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| CITATION: | *Green v NT of Australia* [2022] NTLC 023 |
| PARTIES: | Leslie John Green |
| | v |
| | Northern Territory of Australia |
| TITLE OF COURT: | LOCAL COURT |
| JURISDICTION: | CIVIL |
| FILE NO(s): | 21940174 |
| DELIVERED ON: | 7 NOVEMBER 2022 |
| DELIVERED AT: | DARWIN |
| HEARING DATE(s): | 21, 22 and 23 JUNE 2021 |
| JUDGMENT OF: | JUDGE AUSTIN |

**CATCHWORDS:**

Contract – terms and conditions of employment – contractual obligation - incorporation express term – aspirational statement – prevention of bullying and harassment in workplace – implied common law term to provide safe and healthy working environment – scope of implied term – bullying and harassment and unreasonable management action

Return to Work Act 1986 (NT)
The Public Sector Employment Management Act 1993 (NT)
Workers Rehabilitation and Compensation Act 1986 (SA)
The Northern Territory Public Sector Fire and Rescue Service Act (PFES)

*Sullivan v Moody* [2001] 207 CLR 567
*New South Wales v Paige* [2002] NSWCA 235
*Sheldon v McBeath* (1993) Aust Torts Rep 81-209
*Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCACF 177
*Jones v Dunkel* (1959) HCA 8; 101 CLR 298
*Re Ms SB* [2014] FWC 2014
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165
*Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] 163 FCR 62
*Koehler v Cerebos (Australia) Ltd* [2005] 222 CLR 44
*Govier v The Uniting Church in Australia Property Trust (Q)* [2017] QCA 12
*Hayes v State of Queensland* [2017] 1 QD R 337
*Kelly v Atanaskovic Hartnell Corporate Services Pty Limited (No 2) [2022]*
*State of South Australia v McDonald* [2009] SASC 219

**REPRESENTATION:**

*Counsel:*

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| | Plaintiff: | Ms Grimster & Mr Piper |
| | Defendant: | Mr Grove |

*Solicitors:*

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| | Plaintiff: | Piper Ellis and Associates |
| | Defendant: | Ward Keller |

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| Judgment category classification: | C |
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| Number of paragraphs: | 303 |

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21940174

BETWEEN

Leslie John Green

Plaintiff

AND

Northern Territory of Australia

Defendant

**REASONS FOR JUDGMENT**

7 November 2022

JUDGE AUSTIN

**Background**

1. The Plaintiff is claiming his employer, the Defendant, owed him a contractual duty of care to protect him against a foreseeable risk of harm arising out of his employment. He claims the duty arises out of both an express term of his contract of employment to prevent bullying and harassment in the workplace (*Clause 59.1 - Partnership Agreement*) 2004 and a common law implied term to provide a safe and healthy working environment.

2. The Plaintiff sued the Defendant for pecuniary damages arising out of the alleged breach of the terms of the employment contract at the workplace. There is no claim for personal injury and the claim is based in contract.

3. The Initiating Statement of Claim was filed by the Plaintiff on 28 October 2019. An amended Statement of Claim was filed on 8 October 2020.

4. A Defence was filed by the Defendant on 28 April 2020. An Amended Defence was filed on 26 October 2020.

5. An interlocutory application to amend the defence to add a limitation defence was filed by the Defendant on 23 April 2021. I refused that application on 17 June 2021.

6. The Respondents rely on their amended defence and the Plaintiff on their amended SOC.

7. The matter proceeded to hearing on 21, 22 and 23 June 2021. Multiple exhibits and evidentiary material were tendered at the hearing and Mr Green gave evidence. The evidence of the Plaintiff was largely uncontested.

8. Both parties provided pre-trial and concluding submissions orally and in writing on more than one occasion. The final written submissions and replies were filed by consent of the

parties by 22 December 2021. Further leave was then sought by the Plaintiff to file further written submissions and a defence reply which was consented to by the Defendant. These submissions were filed and served by 28 April 2022.

**Overview**

9. The Plaintiff, Mr Green's claim arises out of events which occurred when he was employed by the Defendant as a Fire-fighter. In late 2015 he was promoted to the position of leading Fire-fighter to the Tennant Creek Fire-station. Whilst there he raised concerns with his superiors about his immediate supervisor, the Officer in Charge of the Tennant Creek Fire-station, Mr Nathan Ferguson. Mr Green complained to his superiors that OIC Ferguson's conduct at work was causing him concerns. As a result of the complaints, Mr Green's superiors at the Alice Springs Fire-station dealt with the matters he raised.

10. OIC Ferguson and Mr Green's superiors subsequently initiated disciplinary proceedings against him on or about 27 or 28 October 2016 and the Defendant actioned those proceedings. Mr Green was suspended from duty during the workplace investigation, and he sought to defend the proceedings. On 16 December 2016 the Chief Fire Officer (CFO) made findings adverse to the Plaintiff which resulted in a disciplinary transfer of him on 12 April 2017, from his duties at Tennant Creek as 2nd Fire-officer to Alice Springs. His family moved to Adelaide.

11. The adverse outcome of the disciplinary proceedings was that Mr Green had breached discipline in 4 ways in regard to 4 conduct allegations. The Plaintiff appealed the outcome of the disciplinary proceedings on 24 March 2017 to the *Public Sector Appeals Board* (the Board). On 14 March 2018 his appeal was successful (written decision 18 May 2018) with the Board finding the Defendant had erred. The findings against Mr Green were set aside in their entirety. Mr Green however complains that the Defendant breached an express term of his contract of employment by failing to prevent bullying and harassment in the workplace and an implied common law term by failing to provide a safe and healthy work environment.

12. The Plaintiff's case depends on him proving the existence and scope of the alleged (1) Express term and (2) Implied Term of his contract of employment and (2) that those terms were breached by his employer, and (3) the breach caused the Plaintiff to suffer financial loss/damage that was reasonably foreseeable.

13. The Defendant says the Plaintiff's claim must fail as 1) he cannot establish on the evidence that *Clause 59.1 - (Partnership Agreement)* 2004, (PA), has been expressly incorporated into his contract of employment; 2) he cannot prove breach of the implied term; 3) he cannot claim damages for breach of the common law implied term for economic loss as opposed to personal injury; 4) the common law claim is statute barred by s52 of the *Return to Work Act* (NT) and further 5) that his claim for breach of contract for both alleged terms cannot include the disciplinary proceedings.

14. Whether the Plaintiff's claim is actionable under an express term of the contract is contingent amongst other matters, on firstly determining whether clause 59 of the PA is incorporated into his employment contract as well as ascertaining precisely what conduct the Plaintiff relies on as the Defendant's bullying and harassment in the workplace.

15. As to the implied common law term to provide a safe and healthy work environment, the Defendant concedes that term however the precise scope of the term is to be determined.

16. This court must determine whether the Plaintiff can hold the Defendant liable for any breach of an express term of the contract or an implied term of the contract from the fact: a) there was an alleged failure to action any complaint he made of OIC Ferguson's conduct and b) arising from the workplace investigation by the Defendant in connection with the process of the investigation of the complaints by OIC Ferguson about him, the disciplinary proceedings.

17. A significant issue is whether the Plaintiff asserts that the Defendant has failed to provide a safe system of work by not reasonably managing the disciplinary proceedings. If he has so pleaded, his claim may fail at common law. However if he has not so pleaded then his claim may be actionable at common law.

**The issues in this case are**:

Express Term:

a) Is the Plaintiff employed under a contract of employment?
b) Is *Clause s59.1 of the Partnership Agreement* 2004 (PA) expressly incorporated into his contract of employment;
c) What conduct is pleaded as the breach of contract by the Defendant?
d) Was the Plaintiff bullied and harassed by OIC Ferguson at work;
e) Did the Plaintiff complain to his superiors about OIC Ferguson's conduct?
f) What was procedure (contractual) for the Defendant to manage workplace complaints about bullying and harassment?
g) Did his superiors fail to prevent bullying and harassment by OIC Ferguson of Mr Green by not managing his concerns about OIC Ferguson;
h) Was the Plaintiff bullied and harassed as a result of the disciplinary proceedings?
i) What procedure was the Defendant contractually obliged to comply with to manage the disciplinary proceedings?
j) What weight is to be given to the *Public Sector Appeals Board Decision* in determining if the Plaintiff was bullied and harassed by the Defendant at work?
k) Has the Plaintiff proven that the Defendant breached the express term by a) failing to prevent bullying and harassment of the Plaintiff at work by not dealing with his concerns about OIC Ferguson; and/or b) by not managing the disciplinary proceedings as contractually obliged to?

Implied Term:

l) Given the Defendant concedes there was an implied common law term of the Plaintiff's employment contract that the Defendant would provide a safe and healthy work environment, what is the precise scope of that term;
m) Can the Plaintiff rely on both the conduct of the supervisor OIC Ferguson; the conduct of Mr Green's superiors; and the internal disciplinary proceedings to ground the cause of action;
n) Has the Plaintiff pleaded that the Defendant has bullied and harassed him in the workplace and failed to provide a safe system of work by, amongst other matters, *not reasonably managing the disciplinary proceedings*?
o) Does *Sullivan v Moody* [2001] 207 CLR 567 and the *State of New South Wales v Paige* [2002] NSWCA 235; (2002) 60 NSWLR 371 <u>preclude the existence of a duty owed by an employer to an employee to take care in doing acts that might injure an employee because the acts are done in the course of a workplace investigation</u>; or

p) Has the Plaintiff limited his claim for breach of the implied common law contractual term in such a way that the claim raises only matters outside the process of the investigation of the complaints against him i.e. the disciplinary proceedings?
q) What is the significance if any of the Board's findings;
r) Is the common law term only actionable for personal injury suffered at work or is it actionable for pecuniary damages/economic loss;
s) Is any common law claim under the implied common law contract term statute barred by s52 of the *Return to Work* Act NT;
t) If not statute barred, did the Defendant breach the common law term by failing to provide a safe and healthy working environment;
u) Did the Plaintiff suffer financial loss as a consequence of any breach of contract, express or implied term?

**The Merits of the Application**

**The Plaintiff's Case**

18. The Plaintiff's case is the Defendant breached an express and an implied term of the employment contract where the Defendant failed to:

    a) *Express Term (Partnership Agreement Clause 59.1) 2004:* take all reasonably practical steps to prevent harassment and bullying in the work place; and/or
    b) *Implied Term (Common Law):* provide a safe and healthy system of work.

19. The Plaintiff's case is that the breaches of the express and the implied terms of the contract are the 20 pleaded allegations, set out in paragraph 5a) – 5t) (express term) and paragraph 7 (the implied term which relies on the same particulars).

20. The Plaintiff's case is his cause of action in contract commenced in late 2015 or early 2016 when he was transferred to Tennant Creek to commence his position as 2nd Fire Officer and there followed a continuous and cumulative series of relevant events which constitute the breach of the terms of his employment contract and culminated in his appeal to the *Public Sector Appeals Board* (the **Board**) and the decision of the Board on 14 March 2018 (**Decision**), or his forced uplift from Tennant Creek by his employer on or about 12 April 2017 (which occurred earlier in time).

21. The Plaintiff submits the evidence shows a continuing omission to take steps which would have prevented a) or provided b) (the contract terms above in paragraph 18). He asserts the breaches include the conduct of his direct supervisor OIC Ferguson from late 2015 to 30 August 2016, his superiors subsequent failure to prevent bullying and harassment in the workplace after he complained to them about OIC Ferguson's conduct towards him and the subsequent disciplinary proceedings instigated by OIC Ferguson and his superiors on or about 27 and 28 October 2016.

22. The time of occurrence of the breach will turn on the construction of the particular contract, see *Sheldon v McBeath*[1]. The Plaintiff claims the notion of a continuing duty, as postponing the accrual of a breach of contract in his case, due to nature of the continuing duty as

[1] *Sheldon v McBeath* (1993) Aust Torts Rep 81-209. In that case, an architect breached the contract in the design of the footings. The Court held that, in performing the contract, there was always the possibility (even if it were impractical) for the correction of the mistakes to take place and the architect had a continuing duty to do so. The Court held that, in that case, the breach occurred when the contract ended and the work handed over - as it was from that time that the architect ceased to have a role that would have allowed correction.

opposed to the Defendant's contention. The Plaintiff asserts the breach accrued on the decision of the Board on 14 March 2018 (Decision, written decision on 14 May 2016), or his uplift from Tennant Creek by his employer on or about 12 April 2017 as a result of the disciplinary transfer (which occurred earlier in time).

**The Defendant's Case**

23. The Defendant's contention is that there are arguably distinct causes of action pleaded in paragraph 5 and 7 of the SOC, accruing each time the Defendant did something alleged in paragraph 5 and 7 as particularised.

24. The Defendant asserts the Plaintiff has not particularised a claim that facts and circumstances from 27 and 28 October 2016 onwards, (paragraph 5h) – t), the subject of the disciplinary proceedings constituted bullying or an unsafe work environment. The Defendant's case is the disciplinary proceedings are not particularised in the Defendant's claim as part of the bullying or unsafe work environment and that it is the conduct of OIC Ferguson alone, (paragraph 5a) – g), that is particularised as the bullying, with the last breach occurring on 30 August 2016.

25. Regardless of how the Plaintiff's case is particularised the Defendant's case is also that the facts and circumstances particularised including the disciplinary proceedings do not constitute bullying and an unsafe work environment and the claim is not made out.

26. Significantly the Defendant asserts that:

    a) The Plaintiff cannot rely on the disciplinary proceedings to ground his cause of action to prove a breach of either the express or implied term asserted;
    b) There is no Express Term as contended by the Plaintiff in the contract of employment;
    *Express Term (Partnership Agreement - Clause 59.1):* to take all reasonably practical steps to prevent harassment and bullying in the work place; and/or
    c) The Common Law Implied Term to provide a safe and healthy system of work is to prevent foreseeable risk of <u>personal injury</u> and therefore the Plaintiff's claim for Economic Loss/Pecuniary Damages is not actionable at law;
    *Implied Term (Common Law):* to provide a safe and healthy system of work.
    d) Any common law action for damages is precluded by s52 of the Return to Work Act
    *Implied Term (Common Law):* to provide a safe and healthy system of work;
    e) The Plaintiff has failed to prove any breach of either the express or implied terms of the contract.

**What Mr Green is alleging constitutes bulling and harassment and/or a failure to provide a Safe and Healthy System of work**

27. The Plaintiff has nonetheless pleaded that, a) the supervisor OIC Ferguson's conduct is part of the alleged breach; and b) his superiors conduct in failing to act on his concerns is part of the alleged breach; and c) that the Defendant's conduct attributable to the employer on or about 27 and 28 October 2016 and afterwards, the disciplinary proceedings against him, also constitutes part of the continuous breach of the Defendant's contractual duties.

28. Mr Green relies on all this conduct as contributing to the bullying conduct and says the Defendant failed to prevent such bullying in the workplace and this resulted in an unsafe work environment. The Plaintiff asserts a cumulative breach.

29. I remain of the view that while it may be arguable generally that the Plaintiff's case could be pleaded as separate and distinct breaches or causes of actions, the nature of this particular case is that the Plaintiff alleges that the Defendant breached their contractual obligations due to multiple and cumulative acts/omissions attributable to the supervisor OIC Ferguson **and** the employer as a continuous course of conduct. Isolated incidents are not alleged as breaches of the terms of the contract.

30. The definition at law of what is required to prove *bullying and/or harassment* in the work place of and by its very nature usually and by necessity usually requires more than just one isolated act and/or omission by the offending party. A workplace where an employee is subject to bullying and harassment or a failure to prevent such conduct, may constitute an unsafe and unhealthy work environment.

31. The terms bullying and harassment may by their very definition both at common law and in statute variously defined, include *the **repetition** of certain behaviours by a person or group of persons who act in an unreasonable way towards another targeted person AND their behaviour creates a risk to health and safety*. An isolated incident of certain behaviour may constitute offensive or unreasonable behaviour that is unacceptable in the workplace but without it being repeated it may not reach the threshold of bullying behaviour or harassment unless it is repeated.

32. The Plaintiff submits that the breaches of the express and implied terms occurred over a period of time and had a cumulative effect. He submits that taken as a whole those breaches, viewed objectively, amount to a failure on the part of the Defendant to discharge the contractual duty of care owed to Mr Green.

33. The Defendant challenges the submission and argues that the disciplinary proceedings are not part of the conduct or circumstances constituting a failure to prevent bullying and harassment in the workplace/or a failure to provide a safe and healthy work environment and cannot be relied on as pleaded.

34. Mr Green's grievance commenced in late November 2015 and continues to March 2018. All of the matters in evidence from the time he arrived in Tennant Creek and was supervised by OIC Ferguson provided part of the context in which the objective assessment of the conduct of the Defendant is to be made. However, in considering whether there was any breach of the express term or implied contractual duty of care, it is appropriate to consider, those events commencing in late 2015 as pleaded.

