CITATION:	*Yao v Northern Territory of Australia* [2022] NTWHC004
PARTIES:	LIE YAO
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO:	2020-02719-LC
DELIVERED ON:	29 June 2022
DELIVERED AT:	Darwin
HEARING DATES:	4 - 8 October 2021
DECISION OF:	Acting Judge Neill

CATCHWORDS:

WORK HEALTH – existence of mental injury; incapacity; arising out of or in the course of employment; perception of hostile working environment; reasonable management action - onus of proof; reasonable management action.

Return To Work Legislation Amendment Act 2015 s 5
Return To Work Act ss 3(1), 3A(1) and (2), 4(5), (6A) and (8)
Workers Rehabilitation and Compensation Regulations regulation14

Jones v Dunkel (1959) 101 CLR 298
Currie v Dempsey (1967) 69 S.R. (NSW) 11
Wyong Shire Council v Shirt (1980) 146 CLR 40
Wiegand v Comcare Australia [2002] FCA 1464
Commissioner of Police v Minahan [2003] NSWCA 239
Swanson v NT of A [2006] NTSC 88
Barnett v NT of A [2010] NTMC 70
McGee v Comcare [2010] AATA 386
Millar v ABC Marketing and Sales Pty Ltd [2012] 21
Corbett v NT of A [2015] NTSC 45
Andreassen v ABT (NT) Pty Ltd [2015] NTMC 026
Harris v NT of A [2019] NTLC 3
Kozarov v State of Victoria [2022] HCA 12
Kaefer Integrated Service Pty Ltd v Spohn & Ors [2022] NTSC 45

REPRESENTATION:

Counsel:

	Worker:	Mr Ben O'Loughlin
	Employer:	Mr Duncan McConnel SC

Solicitors:

	Worker:	Halfpennys
	Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID Number:	[2022] NTWHC004
Number of Paragraphs:	221

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

Claim No: 2020-02719-LC

BETWEEN

LIE YAO

Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA

Employer

REASONS FOR DECISION

(Delivered 29 June 2022)

ACTING JUDGE NEILL

BACKGROUND

1. Mr Lie Yao ("the Worker") was born on 14 June 1970 and he is currently 52 years of age.

2. At all material times the Worker was a permanent employee of the Employer performing clerical duties in the Northern Territory Public Service ("the employment").

3. It is common ground that the Worker at all material times was a worker within the meaning of the *Return to Work Act* ("the Act"), and I so find.

4. The Worker took an extended period of recreation leave and long service leave from the employment of around 17 months' duration from early October 2017, returning to the employment on 4 March 2019.

5. Between 4 March 2019 and 3 June 2019 the Worker did not occupy a specific job position in the employment and performed duties as instructed from time to time.

6. On 3 June 2019 the Worker was offered and he accepted an A04 position as a records officer within the Department of Treasury and Finance.

7. The Worker ceased work on or around 10 February 2020 and made a claim under the Act that he had suffered a mental injury (“the injury”). He claimed that the

injury was an injury within the meaning of subsection 3A(1) of the Act and that it arose out of or in the course of the employment.

8. The Employer disputed the Worker's claim, leading the Worker to commence these proceedings.

9. The matter proceeded before me by way of hearing for five days from Monday 4 October 2021 to and including Friday 8 October 2021. All evidence was received over those five days. In addition to live evidence, I received with the consent of the parties five volumes of Trial Books and some additional documents. The five Trial Books are respectively exhibits E 1 to E 5 in the proceeding. An email dated 22 July 2021 from Cathy Spurr of Halfpennys for the Worker to Chris Osborne of Hunt & Hunt for the Employer and a letter dated 9 September 2021 in response from Chris Osborne to Cathy Spurr are together received as exhibit E 6. These exhibits total some 1,820 pages.

10. Because of this large volume of material, because of the desire of both parties to receive and consider the transcript of the hearing and because of the time of year and the busy schedules of all the lawyers involved, a timetable was allowed for the filing of written submissions and then written responses to those written submissions, all by 28 January 2022. This has unfortunately but unavoidably delayed the preparation of these Reasons for Decision. The written submissions received are as follows:

    i) Worker's Closing dated and filed 9 December prepared by Ben O'Loughlin counsel for the Worker;

    ii) Employer's Closing Submissions undated but filed 24 December 2021 prepared by Duncan McConnel SC counsel for the Employer;

    iii) Worker's Submissions in Reply dated and filed 28 January 2022; and

    iv) Employer's Reply Submissions undated but filed 28 January 2022.

11. On the evidence before me and as set out later in these Reasons I have found that the Worker did suffer a mental injury, that this injury arose out of and in the course of his employment with the Employer, and that he has been totally incapacitated for work to the present time and continuing as a consequence of this injury. The more complex and difficult issues in this matter are raised by the Employer's reliance on the defence arising from the notion of management action taken on reasonable grounds and in a reasonable manner, as provided for in the Act.

