CITATION:	*Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC003
PARTIES:	BEN DANIEL HARRIS
	V
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	21730995
DELIVERED ON:	15 February 2019
DELIVERED AT:	Darwin Local Court
HEARING DATE(s):	10 -14 September 2018; 6 November 2018
JUDGMENT OF:	Judge Armitage

CATCHWORDS:

WORK HEALTH – Management action; reasonable grounds; reasonable manner; wholly or primarily - mental injury - incapacity - normal weekly earnings; remuneration; allowance; leave loading - most profitable employment; reasonably capable of earning; reasonably available

Return To Work Act ss 3, 3A, 49A, 65(2); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Public Sector Employment and Management Act;*

Work Health Act 1986

Arnotts Snack Products Proprietary Limited v Yacob (1984-1985) 155 CLR 171; *Watkins Ltd v Renata* (1985) 8 FCR 65; *Foresight Pty Ltd v Maddick* (1991) 105 FLR 65; *Murwangi Community Corporation v Carroll* (2002) 12 NTLR 121; *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389: Applied

Krygsman-Yeates v State of Victoria [2011] VMC; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; *Department of Education v Sinclair* [2005] NSWCA 465; *McGee v Comcare* [2010] AATA 386; *Re von Stieglitz v Comcare* [2010] AATA 263; *Commissioner of Police v Minahan* [2003] NSWCA 239; *Pulling v Yarra Ranges Shire Council* [2018] VSC 248; *Kerridge v Monsfelt Pty Ltd* - [2009] VCC 0154; *Saitz v NTA* - [2008] NTMC 104: Considered

Rivard v Northern Territory of Australia [1999] NTSC 28;*Corbett v Northern Territory of Australia* [2015] NTSC 45: Not Followed

REPRESENTATION:

Counsel:

Worker:	Mr Miles Crawley SC
Employer:	Mr Tom Anderson

Solicitors:

Worker:	Ward Keller
Employer:	Roussos Legal Advisory
Judgment category classification:	A
Judgment ID number:	[2019] NTLC 03
Number of paragraphs:	140

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

No. 21730995

BETWEEN

BEN DANIEL HARRIS
Worker

AND

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR JUDGMENT

(Delivered 15th February 2019)

JUDGE ARMITAGE

1. On 3 June 2013 Mr Ben Harris commenced employment with the Department of the Legislative Assembly (DLA) as a Senior Administrative Officer level 2 in the role of Director Procedural Support and Education Services[1]. In that role Mr Harris reported to the Clerk of the Legislative Assembly, a position held by Mr Michael Tatham.

2. On 27 March 2017 Mr Harris made a claim for compensation for mental injury sustained in April 2016 which Mr Harris claimed was caused by bullying and harassment. The claim was rejected by the Employer on 10 April 2017.

3. Following a 5 day hearing which concluded with detailed written submissions, the parties limited the issues in dispute. The Employer no longer disputed that Mr Harris had suffered a mental injury on 4 April 2016. Further, the Employer no longer disputed that Mr Harris's mental injury arose out of his employment. The Employer no longer pressed issues concerning the giving of proper notice of the injury. In summary, the issues that remained to be determined concerned: identifying the events at the workplace which gave rise to the mental injury; determining whether the injury was of a type that entitled Mr Harris to compensation; and if so, whether and to what extent Mr Harris suffered any incapacity.

The Statutory Scheme

4. Issues in the proceedings turned in part on the application of the exclusionary provisions in s 3A(2) of the Return To Work Act (RTWA). Both s 3A and the definition of "management action" were amended in 2015[2]. The Court understands

[1] See Ex 8 p2, DLA Job Description Director Procedural Support and Education Services
[2] Return to Work Legislation Amendment Act 2015

that these amendments have not yet been judicially considered in proceedings in the Northern Territory.

5. Section 3A of the RTWA now provides:

> *(1) An **injury** in relation to a worker, is a physical or mental injury arising out of or in the course of the worker's employment and includes;*
>
> *(a) a disease; and*
>
> *(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.*
>
> *(2) Despite any other provisions of this Act, a mental injury is not considered to be an injury for this Act if it is caused wholly or primarily by one of the following:*
>
> *(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;*
>
> *(b) a decision of the worker's employer, on reasonable grounds, to take or not to take, any management action;*
>
> *(c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action.*

6. Section 3 of the RTWA defines management action as follows:

> *(3) **Management action**, in relation to a worker, means any action taken by the employer in the management of the worker's employment or behaviour at the workplace, including one or more of the following:*
>
> *(a) appraisal of the worker's performance;*
>
> *(b) counselling of the worker;*
>
> *(c) stand down of the worker, or suspension of the worker's employment;*
>
> *(d) disciplinary action taken in respect of the worker's employment;*
>
> *(e) transfer of the worker's employment;*
>
> *(f) demotion, redeployment or retrenchment of the worker;*
>
> *(g) dismissal of the worker;*
>
> *(h) promotion of the worker;*
>
> *(i) reclassification of the worker's employment position;*
>
> *(j) provision to the worker of a leave of absence;*
>
> *(k) provision to the worker of a benefit connected with the worker's employment;*
>
> *(l) training a worker in respect of the worker's employment;*
>
> *(m) investigation by the worker's employer of any alleged misconduct:*
>
> *(i) of the worker; or*

(ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness

(n) communication in connection with an action mentioned in paragraphs (a) – (m).

7. Accordingly, s 3A creates a defence to a claim for mental injuries caused wholly or primarily by reasonable management action. In other words, where the worker establishes that a mental injury has arisen out of or in the course of employment (which in this case is accepted), the entitlement to compensation will be defeated if the employer establishes that the mental injury was wholly or primarily caused by reasonable management action. Accordingly, the Employer must satisfy the Court that:

(i) the conduct or actions complained of by the worker constitute management action as defined in section 3; and

(ii) the management action was taken on reasonable grounds; and

(iii) the management action was taken in a reasonable manner; and

(iv) the reasonable management action wholly or primarily caused the mental injury.

8. Prior to the RTWA amendments of 2015, the leading Northern Territory authority on reasonable disciplinary or administrative action was *Rivard v Northern Territory of Australia* [1999] NTSC 28, which was applied, and followed by Barr J in *Corbett v Northern Territory of Australia* [2015] NTSC 45. While expressing reservations as to the correctness of the decision, Barr J explained:

[5] Where the reasonable administrative action exclusion is relied on by an employer, the employer must prove that the relevant reasonable administrative action was the sole cause of the worker's injury. This proposition is established by the Court of Appeal in Rivard v Northern Territory. There the Court considered the 'failure to obtain promotion or benefit' exclusion in the definition of "injury". Priestly J (Martin CJ and Thomas agreeing) interpreted the exclusion as though the word 'only' were added after the word 'result',…

[6]In my view, with respect, the Court's interpretation of the exclusions in Rivard is not correct. There is no proper reason to interpret the exclusions as though the word 'only' were inserted after the word 'result' (twice appearing). In my opinion, the decision of the Full Court of the Federal Court in Hart v Comcare, in relation to an almost identical statutory provision to that under consideration, provides the correct interpretation of the exclusions. The Full Court held that, provided the injury (an adjustment disorder in that case) was suffered as a result of the appellant's failure to obtain promotions, the injury was excluded, with the result that the adjustment disorder was not an "injury" as defined. The Full Court declined to read into the words of the exclusion a "modifier…to restrict the effect of the exclusion to circumstances where there were no other employment related causes". I agree. I agree also with the reasoning of Martin (BR) CJ in Swanson v Northern Territory. There His Honour held that, although a causal link is required between the administrative or disciplinary action and the injury, such action does not have to be the sole or even predominant cause of the injury. (citations omitted)

9. However, the new s 3A excludes from compensation injuries caused "wholly or primarily" by reasonable management action. Given the legislative change, the "sole cause" test articulated in *Rivard* may no longer be considered the binding or guiding authority. Usefully the new provisions largely mirror the provisions in the Victorian legislation, except that the Northern Territory provision uses the word "primarily" in place of the Victorian use of the word "predominantly". Section 40(1) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) provides:

There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by one or more of the following-

(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;
(b) a decision of the worker's employer, on reasonable grounds, to take or not to take, any management action;
(c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action.

How does the Court assess what is "reasonable"?

10. On the question of assessing the reasonableness of the administrative action the Employer[3] referred to *Krygsman-Yeates v State of Victoria*[4] in which Magistrate Garnett considered this question by reference to an overview of relevant authorities[5]; four of which are considered below.

11. In *Bropho v Human Rights and Equal Opportunity Commission*[6], the Full Court of the Federal Court considered the requirement of "reasonableness" in the context of the Racial Discrimination Act (1975). French J (as he then was) said:

"There is a number of definitions of reasonable in the Shorter Oxford dictionary. The relevant ones are:

3. Agreeable to reason, not irrational, absurd or ridiculous.

4. Not going beyond the limit assigned by reason; not extravagant or excessive; moderate.

The adverb "reasonably" is defined as "in a reasonable manner; sufficiently, fairly.

There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done "reasonably" in one of the protected activities in par (a), (b) and (c) of s18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgement. In this context that means judgement independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things "reasonably". The judgement required in applying the section, is

[3] Employer's submissions [9]
[4] [2011] VMC 4 November 2011
[5] Paragraphs [30] – [35]
[6] [2004] FCAFC 16

whether the thing done was done "reasonably" not whether it could have been done more reasonably or in a different way more acceptable to the court."[7]

12. In *Department of Education v Sinclair*[8], a worker's compensation decision which considered the reasonableness of disciplinary action against a teacher, CJ Spigelman for the Court of Appeal said:

"The trial judge's analysis and that of the arbiter, appeared to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation "reasonable action with respect to discipline". In my opinion, a course of conduct may still be "reasonable action", even if particular steps are not. If the "whole or predominant cause" was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, "reasonable action".[9]

13. In *McGee v Comcare*[10] the Tribunal approved its reasoning in *Re von Stieglitz v Comcare*[11] on the issue of "reasonableness". In *McGee* the Tribunal said:

"Whatever administrative action is to be taken must be "reasonable". Reasonableness is a chameleon like concept, tailored to the circumstances. As a minimum to be reasonable the action must be lawful. What is reasonable is assessed objectively and relates to the specific conduct involved in light of the process overall. Reasonableness must be assessed against what is known at the time without the benefit of hindsight, taking into account the attributes and circumstances, including the emotional state of the employee concerned. There must be nothing "untoward" about the actions involved, and the administrative action must not be "the irrational, absurd or ridiculous".[12]

14. In *Commissioner of Police v Minahan*[13] the New South Wales Court of Appeal approved the following statement:

"The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of "reasonableness" is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness."[14]

15. While acknowledging that the decisions referred to above discussed the concept of "reasonableness" as it arose in different statutory schemes, in *Krygsman-Yeates* Magistrate Garnett concluded with the following summation.

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[7] Ibid at [78]-[79]
[8] [2005] NSWCA 465
[9] Ibid at [97]
[10] [2010] AATA 386
[11] [2010] AATA 263 , an authority also relied on by the Worker see WOS at [27]
[12] Ibid at [67]
[13] [2003] NSWCA 239, an authority also relied on by the Worker see WOS
[14] Approving Geraghty J in *Irwin v Director-General of School Education* 18 June 1998

"When considering the reasonableness of that action, it is to be considered objectively having regard to all the circumstances leading to it being taken and the manner in which it is taken in a global context taking into account:

(i) That the management action and the manner in which it is taken should not be irrational, absurd or ridiculous but moderate and fair; and

(ii) The judgement is whether the action taken was done "reasonably" not whether it could have been done more reasonably or in a different way more acceptable to the court; and

(iii) The action and manner in which it is taken may be reasonable even if particular steps involved are not; and

(iv) The action and the manner in which it is taken should be assessed at the time it is taken without the benefit of hindsight, taking into account the attributes and circumstances including the emotional state of the worker."[15]

16. On the question of reasonableness, the Worker also referred to the decision of *Pulling v Yarra Ranges Shire Council*[16] in which Bell J said:

"The management action must be taken on objectively 'reasonable' grounds, which refers to the ends of the action, and in an objectively 'reasonable' manner, which refers to the means of the action. Because both the ends and *the means must be objectively reasonable, it may be necessary to evaluate whether the chosen means are a reasonable proportionate way of achieving a reasonable end".*

17. In light of *Pulling,* it seems that Magistrate Garnett's helpful summation focuses on considerations relevant to the manner or means in which management action is taken but might not fully articulate the need to also consider the basis or grounds from which the management action was commenced. In order to properly factor in the grounds on which the management action was taken the Court must also be satisfied:

(i) That there were objectively reasonable grounds for the management action to be commenced, and

(ii) There was reasonable proportionality between the grounds for commencing management action and the level and manner of action taken.