35. The Plaintiff relies on the same conduct to support a breach of both the express and implied terms as set out below.

**The Plaintiff's evidence**

36. The Plaintiff's evidence can be summarised as follows:

    a) The Plaintiff commenced employment with the Defendant on or around 11 December 2005.[2]
    b) The Plaintiff was engaged as a permanent employee on a contract of employment during his probationary period.
    c) The Plaintiff signed a letter of offer on 19 February 2006 **(Exhibit P1)** which referred to the terms and conditions of his employment as contained in relevant

[2] Exhibit P1; Transcript 21 June 2021, p11.

legislation and the applicable Enterprise Bargaining Agreement: *The Public Sector Employment Management Act NT (*PSEMA), *The Northern Territory Public Sector Fire and Rescue Service Act (*PFES), and the *Rescue Services Partnership Agreement 2004* (PA) as amended from time to time[3].

d) In November 2015 the Plaintiff was based in Alice Springs. He applied for and was approved for a promotional transfer to Tennant Creek in the position of 2nd Fire Fighter.[4]

e) The transfer was for a minimum period of two years and the Plaintiff was led to understand his senior officers would approve a five-year period in Tennant Creek.[5] It was the Plaintiff's intention to work in Tennant Creek for five years and be paid the benefits associated with that posting for that period.[6]

f) The Officer in Charge (**OIC**) at Tennant Creek was Nathan Ferguson.[7]

g) The Plaintiff's senior officers in Alice Springs, Acting District Officer Kleeman and District Officer Letheby, were aware of issues with OIC Ferguson and warned the Plaintiff of those issues.[8]

h) They assured Mr Green they would be able to support him should OIC Ferguson act inappropriately,[9] including by telling Mr Green:

> *"If I had any issues in Tennant Creek, I was to report back to [Acting District Officer Kleeman] or the District Officer, which would be Letheby, when he returned into his normal position in the (District Office) in Alice Springs because Tennant Creek falls under the Southern Command."*[10]

i) After his arrival in Tennant Creek Mr Green returned to Alice Springs to meet with A/ DO Kleeman and / or DO Letheby on a monthly basis[11] and, among other things, he said he provided reports regarding bullying and harassment personally by OIC Ferguson,[12] including in relation to the following:

   i. OIC Ferguson directing Mr Green not to socialise with any volunteer fire fighters (auxiliaries) or any police officers within Tennant Creek;
   ii. OIC Ferguson withholding invitations for Mr Green to socialise with Police;[13]
   iii. an incident involving OIC Ferguson holding a child in a stress position against a fence at the fire station with an intention of teaching that child 'discipline';[14]
   iv. being told by OIC Ferguson it is 'his town' and he can kick Mr Green in the balls if he wants to;[15]
   v. being spoken to by OIC Ferguson like a **"**pre-drill instructor**"**;[16]

j) Mr Green gave evidence that he told DO Letheby about the incident with the child at the fence but that he never heard anything back about it.[17]

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[3] Transcript 21 June 2021, p 9-10.
[4] Transcript 21 June 2021, p15; Exhibit P6, ASOC, para 5(a)
[5] Transcript 21 June 2021, p16; Exhibit P5; ASOC, para 8(b)
[6] Transcript 21 June 2021, p16.
[7] Transcript 21 June 2021, p16; ASOC, para 5(b)
[8] Transcript 21 June 2021, p16-17; Para 5(b) ASOC
[9] Paragraph 5(c) ASOC
[10] Transcript 21 June 2021, p17
[11] Transcript 21 June 2021, p24, 25
[12] ASOC; para 5(e)
[13] Paragraph 5(d)(iv) ASOC; 21 Transcript 21 June 2021, p 17 – 18, 20, 26
[14] Paragraph 5(d)(iii) ASOC; 23 Transcript 21 June 2021, p18, p 19.
[15] Transcript 21 June 2021, p18, p24.
[16] Paragraph 5(d)(i) ASOC; Transcript 21 June 2021, p18.
[17] Transcript 21 June 2021, p.18

k) Mr Green said he raised the incident where OIC Ferguson said he could kick him in the balls if he wanted on a trip to Alice Springs to do the TAE course.
l) Mr Green said his superiors said they would speak to Ferguson generally about his behaviour not about a specific incident.[18]
m) Mr Green said that he told his superiors that OIC Ferguson said he could not associate or socialise with auxiliaries and they told him, something to the effect of 'that is not true you know what the rules are associate with whoever you like'.[19]
n) Mr Green said he also expressed concern to DO Letheby and Chief Fire Officer (CFO) Spain about directions by OIC Ferguson to carry out tasks outside of what Mr Green understood to be the scope of the NTFRS duties, including assisting with the local Speedway. His evidence was that CFO Spain dealt with the issue immediately and put a stop to the speedway assistance, though he did not elaborate on who the CFO spoke to.
o) Mr Green asserted he was told by OIC Ferguson that he should not have brought up with DO Letheby and CFO Spain the issue of the Fire Service providing Fire Suppression at the Speedway at Tennant Creek and OIC Ferguson said that he would tell the speedway at the AGM that the speedway would not be able to function because the 2IC was too lazy to do fire suppression.[20]
p) Mr Green did not give evidence that he raised OIC Ferguson's threats to tell the speedway he was lazy and this further conduct of OIC Ferguson with his superiors.
q) Mr Green also gave evidence about OIC Ferguson actively interfering with his social life and withholding invitations to police events however he stated he did not raise this with his superiors and he sorted out his social life himself and made his own friends.
r) Later in evidence Mr Greem said he did raise it with his mentor DO Kleeman who told him he could socialise with whoever he liked and to ignore Ferguson.
s) Mr Green gave evidence that OIC Ferguson spoke to him like a drill Sergeant but he did not raise this with his superiors.
t) Mr Green gave evidence of at least two situations where it was apparent that rather than addressing the issues A/DO Kleeman and/or DO Letheby relayed the complaints to OIC Ferguson which appeared to make him angrier and more upset with him for going outside the chain of command. Mr Green did not give evidence that he told his superiors that OIC Ferguson was getting angrier with him.[21]
u) Mr Green gave evidence that he spoke to his mentor A/DO Kleeman who was his immediate superior after OIC Ferguson and he dealt with some issues such as the auxiliary issue and the socialising with police issue.
v) With the other issues such as the speedway issue and the Emergency Services Issue A/DO Kleeman directed him to raise those with DO Letheby which he did.
w) Mr Green's evidence was that telling his superiors was the process he understood he should follow re workplace complaints[22].
x) Mr Green said when he raised the issues with DO Letheby he said "I hear what you are saying I will take them up with OIC Ferguson" but there was no offer of any meeting between the parties.[23]
y) In October 2016 OIC Ferguson and/or DO Letheby initiated disciplinary proceedings against Mr Green. When he attended work on 27 October he was informed he was under investigation and that a formal interview/meeting was to be performed the next day and he could have a support person attend with him.

[18] Transcript 21 June 2021; p.24
[19] Transcript 21 June 2021; p.24
[20] ASOC, para 5(f); Transcript 21 June 2021, p19.
[21] ASOC, para 5(g); Transcript 21 June 2021, p18-20.
[22] Transcript 21 June 2021, p25.
[23] ibid

z) On 28 October 2016 he was suspended from his employment from 28 October 2016.[24]
aa) Mr Green defended the disciplinary proceedings and denied any misconduct.[25]
bb) The Defendant offered Mr Green an option to discontinue the disciplinary proceedings against him without further action, if he agreed to a transfer back to Alice Springs, or to have an external investigator appointed to investigate and for Mr Green to remain in Tennant Creek while that occurred.[26]
cc) Mr Green opted to remain in Tennant Creek and have an external investigator appointed
dd) The evidence was that the Defendant determined they were not required to have an external investigator appointed. [27]
ee) The Defendant did not appoint an external investigator and proceeded to make a decision that Mr Green had braced discipline and make adverse findings against Mr Green on all counts of alleged misconduct.[28]
ff) On 24 March 2017, after the decision of breach of discipline, the Defendant advised Mr Green that he would be transferred to Alice Springs on a disciplinary transfer.[29]
gg) On 12 April 2017 that occurred.[30]
hh) Mr Green's wife and children relocated to Adelaide instead of Alice Springs.[31]
ii) Mr Green returned to work in Alice Springs under DO Letheby in May 2017.[32]
jj) Mr Green continued to defend the allegations of misconduct and appealed pursuant to section 59A (b) of the *Public Sector Employment and Management Act* (PSEMA).[33]
kk) Mr Green gave evidence that he left the Fire Service voluntarily on 5 December
ll) Mr Green denied committing any breaches of discipline. His evidence was 'it was a stitch up';[34]
mm) Mr Green gave evidence that he asked the Board if he could go back to Tennant Creek to finish his 5 year term as he wanted to save money. However when he moved back to Alice Springs it became clear to him the Board's rulings were not going to be followed as DO Letheby introduced extra punishments on top of CFO Spain's and DO Letheby was still supplying misleading information. Mr Green did not elaborate further.[35]
nn) On 16 April 2018, after the Board's decision and prior to the 18 April deadline fixed by the Board where he was required to notify the Defendant of his election, Mr Green emailed CFO Spain about his concerns regarding returning to Tennant Creek and stated he would not be returning to Tennant Creek. CFO Mr Spain replied with about ½ an hour. The Correspondence was tendered as exhibit P12.[36]
oo) The HR Department emailed him on 30 July 2018 and notified him of actions taken as a result of the Board's ruling. The email became exhibit P13.
pp) Mr Green voluntarily resigned on 5 December 2019 and commenced employment at QLD Fire and Rescue on 6 January 2020.

[24] Transcript 21 June 2021, p27-28.
[25] ASOC, para 5(k)-(n).
[26] Transcript 21 June 2021, p68, Exhibit P7, para [51]; and Exhibit P12, para [45] – [49].
[27] 21 June 2021, p68, Exhibit P7, para [52]
[28] ASOC, para 5(k-n); Transcript 21 June 2021, p70, Exhibit P7, para [53-56]
[29] ASOC, para 5(k-n); Transcript 21 June 2021, p70, Exhibit P7, para [66]
[30] ASOC, para 5(p); Transcript 21 June 2021, p70, Exhibit P7, para [72-73]
[31] ASOC, para 5(q)
[32] 43 Transcript 21 June 2021, p71 & 85; Exhibit P7, para [72]; 44 ASOC, para 5(r).
[33] 46 ASOC, para 5(s); Transcript 21 June 2021, p71; Exhibit P7.
[34] Transcript 21 June 2021, p77
[35] Transcript 21 June 2021, p72
[36] Transcript 21 June 2021, p72

37. On 14 March 2018 the Board set aside the disciplinary decision and made further directions, including:

    a) that the Plaintiff be offered the option to return to Tennant Creek;
    b) that the Plaintiff be offered the option to remain in Alice Springs;
    c) that the Defendant pay the Plaintiff the relocation allowance pursuant to bylaw 28 which was denied to him in April 2017;
    d) that the Defendant pay to the Plaintiff the difference between his relocation expenses for his family from Tennant Creek to Alice Springs;
    e) that the Plaintiff's leave entitlements be re-credited for the period 9 November 2016 to 15 April 2017;
    f) that all relevant senior HR officers and any managers involved in supervising the Plaintiff be notified of the Board's decision to set aside the disciplinary findings and action;
    g) that the Defendant organise training and performance management plan for Ferguson;
    h) that the Defendant organise conciliation between the Plaintiff and Ferguson, **in the event** he chose to relocate to Tennant Creek; and
    i) Further directions in relation to processes of the Defendant.[37]

38. The Plaintiff alleged in written correspondence to the Chief Fire Officer on 16 April 2018, exhibit P12, that the Defendant did not take steps to address the unsafe work environment at Tennant Creek and that as a result Mr Green advised him that he was unable to return to Tennant Creek in the circumstances, including that it was a risk to his and his family's mental health.[38]

39. Mr Green alleges that as a direct result of the Defendant failing to address the unsafe work environment in Tennant Creek, he was unable to resume his work at that location and suffered economic loss October 2016 to December 2020.[39]

40. The financial loss of Mr Green is set out in exhibits P14 through P21 tendered in these proceedings.

**Defence Evidence**

41. The Defendant broadly denied the particulars in paragraph 5 of the ASOC in the defence, but did not substantially challenge the evidence in chief of the Plaintiff in cross examination of Mr Green at the hearing.

42. The Defendant did however challenge Mr Green about his knowledge of any complaints regime at work at the time he started his employment and during his employment. The Defendant suggested to him that before the disciplinary proceedings were instigated against him, he did know about the procedure set out in the *Public Sector Management* Act (PSEMA) for making complaints about his employer or the behaviour of fellow employees by seeking a review under s59 of PSEMA.

43. Mr Green's evidence was that he wasn't aware he could make complaint's to his union about his employer but agreed he became aware of the existence of complaint's and grievance policies and procedures through his union as a result of what happened to him at

[37] ASOC, para 5(t). Transcript 21 June 2021, p71 - 72; Exhibit P7.
[38] Transcript 21 June 2021, p73 - 74; Exhibait P12, attachment to email.
[39] ASOC, para 8; Transcript 21 June 2021, p75 - 72; Exhibits P14 – P21

Tennant Creek His evidence was that prior to the disciplinary proceedings he was under the impression he would tell management and he'd figure it out from there as he wasn't told by Alice Springs how it worked[40]. His evidence was that he only read the section of the PA where he got paid prior to the disciplinary proceedings and he relied on his union delegates. However Mr Green agreed he did vote for the PA and was aware it was a negotiation.

44. Mr Green was asked in cross examination whether he ever made a formal complaint about OIC Ferguson's conduct against him to his superiors rather than just relaying concerns to his superiors as set out above. Mr Green insisted that the method of complaining about his superiors was to report the conduct to his managers and supervisors and he believed he followed that process over many years and he followed the expected norm[41]

45. Mr Green gave evidence he made a formal complaint to the CFO under s59 PSEMA after the Board's decision in his favour on 14 March 2018. The complaint was about OIC Ferguson's bullying conduct towards him and the false allegations OIC Ferguson made against him during the disciplinary proceedings. A document was tendered as evidence of this complaint, exhibit P25. Mr Green also tendered exhibit P26 dated 2 October 2018 which was a letter from the CEO acknowledging the complaint was being taken seriously however as it could be the subject of confidential disciplinary proceedings Mr Green could not be privy to any developments. Mr Green gave evidence he believed his complaint resulted in no action being taken.

46. Mr Green also gave evidence about his understanding of his employer providing a safe and healthy work environment not only through the award by a psychologist, a Chaplin visiting the station and peer support to workers, he spoke of ongoing training regarding bullying and messages from the Minister and the Commissioner that bullying would not be tolerated. However Mr Green did not give details or particulars about any training or education he received about bullying in the workplace. He only made very general references in his evidence and no procedures or policies were put in evidence.

47. The Defendant had the opportunity to call witnesses at the hearing but no evidence was called by the Defendant nor was any evidence tendered. The Defendant did rely on the material tendered by the Plaintiff.

48. Exhibit P12 and P13 tendered by the Plaintiff is evidence that records the Defendant's response to Mr Green's assertion that the Defendant made no efforts to address the findings of the Board in the workplace around the time of the decision in April 2018.

49. Exhibit P12 shows that on 16 April 2018 approximately 30 minutes after receiving Mr Green's correspondence at about 5pm outlining his complaint about the Defendant not remedying the unsafe work environment he alleged existed at Tennant Creek and notifying the CEO of his decision to elect to stay in Alice Springs as a result rather than return to Tennant Creek, the CFO Mr Mark Spain sent an email acknowledging Mr Green's email and stating that under no circumstances would the Tennant Creek event be used to hinder Mr Green's future prospects both within or outside of the NTFRS.

50. Exhibit P13 is a formal written response from the Human Resource area of NTFRS dated 25 July 2018 which was forwarded to Mr Green by the grievance section on 30 July 2018, documenting steps taken to formally address the Board's findings and directions. This

[40] Transcript 22 June; p13 XXN
[41] Transcript 22 June; p. 14 XXN

email outlined the education and notification steps taken within the department and Alice Springs Fire-station to inform relevant parties and supervisors of the outcome of the Board's decision; performance management of OIC Ferguson and that Mr Green's complaint against OIC Ferguson was being actioned. It also documented a promotion of Mr Green via a merit selection process.

51. Mr Green did not put in any evidence about any complaint's regime other than Clause 59 in the PA. The Clause refers to a grievance procedure under PSEMA. Mr Green's evidence was he did not make a complaint under PSEMA about OIC Ferguson's conduct until after the Board's decision.