THE PLEADINGS

12. The Worker's statement of his claim is found in his Amended Statement of Claim dated 18 June 2021. The Employer's defence is found in its Notice of Defence to Amended Statement of Claim dated 22 June 2021. The Worker has filed an Amended Reply dated 16 July 2021.

13. The Worker particularises the injury as being an Adjustment Disorder with mixed anxiety and depressed mood and/or a Major Depressive Disorder. He pleads that the injury was sustained in the course of the employment – paragraph 3 of the Amended Statement of Claim.

14. The Employer denies that the Worker suffered an injury arising out of or in the course of the employment. The Employer pleads in the alternative that if the Worker did suffer an injury arising out of or in the course of the employment then it is not compensable pursuant to the Act because any such injury was caused wholly or primarily by "management actions contemplated by s 3A of the Act" - paragraph 3 of the Notice of Defence. Although this pleading inadequately identifies subsection 3A(2) of the Act and does not specify whether the Employer relies on subsection 3A(2)(a), (b) or (c) or some combination of these, this is clarified in particular c. to paragraph 3. where the Employer specifically says that if there was any injury then "…the injury was caused wholly or primarily by management action taken on reasonable grounds and in a reasonable manner by the Employer " ("reasonable management action"), which establishes the Employer's reliance on subsection 3A(2)(a) of the Act.

15. The Employer does not deny that the Worker suffered any injury at all in its pleading in paragraph 3 but it does purport to deny this in particular a. to paragraph 3. I am satisfied that nothing turns on this pleading inconsistency. The matter proceeded before me at hearing without objection on the basis that the Employer denied the Worker had sustained any injury at all.

16. In paragraph 4. of his Amended Statement of Claim the Worker identifies and pleads in subparagraphs 4.b. to 4.p. some 17 separate actions and/or failures on the part of the Employer and/or circumstances in the workplace which in whole and/or in part resulted in the injury. In subparagraphs 4.ia. ka., la.,na. and q., the Worker pleads how he was adversely affected by this.

17. The Worker pleads each of the subparagraphs to paragraph 4. as pleadings in their own right, not as particulars.

18. In paragraph 3. of its Notice of Defence the Employer goes on to particularise its pleading that the injury was caused wholly or primarily by reasonable management action. The Employer sets out particulars a., b. and c. and sub particulars i. to xxxiv. to particular c., in relation to this issue.

19. In paragraph 4. of its Notice of Defence the Employer responds to the Worker's pleadings in paragraph 4. of his Statement of Claim. The Employer here refers to the Worker's said pleadings as "particulars", which does not appear to be correct. I am satisfied that nothing turns on this. The Employer has responded by way of sub paragraphs 4.a. to 4.p. in which it admits, does not admit, denies and responds to each of the Worker's relevant pleadings. The Employer has not pleaded to paragraph 4q. of the Worker's pleading, namely that the Worker felt unfairly targeted by the Employer's actions pleaded by the Worker in paragraph 4p. However, the Employer has pleaded its denial of the actions pleaded in 4p. and I am satisfied nothing turns on the Employer's failure to plead to 4q.

20. The Worker pleads that he has been totally and/or partially incapacitated for employment as a result of the injury, from 10 February 2020 to the current date and continuing – paragraph 9 of the Amended Statement of Claim.

21. The Employer denies that the Worker has been or is incapacitated for work, either because of any work-related injury or any injury at all - paragraph 9 of the Notice of Defence.

22. In his Amended Reply the Worker denies that the injury was caused wholly or primarily by reasonable management action – paragraph 1.

23. In paragraph 3. of his Amended Reply the Worker pleads a detailed response to the Employer's pleading in paragraph 3 particular c. of its Notice Of Defence. By way of pleading and not by way of particulars, in subparagraphs 3.a. to k. the Worker here identifies and pleads actions and/or failures on the part of the Employer and/or circumstances in the workplace which he says resulted in the injury.

24. The Worker concludes the Amended Reply by pleading that the Employer in its dealings with him failed to afford him natural justice specifically, and more generally, that the dealings did not amount to management action taken on reasonable grounds and/or in a reasonable manner within the meaning of subsection 3A(2)(a) of the Act - paragraphs 3, 4, 5 and 6 of the Amended Reply.

THE ONUS GENERALLY

25. Because the Worker's claim was disputed at the outset, the Worker bears the onus of proving his claim. Both parties agree this is the correct position, and the Worker was *dux litis* at the hearing.

26. More specifically, the Worker bears the onus of proving:

    i) that he has suffered the injury at all;

    ii) that if he has suffered the injury, it has caused him incapacity for the employment; and

    iii) that if he has suffered the injury, it arose out of or in the course of the employment.

THE MEDICAL EVIDENCE

27. The medical evidence before the Court consisted first of the notes and records of the Worker's treating General Practitioners at the Top End Medical Centre at Stuart Park in Darwin ("the GPs' records"). These covered the period from 9 April 2012 to 9 January 2021.