What does "wholly and primarily" mean?

18. As noted above, a work place mental injury will not be compensable if the employer establishes that the mental injury was caused "wholly or primarily" by reasonable management action. In *Pulling v Yarra Ranges Shire Council*[17], Bell J considered the Victorian legislation which uses the words "wholly or predominantly". Referencing the Macquarie Dictionary 7th edition, Bell J said:

[15] *Krygsman-Yeates v State of Victoria* [2011] VMC 4 November 2011
[16] [2018] VSC 248
[17] Ibid

"[79] Under s40(1)(a), the entitlement to compensation is defeated if the injury is a mental injury caused 'wholly or predominantly' by the management action. These words specify a test of causation in terms of whether the management action is the whole cause or the predominant cause of the injury. 'wholly' means ' entirely; total; altogether…', 'to the whole amount, extent etc' and 'so as to comprise or involve all'. Therefore management action can only be wholly the cause where it is the only cause of the injury. The adverb 'predominantly' comes from the adjective 'predominant' which means 'having ascendancy, power or influence over others; ascendant' and 'prevailing'. Therefore management action can be the predominant cause where other causes contribute to the injury but that cause is still the predominant cause. As there can only be one predominant cause of management action, a cause that is equally important to another cause or other causes is not a predominant cause. To be the predominant cause, that cause must exceed the other or all other causes combined in power and influence.

[80]Whether management action is the predominant cause of the injury where multiple causes are in issue depends upon an evaluation of the proportionate contribution made to the injury by management action on the one hand and the other cause or causes on the other. This evaluation is not carried out in any technical or formal way but by applying common sense to the facts of the particular case. It has been held that 'value judgments and policy have a part to play in causation analysis', and the same is true in a proportionate cause analysis. As has been authoritatively held in an analogous context:

> *"A finding on a question of apportionment is a finding upon 'a question, not of principle or positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': British fame (Owners) v McGregor (Owners) [1943] AC 197,20"; Podrebersek v Australian Iron & Steel Pty Ltd (1985)59 ALJR 492, 493-4 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ)"*

19. Is the word "predominantly" synonymous with the word "primarily" in the context of the legislation? According to the Macquarie Dictionary 5th edition, the adverb "primarily" means 'in the first place; chiefly; principally' and 'in the first instance; at first; originally'. "Primarily" comes from the adjective "primary" which has a large number of meanings but the meanings most closely connected to the meanings of the adverb are: 'first or highest in rank of importance; chief; principal', 'first in order in any series, sequence, etc', 'first in time; earliest'. As with the term predominant, the term primary encapsulates the possibility of there being more than one cause of an injury. Similarly to the term predominant, the term primary encompasses the ideas of hierarchy, rank and importance. A predominant cause must surpass or exceed any other or all other causes. Similarly a primary cause must be first, highest, chief or principal in rank of importance, it too must surpass or exceed any other or all other causes. Whether the term predominant or primary is used, where there is more than one causative factor for a mental injury the Court is required to assess, weigh and evaluate the various contributing causes of the injury in order to determine whether the management action was the chief, principal, or primary cause of the injury. The court

will be called on to assess whether the effects of the management action on causation outweighed, surpassed and exceeded the effects of any other factors which contributed to the mental injury. In my view the task that is to be performed in determining whether the management action is the "whole or **predominant**" cause of a mental injury is the same task that the court must perform when determining whether the management action is the "whole or **primary**" cause of a mental injury. Even if the words predominant and primary are not linguistically synonymous, in my view the task that they require the court to perform in the context of the Work Health legislation is essentially one and the same.

What is the relevance of events pre 2016?

20. Before his employment with the DLA Mr Harris served 14 years in the Australian Army, progressing to the rank of Major. During his army service and again in about December 2014, when employed with the DLA, Mr Harris was diagnosed with Post Traumatic Stress Disorder (PTSD), anxiety and depression arising from his service in the Australian Army[18]. From the middle of 2011 to the middle of 2013, while in the armed services and for a short period when employed in the DLA, Mr Harris saw a clinical psychologist, Dr Jan Isherwood-Hicks, to assist him with managing his symptoms and other life stressors. In spite of his diagnosis, long working hours and personal stressors, Dr Isherwood-Hicks noted that Mr Harris was "functioning very well"[19]and "he didn't stop working"[20].

21. When he started work at the DLA, even with his diagnosis, Mr Harris did not suffer from any incapacity for his employment and in 2014 achieved a merit based incremental increase in his salary due to his "superior performance"[21].

22. However, in late 2014 during a Parliamentary Open Day, Mr Harris was observed to become very upset, abusive and agitated[22]. In his Statement of Claim Mr Harris pointed to a number of workplace events on and from the Open Day and throughout 2015 as contributing to his mental injury. However at the close of the hearing Mr Harris no longer pressed the 2015 events as contributing to his mental injury. Instead Mr Harris submitted that "the events on and following December 2014 and through 2015 were relevant, in that they in effect sowed the seed for what was to follow"[23]. Mr Harris further submitted: "that in reality, the relevant events that cumulatively caused the mental illness were" events that occurred on 7 January, 22 February, between 22 February and 4 April, and 5 April 2016[24].

23. In light of those submissions is it necessary to consider the pre 2016 events in any detailed way? In my view it is. The events of late 2014 and 2015 shed light on two live issues in the proceedings:

[18] See for example Ex 2, Report of Dr James Hundertmark, Consultant Psychiatrist, dated 13 February 2018
[19] T 144
[20] T 146
[21] T 236
[22] T 238; Ex 8 p45 Letter Mr Tatham to Mr Tony Langmair dated 14 June 2016
[23] WOS [45]
[24] WOS [46]

(i) Firstly, the events inform as to Mr Tatham's knowledge (or what he ought to have known) concerning Mr Harris's mental health (or emotional state) as at the beginning of 2016. The Employer's knowledge, through its managers, is relevant on the question of the reasonableness of its management actions.

(ii) Secondly, the evidence provides a means through which the reliability and accuracy of the witnesses can be assessed.

24. It is not disputed that following the 2014 Open Day incident, Mr Harris informed Mr Tatham that he was suffering from a mental illness[25]. I accept that in December 2014 Mr Harris told Mr Tatham that he had depression and/or PTSD[26]. The worker told Mr Tatham that he was changing his medication[27]. It is not suggested that there was any lengthy discussion about his condition but I accept Mr Tatham's recollection that Mr Harris told him "it was between me and the Army, it's a Veterans Affairs matter"[28]. Although Mr Harris believed he had provided Mr Tatham with some written information about his mental health plan and his medication[29], Mr Tatham had no recollection of receiving any written information and could not locate any such documents[30]. Mr Tatham presented as an experienced public servant who maintained detailed records. I accepted his evidence that had he been given any such documentation he would have arranged for it to be filed with Mr Harris's personnel records and that he would have followed up any specific medical issues with Mr Harris. As Mr Tatham had no recollection of receiving the documents, as the documents could not be located, and as there was no reference to them in contemporaneous communications between Mr Tatham and Mr Harris, I am persuaded to accept Mr Tatham's evidence that he did not receive any such documents.

25. In 2015 Mr Harris's performance deteriorated. A performance management process was commenced in April[31] which was successfully concluded in October 2015[32], at which time Mr Harris's performance was once again considered satisfactory. In his evidence Mr Harris said that the letter setting out the 2015 performance management plan was signed by him "under duress". Mr Harris said that he did not agree with contents of the letter and "he wasn't going to sign it" but Mr Tatham told him "I had to or there would be further disciplinary action"[33]. Mr Harris also said "what's not included in that letter is our discussion about my ongoing mental health condition and the drugs that I was on"[34]. Mr Harris's evidence concerning the signing of the plan was challenged in cross examination. In 2016 Mr Harris had complained to the Speaker of the House about Mr Tatham[35] and an investigation had been conducted on behalf of

[25] Employer's submissions [35]
[26] Defence [3(a)ii]; T 273
[27] T 238
[28] T 238
[29] T 18, 20
[30] T 239; Ex 8 p46 Letter Mr Tatham to Mr Langmair dated 14 June 2016
[31] Ex 8 pp205-215 Letters Mr Tatham to Mr Harris dated 13 & 15 April 2015
[32] Ex 8 p218 Letter Mr Tatham to Mr Harris dated 23 October 2015
[33] T 136
[34] T 138
[35] Ex 8, addition to Tab 14, Letter Mr Harris to The Honourable Kezia Purick, MLA dated 23 March 2016

the Commissioner for Public Employment[36] (the 2016 Investigation). In cross examination Mr Harris conceded that he had not previously complained about the alleged oppressive circumstances surrounding the signing of the performance management plan[37]. Further, although the letter was raised by Mr Harris during a consultation with Dr Isherwood Hicks on 21 April 2015, Mr Harris did not seemingly complain to her that he had been forced under duress to sign it. Instead he portrayed the letter as a something of a back-down by Mr Tatham, a "withdrawal/apology type letter" [38]. Notably, this allegation of duress did not form part of the detailed Statement of Claim. In contrast to Mr Harris's evidence, Mr Tatham said the performance management "process was very collegial", "very cooperative"[39]. In its submissions the Employer reasoned that, given the breadth of the complaints made by Mr Harris against Mr Tatham, it was "inconceivable that he would omit to ever mention being forced under duress to countersign the performance management plan"[40]. I found that submission to be persuasive and to accord with common sense, and on this issue I preferred and accepted the evidence of Mr Tatham.

26. Throughout the 2015 performance management process Mr Tatham had regular meetings with Mr Harris. During the 2016 Investigation Mr Harris told the investigator, Mr Tony Langmair, that in 2015 he was changing his antidepressants and keeping Mr Tatham informed of the medication changes and of his psychologist appointments. Mr Harris said that he'd been "talking about it for 18 months"[41]. In his evidence, however, Mr Harris did not recall the version he had given to Mr Langmair and he did not give consistently similar evidence as to multiple conversations with Mr Tatham[42]. Further, save for one appointment in April 2015 (at the very start of the performance management process), Mr Harris did not in fact see Dr Isherwood-Hicks again during 2015[43] and it was not suggested that he saw any other psychologist. The Statement of Claim did not identify any pertinent 2015 conversations. In contrast to Mr Harris's version to Mr Langmair, Mr Tatham said that from time to time in 2015 Mr Harris took sick leave but he did not understand this to be related to Mr Harris's mental health. Mr Tatham said that there were no further conversations about Mr Harris's mental health in 2015 and he was not aware that Mr Harris was suffering from any ongoing mental health issues[44]. It was not suggested to Mr Tatham in cross-examination that there were any further conversations concerning Mr Harris's mental health in 2015. On the evidence before me, I have no difficulty accepting Mr Tatham's account as to there being no conversations with Mr Harris in 2015 concerning his mental health. I accept Mr Tatham's evidence that throughout 2015 he was not aware

[36] Ex 8, addition to Tab 14, Email from Mr Tony Langmair, Director/Investigator Invision, to Mr Harris dated 2 June 2016; Ex 8 pp49-77 Transcript of Audio Interview between Mr Tony Langmair and Mr Harris dated 15 June 2016
[37] T 138
[38] Ex 1 p16 Dr Jan Isherwood-Hicks consultation notes
[39] T 258
[40] Employer's submissions [29]
[41] Ex 8 pp51 & 62 Transcript of Audio Interview between Mr Langmair and Mr Harris dated 15 June 2016
[42] T 139
[43] Ex 1 p16 Dr Isherwood-Hicks consultation notes
[44] T 274

of Mr Harris suffering any "ongoing problems or difficulties as far as affecting his work"[45].