**What conduct is relied on to prove the express and implied terms?**
**(Bullying conduct; failure to prevent bullying by superiors; disciplinary proceedings)**

52. Mr Green contends that not only was he bullied and harassed by his immediate supervisor OIC Ferguson, when he complained to those superiors above him in the manner he had been encouraged to do, they failed to prevent the bullying by OIC Ferguson in the workplace. Mr Green testified that he expressed concerns to District Officer Letheby and Acting District Officer Kleeman about Ferguson but nothing happened to stop the behaviour.

53. Mr Green also complains that although the Defendant through its employees may have genuinely held the belief that Mr Green required some form of discipline, Mr Green contends that that the adverse outcome of the disciplinary proceedings was not reasonable and appropriate and his employer failed to make the workplace safe for him either after his disciplinary transfer from Tennant Creek to Alice Springs, or on the date of the Board's appeal decision.

54. Mr Green also complains that once the disciplinary proceedings were instigated **the Defendant did nothing to intervene to stop the disciplinary proceedings** and this contributed to the failure to prevent him being bullied and harassed at work. In fact the Defendant through its employees instigated and prosecuted the proceedings to an adverse outcome. The Plaintiff relies on the findings of the Board to support his contentions and asks this court on the evidence to make the same finding.

55. Mr Green asserts that this conduct taken as a whole breached the contractual obligation to prevent bullying and harassment and the failure to provide a safe and healthy work environment and was quite likely to cause Mr Green an injury (in the form of a Psychological disorder). I find it is a significant matter that there was very little if any direct evidence about the existence of a risk to Mr Green of injury or harm.

56. It is contended in this case that that the Defendant has breached the contract in the following ways:

    a) Mr Green was bullied and harassed in the workplace personally by OIC Ferguson between late 2015 and 30 August 2016;
    b) Mr Green complained to his superiors, DO Letheby, A/DO Kleeman and CFO Spain about Ferguson's conduct;
    c) His superiors failed to take any action to investigate Mr Green's complaints about OIC Ferguson's bullying conduct;
    d) The Defendant compounded OIC Ferguson's bullying conduct by pursuing the disciplinary proceedings instigated by OIC Ferguson on or about 27 and 28 October

2016 against Mr Green which resulted in the adverse outcome for Mr Green in December 2016;

e) The Defendant did not intervene to stop the disciplinary proceedings;
f) The Defendant enforced the disciplinary transfer and uplifted Mr Green from Tennant Creek as a result of the disciplinary proceedings on 12 April 2017;
g) The Defendant failed to make the workplace safe for Mr Green to return to his position at Tennant Creek after the Board's decision on 14 March 2018;
h) The disciplinary proceedings were unfair and should never have been brought;
i) The Defendant failed to respond to Mr Green's enquiries about whether they would make the workplace safe for him to return to Tennant Creek and on 16 April 2018 Mr Green notified the Defendant he could not return to Tennant Creek and would be staying at Alice Springs.

**Conduct by Ferguson**

57. The conduct complained of by the Plaintiff is that OIC Ferguson specifically personally bullied and harassed him in the workplace between late 2015 and 30 August 2016 by

    a) OIC Ferguson directing Mr Green not to socialise with any volunteer fire fighters (auxiliaries) or any police officers within Tennant Creek.[42]
    b) an incident involving OIC Ferguson holding a child in a stress position against a fence at the fire station with an intention of teaching that child 'discipline'.[43]
    c) being told that OIC Ferguson can kick Mr Green in the balls if he wants to.[44]
    d) being spoken to by Ferguson like a "pre-drill instructor".[45]

58. Mr Green also testified he raised concerns with District Officer Letheby and Chief Fire Officer Spain about directions by OIC Ferguson to carry out tasks outside of what Mr Green understood to be the scope of the NTFRS duties, including assisting with the local Speedway.[46]

**Has the Plaintiff asserted that the disciplinary proceeding were unreasonable management action carried out in an unreasonable manner?**

59. An important issue to resolve is whether the Plaintiff has asserted that the disciplinary proceedings ***were unreasonable management actions carried out in an unreasonable manner*** and therefore constituted bullying and harassment of the Plaintiff in the workplace and whether such action created a risk to his health and safety.

60. The Plaintiff's claim does as stated above, appear to raise matters outside the process of the investigation of the complaints made against him via the disciplinary proceedings in that he does assert that as a result of the disciplinary action the Defendant failed to remedy what had become an unsafe work environment by not implementing the Boards directions,[47] however Mr Green's claim is not be confined to those circumstances.

61. I do find that Mr Green complains of a) the failure of the Defendant to properly investigate workplace complaints made by him to his superiors about OIC Ferguson; and further b) *that he complains that the Defendant did not intervene at any stage to stop the disciplinary proceedings and this should of occurred and he identifies particular steps in the process itself*

[42] Paragraph 5(d)(iv) ASOC; 21 Transcript 21 June 2021, p 17 – 18, 20, 26
[43] Paragraph 5(d)(iii) ASOC; 23 Transcript 21 June 2021, p18, p 19.
[44] Transcript 21 June 2021, p18, p24.
[45] Paragraph 5(d)(i) ASOC; Transcript 21 June 2021, p18.
[46] ASOC, para 5(f); Transcript 21 June 2021, p19.
[47] Transcript 21 June 2021; p.39 submission of Plaintiff's counsel Ms Grimster; exhibit P12 and P13

*where this could have and should have occurred*. He ultimately submits that the disciplinary proceedings were wrongly brought.

62. As in the case of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [48] the Plaintiff is asserting that the process of the workplace investigation against him, the disciplinary proceedings was not conducted fairly and therefore constitutes unreasonable management action which contributed to the failure to prevent bullying and harassment and/or contributed to an unsafe and unhealthy work environment[49]. Mr Green's counsel in submissions stated:

> *Ms Grimster: I would like to tell you about the process that was undertaken by Ferguson Letheby and Spain in initiating the disciplinary proceedings. In prosecuting the disciplinary findings against Mr Green I would like you to find that document (the Board's written reasons for decision of 14 May 2016) relevant evidence that those things occurred. And I would like the evidence of things occurred to be found to be evidence of pleadings that bullying conduct occurred over the course of November 2015 all the way through to March 2018, when the disciplinary process was overturned.*
>
> *So the way I have pleaded it and the way the court should find that we've pleaded our claim is that there was bullying conduct over that course of time and throughout that course of time,* ***there were opportunities for the Defendant to intervene and stop that bullying and harassment and they didn't. ….***
>
> *Her Honour: … You want me to rely on their opinion or* ***do you want me to rely on the fact that a, b, c, d and e happened and at the end of the day those matters did not justify in any way shape or form any disciplinary proceedings at all being taken against Mr Green?***
>
> *Ms Grimster: the latter your Honour.*

63. The Plaintiff's written submissions (sought by the Court at the close of the evidence) in the disclose that Mr Green also complains that the Defendant failed to:

    a) **investigate or take steps to address the complaints by Mr Green (about Ferguson's alleged bullying conduct)**; and
    b) make any attempt to properly deal with the unsafe situation **once the disciplinary action *wrongly taken against the employee* had been reversed**; and
    c) It remained impossible for the worker to return to his contracted position as the employer did not take any reasonable steps to make the workplace safe for him once the Board handed down its decision.

64. Mr Green has asserted certain steps taken during the disciplinary proceedings contributed to the bullying behaviour and the failure to prevent bullying and harassment in the workplace or an unsafe and unhealthy work environment as opposed to just relying on the outcome itself. Mr Green specifically asserts:

    a) the institution of, and adverse outcome of the disciplinary proceedings contributed to the *failure of the Defendant to prevent bullying and harassment in the workplace and/or the creation of the unsafe and unhealthy work environment* (the impugned conduct), [para h Amended SOC]:
    b) that during the workplace investigation itself, the suspension from duty contributed to the impugned conduct, [para i Amended SOC];

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[48] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177

[49] Transcript 21 June 2021; p.39 and submissions of Plaintiff's counsel Ms Grimster on the weight to be given to the *Public Sector Appeal Board's*

c) that CFO Spain advising Mr Green in writing of the adverse outcome and accusing him "*of demonstrating a lack of honesty; and a willingness to provide false and misleading information*" contributed to the impugned conduct [para k Amended SOC];
d) that CFO Spain advising Mr Green in writing of a disciplinary transfer and a formal caution and giving him time to respond contributed to the impugned conduct [para k Amended SOC];
e) Mr Green being advised by the Defendant that his disciplinary transfer to Alice Springs as would be actioned despite requesting he not be transferred contributed to the impugned conduct [para l, m, n, o Amended SOC];
f) Mr Green being transferred to Alice Springs contributed to the impugned conduct [para p Amended SOC].

65. I am satisfied Mr Green's case relies on him proving that the disciplinary proceedings were wrongly taken, that the Defendant could have intervened to stop the proceedings and did not and that they were unfairly conducted. As such he is attacking the process itself and not just the outcome as being unreasonable.

66. The issue is, are his claims actionable under an express or implied term of his employment contract?

67. Mr Green does not specifically assert that there is a particular contractual duty that the Defendant owed him to manage the disciplinary proceeding in a particular manner which was breached, he relies on the express and implied contractual terms.

**Background and Evidence**

***The Relevance of the Public Sector Appeal Board's Decision of 14 March 2018 (published May 2018):***

68. During the hearing the Defendant did not object to the tender of **Exhibit P7,** the *Public Sector Appeal Board Decision of 18 May 2016* which included **Agreed Facts** P24 as an attachment to the decision, for the purposes of the damages assessment. The Defendant objected to the tender of the decision generally and submitted the decision was not relevant to the Plaintiff's case regarding bullying and harassment. I disagree.

69. The Plaintiff wants to rely on the decision to show that the disciplinary proceedings as initiated and prosecuted by the Defendant should never have been commenced, were unfair and/or that the Defendant should have and could have intervened to stop them at certain steps along the way and did not do so.

70. **As already stated, I find, in effect the Plaintiff is asserting that the disciplinary proceedings constituted unreasonable management action carried out in an unreasonable way**.

71. Mr Green, the Plaintiff, gave evidence at the hearing and was cross examined by the Defendant. During his evidence Mr Green was taken to the statement of Agreed Facts P24 which was agreed between the parties as the facts forming the basis of the Appeal by the Plaintiff to the *Public Sector Appeals Board* (the Board) against the *NT Fire Rescue Service Disciplinary Proceedings Decision*. I find that he adopted the document effectively in its entirety and without objection during his evidence. He supplemented those facts with oral evidence which was unchallenged in Cross Examination. Documentary exhibits in the form of emails and letters were also tendered during his oral evidence without objection.

72. I find that Exhibit P7, including the **Agreed Facts P24** was admitted by consent as part of the damages assessment for that purpose and as such as it was admissible for one purpose it was also admissible for other purposes. I also find as submitted by the Plaintiff that the decision is relevant to prove:

    a) there was an appeal by Mr Green against the disciplinary findings;
    b) there was an outcome which found that the Defendant had erred and the adverse outcome of the disciplinary proceedings was overturned in its entirety; and
    c) there were specific directions made by the Board to the Defendant.

73. I also find however it is relevant to these proceedings not only that the Board effectively made findings against the Defendant but that the nature of those findings were that Mr Green's claim that OIC Ferguson's complaints against him were entirely without merit were upheld. This assertion goes to Mr Green's claim before me.

74. The findings of the Board in no way binds me to come to the same conclusions they did about the disciplinary proceedings if that is an issue I must determine.

75. Likewise the findings of the Board also in no way relieves this court of its obligation to make its own decision about whether the conduct alleged is proven, constitutes bullying or harassment in the workplace or created an unhealthy and unsafe work environment or whether any cause of action lies as pleaded.

**The Use of the Board's Decision (reasons published 18 May 2018)**

76. The Plaintiff invites the Court to draw a *Jones v Dunkel*[53] inference, that calling any of the persons involved would not have assisted the Defendant's case. The Plaintiff submits it is therefore open to the Court to make findings of fact on the basis of the Plaintiff's evidence and records.

77. Significantly the Defendant did not put in any evidence at the hearing to contradict the Agreed Facts P7 which formed the basis of the findings of the Board's decision. As such I find that I accept the Agreed Facts P7 as proven by the Plaintiff in these proceedings on the Balance of Probabilities.

78. However whilst I accept Mr Green's unchallenged evidence on many material matters that does not mean I accept all the assertions he makes in the face of contradictory evidence in the form of documentation or emails or most importantly that his claim is made out.

79. On 14 March 2018 the Board handed down its decision. On 18 May 2018 the Board published its reasons for decision. The reasons are important to consider. Throughout the decision the Board found that on the 4 occasions alleged by the respondent the appellant did not breach discipline and that the finding that he did was unreasonable and the outcome for him was punitive and disproportionate when looked at objectively. The Board found that the Defendant had erred in finding the Plaintiff had breached discipline and set aside the findings entirely.

80. The Board also made particular reference to the suspension of the Plaintiff by the Defendant from 9 November 2016 for 5 months until his transfer on disciplinary grounds from Tennant Creek to Alice Springs. The Board found at para [35] of the written decision that the suspension *was a disproportionate, unnecessary and unreasonable response to the alleged breaches of discipline.*

81. The Board made the following findings in its concluding remarks at para [45]:

> "*.. with a clear understanding by all concerned that the appellant did not breach discipline, and that the Respondent's finding he had, and the subsequent actions taken were unreasonable and unnecessary.*"

82. On 14 March 2018 the Board set aside the disciplinary decision and made further directions, including:

    a. *Option for the Plaintiff to be transferred back to Tennant Creek:* that the Plaintiff be offered the option to return to Tennant Creek should he chose;
    b. *Option for the Plaintiff to remain in Alice Springs:* that the Plaintiff be offered the option to remain in Alice Springs if he chooses not to return to Alice Springs;
    c. *Payment of Relocation Allowance:* that the Defendant pay the Plaintiff the relocation allowance pursuant to bylaw 28 which was denied to him in April 2017;
    d. *Payment of uplift down lift difference to Adelaide:* that the Defendant pay to the Plaintiff the difference between his relocation expenses for his family from Tennant Creek to Alice Springs;
    e. *Re-crediting of Leave Entitlements:* that the Plaintiff's leave entitlements be re-credited for the period 9 November 2016 to 15 April 2017;
    f. *Notification of the setting aside of the Disciplinary Findings and the Actions*: that all relevant senior HR officers and any managers involved in supervising the Plaintiff be notified of the Board's decision to set aside the disciplinary findings and action;
    g. *Management Training and Performance Management Plan for OIC Ferguson*: that the Defendant organise training and performance management plan for Ferguson;
    h. *Conciliation:* that the Defendant organise conciliation between the Plaintiff and Ferguson, **in the event** he chose to relocate to Tennant Creek; and
    i. ***Conduct of Initial Meetings***: that the Defendant Should Review its procedures for the calling of initial meetings regarding potential disciplinary matters and stated it was essential that an employee be provided well in advance of the meeting (at least 24 hours) with an agenda and copies of any supporting documentation for the allegations in order that they can provide an adequate response. The Board also emphasised the need for decision makers to be mindful at all times that decisions and actions taken must be *fair, reasonable and proportionate to any breaches found. This is particularly so when suspension of an employee is contemplated*;
    j. ***Right to a support Person at Meetings:*** that the Guidelines for Support Persons relied on by the NTFRS are outdated and have been superseded by the PSEMA Employment Instructions and do not mandate that Support Persons not be involved or speak in the process. The Board found:
    ***…****it seems likely in this particular matter that a better outcome might have been achieved had the support persons from the Union been permitted to more actively assist in the process and a meaningful dialogue been engaged in by all involved.*

83. I find that the Board was a) critical of the CFO's decision, the findings and the penalty imposed which was appealed by the Plaintiff [para 45]; and b) the Board was critical of the decision to suspend the Plaintiff during the proceedings [para 35]; and c) **the Board also criticised the process of the investigation of the complaints made by OIC Ferguson in and**

**of itself**. I find that direction i) and j) are directions in relation to processes of the Defendant.[50]

84. There was, also on my reading of the decision, a direct statement in para [39, 40] that the CEO could have and should have taken other action than the disciplinary proceedings but did not do so:

> *[39]The directions of the Board for the OIC to participate in management training and a performance management plan, is something which the CEO could have, and in the view of the Board, should have taken immediately upon learning of this matter and the manner in which the OIC and other officers involved were conducting themselves in handling the situation.*
>
> *[40]The correct reaction, in the opinion of the Board, should not have been to permit the OIC and others to allow these relatively minor matters to escalate to the point of disciplinary action against the Plaintiff, but instead for the Senior Management to look at the behaviours of the OIC with a view to assisting him in developing his leadership capabilities and skills."*

85. This is an expression of the Board **that in their opinion** after conducting the appeal hearing the CEO could have and should not have permitted the disciplinary proceedings.

