the worker and Foley was completed in December 2003 following a face to face mediation between them. The worker conceded in evidence that her complaint against Foley had been resolved to her satisfaction and an agreement had been concluded to that effect. The worker entered into a mediation agreement with Foley in which it was agreed that the worker's behaviour in the classroom and the interview was inappropriate, and which recorded that the worker offered an apology to Foley, which Foley accepted (Exh W87, folio 224).[351]

487. The employer relied upon the finalisation of the mediation between the worker and Kerr, as was recorded by Maria Di Onno in the following account and provided in her report to Assistant Commissioner McAdie (Exh W87 folio 25):

> Throughout this time, there was ongoing telephone contact with each party. Both parties agreed that they would accept that Senior Constable

---

[345] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* [2003] 216 CLR 212 at [105].
[346] See *Osmond v Public Service Board* (supra).
[347] See [180] of the employer's submissions Part 1 dated 10 March 2010.
[348] See [180] of those submissions.
[349] See [180] of those submissions.
[350] See [181] of those submissions.
[351] See [182] of those submissions

> Barnett provide a report of her concerns in relation to Detective Sergeant Kerr to Assistant Commissioner McAdie and that this report be a basis for discussion at their mediation.
>
> Senior Constable Barnett provided the report to Assistant Commissioner McAdie in the first week of February.
>
> After the report was provided to Assistant Commissioner McAdie, Detective Senior Sergeant Kerr and Senior Constable Barnett agreed (about February 11) to accept the Department's response to this report as a resolution between them, without holding a face to face mediation.[352]

488. The employer also relied upon the Department's response, which was explained by Assistant Commissioner McAdie in his evidence at page 1262 of the transcript:

> I think I had a conversation with the mediator about the possibility of resolving the issue by having Senior Constable Barnett respond to the, essentially provide a written response to the original allegations and for – yes the starting point was Senior Constable Barnett was to write a report that was essentially a response to the initial allegations, that that would be used as a basis for the discussion with Senior Sergeant Kerr and once that report was done, which it was done and provided to me, that whatever response the Department made to that report would be the resolution to the matter, that would bring the matter to an end… My recollection of it is that mediation had reached the point where they simply couldn't agree and that the resolution to the matter would be that their respective points of view would be recorded on the file along with the original allegation, so all of those matters would be brought together into one file, and the matter would be closed.[353]

489. The employer relied upon the following course of events:

> The worker received a memorandum from Assistant Commissioner McAdie on 31 March 2004 advising her that no further action would be taken (Exh W47). It is clear that the worker understood that Assistant Commissioner McAdie considered the issues between the worker and each of Foley and Kerr were finalised. Her understanding is apparent from the emails she sent to McAdie seeking to confirm that his memorandum did not apply to her complaint against Commander Owen (Exhibits W52, W57).
>
> It is also clear that Assistant Commissioner McAdie did what he said he would do, in that he designated the Headquarters file (Exhibit W87) as the file on which the materials relating to the complaint and mediation would

[352] See [183] of those submissions.
[353] See [184] of those submissions.

> be placed, and that the memoranda submitted by the worker and Kerr would not be placed on the worker's personnel file (T1262).[354]

490. I have already found that the decision to mediate the worker's complaints was misconceived and, in all the circumstances, amounted to unreasonable administrative action.

491. Apart from the inappropriateness of the mediation process, I find that the process was protracted – notwithstanding that some delay may have been occasioned by the worker's personal circumstances – and the untimely manner in which it was conducted was not reasonable. So even if the decision to mediate had amounted to reasonable administrative action, the manner in which it was conducted rendered the mediation process unreasonable administrative action.

492. Overall the outcome of the mediation could hardly be described as a resounding success. Although mediation between the worker and Sergeant Foley, on a face to face basis, appears to have resulted in an outcome which was to the satisfaction of the worker, the same cannot be said of the mediation between the worker and Commander Owen and Sergeant Kerr. In relation to the worker's complaint against Senior Sergeant Kerr, mediation appears to have reached the point where the parties simply could not agree and the matter was resolved in the manner explained by Assistant Commissioner McAdie. In my view, that could hardly be described as a positive outcome. With respect to the worker's complaint against Commander Owen, there was a complete lack of resolution (which is separately dealt with later in this decision). Again that was far from a positive outcome.

493. The generally poor outcome of the mediation process reflects upon the inappropriateness of the steps taken by the employer to deal with the

[354] See [185] – [186] of those submissions.

worker's various complaints, and highlights the less than reasonable manner in which it responded to those complaints.

494. As a result of the inappropriate and unreasonable administrative action taken by the employer in connection with the worker's complaints against senior officers of the Northern Territory Police Force the worker suffered a mental injury. That is reflected in the reports of Dr Meadows (Exhibits W65 and W66) and the various medical certificates from Dr Tracey and his notes from early 2005 to 2006.

Alleged denial of natural justice or procedural fairness

495. The worker argued that throughout the entire process of her interaction with the employer, whether it be in the context of administrative action or disciplinary action, she was denied natural justice or, in more contemporary language, procedural fairness.[355]

496. The worker began with the following submission:

> The principles governing natural justice or procedural fairness are the subject of well established principles and authority. There is no contrary statutory intention to deny procedural fairness to police officers in their management or discipline under the *PA* Act or the powers exercised pursuant to it:
>
> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[356]
>
> Absent contrary statutory intention the common law position remains clear.[357]

[355] See [41] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[356] See *Kioa v West* (1985) 159 CLR 550 per Mason J.
[357] See [36] – [37] of the worker's submissions dated 27 January 2010.

497. It was the worker's case that, inter alia, the following actions on the part of the employer were unreasonable and resulted in the worker's injury and subsequent incapacity for employment:

- The failure of the employer to properly investigate the complaint of 16 June 2003 and accord the worker procedural fairness in that alleged investigation;
- The failure to accord the worker procedural fairness in making a decision to mediate all the complaints;
- The cancellation of the mediation process without any explanation to the worker; and
- The failure to accord the worker procedural fairness prior to Assistant Commissioner McAdie making the decision of 31 March 2004 and the failure to provide reasons for that decision.[358]

498. By way of background the worker stated:

> When the worker attended the "informal" meeting with Owen he failed to provide her with the memorandums of Foley and Kerr in his possession and specifically denied the worker access to this information during the meeting. This meeting was in June 2003, yet the worker did not receive access to the memorandums detailing the accusations against her despite repeated request for access until 26 August.[359]

499. The worker proceeded to submit that "it is of no remedial value that the worker was permitted to take notes with respect to the memorandums".[360] The worker added: "It is not reasonable administrative action that the worker was not provided a copy of the memorandums containing the allegations against her, nor was the worker given the opportunity to respond".[361]

[358] See [100] of those submissions.
[359] See [41] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[360] See [42] of those submissions.
[361] See [42] of those submissions.

500. In answer to specific submissions made by the employer, the worker submitted:

> At paragraph 191 of the employer's submissions the employer argues that no requests for copies of the memorandums were made by the worker at that stage. If true, this is irrelevant, as copies ought to have been provided at the outset. The failure of the worker to request copies of the memorandums does not justify the breach of natural justice, nor is it a defence to the lack of reasonableness. It was clear to the employer that the worker wanted a copy of the documents, she was denied access to them at the meeting with Owen in June 2003 and hence the involvement, ultimately, of the Police Association.
>
> In paragraph 196 of the employer's submissions (T1278.7-1279), McAdie answers the question as to why the memorandums were not provided to the worker:
>
> > My reason for doing so is that there is a fairly large difference between somebody taking handwritten notes and talking about the things that are contained in the file and passing around copies of the documents that exist with people's signatures on them and so on and so forth. What I perceived I had a situation here was that I had people within the organisation essentially were blueing with each other about various things, and that was capable of inflaming it would be passing around the documents that people had written. I couldn't control – Senior Constable Barnett was certainly entitled to see the nature of the allegations that had been made against her. I granted the easiest way of doing that would have been to give her a copy of those things but I was concerned about some other issues and in compromising it seemed the best compromise to make would be to allow her to see all the documents and allow her to make notes about them if she wished to do so.
>
> The employer assigned the blame for the worker in not receiving the memorandums to the failure by the worker to request them. The evidence of McAdie demonstrates, however, the worker was never going to obtain a copy because of the "compromise" upon which he unilaterally decided.[362]

501. By way of response to a further specific submission made by the employer the worker submitted:

> The employer, through McAdie, during the meeting with the worker, attempted to describe natural justice to the worker. His answer is reproduced in paragraph 199 of the employer's submissions. Essentially, McAdie claimed that because he was not contemplating an outcome of disciplinary or criminal action then there is no requirement to provide copies to the worker of the allegations. This is an example of the systemic bullying within the Police Force, as the worker was

[362] See [43] – [44] of those submissions.

deliberately denied natural justice. The worker was not afforded natural justice in the circumstances.[363]

502. The employer took a contrary position to the worker in relation to the fairness of the manner in which it had interacted with the worker.

503. The employer submitted that it was reasonably clear that the worker had inspected documents on 2 occasions: the first probably on 26 August 2003 and the second on or about 1 September 2003.[364]

504. The employer pointed out that in relation to the first occasion, "the worker's evidence was that she was given very limited access to relevant documents, in that she was restricted to only 'something like 20 minutes' to read them (T129.6) She acknowledged, initially at least, that she was probably allowed to make notes in relation to the documents provided to her (T129.7).[365] She also said: "I had very limited time, I was only allowed to do it – read them for about 20 minutes".[366]

505. The employer then went on to point out that at page 130 of the transcript the worker gave evidence that Acting Superintendent Robert Harrison had told her that she was only allowed to read the documents and that when she had finished reading them she was to leave. According to the worker she had only a half an hour or 20 minutes to read them.[367] The employer submitted that in this context "the Court should bear in mind that the initiating request from the worker, made by the NT Police Association by letter dated 5 August 2003, was that she be allowed to read the file that had resulted from her complaint (Exh W87, folio 114). No request for copies was even made at that stage." [368]

[363] See [45] –[46] of those submissions.
[364] See [187] of the employer's submissions Part 1 dated 10 March 2010.
[365] See [188] of those submissions
[366] See p 129 of the transcript and [188] of those submissions.
[367] See [188] of those submissions.
[368] See [190] of those submissions.

506. The employer then proceeded to point out that at page 130 of the transcript the worker claimed that she "wasn't allowed to take any notes, even though I took that one note".[369]

507. The employer submitted that the claimed restriction on taking notes was untrue. The employer said that "the true reason the worker did not take notes on 26 August was that (1) she did not know whether she wished to respond to the allegations and (2) she was pressed for time as a result of a commitment of her own, as is made clear by her contemporaneous email to Mr McAdie dated 1 September 2003 (Exh W33):

> Just in case you did not receive it, I am requesting another opportunity to read the same reports. Since reading them I have decided I would like to respond to their accusations and therefore I need to read the reports again and take notes. I did not take notes on Tuesday due to time restraints and was unsure if I wished to reply to their accusations." [370]

508. The employer submitted that the claimed imposition of a 20 minute's time limit was false and that the alleged discussion with Harrison in which he allegedly imposed the condition was also false. [371] The employer pointed out that the worker admitted at page 380 of the transcript that the alleged time restriction was self imposed.[372] She said: "Now that I've seen my diaries the restriction came from me because I had an appointment at 9.30".[373]

509. In continuing to stress the worker's vacillation, the employer noted that at page 382 of the transcript the worker stated: "The probability is I was not allowed to take notes because otherwise I would have".[374] The employer further noted the worker's evidence at page 382 of the transcript: "There was a restriction imposed on me because I was not allowed to take written notes".[375] Notwithstanding that evidence, the employer pointed out that "at

[369] See [191] of those submissions.
[370] See [192] of those submissions.
[371] See [193] of those submissions.
[372] See [193] of those submissions.
[373] See [193] of those submissions.
[374] See [194] of those submissions.
[375] See [194] of those submissions.

no time did the worker complain to Mr McAdie about what would have been an unfair and unreasonable restriction on the worker".[376]

510. The employer made the following submission:

> It is clear that no time restriction was imposed on the worker in relation to the request to inspect the documents. It is also clear that the worker was allowed to make notes. The only restriction that was placed on the worker was that she was not allowed to copy the documents. That restriction was reasonable and, as subsequent events proved, particularly apposite in this case. The worker's husband, upon learning of the content of the memo from Foley wrote an internal memo to Assistant Commissioner McAdie seeking an opportunity for him to be able to answer her "allegation" (Exh W87 folio 132). It was precisely that risk of misinformation and divulging of confidential personnel documentation that Assistant Commissioner McAdie sought to guard against by imposing that restriction (T1278-1279).[377]

511. The employer then proceeded to make this submission:

> We raise a further matter relevant to the worker's complaint of denial of natural justice or procedural fairness, which adversely reflects on the worker's credit. On 24 October 2003, she wrote to Mr McAdie (Exh W36) to complain about not having copies of the reports about her written by Kerr, Foley and Cooper. In seeking to attack or discredit the mediation process, she wrote: -
>
> > "If I do not have a copy of the reports how am I supposed to discuss the allegations made about me and provide a response to those allegations".
>
> The worker seemed to have forgotten that the reason she gave Mr McAdie on 1 September (Exh W33) for her request to re-inspect the documents at that time was that she wanted to make notes to reply to the accusations made against her. Moreover, she claimed at T385-386 that, on the re-inspection, she dictated onto her tape recorder all the statements (including Cooper's Foley's, and two from Kerr) and subsequently typed them up (T386.2) on the Police computer. In other words she had a verbatim record of all allegations made against her. Her complaint to Mr McAdie can therefore be seen to be quite mischievous.[378]

[376] See [195] of those submissions. The employer noted that the worker's email Exhibit W33 "made no such mention and no complaint otherwise was made to McAdie: see T1299.7".
[377] See [196] of those submissions. The reason why Assistant Commissioner McAdie did not give a copy of the documentation to the worker was referred to by the worker in her submissions referred to above.
[378] See [197] – [198] of those submissions.

512. By way of demonstrating the reasonableness of its actions, the employer relied upon Assistant Commissioner McAdie's explanation of the requirements of "natural justice" and his offering the worker yet another opportunity to inspect the documents:

> "Natural justice" requires that you are informed of the nature of the allegations made against you and given a chance to respond to those allegations. However, such an arrangement is only triggered if there is a disciplinary or criminal action contemplated. As I have not been contemplating such outcomes, there is no such requirement. Additionally, the requirement is that you be made aware of them, this implies that you are told by some means, not necessarily supplied with copies of documents etc. You have had the opportunity to read the documents and therefore the requirement has been discharged, in my view. If you wish to do so, I will allow you to see them again in similar circumstances.[379]

513. The employer submitted that in all the circumstances "the alleged denial of natural justice to the worker cannot be made out".[380]

514. In its submissions in reply dated 15 June 2010 the employer made the following set of submissions:

> The worker's submissions maintain that the worker was denied procedural fairness due to a "failure to provide her with allegations alleged against her and to allow her an opportunity to respond". But the allegations were not the subject of any proposal to take action against the worker. If the worker could not be adversely affected by the allegations, then no requirement for procedural fairness or natural justice arises: see for example, the evidence of Assistant Commissioner McAdie at T1256 and Exh W36.
>
> Throughout the course of the mediation itself and continuing into these proceedings the worker has confused the notions of procedural fairness and natural justice with an alleged failure to act upon her allegations. The worker was never to be the subject of any adverse action once the mediation had been commenced. Assistant Commissioner McAdie was at pains to explain this to the worker again and again during the period leading up the mediation proper. Thus it was illogical that the worker should, in advancing her complaint of harassment and bullying, require access to the allegations by Kerr and Foley regarding the worker's own behaviour.
>
> The worker's fixation with the contents of Kerr's and Foley's allegations against her, and her frustration at not having a copy from which to prepare her detailed and minutiae driven response are probably the most illuminating insights into her personality and her motivation in the whole affair. The worker had no complaints of substance against Kerr, Foley or Owen at all. What she

[379] See [199] of those submissions and Exhibits W36 and W87.
[380] See [201] of those submissions.