27. In his Statement of Claim and in evidence Mr Harris complained that in 2015 Mr Tatham had increased his workload such that he was routinely unable to leave work for up to two hours after the house had risen on Parliamentary sitting days[46]. However, this evidence was not consistent with the contemporaneous records[47] and in my view was exaggerated.

28. In his Statement of Claim and in evidence Mr Harris complained that he was required to conduct professional development training, known as "Hot Tuesday Topics", on an hours' notice, without adequate time to prepare, and he was unfairly required to present "pretty much all" of them[48]. In contrast, Mr Tatham said the topics were shared among staff according to an allocated roster finalised well in advance[49]. Mr Tatham said he presented his "own (rostered) topics, and the people who were supposed to deliver them, delivered them"[50]. When cross examined on this matter, Mr Harris specifically recalled doing the topic of "Privilege". Mr Harris said this was "highly embarrassing and humiliating" as it was a topic unfamiliar to him[51]. However, emails revealed that this was not a last minute re-allocation to present the topic but was a request by a colleague for assistance as the colleague was concerned he might run late for the start of the presentation. The colleague provided Mr Harris with his written preparation on the topic[52]. In my view the contemporaneous email is inconsistent with Mr Harris's recollections about being burdened with last minute presentations and I consider his complaints about this issue to be exaggerated.

29. In his statement of claim Mr Harris complained that in 2015 he was not supported in the work place when on crutches for a month. Mr Harris did not give evidence in chief on this issue but under cross examination he said that Mr Tatham had refused a request by him to move offices and told him that he "was shirking his responsibilities and trying to get other people to do my work"[53]. Mr Harris did not make a similar complaint to Mr Langmair during the 2016 Investigation and it was suggested in cross examination that this was the first time he had made such a complaint, however Mr Harris said he had complained to colleagues. In his evidence Mr Tatham denied any such conversation[54] and pointed to emails which documented arrangements that accommodated Mr Harris's medical appointments and physical limitations[55]. In my view the contemporaneous emails support the tenor of Mr Tatham's evidence and are

[45] T 274
[46] T 15
[47] Ex 8 pp24-33 Mr Harris's Sitting Allowance Claim Forms 2015; Ex 3 Email outlining Parliamentary sitting times 2015
[48] T pp16, 110
[49] Ex 8 p83 Email Mr Tatham to Ms Purick dated 10 February 2015
[50] T 241
[51] T 110
[52] Ex 4 Email Mr Keith Russell to Mr Harris dated 30 November 2015
[53] T 135
[54] T 249-251
[55] Ex 8 pp189-191 Emails between Mr Harris and Mr Tatham dated 10 June 2015 & Emails between Mr Harris and Mr Daniel Thomas dated 12 June 2015

inconsistent with the tenor of Mr Harris's evidence. I am persuaded that Mr Harris's complaints on this issue are incorrect.

30. Although Mr Harris played a significant role in the hosting of a successful Commonwealth Youth Parliament in October 2015[56], he complained that Mr Tatham made it more difficult for him to organise the event, and failed to provide guidance[57]. These allegations were denied by Mr Tatham[58] who pointed to a substantial body of contemporaneous emails which documented his considerable oversight and input into the preparation and running of the event[59]. In my view, the contemporaneous email record supports Mr Tatham's account and is inconsistent with Mr Harris's version. I am persuaded that Mr Harris's version is incorrect.

31. Following the success of the Commonwealth Youth Parliament, Mr Harris was to make a presentation at the New Zealand Parliament in February 2016. Concerning this presentation Mr Harris complained that he was "asked to go at the very last minute…on the last day before I went on leave…so I begrudgingly said yes although I didn't know when I'd have time to prepare"[60]. Having commenced his leave, Mr Harris decided "it was just too much, so I wrote an email…it turns out I had the wrong address…to the New Zealand Parliament…'Please accept my apologies. I won't be coming'"[61]. However, on this issue I found the following submissions of the Employer to be persuasive:

"Under cross examination Mr Harris conceded that he had sent an email to the New Zealand Parliament on 10 November 2015 offering to participate in the seminar and had from that time to prepare and make all necessary travel arrangements (T 171-172). Having done nothing towards that end prior to commencing leave on 16 December 2015, Mr Harris decided that he would not go to New Zealand, but took no step to inform anybody in the Territory (T174, 176)."[62]

32. Further in cross examination Mr Harris conceded that an official work email (such as the one cancelling his attendance at the New Zealand parliament) should have been sent via the public service email and not from his private email. By way of justification, Mr Harris initially denied having access to his work emails at home, but later conceded under cross examination that that was incorrect[63]. In addition Mr Harris provided different explanations for his decision not to attend. On the one hand he said he didn't have time to prepare or arrange travel[64], and on the other he explained his cancellation on "unforeseen personal reasons"[65]. In any event, when asked to provide a copy of the cancellation email, which Mr Harris conceded was a reasonable request, he

[56] Ex 8 p703 Email of Mr Tatham dated 6 November 2015
[57] T 124
[58] T 243
[59] Ex 8 pp337-340 List of emails from Mr Tatham to others concerning preparations for the Commonwealth Youth Parliament 2015
[60] T 30
[61] Ibid
[62] Employer's submissions [30]; Ex 5 Email Mr Harris to Ms Ferguson dated 10 November 2015
[63] T 174-176
[64] T 255 (Tatham); T 174 (Worker)
[65] Ex 1 p51; T 193

refused "because I was angry at the time and being difficult"[66]. On the circumstances surrounding the arrangements for and cancellation of Mr Harris's attendance in New Zealand, I found Mr Harris's evidence to be unconvincing.

33. On the evidence before me, I was satisfied there was only one conversation as at the end of 2015 between Mr Harris and Mr Tatham concerning Mr Harris's mental health, namely the conversation in December 2014 in which Mr Harris informed Mr Tatham of mental health issues connected to his service in the army. Mr Harris did not inform Mr Tatham of any continuing or new mental health concerns during 2015. I am not persuaded by Mr Harris's submissions that Mr Tatham, or any reasonable manager, ought to have inferred or gleaned that Mr Harris's performance issues in 2015 were related to a mental illness or change of medication. If mental health issues were ongoing throughout 2015, I would have expected any such issue to have been communicated by Mr Harris to Mr Tatham in one or more of their many meetings. Indeed, Mr Harris's own evidence was that he would have communicated any such issues because he had been taught during his fourteen years in the army to be upfront about problems that might affect his work capability[67].

34. In addition, on the evidence before me I am persuaded to accept the Employer's submissions that Mr Harris's evidence on several events in 2015 was inaccurate, exaggerated or embellished[68].

35. Mr Harris took annual leave from 16 December 2015 and returned to work on 4 January 2016[69]. On 4 and 5 January, Mr Harris, along with other senior employees and staff, participated in the task of commencing a stocktake audit of the storerooms. Although he had not had a good holiday, it was not suggested by Mr Harris that he was unfit or unwell for work on those days[70]. Mr Tatham asked Mr Harris about the New Zealand seminar and Mr Harris informed Mr Tatham that he was not going to New Zealand as he had not arranged his travel and it was acknowledged that the matter would be discussed later.

36. On the evening of 5 January 2016 Mr Harris learned that an army colleague was involved in a car crash and Mr Harris believed his colleague was seriously injured. Mr Harris did not attend work on 6 January 2016 as the news of the crash and injury to his colleague caused him to suffer an acute mental reaction[71]. Although Mr Harris thought he might have notified the workplace of his absence on 6 January, he was not certain[72] and ultimately accepted that he had not[73]. He said he turned his phone off and was not contactable on 6 February[74]. Mr Harris returned to work on 7 January 2016[75]. The work events that followed became a significant focus of these proceedings.

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[66] T 176
[67] T 18
[68] Employer's submissions [22]
[69] T 23
[70] WOS [65]; Employer's submissions [38]
[71] WOS [66]; Employer's submissions [39]
[72] T 23
[73] T 181-182
[74] T 23, 181

Issues

37. The following issues remain to be determined:

    (i) Did the Worker suffer a mental injury arising out of his employment?

    (ii) What were the work events that gave rise to the mental injury?

    (iii) Were the causative work events management actions taken on reasonable grounds and in a reasonable under the provisions of s 3A(2) of the *Return To Work Act*?

    (iv) Did the mental injury result in incapacity?

    (v) If so, did Mr Harris suffer any economic loss?

Did the Worker suffer a mental injury arising out of his employment?

38. Following an incident at work on 4 April 2016 (discussed below), Mr Harris was suspended from work from 5 April 2016. He did not return to his substantive position at the DLA. He returned to work in a senior administrative position with the Northern Territory Police, Fire and Emergency Services (NTPFES) on 7 November 2017.

39. Mr Harris saw Dr Wasim Shaihk on 13 April 2016. The appointment was cut short, because Mr Harris was abusive and exhibiting extreme agitation and aggression. Based on the short assessment Dr Shaihk considered Mr Harris was suffering from PTSD and agitated depression, and incapacitated for work for at least two months[76]. Dr Shaihk did not provide a fully considered opinion, no doubt due to the limitations of the consultation.

40. On 13 August 2016 Dr Dinesh Arya certified that Mr Harris was fit to return to work but noted that he should be protected from stressors especially "interpersonal situations in which he may feel threatened and intimidated"[77]. However, the Employer was still concerned that Mr Harris might not be fully fit for return and requested a further assessment by Dr Shaikh[78].

41. Mr Harris saw Dr Shaihk again on 27 October 2016. Dr Shaikh provided a report dated 7 November 2016[79]. Dr Shaihk outlined that Mr Harris had suffered from PTSD following his deployment to Afghanistan, but considered the appropriate diagnosis for the period that Mr Harris had been off work since April was a major depressive disorder of agitated state. Dr Shaikh noted that Mr Harris considered that the performance management process was inappropriate, intimidating and lacked procedural fairness and it was Dr Shaihk's opinion that work factors were causative of the mental illness[80]. Dr Shaikh considered that Mr Harris exhibited obsessional

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[75] T 23

[76] Ex 1 pp104-108 Independent Medico Legal Report of Dr Wasim Shaihk dated 13 April 2016

[77] Ex 1 p124

[78] Ex 1 p128 Letter to Mr Harris from Ms Catherine Webber, Deputy Chief Executive Organisational Services dated 4 October 2016

[79] Ex 1 pp131-138

[80] Ex 1 p217 File Note dated 5 September 2018

negative beliefs about Mr Tatham[81]. Dr Shaikh considered that Mr Harris was fit to return to work with one qualification, not with Mr Tatham. Dr Shaihk said that Mr Harris's negative emotions towards Mr Tatham increased the risk of deterioration in his mental health if he were to return to work under Mr Tatham.[82]

42. The Worker sought to rely on some opinions expressed by Dr Shaihk as to the appropriateness or reasonableness of the management actions taken in respect of Mr Harris. I do not give weight to those opinions. In my view they were based only on one version of events as recounted by Mr Harris, which I have found, in many particulars, to be unreliable. Further the opinion was based on the assumption that the Employer was aware of Mr Harris's mental health issues at the time the actions were taken. Again, for reasons stated elsewhere in this decision, I consider this assumption to be incorrect.

43. Dr Jan Isherwood-Hicks, Clinical Psychologist, provided a letter of opinion dated 7 February 2017[83]. Dr Isherwood-Hicks noted that Mr Harris had a history of PTSD but considered that his illness since April 2016 was a combination of depression and anxiety triggered by events at his workplace. As at the date of her letter, Dr Isherwood-Hicks considered that Mr Harris could return to work in his substantive position provided he was not supervised by Mr Tatham as the relationship between Mr Harris and Mr Tatham had "irreconcilably broken down". Dr Isherwood-Hicks said "If Mr Harris were provided with an alternative chain of command it is my opinion he could successfully return to his substantive position".

44. Dr James Hundertmark, Consultant Psychiatrist, saw Mr Harris on 5 February 2018 and provided a report dated 13 February 2018[84]. Dr Hundertmark said:

"It is my opinion that Mr Harris suffered from two psychiatric conditions in April 2016. Firstly he suffered from a chronic posttraumatic stress disorder. Secondly he suffered from an adjustment disorder with depressed mood and anxiety in response to the workplace issues. It is my opinion that the conditions were equal in their impact on Mr Harris, clearly only the second condition is related to the treatment he received in the workplace."