86. The question for this court is whether I am able to come to the same conclusion based on the Board's decision and the Agreed Facts tendered as evidence. Essentially what is alleged on the evidence before me is that the disciplinary proceedings or the action as a whole constituted **unreasonable management action carried out in an unreasonable manner**.

87. It is important to note that Investigating alleged inappropriate work behavior in accordance with established policies and procedures is not bullying. Reasonable Management Action is justified feedback or disciplinary action that is carried out in a reasonable manner. Management Action is considered reasonable if it is fair, transparent, and consistent with established policies and procedures however it may unreasonable if the action is not justified, aggressive or undertaken with malicious intent.

88. In the case *Re Ms SB* [2014] FWC 2014, Commissioner Hampton said that 'reasonable' management action consisted of the following elements:

    a) The behaviour of those being accused of bullying must be management action
    b) It must be reasonable for management to take that particular action
    c) The action itself must be carried out in a reasonable manner

89. In that case, the FWC stated that "the action doesn't need to be perfect or ideal; overall, it may still be reasonable, even if particular steps are not; and the action must be lawful and not 'irrational, absurd or ridiculous'. Furthermore, "any 'unreasonableness' must arise from the actual management action in question (rather than the employee's perception of it) and there must be an element of adherence to established policies or procedures".

90. For something to constitute unreasonable management action the test is not whether something is considered reasonable from the manager's point of view it has to be objective. The test is also whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'[51].

[50] ASOC, para 5(t). Transcript 21 June 2021, p71 - 72; Exhibit P7.
[51] *Re Ms SB* [2014] FWC 2014 @ para [51]

91. Consideration must be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances[52].

92. In the Fair Work Decision in 2015, *Amie Mac v Bank of Queensland Ltd & Ors* FWC 774, Vice president Hatcher addressed the exception to bullying by examining what could be determined as 'Reasonable management Action'. VP Hatcher stated that for management action to be unreasonable it must be proven to have *"lacked evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable in all circumstances"*.

93. In this case there is some evidence from the Board's decision that they were critical of procedural steps the Defendant took during the disciplinary proceedings. The Board's directions i) *Conduct of the Initial Meeting* and the j) *Right to a Support Person* could be evidence that the Board was critical of how the Defendant conducted Mr Green's proceedings as they recommended that the Defendant review how those matters were dealt with in the future. The Board also made specific findings at para [35] regarding the suspension of the Plaintiff in response to the nature of the allegations of discipline allegations.

94. I find however that there is insufficient evidence to show, regardless of this criticism, whether during the process of the management action there was *an element of adherence to established policies or procedures* or more importantly a failure to do so by the Defendant, as no evidence was put before the court on this point (other than the Board's decision). The criticism falls short of making this finding.

95. Likewise although the CFO's decision and the **adverse outcome** was found by the Board on review to be unreasonable and inappropriate, on the evidence before me I am unable to conclude that the Plaintiff has proven that the management action *"lacked evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable **in all circumstances**"*. This is because although the Board was critical of the evidential basis for the breach of discipline findings, the evidence falls short of this court being able to determine if the instigation and continuation of the management action meets this test.

96. The Board's opinion at para [39, 40] about the CEO intervening must be scrutinised. I find the Board ultimately disagreed, in hindsight with the evidential basis for finding the conduct alleged breached discipline. Further the assertions about the CEO are not able to be tested in these proceedings.

97. There is evidence in exhibit P8 that Mr Green through *United Voice* wrote to the CEO Commissioner Kershaw on 26 October 2016 complaining of his treatment at the initial meeting and that he had not been afforded procedural fairness or natural justice. However I am unable to make a finding that the CEO at that time was fully appraised of all the relevant circumstances and allegations such that it was appropriate to proceed in the manner recommended by the Board in their opinion at that point in time.

98. Likewise Mr Green's assertions and perceptions of what was unreasonable are not sufficient. Whilst there is no doubt that the Board found that the outcome for Mr Green was not reasonable or appropriate that is a different matter to whether the process itself was.

[52] *Department of Education & Training v Sinclair*[2005] NSWCA 465

99. Mr Green relies on the facts that were tendered P7 that formed the basis of the Board's decision and on the decision itself. The decision speaks to the evidence relied on in the appeal hearing, the outcome and penalty being unreasonable and inappropriate on the facts as the Board found them to be after their enquiry.

100. Whilst I find that the Board's directions i) and j) do criticise the process of the disciplinary proceedings and the Board was particularly critical of the decision to suspend Mr Green, I cannot substitute my own findings for the Board's opinion. I also find that a careful reading of the Board's decision shows the Board fell short of making findings about the administration of the process itself as being unreasonable and inappropriate as opposed to some of the steps in the process and the outcome.

101. The Board disagreed that suspension was warranted given the allegations raised and commented that suspension should be reserved for only the most serious cases. This is a criticism of the judgment of the decision makers but not necessarily of the process itself. The Board overturned the disciplinary findings entirely on the basis the evidence did not support that a breach of discipline occurred. Again the Board criticised the findings as opposed to the process.

102. Whilst the Board expressed an opinion about their view of the correct reaction to OIC Ferguson's complaints at para [39-40] by the CEO that is insufficient for me to find that the whole process was unjustified or that OIC Ferguson's complaints were motivated by malice. While Mr Green complained he was not afforded Natural Justice initially and the Board made recommendations about the initial meeting, I am unable to conclude the ultimate findings of the Board were on the grounds that Natural Justice was not afforded to Mr Green.

103. Even if I concur with the Board's factual findings I find in this case without more evidence that I cannot simply adopt the Board's opinion at [para 39-40] and then extrapolate to make a finding that the process itself was flawed on the evidence in this case to the requisite standard to constitute unreasonable management action. As such I find reliance on the Board's decision and the Agreed Facts does not assist the Plaintiff in this regard.

104. **If I am wrong about the evidence of the Board's decision I find that the Plaintiff has not proven the Defendant breached the express term in any event as he has failed to demonstrate that there was any contractual duty of the Defendant to manage the disciplinary proceedings in a particular manner such as to ensure he was not bullied or harassed at work (*Romero v Farstad Shipping* distinguished).**

105. **Further he has not established that there was any real risk of injury as there is little if any evidence of any risk of injury as a result of the disciplinary proceedings other than a reference to stress in the initial letter to the CEO in exhibit P8. In fact after this there is a distinct lack of evidence about any such risk or the effect of the disciplinary proceedings and all the alleged bullying conduct to Mr Green. I find he has not proven that the express term was breached for these reasons.**

**What was the evidence about the state of affairs after the Board's Decision?**

106. Whilst Mr Green asserts in his evidence that the Defendant did nothing to make the workplace safe after the Board's decision such that he could not return to Tennant Creek, I don't accept that is the case based on his assertion. The evidence suggests otherwise. P12 and P13 document efforts to implement some of the Boards' directions.

107. As of 16 April 2018 in the letter of the CFO, the evidence discloses that the Plaintiff had elected to remain at Alice Springs. The Plaintiff appeared to have lost confidence in his employer at that time given his treatment by OIC Ferguson and the Defendant throughout the disciplinary proceedings and this is evidenced by the allegations he made at that time in a formal complaint, exhibit P25, after the Board's decision.

108. The fact he did not elect to return to Tennant Creek is a significant matter. No time limit was indicated by the Board in which the Defendant was to comply with the Board's directions. Mr Green notified the CFO on 16 April, 2 months after the decision and 1 month after the written reasons for decision. The Defendant was entitled to a reasonable time to action the directions. Some of the Directions were contingent on the Plaintiff making an election, such as the issue of *Conciliation. Performance Management* of OIC Ferguson would inevitably have been ongoing and not able to be resolved in a 2 month period. The payment of allowances and re-crediting of leave would not affect his work environment at Tennant Creek. The dissemination of the Board's decision and directions is an important matter but the evidence is that CFO Spain assured the Plaintiff he would not be adversely treated.

109. There is no allegation that the Plaintiff's work environment at Alice Springs was unsafe or that he was subject to bullying or harassment in that environment. This is a relevant matter to mitigation of his loss and his claim for damages. I also find that on the evidence there is nothing to suggest that after that Board's decision he was treated adversely at Alice Springs and exhibit P13 sets out that he had been successful for promotion. Some evidence was forthcoming from about that promotion at the hearing in relation to the Plaintiff's earnings but it was not explored in the context of him being treated adversely or his career prospects being limited.

110. I find the evidence shows at the time the Plaintiff wrote the letter to the CEO on 16 April 2018, which was about two months after the decision of the Board on 14 March 2018, the Plaintiff had determined he would not return to Tennant Creek and notified the CEO of this in writing. From at least that date, it was not a requirement for the Defendant to remedy any unsafe work environment at Tennant Creek in accordance with the Board's directions as the Plaintiff had elected not to return to that work environment. Further it appears that he was successful for a promotion around that time regardless of the outcome of the disciplinary proceedings.

**Relevant Terms and Conditions of Mr Green's Employment – is he engaged under a contract of employment**

111. It is disputed by the Defendant that the Plaintiff is engaged under a contract of employment. Despite the Defendant's position regarding how the Plaintiff was engaged, the hearing was conducted on the basis that Mr Green was employed under a contract of employment.

112. I do find on the evidence that Mr Green was engaged under a contract of employment. Mr Green was originally engaged as a Fire-fighter in accordance with a ***Letter of Engagement***: Mr Green gave evidence at the hearing[53] that he was offered a permanent contract of employment after he completed the recruit training course and during his probation period. He stated that he signed the letter of offer dated 14 February 2006 agreeing to the content of the contract of his employment. That letter of offer was exhibit P1 at the hearing.

[53] Transcript 21 June 2021, p 9-10; Exhibit P1 at the hearing of 21 June 2021.

113. Mr Green stated that his understanding was the conditions of his employment relating to salary, hours of work etc… were not contained in the letter of offer which stated his conditions of employment could be found in the referred to relevant legislation, the *PSEMA*, the *NT Fire and Emergency Act (NTFE Act)* and *Regulations* as amended from time to time, and the *NT Public Sector Fire and Rescue Service 2004 Partnership Agreement* as amended from time to time.

114. I find that the *Letter of Engagement* of the Plaintiff must form the basis of his contract. It is not disputed by the parties that if the respondent is employed under a contract that the *Letter of Engagement* does not contain all of the contractual obligations. The letter of engagement states:

> *"This letter is to formally offer you permanent employment from 11 December 2005 as a Fire Fighter Recruit with the Northern Territory Fire and Rescue Service. Your commencement salary will be $47444.00 per annum"* [54]

115. The letter goes on to make the appointment conditional on the Plaintiff being an Australian Citizen or granted Australian Residency and then states:

> *"Your permanent employment will be in accordance with the Public Sector Employment and Management Act (PSEMA) and the Northern Territory Fire and Emergency Act and the regulations as amended from time to time. Your employment conditions are contained in the PSEMA, the Northern Territory Public Sector Fire and Rescue Service 2004 Partnership Agreement as amended from time to time."*

116. I find that it is not necessary to identify comprehensively all of the express terms of Mr Greens contract of employment. To the extent that the terms and conditions were found in binding statutory Acts and regulatory or industrial awards or agreement provisions it is unnecessary to determine if they are also incorporated into the contract of employment. The contract cannot contradict any such terms. However it is necessary to identify the important terms and conditions of Mr Green's contract and whether s59.1 of the PA as amended from time to time was incorporated.

117. I find that many of the terms and conditions of Mr Green's contract of employment are found in PSEMA and the NTFE Act and the corresponding regulations. The PSEMA sets out a grievance process, which is referred to in clause 59.3 of the PA, in fact Mr Green availed himself of that process when he appealed to the BOARD.

118. The Defendant, despite purporting to dispute the contractual nature of the relationship has not put in any evidence to contradict the Plaintiff's evidence.

119. Ultimately, it is irrelevant whether the agreement between the parties is verbal or in writing. The fact remains that the only evidence is that the parties are bound by a contractual relationship and that is the Plaintiff's understanding. The implication is that if a party were to breach the contract of employment, they find themselves facing a claim for damages arising from the breach of contract. The Plaintiff in this case has alleged breach of an express term of the contract.

[54] Exhibit P1 – Letter of Engagement of Plaintiff dated 14 February 2006

**Statutory Regulation of the Contract of Employment**

120. The determination of the Plaintiff's submission concerning the incorporation of an Express Term in the contract of employment and that clause s59.1 PA forms part of the contract requires a closer analysis of the basis of the terms. What is clear in this case is that Mr Green's employment is governed and regulated by statutes such as *PSEMA* and *the NT Fire and Rescue Act* (NT), regulation and industrial awards such as *The Partnership Agreement 2004* as amended from time to time which provides a variety of means by which employees may be protected from abuses of power by the employer and provides means of redress to employees who are aggrieved by some conduct of the employer.

121. The applicable statutory and regulatory context may be important in determining whether the specific term is incorporated by reference (as per the letter of offer) as an express term in the contract and whether other terms are to be implied into an employment contract and its effect once so found.

122. The Defendant asserted not only that the Plaintiff was not employed under a contract of employment but that any contract of employment did not include Clause.59.1 as *The Partnership Agreement 2004* as amended from time to time could only include a reference to the original Partnership Agreement.

***Express Term s.59.1 of The Partnership Agreement 2004 – what is the wording of Clause 59.1:***

123. The Plaintiff's Statement of Claim includes a specific plea stating *The Northern Territory Public Sector Fire and Rescue Service 2004 Partnership Agreement (**2004)*** (PA) *and* the PSEMA and the *NT Fire and Rescue Act* (NT) contained the terms and conditions of the Plaintiff's employment.

124. Specifically the Plaintiff has pleaded at paragraphs 3, 5, and 10 of the Statement of Claim as follows:

> *"3. The Plaintiff's employment terms and conditions were contained in PSEMA, The Northern Territory Public Sector Fire and Rescue Service 2004 Partnership Agreement (**2004 Partnership Agreement),** as amended from time to time. For the purposes of the employment contract, the **2004 Partnership Agreement**, as amended from time to time included the Northern Territory Public Sector Fire and Rescue Service Enterprise Agreement 2011 -2013 as in force from 14 September 2011 to 23 January 2017 and the Northern Territory Public Sector Fire and Rescue Service Enterprise Agreement 2013 -2017 as in force from 14 January 2017 to 5 July 2019.*
>
> *4. One of the terms of the Plaintiff's contract of employment was that the employer would take all reasonably practical steps to prevent harassment and bullying in the workplace (the Enterprise Agreements paragraphs 59.1) specifically;*
>
> *5. In breach of the term of employment referred to in paragraph 4 herein, between about November 2015 and 14 march 2018, the Defendant failed to take all reasonably practicable steps to prevent harassment and bullying toward the Plaintiff in the workplace. (The paragraph then goes on to plead 20 particulars of breach paragraph 5a)-t)….*
>
> *8. As a result of the Defendant's breaches referred to in paragraphs 5 and 7 herein, the Plaintiff suffered loss and damage. (The paragraph then goes on to plead particulars of damages in the order of $100000.00 with particulars, though a schedule of amended particulars was received at the hearing)."*

125. The Defendant asserts however, that the PA cannot form the basis of the contractual obligations of the parties. The Defendant asserts the conditions of employment are contained in the letter of engagement and the reference to the PA "from time to time" would not include any of the terms of the Enterprise Agreement once it had been renegotiated over time.

126. It is the Defendant's case that the PA at the time of the Plaintiff's employment did not contain Clause 59 and was no longer operable once the PA had been renegotiated at the end of its term. The Defendant submits clause 59 of the Enterprise agreement operable in 2017 cannot be a condition of the Plaintiff's contract of employment.

127. I have not been provided with a copy of the agreement which was in place at the time of the letter of engagement in 2006. The Plaintiff submitted that agreement in place in 2006 is not relevant given that the letter of engagement includes the partnership agreement *"as amended from time to time"*.

128. The Plaintiff argued Clause 59.1 of the partnership agreement became part of the employment contract as it is part of the agreement as amended from "time to time".

129. The Defendant submitted that such an interpretation of the phrase "as amended from time to time" is wrong and cannot include subsequent renegotiated agreements.

130. The Defendant referred to the clause 6.2 & 6.3 of the agreement of 2007 – 2010 which state:

> *"6.2 The Agreement is a comprehensive Agreement and when it commences operation the Northern Territory Public Sector Fire and Rescue Service Employees (Northern Territory) Award 2004 Partnership agreement ceases to apply.*
>
> *6.3 This Agreement replaces the Fire and Rescue Services Employees (Northern Territory) Award 2001."*

131. The Defendant submitted those clauses support a finding that once there is a renegotiation of agreement then the old agreement ceases to exist and therefore any changes in the agreement are not an "amendment from time to time" and cannot be imported into the Plaintiff's contract of employment.