> faced, on the other hand, was multiple serious breaches of discipline which collectively, could have been sufficient to end her career as a detective, if not in policing altogether. It served her interests to maintain her allegations and avoid any disciplinary action being issued for her serial breaches. But the battles she started could only have ended badly for her, unless some resolution could be reached. Commander Owen tried to help the worker by keeping her on the detective course and undertaking to investigate her allegations. Assistant Commander McAdie tried to help her by showing her the futility of following a traditional investigation approach to allegations that were demonstrably by that time without any substance. Assistant Commissioner Kelly tried to help her by seeking a compromise that would be acceptable to the worker and Commander Owen. These members expended substantial resources and personal effort to support the worker and restore her to a functioning, valuable serving police officer. When the worker's own behaviour sabotaged her progress, she went on extended sick leave. Her return to work also required the expending of substantial resources by police, but they did not back away from the task. The worker again sabotaged her own progress and finally in April 2006 through a repetition of the same behaviours that had got her into trouble in the past, demonstrated that she was effectively unemployable as a detective.[381]

515. The worker's complaint that Commander Owen had denied her procedural fairness during the meeting on 12 June 2003 has already been dealt with. It was concluded that Commander Owen's failure to provide the worker with access to the memorandums did not render the administrative action he was undertaking unreasonable.

516. What remains to be considered is the worker's complaint that she was denied procedural fairness during her subsequent interaction with the employer.

517. When considering that complaint it is important to place it in the context of the worker's allegation that the employer failed to investigate her complaints. As noted earlier, the worker submitted that the failure of the employer to investigate the complaint of the 16 June 2003 and accord the worker procedural fairness in relation to that investigation resulted in her first injury

518. In my opinion, the failure of the employer to provide the worker with copies of the memoranda containing the allegations against her did not amount to a denial of procedural fairness for the following reasons.

---

[381] See [53] – [54] of the employer's submissions in reply dated 15 June 2010.

519. First, the restriction placed on the worker obtaining copies of the memoranda was reasonable for the reasons given by Assistant Commissioner McAdie.

520. Secondly, I am satisfied on the balance of probabilities that the worker had inspected the documentation on two occasions, namely 26 August 2003 and 1 September 2003.

521. Thirdly, I am satisfied on the balance of probabilities that the worker was afforded ample opportunity to read the documents and take notes of the contents of those documents, and that any restrictions placed on reading the documents or note taking were self- imposed.

522. Fourthly, as submitted by the employer, the worker's complaint that she was denied procedural fairness due to a failure to provide her with the allegations against her and to allow her an opportunity to respond seems not to be to the point, as the employer was not contemplating disciplinary or any other administrative action against the worker, but was engaged in the task of investigating the worker's complaint. I agree with the submission made by the employer that "throughout the course of the mediation itself and continuing into these proceedings the worker has confused the notions of procedural fairness with an alleged failure to act upon her allegations". I further agree with the observation made by the employer that it is somewhat illogical that the worker should complain about denial of access to the allegations made against her by Sergeant Foley and Senior Sergeant Kerr when in fact "the shoe was on the other foot" – the worker was requiring the employer to investigate her complaints against the senior police officers. However, in any event, I am satisfied that the employer did in fact allow the worker access to the relevant documents and the allegations contained therein, and afforded the worker the opportunity to respond insofar as it was necessary in the context of the investigation of her complaints and the mediation process.

523. As to the worker's further complaints of lack of procedural fairness during the investigative process, I consider that there is merit in the worker's argument that she was denied procedural fairness in relation to the decision to mediate all her complaints. The evidence points to that having been a unilateral decision on the part of the employer, resulting in mediation, in effect, having been "forced" on the worker.

524. I see no need to go on to consider the worker's further two complaints that the mediation process was cancelled without any explanation to the worker and that there was a failure to accord her procedural fairness prior to Assistant Commissioner McAdie making the decision of 31 March 2004. For the reasons given above the mediation process was misconceived and ineffectual and, in all the circumstances, did not amount to reasonable administrative action.

The investigation by the Professional Responsibility Division of the complaint over the handling of the dog complaint

525. As set out in the workers submissions, Lorraine Carlon was tasked by Helen Braam from the Ethical and Professional Standards section of NT Police to investigate a complaint against police, "namely against Mrs Barnett and ultimately to determine whether there was a conflict of interest or specifically a breach of policy in transferring the PROMIS job to herself without it being allocated".[382]

526. Again as set out in the submissions, Lorraine Carlon provided a report of her investigation by way of internal memorandum.[383] She had been asked to provide all of the information that she had relating to the worker by NT Police during May/June 2009.[384]

[382] See [75] of the worker's submissions dated 27 January 2010.
[383] See [76] of those submissions and Exhibit E118.
[384] See [77] of those submissions.

527. The worker's submissions noted that Mrs Barnett telephoned Lorraine Carlon, and it is alleged that the worker stated to her that she should have lied or said nothing about details relating to the investigation.[385] The worker submitted as follows:[386]

> This was not reported by Lorraine Carlon and in fact nothing further was done about it because she considered Mrs Barnett's reactions and actions to the investigation were an expected reaction to the complaint.[387]
>
> A formal complaint was not made in relation to this issue nor any action taken under the *PA* Act.

528. In the workers' submissions in response to the employer's submissions dated 1 July 2010 (at [47]) the following submission was made:

> The investigation of the complaint against the worker regarding the dog was excessive. Ultimately, the worker was cleared of any wrongdoing, however, by that stage a further episode of harassment had been authorised and undertaken by the employer. The fact that Commander Fields (W87, folio 150) had this CAP under his direct oversight is significant to the worker's belief that she was monitored more than others. This is not reasonable administrative action. Commander Fields in his diligence to show that there was no apprehension of bias actually displayed bias by expecting a certain outcome and therefore putting more manpower into the investigation because of that expectation.

529. The employer submitted that "this investigation arose in the lead-up to the mediation and apparently caused the worker a great deal of stress, evidenced by the worker's own conduct and contemporaneous statements to others, and by the fact that Dr Tracey significantly increased the worker's dosage of antidepressant medication on 4 November 2003".[388] In its submissions in reply dated 15 June 2010 (at [42]) the employer pointed out that the worker's submissions "incorrectly describe the nature of the complaint that was the subject of Carlon's investigation: it was not a 'dog complaint' but a complaint against Police – specifically the worker".

---

[385] See [78] of those submissions. See also pp1080-1081 of the transcript and Exhibit E119.
[386] See [79] –[80] of those submissions.
[387] See pp 1085-1093 of the transcript.
[388] See [202] of the employer's submissions Part 1dated 10 March 2010. The employer noted that on 18 November 2003 Dr Tracey recommended that the worker make a workers compensation claim : see Tracey's notes, Exhibit W94, p 136.

530. The employer pointed out that the worker attributed the investigation of her to "the fact that Superintendent Braam was in a relationship with Jeannette Kerr and that she, the worker, was being "got at" by Kerr.[389]

531. The employer proceeded to make the following submission:

> Notwithstanding the worker's perception, or claimed perception, the investigation was not a conspiracy against the worker by Kerr or Braam or anyone else. Commander Fields confirmed this by email dated 29 October 2003 (Exh W87, folio 150)…
>
> Given the complaint by a member of the public, the subject matter of the complaint had to be investigated. Clearly (based on outcome) [390] the PRD investigation was impartial, and (by retaining control at all times) Commander Fields took proper steps to ensure that there was no reasonable apprehension of bias.[391]

532. Later, the employer made these submissions:

> Despite the worker's paranoid belief that the complaint was a tool for Kerr to get at her indirectly, there was no evidence to substantiate that claim. Moreover, the worker did not disclose as any part of her case that she had raised that allegation with Assistant Commander McAdie at the time and he had promptly debunked it. The investigation was tasked to Superintendent Braam by Commander Fields of PRD.
>
> There is no evidence that the complaint, or the manner of its investigation, was part of a campaign of bullying or harassment of the worker by Kerr or anyone else.[392]

533. By way of conclusion the employer submitted:

> Once more, the facts establish reasonable administrative action, taken in connection with the worker's employment, in the investigation of a complaint against her. Yet another significant relevant cause of the worker's injury comes within the exclusionary elements to the definition of "injury" in s3 of the Act.[393]

534. In my opinion, on all the evidence, the administrative action taken by the employer in relation to the so-called "dog complaint" was not excessive nor

[389] See [208] of the employer's submissions dated Part 110 March 2010. See also Exhibit E119, p1
[390] The worker was cleared of any "wrongdoing": see [203] of the employer's submissions.
[391] See [216] – [217] of those submissions.
[392] See [42] – [43] of the employer's submissions in reply dated 15 June 2010.
[393] See [219] of those submissions.

could it be properly considered to be part of "a campaign of bullying and harassment of the worker". The evidence establishes that the administrative action taken in connection with the investigation of the complaint against the worker was reasonable.

535. It is noteworthy that the employer's actions in relation to the investigation were not included in the list of actions that the worker alleged were unreasonable and resulted in injury and subsequent incapacity.[394]

Indeed, it is difficult to see how this investigation falls within the ambit of the worker's claim, which is that she suffered a mental injury as a result of the failure of the employer to investigate her complaints.

536. However, the fact that the worker appears to have suffered a great deal of stress as a result of the investigation – which the Court has found to have been reasonable administrative action – is relevant to the compensability of the worker's alleged injury.

Lack of resolution with Commander Owen

537. This was one of the major factors alleged by the worker to have contributed to her injury. Although this factor has already been dealt with, it warrants further analysis.

538. The employer began by stating that there was a "lack of objective justification for the worker's sense of injustice over the Owen meeting on 12 June 2003".[395]

539. The employer pointed out that the mediation process with Commander Owen did not resolve anything.[396] Owen stated that he expected a face to face mediation; however the worker would not meet with him face to face.[397]

[394] See [100] of the worker's submissions dated 27 January 2010.
[395] See [220[of the employer's submissions Part 1 dated 10 March 2010.
[396] See [221] of those submissions.
[397] See[221] of those submissions.

540. As stated in the employer's submissions, and in the mediator's report (Exhibit W87 folio 226), the worker refused to meet face to face with Commander Owen.[398] The employer submitted that the "mediation thus became a shuttle mediation, and was unsuccessful", and "Owen then made a decision that he was not going to further engage in the mediation process".[399]

541. The employer went on to make the following submissions:

> Counsel for the worker attempted to suggest at the trial that the worker had proposed and would have accepted as a sufficient resolution of her complaint "a letter from the department acknowledging her letter of complaint against Commander Owen". This was put to Owen at T1145.6 and to Kelly at T1439.8 and T1440.3. Owen knew nothing about it and nor did Kelly. Indeed the true situation was that, even after the worker's husband had written a letter of apology for what he said were his "wrong" complaints against Owen (Exh W87, folio 215) the worker was persisting with her demand that Owen apologize to her for inter alia "insulting my husband in my presence" – see Exh W87, folio 237. The correct conclusion is that the worker's actual requirement was a letter from the department acknowledging the legitimacy of all her complaints against Owen.
>
> We submit that, given the worker's actual requirement, but noting her refusal to meet with Owen in a proper mediation, and given the unreality of the worker's position, mediation in the limited manner, the worker would agree to, was bound to fail.
>
> However, the fact that mediation did not resolve the worker's complaint against Commander Owen does not mean mediation was not a reasonable process for the employer to put in place. Assistant Commissioner McAdie acknowledged that if the mediation process did not resolve the worker's complaints, then he would have conducted an investigation. However, a short time after the attempted mediation between the worker and Owen, the worker expressed a willingness to allow Assistant Commissioner Graham Kelly to try and resolve the situation (Exh W87, folio 214). Graham Kelly had been working with the worker's husband to resolve his issues with Commander Owen, so it was reasonable for the employer to allow Assistant Commissioner Kelly that opportunity, particularly if the worker consented.[400]

542. As submitted by the employer:

> Assistant Commissioner Kelly commenced his involvement in March 2004. The worker was clearly aware of that, having spoken at length with Assistant Commissioner Kelly on 30 March and also having clarified with Assistant Commissioner McAdie on 10 April that McAdie's memorandum confirming resolution of the mediation process (exh W47) only related to Kerr and Foley,

[398] See [222] of those submissions.
[399] See [223] of those submissions.
[400] See [224] – [227] of those submissions.

> and that her complaint against Owen was being dealt with by Assistant Commissioner Kelly (exh W52).
>
> Mr Kelly correctly assessed the issues between the worker and Commander Owen as complex and complicated. The genesis of the conflict was the worker's inappropriate behaviour on the detectives course. Owen had provided an explanation for his actions which had been provided to the worker, but the worker was still not satisfied. The worker had a tendency not to deal with situations of conflict in the workplace in an appropriate way and had a perception that she was being singled out for unfair scrutiny. The worker had potential as a detective but had a significant problem in her manner of dealing with her peers and especially senior ranking officers and had not yet demonstrated her suitability to be a detective. The worker had a perception that she was being or would be treated unfairly in relation to obtaining her detective's designation.
>
> In order to work towards a resolution, Kelly wanted to identify precisely what issues were important to the worker, so that he could then find out if Owen were prepared to provide a further explanation for his actions and, if Owen were prepared to do so, an apology to the worker at least for any unintended offence caused by Owen's choice of language.[401]

543. The employer then noted that the worker had submitted an email to Assistant Commissioner Kelly on 26 May 2004 listing 3 matters for which she wanted an apology from Commander Owen (Exhibit W61). Assistant Commissioner Kelly spoke to Commander Owen about these matters and subsequently prepared a formal memorandum to him dated 16 June 2004 seeking a response of some kind.[402] The employer went on to note that Commander Owen provided a written response to Assistant Commissioner Kelly on 10 August 2004 (Exhibit W87, folio 249-248). Having read that response, Assistant Commissioner Kelly put the worker on notice on 17 August 2004 as to the objective difficulties she faced in pursuing her demands (exhibit W87 folio 256-255).[403]

544. The employer submitted that Assistant Commissioner Kelly "had some insight into the fact that the worker's complaints against Owen could not objectively be made out, or at best, would represent a 'totally different perspective' of a meeting in which Owen had 'protected (her) from

[401] See [230] – [232] of those submissions.
[402] See [233] of those submissions.
[403] See [234] of those submissions.

immediate removal from the detective course, and the inevitable removal from CIB (exh W87 folio 256)".[404]

545. The employer went on to submit:

> The approach taken by Assistant Commissioner Kelly must be judged for reasonableness against that background. The Court can be satisfied that the worker's version of the Owen meeting is subjective and biased, and does not accord with the facts. The actions of Assistant Commissioner Kelly in dealing with the worker in the way he did, and in pursuing Commander Owen for a response to try and reach some kind of resolution and closure for the worker, was not only reasonable, but in the circumstances, represented a very generous concession to her.
>
> The letter to the worker from Mr Kelly dated 7 December 2004 (Ex W87 folio 267-269) was a proper conclusion to the administrative process undertaken and continued by Mr Kelly and contained explanations and apologies from Mr Owen, as appropriate. It did not satisfy the worker (see T200-201) who became angry, ripped up the letter and threw it in the bin. She claimed at T203 that she smashed her head against the wall and lost total control, presumably because she perceived that her complaint against Mr Owen had been unsuccessful, as objectively it deserved to be. Moreover, the reasonableness of the administrative actions taken by the employer are not to be judged by the worker's unreasonable response.[405]

546. The worker made the following submissions in relation to the lack of resolution of her complaint against Commander Owen:[406]

- Commander Owen did not honour the worker's decision to not meet face to face but to continue with shuttle mediation. Instead, Commander Owen took this opportunity to withdraw from the mediation process;

- The employer submits that the mediation was bound to fail. If this was the prevalent opinion with the employer's organisation then there was no justification to pursue this process to resolve the ongoing problems between Commander Owen and the worker. Compounding on the delays in responding to answer the worker's complaint, it is an unreasonable administrative action to pursue a course which is bound to fail;

- Assistant Commissioner Kelly was tasked with resolving the conflict between the worker and Commander Owen. Therefore the outcome desired by Assistant Kelly was irrelevant to the

[404] See [236] of those submissions.
[405] See [237] – [238] of those submissions.
[406] See [48] – [52] of the worker's submissions in response to employer's submissions dated 1 July 2010.

task he was assigned to do and the reasonableness of the administrative action or procedure. However, his desire to remove the worker from her position without first investigating the situation cannot be seen as reasonable administrative action;

- Assistant Kelly became involved in the conflict resolution in March 2004. The conflict arose in June 2003. The employer's submission at paragraph 230 details the origin of the complaint as "the worker's inappropriate behaviour on the detective course". That is, a provisional finding had already been made. Informal meetings were held by the management within the Police Force to discuss the worker's "inappropriate behaviour";

- Commander Owen's actions in the meeting of June 2003 constituted bullying and harassment of the worker. Commander Owen's actions were never investigated or if they were investigated, no evidence of such an investigation has been produced. This cannot be reasonable administrative action. The submissions of the employer acknowledge there was no resolution of the conflict between the worker and Commander Owen. In paragraph 234 of the employer's submissions, Assistant Commissioner Kelly's evidence is reproduced wherein he explains the difficulty of achieving any resolution of the conflict with Commander Owen. It was submitted that "Kelly put the worker on notice on 17 August 2004 as to the objective difficulties she faced in pursuing her demands". The fact that Commander Owen has to be convinced on a course of action meant the entire dispute resolution process was fundamentally flawed. There was a lack of good faith on Commander Owen's part and this is a breach of a requirement for reasonable administrative action.