"It is my opinion that Mr Harris has a somewhat narcissistic personality style which may have contributed to a minor degree to the issues in the workplace."

"With respect to the issue of causation, two comorbid diagnoses have been outlined above, those being (1) chronic posttraumatic stress disorder and (2) an adjustment disorder with depressed mood and anxiety."

"In summary it is my opinion that chronic posttraumatic stress disorder caused by service in Afghanistan and an adjustment disorder caused by workplace issues were equal and significant causative factors in the presentation at that time [April 2016])."

[81] T 97, 98
[82] T 95, 99
[83] Ex 1 pp144-145
[84] Ex 2

"In summary it is my opinion that the adjustment disorder has now resolved…. The posttraumatic stress disorder continues. The posttraumatic stress disorder symptoms may have moderated to a slight degree but they are still clearly present."

"It is my opinion that Mr Harris has full work capacity. He can work full time in his current role.[85]*"*

"There is no current work incapacity."

"Mr Harris has no incapacity for work at present."

45. On the evidence I accept, and it is not disputed[86], that Mr Harris suffered a mental injury arising out of his employment. In my view it is not necessary to prefer one diagnosis over another. On all the evidence it seems that Mr Harris was suffering, at least to some extent, from chronic PTSD arising out of his deployment to Afghanistan. In addition from April 2016 he was suffering from a second condition, namely, an adjustment disorder or depression and anxiety arising out of the events at the workplace. Whilst there may have been some contribution from his personality type and his chronic posttraumatic stress disorder to the onset of the second condition, I am satisfied that the primary cause of the second condition was the workplace.

46. In November 2017 Mr Harris had returned to work in a senior administrative role at the NTPFES. This signifies the full extent of his recovery and his capacity for work in the field of his pre-injury employment, namely, that of a senior administrative officer. When he was seen by Dr Hundertmark in early 2018, Dr Hundertmark considered, and I accept, that Mr Harris was fit to return to work in his substantive position. The only limitation arose from Mr Harris's obsessive animosity towards Mr Tatham. Because the relationship between the two had irreconcilably broken down, Mr Harris's mental health might deteriorate were he to work with Mr Tatham again.

What were the work events that gave rise to the mental injury?

Were the causative work events management actions taken on reasonable grounds and in a reasonable manner (protected management actions) under the provisions of s 3A(2) of the *Return To Work Act*?

47. Is helpful to consider these issues together.

48. As noted earlier, whilst it was not in dispute that on or by 4 April 2016 Mr Harris had suffered a mental injury arising out of his employment, there remained a dispute about which work events contributed to the mental injury. In considering the evidence on these matters it is helpful to breakdown the events to those occurring on or between the following dates:

    (i) 7 January 2016; and

    (ii) between 22 February 2016 and 5 April 2016.

[85] Mr Harris had secured employment with Northern Territory Emergency Services at level SAO 1
[86] Employer's submissions [2(b)]

Workplace events on 7 January 2016

49. When he got to work on 7 January, Mr Harris submitted an electronic sick leave application for his absence on 6 January and Mr Tatham responded with an email headed "Professionalism and Questions I require a Response to"[87]. The email was forthright and to the point. It raised Mr Tatham's concerns about: Mr Harris's absence from work on 6 January without notification, his failure to respond to email and phone messages, and Mr Harris's decision not to attend the New Zealand seminar and his apparent failure to notify anyone about that decision. Mr Tatham requested a copy of the email Mr Harris claimed he had sent to the New Zealand Parliament cancelling his attendance. Mr Tatham's email concluded "I am concerned that 2016 has commenced poorly after a lengthy performance management process was concluded in 2015. You are a senior professional in this agency and if you don't respect the requirements of the agency I will be required to act accordingly".

50. Under cross examination Mr Harris did not disagree with the proposition that in light of, his unexplained and uncommunicated decision not to go to New Zealand, his unexplained absence from the office, and his failure to respond to messages; that it was reasonable for those matters to be raised with him[88]. However Mr Harris explained that he thought Mr Tatham "should have come and had an informal discussion before sending the email[89]", because he was already feeling unwell and Mr Tatham's email made him feel worse[90] and he "overreacted" [91].

51. Mr Harris complained about the email to his colleague, Ms Jacqui Forrest, Director Business Services. Ms Forrest documented their meeting in a file note which she completed the same day[92]. In her file note Ms Forrest described Mr Harris as being emotional and physically shaking. She said he referred to Mr Tatham with "derogatory expletives" and considered Mr Tatham's email to be "unreasonable". Mr Harris told Ms Forrest that his medication had changed and he had not eaten or slept for three days. Ms Forrest counselled Mr Harris to "not make rash decisions", to see Mr Tatham and "explain that he was unwell", and to "see his doctor today".

52. Mr Harris then met with Mr Tatham. In his evidence in chief Mr Harris described the meeting as follows:

    "…he (Mr Tatham) was angry, slammed his hand on the desk, told me I was playing him for a fool, told me there was nothing wrong with me. And I said I would like to go on leave. And he said you should think about your position in the department while you are away."[93]

[87] Ex 1 p52
[88] T 184
[89] T 190
[90] T 186
[91] T 184
[92] Ex 1 p55-56
[93] T 26

53. Mr Tatham disagreed with Mr Harris's recall of the meeting. Mr Tatham said Mr Harris appeared a bit agitated and told him that he "didn't appreciate the email". Mr Harris told Mr Tatham that he had been depressed and not eating or sleeping. Mr Tatham agreed that in light of that information it was clear that Mr Harris was unwell and told Mr Harris to take sick leave. Mr Tatham agreed that he used the phrase "stop playing me for a fool" but provided a different context, namely, that Mr Harris needed to keep him informed so they could make appropriate arrangements when he was away and plan how to proceed[94].

54. Shortly after the meeting Mr Tatham sent a follow-up email to Mr Harris summarising their conversation and setting out how they were to proceed[95]. Concerning Mr Harris's complaint that Mr Tatham was not sympathetic, in the email Mr Tatham recorded his surprise at having given that impression but reminded Mr Tatham "that while we offer every assistance, at the same time we require professional courtesy and respect for the Policies of the department". Mr Tatham noted that prior to the meeting, he was not aware that Mr Harris was suffering from depression and in light of that disclosure Mr Tatham reminded Mr Harris of the services and work place flexibility that were available should he wish to avail himself of that assistance. In the email Mr Tatham specified that he would require a medical certificate certifying that Mr Harris was fit to return to work to ensure that "work will not contribute to any further difficulties for you either personally or medically". Mr Tatham concluded "Please do not confuse my request to meet basic professional requirements with a lack of empathy. We continue to value your contribution to the workplace and I wish you all the best".

55. Concerning Mr Tatham's follow-up email, on behalf of the Worker it was submitted "it appears little more than a self-serving statement by Mr Tatham"[96]. Such a submission seems unjustified. Firstly, the email was sent to Mr Harris shortly after the meeting. Were the email inaccurate, Mr Harris had the opportunity to respond to it, correct it or add to it and it is not relevant that Mr Harris claims he did not see the email until his return to work. Secondly, the email appears entirely consistent with Mr Tatham's punctilious management style as demonstrated throughout his evidence and by his correspondence, notes and memos tendered in these proceedings. In those circumstances, I have no difficulty relying on the email as a contemporaneous and reliable summary of the meeting and, where the contents of the email or Mr Tatham's evidence differ to the evidence of Mr Harris, I prefer and accept Mr Tatham and the email.

56. I am satisfied on the evidence that the emails and meeting between Mr Tatham and Mr Harris on 7 January 2016 were relevant management actions in that they were actions taken by the employer in the management of Mr Harris's behaviour in the workplace, more specifically they were communications on the question of possible misconduct by Mr Harris concerning his possible failure to comply with departmental policies.

[94] T 257, 277
[95] Ex 1 p53
[96] WOS [74]

57. In light of Mr Harris's failure to notify his employer of his absence from work on 6 January 2016, his failure to respond to messages on his work email and phone, his failure to inform his employer that he would not be attending and presenting at an international seminar as previously arranged, and taking into account his senior role in the organisation and his recent history of performance management, in my view there were sound grounds for commencing management action. Whilst that action could have been commenced verbally, which Mr Harris might have preferred, there was nothing disproportionate, unfair, heavy handed or untoward in the inquiry being commenced by email, which had the added rational advantage of providing a contemporaneous documentary record. Further, whilst the concluding statement "You are a senior professional in this agency and if you don't respect the requirements of the agency I will be required to act accordingly" might seem somewhat insensitive, in my view when looking at the email as whole, the meeting that followed and the follow-up email, the overall approach was proportionate, moderate and reasonable. Indeed, although Mr Harris was clearly angry and perhaps shaken by the initial email, it is apparent that he was able to regather his composure sufficiently to clarify matters in the meeting with Mr Tatham shortly thereafter.

58. I find that it was at that meeting, and not before, that Mr Tatham learned that Mr Harris was suffering from depression. In light of that information Mr Tatham quite properly pointed Mr Harris to various supports that were available to him. In my view the meeting continued to demonstrate an appropriate, rational and moderate response to the unfolding issues and information.

59. I am satisfied on the evidence that Mr Harris did not have a good Christmas break[97], that when he returned to work he was not eating or sleeping well[98] and that he had an acute reaction to the news of his colleague's car accident on 5 January 2016. He was still unwell and should not have come into work on 7 January 2016[99].

60. After the meeting on 7 January 2016 Mr Harris commenced sick leave and he did not return to work until 22 February 2016. Mr Harris's sick leave was supported by medical certificates from his General Practitioner[100]. He also saw his psychologist Dr Isherwood-Hicks on four occasions. During those sessions Mr Harris did not discuss or complain about the events of 7 January 2016 although he did tell Dr Isherwood-Hicks that he was not to return to work without a medical certificate.

61. It seems that Mr Harris was somewhat perplexed as to why a medical certificate was required before his return to work, suggesting that perhaps he considered this requirement unnecessary or unreasonable. When dropping off some medical certificates on 8 February 2016 Mr Harris raised this with Ms Forrest. In a contemporaneous file note Ms Forrest recorded that Mr Harris told her he had a "permanent disability" and Ms Forrest "explained that his treating doctor will need to determine if he is fully fit, requires a staged return to work, modified duties or

[97] T 193
[98] Ex 1 p55
[99] T 186
[100] Ex 1 pp57-61

different types of duties to return to work" [101]. In light of Mr Harris's statements that he had depression and a permanent disability, it was clearly prudent and reasonable to seek a medical clearance before his return to work, to ensure he could safely return to all his duties and responsibilities.

62. Mr Harris's General Practitioner was away for a period of time and Dr Isherwood-Hicks recommended that Mr Harris not return to work during the February parliamentary sittings. Following those delays, Dr Isherwood-Hicks considered Mr Harris was fit to return to work[102], as did his General Practitioner who provided a medical certificate dated 20 February 2016 declaring him "better" and "able to resume his regular occupation" [103]. The medical evidence did not seemingly support Mr Harris's earlier statement that he had a permanent disability or that he was suffering any ongoing illness that might affect his work.

63. As to the weight that should have been given to the medical certificate, relying on evidence by Dr Hundertmark, the Worker submitted that the medical clearance meant very little because, having been away from work for just over six weeks, it would have been "self-evident" to his employer that Mr Harris's mental state was "not very good"[104]. However, in fairness Dr Hundertmark's evidence continued "if he is fit to make a return to the workplace and take part in normal workplace duties and if normal workplace duties include being advised that normal workplace management is necessary, then it is part of normal workplace duties" [105]. In my view, having received a full and unqualified medical clearance for return to work without reference to any ongoing medical conditions or limitations, the Employer did[106], and in my view was entitled to, proceed on the basis that Mr Harris was fit for all normal workplace matters, including performance management if it was required.