132. Alternatively the Defendant submitted if the renegotiated PA did apply to the Plaintiff's employment then clause 59.1 was a reflection of the legislative requirement under Commonwealth legislation which is focussed on preventing personal injury not creating contractual obligations. The Defendant argued clause 59.1 is only an 'aspirational' statement and not an obligation which can form the basis for a contractual obligation between employer and employee.

133. In the 2011-2013 partnership agreement clause 59.1 remained the same

134. In the 2013-2017 agreement clause 59.1 is slightly different to take account of change in legislation:

> *"59.1 All parties to the agreement acknowledge the commitment to achieve and maintain a safe and healthy work environment* ***and will take*** *all reasonably practicable steps to prevent harassment and bullying in the workplace…"*

135. I cannot accept the Defendant's argument. I refer to the decision of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*[55] and find that in this case the words of the letter of engagement specifically include the words "as amended from time to time" which is a precise and certain use of language and is evidence that the intention of the parties is to not only to refer to the current PA at the time of the engagement of the employee but also the PA as modified from time to time to incorporate future amendments and future agreements.

136. I also cannot accept the Defendant's argument as to do so would create an untenable situation. A situation where a person, who is employed during the operation of an enterprise bargaining agreement and whose employment continues over a period in which the relevant enterprise bargaining agreement is renegotiated would not be able to rely on the later agreement for his conditions of employment.

137. If you take that argument to its logical conclusion that would result in different employees in a workplace having different conditions of work (as set by the enterprise bargaining agreement or award) based upon when they were employed. That would undermine the whole purpose of enterprise bargaining agreements or awards.

138. I find that the applicable clause is that in the most recent *Partnership Agreement* as amended.

139. As to the argument about whether clause 59.1 was a reflection of the legislative requirements under Commonwealth legislation which is focussed on preventing personal injury not creating contractual obligations and whether clause 59.1 is only an 'aspirational' statement and not an obligation which can form the basis for a contractual obligation between employer and employee, it is necessary to consider clause 59 in its entirety to determine if it is expressly incorporated into the employment contract.

***Is Clause 59.1 of the Partnership Agreement (2004) incorporated as an Express Term of the Contract of Employment?***

140. The Defendant sought to distinguish between conditions of employment (as set by the PA) and the contractual conditions.

141. The Defendant argued that even if the conditions of the later PA applied to the Plaintiff's conditions of employment that did not necessarily mean those conditions becomes a contractual obligation which can form the basis for contractual damages other than for personal injuries. The Defendant argued that the clause reflected legislative requirements and was not intended to be contractually binding and was only an aspirational statement.

142. Whether the clause is incorporated as an express contractual term is dependent on the parties intentions objectively ascertained. The question is, what was the understanding of the employer and the Plaintiff that the words in the letter of engagement "would have led a reasonable person in the position of the (worker) to believe"[56]?

143. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 the High Court said:

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[55] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [55][2014] FCAFC 177 at para [59]
[56] Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] 163 FCR 62 per Black CJ at paragraph 23; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]

*"the meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."*

144. I am of the view that the Statement of Claim pleads that the PA, particularly clause 59.1, becomes a contractual obligation which the Defendant has breached as particularised and that breach has resulted in the damages. The Plaintiff must prove to the requisite standard that the PA, particularly clause 59.1 does form part of the Defendant's contractual obligations as an express term of Mr Green's contract.

145. In this case, as already stated, I do find that the relationship of employer and employee in Mr Green's case was a contractual relationship.

146. In the past, the contract of employment has generally been well defined and addressed specific items, such as leave, salary entitlements, working hours, confidentiality, etc. However, Recently the Court has been more inclined to extend the contract of employment, and incorporate additional terms and conditions. In Mr Green's case, these employment conditions are not specifically stated in the letter of offer, rather they are by found in the **PA** which is referred to in the letter of offer about his employment contract.

147. The issue in this case is whether Mr Green's contract of employment incorporates all of the matters included in the PA which is expressly referred to in his letter of offer. This express referral to the PA is not determinative of whether some or all of the Agreement is incorporated into the Contract of Employment but may be taken into account when considering the intention of the parties. Clearly some matters must be incorporated, such as salary and leave entitlements etc… which are found in the PA**.** This lends some weight to the Plaintiff's argument that the reference to the PA must be given due consideration.

148. Some contracts of employment also incorporate various policies prepared by the employer. These policies may refer to performance management processes, discipline or grievance procedures. They may also deal with Workplace Health and Safety, bullying and/or harassment. Within these policies, an employer will often accept various obligations, as well as imposing obligations on employees. For example, an employer may promise to deal with an employee in a certain manner, or to deal with a complaint made by an employee in a certain way. Whilst certain procedures and policies can form the basis of such grievance proceedings, this is not determinative.

149. In the appeal case of *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120 the Full Federal Court held that policies will generally only be "contractual" in nature if "*a reasonable person in the position of a promisee (the employee) would conclude that a promisor (the employer) intended to be contractually bound by a particular statement*." In determining this, a Court will have regard to the text of the policy, the surrounding circumstances known to the parties and the purpose and object of the transaction.

150. The Court found that policies which use words such as "will", "must" or "shall" when expressing promises suggest a contractual undertaking or promise. Conversely, policies which express statements as "aspirations" or "aims" will generally not meet this test. The Court concluded that the statement: *"JB Were will take every practicable step to provide and maintain a safe and healthy environment for all people"*, embodied a contractual obligation and should be interpreted as being a term of the contract of employment. The Court dismissed the appeal (although it upheld an ancillary appeal with regard to the order for legal costs awarded to Mr Nikolich).

151. However the existence of mutually actionable obligations in the PA or the clause coupled with mandatory language lends some weight to the Plaintiff's argument that it is the intention of the parties that the clause be incorporated as an express term of the contract in order to ensure that the parties prevent bullying and harassment in the workplace and the Defendant achieve and maintain a safe and healthy working environment.

152. I refer to Chief Justice Black's comments in *Nikolich* about the common law duty to provide a safe system of work which will be implied into a contract of employment. It seems that the implied obligation on an employer to provide a safe place of work and safe system of work will always supersede any "creative drafting" within contracts or policy documents that attempt to exclude employer liability.

153. In the later decision of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*[57] the Full Court of the Federal Court found that a workplace policy, the *Workplace Harassment and Discrimination Policy* (the **Policy**), formed part of an employee's contract of employment and the employer's failure to follow the policy amounted to a breach of contract. The contract was in the form of a letter of engagement provided to the employee in January 2011. The letter included the following key sentence "*In addition, all [company] policies are to be observed at all times*".

154. On appeal the Full Court of the Federal Court found that although some aspects of the Policy were merely aspirational, '*specific obligations were clearly ascertainable and quite capable of precise identification*'. [13] The court held the policy formed part of the employment contract as:

> *The language used in this instance, taking the Policy as a whole, makes it clear that there is an expectation by the company that there will be mutual obligations. In return for the employee complying with the terms of the Policy, the employer gives a responsive assurance that complaints of non-compliance by other employees will be treated in a certain way.*

155. The Full Court took into account surrounding circumstances including that:

    a) the Policy was the subject of an education program at the time of, or contemporaneous with, the offer of employment;
    b) Farstad provided the Policy to Romero;
    c) Romero was required to sign the Policy;
    d) the benefit in the Policy was a benefit ordinarily conferred in employment contracts; and
    e) there was regular reinforcement of this and other company policies on an ongoing basis.[11]

156. Also relevant, in the Full Court's view, was the actual employment context including the need to avoid problematic situations arising for Romero if bullying and discrimination were not precluded; and the importance, in the operation of ships, of maintaining a calm environment from a safety perspective.[12]

157. In all, the court found that the company's workplace investigation *"fell short of the standard and procedure **promised under the Policy**"*. The Court set aside the orders of the primary judge and declared that the company had breached its employment contract with the second officer and found, amongst other things, the procedures adopted by the employer

[57] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177

did not comply with the policy in the workplace investigation of complaints made and there was a general failure to carefully and systematically investigate the complaints made.

158. In the 2013 -2017 agreement clause 59.1 is slightly different to take account of change in legislation:

> *"59.1 All parties to the agreement acknowledge the commitment to achieve and maintain a safe and healthy work environment **and will take** all reasonably practicable steps to prevent harassment and bullying in the workplace.*
>
> *59.2 All parties to this Agreement acknowledge the NTPS Code of Conduct. Pursuant to the Code, an employee **must** behave in a professional manner in carrying out their duties and treat colleagues, supervisors and others in the workplace with courtesy, dignity and respect at all times.*
>
> *59.3 An employee who is aggrieved by their treatment in employment **may** seek a review under section the PSEM Act."*

159. I have already found that this is the wording of the Clause that the Plaintiff submits is expressly incorporated into his contract of employment.

160. The Northern Territory Public Sector Code of Conduct (NTPSCC) was not tendered by the Plaintiff at the hearing however at the relevant time, in 2015, the NTPSCC arose under Section 16(2)(c) of the *Public Sector Employment and Management Act* (PSEMA) 1993 (the Act) and the Regulations. The objects of the Act prescribed the Principles of Public Administration and Management, Human Resource Management and Conduct. The NT Commissioner for Public Employment in 2015, Mr Ken Simpson, made rules, consistent with the Act, relating to the good management of the Northern Territory Public Sector (NTPS). These were known as Employment Instructions and included a Code of Conduct to be observed by all public sector employees The NTPSCC was Employment Instruction Number 12 and stipulated the minimum standards of conduct expected of public sector officers. It stated that all public sector officers are bound by the code.

161. I have considered the historical NTPSCC 2015, referred to in clause 59.2 although it was not tendered in the Plaintiff's case, as it was in force at the time. There is no specific reference to bullying and harassment but there is general reference to standards of conduct that employees shall adhere to. Consequences for failure to do so include breaches of discipline.

162. Clause 59.3 refers specifically to an employee aggrieved of any workplace conduct seeking a review under PSEMA, a legislative scheme. The Defendant contends, it is unlikely that clause 59 was intended to be expressly incorporated as a contractual term because it refers specifically to the legislative pathway for an aggrieved employee to pursue workplace issues including complaints about bullying and harassment. Further there was and is already in existence legislation and bullying laws, work health and safety, Commonwealth and State occupational health and safety laws at the time of these events.

163. However, I don't necessarily agree with the Defendant. I refer to the decision of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [58] where the full court of the Federal Court of Australia held:

[58] Supra @ para [55-58]

*[55]The better view is to the contrary. The existence of legal obligations on the part of both parties, might be thought to be a good reason for contractually binding the parties to a specific method as to the manner in which those statutory obligations are to be observed. The legislation necessarily dictates that the obligations are serious, being an added reason why one would expect the promises to be binding.*

*…*

*[55]In situations where clear language is used and sufficient emphasis is placed upon the need for compliance (implicitly by both parties) with the terms of a company policy, then especially where that goes to fundamental conditions of employment, such as payment and the method of compliance with external statutory obligations, objectively viewed, the parties would be expected to regard such terms as contractually binding….*

164. In this case clause 59 refers to legislatively mutual obligations as well as obligations that could be contractually binding. The NTPSCC referred to in clause 59.2 goes to a compulsory *public sector code of conduct* which also goes to fundamental conditions of employment such as *conduct standards*, *conflicts of interest and disclosure of wrongdoing* by all public sector employees. The consequences of non-compliance with the code are stated to be possible disciplinary proceedings.

165. The NTPSCC refers to public sector officers being mandatorily obliged to comply with the code. In relation to conduct the NTCC says an employee '…**shall** *exercise proper courtesy, consideration and sensitivity and* ***shall*** *act with fairness and equity in their dealings with members of the public and with other employees.'* [Principles of Conduct NTCC 2015]

166. The *Partnership Agreement 2004* (PA) is referred to in the contract of employment letter of offer, exhibit P1, and the letter states the Plaintiff's conditions of employment are in the PA as 'amended from time to time' (as well as in relevant legislation also referred to in the letter). The Plaintiff argues this is evidence that the PA and specifically clause 59 is expressly incorporated in the contract by express reference in the letter of offer.

167. The wording of clause s.59.1 in the most recent version tendered, exhibit: *"59.1 All parties to the agreement acknowledge the commitment to achieve and maintain a safe and healthy work environment* ***and will take*** *all reasonably practicable steps to prevent harassment and bullying in the workplace…"* uses mandatory language which is some evidence of an intention by both parties that the clause might be incorporated into Mr Green's contract of employment and was intended to be more than just an aspirational statement.

168. Likewise the language in clause 59.2 is mandatory and the NTPSCC 2015 consistently uses the words 'an employee **shall…'** The clause itself uses mandatory language which suggests a contractually binding obligation on the employee which can be contrasted with the discretionary language of **may** where an employee's can decide whether to pursue a remedy in clause 59.3 if aggrieved at work.

> *Clause 59.2 all parties to this Agreement acknowledge the NTPS Code of Conduct. Pursuant to the Code,* ***an employee must behave*** *in a professional manner in carrying out their duties and treat colleagues, supervisors and others in the workplace with courtesy, dignity and respect at all times.*

169. By contrast, *Clause 59.3* uses the word '**may**' in the context of an employee's discretion to pursue a complaint.

170. Further I agree that the analysis of clause 59.1 and the clause as a whole, shows it is may be more than an aspirational statement due to the expression of the parties intention

evidenced by the mandatory language used and the mutual obligations created such that the conclusion is that not only was it within the contemplation of the parties it is the only logical conclusion.

171. I do find given the language used and the mutual obligations of clause 59.1 make it likely that the clause is incorporated into Mr Green's contract of employment as an express contractual term imposing obligations on Mr Green and his employer, the Defendant to adhere to maintain a state of affairs to provide and maintain a safe and healthy work environment and to prevent bullying/harassment in the workplace by incorporating clause 59.1 of the *Partnership Agreement 2004*.

172. Whether the Plaintiff has established what standards and procedures the parties are required to adhere to in ensuring their contractual obligations are met is another issue.

**If Clause 59.1 expressly incorporated did the Defendant breach the clause by failing to prevent bullying and harassment of Mr Green?**

173. Regardless of whether clause 59.1 is expressly incorporated in his contract of employment I find the Plaintiff has not established on the evidence that there was a breach of that term of the contract. I find the Plaintiff's case falls short evidentially.

174. Part of the Plaintiff's difficulty is not establishing what standards and procedures the parties are required to adhere to in ensuring their contractual obligations are met. However evidentially the impugned conduct has also not been proven.

**Has the Plaintiff established on the evidence that he was bullied by OIC Ferguson and that when he complained to his superiors they failed to act on his concerns?**

175. The short answer is no.

176. I find the Plaintiff has not established on the balance of probabilities ***that*** there was a failure by the Defendant to prevent bullying and harassment in the workplace by:

    a) Failing to deal with OIC Ferguson after he complained to them; or
    b) Failing to undertake any workplace investigation of his complaints to prevent him being bullied by OIC Ferguson; and
    c) Failing to prevent bullying through the disciplinary proceedings, by intervening to stop them

**Breach of the Express Term**

177. The Plaintiff sought to take the Court to the wording of clause 59.1 as an express term but did not seek to explain how it was administered in the contractual environment. The evidence about the parties' knowledge and or intention regarding the standards and expectations and mutual obligations relating to preventing bullying and harassment in the workplace fell short. I find there is a distinct absence of evidence about the parties objective intention when entering into the contract of employment or during his employment as to what the standard of conduct and behaviour was that was expected to be adhered to ensure that clause 59.1 would be achieved and maintained.

178. Significantly the Plaintiff did not seek to introduce into evidence any policies or procedures prepared by the employer dealing with Workplace Health and Safety, Bullying and/or Harassment in the workplace or Investigation of Complaints. There is usually well known

and established workplace practices procedures and policies regarding bullying and harassment in the workplace. I find that as a matter of inference policies and procedures did exist however none were tendered in evidence or relied on by the Plaintiff to prove any breach of the express term. Policies were tendered as evidence, exhibit P5 – *General Orders Regional Station Appointments* and also referred to in correspondence, *Respect Equity Diversity Policy*, exhibit P 25.8

179. I have considered the historical NTPSCC 2015, referred to in clause 59.2 although it was not tendered in the Plaintiff's case, as it was in force at the time. The Code of Conduct does provide some assistance. There is no specific reference to bullying and harassment but there is general reference to standards of conduct that employees shall adhere to. Consequences for failure to do so include breaches of discipline. The language is mandatory. However for the reasons set out I don't find that any breach has been proven.

**The Evidence about bullying**

180. The evidence given by Mr Green about his understanding of the Defendant's obligation to provide a safe system of work is that Mr Green understood the safe workplace was achieved not only through the award but through the provision of a psychologist and a Chaplin visiting the station and the provision of peer support. He also referred to the existence of ongoing training regarding bullying and that it was not to be tolerated, and that this was reinforced by the Minister and the then Police Commissioner, Kershaw[59].