28. The GPs' records show that the Worker first presented for mental health reasons on 18 February 2013 complaining of "*Poor sleep. No early morning wakening. Low self esteem. Normal mood. Anxious. Stress at work"*. There are then five further

entries recording symptoms of psychological stress reported by the Worker as being work-related in 2013, being 25 February 2013, 4 March 2013, 5 March 2013, 6 March 2013 and 11 October 2013, a total of six such entries in that year.

29. The GPs' records then show a gap after 11 October 2013 until the Worker's next presentation for symptoms of psychological stress said to be work-related nearly 2 years later, on 21 September 2015. This was followed by entries recording this history on 5 October 2015 and 15 October 2015, a total of three such entries in 2015.

30. The GPs' records then show a gap after 15 October 2015 until the Worker's next presentation for symptoms of psychological stress said to be work-related nearly 9 months later, on 5 July 2016. There are then two further entries recording this history, on 30 August 2016 and 14 November 2016, a total of three such entries in 2016.

31. The GPs' records then show a gap after 14 November 2016 until the Worker's next presentation for symptoms of psychological stress said to be work-related nearly 4 months later, on 2 March 2017. This was followed by entries recording this history on 18 April 2017, 19 September 2017 and 1 October 2017, a total of four such entries in 2017.

32. The GPs' records then show no record of the Worker's attending on any General Practitioner at the Top End Medical Centre for any reason after 1 October 2017 until 3 October 2019, a gap of two full years. On 3 October 2019 the record shows that the Worker presented and gave a history of "*too much stress… working for NT government …Work problems".*

33. The Worker had taken extended recreation and long service leave for a period of 17 months, returning to work with the Employer on 4 March 2019. Arithmetically, 17 months before 4 March 2019 would take us to around early October 2017, coinciding with the last relevant entry in the GPs' records on 1 October 2017, before the gap of two full years when the Worker did not attend the Top End Medical Centre for any medical reasons at all. However by 3 October 2019, seven months after he returned to work on 4 March 2019 and 24 months after he went off work for long leave in early October 2017, he was once again consulting his GPs and complaining of symptoms of psychological stress which he reported were work-related.

34. After 3 October 2019, the Worker presented at the Top End Medical Centre complaining of symptoms of psychological stress said to be work-related on eight further occasions before he finally ceased work on 10 February 2020, a total of nine such presentations between his return to work on 4 March 2019 and his ceasing work on 10 February 2020, the last such attendance being on 29 January 2020.

35. Between 10 February 2020 and the last entry in the GPs' records in evidence before the Court being 9 January 2021, the Worker presented at the Top End Medical Centre complaining of symptoms of psychological stress said to be work-related and/or "*Workers comp*", on 20 separate occasions.

36. Further medical evidence before the Court included medical certificates from the Top End Medical Centre certifying that the Worker was unfit from time to time for his employment with the Employer between September 2019 and February 2020. These certificates were in an unhelpful format stating merely that the Worker had "a medical condition" without identifying that medical condition or its relationship, if any, with the employment. However, nine of these medical certificates coincide with the records of the Worker's nine GP presentations from 3 October 2019 to 29 January 2020 for symptoms of psychological stress said to be work-related.

37. There were also 19 additional medical certificates before the Court in the more helpful NT WorkSafe format covering the period from 7 April 2020 to 26 October 2021, to the effect that the Worker was suffering a work-related Major Depressive Disorder and was totally unfit for work over this period. These certificates took us to shortly after the conclusion of the hearing in this matter.

38. There were three letters of attendance from psychologist Ms Kim Groves stating that the Worker had attended for psychological counselling on each of 15 April, 31 May and 26 July 2021, but without identifying any condition relevant to that counselling, or any relationship with the employment. The Worker appears never to have consulted a treating psychiatrist.

39. No reports were tendered in evidence from any of the Worker's treating General Practitioners or from the psychologist Kim Groves, and there was no live evidence from any of these.

40. The Court heard live evidence from psychiatrist Dr Ash Takyar who was retained by the Worker's legal representatives to examine him as a medico-legal specialist. The Court received medical reports from Dr Takyar dated 20 January 2021 and 13 July 2021. Additionally, the Court received notes of a telephone conference on 1 October 2021 between Dr Takyar and the Worker's counsel Mr Ben O'Loughlin.

41. The Court received a medical report dated 6 May 2021 from psychiatrist Dr James Hundertmark who was retained by the Employer's legal representatives to examine the Worker as a medico-legal specialist. Additionally, the Court received notes of a telephone conference on 28 September 2021 between Dr Hundertmark and the Employer's counsel Mr Duncan McConnel SC.

42. The parties agreed to tender the report and the telephone conference notes of Dr Hundertmark without adducing any live evidence from him and therefore without his being subject to cross-examination. I am satisfied that no *Jones v Dunkel* issue arises, as these documents were received in evidence by consent on this basis.