547. In response to the employer's submission that the worker's complainant could not be objectively made out the worker submitted that the employer had failed to provide evidence to show how that conclusion was drawn. [407] The worker went on to submit:

[407] See [53] of those submissions.

> It is invalid to draw the conclusion that the worker' grievance was not soundly based without conducting a corresponding investigation into the actions of Owen. From the outset this failure to properly investigate the worker's claims was an unreasonable administrative action.[408]

548. As previously noted, the employer's recourse to mediation as a means of resolving the worker's various complaints, particularly in relation to her complaint against Commander Owen, was problematic. That is demonstrated by the fact that the worker did not wish to engage in face to face mediation with Commander Owen, whereas the Commander was prepared to meet face to face with the worker. That was a very relevant circumstance bearing upon the potential worth of mediation as a vehicle for dealing with her complaint against Commander Owen. Given the worker's perception that she had been bullied and intimidated by Commander Owen it is not surprising that she wished to avoid face to face contact. Furthermore, as mentioned earlier, the mediation process was embarked upon without the employer having due regard to the results of the worker's pre- induction psychological testing (which would have suggested that the employer was dealing with a problematic personality) with a view to determining whether mediation was preferable to a traditional investigation of the worker's complaints.

549. The worker's refusal to engage in face to face mediation with Commander Owen was not without consequences. The Commander made a decision not to further engage in the mediation process. That brought the mediation process to an end, without there having been a resolution of anything – something which is freely conceded by the employer.

550. What particularly works against the reasonableness of embarking upon the mediation process is the employer's submission that the mediation was bound to fail because of the worker's refusal to meet face to face with Commander Owen, "the worker's actual requirement", "the unreality of the worker's position" and the limited form of mediation to which she was prepared to agree. All of those circumstances are indicative of mediation not

[408] See [53] of those submissions.

being the appropriate means of dealing with the worker's complaint against Commander Owen. The worker's position should have been obvious to the employer. The worker wanted the legitimacy of her complaint against Commander Owen acknowledged: in other words she wanted her complaint investigated.

551. Assistant Commissioner McAdie's acknowledgement that if the mediation process proved not to be successful then he would have conducted an investigation is also telling, and indicative of the unreasonable administrative action taken by the employer in connection with the handling of the worker's complaint. This acknowledgment shows the employer's preference to pursue mediation as an alternative to undertaking a traditional investigation of the worker's complaint, while at the same time recognising a possible need to revert to an investigation. The acknowledgement also demonstrates a continuing active interest on the part of the worker in having the legitimacy of her complaint acknowledged.

552. The problem with reverting to an investigation after a protracted and unproductive mediation process is that a psychological injury may well have occurred as a result of the unfruitful process of mediation, and before the investigation is embarked upon. This is exactly what happened in the present case. The worker suffered a psychological injury as a result of the drawn out and profitless mediation with Commander Owen, with no subsequent investigation ever having been undertaken.

553. The final indicia of the unreasonableness of the administrative action taken in connection with the worker's complaint against Commander Owen was Assistant Commissioner Kelly's notification to the worker on 17 August 2004 as to the objective difficulties she faced in pursuing her demands, which clearly left her complaint against the Commander unresolved. That notification marked the final failure of the employer to investigate her complaint. Indeed, by her response to Assistant Commissioner Kelly's

correspondence the worker demonstrated her dissatisfaction with the lack of closure.

554. It is noted that the employer attempted to justify the reasonableness of the approach taken by Assistant Commissioner Kelly on the basis that the worker's complaint could not objectively been made out – a belief that it sought to attribute to Assistant Commissioner Kelly. However, notwithstanding any such belief the employer should have proceeded to investigate the complaint and if, as a result of that investigation, it was not satisfied that the complaint had been substantiated, then it should have so found and advised the worker accordingly.

555. As pointed out in *Mitsubishi Motors Australia v Lupul* (supra) the reasonableness of an employer's actions is be considered in the light of certain factors, for example, the worker's history, age, personality and legitimate expectations. Mrs Barnett had a legitimate expectation that her complaint would be investigated and that there would be closure. Her complaint was never investigated and there was no closure for the worker. Accordingly, the administrative action taken by the employer – or perhaps more precisely the administrative action not taken by the employer – was in all the circumstances not reasonable.

The worker's failure to obtain a promotion or benefit

556. The worker submitted the following:[409]

- Mrs Barnett passed the detectives course with credit ;[410]
- Detective Sodoli made recommendations for the worker to be assigned her detective status, [411] as well as Detective Jaci Grant;[412]

[409] See [81] – [84] of the worker's submissions dated 27 January 2010.
[410] See Exhibit W12.
[411] See Exhibit W108.
[412] See Exhibit W139.

- The worker was to be promoted to detective status at the conclusion of the RTW Program.

557. The worker went on to make the following submissions:

> The unlawful actions of OIC Heath with regard to his failure to comply with the RTW Program and sequelae ensured Mrs Barnett's psychiatric condition deteriorated to the extent she was unable to continue as a serving police officer. At this time there were 2 days remaining of the RTW Program.
>
> The threat by Assistant Commissioner McAdie that Mrs Barnett would not remain in Crime Command was then effected by the behaviour of NT Police in its treatment of Mrs Barnett in the work place.
>
> Mrs Barnett did not mention her detective status other than in relation to confirming she was yet to be appointed despite fulfilling all the requirements, her superiors making the relevant recommendation and that her time was coming up to finish the probation period installed by the RTW Program.
>
> AC Kelly's evidence in the witness box was that the Detective Status file pertaining to Mrs Barnett went missing.
>
> Under the circumstances it is impossible to determine what role if any the lack of attaining detective status had on Mrs Barnett.[413]

558. The employer's submissions linked the worker's failure to obtain detective status with her angry outburst on 10 September 2004.[414]

559. The employer relied upon the worker's outburst directed at Senior Sergeant Sodoli on 10 September 2004 in relation to the adequacy of grounds for a search warrant in particular whether a signed statement needed to be obtained prior to applying for and executing a search warrant.[415]

560. The employer went on to make this submission:

> …the worker's case relies on a mental injury suffered ("diagnosed") from or about 10 September 2004 (paragraph 59 ASOC). The date of 10 September 2004 was presumably chosen because that was the date the worker swore at Detective Superintendent Sodoli…. The situation which "came to a head on 10 September 2004" was as a result of the sum of all the previous psychological insults that

[413] See [85] – [89] of the worker's submissions dated 27 January 2010.
[414] See [239] – [269] of the employer's submissions Part 1 dated 10 March 2010.
[415] See [239] of those submissions. See also pp 194, 538-9 of the transcript and Exhibit E85.

> the worker endured; each and every one of the events had some cumulative effect in the ultimate injury.[416]

561. The employer relied upon the report of Dr Epstein dated 20 April 2009 (Exhibit W96) wherein the doctor attributed the cause of the worker's condition in part to "failure to promote her to the position of Detective in February 2004".[417] The doctor explained that this was one of a series of events which led to her becoming distressed.

562. The employer pointed to the worker's own evidence concerning the importance to her of the detective designation.[418] The employer went on to submit:

> The inescapable conclusion from the worker's own evidence is that the designation would have brought a benefit to her. It would have provided her with a status which was recognised within the Police Force. It would have provided recognition of her ability and experience in the conduct of complex investigations. She saw it as a requirement, in the long term, for continuing to work in the field of long running, protracted, serious offence investigations.[419]

563. The employer also pointed out that "the designation as a Detective also conferred permanency to plain clothes officers working in Detective positions. General Order D4 (part of Exh W106) sets out the relevant process involved in obtaining a detective's position in Crime Command".[420]

564. It was submitted on behalf of the employer as follows:

> Based on the requirement for supervision and assessment of the suitability of a member for detective duties set out in Part 5 of General Oder D4, the natural inference that can be drawn is that a member who does not obtain Detective designation after extended service as a plain clothes officer could not reasonably expect to hold down a detective's position in Crime Command. This is an equally important aspect of the "benefit" conferred by Detective designation, analogous to the concept of permanency in a public sector position, which was considered by Heerey J in *Trewin*.[421]

---

[416] See [240] of those submissions.
[417] See [242] of those submissions.
[418] See [245] of those submissions.
[419] See [246] of those submissions
[420] See [247] of those submissions.
[421] See [248] of those submissions.

565. The employer dealt with the course of events in relation to the worker obtaining her detective designation up until the time of her verbal conflict with Senior Sergeant Sodoli on 10 September 2004, during which she swore at him, and following which the worker was informed that disciplinary action would be taken against her. [422]

566. The employer also referred to attempts by the worker to downplay the significance of her failure to obtain her detective designation.[423]

567. The employer made the following submission:

> The truth is that the worker was very upset about not getting her detective designation; it was still a relevant matter narrated to Dr Epstein for the purposes of the case. She knew on 10 September that she had ruined all prospects of obtaining her detective designation as a result of her own behaviour, as soon as Sodoli told her she was to be charged. Her pretence in evidence at T218 that she did not care as at 10 September was arguably an dishonest attempt to deal with the employer's Defence by pretending that she was not psychologically affected by her failure. Moreover, the worker's pre-occupation with her detective designation continued and was one of the issues in her return to work management plan in March 2006 – see exh W70, page 1, issue (x) under the heading "Issues Arising".[424]

568. The employer submitted that "the evidence… establishes that the worker's failure to obtain a benefit, the detective designation, in connection with her employment, was causative of her injury of 10 September 2004" and that "it is clear that this failure was a significant relevant cause of the worker's injury and comes within the exclusionary elements to the definition of "injury" in s 3 of the Act".[425]

569. The employer then dealt with the disciplinary proceedings, which were initiated after the Sodoli incident:

> Following the worker's angry outburst on 10 September 2004, she went on sick leave. The worker remained on sick leave until a return to work program was negotiated with her in May the following year. It is clear in all the circumstances that the worker's injury in September 2004, and her continued illness from stress, was caused at least in part by the disciplinary action

[422] See [249] – [263] of those submissions.
[423] See [262] - [263] of those submissions.
[424] See [264] of those submissions.
[425] See [266] of those submissions.

instituted against her for swearing and insubordination towards Sergeant Sodoli. In a medical report prepared shortly after these events, Dr Meadows reported the relevance of the disciplinary action to the worker's condition (Ex W66): -

> Detective Barnett has been put on report for calling Sergeant Sodoli a "fucking wanker & for refusing to do a search warrant. Her GP, Wal Tracey, put her on stress leave because of the many incidents referred to above and has written to Mark McAdie about the situation.

The disciplinary action against the worker was reasonable. The worker was served with a formal service of a Notice of Alleged Serious Breach of Discipline in October 2004. The worker provided a written response to the formal notice making admissions. The outcome of the disciplinary action was that the worker was to be counselled. The implementation of the disciplinary action (counselling) was then caught up in the negotiations between the worker and the Human Resources department of the employer over the worker returning to work, following the examination by Dr Meadows. The worker sought to have the counselling deferred until the completion of the return to work management plan but the employer considered that it should be actioned as soon as she had returned to work (T494-5). That decision too was reasonable.[426]

570. The employer concluded its submissions by stating that "the evidence thus establishes that [the worker's] injury allegedly suffered from 10 September 2004 to 31 January 2005 was caused also by 'reasonable disciplinary action taken against the worker', another of the exclusionary elements to the definition of 'injury' in s3 of the Act".[427]

571. In response to the worker's submission to the effect "that because the file for the worker's application cannot be located, the effect of not obtaining her detective's designation cannot be determined", the employer stated that "the file is irrelevant to any exercise in assessing the worker's state of mind, or the effect that the failure to obtain the detective designation had on her".[428]

[426] See [267] – [268] of those submissions.
[427] See [269] of those submissions.
[428] See [44] of the employer's submissions in reply dated 15 June 2010.

572. The employer concluded its submissions thus:

> The expert medical opinion was that the failure to obtain the detective designation had a significant emotional and psychological impact on the worker and contributed to her condition. The worker's emotional state when giving evidence on this issue was consistent with that opinion.[429]

573. In my opinion the expert medical evidence, upon which I am prepared to act, establishes that the failure of the worker to obtain her detective designation was a factor that contributed to her first injury. I am also satisfied that the failure of the worker to obtain such a status within the Northern Territory Police Force fell within the exclusionary elements to the definition of "injury", namely, the failure to obtain a promotion or benefit". In my opinion the failure of the worker to obtain her detective status amounted to a failure to obtain a "benefit" as expounded upon in the relevant authorities, which were discussed very early in these reasons for decision.

574. No submission was received from the worker in relation to the reasonableness of the disciplinary action taken against the worker in October 2004. Nor was any submission received in relation to the contribution of that action to the worker's injury.

575. Having regard to all the available evidence I am satisfied on the balance of probabilities that the disciplinary action taken by the employer was in connection with the worker's employment, and that the disciplinary action was reasonable, not only in principle, but in the manner in which it was taken.

[429] See [45] of those submissions.