Workplace events between 22 February 2016 and 5 April 2016

64. It is common ground that on his return to work on 22 February 2016 Mr Harris was told to meet with Mr Tatham. At that meeting Mr Tatham gave Mr Harris a letter[107] which commenced a second process of performance management. It is not in issue that this letter was management action pursuant to s 3A of the Act.

65. As noted earlier, in 2015 Mr Harris participated in a six-month Performance Management Plan with Mr Tatham which commenced by letter on 13 April 2015. The 2015 performance management process was explained in the letter[108] and in employment instructions that were attached to it. In that letter Mr Tatham documented his concerns specific to issues arising in 2014 and 2015, as well as more generalised concerns about Mr Harris's performance. Those concerns included (inter alia):

[101] Ex 1 p62
[102] T 155
[103] Ex 1 p63
[104] WOS [81], relying on the evidence of Dr James Hundertmark at T 311
[105] T 312
[106] See evidence of Mr Tatham T 259, 279
[107] Ex 1 pp64-67
[108] Ex 8 pp205-210

(i) Failing to complete all of his work responsibilities "in a timely manner or at all",

(ii) Deadlines not being met,

(iii) Correspondence incorrectly drafted and overdue,

(iv) A cabinet submission on the E Tabling project "which had a generous four month lead time" being two months overdue, and

(v) Failing to provide notification of absences from the work place and a "cavalier approach" (with particular reference to an un-notified absence on 6 January 2015).

66. In his 22 February 2016 letter, Mr Tatham outlined similar concerns to those raised in 2015 and noted that in spite of improvements in Mr Harris's performance achieved in 2015, those improvements had not seemingly been maintained. Mr Tatham wrote:

"Your poor performance and the advice of your permanent disability require me to conduct further investigation.

I will determine if there are reasonable grounds to demonstrate if your conduct relates to an inability due to a medical condition or unsatisfactory performance pursuant to section 44 of the Public Sector Employment and Management Act (the Act) or to potential breaches of discipline pursuant to section 49 of the Act.

Particulars of Performance Concerns

1…

17…

…

Medical Condition

This is obviously a sensitive and difficult situation because I have raised serious concerns about your performance in the past but now, for the first time, I understand that you may be asserting that these matters relate to a permanent disability

I require further information from your medical practitioner relating to the nature and impact of your permanent disability…..

…

Return to Work Duties

While I conduct further investigation in relation to the performance and discipline issues I have outlined above, I advise that pursuant to sections 24(3)(e) and 36(1) of the Act, I am revising the duties I require you to perform. You will continue to be remunerated at your nominal level of Senior Administrative Officer 2 (SAO2).

…

Over the coming months you will be concentrating specifically on tabled papers management, online tabled papers, copy storage papers and archive management of tabled papers and all other Table Office hard copy and digital documents.

In your refined role you will work cooperatively with the Director of Business Services to implement the process for e-tabling and with the Table Office Manager to complete the tasks relating to reorder and storage of tabled papers, copy papers parliamentary records and bring forward publication of bound copies up to, and as far as is possible, including the 12th Assembly.

You will ensure the Table Office is up to date and compliant with the records management requirements of the Department.

You are not required to undertake any duties as Sargent at Arms and the Director of Security will continue to report to me. I will continue to oversee the Table Office and sittings procedural matters for sitting days without your assistance.

You will not be required to participate in Know Your Assembly ASeminars for 2016.

…

…You will continue to report to me on a daily basis for performance management reasons.

Should any of the matters raised in this correspondence be of concern they can be discussed at our meeting tomorrow. Should you require employee assistance, this is available to you through the Employee Assistance Scheme.

I look forward to working through the issues I have raised with a productive and professional approach."

67. Concerning the meeting in which he received the investigation and performance management letter, Mr Harris said in evidence that Mr Tatham:

"Literally threw the letter across the table at me and said "We're not discussing that today. You can read it and we'll discuss it tomorrow".[109]

"..it was thrown at me.. it was not given to me.. it was thrown across the desk. Mr Tatham has quite a wide desk."[110]

68. On 15 June 2016 Mr Harris told Mr Langmair about the meeting and described it as follows:

"Not handed to me, didn't want to discuss it, didn't give me an opportunity to read it….he didn't even want to give me the ability to respond. Finally I went in and I said 'I'd like to respond in writing to this because you won't discuss it with me' and he said 'ok you can have three days' and I said' no, no, I'll have fourteen to respond'." [111]

69. Unsurprisingly, Mr Tatham had a different recollection of the meeting. Mr Tatham said:

[109] T 27
[110] T 197
[111] Ex 8 p56

"Mr Harris attended my office and we sat down. Had a brief 'how are you' discussion and I handed him this letter and I said to him 'Look I'm going to give you a letter. It's got a number of things in it. It's around performance. It's around medical. And it's around discipline matters. I'd like you to have a look at that and I'd like you to read it. You can do it now or you can take it away'. And the meeting was concluded fairly shortly thereafter because he took it away."

"I didn't put it in his hands…I put it in front of him... I am not in the habit of throwing letters…There is no point." [112]

70. Mr Tatham said that the plan was to meet again the next day to discuss matters further. Mr Tatham kept some brief contemporaneous shorthand notes of those two meetings:

"Harris Mon 22/2

Handed over letter-meeting concluded advising 8.15 meeting Tues."

"Harris Meeting 8.15 23/2/16

Briefed on S/Room requirements

Daily meeting

14 days respond to correspondence

Liaise with MC"[113]

71. Mr Harris saw Dr Isherwood-Hicks on 3 March 2016. According to the her contemporaneous notes: Mr Harris showed her Mr Tatham's letter; told her that he had taken some advice, drafted a reply and felt a lot better as he was able to refute every allegation; but had effectively been demoted to carrying boxes and a website task. Mr Harris told Dr Isherwood-Hicks that he was no longer Sergeant at Arms but was on full pay[114]. Mr Harris did not tell Dr Isherwood- Hicks that the letter had been thrown at him. Although the letter of 22 February 2016 was described as "slicing"[115] and Dr Isherwood-Hicks expressed the view that the change in duties was not in Mr Harris's best interest so far as his mental health was concerned, Dr Isherwood-Hicks did not suggest that Mr Harris was distressed, unwell or not coping with the work situation. It was her view that he was "hopefully applying the strategies and managing it"[116] and she did not advise him to stay away from work.

72. Although the contemporaneous records are limited, in my view they are more consistent with Mr Tatham's recall of events than with Mr Harris's recall. Where the evidence differs between Mr Harris and Mr Tatham on the events of 22 and 23 February 2016 I prefer the evidence of Mr Tatham. In light of the medical certificate of 20 February 2016 and the observations of Dr Isherwood-Hicks that Mr Harris was "managing" I do not accept the submissions of the Worker that Mr Harris was "already

[112] T260
[113] Ex 8 p287
[114] Ex 1 p17
[115] T 162
[116] T 156

unwell" or that it was "reasonably foreseeable" by the Employer that he would be "intimidated by the letter" [117].

73. In his evidence Mr Harris agreed that he was not put under any pressure to deal with or respond to the matters set out in the letter that day[118] and he provided Mr Tatham with his written response to the letter on 7 March 2016[119]. Mr Harris responded to each of the performance issues raised by Mr Tatham and provided his version or explanation. Mr Harris also raised his concerns about the process that had been adopted. Mr Harris thought that there might have been a failure to comply with section 44(5) of the *Public Sector Employment and Management Act* and the *Commissioner of Public Employment's Instruction Number 3 – Natural Justice.* However these concerns were not pressed in the proceedings and appear misconceived as it is apparent that no final decision had been made about Mr Harris's performance or any consequence that it might attract; the matter was still at an early investigation and/or performance management stage. Mr Harris also complained there had been a failure to comply with the Department's Performance Management Guideline and this complaint was pressed in submissions. It was submitted that a failure to follow the policy was a factor that pointed to the management action being unreasonable or unfair. According to the Worker's submissions[120] the performance management procedures relevantly required that:

    (i) *...*

    (ii) *regular informal discussions about specific performance issues have been raised with the employee and have not resulted in a satisfactory improvement in performance;*

    (iii) *if serious concerns or medical grounds are identified, the matter must be promptly escalated to the human resources manager and/or director of strategic and business support services for guidance and advice;*

    (iv) *the Performance Improvement Plan in accordance with the template must be used. The draft plan should be discussed with the human resources manager initially then with the employee at a meeting and an agreement for the final plan sought.*

74. As I understand the Worker's submissions he complained, firstly, that he was taken by surprise by the letter of the 22 February 2016 on his return from sick leave and in particular complains that "the informal discussions about specific performance issues" required by the performance management procedures had not taken place. However, in his letter of reply of 9 March 2016[121] Mr Tatham pointed to a long history of meetings, correspondence and requests (by reference to dates, emails, meeting notes and minutes) relevant to the specific issues raised in relation to Mr Harris's performance. I

[117] WOS [86]
[118] T 197
[119] Ex 1 pp70-75
[120] WOS [87]
[121] Ex 1 pp76-84

am satisfied that regular informal discussions relevant to Mr Harris's duties and his performance had taken place.

75. Secondly, I understand that the Worker complained that because he had taken sick leave for depression and stated that he had a permanent disability, the matter ought to have been referred to, or advice should have been taken from, the human resources manager or director of strategic and support services. However, having twice been requested to provide a medical report explaining his condition, Mr Harris had not produced anything that explained or supported his assertion of a disability, and to the contrary the 20 February 2016 medical certificate said he was "better". In those circumstances I do not consider there was any breach of the departmental guideline.

76. Finally, the Worker complained that the Performance Improvement Plan template was not completed. In his evidence, which I accept and consider sensible, Mr Tatham explained:

"When I am implementing this policy with someone at the very senior level, I would expect that person to be able to cope with a more collegiate approach, a more cooperative approach to the performance management… So with the Performance Improvement Plan which I put in place under the policy and following the letter to Mr Harris, I understand it doesn't necessarily comply with the template, but it complied with my view on what was appropriate for a very senior manager who was reporting directly to me as the CEO."[122]

77. Further, in fairness to Mr Tatham, by reference to his letter dated 9 March 2016, it appears he intended to develop a Performance Improvement Plan but events overtook its preparation[123].

78. Mr Harris further complained that in light of him telling Ms Forrest on 8 February 2016 that he did not wish to communicate with Mr Tatham and "preferred not to be contacted by him at the moment"[124], it was unreasonable and unnecessary on his return to work to be asked to attend daily meetings with Mr Tatham. However, this requirement was short lived. Within the first week of Mr Harris's return, Mr Tatham reconsidered the efficacy of this approach. Mr Tatham said that he "didn't want it to become personal" and he "wanted Mr Harris to have that bit of space" so arranged for Mr Harris to meet with the Deputy Clerk instead[125]. Given Mr Harris's seniority in the organisation, Mr Tatham was his direct line manager, that they had both successfully worked together through a lengthy performance management process in 2015 which included regular meetings, and in light of Mr Harris's medical clearance; in my view it was not unreasonable for Mr Tatham to initiate regular (even daily) meetings for the purpose of managing the completion of prioritised tasks (similar to the 2015 process). I agree with the gist of the Employer's submission that Mr Tatham responded quickly

[122] T 247

[123] Ex 1 p84 (see dot point 5); Ex 8 addition to Tab 14, Email Ms Marianne Conaty, Deputy Clerk to Mr Langmair dated 15 June 2016 at 11:12:24am, paragraph 2

[124] Ex 1 p62

[125] T 283

and aptly when he realised that Mr Harris might not be comfortable with the frequency of their contact[126].

79. A significant aspect of the Worker's submissions concerned the changes made to Mr Harris's duties on his return to work. The Worker complained that the effect of those changes was a practical demotion to that of storeman "far below the substantive responsibilities of his normal position" which was shaming of him[127]. Further the Worker complained that, concerning the project plan that he was required to prepare, "the draft plan proceeded through several versions, as a result of changes being required which were not mentioned in earlier versions, and changes to the changes" [128]. The worker submitted that the combined effect of "requiring or allowing Mr Harris to undertake these duties was patently and obviously unreasonable" [129].