43. Dr Hundertmark examined the Worker on two separate occasions, on 20 April 2021 and 21 April 2021 respectively. He diagnosed the Worker as suffering from a Major Depressive Disorder. In Dr Hundertmark's opinion, the Worker then had no fitness for work due to the high levels of his depression which was effectively untreated. He expressed the view that the Worker might make a gradual return to work over the course of 3 to 6 months if he was treated and if he made a standard response to that treatment. He noted that the Worker's high levels of anger

towards his workplace might delay that recovery. Dr Hundertmark recommended that the Worker undergo 12 to 18 sessions of treatment with an experienced psychologist and also have a small number of sessions with a treating psychiatrist to review the overall package of treatment including medication, psychotherapy and engagement with a rehabilitation officer.

44. Dr Hundertmark was cautious in his report dated 6 May 2021 in identifying the cause or causes of the Worker's Major Depressive Disorder. At page 7.4 he responded to a request to identify the cause of the injury as follows: "*Mr Yao states that performance management in the workplace has caused his injury. He also states feeling abused and spied upon in the workplace*". Later in that report at page 7.7 Dr Hundertmark said further: "*Mr Yao believes that his performance management has caused his illness. There certainly are symptoms of a major depressive disorder which have developed from early in 2020".*

45. In the telephone conference notes of 28 September 2021 Dr Hundertmark was prepared to be more specific in identifying and attributing the cause of the Worker's Major Depressive Disorder. He said in numbered paragraphs 2. to 6:

> "2. *In the first examination*, *I formed the view that the Worker appeared significantly depressed to the extent that he may have been verging on having paranoid symptoms."*
>
> *"3.The presentation was of what is referred to as 'overvalued ideas' of a paranoid nature, which is not delusional but bordering on delusional."*
>
> *"4. After the first session, I requested that further background file material be provided to me so that I could compare the presentation with the documented actions and try to make an assessment of whether the Worker was expressing paranoid overvalued ideas. I then arranged to re-examine the Worker so that I could check his presentation against the other records. Mr Yao did have a surprisingly poor command of English making another assessment session required."*
>
> *"5. I disagree with the assessment by Dr Takyar that the Worker's condition was not caused by performance management. Dr Takyar appears to have accepted the Worker's presentation at face value and assumed the correctness of the history given without considering whether the presentation (history) is in fact a manifestation of the illness."*
>
> *"6.* ***It was apparent to me that the Worker's response to a process of performance management led him to become depressed with paranoid features*** (my emphasis)*."*

46. Here, Dr Hundertmark was expressing a different opinion from that expressed by Dr Takyar at page 3.5 of his report dated 13 July 2021, namely that the Worker's psychiatric illness had been caused by the micromanagement of the Worker and bullying and harassment of him by individuals in the workplace, rather than by a process of formal performance management. However, in his cross-examination on 6 October 2021 at transcript page 218.6 for that day Dr Takyar conceded as

follows:

> *"Lots of things can lead to changes in mental state. So a quality management process could, just as if there were behaviours in the workplace by other people. Many factors can lead to changes in mental state*."

47. Dr Takyar initially diagnosed the Worker as suffering from "*a DSM-5 adjustment disorder with mixed anxiety and depressed mood (chronic) with symptoms of a moderate to severe grade*" – report dated 20 January 2021 at page 6.3. However, after considering Dr Hundertmark's report dated 6 May 2021, Dr Takyar agreed that Dr Hundertmark's diagnosis of Major Depressive Disorder was "*appropriate*" – his report dated 13 July 2021 at page 2.3.

48. Dr Takyar also agreed with Dr Hundertmark in his opinion that the Worker was currently totally incapacitated for work by his mental injury. Dr Takyar said the Worker would require referral for treatment by a psychiatrist as well as up to 20 sessions of structured consultations with a clinical psychologist. He said in his answers to questions 3., 5. and 6. on page 6 of his report dated 20 January 2021 that the Worker's condition was not yet stable.

THE EXISTENCE OF ANY MENTAL INJURY

49. As previously noted, the Employer disputes that the Worker has suffered or is suffering from any mental injury at all, whether work-related or not. There is a substantial medical history before me as identified above that the Worker over many years had consistently reported symptoms of psychological stress, and that he continued to do so after he returned to work after a symptom-free period of around 24 months. There is expert opinion from two psychiatrists based on the Worker's current reports of symptoms of psychological stress. There is no medical evidence or opinion to the contrary. The Worker's evidence that he in fact suffered from such symptoms was not seriously challenged in cross examination.

50. I am satisfied on the basis of the GPs' records over the period from 3 October 2019 to 29 January 2021, the GPs' medical certificates from 3 October 2019 to 26 October 2021 and from the Worker's live evidence, that the Worker suffered symptoms of disturbed sleep, fatigue, anxiety, feeling depressed, feeling less enjoyment in life, headache, ruminating about his work, and feeling stressed generally by his work, from around June 2019 to the date of the hearing. These are generally the symptoms recorded by each of Dr Takyar and Dr Hundertmark in their reports as having been provided to them by the Worker, and relied on by each of them in arriving at their respective diagnoses.

51. I accept the Worker's evidence of the symptoms. I am satisfied on all the evidence including the expert opinions of both psychiatrists and I find that the Worker has suffered from the injury, from at least 3 October 2019 when symptoms were first recorded, to the date of the hearing in October 2021, and continuing. I find that the injury is a Major Depressive Disorder.