The behaviour of Acting Superintendent Andrew Heath during the return to work management plan

576. In relation to the second injury as pleaded in the Amended Substituted Statement of Claim,[430] initially the worker made some very broad sweeping submissions:

> That NT Police failed to properly manage Mrs Barnett's *RTW Program* from psychiatric illness by:
>
> - placing her in an environment not supportive of her known illness;
> - failing to provide those with whom she was working of an understanding of her workplace rehabilitation needs;
> - placing her in a workplace environment contrary to the rehabilitation provider and medical practitioner's advice; and
> - failing to ensure compliance with the terms of the agreed *RTW Program*.[431]

577. The employer, on the other hand, made very detailed submissions in relation to the cause or causes of the worker's second injury.[432]

578. The employer prefaced its submissions thus:

> The worker alleges that she suffered further psychological injury as a result of the "bullying and inappropriate behaviour of Acting Superintendent Heath". The date of the alleged injury is not clearly pleaded but the alleged bullying and inappropriate behaviour appears to include the issuing of a section 79 Notice of Alleged Breach of Discipline by Acting Superintendent Heath on 11 May 2006…
>
> The employer's case is that any injury sustained by the worker in 2006 was:
>
> 1. an accumulation of the previous "insults" and the continuing effects of the 2004 injury; and

[430] The allegation was that the worker sustained a further psychological injury at the hands of Acting Superintendent Heath due to his bullying and inappropriate behaviour: see also [55] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[431] See [101] of the worker's submissions dated 27 January 2010.
[432] See [1] – [121] of the employer's submissions Part 11 dated 10 March 2010.

2. precipitated by events or actions that are properly characterised as reasonable administrative action or reasonable disciplinary action by the employer.[433]

579. Contrary to the pleading of the worker, the employer submitted that the evidence showed that the worker had not ceased to be incapacitated for work after 13 January 2003.[434]

580. The employer then proceeded to make detailed submissions regarding the return to work management plan (May to August 2005).[435]

581. After chronicling the considerable difficulties that the employer had experienced in having the worker agree to the terms of the return to work plan and the worker's resistance to the implementation of the plan, the employer noted that the worker alleges that the employer acted contrary to the return to work management plan in various respects.[436] The employer submitted that "it is therefore important to pay close regard to the actual requirements of that return to work management plan, because it differs from the requirements asserted by the worker in her pleading and in her evidence".[437]

582. The employer refuted the worker's assertion that during the period up to August 2005 she "became aware that neither the fact nor the details and circumstances of her return to work program had been made available to her supervising officers who were consequently critical of the worker for not

[433] See [1] and [3] of those submissions.
[434] See [6] – [12] of those submissions.
[435] See [13] – [24] of those submissions.
[436] See [16] of those submissions.
[437] See [17] of those submissions.

attending at the workplace on a full time basis, which caused the worker to experience further psychological injury".[438]

583. The employer submitted:

> The worker was under the supervision of Detective Sergeant Rob Jordan, who was well aware of the fact of the return to work management plan, and the details and circumstances of it. He had been provided with a copy of the return to work management plan by HR before the worker resumed duties on 1 June 2005 (Exh E82). The worker was the subject of criticism, but not for not working full time.[439]

584. The employer referred to the assignment of a rehabilitation provider (Louise Bilato) to the worker and her role of assisting in monitoring the worker's return to work.[440] The employer also noted the role of Detective Sergeant Hodge as the worker's mentor.[441]

585. As to criticism of the worker, the employer submitted:

> The account obtained in cross-examination of the worker about events surrounding Sergeant Jordan's criticism of the worker arriving late to work (T497.7-499.1) and Sergeant Jordan's mistaken criticism for not attending work on one day (T206.4, T500) is the only evidence of the worker's supervisors being critical of the worker. The criticisms of the worker were not for being unable to work full time but for her tardiness and her unexplained absence from work.[442]

586. The employer submitted that in her detailed progress report to the employer on 14 September 2006 about the worker's return to work management plan Louise Bilato noted the worker had completed 9 weeks of work before embarking on recreation and sick leave that would see her off until December, but made no mention in her report of any "issues of the kind described by the worker in paragraphs 69 to 71 of the ASOC".[443] The employer went on to submit: "According to Louise Bilato's email of 6 January 2006 (Exh W122, tab 10) 'there has been no information to suggest

[438] See [18] of those submissions.
[439] See [19] of those submissions.
[440] See [20] of those submissions.
[441] See [21] of those submissions and pp 497 and 499 of the transcript of the worker's evidence.
[442] See [22] of those submissions.
[443] See [23] of those submissions.

that there were any particular issues or concerns arising regarding Roberta's work performance that might delay her completing the RTW management plan'".[444]

587. The employer then made the following submission:

> The evidence demonstrates that the employer was actively engaged in the return to work management plan from the time of its commencement until the worker went on leave in early August 2005. The worker ultimately conceded that her allegation that her supervisors did not know about the return to work management plan was incorrect (T504.1):[445]
>
> > …I wonder if I could have you have a look at this document 102.[446]…I suggest to you that the fact was Sergeant Jordan did know about your return to work plan and your issues? I don't know, I never seen this before.
> >
> > I suggest to you that your evidence to the effect that he didn't know anything about it isn't (sic) incorrect. Well, it might be incorrect, but I didn't know he knew anything about it. I've never seen this before.

588. The employer proceeded to make submissions regarding the return to work management plan (December 2005 onwards).[447]

589. After referring to the worker's assertion in the Amended Substituted Statement of Claim that the RTWMP mandated by the employer "required the employer to provide weekly written feedback regarding the worker's performance", the employer made the following submission:

> The return to work management did not require weekly written feedback to be provided to the worker. It provided that there would be "weekly discussions…held between yourself and Detective Sergeant Jordan. The purpose of these discussions will be to provide the opportunity of both yourself and Sergeant Jordan to raise any issues that have been identified during the course of the week and address them at the earliest stages" (Exh W69).[448]

[444] See [23] of those submissions.
[445] See [24] of those submissions
[446] This became Exhibit E82, the email from HR to the worker's supervisors on 31 May 2005, attaching the return to work management plan after it had been approved by Dr Tracey.
[447] See [25] – [46] of the employer's submissions Part 11 dated 10 March 2010.
[448] See [26] of those submissions.

590. The employer submitted that the RTWMP also provided for weekly reports to be provided to the Officer in Charge and "appropriate notification of any issues identified".[449]

591. The employer disputed the worker's allegation that "contrary to the supervised management plan the employer failed to provide written or other appropriate feedback".[450] The employer submitted that the RTWMP was properly implemented from December 2005 onwards and that the employer's actions amounted to reasonable administrative action.[451] The employer submitted that the evidence demonstrates that this is the case.[452]

592. In response to the worker's allegation that no one at Palmerston knew she was on a RTWMP, the employer said that "the documentary and oral evidence demonstrates that the worker's supervisors were all briefed on the contents and requirements of the return to work management plan at the time of her commencement at Palmerston".[453]

593. The employer made the following submissions:

> A meeting of the relevant personnel involved in the management plan, including the worker herself, was held on 16 December 2006, within a week of the worker resuming work. Under cross examination the worker acknowledged that the meeting had taken place and the return to work management plan had been discussed (T505-6). The email from Louise Bilato to Greg Dowd dated 6 January 2006 (Exh W122 Tab 10) further corroborates the timing and content of the meeting.
>
> The worker's supervisors knew about the detail of the return to work plan and what was required of them. That is evidenced by the fact that immediately upon her commencement at Palmerston, the worker's supervisor Sergeant Turner submitted memoranda which were clearly for the purposes of her return to work management plan (Exh W71, W72).
>
> Sergeant Turner left the unit in early February 2006 and Sergeant Bennet took over the supervision of the worker. Sergeant Bennett's first report of 16 February 2006 (Exh W73) was unremarkable but reflects precisely what was

[449] See [27] of those submissions.
[450] See [28] of those submissions.
[451] See [28] of those submissions.
[452] See [28] of those submissions.
[453] See [30] of those submissions.

intended by the return to work management plan. In that memorandum, he reported that he had discussed an issue with the worker:

> Det Barnett and I had cause to discuss an issue relating to my role as supervisor and the need for me to be informed of investigations undertaken within the section. The issue was discussed and has been resolved amicably. There are no issues that warrant any further action to be taken.

Consistently with the return to work management plan, appropriate notification of the issue was undertaken by Sergeant Bennett. Also, consistently with the return to work management plan, Sergeant Bennett reported on the matter to his OIC. There was no further requirement for a copy of that memorandum to be provided to the worker.[454]

594. The employer went on to submit that Sergeant Bennett had further discussions with the worker and that "the discussion was no more than a simple correction of the worker's behaviour and was within the usual managerial role of the supervising sergeant".[455] The employer submitted that "it was the type of feedback that was specifically contemplated by the return to work management plan".[456]

595. The employer then made the following submissions:

> On 1 March 2006, Sergeant Bennett submitted a memorandum to Senior Sergeant Heath documenting the issues that he had identified and discussed with the worker in the course of his supervision of the worker (Exh E83). These were the same kind of issues that the worker had been counselled about many times in the past or in relation to which the worker had been spoken to in the past. It involved an interchange between the worker and her immediate supervisor in which the worker reacted angrily and aggressively to criticism of her performance… It was such behaviour that the return to work management plan was directed at addressing and working on resolving (although the worker refused to concede that to be the case when cross examined about it T491).
>
> In submitting the memorandum to the OIC of the station, Sergeant Bennett was complying with the return to work management plan. There was no requirement for the memorandum itself to be provided to the worker, either under the terms of the return to work management plan, or as a matter of general fairness.
>
> Senior Sergeant Heath… reviewed the memorandum on 3 March 2006. He spoke to Sergeant Bennett and then telephoned Louise Bilato to discuss it with her. Senior Sergeant Heath made notes of that conversation (Exh E172). Louise Bilato suggested a meeting of the relevant personnel, including the worker. This meeting was arranged for 7 March 2006.

[454] See [31] – [34] of those submissions.
[455] See [35] of those submissions.
[456] See [35] of those submissions.

> In contacting Louise Bilato Senior Sergeant Heath behaved very reasonably. There was no reason why he could not have spoken to the worker directly about the matters raised by Sergeant Bennett, but Louise Bilato was able to offer Senior Sergeant Heath some assistance with managing the issues that had arisen. Louise Bilato contacted the worker and spoke to her directly about the issues that had been identified by Sergeant Bennett and Senior Sergeant Heath. From this, she prepared her agenda for the meeting, which listed a number of the things that the worker had said in response to the issues raised by them (Exh E123).
>
> The worker's response to notification of the meeting was to take sick leave. The email documentation in evidence establishes that shortly after receiving the meeting invitation the worker spoke to Louise Bilato and arranged to see Dr Tracey (Exh W94, p 56). She saw Dr Tracey that day and he issued her with a medical certificate to go off work for 10 days (Exh W94, p 54).
>
> The result was the worker avoided attending the meeting that had been scheduled for the purposes of addressing the worker's performance issues as identified by Sergeant Bennett to Senior Sergeant Heath. The employer was unable to address with the worker the legitimate concerns it had with her performance.
>
> There is no doubt that the worker knew what the purpose and subject of the meeting was to be...[457]

596. The employer submitted that Dr Tracey's willingness to provide the worker with a medical certificate, excusing her from the meeting, caused some frustration to Louise Bilato.[458]

597. The employer submitted that it was clear from her email and her evidence that Louise Bilato did not consider that the worker could not attend the meeting.[459]

598. Finally the employer made this submission:

> As far as Louise Bilato was concerned Dr Tracey was not just very supportive of the worker but "extremely" so (T1219.8). This was only the second time in 2006 that the worker had consulted with Dr Tracey and the only time relating to her injury or the return to work management plan (exh W 94, p 131). Nevertheless, Dr Tracey responded to Louise Bilato's emails by expressing his support for the worker and agreeing that she should not have to sit in meetings. He did so notwithstanding that he had approved the return to work plan in June 2005

[457] See [37] – [43] of those submissions.
[458] See [44] of those submissions and Exhibit W94, p56.
[459] See [45] and page 1229 of the transcript.

> which specifically provided for the regime the worker was complaining to him about.[460]

599. At paragraph 47 of its submissions dated 10 March 2010 the employer stated:

> A central plank of the worker's case was that the alleged bullying and harassment by Acting Superintendent Heath occurred in the setting of a medically imposed requirement that the worker be provided with a psychologically supportive workplace.[461]

600. At paragraphs 48 to 64 of its submissions the employer embarked upon a close examination of all the surrounding circumstances and whether Acting Superintendent Heath had responded inappropriately to restrictions being imposed by the worker's doctor, Dr Tracey.

601. The employer noted that Dr Tracey certified the worker unfit for work from 3 March until 12 March 2006, and subsequently issued a certificate stating that the worker could only work 3 days a week in "a psychologically supportive workplace"; and this was done without reference to the employer and without participating in the meeting held on 7 March 2006.[462]

602. At paragraph 50 of its submissions the employer submitted that it was "quite clear that Sergeant Bennett knew precisely what the management plan entailed" and that "the first memorandum on 16 February 2006 (Exh W73) illustrates Sergeant Bennett's understanding of the arrangements".[463] The employer also submitted that "it must have been obvious to her (the worker) that the process of management contemplated in the return to work management plan was being undertaken at the initiative of Sergeant Bennett".[464]

---

[460] See [46] of those submissions.
[461] See [47] of those submissions.
[462] See [48] of those submissions.
[463] See [50] of those submissions.
[464] See [51] of those submissions.

603. The employer went on to make the following submissions:

> Dr Tracey somewhat unhelpfully explained what he meant by the expression "psychologically supportive workplace" : "Well, by saying – specifying a psychologically supportive workplace, you'd expect the patient not to be bullied or harassed because that's what led to the patient suffering an injury in the first place." (T634.3)
>
> It is clear that Dr Tracey took the view that the issues being raised with the worker and the complaints about her behaviour in the workplace were further examples of bullying and harassment, notwithstanding that he had only the worker's version of events to support such a claim, and notwithstanding that Louise Bilato had stated in her email to him before the worker saw him on 3 March that Superintendent Greg Dowd had expressed strong support for the worker, albeit with a qualification that he had a responsibility to consider the ongoing suitability of detective work if the worker could not cope with it.
>
> The consequence of the worker's refusal to attend the meeting, and her doctor's unqualified acceptance of her version of what was occurring in the return to work management plan was that the employer was unable to address directly with the worker the issues that needed to be addressed in order to maintain functional working environment for both the worker and the employer. It left the employer with little practical alternative but to consider transferring the worker to a different position that would meet the restrictions that were imposed by her injury or illness.
>
> The difficulties facing the worker's supervisors were set out in an email from Superintendent Dowd to Louise Bilato on 13 March 2006:
>
> > I am concerned that we cannot meet these requirements and still run an Investigations Unit efficiently. I need a team who are available for callouts and weekend work. That team needs to work cooperatively and feel they are not carrying others who are not prepared or able to put in the effort to make the unit work. (Exh W122 Tab 12)[465]

604. The employer submitted that there were "genuine issues with whether the worker could continue to work in the unit given her restrictions".[466] The employer also submitted that at pages 674 to 675 of the transcript Dr Tracey acknowledged that it might not be possible for the employer to provide the worker with a psychologically supportive workplace, and that the worker might be better off out of detective work.[467]

---

[465] See [54] – [57] of those submissions. See also Sergeant Bennett's email to Senior Sergeant Heath and Superintendent Dowd on 17 March 2006 (Exhibit E124) referred to in [58] of the employer's submissions.
[466] See [59] of those submissions.
[467] See [60] of those submissions.