80. In my view the Worker's submissions incorrectly characterise and over-simplify the project that Mr Harris was tasked to complete. The full scope of the project is detailed in Mr Tatham's letter to Mr Harris of 26 February 2016[130]. The project required Mr Harris to address "the significant task of on-line management of tabled papers and the modernisation of the Assembly's approach to tabled papers as required by the Subordinate Legislation Committee's May 2013 recommendation to the Assembly as adopted". The letter identified seven desired outcomes and required Mr Harris develop a set of protocols "which will achieve 100% electronic table papers and a proposed time frame for completion of the project". Mr Harris was further tasked to "include an agreed timeframe for the completion of the audit of" the Bills and Papers Rooms and the Archives Store. Mr Harris was required to liaise with the Deputy Clerk who was to performance-manage aspects of the process to its conclusion. In his letter of 9 March 2016[131], Mr Tatham briefly summarised the history of the project since 2013 and noted that part of the project had been completed by the Director of Business Services in 2015. I accept that this project had become a priority for the office and that it required high level planning and coordination from senior staff. Even management of the storage rooms had become a priority at the highest levels as evidenced by the participation of the Clerk, Deputy Clerk, Director Business Service and the Acting Business Support Manager in the assessment and stocktake planning and process[132]. Accordingly, a second aspect of the project was to plan the management of the physical auditing and storage of the documents[133]. Although Mr Harris complained that he was "moving boxes" this was not what he had been tasked to do[134]. In my view, the project was not a demotion and it fell within the purview of Mr Harris's responsibilities.

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[126] Employer's submissions [55]
[127] WOS [101]
[128] WOS [102]
[129] WOS [103]
[130] Ex 1 pp68-69
[131] Ex 1 p78
[132] See for example Ex 8 pp282-284
[133] See for example Ex 1 p 87 paragraph 1, File Note of Ms Jacqui Forrest, Director of Business Services dated 4 April 2016
[134] T 266

81. Whilst I was satisfied that there was nothing unreasonable about requiring Mr Harris to complete the allocated project, I consider the real complaint was about the removal of other responsibilities so that he could focus solely on this project. If I understand the submissions correctly, because he was not allowed to participate in the "fun" part of the job the Worker complained the action was punitive. In support of the submission he pointed to the following evidence of Mr Tatham:

"I was conducting an investigation about what was going on with him but what I had in mind there [was] to concentrate his effort, your Honour, on the key things that had really fallen by the wayside. So I made an assessment that I, with the rest of this staff could cope quite well with sitting days and doing the sitting period material and doing the presentations and the papers and all the things that we had to do for a sitting day to occur. But what had been falling by the wayside in the background, it was really getting to the stage where it was very very late, but also I was thinking in the context of workload, this would be a concentration of effort on a specific project which would actually mange his workload perhaps a bit better and he would be able to just concentrate on that without all the 'fun' if you would like to say of a parliamentary sitting day which is full of people coming and going and lots of requirements to get in and out of the chamber and do all that sort of stuff." [135]

82. However, in justification and further explanation of his decision Mr Tatham said:

"The point of having a plan for the project had become abundantly clear, your Honour, over the last two and half years it had just fallen by the wayside. It wasn't part of what was being done on a day to day basis by Mr Harris as part of his responsibilities, it had been sitting and been shifted to new reporting timeframes through my Monday reports with Mr Harris and he had not been able to come up with a plan that would satisfy what we were required to do for the members of the assembly as per a resolution of the Assembly, and, as I said to the Deputy Clerk at the time, I said 'I've given Mr Harris this specific project because we are now way behind on what a resolution of the Assembly was and in the world of parliamentary practice if you don't do what the assembly asks you to do you are in contempt of the Assembly'. And as Clerk of the Assembly it wasn't really a good look for me to be in contempt of the Assembly."[136]

83. I note that Ms Marianne Conaty, the Deputy Clerk, documented her role in supervising Mr Harris's project in an email to Mr Langmair on 15 June 2016[137]. Ms Conaty annexed the working drafts of the plan Mr Harris was developing and she listed her meetings with Mr Harris between 29 February 2016 and 4 April 2016. It appeared to me that Ms Conaty considered that the work Mr Harris was tasked to complete was a genuine priority and she took her job of supervising it to completion seriously. Similarly, in her file note of 4 April 2016[138], Ms Forrest also documented her

[135] WOS [93(b)]
[136] T 265
[137] Ex 8 Tab 14, unnumbered pages
[138] Ex 1 pp85-87

understanding that the project being undertaken by Mr Harris was "important" and the plan was "necessary".

84. Further I do not accept the submissions that Mr Harris was stripped of all other duties or isolated. He was meeting with the Deputy Clerk and others[139]to progress the project, and was offered small group training in RM8[140]. I accept the evidence of Mr Tatham that Mr Harris still had line management of his staff and could call on them or the departmental support team for assistance.[141]

85. It is natural that employees find some aspects of their employment more enjoyable than others. A decision to exclude an employee from the enjoyable aspect of a job, taken on arbitrary grounds or without sound reason, might be unreasonable. However, in this case I accept Mr Tatham's evidence that he had genuine and legitimate grounds for temporarily requiring Mr Harris to focus and finalise one project which fell within the ambit of his senior level of responsibility. Whilst Mr Harris might not have liked the project or considered it worthy, in my view the decision was not implemented as a punishment nor was it a practical demotion.

86. On 4 April 2016, Mr Harris met with Ms Conaty, for one of their scheduled meetings. Ms Conaty made a file note of that meeting which outlined their inspection of the work to date and their discussions concerning the latest draft plan[142]. Ms Conaty notes that she made a number of further requests in relation to additional amendments to the draft, some of which she said she had already raised in earlier meetings but which had been ignored or overlooked. Ms Conaty noted:

"Mr Harris was civil to me during this meeting and advised that he would address these matters and continue work on the brief to the Speaker.

I noted I was aware how much work he had put into many of the tasks contained in the plan and that I had observed a lot of progress during our walk around on 24 March 2016.

I thanked him for his March report which I received during the afternoon of 1 April 2016 and advised that I had provided it to the Clerk at our weekly meeting on 4 April 2016. I told Ben that if he addressed the matters I requested, I would sign the plan through to the Clerk."

87. Very shortly after that meeting Mr Harris went into Ms Forrest's office and "lost it"[143]. An account, which is not disputed, is set out in Ms Forrest's contemporaneous file note[144]. In summary, Mr Harris shouted, swore and complained that he had been asked to make further changes to the draft plan which he considered "pointless". He considered that the plan contained unrealistic deadlines designed to be held against

[139] Ex 8 additional document to tab 14, Email Ms Conaty to Mr Langmair dated 15 June 2016; for example Russell, Jacqui and Julia see email trail 8 March 2016; Ex 8 p285
[140] Ex 8 additional document to tab 14, email Ms Conaty to Mr Harris dated 1 march 2016
[141] T 266, 284
[142] Ex 8 addition to Tab 14, File Note Re Project Plan Meeting with Ben Harris 4 April 2016
[143] WOS [104]
[144] Ex 1 pp85-87

him. After railing against his work and Mr Tatham, Mr Harris articulated matters concerning his health. Mr Harris said:

"…he is not sleeping and he said I have an anxiety attack every f morning when I think about coming into this f* place and have to deal with the f* Clerk.*

Mr Harris stated he hears telephones ringing every 15 minutes and that he smells the dust from his tent in Afghanistan. Mr Harris advised that on his way to work this morning that he was near a zebra crossing and saw the oncoming car wasn't going to stop. He advised he had considered just walking under it and killing himself. He advised that when he is ironing his shirts he thinks about pushing the iron into his face. He also advised that he picks at his scalp.

….

Mr Harris reiterated that the Clerk is responsible for his current state of mind."

88. In response to Mr Harris's outburst and mental health disclosures, it was determined that Mr Harris should be suspended from duties on full pay "until such time as you are medically fit to return to the workplace". This was communicated to Mr Harris on 5 April 2016 by letter[145] and in a recorded meeting with Ms Conaty and Ms Forrest[146]. In my view this suspension was management action for the purposes of s 3A of the Act. The Employer submits that as the injury was already "caused" the actions of the Employer on 5 April 2016, post-onset, are not relevant[147]. However, whilst the injury was manifest on 4 April 2016, in my view, management action taken on 5 April 2016 had the potential to exacerbate the injury, or contribute to its severity. Accordingly I disagree with the submission that the events of 5 April are not relevant. I consider that I am required to assess the reasonableness of the decision to suspend on medical grounds.

89. The Worker complained that the suspension was unnecessary and heavy handed. The Worker submitted that he should have been forewarned or consulted about the decision, given the opportunity to have a support person present, and that he should have been offered "special or other leave"[148].

90. According to the letter of suspension, Mr Tatham consulted with the Office of the Commissioner for Public Employment, the Employee Assistance Service Australia and the Crisis Assessment and Triage Team. It seems to me that he took reasonable steps to obtain appropriate advice on how best to proceed.

91. Given the seriousness of the outburst on 4 April 2016 and Mr Harris's disclosures of thoughts of self-harm, I consider the Employer was justified in acting promptly. Mr Tatham's duty of care was not limited to Mr Harris but included his other staff. In those circumstances it was reasonable that Mr Harris be excluded from the work place until his medical fitness was established. In addition it was reasonable that he undergo

[145] Ex 1 pp88-89 Letter Mr Tatham to Mr Harris dated 5 April 2016
[146] Ex 1 pp94-103
[147] Employer's submissions [63] – [64]
[148] WOS [109]

a psychiatric assessment (which Mr Harris had, in any event, already consented to[149]). Whilst some other form of leave (if available) might have better suited Mr Harris, a medical suspension was a legally available and proportionate response to the gravity of the incident and the mental health disclosures.

92. In my view it was reasonable not to give prior notice of the decision. Any "heads up" might have caused a further outburst and put Mr Harris or other staff at risk. Further, whilst a support person could have been arranged, it appears that Mr Harris was comfortable approaching Ms Forrest with his concerns, as he had done the previous day, and she was one of the persons who delivered the letter and explained what was to occur. Finally, there was no evidence before me that any departmental policies or guidelines had been breached by the approach taken[150].

93. I note that many of the Worker's submissions as to the reasonableness of the various actions, presupposed that Mr Tatham knew or ought to have known that Mr Harris was suffering a mental illness or permanent disability during the period from 7 January through to 5 April 2016. I do not accept that proposition. I accepted Mr Tatham's evidence that there was one conversation in late 2014 or early 2015 when Mr Harris told him of an illness associated with his army experience. Mr Tatham was aware on 7 January that Mr Harris was depressed which in evidence Mr Harris said was due to receiving information that a war colleague was seriously injured in a car crash. However, in my view Mr Tatham was entitled to rely on the medical certificate of 20 February 2016 which said that Mr Harris was "better". In his letter dated 22 February 2016, Mr Tatham invited Mr Harris to provide further medical evidence if he was asserting a permanent disability relevant to his work. In his response on 7 March 2016, Mr Harris again referred to his mental health, claimed he had provided written information about it in late 2014, and declined to provide any further information (but agreed to be psychiatrically assessed). In his letter of 9 March 2016 Mr Tatham made it clear that he had not received the medical documents in 2014 and requested copies (which were not and have never been provided). In those circumstances, I remain of the view that Mr Tatham was entitled to proceed on the basis of the medical clearance of 20 February 2016 that Mr Harris was "better". He was entitled to make management decisions on the basis that Mr Harris was "better" and "able to return to normal duties". However, even if I am mistaken, based on the limited and dated information on which the medical condition and disability was claimed, there was little more that Mr Tatham could do than to seek further information. When that was not forthcoming, in my view it was reasonable for him to proceed with the decisions that he made on the information that was available to him.

94. In all the circumstances, having considered each of the workplace actions in turn, I was satisfied that the performance management process and medical suspension were taken on reasonable grounds and in a reasonable manner. Furthermore, I have stepped back and taken a second look at the management actions as a whole, and remain of the same view. Mr Harris has therefore not suffered an "injury" as defined by the RTWA, and the Employer has no liability to Mr Harris.

[149] Ex 1 p71

[150] WOS [111]; Employer's submissions [67]

95. Although I have found against The Worker on this issue, it is prudent to address the remaining issues raised in the trial.

Did the mental injury result in an incapacity for work?