CAPACITY FOR EMPLOYMENT

52. The opinions of each of Dr Takyar and Dr Hundertmark that the Worker was presently incapacitated for any work as a consequence of a Major Depressive Disorder were not traversed in cross examination. On the basis of the live evidence of the Worker and of the GPs' records and their medical certificates and on the basis of the expert opinions of both Dr Takyar and Dr Hundertmark in their reports and telephone conference notes, and of Dr Takyar's live evidence, and in the absence of any evidence to the contrary, I am satisfied and I find that the Worker has been totally incapacitated for any work from at least 10 February 2020 to date and continuing as a consequence of the injury.

ARISING OUT OF OR IN THE COURSE OF THE EMPLOYMENT

The Prior Medical History

53. The GPs' records show that before the Worker stopped work on the basis of the claimed mental injury on 10 February 2020 he had attended on his treating GPs on 25 separate occasions over a period of seven years for symptoms of psychological stress which he consistently reported were work-related. The first such report was recorded on 18 February 2013 and the last such report before he ceased work was recorded on 29 January 2020.

54. The Worker took extended leave from the employment for 17 months from early October 2017 to 3 March 2019, returning to work on 4 March 2019. The GPs' records show that over this period of 17 months the Worker did not attend upon his GPs at the Top End Medical Centre on any occasion for symptoms of psychological stress, or at all. There is no evidence before me and no suggestion has been made that the Worker attended on any different health service provider over this period.

55. The Worker's pleaded case is limited to events and circumstances which arose after his return to work on 4 March 2019. Paragraph 4 of his Amended Statement of Claim dated 18 June 2021 pleads specifically that the injury arose as a result of listed events and circumstances a. to q., all of which occurred on and after early June 2019. The history of the Worker's psychological symptoms prior to his return to work on 4 March 2019 generally and prior to early June 2019 specifically is nevertheless still relevant.

56. The GPs' records establish that the Worker had sought medical treatment for psychological symptoms which he consistently reported were work-related, over a period of four years and seven and a half months from 18 February 2013 to 1 October 2017. These records show that the Worker did not seek medical treatment for psychological symptoms or for any other health-related purpose for the 17 months he was on leave and away from the workplace, from shortly after 1 October 2017 to 3 March 2019. These records show that seven months after the Worker returned to work on 4 March 2019 he began once again on and after 3 October 2019 to seek medical treatment for psychological symptoms which he again told his GPs were work-related.

57. Mr McConnel SC for the Employer submits at paragraph 5. in his Employer's Closing Submissions received 24/12/21 that the Worker's "…*resort to medical absences was just an attempt to frustrate that process of performance management"* – here Mr McConnel was referring to a process of performance management which I find later in these Reasons was an unusual process. The Worker's prior medical history does not support Mr McConnel's submission. That history shows that before the Worker went on extended leave in about October 2017 his psychological symptoms reported up to then had been connected with the employment, even in the absence of any unusual process of performance management. The abrupt cessation of any recorded history of psychological symptoms during the 17 months the Worker was on leave and away from the employment from early October 2017 to 3 March 2019 further supports this connection. The history the Worker contemporaneously provided to his treating GPs of psychological symptoms resuming by 3 October 2019, seven months after he returned to the employment on 4 March 2019, and continuing thereafter until he ceased work on 10 February 2020, and his live evidence on this issue, need to be assessed in the light of this earlier history.

58. First, the lengthy, contemporaneously recorded earlier history of psychological symptoms diminishes any likelihood that the Worker's evidence of his subsequent very similar symptoms which he had then attributed to the employment, and of his subsequent perception and attribution of their cause, was recently invented purely to frustrate the process of an unusual performance management in 2019 and 2020. The earlier history is to be taken into account in assessing the credibility and reliability of the Worker's evidence of events he found distressing and their impact on him, after his return to work on 4 March 2019. The earlier history in that way is relevant in determining whether the injury arose out of or in the course of the employment.

59. Second, if the Employer knew before 4 March 2019 of the Worker's medical history of stress-related symptoms then that knowledge would potentially be relevant to the assessment of the reasonableness of the Employer's subsequent management actions. In *McGee v Comcare* [2010] AATA 386 the Administrative Appeals Tribunal said:

> *"Reasonableness must be assessed against what is known at the time without the benefit of hindsight, taking into account the attributes and circumstances**, including the emotional state of the employee concerned*** (my emphasis)*."*

60. Mr McConnel SC for the Employer has conceded that the Worker's supervisor Janet Cleveland knew of his prior mental health medical history – that concession appears in paragraphs 18 and 19 of the Employer's Closing Submissions received 24/12/21. Additionally, there is evidence before me of such knowledge on the part of the Employer in the form of the medical certificate dated 1 October 2017 which is located on page 108 in Trial Book 1. That certificate provides as follows:

> *"**Medical Certificate***
>
> *01/10/17*

This Is To Certify That

Mr Lie Yao is going through a lot of stress and will benefit from stress leave from work from 01/10/17 to 22/10/17 inclusive.