181. When pressed in Cross Examination Mr Green stated his understanding of making a complaint was to complain to his supervisors about bullying in the workplace. He stated he believed telling his immediate supervisor A/DO Kleeman and DO Letheby was sufficient to have his complaints heard and dealt with. He stated he had lodged a s.59 formal grievance about OIC Ferguson's bullying conduct in 2018, at or after the time of the Board's decision, but relied on his union and lawyers to do the paperwork[60] and prior to that time he did not know about that process because he was not told about it by Alice Springs.

182. Exhibit P25 is a copy of the email grievance sent to CFO Spain on 16 April 2018. P26 is the CFO's response dated 2 October 2018 which referred to *The Respect, Equity and Diversity Policy*. That policy was not tendered in court or made available. The CFO also stated that the Plaintiff's complaints were being taken seriously, enquiries had been made and his complaint had the potential to form the basis of disciplinary proceedings under PSEMA so the CFO could not provide the Plaintiff with any further information.

183. I find that workplace Policies did, by inference, exist which purported to regulate how grievances and complaints were to be managed, including the disciplinary proceedings against him; however they were not put in evidence by the Plaintiff.

184. Mr Green gave evidence about a process he said he was encouraged to follow to relay his concerns about Ferguson to his superiors once he was aware he was to be transferred to Tennant Creek. He stated he did relay some concerns to his superiors on several occasions.

185. Mr Green listed several incidents of concerning conduct by Ferguson, however the evidence about relaying such concerns to his superiors lacked particularity and detail about: when he spoke to them other than he visited Alice Springs after being transferred to Tennant Creek, where he spoke to them, who was present, what was said, what the

[59] Transcript 21 June; p. 24 Re-examination
[60] Transcript 22 June; p.32

outcome was of the discussion and was of such generality that I am unable to ascertain what the nature of any complaint was or if it was a complaint at all.

186. Mr Green's evidence was that his initial complaints about Ferguson in 2015 and 2016 to his superiors at the Alice Springs Fire-station were made informally and were made when he went to Alice Springs. His evidence was that was how he was encouraged to raise issues. He complains that his superiors failed to investigate his complaints about Ferguson's conduct. He stated on some occasions he received responses about how to manage Ferguson's conduct such as to ignore Ferguson's direction not to socialise with certain persons but that on other occasions he believed that his concerns were passed on to Ferguson.

187. Mr Green does not assert his complaints were in writing or formally documented in any way to the Defendant but that they were raised when he met with DO Lethby and A/DO Kleeman at Alice Springs and one matter, the speedway matter was dealt with directly by Spain at Tennant Creek.

188. This is significant given that Mr Green did not pursue the remedy under clause 59.3 in relation to raising his concerns about OIC Ferguson. He suggests that his superiors were obliged to act on his complaints. The evidence is that they did act in a number of ways to deal with Mr Green's complaints.

    a) CFO Spain dealt with the speedway incident immediately and told OIC Ferguson to stop support services. The Plaintiff's evidence did not disclose any further complaint being raised regarding OIC Ferguson admonishing him about this incident afterwards;
    b) A/DO Kleeman advised him to take problems higher on occasion which he did;
    c) DO Letheby spoke directly to OIC Ferguson about his conduct generally presumably in an attempt to resolve any workplace issues. Mr Green's evidence was he was aware that DO Letheby intended to speak to Ferguson, he did not complain about this happening;
    d) Mr Green's evidence did not disclose he ever told his superiors about any angry backlash he perceived from OIC Ferguson after DO Letheby spoke to him about his conduct towards Mr Green;
    e) DO Letheby told him to ignore issues about socialising and Mr Green's evidence was that he got on with his social life after a certain point and did not raise some issues with his superiors.

189. The evidence reveals his superiors did deal with his complaints after he raised them. Mr Green's evidence fell short as he did not say he told his superiors that OIC Ferguson was angry with him for going out of the chain of command and complaining about him. His evidence was also that he sorted his social life out and took his superiors advice and ignored OIC Ferguson's directions and did not raise this issue again. He did not take the speedway issue to his superiors again after the CFO dealt with the issue so his superiors could not have known about any backlash.

190. The issue of OIC Green speaking to him harshly and threatening him may or may not have been addressed however; I am unable on Mr Green's evidence to determine when exactly he spoke to his superiors, what he complained about, when they said they would speak to OIC Ferguson and what outcome there was if any. There is no chronology of his concerns and it is not possible to determine the sequence of alleged events. Mr Green's evidence of his complaints lack particularity, they are not formally recorded nor are they in writing and there is no evidence from the Plaintiff that he ever followed up with anybody about any particular matter.

191. Even if OIC Ferguson's conduct towards the Plaintiff was angry and inappropriate on occasion causing Mr Green's superiors to speak to him, Mr Green did not follow through and report to his superiors that OIC Ferguson's conduct was escalating towards him. It goes without saying that his superiors could only act on complaints they received. On his evidence Mr Green did not take the more serious matters to his superiors such as any escalation or backlash due to him complaining about OIC Ferguson.

192. Further the Plaintiff gave evidence he was told on several occasions that his supervisor would raise the matter with Ferguson as a mechanism to deal with his concern. Mr Green was not only aware this would happen but said it appeared that on occasion this did occur. The matter which had specific detail was the issue about the speedway which was actioned by the CFO on the spot while he was at Tennant Creek where Ferguson was told his officers were not to man the speedway from then on. Ferguson then allegedly retaliated against Green however his evidence was not that he complained about the retaliation to his superiors.

193. There was no evidence from any employee of the Defendant that Mr Green did raise concerns with his superiors and that they were taken as bullying and harassment complaints that required investigation in the workplace, or that a workplace investigation was instigated or should have been and was not. The Plaintiff's complaint is that there was a failure to act which failed to prevent him being bullied.

194. Whilst I find it could indeed be entirely possible to incorporate into a contract of employment an express contractual term imposing obligations on an employer to adhere to certain standards and procedures including maintaining a state of affairs where a workplace is free from bullying/harassment by incorporating clause 59.1 of the PA, the Plaintiff case falls short evidentially when it comes to determining if that clause has been breached. Likewise regarding the investigation with reasonable care of workplace complaints (see ***Romero***).

195. The manner of complaint about OIC Ferguson initially in 2015 and 2016, differs from his later evidence that once the disciplinary proceedings were instigated against him, Mr Green then became involved with representatives from *United Voice* who was able to assist him to defend the allegations. Through that process he appeared to be given advice about the legislative scheme he was being pursued under. He then made a formal complaint against OIC Ferguson in 2018 for bullying and harassment under the same legislative scheme referred to in clause 59.3 of the PA. There is overlap with his complaints, see exhibit P25.

196. The issue of any complaint being made and any process of complaint of OIC Ferguson bullying or harassing the Plaintiff prior to the instigation of the disciplinary proceedings was that he made informal complaints at best through discussions with his superiors believing that was the mechanism to do so and that he did not pursue any formal complaint under PSEMA as set out in clause 59.3. His evidence was he was not aware of any grievance policy or referred to the code of conduct and his evidence was that was because Alice Springs did not tell him about that despite referencing workplace training about bullying and having read the PA.

197. Mr Green did make complaints in writing through his representatives '*United Voice'* during the disciplinary proceedings in 2018 about the process. He also put in writing that he was being denied natural justice and could not answer the allegations being made against him without adequate disclosure on at least one occasion and actively sought to defend the allegations made against him.

198. Mr Green also wrote to protest the outcome of the disciplinary proceedings to the CFO after his decision and the Police Commissioner Reece Kershaw. The court is also aware of a Grievance Process the Plaintiff availed himself of pursuant to s.59 of *PSEMA* when he appealed the disciplinary decision. A copy of the Board's decision was tendered in evidence as Exhibit P7. The CEO and the CFO declined to suspend the decision pending his appeal and enforced the transfer to Alice Springs. The Defendant waited for the Board's decision.

199. This mechanism or a grievance mechanism is also referred to by the CFO in his correspondence about Mr Green's complaint however Mr Green did not make a formal complaint about OIC Ferguson until after the Board's decision in 2018.

**Conclusion bullying**

200. In conclusion I find that the evidence is not of a sufficient standard for me to make a determination of the existence of the contractual framework and the **procedures** that may have existed to manage bullying and harassment in the workplace and to action or investigate complaints of such conduct. I am unaware of the standards and procedures promised by the Employer as a contractual obligation, if there were any, to prevent and to investigate any allegations of bullying or harassment in the workplace other than that in clause 59.

201. Mr Green did not pursue the contractual remedy by seeking a review under clause 59.3, as he did not pursue his complaints about OIC Ferguson under PSEMA, which would have instigated an investigation of his complaints. He complains when he raised his concerns with his superiors they failed to investigate. He may suggest that raising matters with his superiors is enough to trigger a clause 59.3 review if a term of his contract, however I don't find that is the case. Mr Green complained informally by raising his concerns with his supervisors. There is no evidence about what standard Mr Ferguson and the employees were expected to adhere to determine if clause 59.1 was breached even if the term was expressly incorporated.

202. There is a lack of certainty and precision in Mr Green's evidence about how, when and in what manner and form he raised the concerns with his superiors such that I can't be satisfied that he actually made complaints to his superiors that justified different action to that taken. I make my findings in light of Mr Green's evidence that most if not all of the concerns he actually raised were dealt with in a particular manner with his knowledge. Mr Green appears to complain that he was not satisfied with what his superiors did, however there is no evidence he pursued this further with his superiors. Significantly, there is no evidence he ever told them that OIC Ferguson was become angry with him for going outside the chain of command or that his conduct was escalating or retaliatory.

203. In this case though I may conclude the specific clause s59.1 of the PA is incorporated as an express term of Mr Greens' contract, in the absence of additional evidence about the clause and any policies procedures or education in the workplace about bullying and harassment I cannot conclude that there has been a breach of the express term as asserted.

204. **I also find that the conduct alleged as bullying conduct by OIC Ferguson is not proven and importantly that the conduct of his superiors alleged as failing to prevent him from being bullied and harassed by OIC Ferguson has not been proven by the Plaintiff to breach the express term**.

**Breach due to Disciplinary Proceedings**

205. In Mr Green's case the breach asserted by him is that 1) his superiors failed to prevent bullying and harassment by failing to action his complaints about OIC Ferguson and 2) the disciplinary proceeding against him contributed to the bullying and harassment in the workplace and the Defendant failed to intervene to stop the proceedings when they had opportunity to do so. There is no evidence that the complaints to the superiors triggered or grounded the disciplinary proceedings. Mr Green did not assert this in evidence and the facts grounding the disciplinary proceedings were different to his complaints.

206. There is no evidence that the proceedings were triggered as a result of malice or that the complaints were connected in any way. The Board's findings do not go this far. The case of *Romero v Farstad Shipping* can be distinguished in this regard on the facts. In that case the relevant policy was found to be expressly incorporated into the contract. Ms Romero's email to her employer alleging certain conduct against her Captain was taken by her employers as a complaint and a workplace investigation was commenced which resulted in allegations being made against her by her Captain. The court found that her employer's had breached their contractual duty to her by failing to follow the workplace procedure for investigations set out under the policy.

207. Further I find the Plaintiff is conflating 2 issues. One being the alleged failure to prevent bullying and harassment by failing to action or investigate his alleged complainants made to his superiors about OIC Ferguson's conduct; and two by alleging the disciplinary proceedings by the Defendant contributed to bullying and harassment in the workplace as the Defendant failed to stop the disciplinary proceedings. I find that the only conclusion I can come to is the Defendant asserts that the disciplinary proceedings themselves constituted unreasonable management action taken against him by his superiors. They are different matters.

208. Mr Green did not tender any procedure or policy or point to any contractually binding process the Defendant was obliged to follow that was breached in regards to the disciplinary proceedings against him other than the express term as failing to prevent bullying and harassment. The Defendant was obliged to manage the disciplinary proceedings reasonably under PSEMA and the law however, as stated, I find the evidence falls short of proving the management action was not reasonable and that any breach has been proven of the express term because it was bullying of Mr Green by his managers.

209. Whilst the Plaintiff complains the manner of the workplace investigation against him, the disciplinary proceedings was unreasonable and inappropriate, he has again failed to establish, other than by relying on the Board's decision how this constituted bullying and harassment by the Defendant which breached a contractual term.

210. The Plaintiff did appeal the Decision of the CFO under s59A of PSEMA to the Board. The Board's decision does not lead to a conclusion or finding that the Defendant's management action was unreasonable or inappropriate. The Board made findings about the outcome and the penalty imposed being unreasonable and inappropriate and reversed the finding that he had breached discipline. The Board also made certain directions with a view to financially compensating Mr Green to some extent and attempting to remedy any reputational damage he had suffered in the workplace. Whilst the Board was also critical of the evidentiary basis of the Defendant's findings and *critical of some of the processes of the disciplinary proceedings*, the evidence falls short of me being able to make a finding that the management action was unreasonable. The Directions about the process don't lead to the ultimate finding sought by the Plaintiff.

211. Mr Green did not tender any evidence other than the Board's findings to support this claim. I cannot make a *Jones v Dunkel* direction to fill in the gaps of Mr Green's case regarding this evidential shortfall and I do not do so. I find these assertions cannot be established in the absence of further evidence about the conduct of such proceedings and any established practices, processes and procedural guidelines which should have been adhered to and were not. Nor can I go so far as to make a finding that a lack of procedural fairness was not afforded to Mr Green or that OIC Ferguson's complaints were instigated by malice.

212. If I am wrong about whether clause 59.1 is expressly incorporated, I find as set out above, that there is insufficient evidence to establish that the express term has been breached by the Defendant without evidence of what procedures were required to be followed by the employer contractually to prevent bullying and harassment in the workplace. Also and most significantly the evidence does not support a finding that the Defendant's conduct breached the term as the Plaintiff has not proven the Defendant failed to prevent bullying and harassment.

213. The Plaintiff bears the onus to establish not only that the term is incorporated but the scope of the term and that it has been breached by the employer's conduct or failure to act. That has not occurred.

**Common Law Implied Term of Contract: Foreseeability of risk of harm or injury**

214. The Plaintiff's Statement of Claim includes a specific plea stating that there is an Implied Term at common law in Mr Green's contract that the *Defendant Employer would provide a healthy and safe working environment*, the contractual duty of care. The precise scope was not identified clearly at the trial beyond this general expression, though some assistance can be gleaned from written submissions subsequently filed. The Defendant does not dispute that this term is implied into the contract at law however states that the precise scope requires elucidation. I agree.

215. I find as in the decision of ***Nikolich*****,** and it is properly conceded by the Defendant, there is an implied term in the contract of employment that the Defendant is to provide a safe and healthy work environment. That implied term includes an obligation and duty of care that the Defendant takes all reasonable steps to prevent bullying and harassment in the workplace in order to maintain that state of affairs.

216. The Defendant asserts that the implied term can only be the basis for a claim for personal injury because it has been implied by the courts to protect workers from risk of injury while working, not for pecuniary damages arising out of harm other than personal injury. The Plaintiff asserts otherwise and argues that the obligation is not so confined and extends to economic loss suffered by a worker where an employer fails to provide a safe system of work.

217. The Plaintiff does not appear to resile from the requirement that the Plaintiff must still establish that there is a 'risk of injury or harm' to the Plaintiff that must be established due to the Defendant's failure to provide a safe system of work, however asserts that damages can be awarded for harm caused of an economic nature as a result of the breach of the employers contractual obligation to provide a safe system of work.

218. The Plaintiff specifically eschews that he suffered any physical or mental injury for the purposes of these proceedings, as a result of the alleged conduct and no evidence from any medical professional was relied on at trial. Some evidence was led in the case

regarding the risk of the alleged conduct on the Plaintiff mentally and on his family, but the majority of the evidence was on the consequences to him professionally and economically. Mr Green stated he did not take any sick leaved during the relevant period and that he did not lodge a Worker's Compensation Medical Certificate or a Statement[61] of Fitness to Work.

219. In exhibit P8 of 26 October, when Mr Green's union representative wrote to the CEO Commissioner Kershaw she referred to the Mr Green *being genuinely upset how this matter has been conducted as it has placed himself and his wife under unnecessary stress*. Mr Green also referred to a risk to his family and his own mental health should he have to return to Tennant Creek in his correspondence to CFO Spain on 16 April 2018, however he does not drill down to any specifics about what that risk entails just makes a general statement that he is not confident that the culture of the fire service will change given his past dealings with OIC Ferguson and DO Letheby and his experiences of the disciplinary proceedings.

220. Mr Green gave evidence he was suspended from duty from 2 November 2016 for 4 months and he did not speak to anyone during that time as he was directed not to talk to anyone.[62] He gave evidence he was transferred to Alice Springs against his wishes and his family went to Adelaide instead of accompanying him to Alice Springs. He said he had gone to a Doctor but gave no evidence of the impact of the alleged bullying by OIC Ferguson; the disciplinary proceedings or the adverse outcome; or the appeal proceedings.