605. The employer submitted that "there was no evidence whatsoever that the worker's colleagues were harassing her or that they were not giving her a fair go, but the difficulties with accommodating the worker in the unit were borne of practical necessity from the very nature of the work involved, and the make up of the unit".[468] The employer stated that the difficulties were outlined in the email from Sergeant Bennett to Senior Sergeant Heath on 17 March 2006.[469]

606. The employer then proceeded to make the following submission:

> Senior Sergeant Heath proposed 2 alternative positions, both of which would still carry a detective's role but would accommodate the worker's need to work at her own pace and without perceptions of constant supervision (Exh E124). There is no suggestion that Senior Sergeant Heath was undermining the worker, harassing her, or bullying her, in identifying these positions. It is not known if the worker even knew about them. Louise Bilato was supportive of the need to consider those options (Exh W143).[470]

607. It was submitted on behalf of the employer that Senior Sergeant Heath confirmed his intentions in identifying those positions at T1367.8.[471]

608. The employer then made the following submission:

> The worker's counsel then incorrectly suggested that there was no response from the employer to that suggestion. In fact the suggestion was picked up by Louise Bilato and Greg Dowd on 21 Mach 2006 (Exh W 143) but not pursued because it would have entailed a return under the command of George Owen. Acting Senior Sergeant Heath referred to that fact in his evidence at T1368.9 – 1369.2.[472]

609. The employer then turned to address the alleged questioning of the worker's diagnosis:

---

[468] See [61] of those submissions.
[469] See [61] of those submissions.
[470] See [62] of those submissions.
[471] See [63] of those submissions. Heath gave evidence that he could not meet the full operational requirements of the unit because he needed a full time person who could devote and take their fair share of the load; and the worker was not able to do that. In relation to the suggested positions, Senior Sergeant Heath said " …the reason I looked at that was to assist Senior Constable Barnett so she could maintain her senior constable detective status as well as complete the program and taken into consideration some of the – was going to that Roberta Barnett's perspectives on E123. I was just trying to balance everyone if I could". Senior Sergeant Heath was asked this question "The reality was you couldn't accommodate somebody who could only work part time … and needed psychological support" to which he gave the answer "Not within that unit, that's correct".
[472] See [64] of those submissions.

The worker alleges that one of the acts of administrative bullying by the employer was in the form of Senior Sergeant Heath questioning the worker's diagnosis. The worker has identified the apparent questioning of the worker's diagnosis in a memorandum issued by Acting Superintendent Heath on 12 April 2006 (the Heath memorandum) as the major factor contributing to her strong reaction to it. It records a conversation that had taken place between then Acting Superintendent Heath and the worker that occurred some time shortly before the memorandum was issued:

> The reporting member has since spoken with S/C Barnett to see how she is coping with working three days per week. The member also asked S/C Barnett whether her illness has been appropriately diagnosed and whether correct medication has been prescribed to her in order to assist her RTW program. S/C Barnett advised the reporting members that she had been diagnosed with an illness and that she is taking medication.

The memorandum thus did no more than record the earlier conversation between the two officers at an earlier time. Nevertheless, given the significance attached to the issue of questioning the worker's diagnosis at all, it is worth examining the circumstances of how that came about.[473]

610. The employer made these submissions in relation to the issue:

- Seen in proper context the questioning was not as the worker sought to characterise it "an act of undermining the worker or her relationship with her treating doctor;[474]

- The worker's medical condition and whether it had been correctly diagnosed was one of a number of matters discussed between Acting Superintendent Heath and the worker, as detailed by Acting Senior Sergeant Heath in his evidence at page 1317 of the transcript;[475]

- The worker was not upset by the discussion and Heath was being "a supportive manager";[476]

- The conversation between the worker and Acting Superintendent Senior Sergeant Heath needs also to be considered in the context that there was some discussion about

[473] See [65] and [66] of those submissions.
[474] See [67] of those submissions.
[475] See [69] of those submissions. Acting Senior Sergeant Heath's evidence was as follows: " I asked her have you got this illness diagnosed correctly…are you on medication for it, is the mediation the right medication, is it the right dosage. I'm just looking at as the manager to try and work, look at all of the factors that could possibly be affecting Senior Constable Barnett's mood and behavioural changes that happened rapidly in the workplace at times". He gave the following evidence as to what prompted him to ask that series of questions: "The reason I say that, and I related this to Roberta at the time, is that my first wife suffered a mental illness and also suffered from cancer, and there were different medications the doctors put her on and I knew from my experiences on the home front that some medications don't work… so I was talking to Senior Constable Barnett like that to try and show her that look I'm empathetic …."
[476] See [70] of those submissions.

the certainty of the diagnosis of the worker's condition.[477] Louise Bilato had identified the medical management of the worker's condition as an issue for the 7 March meeting. When questioned about this, Louise Bilato acknowledged that she had doubts about the worker's condition herself and that she had discussed these with the worker's supervisors;[478]

- Given that "there was active inquiry and discussion of those issues (including with the worker herself) going on at the time, and given that the discussions included the employer, it was reasonable for Acting Superintendent Heath to raise the matter with the worker and to do so in an appropriate way. The fact that the worker took no offence to the discussion at the time is indicative of its appropriateness and reasonableness.[479]

611. The employer then made extensive submissions in relation to the memorandum of 12 April 2006 (the Heath memorandum).[480]

612. The employer referred to the worker's complaint that her weekly and monthly reports were not being provided and that she was not being provided with a copy of those reports.[481] The employer made these submissions in relation to the worker's complaint:

> It is clear from the terms of the return to work management plan that the worker in fact did not have an entitlement to copies of the reports and the obligation of the worker's supervisor was to simply appropriately notify her of any issues. Notwithstanding that the worker had been provided with copies of some of the reports.
>
> Appropriate notification of issues had occurred, through the discussions between Sergeant Bennett, the raising of the issues with Louise Bilato and the intended meeting of 7 March 2006, the subsequent discussions between Louise Bilato and the worker after the meeting and the informal meetings between Acting Superintendent Heath and the worker.
>
> So, in respect of the period before the worker went on sick leave the worker's allegation at ASOC 75 that the employer failed to provide "written or other appropriate feedback" is incorrect.[482]

[477] See [71] of those submissions.
[478] See [71] of those submissions and pages 1226 and 1227 of the transcript.
[479] See [73] of those submissions.
[480] See [74] – [92] of those submissions.
[481] See [74] of those submissions.
[482] See [76] – [78] of those submissions.

613. At paragraphs 79 and 80 of its submissions the employer submitted that no new or further issues were identified in relation to either the worker or the worker's performance. The employer went on to submit:

> It is also unsurprising that the worker's supervisors did not within that time submit weekly written reports to the Officer in Charge. Nothing turns on any failings of the worker's supervisors in that regard. The critical thing as far as the worker was concerned was that she be given appropriate feedback.[483]

614. The employer then submitted:

> The monthly reporting had in fact occurred by virtue of the meeting on 7 March at which all stakeholders – particularly, relevant management personnel who were to be kept informed through that monthly reporting – attended. By 12 April 2006, therefore a monthly report was not overdue at all. That concession was wrongly made by Acting Superintendent Heath, albeit that it was done in good faith.[484]

615. Before going on to make specific submissions in relation to the Heath memorandum, the employer recited paragraphs 75 and 76 of the Amended Substituted Statement of Claim:

> Contrary to the Supervised Management Plan the employer failed to provide written or other appropriate feedback. On 12 April 2009 (sic) the worker requested the officer charged with that responsibility to provide the performance written feedback, Acting Superintendent Heath, and complained that she was not also, contrary to the Supervised Management Plan, having regular review meetings with her immediate supervisor. These particulars were also requested by the Rehabilitation provider Ms Bilato.
>
> Acting Superintendent Andrew Heath responded to this request by issuing disciplinary proceedings against the worker.[485]

616. The employer submitted that the substantive allegation demonstrated a fundamental misconception of the action taken by Acting Superintendent Heath: the superintendent did not respond to the worker's request for written feedback by issuing disciplinary proceedings, but responded by providing the written feedback that she had requested.[486]

---

[483] See [81] of those submissions.
[484] See [82] of those submissions.
[485] See [83] of those submissions.
[486] See [84] of those submissions.

617. The employer went on to make the following submissions:[487]

> The Heath memorandum was detailed. He agreed with the worker's counsel's suggestion that he had "rolled all the facts into one big one" but that agreement does not amount to agreement with the false premise that the worker had not been getting any feedback… The worker had received comprehensive feedback about all the issues identified by her supervisors relating to her performance.
>
> Unsurprisingly, therefore, the information contained in the memorandum was all information that the worker, Louise Bilato, Senior Sergeant Heath and Sergeant Bennett already knew. However, what the memorandum did do, was provide a detailed briefing to the incoming supervisors of the worker as to the details and the history of the return to work management plan. It provided an accurate summary of the issues that were presently affecting the return to work management plan. The need for the worker's supervisors to be fully briefed was something which the worker had placed great emphasis upon both at the time – viz her (false) complaint to Dr Tracey that Sergeant Bennett needed to be briefed – and in these proceedings, both in her pleading (ASOC paragraph 69) and her evidence (T213.9; T223.3).
>
> Significantly what the memorandum contained was a record of criticisms that had been made of the worker's performance and behaviour and its impact on other members of the unit. Those were matters which it was appropriate to include in the memorandum.
>
> Louise Bilato agreed that the matters that had been discussed in the 7 March meeting should be disclosed to the worker given that she had not attended…[488]
>
> Dr Tracey also acknowledged that, if the worker had not attended meetings related to her return to work program, she was nevertheless entitled to know what had been discussed.[489]
>
> The only specific complaint that the worker made in evidence about the contents of the Heath memorandum was that it questioned the diagnosis of her condition…
>
> No other complaint as to any of the contents of the Heath memorandum was made by her. The same, single complaint was made of the Heath memorandum by Dr Tracey, who also did not identify any other matters that made the memorandum inappropriate.
>
> The evidence clearly establishes however, that the supposed questioning of the worker's diagnosis was not an issue raised for the first time in the memorandum at all (see paragraphs 68 to 72 above), and moreover, that the question of the worker's diagnosis was an issue relevant to the return to work management plan, which had been appropriately raised with the worker, as contemplated by that plan.

[487] See [85] – [92] of those submissions
[488] See p 1229 of the transcript.
[489] See p 675 of the transcript.

618. The employer then proceeded to address what it says is the true reason for the Heath memorandum causing offence.[490] In particular, the employer made this submission:

> The Heath memorandum contained detailed criticisms of the worker's performance and her attitude and behaviour in the workplace (balanced with a range of information including recognition of the worker's capabilities and capacity to produce work of good quality). It is probable that those criticisms of the worker were the real cause of the worker's angry reaction to the memorandum. However, there was no reason for the worker's supervisors to consider that the worker should not be provided with information about her performance, including negative or critical information. Indeed, the return to work management plan was built around the communication of such information for the purpose of the worker continuing to work on improving her performance in this area. This was most clearly articulated by Louise Bilato's background report to the management plan (exh W1`22, tab 3):
>
> The return to work plan is in place for six months with the intention to ensure that open communication and to facilitate the early identification of any training or development needs via weekly meetings with her direct supervisor, Detective Sergeant Rob Jordan.[491]

619. The employer then proceeded to make a set of submissions in relation to the effect of the Heath memorandum.[492]

620. The employer began by referring to the worker's pleadings:

> The worker alleges in paragraph 76 of the ASOC that Acting Superintendent Heath "responded to the worker's request" for feedback by issuing disciplinary action against her. This allegation is either a misunderstanding of the nature of the Heath memorandum or a misrepresentation of it, together with the complete omission of any account of the worker's angry and aggressive outburst in the workplace the day it was received.[493]

621. The employer made the following submission:

> The Heath memorandum was also misconstrued by Louise Bilato. Subsequently, Louise Bilato wrote a strongly worded letter to the Director of Human Resources for the employer (Exh W 122, folio 7). However, a close analysis of Louise Bilato's letter shows that she made the same fundamental error as to its status in her attack upon Heath as the worker has done in her ASOC. She mistakenly understood the memorandum itself to be disciplinary action against the worker, or alternatively, has misunderstood the disciplinary action to have been taken for the matters referred to in the memorandum.

---

[490] See [93] –[96] of those submissions.
[491] See [96] of those submissions.
[492] See [97] – [103] of those submissions.
[493] See [97] of those submissions.

Louise Bilato acknowledged in her evidence (T1237.6 – 1238.1) that she was completely mistaken about the purport of the Heath memorandum. Her concerns about his actions were found to be without foundation:

> Well what do you refer to when you say that he has seriously undermined your therapeutic alliance with Ms Barnett? Well because he was in – in my view in that internal memorandum it was provocative and he was putting those statements back to her for very different purposes and the purposes in which they were intended for that meeting. So…I took exception and I did not believe that there was good intent in him putting those statements into an internal memorandum to – for disciplinary purposes.
>
> …but it wasn't only for disciplinary purposes, was it? This was not a memorandum for disciplinary purposes?
>
> No, no. It was – if you look at the initial part of it, it's in response to a complaint by the worker that she hadn't received sufficient reports or regular reports on matters relevant to her supervised management plan for her return to work, and – and so if you look at the initial parts of Exhibit W74 you'll see that Acting Superintendent Heath refers to an email stating – an email received from Ms Barnett stating that her weekly and monthly reports were not being completed, she's not been provided with a copy of the reports and then saying he agrees with her setting out the reports that had been received and then going on to set out a history of events leading up to the date of the memorandum itself. But it's certainly – did you think it may have been for disciplinary purposes, did you? Yes, I'm sorry I did I –and again I was away at the time and certainly it had a very significant impact on Ms Barnett on my return.
>
> But anyway so it was your understanding it may have been for disciplinary reason? Well is there – is there not something else that went with this?
>
> No.
>
> Ms Gearin: No.
>
> (T1240.8-1241.1) "… And so what I'm suggesting to you is that the report is apparently doing no more than providing a summary of the conversation that he had with Mrs Barnett? Yes, from his perspective those comments, yes.
>
> Yes, entirely from his perspective, but it – on the face of it appears to be a report of discussions he had already had with the worker? Yes.
>
> And if I understand your evidence you didn't appreciate those matters at the time you first read exhibit W74 because you thought it was tied up in some way [with] disciplinary proceeding and you were reading it as though the two were somehow or other connected? Absolutely. Well I

> think Roberta had been – the – the information I had got that she had been charged with something.[494]

622. The employer went on to submit that "Louise Bilato also asserted that the Heath memorandum was a serious breach of confidentiality, however, when appraised of the true nature of the Heath memorandum under cross examination (at T1236.2) that concern fell away'.[495] The relevant evidence was as follows:

> Ms Bilato, just before you look at exhibit W74, you said in your letter to police human resources, dated 22 May 2006 that in the second paragraph of that letter you believe… I put it to you fully "Having received a copy of an internal memorandum written by Acting Superintendent Andrew Heath, which you supplied to Ms Barnett on 13 April 2006, I believe that he has seriously breached my confidentiality and furthermore has questioned the medical diagnosis…"
>
> I just wondered if you could identify for us where you believe that Acting Superintendent Heath has breached your confidentiality? I think I was referring to the – all the comments that were in that original agenda item and that he had quoted me in this memorandum as putting, I think that was part of it.
>
> Mr Barr: I was just going to say, was there any other matter that appears that – in what other way do you believe that Acting Superintendent Heath breached your confidentiality? Well…in particular reference to those statements that I believe he was stating it out of context and I hadn't had I guess a chance to discuss with him that he was going to be putting them into something like this that they were an agenda item that was put on the – at the meeting and then here it was being put back in a – a very different statement or a different context.
>
> But if you could please look at exhibit 133 the agenda paper? Yep.
>
> Ms Bilato, it would seem that he has accurately transposed or transcribed the matters that you identified in that agenda paper under the heading "Roberta Barnett's perspective"? That's right, yes.
>
> … Was there any other respect in which you believe that he had seriously breached your confidentiality? No, I think it was more in relation to the comments that were raised in that meeting and that… had been implanted into this internal document.
>
> …But is it the case that you yourself had no reason not to disclose to Ms Barnett the matters that were in the meeting agenda paper? No that's right – I agree with that…..I do believe that she actually had a copy of that. It was the… context in which this was being written and it is my surprise that they – those

[494] See [98] – [99] of those submissions.
[495] See [100] of those submissions.