Dr Mujtaba Ali"

61. The GPs' records show that the Worker had been given medical certificates to excuse him from work at nine of the 15 separate GP visits before 1 October 2017 identified earlier in these Reasons when he made complaints of work-related stress. However, no certificates prior to 1 October 2017 were included in the documents tendered at this hearing. On the basis of these recorded complaints and of the content of the medical certificate dated 1 October 2017 I infer that these nine earlier certificates similarly identified stress as the medical reason for the Worker's absences from work.

62. The Worker was in the employ of the Employer at all times covered by these nine certificates from 2013 to 2017. I further infer that each of these nine certificates, and the 10th certificate dated 1 October 2017, were provided by the Worker to the Employer shortly after each relevant date. That is the main purpose of a medical certificate.
63. On the basis of this evidence and these inferences and of Mr McConnel's concession, I am satisfied on the balance of probabilities and I find that the Employer was aware prior to March 2019 that the Worker had a medical history of stress-related presentations to GPs and related absences from work.

The Worker's Perception

64. The Worker's case is that following his return from leave on 4 March 2019 he was subjected to two categories of stressors. He alleges he was micromanaged and bullied by more senior personnel in the workplace, and additionally, that he was subjected to an unusual formal performance management process allegedly to improve his performance but in reality deliberately targeting him for the purpose of dismissing him from the employment ("the alleged mismanagement"). His case is that the alleged mismanagement caused or materially contributed to his suffering the injury.

65. Dr Hundertmark considered that the Worker "*was verging on having paranoid symptoms*", that he presented with "*overvalued ideas of a paranoid nature, which is not delusional but bordering on delusional*" and that he had become "*depressed with paranoid features*" – paragraph 45. above. This could have led the Worker to perceive the workplace as being hostile to him.

66. In *Corbett v NT of A* [2015] NTSC 45 Justice Barr in paragraph [20] cited and followed the approach to the question of such a perception taken by von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [24]. Justice Barr set out the relevant law in this situation as follows:

"[20] …*The authorities establish that, if the worker perceives conduct on the part of others in the workplace as creating an offensive or hostile working*

environment, and as a result of that perception suffers a mental injury, causation under workers compensation law is made out. There is an "eggshell psyche" principle in the law of workers compensation, analogous to the "eggshell skull" principle at common law. However there is one significant qualification: the relevant perception held by the worker must be a perception about an incident which actually happened or an actual state of affairs."

67. I am required to consider the evidence and make findings as to what happened to and/or concerning the Worker in the workplace after his return to work on 4 March 2019. I am required to consider whether the Worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace, against the background of those findings. I am not required to determine whether any such perception or perceptions were justified or reasonable. Then, I am required to consider and make a finding whether those perceptions caused or materially contributed to the injury.

Micromanagement and Bullying

68. The Worker gave his evidence in chief on 4 October 2021. At transcript pages 29.4, 30.3 and 33.2 he gave evidence that in 2017 he had worked under his manager Janet Cleveland and that "… *Sorry Janet Cleveland, in 2016/17. And she has been, from the beginning, has been spy on me and deliberate target me*". He gave evidence that he took the 17 months long leave because of a health issue, namely "*work-related stress*".

69. The Worker gave evidence that when he returned to work in the employment on and after 4 March 2019 his health had recovered. There was initially no position for him and he was encouraged to look for a position outside the Department of the Chief Minister ("DCM") and the Department of Treasury and Finance ("DTF"). He did not find any such position and he was allocated tasks on an *ad hoc* basis. Then on 3 June 2019 he was allocated an AO4 position in the Records Management section in DTF.

70. The chain of command in that section started with Cassandra Spiers as Head of the section, next below her was Janet Cleveland, then two steps down was Lulu Ng, then came the Worker at the AO4 level and then Cassie Hendrick and Natalie Stott at the AO2 level. With the exception of Cassandra Spiers, all these personnel including the Worker worked in the same open plan office.

71. The Worker gave evidence that he felt he had not been adequately trained to carry out the work in his AO4 position. He said that the data set in DTF when he came back to work in March 2019 was all electronic, and it was different from the data set involving physical paper which had been used by the DCM where he had worked before he went off work in October 2017. He said that he did not have any experience with the DTF dataset and he said that the procedures were different – "*Later I discover it's a big difference between the previous – so before I left and in 2017 and the 2019".* The Worker was asked how he was trained in respect of these differences and he replied: "*So at that time my manager Janet is directing me to self-learning, and she pointing some procedure to me, and she also asked*

Lulu to give me some training. Later I was discovered that this training are very short, sharp, and I missing steps in this training, and that's cause confused" - transcript 4 October 2021 page 37.1.