96. From the medical evidence it is clear that Mr Harris was unable to work for a period of time because of his mental injury. By November 2017, at the very latest, Mr Harris could complete all the tasks required of his pre-injury employment and had recommended employment in a senior administrative role. However, it was not disputed that Mr Harris "should not return to employment under Mr Tatham due to the risk of recurrence of his mental illness"[151]. Mr Harris was able to complete all of the duties relevant to his pre-injury employment but he could not work under Mr Tatham due to the level of animus and blame that he harboured against him. If he did work with him, his mental illness might recur. Was this qualification, namely, that he could not work with Mr Tatham, a continuing partial incapacity?

97. Section 3 of the RTWA provides that:

"Incapacity means an inability or limited ability to undertake paid work because of an injury."

98. The concept of incapacity was considered by the High Court in *Arnotts Snack Products Proprietary Limited v Yacob*[152]. In the majority joint judgment of Mason, Wilson, Deane and Dawson JJ the High Court held:

"…it follows that the concept of partial incapacity for work is that of reduced physical capacity, by reason of physical disability, for actually doing work in the labour market in which the employee was working or might reasonably be expected to work[153].

99. Mr Yacob was a clerical worker employed in a position which required him to climb and lift. He fell at work and injured his back and could no longer climb and lift, but he could still perform clerical duties. The majority held:

"In the present case because the Commission found that the respondent's injury disabled him from performing part of his pre-injury work, it followed that he was partially incapacitated for work – he was unable to undertake clerical duties which involved climbing, lifting and bending. His incapacity for work, due to injury, was clearly relevant to his pre-injury employment and to his ability to sell his labour on the open market. Potential employers, like the appellant, who had jobs for clerks who are required to climb, lift and bend, would not employ him"[154].

100. In *Watkins Ltd v Renata*[155]Toohey and Morling JJ, when applying *Yacob* said:

[151] Employer's submissions [70]
[152] (1984-1985) 155 CLR 171
[153] Ibid p178
[154] Ibid p179-180
[155] (1985) 8 FCR 65

"In the view of the majority (Mason, Wilson, Deane and Dawson JJ) incapacity for work 'means a physical incapacity for actually doing work, resulting from injury (or disease) and …compensation is awarded for that incapacity where it reduces the employees ability to sell his labour in the open market…'(at 217). The majority accepted the approach taken to the concept in Williams v Metropolitan Coal Ltd (1984)76 CLR 431 and Thompson v Armstrong Royse Pty Ltd (1950) 81 CLR 585. Referring with approval to the judgment of Stark J and Dixon J in Williams, the majority said (at 217):

> *'Central to these statements especially that of Dixon J is the view that incapacity for work denotes a physical incapacity for doing working the labour market in which the employee was working or might reasonably be expected to work, though this incapacity may not necessarily attract compensation under s11(1) because it results in no loss of earning power.'*

In Williams at 444 Starke J expressed the matter in this way:

> *'Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury.'*

A relevant consideration is the restriction of opportunities open to a person who is disabled by reason of his injuries."[156]

101. In *Foresight Pty Ltd v Maddick*[157] his honour Justice Mildren considered the concept of incapacity under the *Work Health Act* 1986 which contained the same definition as the RTWA. Mildren J said:

"The word 'incapacity' is defined by s 3(1) of the Act to mean 'an inability or limited ability to undertake paid work because of an injury'. The right to receive weekly compensation under the Act depends upon there being, inter alia, incapacity (see s53) which, in broad terms, is productive of financial loss to the worker; see s 64 and s65. However, neither the above definition of incapacity nor the other provisions of the Act require or compel a conclusion that all incapacity cases cease once a worker is able to return to employment which is as well paid as that which he would have earned but for the injury. A person might have the capacity to work in several fields of employment. Supposing, as a result of an injury, he loses the ability to work in all those fields except one, and he obtains employment in the one field left open to him, with the result that there is no financial loss, it could not be said that the worker no longer had a limited ability to undertake paid work because of his injury. The receipt, post injury, of the same or higher wages than that received pre-injury has long been rejected as sufficient to deny the existence of partial incapacity for work (citations excluded)."[158]

[156] Ibid pp68-69
[157] (1991) 105 FLR 65
[158] Ibid p67

102. In *Kerridge v Monsfelt Pty Ltd*[159] his honour Judge Bowman was concerned with a Mr Kerridge, a tyre fitter, who claimed he had suffered an injury at his work place due to alleged bullying by his foreman, Mr Watson. Bowman J found that Mr Kerridge could perform all his duties elsewhere but could not return to his former place of employment. Bowman J said Mr Kerridge's "incapacity was specific not just to his former place of employment but to the place whilst Mr Watson was there" and "it seems to me that his incapacity as at April 2007 was probably confined to one particular workplace of the defendant whilst one particular individual remained there"[160]. Considering *Yacob* Bowman J said:

"The majority went on to underline the fact that a worker is not partially incapacitated if he can do all the things that he could do before the injury. However the theme to which the High Court returned was that of the injured workers ability to sell his labour in the open market."

103. Bowman J in *Kerridge* said:

"…If, for example, [Mr Kerridge] had developed an allergy to rubber, but was still fit for employment in the auto industry which did not involve the handling of tyres, he would be partially incapacitated within the meaning of Yacob and compensation could well be payable. His ability to sell his labour on the open market would have been reduced as a result of his inability to obtain employment in positions involving tyre. However, that is not the situation. There is no evidence to suggest that he developed either a physical or psychological sensitivity to work as a tyre fitter. Any restriction which he had was confined to one particular place of employment with the defendant and, in my opinion, whilst one particular person was working there. That falls well short of the type of test applied in Yacob*. There has been no meaningful restriction on [Mr Kerridge's] ability to sell his labour in the open market, or indeed, in the field in which he was working."*[161]

104. The Worker submitted that the Victorian decision and those that followed it were neither binding nor persuasive because the Victorian legislation was not in the same terms as the Northern Territory legislation. However, on the meaning of incapacity and as an example of the application of *Yacob* to a factual situation which bears some similarity to the facts in this case, I found the Victorian decision instructive.

105. Mr Harris's field of employment, encompassed all senior administrative roles for which he had relevant training and experience. The field was not limited to government employment of the classification Senior Administrative Officer 2 but extended to all senior administrative positions in the private and government sector for which Mr Harris had relevant training and experience. The Worker submitted that because Mr Harris could not return to his old job under Mr Tatham the open market available to him was reduced and his opportunities restricted. But Mr Harris had

[159] [2009] VCC 0154
[160] Ibid [103]
[161] Ibid [106]

capacity to work in the **field** of employment in which he might reasonably be expected to work.

106. In my view the binding authorities[162] consider firstly, whether the worker has any continuing inability arising from the injury, and if so, secondly, whether that inability reduces the fields of employment in which the worker might reasonably participate. On the medical evidence before me I was satisfied that by November 2017 Mr Harris was fully capable of completing all his pre-injury duties in a senior administrative role. He had developed no sensitivity to the work of a senior administrative officer. He suffered no continuing inability from the work related mental injury. Having recovered from his work related mental illness, there was no restriction on his capacity to undertake paid work in all fields of employment in which he was or might reasonably be expected to work. Neither his opportunities for work nor his earning capacity were restricted or reduced by any continuing disability. He could do everything that he could do before the injury. That he could not work at one locus or site of employment (his old job while Mr Tatham was still there) did not, in my view, amount to any meaningful restriction to his ability to undertake paid work in the fields of employment open to him or to his ability to sell his labour in the open market.

107. I accept the submissions of the Employer who put it this way:

> *"But this is not a case like Yacob…where there are ongoing limitations on what the worker is **able to do**. There are no such limitations upon Mr Harris in this case. The only limitation is that he should not return to a single workplace, and then only for so long as he would be answerable to Mr Tatham at that workplace. Interpersonal difficulties of this sort have not been recognised as limiting the ability of the worker to work."*[163]

Did Mr Harris suffer any economic loss?

108. The contentious issues concerning economic loss were:

(i) Whether a "sittings allowance" should be included when calculating normal weekly earnings,

(ii) Whether holiday leave loadings should be included when calculating normal weekly earnings, and

(iii) Whether Mr Harris's earnings at the Precinct Tavern should be excluded from calculations s 65(2) RTWA.

Should the "sittings allowance" be included when calculating normal weekly earnings?

109. Section 49A of the RTWA relevantly provides:

> *"(2) Subject to this section, the worker's normal weekly earnings immediately before the first compensation date are the gross remuneration paid to the worker…*

[162] *Arnotts Snack Products Proprietary Limited v Yacob* (1984-1985) 155 CLR 171*; Watkins Ltd v Renata* (1985) 8 FCR 65*; and Foresight Pty Ltd v Maddick* (1991) 105 FLR 65

[163] Employer's submissions [75]-[76]

(3) The following are included in the calculation of the worker's normal weekly earnings:

(a) if the worker works overtime in accordance with a regular and established pattern – the amount of wages attributable to that overtime;

(b) …

(c) any climate allowance, district allowance, leading hand allowance, shift allowance (if the worker works shift work in accordance with a regular and established pattern) or service grant received by the worker;

(d) …

(4) The following are not included in the calculation of the worker's normal weekly earnings:

(a) ...

(b) the amount of wages attributable to overtime other than as mentioned in subsection (3)(a);

(c) an allowance or grant not mentioned in subsection (3)(c);

(d) …

(e) Any other remuneration paid by an employer to the worker in a form other than an amount of money paid or credited to the worker.

110. The *Speakers Determination DLA07 of 2016 – Daily Sittings Allowance and Time Off in Lieu*[164] provides as follows:

"Eligibility"

This determination applies only to departmental employees with a classification at the Administrative Officer level 7, its equivalent or above who are not entitled to the payment of overtime.

The employee must have been directed by the Speaker, the Clerk, or a delegated person to perform work which:

- *is related to parliamentary sittings including Estimates Committee hearings;*
- *is undertaken in addition to the full performance of the employee's normal hours of duty; and*
- *is of at least three hours duration exclusive of meal breaks.*

The employee must have attended at least two days of any given week during which the parliamentary sittings/Estimates Committee hearings are held.

Rate of Daily Sittings Allowance

The 2016 rate will be $187.00 for each occurrence of extra duty worked from 1 January 2016.

[164] Ex 9

Time off in lieu of Daily Sittings allowance

All employees eligible for the payment of daily sittings allowance are encouraged to take time off in lieu rather than the allowance. Refer to schedule B.

Procedures relating to the Daily Sittings Allowance

Claims for the payment are to be submitted in a manner approved by the Clerk.

Employees who intend to claim daily sittings allowance are required to advise the Authorising Officer (Speaker, Clerk or Deputy Clerk) of the reasons why time off in lieu cannot be taken.

Approved claims for the payment of daily sittings allowance are to be forwarded to the Human Resource Manager for processing."

111. The Employer submitted:

(i) Section 49A(3)(c) of the RTWA provides that certain identified allowances are to be included in the calculation of a worker's normal weekly earnings. As sub section (3)(c) does not refer to a "sittings allowance", then by virtue of s 49A(4)(c) it is not to be included.

(ii) The sittings allowance can be distinguished from wages attributable to overtime because;

(a) it is not automatically available and must be approved,

(b) it is only available to senior employees,

(c) it has specific eligibility criteria, and

(d) it is a fixed amount and not paid in accordance with hours worked (wages).

112. The Employer referred to *Murwangi Community Corporation v Carroll*[165] in which the Court of Appeal positively referred to Latham CJ in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation*[166]. Latham CJ was considering the word "allowance" in the context of an employment relationship and said:

"When the word is used in connection with the relation of employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of service. Expense allowances, travelling allowances and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of service. Tropical allowances, overtime allowances and extra pay by way of 'dirt money' are allowances as compensation for unusual conditions of service."[167]

[165] (2002) 12 NTLR 121
[166] (1944)69 CLR 389
[167] Ibid at 396-397

113. The Employer submitted the sittings allowance was in the nature of a grant as defined in *Murwangi* and was a true "allowance".