> comments were being quoted in a … document such as this that that wasn't the intention of the original meeting.[496]

623. It was submitted on behalf of the employer that "the misapprehension by Louise Bilato in relation to the effect of the Heath memorandum was further confirmed in re-examination by the worker's counsel, at T1247.5".[497] The employer went on to make the following submission:

> In any event there must be real doubt that the views expressed by Louise Bilato in that letter (the letter of 22 May 2006) were ever genuinely held by her. She expressed a very different view of the worker's reaction to the Heath memorandum when writing to the Human Resources personnel of the employer (exh E 126).[498]

624. The employer ended its submissions on this discrete issue with the following submission:

> When the confusion surrounding the nature of the Heath memorandum is removed, Louise Bilato's view as expressed in that email is most probably the truth of the situation on 12 April 2006. The worker was not being subjected to disciplinary action at all. She had received information that was critical of her performance and attitude and as a consequence, she reacted in a totally inappropriate way. As Mrs Bilato accurately observed, the worker's outburst was about self - justification.[499]

625. That submission was followed by a number of submissions regarding the worker's behaviour on 13 April 2006.[500]

626. The employer submitted that the worker "reacted to the memorandum by blowing up with an angry outburst" and left the workplace.[501] The employer went on to submit:

> The worker's behaviour was inappropriate. It was a display of insubordination, aggression and abusive and offensive language by an officer of a lower rank directed towards an officer of a higher rank. Although the words were not said to Acting Superintendent Heath's face, they were publicly made.
>
> Such behaviour in any organisation is inappropriate and could be expected to attract some form of disciplinary response – informal or formal, from a rebuke

[496] See [100] of those submissions.
[497] See [101] of those submissions.
[498] See [102] of those submissions.
[499] See [103] of those submissions.
[500] See [104] –[113] of those submissions.
[501] See [105] of those submissions.

through to a warning or even dismissal. In the NT Police any serious disciplinary action against an officer could only be undertaken by invoking the processes under Part IV of the *Police Administration Act*.

Acting Superintendent Heath investigated the circumstances of the worker's conduct in order to satisfy himself that formal disciplinary action was called for. He obtained the statutory declarations of Sergeant Blackwell and of 2 junior officers (exh E 134). Those statements confirmed that:

- The worker threw a computer mouse at the wall and knocked over items on her desk;
- The worker swore repeatedly;
- The worker told Blackwell "Andrew can stick this meeting";
- The worker told Blackwell "You can tell Heathy to go and get fucked";
- The words were spoken in a loud and aggressive manner and were witnessed by Blackwell and the 2 other officers.

The decision by Acting Superintendent Heath to take disciplinary action against the worker cannot be construed as an act of vindictiveness on his part. He was virtually bound to follow that course given the very public nature of the worker's out burst. In any event, there is no suggestion that he had any malice or ill feeling towards the worker at all prior to the outburst. Formal disciplinary action had been taken against the worker for a similar outburst and the worker had been formally counselled for it.

The worker's outburst was properly investigated by Acting Superintendent Heath before he made any decision to issue a Notice of Alleged Serious Breach of Discipline (Notice). It was not suggested by the worker's counsel that the conduct of the worker was not sufficient to justify issuing the Notice. However it was clearly the intent of her cross examination of Mr Heath to establish that he had decided to issue the Notice before he had received the statements of the relevant officers. It turned out that all the statements predated the date of issuing the Notice (by some margin): T 13409.7 – T1410.3)[502]

627. The employer submitted that "under cross examination by the worker's counsel Mr Heath explained the extent to which he sought guidance from within the organisation before issuing the Notice at T 1408.7- 1409.7".[503]

628. In closing the employer made these final submissions:

The process adopted by Acting Superintendent Heath in sending the Notice to the worker by registered post was a reasonable way of proceeding while respecting a directive from the worker's husband that there no personal contact.

[502] See [106]- [110] of those submissions.
[503] See [111] of those submissions.

> It was reasonable for Acting Superintendent Heath to infer that such directive meant personal contact. The alternative, implied in questions from the worker's counsel, would have meant that the notice could not be served by any means and therefore could not have proceeded at all. The worker was not entitled to unilaterally (and without any medical confirmation that her mental condition required absolute shielding from any contact whatsoever with her employer) to frustrate that process by preventing the Notice from being served in any manner.[504]

629. The next set of submissions made by the employer was directed at the withdrawal of the Notice.[505]

630. At paragraph 114 of its submissions the employer noted:

> The worker alleged at paragraph 79 of the ASOC that the Notice was withdrawn on 22 June 2006. When read in conjunction with the allegation at paragraphs 76 and 77 of the ASOC the clear imputation is that the withdrawal of the Notice was an acknowledgment by the employer that the issuing of the Notice in the first place was somehow bullying and inappropriate behaviour.

631. The employer relied upon the explanation given by Acting Sergeant Heath as to why the Notice was withdrawn.[506] Acting Sergeant Heath gave evidence of having a meeting with Assistant Commissioner McAdie. He went on to say:

> By that stage I formed the opinion that this issue can no longer be dealt with at Palmerston Police Station level and for the Assistant Commissioner McAdie and Helen Campbell to be involved, it's now sort of gone to the strategic level, and we had a discussion about the section 79 and I was advised by the Assistant Commissioner and Helen Campbell that they're coming up with some management plan for Senior Constable Barnett. They asked me if I would consider withdrawing section 79 and listening to, I can't recall the conversation, but my understanding was that there was a bigger picture for Senior Constable Barnett. So I had no issues of withdrawing the section 79 and I notified Senior Constable Barnett of that because basically it was going to a higher level.[507]

632. As to whose decision it was to withdraw the notice, Acting Sergeant Heath stated:

> It was suggested to me by Assistant Commissioner McAdie because…they were looking at a more long term strategic sort of management, which I don't know what that was…it was they were not pressuring me to withdraw it. I saw that they were taking over the management of Senior Constable Barnett and I was

[504] See [112] – [113] of those submissions.
[505] See {114] – [117] of those submissions.
[506] See [115] of those submissions and the evidence of Heath at p 1328 of the transcript.
[507] See [115] of those submissions

> quite happy to withdraw the section 79 for them to go down whatever line they were going to take, which I'm not aware.[508]

633. The employer pointed out that Acting Sergeant Heath rejected the suggestion that he had been directed by McAdie to withdraw the Notice.[509] He said that it was merely suggested to him that he withdraw the notice: "I wasn't directed. I withdrew the section 79 to assist them with whatever they were going to do".[510]

634. The employer submitted that the worker's counsel did not ask Assistant Commissioner McAdie about the withdrawal of the Notice: "no other evidence was advanced in the worker's case to support the suggestion that the Notice had been withdrawn because it had been used inappropriately".[511]

635. At paragraph 118 of its submissions the employer submitted that it is most unlikely that the memorandum from Acting Superintendent Heath seeking the suspension of the worker's shooter's licence had anything to do with the worker's injury, because "the worker was most probably unaware of it at the time and is unlikely to have known about it until after the commencement of these proceedings".

636. However, the employer noted that the worker's counsel sought to rely on the memorandum as evidence of bullying and inappropriate behaviour. The employer submitted that "there is no basis to reach such a conclusion about Heath's conduct in that regard" and "Heath was acting in good faith".[512]

637. The employer made the following final submissions:

> The worker has not established that Acting Superintendent Heath acted in any way that could be construed as harassment or bullying of the worker. Acting Superintendent Heath's only "fault" was to provide the worker with a written account of matters of which she was or should have been, already aware.

---

[508] See [115] of those submissions.
[509] See [116] of those submissions and pp 1329-1330 of the transcript.
[510] See [116] of those submissions and the transcript.
[511] See [117] of those submissions.
[512] See [118] of those submissions.

> The worker's reaction to the Heath memorandum was given due consideration not only by Heath but by other suitably qualified and skilled personnel within human resources and welfare divisions of the employer. Acting Superintendent issued the disciplinary notice with their agreement and support. The notice was subsequently withdrawn not because it had been issued inappropriately but because Acting Superintendent Heath had been advised by management that they wanted to re-establish a return to work process and preferred that he withdraw the notice in order to facilitate the prospects of a successful return to work by the worker.[513]

638. The worker made the following specific submissions:

> Without reiterating all the evidence surrounding the return to work management plan (RTWMP) it is clear that one such plan was implemented from on or about 31 May 2005.
>
> The RTWMP required certain reports to be done on a certain time scale.
>
> The reports required under the RTWMP were not completed. The employer suggests the requirement in relation to the completion of the reports was not as stringent as that made out by the worker. The employer suggests the RTWMP "provided for weekly reports to be provided to the Officer in Charge" and "appropriate notification of any issues identified". The explanation fails to identify why Sergeant Lenny Turner (Turner) set the objectives with the worker and left her to achieve the goals set, and continued to submit written reports. These written reports were all favourable regarding the worker's work performance.
>
> The RTWMP did require weekly written reports to be completed as evidenced by Louise Bilato (Bilato) in her email dated 6 January 2006 (Exhibit 122, tab 10). She refers to the meeting held at Palmerston Station on 16 December 2005 with Heath, Turner and the worker and states:
>
> > So the bottom line is:
> >
> > 1. Roberta Barnett completed 9 weeks of the 26 weeks RTWMP at Casuarina Station working 3 days/week.
> >
> > 2. There has been no information to suggest that there were any particular issues or concerns arising regarding Roberta's work performance that might delay her completing the RTWMP.
> >
> > 3. Roberta has now been back at work since 09 December. Therefore a monthly report would now be due to be drafted by the OIC for you outlining her work performance and any issues etc.
> >
> > 4. On the understanding that her time at Casuarina station was counted as 9 full weeks Roberta would have 17 weeks to complete and if she were to take no further leave then the RTWMP would be finalised by 14 April 2006.

[513] See [120] – [121] of those submissions.

> My understanding of the spirit, or intention, of the RTWMP is to encourage employees to take more responsibility for their work behaviours and for supervisors to be more aligned with, or be able to identify appropriate management strategies if required. I would hope that something useful is gained for this process and that it is not simply another layer of bureaucracy that achieves no discernible benefit for either the worker or the supervisor.

When questioned by Counsel for the worker about the RTWMP procedures Heath answered at the top of T1348:

> Right. So that's the first report that Len submitted. The next one is 25 January, that we've been able to find, W72? Yes.
>
> That's more than a week later, isn't it? It is.
>
> Almost two weeks later, isn't it. Well, whatever the dates are, it doesn't matter, the 13th to the 25th is more than a week? Yes
>
> The next one, I suggest, is W73, which is 16 February? Yes.
>
> They're the only ones that we've been able to identify so it appears, would you agree, that those weekly reports were not submitted? Yes.[514]

639. The worker submitted that "Bilato's reference to the reports submitted by Turner clearly demonstrate that Turner knew about the requirements of the RTWMP".[515] The worker went on to submit:

> It is acknowledged that Turner's compliance was less than required. There is no evidence, however, that even though Bennett who was aware of the reporting requirements when he took over as the worker's supervisor at Palmerston, he had understanding of her part-time status and workload which ultimately caused further problems. While it is clear Bennett must have known of the existence of RTWMP, there is noting in his memorandums which indicates he is aware of the terms and obligations of the RTWMP. In any event Bennett failed to provide weekly reports to the worker on time or at all.[516]

640. In response to a submission made on behalf of the employer the worker submitted:

> The employer alleges the RTWMP did not require weekly written feedback to be provided to the worker from December 2005. In paragraph 28 of the employer's submissions the employer suggests "…that the return to work management plan was properly implemented in the course of the worker's return to work from

[514] See [56] –[60] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[515] See [61] of those submissions.
[516] See [61] of those submissions.

> December 2005 onwards and that the employer's actions were reasonable administrative action. The evidence demonstrates that this is the case".
>
> Despite the employer's submissions alleging the RTWMP did not require weekly written feedback when questioned by the worker's counsel Heath conceded at T1348.7 that:
>
> > They're the only ones that we've been able to identify so it appears, would you agree, that yours weekly reports were not submitted? Yes.
> >
> > And you didn't submit yours in January? No, it doesn't appear I did.
> >
> > There's no doubt, in relation to this email that you received, that you were advised of those obligations on 16 January 2006.
> >
> > Furthermore, at T 1349 Heath further conceded he was aware the RTWMP was due to end on 14 April 2006…
>
> Again at T1350.9 Heath concedes14 April 2006 was the anticipated end date of the RTWMP.[517]

641. The worker submitted that it was "clear Heath was unable to implement the necessary changes into the Palmerston CIB to facilitate the worker's RTWMP".[518] The worker relied upon what was considered to be a concession on the part of Heath at pages 1353 to 1355 that he was unable to accommodate the necessary requirements, as set out in Dr Tracey's medical certificate, for the worker to remain in his unit. In particular the worker relied upon the following piece of evidence:

> So you were left… with the problem of an undermanned unit and somebody that needed a psychologically supportive workplace that you couldn't provide? It was very difficult to manage.[519]

642. The worker also relied upon the evidence given by Acting Superintendent Heath at page 1354 of the transcript:

> The reality was that you couldn't accommodate somebody who could only work part-time and had psychological – needed psychological support? Not within that unit, that's correct.[520]

[517] See [62] –[65] of those submissions.
[518] See [66] of those submissions.
[519] See [66] of those submissions.
[520] See [67] of those submissions.

643. It was submitted on behalf of the worker that at page 1357 of the transcript Acting Superintendent Heath "again concedes the requirements of the RTWMP were not complied with".[521] In particular, the worker relied upon the following evidence given by Heath:

> It was your duty to ensure that a monthly report was submitted? Yes
>
> And you didn't do it? No, it wasn't done.
>
> And Mrs Barnett's supervisor, who was under your command, was obliged to submit weekly reports? Yes.
>
> That was not done? Some were.
>
> Well, none other than the ones we've got? Well, three were done and others weren't.
>
> Well, they weren't done in accordance with the program, were they? No, they weren't.
>
> The purpose of the program…was that matters would not fester and build up, that they would actually be dealt with in a timely manner. That was the purpose of the written reports, wasn't it? Yes.
>
> And then, of course, the whole matter escalated after that, didn't it? Yes.[522]

644. It was also submitted that Acting Superintendent Heath's memorandum of 12 April 2006 (2 days prior to the completion of the RTWMP) to the worker had a distressing effect on the worker.[523]

645. The worker did not return to work following receipt of Acting Superintendent' Heath's memorandum to her dated 12 April 2006.

646. The worker submitted that "the inability and unwillingness of Heath to comply with the known requirements of the RTWMP created a situation which caused the second injury to the worker" and "the employer's failure

[521] See [68] of those submissions.
[522] See [68] of those submissions.
[523] See [68] of those submissions. Acting Superintendent Heath conceded that the worker became very distressed when she received the memorandum.

to effectively deal with the worker's first injury directly resulted in the worker sustaining the second injury".[524]

647. By way of demonstrating the unreasonableness of the employer's actions the worker made the following submissions:

> …the employer has never suggested or proposed that the worker attend a course/workshop/seminar to learn to better relate to her superiors, to take orders or operate within the hierarchical organisation. This type of action would have been a step in the right direction in demonstrating reasonable administrative action. At no time did the employer request the worker attend a workshop, seminar or even counselling to better deal with criticism as a constructive tool to learning and development.
>
> The only suggestion for any course to be undertaken by the worker was made by Owen in 2003, namely, for the worker to attend anger management, hardly an appropriate recommendation at the time given the nature of the meeting.
>
> The employer had long–standing awareness of the worker's problems in relating to superiors. In fact the main concern has always been in relation to the worker's ability to operate in a strictly hierarchical organisation. The employer never counselled or disciplined the worker for a lack of attention to her police work or any concerns relating to her ability as an officer. The only formal complaints made were in relation to the manner in which the worker interacted with her superiors in stressful situations.
>
> In failing to take appropriate action to assist the worker in dealing with the core issue, it therefore cannot be a reasonable administrative action to criticise and discipline the worker for not showing the necessary respect to her superiors.
>
> The ultimate issue during the present case was not the failure of the worker to operate as a competent member of the Police Force. Instead the issue was about the employer's lack of understanding that the worker did not have the necessary ability to operate within a hierarchical organisation and relate with deference to her superiors. This lack of understanding is compounded by the fact the employer knew of the worker's personality from the results of the COPS test. There has never been any indication that these traits have changed with the effluxion of time and in any event the employer, apart from the 2 COPS tests 3 months apart back in 1998, has not requested the worker to submit to another psychological assessment similar to the COPS test, or at all.[525]

[524] See [68] of those submissions.
[525] See [72] – [77] of those submissions.