72. The Worker was asked why and how the DTF dataset was different from the DCM dataset. He replied: "*Later it's – after I worked there I believe it's – they had a business unit, the structure is different than DCM. They building, like, a financial group; and each group, they have unique, the project, like a revenue office; and they sitting underneath they have all the people sitting (inaudible), these people are allowed to reading some document. Another documentation reading by another. It's a slightly different than DCM set up. DCM set up, when we set up we mainly using for – in 2016 – 17 mainly using the physical file. So we create physical file. If we have electronic copy, we still save on electronic. If no electronic copy, they can go through the hard copy physical file".*
73. The Worker was asked whether people in Records Management gave access to different files to different people, and whether that was part of his job. He replied that it was. He was asked whether he received any formal training from outside the section and he replied: "*No, no formal training send outside, just learning, asking question, and if they got time to help you; if not get time, you practise; and eventually when I practise I was getting the email immediately from Lulu, 'That's your mistake'*. Counsel for the Worker clarified this by asking: "*And you are saying that was your training; you are left by yourself; you're to study the – I'm talking the dataset here, the DTF dataset; and if you get something wrong, she will send you an email?"* The Worker replied: "*Yeah*".

74. Starting at transcript page 38.9 through to page 39.5 the Worker gave evidence that his manager Janet Cleveland asked him about his toilet habits. He said this first occurred some time in September 2019. He said that Janet came to his desk and stood on his left-hand side and asked him: "*What are you doing in the toilet*?" The Worker believed that Lulu Ng was also present in the open plan office when this question was asked. The Worker said that Janet asked him how long he had been in the toilet and then asked him the reason why he appeared to be in the toilet every morning. The Worker said he replied to her that he had diarrhoea, and that Janet Cleveland went on to say: "*You have diarrhoea for long time. You have diarrhoea for long time".* The Worker said that Janet Cleveland spoke in a normal "*tone*" and that two female co-workers were present in the work area at this time. The Worker was asked how he felt at that point and he replied: "*I feel shame. I feel embarrassed, in particular for me as a male when female ask me about this".*

75. At transcript page 39.7 to page 40.2 the Worker gave evidence that towards the end of September 2019 his supervisor Janet Cleveland spoke to him in the presence of other co-workers and accused him of not having any Records Management knowledge. The Worker was asked how this had made him feel and he said: "*I feel terrible for me. I feel very, very low. I feel I just been hit by somebody".*

76. On page 40 of the transcript on 4 October 2021 the Worker gave evidence that he was instructed by Lulu Ng: "*If you have any training issues, escalate please just contact with record system, DCIS record system to resolve these things*". However, the Worker said he found that he was not permitted to contact or receive

information from the DCIS records system. He said: "*After she instruct me do so, and she assigned the job asked me do so, I ring them up, they say 'Lie, I'm sorry, you are not on the list'. But they say, 'I'm your friend, but I can't help you. You are not on the list.' I asked the people there, I think the person is Marvin, and he say, 'I'm sorry, it's only two person in your team allowed to contact, which is Janet and Lulu' ".* The Worker went on to say: "*I couldn't complete my task. And obviously I will getting another email from Lulu one day later, say I didn't do right things".*

77. At transcript page 40.10 to 41.5 the Worker gave evidence that Janet Cleveland told him: "*You has been – we don't like you using the mobile phone too often in the office, your private phone call*". The Worker protested in response that he did not use his mobile phone at work. He said at first that he took his mobile phone to work for emergencies but he did not take phone calls and he did not make phone calls from his mobile at work. He then conceded that perhaps he made one or two calls from his mobile phone during work hours each week.

78. At transcript page 41.6 to 45.10 the Worker gave evidence that Janet Cleveland instructed him in relation to emails. She instructed him to reply to her emails on the same day he received them. Janet Cleveland further instructed the Worker to reply to emails from his immediate superior Lulu Ng also on the same day he received them.

79. At transcript page 42.1 the Worker gave evidence that Janet Cleveland instructed him to record everything he did in the office each day. He was also to record each time he left his desk and the reason he left his desk and how long he would be absent from his desk. He was required to report to Janet Cleveland in person every time he wished to leave his desk and if Janet Cleveland wasn't available, he was to report to Lulu Ng. The Worker said in his evidence:

> "*Okay. She's ask me – she create an Excel spreadsheet to ask me record every things I did in the office, everything. Like for example in the morning you come in, what time you log on the computer, what time you make a phone call, and between the time, and she want to see how much time I answer the query. And if I want to go left office, I have to let her know, reporting to her, so I have to tell her, "I need to go toilet," and how long it will be."*

80. Counsel asked the Worker how it made him feel and the Worker replied: "*I feel I being target*". Counsel sought to clarify: "*you feel you are being targeted*?" And the Worker replied: "*Target*".

81. At transcript page 42.5 to 43.8 the Worker gave evidence about difficulty he had experienced in carrying out a security review. This involved identifying staff changes and ensuring that staff who had moved on no longer had security access and new staff were granted security access. The Worker said he felt the need to ask another staff member Cassie Hendrick questions about how to carry out this review but Janet Cleveland intervened and stopped him.