221. Mr Green's evidence was there was a need for the Defendant to remedy the Tennant Creek work environment as his perception was it was unsafe for him to return to work there, see exhibit P12. He did give direct evidence that his view was the disciplinary proceedings were a 'stitch up' and he did not trust DO Letheby or the Fire Service to deal with him fairly at work regardless of the Board's findings but he did not extrapolate that to any risk to his mental health including whether he was labouring under any ongoing workplace or personal stress as a result of what was occurring.

222. There is in fact a paucity of evidence about any actual or ongoing consequence to his mental health or any risk to his mental health. It appears on that Mr Green sought to rely on the inference that there was risk to his mental health if he was required to return to the work environment under OIC Ferguson given the allegations of the bullying conduct as a whole.

223. It is an implied term of a contract of employment that the employer owes to each employee a duty to provide a healthy and safe working environment and to take reasonable care to protect the employee against foreseeable injury arising out of the contract of employment. (I will refer to this duty as the implied contractual duty of care, for convenience.) The content of the duty is the same whether the duty itself is found in the contract of employment or in a tortious duty of care.

> *The duty includes a duty to take reasonable care to avoid causing or committing psychiatric injury to the employee,* ***if psychiatric injury to the particular employee is reasonably foreseeable****.*[86] *The circumstance that it is a matter of "general knowledge" that recognisable psychiatric illnesses may be triggered by stress does not lead to the conclusion that an*

[61] Transcript 21 June 2021: p.21
[62] Transcript 21 June 2021: p.64,65

*employer must now recognise **that all employees** are at risk of psychiatric injury from stress at work*[63].

224. As the case law makes clear it is not enough to say that there was a risk that a psychological or psychiatric disorder might be triggered by Mr Green being stressed by the disciplinary proceedings? It is also insufficient for him to say his perception was that if he returned to Tennant Creek it would be a risk to his Mental Health.

225. I find in this case the evidence falls well short of the Plaintiff establishing that in Mr Green's case the employer was on notice that there was a risk to that particular employee that they might commit a psychiatric injury as a result of the alleged conduct. The risk is too remote and not established by Mr Green.

**The Scope of the Implied Term to Provide a Safe and Healthy Work Environment – Does it include a Duty on the Employer to conduct the disciplinary proceedings in a fair way?**

226. The Plaintiff claims that they do not seek to expand the scope of the duty implied (see submissions). Whilst there is no dispute about the implication of a term concerning a safe and healthy working environment I find the Plaintiff has in fact sought to include in the scope of this implied duty to make an argument at trial that the Defendant breached this term of the contract by failing **to undertake disciplinary proceedings in a fair way**.

227. The Plaintiff has asserted in the pleadings that the disciplinary proceedings actioned by the Defendant constituted bullying and harassment against him in the workplace, amongst other allegations. The Plaintiff specifically pleaded and stated that the disciplinary proceedings are part of the conduct alleged as bullying and harassment and part of the failure to provide and safe and healthy work environment. Further the Plaintiff asserts the actions of the Defendant in conducting the disciplinary proceedings culminated in the state of affairs whereby the workplace at Tennant Creek was unsafe.

228. The Board's findings were that the *adverse outcome of the disciplinary proceedings were unreasonable and inappropriate* and certain actions needed to be remedied by the Defendant. The Plaintiff alleges that the Defendant did nothing to make good this unsafe work environment thus making it unsafe for him to return to Tennant Creek. The Board was also critical of some of the Defendant's processes in conducting the disciplinary proceedings.

229. The evidence led by the Plaintiff and the clarification of the issues (sought by the Court via written submissions at the close of the evidence) in the Plaintiff's submissions disclose that Mr Green also complains that the Defendant failed to:

    a) **investigate or take steps to address the complaints by Mr Green (about Ferguson's alleged bullying conduct)**; and
    b) make any attempt to properly deal with the unsafe situation **once the disciplinary action *wrongly taken against the employee* had been reversed**; and
    c) it remained impossible for the worker to return to his contracted position as the employer did not take any reasonable steps to make the workplace safe for him once the Board handed down its decision.

[63] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 per McHugh, Gummow, Hayne, Callinan and Heydon JJ) [27] (McHugh, Gummow, Hayne and Heydon JJ)

230. I find that the Plaintiff seeks to have the implication of a term into his contract of employment concerning a safe and healthy working environment which necessarily includes in the scope of that term that the Defendant was required **to undertake disciplinary proceedings in a fair way** given how he has pleaded his case. He specifically asserts that the disciplinary proceedings were *wrongly taken against the employee*.

231. During his evidence he complained not only about the consequences of the disciplinary proceedings, he complained about how they were conducted, the fact he was not afforded natural justice during the proceedings and the findings made against him which caused him to appeal as follows:

    a) In October 2016 Ferguson and / or Letheby initiated disciplinary proceedings against Mr Green and he was suspended from his employment from 28 October 2016.[64]
    b) Mr Green defended the disciplinary proceedings and denied any misconduct.[65]
    c) The Defendant offered Mr Green an option to discontinue the disciplinary proceedings against him without further action, if he agreed to a transfer back to Alice Springs, or to have an external investigator appointed to investigate and for Mr Green to remain in Tennant Creek while that occurred.[66]
    d) Mr Green opted to remain in Tennant Creek.[67]
    e) The Defendant did not appoint an external investigator and proceeded to make adverse findings against Mr Green on all counts of alleged misconduct.[68]

232. Mr Green also pleaded his case in the same manner:

    a) the institution of, and adverse outcome of the disciplinary proceedings contributed to the *failure of the Defendant to prevent bullying and harassment in the workplace and/or the creation of the unsafe and unhealthy work environment* (the impugned conduct), [para h Amended SOC]:
    b) that during the workplace investigation itself, the suspension from duty contributed to the impugned conduct, [para i Amended SOC];
    c) that CFO Spain advising Mr Green in writing of the adverse outcome and accusing him "*of demonstrating a lack of honesty; and a willingness to provide false and misleading information*" contributed to the impugned conduct [para k Amended SOC];
    d) that CFO Spain advising Mr Green in writing of a disciplinary transfer and a formal caution and giving him time to respond contributed to the impugned conduct [para k Amended SOC];
    e) Mr Green being advised by the Defendant that his disciplinary transfer to Alice Springs as would be actioned despite requesting he not be transferred contributed to the impugned conduct [para l, m, n, o Amended SOC];
    f) Mr Green being transferred to Alice Springs contributed to the impugned conduct [para p Amended SOC].

233. After carefully reviewing the evidence and submissions I can only conclude that this is the scope of the term given the case pleaded.

**Does an Employer owe an employee a duty to take reasonable care in the conduct of workplace investigations?**

[64] Transcript 21 June 2021, p27-28.
[65] ASOC, para 5(k)-(n).
[66] Transcript 21 June 2021, p68, Exhibit P7, para [51]; and Exhibit P12, para [45] – [49].
[67] 21 June 2021, p68, Exhibit P7, para [52]
[68] ASOC, para 5(k-n); Transcript 21 June 2021, p70, Exhibit P7, para [53-56]

234. Following the decisions of *Sullivan v Moody*[69] and the *State of New South Wales v Paige*[70] it became well established that an employer ***does not owe an employee a duty to take reasonable care in the conduct of workplace investigations not to cause foreseeable injury under an implied contractual duty of care to provide a healthy and safe work environment***.

235. It was anticipated that this decision might come under scrutiny in the recent appeal in the matter of *Govier v The Uniting Church in Australia Property Trust*[71] to the High Court of Australia.

236. On appeal the Court held at [66]:

> *[77]... That difference between this case and* ***Paige*** *has no bearing upon the New South Wales Court of Appeal's decision* ***that the proposed duty by an employer to supply a safe system of investigation and decision-making in relation to the incidents of an employee's contract of employment, as opposed to a safe system of work in relation to the conduct of tasks*** *for which an employee was engaged, would involve a novel category of duty of care.*

237. On appeal of *Govier* to the High Court of Australia, found that in order to consider whether the proposed duty was compatible with the legislative and contractual context of the employment relationship, it was necessary to have the employment contract in evidence along with any applicable workplace policies. As the contract and policies were not in evidence in the earlier proceedings, the High Court found that a proper consideration of the question as to the existence and scope of any duty of care was not possible. Leave to appeal was revoked effectively disposing of the litigation.

238. In the recent case of *Hayes v State of Queensland*[72] the appeal court held that the trial judge had erred in finding that no duty of care arose as a consequence of the decision in ***Paige***. The majority of the appeal court found that ***Paige*** did not apply because the appellants made "no complaint about the investigation itself". Instead, it was contended that the appellants' cases were based on a duty to support them as employees while the investigations were carried. His Honor Dalton J, held at [125];

> *…insofar as the appellants did not attack the fact of, or processes of, the investigations, there was no incoherence or inconsistency between any administrative law concepts and the duty of care alleged. Nor was there any inconsistency between the duty of care alleged by the appellants and the employer's duty (common law in this case) to investigate the complaints made by one group of employees against another group of employees. My conclusion therefore is that the principles in* Paige *did not stand in the way of a duty of care arising.*

239. I find that unlike the decision of ***Hayes,*** Mr Green does make a complaint about the investigation itself, the disciplinary proceedings. He specifically particularises this process as being part of the continuing breach of the contract of employment which operated to constitute bullying and harassment and created an unsafe and unhealthy working environment.

240. Whilst Mr Green also complains of other matters concerning his employer's failures to take certain actions both before and after the disciplinary proceedings and related to the consequences of the disciplinary proceedings, he does not confine his claim to these matters.

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[69] ibid
[70] *State of New South Wales v Paige* [2002] NSWCA 235; (2020) 60 NSWLR 371
[71] *Govier v The uniting Church in Australia Property Trust (Q)* [2017] QCA 12
[72] *Hayes v State of Queensland* [2017] 1 QD R 337

241. I find and conclude that the Plaintiff complains that that the Defendant failed **to undertake disciplinary proceedings in a fair way** which constituted bullying and harassment and contributed to the unsafe and unhealthy work environment.

242. I find that the Plaintiff seeks to conflate the issues. He seeks to argue that the Defendant failed to properly investigate his bullying allegations against OIC Ferguson. The Plaintiff further argues that ***the Defendant then failed to provide a safe system of investigating and decision making in the context of the disciplinary proceedings against him and this constituted bullying and harassment as the management action taken was not reasonable.*** He then finally, seeks to argue that subsequently this resulted in an unsafe system of work in relation to the possible conduct of his tasks at Tennant Creek such that he could not remain there and perform his duties.

243. Regardless I find that the Plaintiff seeks to argue amongst other matters, the novel category of duty of care addressed in both ***Paige*** and ***Govier*** which has been found not to be implied at law[73]. In the Plaintiff's case the complaint is that the investigation itself (the unreasonable management action against him) is part of the bullying and harassment and the cause of the damage.

244. Firstly the duty does not exist and secondly it is too remote. As such I find that his claim is not actionable under the common law implied contractual term.

**PSEMA and the Grievance Process: Incoherence or Inconsistency between any administrative law concepts and the duty of care alleged**

245. For a breach of discipline under s.49 of PSEMA to be found the CEO of the Agency must be satisfied under s49A on reasonable grounds that an employee has committed a breach of discipline. Further pursuant to s49A (3) the CEO **must not** take disciplinary action unless satisfied a) the action is appropriate and reasonable in the circumstances etc...

246. One remedy for the wrongful exercise of the disciplinary power is to seek a review of the decision of the CEO under s59 or appeal the decision under s59A who conducts a hearing de novo. Inherent in that process is the same requirements of reasonableness and appropriateness as set out in the preceding paragraph. Whilst the rules of evidence do not apply the principles of Natural Justice and Procedural Fairness do and are enshrined in the legislation.

247. The statutory and regulatory framework in Mr Green's contract of employment provided restraints on the exercise of power by the Defendant and by those exercising supervisory or other powers under the PSEMA or the EBA which could affect Mr Green adversely.

248. The existence of the means of redress can be taken to operate as a normative influence on the behaviour of the Defendant and of others in positions of responsibility. Mr Green and his fellow employees are provided with means of redress in those cases in which powers are exercised unfairly, or are perceived to have been exercised unfairly.

249. In this way, employees such as Mr Green obtain the kind of protection to which, as I understand it, the implied term sought to be relied on is directed. The statutory and regulatory context in which Mr Green was employed provided, by a variety of means, for

[73] The decisions of *Kelly* and *Romeo* can be distinguished. *Kelly* on its facts that the unsafe system of work was created and maintained by the conduct of A personally and then by the failure to take any action to prevent that conduct. *Romeo* because the court found that there was an express term of the contract of employment which the employer breached in the course of the workplace investigation by not complying with its own policy that had been incorporated into the contract of employment.

the achievement of a balance between the Defendant's interests in discharging the obligations imposed by the *relevant legislation* and the employee's interests in not being unfairly or improperly treated.

250. I doubt in any event that any such duty could be found to have been breached in the circumstances alleged. That is because, in the determination of the nature and extent of any breach, account would have to be taken of the means of grievance resolution and appeal available to Mr Green. Even if he had been treated unfairly or inappropriately, the statutory and award context evinces an intention that his grievances should be addressed within the confines of the employment relationship, making use of the procedures provided.

251. For the reasons already given, I am satisfied that Mr Green's contract of employment did not contain the scope of the implied term which he must be contending, to take reasonable care in the conduct of workplace investigations not to cause foreseeable injury (personal or economic) under an implied contractual duty of care to provide a healthy and safe work environment.

252. The evidence before this court disclosed that Mr Green pursued, successfully, a grievance process through the Public Sector Appeals Board to a conclusion which resulted in adverse findings being made against the Defendant and OIC Ferguson in the context of the employment relationship. Economic awards were also made in Mr Green's favour as were directions with a view to mitigate damage to his reputation.

253. Evidence was not put before the court about any pursuit of any outcome as ordered by the Board and this was not a trial seeking specific performance of the Board's orders. Presumably such orders could have been sought by the Plaintiff if necessary to enforce the Board's orders.

254. The case pleaded is that the Defendant failed to fulfil their contractual obligations to ***maintain a state or condition of affairs*** in relation to both of the contractual terms alleged to have been breached by the applicant failing to:

    a) Achieve and maintain a healthy and safe working environment and take all reasonably practical steps to prevent harassment and bullying in the work place (EBA clause 59 (express term); and/or
    b) Provide a healthy and safe work environment (implied term).

255. The evidence relied on by the Plaintiff to prove his case is that the cause of action accrued when the Defendant breached the duty by either uplifting him from his position as lead fire-fighter at Tennant Creek as a result of the disciplinary proceedings or due to the third party intervention of the **Board's decision,** such that the obligation became impossible to perform**.**

256. **By that time the Board had delivered its decision under the grievance process Mr Green pursued.**

**Breach of the Implied Term of the Contract to provide a Safe and Healthy System of Work**

257. In any event I find that the Plaintiff has not established any Implied Term was breached by the Defendant.

258. It is contended in this case that that the Defendant has breached an obligation to provide a safe workplace in the following ways:

a) The supervisor Ferguson bullied and harassed the Plaintiff personally at work;
b) The Defendant through his direct supervisors failed to take any action to investigate Mr Green's complaints about Ferguson's bullying conduct;
c) The Defendant compounded the bullying conduct by pursuing the workplace investigation against him/the disciplinary proceedings instigated by Ferguson;
d) The disciplinary proceedings were conducted in an unreasonable manner resulting in an adverse outcome for Mr Green;
e) Mr Green had to appeal the disciplinary proceeding to the Public Sector Appeals Board;
f) The Defendant failed to make the workplace safe for Mr Green by implementing the Board's findings after the Board's decision.

259. They further allege that this conduct was quite likely to cause Mr Green an injury (in the form of a Psychological disorder). I note that I have already found that there was very little if any evidence about the risk of psychological harm or injury to Mr Green in this case. This is a significant matter. Ultimately I would have found if required to decide this issue that there is a lack of evidence establishing such risk and any risk was too remote and not foreseeable.

260. Although the Defendant through its employees may have genuinely held the belief that Mr Green required some form of discipline, Mr Green contends that the disciplinary proceedings were wrongly brought and the Defendant should have intervened to stop them. As such he does complain that the disciplinary proceedings were conducted in an unreasonable manner and he does complain about the manner of the conduct of the workplace investigation itself not just the outcome of it.

261. The discharge of the implied contractual duty of care required the Defendant to take account of Mr Green's individual circumstances (*Koehler v Cerebros (Australia Ltd* [2005] HCA 15 at [35]; (2005) 22 2 CLR 44 at 57). When I consider the overall circumstances of Mr Green from the dates from late 2015 to his uplift date and/or the Appeal Board decision, I must be able to conclude that the Defendant was in breach of that implied contractual duty. It is alleged that the breach arises as a result of the cumulative nature of the breach of contract as alleged.