648. The worker and the employer have assumed diametrically opposed positions in relation to the worker's return to work management plan.

649. The worker alleges that during the implementation of the return to work management plan the employer, through the actions of Acting Superintendent Heath, engaged in bullying and inappropriate behaviour, and by necessary implication engaged in unreasonable administrative and disciplinary action. The worker's case was that the employer had failed to properly manage the worker's return to work program. Consequently the worker suffered the second injury as pleaded and particularised in the Amended Substituted Statement of Claim.

650. The employer's position is that the worker's alleged second injury in 2006 was "an accumulation of the previous 'insults' and the continuing effects of the 2004 injury" and was "precipitated by events or actions that are properly characterised as reasonable administrative action or reasonable disciplinary action".

651. It is important when considering the reasonableness or otherwise of the employer's actions during the operation of the return to work program not to single out a particular blemish, but to look at the entire process: see *Department of Education & Training v Sinclair* [2005] NSWCA 465 at [97].

652. At the outset, I am not reasonably satisfied on the balance of probabilities that Acting Superintendent Heath engaged in bullying behaviour. However, that is not to say that the actions of the employer, during the return to work program, amounted to reasonable administrative action or disciplinary action. The employer bears the onus of establishing that the employer's actions during the material period come within the exclusionary elements to the definition of "injury" in s 3 of the Act.

653. I am not satisfied on the balance of probabilities that the employer fully complied with the requirements of the return to work management plan.

That is not to say that the employer, through its servant or agents, was not aware of the requirements of the return to work program. The point is that the employer has failed to satisfy the Court that the reports required under the return to work management plan were submitted in a timely fashion and in fact provided as required pursuant to the plan. There is a body of evidence, including the evidence given by Acting Superintendent Heath, that the reporting requirements were not complied with.

654. The importance of the periodic reports cannot be overestimated. The purpose of those reports was, as stated by Louise Bilato, to "encourage employees to take more responsibility for their work behaviours and for supervisors to be more aligned with, or be able to identify appropriate management strategies if required". In my view, the reports were one of the lynchpins of the return to work program that had been formulated for the worker. It is clear that throughout the period of the return to work program the worker continued to display the characteristics of her unusual and difficult personality. The employer needed to be equipped with the necessary information in order to identify appropriate management strategies by way of response to the worker's conduct, and to enable it to put in place appropriate measures to assist the worker in taking more responsibility for her work behaviour. The reporting requirements were directed at generating the necessary information.

655. Next, there is the matter of Acting Superintendent Heath's questioning of the worker's diagnosis. The Superintendent's questioning of the diagnosis certainly had the appearance of being exactly that, as well as having the appearance of undermining the worker and her relationship with her treating doctor. In fact, the Superintendent's questioning of the diagnosis had prompted Louise Bilato to write a strongly worded letter to the Director of Human Resources for the employer. However, the employer says that the Superintendent's questioning of the diagnosis was misconstrued by Louise Bilato – indeed a matter conceded by her in her evidence. Although the

evidence supports the employer's interpretation of the Superintendent's questioning of the diagnosis, it is a matter of some concern there was such scope for misunderstanding. That suggests that there was not an effective line of communication between all persons involved in the implementation of the worker's return to work program.

656. The same concern carries over into the Heath memorandum. Although Louise Bilato acknowledged that she was mistaken in believing that the memorandum sent by Acting Superintendent Heath to the worker on 12 April 2006 was in the nature of disciplinary action against the worker, the fact that such confusion surrounded the nature of the memorandum again is suggestive of the worker not being effectively managed on the return to work program.

657. The evidence showed that there were clearly issues with whether the worker could continue to work in the Palmerston Investigation Unit. That was not only identified by Dr Tracey, but was also acknowledged in Acting Superintendent Heath's memorandum to the worker dated 12 April 2006. There the Superintendent stated: "The issue is now whether the Palmerston Investigation Unit is a psychologically supportive workplace by virtue of the nature of the job or work requirements of the unit". Problems accommodating the worker in the Palmerston Investigation Unit were also identified in the email sent by Superintendent Dowd to Louise Bilato on 13 March 2006.

658. In my opinion, they were concerns that should have been obvious to the employer at the outset, or at least much earlier than March 2006. There should have been a realisation earlier on that the Palmerston Investigation Unit was not a psychologically supportive workplace because of the obvious tension between the effective functioning of an investigative unit and the need to medically manage a worker on a return to work program with all its attendant restrictions.

659. With respect to the employer's management of the worker during the return to work program I agree with the submission made on behalf of the worker that the employer failed to take appropriate action to assist the worker in dealing with the core issue. That core issue was the worker's problems in relating to superiors and the worker's ability to co-operate in a strictly hierarchical organisation. The employer appears to have had a lack of understanding that the worker did not have the necessary ability to operate within such an organisation. However, that should have been obvious to the employer by reason of the worker's conduct during the course of her employment. Moreover, the employer had available to it vital information – the results of the pre-induction psychological testing – that would have alerted it to the fact that the worker had an unusual and difficult personality that would explain her inability to function within the hierarchical structure of the Northern Territory Police Force.

660. As observed by Louise Bilato, Mrs Barnett's case was reasonably complex and required sensitivity and commitment from all parties. The employer bore a substantial burden in having to deal sensitively with a difficult and often unreasonable worker like Mrs Barnett – in the way highlighted in *Rukavian v Bridgestone Australia Ltd* (supra). It was incumbent upon the employer to ensure that any administrative action taken against the worker in connection with her employment was not only reasonable but be seen to be reasonable.

661. I also agree with the worker's submission that the employer seems to have overlooked the option of referring the worker to programs, such as courses, workshops, seminars or appropriately structured counselling sessions, that were specifically designed to improve her ability to relate to superiors and to take orders or otherwise function effectively within a hierarchical organisation. Had the employer done that, either during the return to work program or at earlier times in the course of her employment, then that type of administrative action would have been not only a positive step in the right direction, but would have been reasonable administrative action.

662. As stated earlier, one has to have regard to the entirety of the employer's actions during the return to work program. In my opinion, the employer has failed to satisfy the Court on the balance of probabilities that the administrative action that it took in implementing the return to work management plan, and during the course of its interaction with the worker during the currency of that plan, was reasonable.

663. The final matter that calls for consideration is the disciplinary action taken by Acting Superintendent Heath on 11 May 2006, when he issued a s 79 Notice of Alleged Serious Breach of Discipline on account of the worker's outburst and behaviour on 13 April 2006.

664. Despite the obviously inappropriate behaviour of the worker on the 13 April 2006 I think that the subsequent decision to commence disciplinary proceedings against the work was unfortunate. Although the return to work plan had ended on 14 April 2006, the evidence shows that a return to work program had not been completely abandoned. However, against that backdrop Acting Superintendent Heath issued the s 79 Notice after due investigation, and after seeking guidance from within the Northern Territory Police Force. In my opinion, the decision to commence disciplinary proceedings under the prevailing circumstances was ill - advised.

665. The fact the disciplinary action was ill advised is confirmed by Acting Superintendent Heath's withdrawal of the s 79 Notice. Although he was not pressured to withdraw the notice, he did so on the suggestion of Assistant Commissioner McAdie, who was "looking at a more strategic sort of management "for the worker. Acting Superintendent Heath withdrew the Notice to facilitate that objective. There can be no doubt that the suggestion coming from Assistant Commissioner McAdie would have played an influential role in relation to Acting Superintendent Heath's decision to withdraw the Notice.

666. In my opinion, the clear imputation is that the withdrawal of the s 79 Notice was an acknowledgment by the employer that the issue of the Notice was somewhat premature (and therefore inappropriate) and that there was another alternative for dealing with the situation. According to the evidence that alternative entailed looking at the "bigger picture". In my opinion, that "bigger picture" should have been considered prior to the issue of the s 79 Notice.

667. There can be no argument that the ultimate objective of disciplining a worker in respect of poor work performance or poor work attitude is to improve the worker's performance at work or to improve his or her work attitude. The problem in the present case is that the employer did not take constructive steps to identify the reasons for the worker's poor work attitude. That in my opinion would have been an appropriate starting point before contemplating disciplinary action. All other options should have been explored before issuing a s 79 Notice. Those options may have included appropriately structured counselling and a warning that if the offending behaviour recurred disciplinary action would be taken.

668. In my opinion the employer has failed to satisfy the Court on the balance of probabilities that the disciplinary action taken by Acting Superintendent Heath on 11 May 2006 was reasonable.

THE COMPENSABILITY OF THE WORKER'S INJURIES

669. I am satisfied on the balance of probabilities that the worker's first injury was the result of the failure of the employer to investigate, or properly investigate or properly resolve her complaints against Sergeant Foley, Senior Sergeant Kerr and Commander Owen. That finding is supported not only by the worker's evidence, but also by the medical evidence. That body of evidence clearly establishes that the said failure on the part of the employer materially contributed to the worker's first injury.

670. On the present state of the authorities, "the material contribution" test focuses upon the extent that a work related factor has contributed to an injury. The test goes beyond a mere causal connection between the causative factor and the injury. In accordance with what was articulated in *Treloar v Australian Communications Commission* (1990) 26 FCR 316 the causative factor must in fact – and in truth – contribute to the injury. The causal nexus must be established on the balance of probabilities, and not left in the realm of possibility or conjecture. However, once the nexus is established it matters not that the contribution be large or small.

671. Having determined that the employer's aforesaid failure materially contributed to the worker's first injury, it falls upon the employer to establish that that causative factor comes within the exclusionary elements to the definition of "injury" in s 3 of the Act. In my opinion, the employer failed to establish that the manner in which it dealt with those various complaints – which was principally by way of a process of mediation - comes within the exclusionary elements to the definition of "injury" in s 3 of the Act. The employer failed to show that its administrative response to the worker's complaints amounted to reasonable administrative action. According to the law as it presently stands in the Northern Territory that is sufficient to make the worker's first injury compensable.

672. However, for the sake of completeness I will consider the other causative factors that have been said to have contributed to the worker's first injury.

673. Although the worker appears to have suffered a great deal of stress as a result of the investigation in relation to the so- called "dog complaint" – which investigation has been shown by the employer to have amounted to reasonable administrative action – I am not persuaded by the employer that that investigation materially contributed to the worker's injury. In my opinion, on the state of the evidence, the contribution of that administrative

action to the injury does not go beyond a matter of mere surmise or conjecture.

674. Turning to the contribution of the worker's failure to obtain a benefit (in terms of obtaining detective designation) to the first injury, the evidence given by Dr Epstein is equivocal. The doctor's opinion that the worker's condition is only partly related to her failure to be promoted and appears to have been one of a series of events that led to her becoming distressed begs the question. In my opinion it does not establish that the failure of the worker to obtain detective designation resulted in the worker's first injury – that is to say that that failure materially contributed to the injury.

675. That leaves the disciplinary action taken by the employer against the worker in October 2004 as a factor that was causative of the worker's first injury. In my opinion, Dr Meadows' evidence concerning the relevance of that disciplinary action to the worker's injury (Exhibit W 66) does not establish on the balance of probabilities that the disciplinary action – which has been found to constitute reasonable administrative action - materially contributed to the injury.

676. The foregoing analysis indicates that even if the decision in *Rivard v NTA* (supra) is bad law, and the law is as expounded in *Hart v Comcare* [2005] FCAFC 16; 145 FCR 29 (as argued by the employer), then the first injury suffered by the worker remains compensable.

677. I now turn to consider the compensability of the second injury suffered by the worker.

678. The employer has failed to persuade the Court that the second injury, which is an injury in its own right, was the result of reasonable administrative action or reasonable disciplinary action. The employer has failed to satisfy the Court that the worker's second injury was precipitated by actions that can properly be characterised as reasonable administrative action or

reasonable disciplinary action. Furthermore, I am satisfied on the balance of probabilities that the administrative action (or absence thereof) during the currency of the return to work, along with the subsequent disciplinary action, resulted in the worker's second injury. That finding is supported by both the worker's evidence and the medical evidence.

679. I find that the worker's second injury is compensable, not only according to the present state of the law but also according to the contrary view of the law expressed in *Hart v Comcare* (supra).

THE WORKER'S INCAPACITY AND CALCULATION OF COMPENSATION

680. As the worker's claim has been established, it now remains to calculate the compensation payable to the worker.

681. For the purposes of s 65 of the *Workers Rehabilitation and Compensation Act* loss of earning capacity in relation to a worker is the difference between:

a) his or her normal weekly earnings indexed in accordance with s65(3) of the Act ; and

b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:

i. in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self employment), if any, reasonably available to him or her; and

ii. in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her.

and having regard to the matters referred to in section 68 of the Act.

682. Section 68 provides as follows:

> In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for the purposes of section 75B(3), regard shall be had to :
>
> a) his or her age;
>
> b) his or her experience, training and other existing skills;
>
> c) his or her potential for rehabilitation training;
>
> d) his or her language skills;
>
> e) in respect of the period referred to in section 65(2))b)(i) – the potential availability of such employment;
>
> f) the impairments suffered by the worker; and
>
> g) any other relevant factor.

683. Loss of earning capacity in the present case is assessed by reference to the amount, if any, the worker is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if she were to engage in the most profitable employment that could be undertaken by her. In the present case s 65(2)(b)(i) has no application because the reasonable availability of such employment had ceased to be a relevant criterion by the date of termination of the worker's employment.[526]

684. It is well established law that the worker bears the onus of establishing the level of her incapacity, both in the physical sense and in the sense of the amount of compensation to which that level of incapacity entitled her: see *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 383-384; *Work Social Club Katherine v Rozycki* (19989) 143 FLR 224.

[526] See [126] of the employer's written submissions Part 11 dated 10 March 2010.

685. It was conceded by the worker's counsel in her opening that the worker is not totally incapacitated for work.[527] That is also supported by the body of medical evidence before the Court.[528]

686. The employer submitted that:

> For the reasons that the worker received payments of sick leave until the date of her termination of employment, and that the dated of termination of employment was more than 104 weeks after the date of the 2006 injury (13 April 2006), the assessment of the worker's loss of earning capacity is relatively straightforward.[529]

687. However, that is the only straightforward aspect to the assessment of the worker's loss of earning capacity.

688. The worker, who bears the onus of proving the level of her incapacity in the sense of the amount of compensation to which that level of incapacity entitles her, made the briefest of submissions in relation to incapacity and loss of earning capacity:

> The issue of incapacity must be viewed in the light of the evidence of the medical experts, in particular Drs McLaren and Epstein and Professor Whiteford All hedge their opinion with significant qualification (T695, T696, T697, T698, T715, T720, T721, T725). The evidence on a whole discloses that the worker's capabilities only exist within the context of a "managed" graduated return to work, the sorts of work the employer contends the worker is reasonably capable of performing. That is to say such "manufactured" employment is not the most profitable employment that could be undertaken by the worker. This is not employment but an assisted return to work. The worker concedes that her self employment may qualify as her most profitable employment (T620, 612).
>
> The refereeing fits into the same category. It was volunteer work at best (T233) and led to issues of fatigue (T613). The worker may, in the future, be in a position to undertake sports administration type work, but again this is in the nature of a return to work not "employment" (T234).[530]

689. On the other hand, the employer made quite lengthy submissions on the issue. [531]

---

[527] See p 29 of the transcript.
[528] See the medical reports of Dr Epstein, Dr McLaren and Professor Whiteford.
[529] See [125] of the employer's submissions Part 11 dated 10 March 2010.
[530] See [99] – [110] of the worker's submissions in response to the employer's submissions dated 1 July 2010.
[531] See [122] – [152] of the employer's submissions Part 11 dated 10 March 2010.