114. The Worker, relying on the reasoning in *Saitz v NTA*[168], submitted:

    (i) That simply labelling a payment an allowance is not determinative of the issue as the label may be a misnomer which belies the true character of the payment[169].

    (ii) That benefits which were in truth part of "remuneration simpliciter" should not be excluded from Normal Weekly Earnings because such a construction is not be consistent with the compensatory nature of the Act which is directed at "income maintenance"[170].

115. In *Saitz* Dr Lowndes SM (as he then was), considered an earlier iteration of the legislation, namely, the *Work Health Act.* Dr Lowndes SM considered the concepts of remuneration and allowance and in my view his reasoning remains relevant to understanding the terms as used in the current legislation. Dr Lowndes SM considered whether a higher duties allowance ("HDA") should be treated as a component of remuneration rather than an excluded allowance. He said:

    "*In order to begin to answer that question it is necessary to further consider the concept of remuneration at a more theoretical level.*

    As elucidated by Freedland[171]*, the concept of "remuneration" invokes:*

    > *'…the notion of not merely payment of one person by another or others but more specifically of payment in the context of work or of employment. In other words, it is part of the meaning of remuneration that it has a connection with work or employment…there is a direct or tight exchange-based kind of connectedness whereby remuneration is seen as being for or in return for work'.*

    Freedland also refers to another theory of remuneration – the relational theory – according to which 'there is a looser and more indirect kind of connection whereby remuneration is seen as being given in respect of a period of employment'.

    …

    In dealing with the issue at hand, it is important to keep firmly in mind the 'exchange-based' – the quid pro quo-approach to remuneration as well as the relational theory of remuneration.

    According to the 'exchange-based' theory the core element of 'remuneration' is the payment of a salary or wages to an employee by an employer as a reward – as something earned- for work done or services rendered by him or her in the course of their employment. (citation omitted)"[172]

116. In *Saitz* Dr Lowndes SM also considered "overtime" payments. He said:

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[168] [2008] NTMC 104
[169] Ibid [63] and [78]
[170] Ibid [123]
[171] Freedland, *The Personal Employment Contract* (2003 Oxford) p95
[172] Ibid [55]-[57] and [59]-[60]

"In order for a worker's earnings of overtime to be taken into account in calculating his pre-injury 'normal weekly earnings', it is necessary for the employee to show that the overtime is sufficiently established and worked with sufficient regularity to form part of his or her regular income: see AAT Kings Tours Pty Ltd v Hughes [1994] 4 NTLR 185*"*[173]

117. In *Saitz* Dr Lowndes SM concluded that the HDA sat "squarely within the compass of salary" and "remuneration simplicitor, according to the relational theory of remuneration". Dr Lowndes SM held that the HDA formed an integral part of the worker's regular income and the label "allowance was "a misnomer". [174]

118. In contradistinction to the concepts of salary, wages and remuneration, Dr Lowndes SM considered the "defining characteristics of an allowance" as identified by Latham CJ in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation*[175]. Noting that Latham CJ's analysis concerned different legislation, Dr Lowndes SM considered it "nonetheless valuable" and of great assistance in interpreting the phrase "any other allowance"[176]. By reference to that analysis Dr Lowndes SM said:

"According to his Honours analysis, in order for a particular benefit to qualify as an "allowance" it must amount to "a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of service.

In order to fully comprehend the nature of the requirement imposed by the Chief Justice it is necessary to refer to the examples his Honour gave in explication of the requirement.

As noted earlier, his Honour began with these three examples: expense allowances, travelling allowances, and entertainment allowances. All three readily fall within the parameters of Latham CJ's analysis. Significantly all three are not directly referable to the performance of work duties and, strictly speaking, are not paid as a reward for work done or services provided during the course of one's employment. They are payments made to an employee on account of work related expenses that are liable to be incurred by an employee during the course of employment. They are indeed something additional to 'ordinary wages' which is paid to an employee for the purpose of meeting some particular requirement of his or her employment, for example, travelling to and from the place of employment, entertaining the employer's customers or undertaking some other work related activity that causes an employee to incur expense. In my view the Chief Justice's analysis of the term 'allowance' should be construed in light of those examples and confined to examples of that ilk."[177]

[173] Ibid [70] and [73]
[174] Ibid [76] – [78]
[175] (1994) 196 CLR 389
[176] *Saitz* [80]
[177] Ibid [81]-[83]

119. Dr Lowndes SM ended his analysis by applying the purposive approach to statutory interpretation. Considering and applying *Murwangi Community Aboriginal Corporation v Carroll*[178] and *AAT King's Tours Pty Ltd v Hughes*[179] he said:

> *"The Work Health Act contemplates ongoing weekly benefits in the context of an income maintenance scheme. The intention of the Act is to provide for the maintenance of a worker on an ongoing basis, during a period or periods of incapacity, with the income that he or she might otherwise have expected, but for the injury, to have at their disposal.*
>
> …
>
> *I agree with the submission made by Mr McDonald that 'in the ordinary course, the HDA money was part of what Ms Saitz could have counted upon receiving if there had been no injury causing incapacity."*[180]

120. In Mr Harris's case the evidence established that, whenever parliament was sitting, he worked additional hours sufficient to entitle him to claim the sittings allowance. He never took time off in lieu and payment of his sittings allowance was always approved.[181]

121. In my view applying the reasoning in *Saitz*, the "sittings allowance" is directly referable to the performance of work duties during parliamentary sittings and is a reward for work done during the course of employment. It is not referrable to some additional expense or requirement in the nature of the examples discussed by Latham CJ as true allowances. Further I consider that the additional hours were worked and the payment was made with such regularity as to form part of Mr Harris's regular income. Up until the time of his injury Mr Harris could have counted on receiving that money if he had been working.

122. Accordingly I was satisfied that the so called "sittings allowance" was in fact remuneration and should be included in the calculation of the Worker's normal weekly earnings.

Should the holiday leave loading be included when calculating normal weekly earnings?

123. Leave loadings are not referred to in s 49A of the RTWA. Accordingly it was necessary to determine whether they are included or excluded from a Worker's normal weekly earnings.

124. The *Northern Territory Public Sector 2013-2017 Enterprise Agreement* provides inter alia for:

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[178] (2001) 166 FLR 247
[179] (1994) 4 NTLR 185
[180] *Saitz* [109] and [111]
[181] Ex 8 pp14-33, Sittings allowance claim forms for the period 7 July 2013 – 7 December 2015.

(i) Pursuant to clause 52.8 Cash-out Leave - subject to certain approvals and conditions an employee may cash-out accrued recreation leave and *"the employee must be paid at least the full amount that would have been payable to the Employee had the Employee taken the leave that the Employee has forgone"*.

(ii) Pursuant to clause 52.10(a) Payment in Lieu – *"where an Employee ceases employment, other than by death, the Employee is entitled to payment in lieu of any available recreation leave entitlement."*

(iii) Pursuant to clause 54.1 Recreation Leave Loading - *"In addition to normal salary payment for recreation leave, an Employee is entitled to recreation leave loading on 1 January each year."*

(iv) Pursuant to clause 54.2 (b) – *"On cessation of employment an Employee is entitled to payment in lieu of any unpaid leave loading plus a pro rata payment of the leave loading entitlement as at 1 January of the year of cessation for each completed month of service"*.

125. In my view it is clear that the recreation leave loading is an entitlement which is paid to an employee whether leave is accrued, taken, or cashed out and a pro rata payment of the leave loading is paid on cessation of employment. In those circumstances, I am of the view it is an entitlement that falls within the concept of remuneration and it is not an excluded allowance.

Should Mr Harris's earnings at the Precinct Tavern be excluded from s 65(2) RTWA calculations?

126. Following his suspension from the DLA on 5 April 2016, Mr Harris continued to receive remuneration under the following arrangements:

(i) from 5 April 2016 to 30 June suspended with remuneration,

(ii) from 1 July to 14 July miscellaneous paid leave,

(iii) from 15 July to 16 August personal leave,

(iv) from 16 August 2016 to 4 January 2017 deemed to be on duty but not required to attend,

(v) from 5 January 2017 – 5 April suspended on pay,

(vi) from 6 April to 7 November 2017 initially suspended without pay but on 7 November back paid for all periods of suspension.

127. During the period of unpaid suspension and before he received his back pay, Mr Harris commenced casual employment at the Precinct Tavern on 8 August 2017. He continued working at the Precinct Tavern even after he commenced a full time placement with NTPFES on 8 November 2017, as a Staff Officer paid at the AO7 level. On 23 July 2018 Mr Harris secured the position of Assistant Director, Secretariat and Protocol at NTPFES at the SAO1 level.

128. The issue for determination is the relevance of Mr Harris's earnings from at the Precinct Tavern for any calculation pursuant to s 65(2) of the RTWA?

129. Section 65(2) provides:

"For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:

(a) his or her normal weekly earnings indexed in accordance with subsection (3); 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) …

And having regard to the matters referred to in section 68"

130. Section 68 provides:

"In assessing what is the most profitable employment available to a worker for the purpose of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:

(a) his or her age;

(b) his or her experience, training or 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."

131. As I understand the Worker's submissions, once he was back paid, Mr Harris should properly be regarded as being in full time employment being the most profitable employment reasonably available to him. Further, once he was employed in a full time position at the AO7 level, that too should be regarded as the most profitable employment reasonably available to him. Any additional earnings over and above those obtained from his most profitable full time employment should be excluded from the relevant calculations. The Worker submitted that:

"The 'most profitable employment' must be interpreted as meaning 'full-time employment'. Otherwise, it could always be argued that a worker could supplement his residual earning capacity with an extra hours job. To reduce a workers benefits because of, say, a theoretical capacity to work 80 hours per week would not be consistent with the beneficial purpose of the Act."[182]

[182] WOS [144]

132. The Employer submitted:

> *'It matters not how many jobs a worker has or how many hours they work (combined) in those jobs per week for the purpose of ascertaining normal weekly earnings.*
>
> …
>
> *In this case Mr Harris has actually demonstrated what he was reasonably capable of earning from work he was capable of undertaking from time to time, including at times work undertaken at the Precinct Tavern. Those amounts must be included in the calculations. There is no reason to conclude otherwise by reference to the phrase 'most profitable employment'."*[183]

133. In my view the issue turns on what is "reasonable" I consider that the amount a person is "reasonably capable of earning in a week" incorporates the concept of reasonable hours of employment, properly allowing for the personal attributes and any impairments of the individual worker. Some workers might be reasonably able to work full time, others might only reasonably be able to work part-time.

134. Further, I consider that it might be reasonable for a worker to work more than one job provided the jobs are, in isolation, and in combination with each other, within the reasonable capacity of the worker.

135. However I am also of the view that whilst a worker might be physically or mentally able to work more than normal full time hours, it might not be reasonable to expect them to do so. It will all depend on the circumstances of the worker and the nature of the work being undertaken. For example, some jobs might require longer hours one week off set by shorter hours the next. Indeed, Mr Harris's substantive position at the DLA had longer than normal working hours during parliamentary sittings but he accepted the longer hours and the sittings allowance that went with them.

136. There will also be occasions when it might not be reasonable to expect someone to work longer than normal full-time hours. In those cases, work done in excess of full time employment should not be considered "reasonably available" and earnings from excess hours should be excluded from the calculations.

137. Turning to the facts in issue, firstly there is the period of time when Mr Harris was not working at the DLA, but receiving back pay. He was not in full time employment, rather he was suspended from employment but with pay. During that period I consider that Mr Harris was reasonably capable of working at the Precinct Tavern and the work was reasonably available to him. In those circumstances the Precinct Tavern earnings apply to s 65(2) calculations.

138. Secondly there is the period when Mr Harris was employed full time at NTPFES but in addition continued to work part time at the Precinct Tavern. While Mr Harris was capable of working the additional hours in my view it was not reasonable to expect him to do so; in other words, the additional hours were not "reasonably available" to

[183] Employer's submissions [86] and [88]

him. For that period the Precinct Tavern earnings should be excluded from the s 65(2) calculations.

Decision

139. The Worker's application is dismissed.

140. I will hear the parties in relation to any ancillary or consequential orders.

Dated this 15 day of February 2019

JUDGE ELISABETH ARMITAGE
WORK HEALTH COURT