262. The evidence is that the respondent engaged in the disciplinary proceedings during this time which resulted in his transfer to Alice Springs and then the Appeal Board's Tribunal proceedings. Significantly the aspects of the disciplinary proceedings allegedly constituting the bullying, harassment and victimisation which Mr Green complains of was then addressed in the Appeal Board's Tribunal proceedings, a grievance process open to the Plaintiff.

263. It is necessary to determine if the conduct complained of amounted to poor management practices or inappropriate treatment that was then resolved, albeit through a grievance process, or whether it did constitute bullying and harassment as complained of by Mr Green. By his conduct Mr Green accepted that a continuing contractual relationship with the respondent was possible and did continue.

264. The evidence attaches significance to the failure of the respondent to properly recognise and cease the disciplinary proceedings brought against him by the supervisor OIC Ferguson. The case pleaded asserts that subsequent management action, the disciplinary

proceedings, taken by the Respondent was not appropriate or reasonable and as such the findings of the Respondent in the disciplinary proceedings also constituted bullying and harassment.

265. Bullying at work happens when a person or group of people repeatedly behave unreasonably towards another worker or group of workers and that behaviour creates a risk to health and safety.

266. Reasonable management action that is carried out in a reasonable way is not bullying or harassment. A manager can make decisions about poor performance; take disciplinary action; direct and control the way work is carried out. However, Management action that isn't carried out in a reasonable or appropriate way may be considered bullying. In this case the Plaintiff is alleging that the supervisor OIC Ferguson personally bullied and harassed him, his superiors failed to act on complaints he made about that bullying and the disciplinary proceedings and findings against the Plaintiff are also bullying or a failure to provide a safe and healthy work environment.

267. As to whether that conduct and those circumstances constitute bullying and or harassment in the workplace is one thing but whether the conduct even if proven, is actionable for alleged breach of contract is another.

268. As discussed the evidential findings I have made about the Board's findings do not lead me to conclude that the management action was unreasonable and even if it was I find it is not actionable under the Implied Term. I cannot conclude the process constituted bullying and harassment in and of itself. The allegation is it also contributed to an unsafe work environment. I cannot conclude that either.

269. To ground the breach the Plaintiff needed to establish that this conduct was quite likely to cause Mr Green an injury (in the form of a psychical or psychological disorder) regardless of whether Mr Green suffered such an injury or not. I find that there was insufficient evidence led at the hearing by the Plaintiff to establish this to the requisite standard. The Plaintiff bore the onus. There was never any suggestion that Mr Green was at risk of any physical injury and only fleeting and passing references to any impact on the Defendant of risk of harm of a psychological injury, however the Plaintiff did not address this issue, the 'risk of personal injury' on the evidence.

270. Given the paucity of evidence in this case about the risk of injury to Mr Green if the claim were actionable, which I find it is not, I don't find any breach occurred as any risk is too remote.

**Breach of the Implied Common Law Term of the Employment Contract - personal injury and s.52 Return to Work Act (NT): Statute Bar**

271. The Defendant in the present matter has conceded the existence of the implied common law Contractual duty as a matter of law. The Defendant asserts that the Plaintiff's claim is not actionable as the he cannot claim damages for breach of the common law contract of the implied term for economic loss as opposed to personal injury. The Defendant also pleads preclusion to the Plaintiff's case by reason of section 52 of the *Return to Work Act* (NT) (RTW) as any claim for common law damages is barred. The Plaintiff submits the duty is actionable and is not abolished by the NT worker's compensation legislation that abolishes common law rights.

272. The Plaintiff relies on the recent authority of *Kelly v Atanaskovic Hartnell Corporate Services Pty Limited (No 2) [2022]* FedCFamC2G 112 where at paragraph [103], Driver J also made findings confirming a common law breach of contract is actionable notwithstanding the application of the NSW respective work health statutory scheme. It is important to note that the NSW legislation and scheme differs from the NT equivalent in a number of material ways.

273. The Defendants in *Kelly* asserted the Plaintiff was precluded from claiming damages because of the operation of Division 3, the 'Modified Common Law Damages', and especially because her injury did not reach the 15% threshold. Ultimately, Driver J found that there was not enough evidence to establish Ms Kelly sustained any psychiatric injury. However, significantly, even in the absence of any injury, he found the Defendant "*liable for breaching the Employment Contract by failing to protect Mrs Kelly from the harm inflicted upon her by Mr Atanaskovic.*"

274. The Plaintiff submits that although the construction of section 52 of the RTW Act (NT) differs from its NSW counterparts, the Defendant's proposition that the Court is prohibited from finding a breach of contract because of s52 of the RTW Act must be rejected. It is not in dispute that in the NT, if a compensable injury is sustained, no common law claim will exist for damages as a result of the injury. The Plaintiff submits that the *Kelly* decision confirms that it does not follow from s52 RTW Act that there can be no claim for breach of the implied term in any circumstances, and in particular, such a claim is actionable where s52 does not apply, **such as in claims that are not founded on the existence of a personal injury**.

275. In the judgement of *State of South Australia v McDonald*[74] the joint judgment of the Full Court, Doyle CJ, White, Kelly JJ discussed a submission that s54(1) of the *Workers Rehabilitation and Compensation Act 1986* (SA), (WRC) had the effect of precluding the Plaintiff Mr McDonald of his claim for breach of his employment contract. The court found that the claim was not precluded on this basis.

276. The appeal Court found that at the time the existence or otherwise of a compensable disability had not been established by the means contemplated by the WRC Act for such a determination. The Appeal Court went on to find that the trial judge had awarded damages for a breach of the appellant's employment contract, specifically the implied term in the employment contract. The court found[75]:

> *… [196] the liability of the Minister for the breach of contract did not arise because of the occurrence of the compensable disability. Conduct by an employer of the general kind found by the Judge in this case may be repudiatory, and give rise to a claim for damages for breach of contract, even in the absence of the occurrence of a compensable disability. Although it is usually the occurrence of injury which brings breaches of the implied contractual duty of care before the courts, an employer may breach that implied term…. Without the breach causing any injury at all. If such breaches are sufficiently serious to be repudiatory the employee may accept the repudiation and treat the contract at an end. It would be a strange result if s54(1) is construed as precluding one employee from bringing a claim for damages for breach of contract following a repudiatory breach by an employer resulting in an injury <u>but not as precluding a fellow employee who had been subject to the same conduct by those who had not suffered an injury</u>.*

[74] *State of South Australia v McDonald* [2009] SASC 219
[75] Ibid at [196-197]

*[197] Another way of making the point is to note that just as there can be repudiatory breach of a contract of employment without the occurrence of a compensable disability, so also can there be a compensable disability without there having been any breach of contract at all.*

277. The Supreme Court decision appears to be authority for the proposition that in cases where no injury is suffered by the Plaintiff a breach of the employment contract is not precluded under the relevant Work Health or Workers Compensation legislation. The liability in that case did not arise out of any personal injury suffered by the Plaintiff but out of the employers conduct for breach of the implied term of the employment contract.

278. The evidence in Mr Green's case is that, Mr Green did not suffer any physical or psychiatric or psychological harm or injury in the nature of a compensable injury. There is simply no evidence that has been put before the court. Regardless the Defendant seeks to argue that the action is statute barred and precluded.

279. In summary I find that in this case there is no evidence of Mr Green suffering any injury though he relies on some evidence of risk of some psychiatric or psychological injury. I find that the Plaintiff asserts liability of the Defendant arises from breach of the employment contract and not as a result of any personal injury suffered by Mr Green. Any damages are not to be assessed as to provide compensation for any injury suffered by the Plaintiff.

280. It is my view that s52 would not preclude an action at common law for breach of contract in this case given that Mr Green not only did not suffer any injury but that there is insufficient evidence of any foreseeability of risk of injury established on the evidence. However, I do not need to decide this issue in this case as I rule that:

    a) If the Express Term is incorporated into the contract;
    b) The Plaintiff has not proven that the term has been breached by the Defendant on the balance of probabilities; and
    c) The Implied Term is not actionable at common law as the scope of the Implied term sought to be relied on by the Plaintiff to ground his cause of action is not actionable at common law; and
    d) The Plaintiff has not established on the evidence that any real risk of injury to Mr Green existed and was not foreseeable.

**Conclusion**

281. Ultimately I find the way the Plaintiff has framed his case means I cannot conclude the Defendant's conduct as alleged constitutes bullying and harassment in the workplace and/or it resulted in an unsafe and unhealthy work environment.

282. In this case I do find that clause 59.1 is likely to be expressly incorporated into the Plaintiff's contract of employment due to the use of clear, mandatory and mutually binding language where the intention of the parties is easily ascertainable. I also find that there is an implied term of Mr Green's contract of employment, which is conceded by the Defendant, that the Defendant provide and maintain a safe and healthy work environment.

283. However, I find the scope of the Implied common law term relied on by the Plaintiff includes an assertion that the disciplinary proceedings were wrongly brought or were unfair and that cause of action is precluded at common law.

284. Significantly I find the Plaintiff has not proven that there was any breach of the express term if it is incorporated, or the implied term of the contract as relied on.

285. To prove that the Defendant failed to prevent bullying and harassment (express term) and failed to maintain a safe and healthy work environment (implied term), the Plaintiff relies on the combination of OIC Ferguson's conduct as bullying; his superior's failure to act on his complaints and investigate OIC Ferguson's conduct to prevent the impugned conduct; and the Defendant's institution and conduct of the disciplinary proceedings against him to make out his claim. He alleges a cumulative breach of the contract.

286. There is insufficient evidence for me to conclude that OIC Ferguson's conduct alone constituted bullying and harassment of Mr Green at work. I also find that Mr Green cannot prove his superiors did not act on his complaints about OIC Ferguson such that he can prove a breach of any express contractual term or implied term. Further I find he cannot rely on the disciplinary proceedings to prove the Defendant breached either the express or implied term of his employment contract. The evidence does not disclose that the disciplinary proceedings themselves were a mechanism for bullying or harassing Mr Green at work.

287. Importantly whilst I find the evidence of the conduct of OIC Ferguson towards Mr Green is concerning behaviour at work, some of the behaviour was not the subject of complaints to his superiors on Mr Green's evidence. A close analysis of his evidence shows that while the Plaintiff raised some matters with his superiors he often failed to follow through with the issues that might have evidenced OIC Ferguson bullying Mr Green by being angry and retaliatory towards Mr Green.

288. I also find the Plaintiff's evidence about OIC Ferguson's conduct and complaints he made to his superiors and what they did as a result lacked specificity and detail to allow me to make findings that the superiors failed to prevent Mr Green being bullied. I find the Defendant, through Mr Green's superiors did in fact act in most cases when Mr Green raised a concern with them, often with Mr Green's knowledge and with the intention to address his concerns. There were significant shortfalls in the Plaintiff's evidence about what he actually communicated to his superiors as complaints and his evidence was that he did not follow through to complain about matters he asserts amounted to bullying by OIC Ferguson. Mr Green's complaints were not in writing, the evidence was not chronological and the review process set out in clause 59.3 under PSEMA was not actioned or sought by Mr Green when he orally raised matters with his superiors on an ad hoc basis. There is no evidence he followed through with his superiors to see what the outcome was of concerns he raised and some of the more serious allegations of bullying were not the subject of a complaint at all to his superiors on his evidence.

289. What his superiors acted on and how they acted is discussed in my reasons and my ultimate conclusion is that the conduct of OIC Ferguson *complained of* to his superiors fell short of the allegations of bullying made by Mr Green in his evidence. Whilst there is no evidence that his superiors conducted any workplace investigation against OIC Ferguson as a result of Mr Green's complaints, I don't find that this resulted in a failure to prevent bullying and harassment in the workplace.

290. I am unable to find that the process of the Defendant instigating and prosecuting the disciplinary proceedings constituted bullying of Mr Green, and the Defendant's failure to stop the disciplinary proceedings constituted a failure to prevent bullying and harassment in the workplace or that it created an unsafe work environment. For the reasons already given I have found that Mr Green does assert that the Defendant wrongly commenced and pursued the disciplinary proceedings and they were unfair, or were unreasonable management action. Importantly Mr Green submitted that the Defendant had the opportunity to intervene to stop the proceedings at several stages and failed to do so.

291. The evidence relied on which is primarily the decision of the Board and the Admitted Facts do not go so far as to allow me to make such a finding. This is despite the fact the Board was critical not only of the adverse outcome for Mr Green as being unreasonable and inappropriate but was also critical of some of the processes of the workplace investigation against him in the directions, i) and j) and the decision to suspend Mr Green during the proceedings. Regardless, I find that there is insufficient evidence for me to make the finding sought to the requisite standard without more evidence about the accepted practices, procedures and protocols of such disciplinary proceedings that should be adhered to during the conduct of such proceedings.

292. Regarding the disciplinary proceedings, as stated I find the Plaintiff has not proven on the evidence that the Defendant breached the express term of the contract of employment if it is incorporated.

293. Further I find he is unable to rely on the disciplinary proceedings as being unfair as a breach of the implied term of his contract of employment to provide a safe and healthy work environment as the cause of action does not lie at common law. He also has not established on the evidence that the process of the disciplinary proceedings were flawed, they were wrongly brought, were unfair, or were unreasonable management action.

294. I find Mr Green also asks this court to find that the outcome of the disciplinary proceedings created an unsafe work environment under the Implied Term as his employer failed to make his workplace at Tennant Creek safe. The Plaintiff asserts his cause of action accrued on his uplift or on the board's decision. They are different contentions. The decision of the CFO that he breached discipline was made in December 2018. He appealed the decision in April 2017. The decision of the Board on 14 March 2018 overturned the disciplinary outcome and made directions to the Defendant that required action, some regarding the Tennant Creek workplace which directly affected Mr Green and was contingent on Mr Green's elections.

295. Before the Board's decision Mr Green worked in Alice Springs. Mr Green has not given or tendered any evidence that he was bullied or harassed during this period or that his workplace was unsafe or unhealthy at Alice Springs. What he has asserted is it was unsafe to return to Tennant Creek during this time.

296. By 12 April 2018, 2 months after the Board's decision, the Plaintiff had determined it would be unsafe to return to Tennant Creek and notified the Defendant of this fact and that he would not be returning to Tennant Creek. There is no evidence that the Plaintiff had elected to return to Tennant Creek before that date. I find Mr Green had lost confidence in the Defendant and indicated it was his view that the Defendant would not make Tennant Creek safe for him regardless of any action or inaction of the Defendant and thus he elected not to return.

297. I find the Defendant had determined to address some of the Board's directions and this is evidenced in the CFO's email to Mr Green of 16 April 2018 and the letter of 30 July 2018, Exhibit P26. I am unable to assess what other measures were being implemented or not at Tennant Creek as there is an absence of evidence to this effect. A statement that Mr Green's election was not considered before his letter of 16 April 2022 is not sufficient evidence for me to conclude that the workplace at Tennant Creek was unsafe for him to return to. I have no evidence before me about where OIC Ferguson was at that time, who was at the Fire-station, how long it would have taken for any return to work to be processed and what steps would have been implemented once an election was made. Whilst this court cannot speculate, the absence of evidence about the state of affairs is

relevant. Mr Green's perception is not a sufficient basis for this court to make a finding as sought by the Plaintiff. I find that Mr Green's election on the basis he claims is not made out.

298. There is insufficient evidence for me to conclude that OIC Ferguson's conduct alone constituted bullying and harassment. Significantly the Plaintiff relies on the combination of OIC Ferguson's conduct; his superiors conduct and the Defendant's institution and conduct of the disciplinary proceedings to make out his claim. For the reasons already given I find that the claim has not been made out.

**Loss and damage**

299. The Plaintiff claims damages for the breach of Employment Contract. He contends that he has suffered economic loss. Mr Green also claims special damages for economic loss, based upon the premature end of his promotion in Tennant Creek, his compulsory uplift to Alice Springs, his removal expenses and out of pocket expenses in relocating his family to Adelaide not Alice Springs. He also claims the salary difference from the forced relocation.

300. I do not accept Mr Green's claim for damages as I find he has not established the Defendant breached his contract of employment and that Mr Green suffered economic loss as a result. Mr Green's earning capacity was approximately the same at Alice Springs as in Tennant Creek and he was promoted. It increased slightly and in 2020 he sensibly chose to resign his post and relocate to QLD. He has mitigated his loss and is gainfully employed at a higher salary.

301. I do not accept that Mr Green employment prospects or long term promotional prospects have been adversely affected. He gained work as a Fire-fighter and then in another position. He is now earning more than he would have in that position.

302. If I had found breach of contract I would only have awarded nominal damages for any breach in any event. However, I will not award any amount for economic loss as no breach of contract has been proven.

303. I will hear the parties as to costs.