690. The employer submitted that "all of the medical experts agreed that the worker would be capable of working as a factual investigator, subject to some ongoing medical treatment".[532] However, it is important to closely examine the body of medical evidence to determine the worker's capacity to perform that type of work, and the conditions under which she would be able to perform such work.

691. Starting with Dr Epstein, the doctor proffered the following opinion concerning the worker's suitability for employment::

> It is likely that she could work as a recreation officer but I have some concerns about her being able to work as a local government inspector as this is likely to lead to confrontation, although the job does involve some degree of autonomy. She is less likely to be able to cope with the job of local government clerical worker where there is much less autonomy and where she would be working in a hierarchical situation.[533]

692. However, Dr Epstein went on to address the workers capacity to undertake employment as a factual investigator:

> …Doctor, in terms of her transferable skills, you probably detected from the rehabilitation report that you were provided with that Mrs Barnett has a considerable background in investigation.; that is, actual (sic factual) investigation. Speaking to witnesses, obtaining relevant details about, in her previous job, crimes or offences that had been committed or events which had occurred. She's a trained investigator in that respect? Yes.
>
> Would you see benefit in a job that enabled her to transfer those skills and utilise them so that …? I would think so.
>
> Yes. It would be desirable to try to give her a job in which she could have the satisfaction of using her previously acquired skills; is that correct? I think that would be very good for her mental health.
>
> Yes. One job that has occurred as something that she could – has the background and ability and skills to carry out is that of a private inquiry agent, what's called a factual investigator. These people do not work in hierarchical organisations. They're assigned a particular investigation to do. It might be a motor vehicle accident or a fire or theft or an injury of some kind. And they go and interview witnesses and look for relevant evidence that might affect, for example, the position of an insurer or an employer or something of that kind. That's a job that we have identified as being in existence and a job that, in fact, is available from time to time. Do you see any benefit in her being able to carry

[532] See [130] of those submissions and Exhibit W96, report dated 12 May 2009, p3.
[533] See Exhibit W96, p 3. See also [129] of the employer's submissions Part 11 dated 10 March 2010.

out such a job? I certainly do. I think though that – the success or otherwise of that type of job depends on the degree to which she believes herself to be subject to supervision and the way in which that supervision is provided.

Yes. So the job is said to involve a high degree of autonomy. Factual investigators handle their own files. Not required to work in teams. On individual investigations with something like 70 per cent of the work conducted outside the office. That would seem to take her outside the kind of hierarchical structures that you were concerned about? Yes, I think so and that sounds to me like it would be a very suitable type of job for her to do.[534]

693. When questioned about whether the worker would be capable of working as a factual investigator, Dr McLaren gave the following evidence:

The other thing I mentioned to you is that people who employ these factual investigators place great emphasis on the fact that someone may have been a detective because they're thought already to have the relevant skills? The skills, the training and mindset.

Yes? Yes. I imagine that would be the case.

So, again that would be another thing that would make it particularly suitable for someone like Ms Barnett who…? Yes

…exists on that kind of work? It would have to be looked at very closely.

…Now my learned friend just asked you some questions about her being a surveillance operator. Now, you said that that was something that would be – have to be seriously looked at? Yes.

What would be the problems that she might encounter in such employment? Well dealing with - well she'd have to deal with police. She might find that difficult, so we'd have to be careful about that.

Right? And dealing with aggression in the interview, she might have trouble with that. So, really, there's – there's a lot of possibilities but I think at this stage – or when I saw her then, those possibilities were tending to be slight.

Are you suggesting that she could work now as a surveillance operator? Well at the moment I haven't seen her for two years so –

The last time you saw her? The last time I saw her in December '07 I wouldn't have thought so. It would take time. She would have to be graded back into the workforce. But you're looking at the ultimate objective, which would be to work independently at a level consistent with her experience and training and responsibilities. So I think a surveillance officer is one of those jobs.

[534] See p 704 of the transcript and [133] of those submissions.

> Yes? Sorry, not a surveillance officer. They're – they're the minions. No. And – what Mr Barr described. That type of job would be consistent with her previous training, experience, etc.

694. Professor Whiteford also considered the worker's suitability to undertake the work of a factual investigator:

> I mentioned earlier that you've been provided with a copy of a statement of Jodie Horsell and the details, or work duties, of the position of a surveillance investigator and factual investigator. Did you have a view as to the suitability for the worker of the position of factual investigator? Again I would not have thought based on my examination of Mrs Barnett that that type of work was clinically inappropriate or contraindicated. There are some stresses associated with that sort of work but I do not believe from the statement I've seen that it would be as stressful as working as a police officer, and I wouldn't have thought psychiatrically that Mrs Barnett was incapable of doing that work when I examined her…
>
> What's your view as to whether or not she now return to work in the capacity identified in the Jodie Horsnell material? I examined Ms Barnett in April I think 2009 so as of that time I would thought she could do that sort of work.
>
> From a psychiatric point of view as at April 2009 when you saw her was there any impediment to her returning to work you've just described? No.
>
> And you would not recommend that she be employed in the position that we're discussing in Darwin? I was given the duty statement and I asked could this person carry out those duties full stop. The answer is, I think, yes.[535]

695. The employer made this submission:

> The worker's counsel sought to establish that the worker only had capacity to undertake the work on limited hours. However none of the medical experts went beyond recommending that the initial return to work be medically supervised, with a concession that in the initial stages the worker might require some adjustment of her medication, and monitoring to assist her through the transition from being out of work long term, back into work.
>
> None of the doctors were prepared to say that the worker did not have the capacity to undertake the position full time.[536]

696. The employer relied upon the evidence of Dr McLaren at page 698 of the transcript, which was to the effect that the medical management should form part of an assisted return to work program:

[535] See pp 715, 716 and 722 of the transcript and [134] – [135] of those submissions.
[536] See [136] – [137] of those submissions.

> …When you say that any return to work program are you talking about a graduated return to work program? Yes, an organised return to work program which is under supervision, so rather than simply saying "Okay, go and get yourself a job". Then she would need assistance in getting a placement. For example she may – it would be extremely unlikely that – well she's – has a lengthy work health claim she would be able to get a job on her own rights. That would have to be negotiated with an employer. And in particular I imagine the surveillance industry or the private investigation industry would be very cautious about taking a police officer who had left under a cloud. They would want to know that that had been cleared up and that it was appropriate for her to begin work. So there'd be quite a lot of negotiation. This is normal. I don't regard this as unusual.
>
> Right. So she would have to have an assisted return to work program; is that what you're saying? I think so.
>
> Right. And in fact it may or may not work, depending on…? Exactly. And it improves the likelihood of a successful outcome rather than – having a proper return to work program under supervision with a negotiated start with an approved employer etc etc.
>
> And would that need to be medically managed? It would certainly require medical supervision.[537]

697. The employer submitted that "Dr Whiteford did not consider it necessary to involve the employer, but thought it was cautious and safe for the worker to have access to a treating practitioner to assist if required" :

> …Both Dr McLaren and Dr Epstein took the view and I think it's not very far from your position that what she needed to do for the future was to be involved in a medically managed return to work program? Medically managed as in supervised by a clinician, yes.
>
> That's your opinion as well? I think that is the cautious and safe thing to do, so that if any symptoms return they will be able to be dealt with quickly rather than allow to continue.
>
> And she would need to be supervised by somebody, an appropriate person in that medically managed return to work program in consultation with the medical management? From a clinical point of view she would need to have a clinician with whom she could be in contact with on a regular basis during the return to work while she dealt with any issues that came up during that return to work, yes.
>
> And it would be of assistance for the employer to be involved and know what issues might be so that in that return to work that could be gradually worked though, rather than the medical management and the employer not talking to each other? Well, I think you know this - you know I wouldn't over medicalise (sic) this and treat her with kid gloves as if she's so fragile she's going to fall

[537] See p 698 of the transcript.

> apart. I think she is independent, she needs the opportunity to establish herself as an independent confident individual and I wouldn't over - manage this. If you do that you're almost anticipating something's going to go wrong, and in fact you want to create the opposite expectation that in fact everything's going to go fine. So you don't want to put too much structure around this. Flexibility is probably better.
>
> And it's your view, is it, that the employer need not know anything about this history or the fact that she needs to be medically managed? From a psychiatric perspective I don't think that's a necessary requirement. Whether it is from an employment or industrial perspective I'm not able to comment. There are many patients who chose not to disclose their previous medical history to new employers there are others who chose to…for Mrs Barnett is that she has a treating clinician with whom she can get clinical support and advice and assistance while she returns to the workplace.
>
> When you say graduated, that is part time? It may be part-time initially. If she can negotiate that with a prospective employer that would be something that she would have to talk through. Again that flexibility I mentioned earlier.[538]

698. The employer submitted that "Dr Epstein also considered that the medical management of the return to work required only access to treatment if required, for monitoring her medication".[539]

699. The employer relied upon the following evidence given by Dr Epstein:

> Now as I understand your evidence it was you thought that she could return to work initially in an appropriately supervised position on a part-time basis? Yes.
>
> And would that apply to the job as the private investigator that he was talking to you about? Yes.
>
> In your opinion, would that require her to be medically managed in that job – in that return to work? I would think that would be useful and – I would see that in terms of monitoring her medication.
>
> Yes? It would be useful in terms of – in changing the medication. If for example it's too sedate, changing the time at which she takes her medication in case it interferes with her work. I think those issues would be important.
>
> Yes. And in your opinion you would require somebody to be a sympathetic employer to cope with that until it was – the situation stabilised, is that right, or until it was ascertained whether, in fact, that was going to work out? Yes I think so. I think that it's not necessary that she needs somebody particularly

[538] See pp 721 and 722 of the transcript and [139] of the employer's submissions Part 11 dated 10 March 2010.
[539] See [140] of those submissions.

> sympathetic. I think what she needs is a situation where she feels she's being dealt with fairly.[540]

700. The employer further submitted that "Dr Epstein expressed an opinion in his report of 10 April 2009 (Exh W96, p 10) that the worker 'could go back to work on a part-time basis in a situation where she was not under the same sort of pressures from others and not working in a hierarchical situation'".[541] The employer submitted that "Dr Epstein expressed 'substantial agreement' with Professor Whitefords' report dated 30 April 2009".[542]

701. It was submitted on behalf of the employer that the worker had the capacity to work as a factual investigator since at least 2007.[543] The employer went on to make these submissions:

> On the basis of the medical evidence, as well as the evidence of the worker's extensive rugby activities throughout 2007 and into 2008, it is apparent that she has had the capacity to work as a factual investigator since that time. The medical evidence supports the notion that such employment could be undertaken full time, but with an allowance for medical management and support given the worker's likely de-skilling after some years' absence from employment and to minimise the risk of the worker suffering a recurrence of her symptoms.
>
> The Court has evidence upon which it can make an assessment of the remuneration payable in such a position. The approach to remuneration on the evidence available should be similar to that which a court takes in assessing damages. Although the evidence available relates to a position in the Northern Territory, there is no reason to suggest that the position is unique to the Northern Territory or that the remuneration for such a position is likely to change depending on the jurisdiction in which the worker lives.
>
> The available evidence puts the remuneration for such a position at $63,840 per annum (Exh E148). The weekly equivalent of that salary is $1227.69.
>
> The Court should make a declaration that the worker has been capable of working as a factual investigator since 2007 until the date of judgment. It is not necessary, for the reasons outlined above, that the Court make a determination as to the availability of such work because it does not arise in the circumstances of this case.

[540] See p 70 of the transcript and [140] of those submissions.
[541] See [141] of those submissions.
[542] See [141] of those submissions.
[543] See [142] – [147] of those submissions.

> The Court should further make a declaration that the value of the most profitable employment available to the worker is, from December 2007 and onwards, $1227.69 or thereabouts.[544]

702. The calculation of the worker's loss of earning capacity is problematic to say the least.

703. The worker bears the onus of proving her loss of earning capacity. However, the most that she can do is to reject the employer's argument that employment as a factual investigator presents as the most profitable employment that she could undertake. In its place she advances the proposition that her somewhat ill defined self employment "may qualify as her most profitable employment"; and that proposition is put forward without any attempt on her part to put a monetary value on that postulated employment, for the purposes of establishing the difference between her normal weekly earnings and the amount that she is reasonably capable of earning from time to time per week in work that she is reasonably capable of undertaking.

704. There is also a real issue as to whether self employment can be considered to be the most profitable employment that could be undertaken by the worker. It is noted that while most profitable employment includes self employment in respect of the period to the end of the first 104 weeks of total or partial incapacity, most profitable employment is not stated to include self employment for the period after the first 104 weeks of total or partial incapacity. The rationale for that difference is not readily apparent.

705. However, the employer, in some respects, comes to the aid of the worker. Although the worker may not agree with the evidence led by the employer concerning most profitable employment, the worker can nonetheless ultimately rely upon that evidence in support of her claim for compensation.

[544] See [148] – [152] of those submissions.

706. Exhibit E148, being the statement of Jodie Horsnall, sets out two position descriptions. The first related to "Factual Investigator: salary package $63,840 per annum". The second related to "Surveillance Investigator: salary package $53,200 per annum". The salaries referred to in the position descriptions are full time employment salaries.

707. The covering letter from the employer's solicitors to the worker's solicitors, which formed part of Exhibit E148, contained the following statements:

> We confirm that the evidence of Jodie Horsnall does not, of itself, purport to extend to employment outside the Northern Territory…
>
> For the avoidance of doubt the employer reserves the right to make submissions to the effect that a position of the nature described by Ms Horsnall exists outside the Northern Territory and that the worker has the capacity to undertake that work.

708. As Jodie Horsnall was not called to give evidence there was no cross examination in relation to the matters contained in her statement and the position descriptions. In particular, there was no evidence as to what, if any, effect the evidence given by the various doctors in relation to the medical management of the worker's condition on return to work might have on the ability of the worker to earn the salaries referred to in the position descriptions. Those salaries are full time employment salaries, and presumably are predicated upon an applicant for either position being a fully functional worker, without Mrs Barnett's history and ongoing medical issues.

709. Furthermore some of the medical evidence indicated a possible need for the worker to engage in a graded return to work, and during the initial stages working only part time. There was also an indication that Mrs Barnett might have to negotiate her employment with a prospective employer.

710. It is conceivable that all those factors might affect her ability to earn either of the salaries referred to in the position descriptions.

711. Therefore, although the worker may in the future be able to earn a salary of $63,840 as a factual investigator, her earning capacity in the immediate future may be somewhat less. However, the evidence, as it stands, does not enable any determination to be made as to any diminished earning capacity on the part of the worker in the short term.

712. In the absence of such evidence, I am inclined to act upon the salary of $63.840 as being indicative of the worker's earning capacity for the purposes of determining her entitlement to compensation. However, as the Court will need to receive further submissions in relation to issues concerning the application of compensation payments under the *Workers Rehabilitation and Compensation Act* and the worker's sick leave entitlements,[545] I propose to hear further from the parties in relation to the worker's loss of earning capacity.

713. To the extent that it is necessary I will also hear the parties in relation to the employer's deemed liability and relief therefrom.

Dated this 7th day of September 2010

_____

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE

[545] See [124] of those submissions.