82. The Worker reported that Janet said: "*Lie, you should know it. That's the procedure. We made the procedure for you to perform this task. Just go through the procedure if you have anything*". The Worker said that he had to ask Cassie

– "Because I no familiar with that. I'm not familiar the working group because of their using – they don't call the division like (inaudible) aboriginal/indigenous policy, like major project at DCM. They are called financial group, financial management group, and revenue – revenue something group, and budget – different groups, different boss, different managers. Need to ask some who I going to send, because if I sent to the wrong person, for example for me –". Counsel asked: "*It's just a query about: are these people still here – who has left*?" And the Worker replied: "*Yes, yes, yes. And I would get a plan for that".*

83. Counsel asked the Worker how he felt when Janet told him to stop seeking this assistance from Cassie and the Worker replied: "*I feel being – being honest to you, I feel be bullied*".

84. The Worker gave evidence of what he described as a "confrontation" between Janet Cleveland and him, which took place in December 2019. He said that he had received a phone call at work from an individual he knew as Rangga. Rangga told the Worker that he had lost access to some Treasury data, and he needed to recover that access so he could finish his job. The Worker said he knew that he and Rangga worked on the same floor in the same building. The Worker had been directed by his immediate supervisor Lulu Ng to remove Rangga's access to the system because Rangga had moved on to a different job in a different department, so the Worker had done this. The Worker went on to explain that he reactivated Rangga's access to the system once he satisfied himself that Rangga had a legitimate purpose in having that access, to finish some work before he moved on to his new job - transcript page 45.2 to 45.8, 4 October 2021.

85. The Worker gave evidence that he received an email later the same day from Janet Cleveland stating that he had breached the security access process by giving access to an unauthorised person. The Worker gave evidence that he had a meeting with Janet Cleveland in which he suggested his immediate supervisor Lulu Ng had made a procedural error and that if he, the Worker, had made such an error he would have been reprimanded for it. The Worker said that Janet Cleveland told him that was not his business and the Worker responded that everybody should be bound by the same procedure, whether a team member or a manager. At the conclusion of this apparently intense discussion, the Worker felt unwell and went home early – transcript pages 45.9 to 47.5, 4 October 2021.

86. The Worker gave evidence of another workplace confrontation, this one occurring in February 2020. This is found at transcript 47.5 to 48.9, 4 October 2021. The Worker had previously contacted his Union for assistance on another work issue, and he received a phone call at work from an Industrial Officer of the Union to discuss that. The Worker said that Janet Cleveland approached him the following day and asked him whether he had taken a private phone call the day before. The Worker replied that he had taken a call during his lunch hour. The Worker gave evidence that in the course of this same discussion, Janet Cleveland then changed topics and commented that the Worker was still taking a lot of toilet breaks. The Worker said that other people were in the vicinity because it was an open plan office, and while he could not be certain that other people overheard this discussion, he was concerned by the possibility.

87. The Worker gave evidence that this discussion about his telephone calls and about his toilet habits, taking place at the workplace in the open plan office, was distressing to him. Specifically, he said when asked how this had made him feel:

> *"Worker: Yes, no good. No good. He feel very, very low. I feel worry. I feel unhappy. And also particular – particular in the Records Management team, can I say something? Records Management – it's only one male in the Records Management. All other officer in my team is a female. All the – even all the boss are female. Just only me at that time. When she asked me something to that, I was feel bad.*
>
> *"Counsel: About toileting? Are you talking toileting now?*
> *"Worker: Toileting, toileting, yes.*
>
> *"Counsel: Was there ever a conversation about a vibrating mobile phone?*
> *"Worker: Oh, yes. That's – I also note here, since she told me, 'Do not using your personal phone call at the work time', okay 'If you want to make a' – and I notice, every – because in my office, everyone using vibrate, their phone switched to silent.*
>
> *"Counsel: The phones are switched to silent, yes?*
> *"Worker: All my colleagues are switch to silent. And when they going to – I don't know. And they help other client – I see other client at another desk. Sometimes the girls are put that phone on the table – on the desk. And from time to time, they all vibrating. Because my phone gets put in the bag. I switch off because when Janet told me, 'Do not using' limitation using my mobile phone, I switch off completely. And she approached me. She say, 'Is your phone?' She says. I was so bad. I say, 'No, look. That's Cassie Hendrick's phone'…' That's Natalie Stott's phone.' That's not only for once. Because vibrate the desk is shaking, her desk and feel it because where big long desk altogether. She coming there. She sometimes has a watch. 'Did you call?' 'No, I didn't'. I believe she just tried to find any whatever doing.*
>
> *"Counsel: Did you ever see her criticise other staff about phone use?*
> *"Worker: Not in front with me.*
>
> *"Counsel: Did you ever see her talk to other staff about toileting?*
> *"Worker: No, no".*

88. Janet Cleveland gave evidence in cross examination about her querying the Worker about his toilet habits. She was asked about the tone of her voice when she spoke to the Worker on this subject, in the following exchange:

> *"Counsel: Sorry, my question might not have been clear. When you say you lost it, could you say what you mean by losing…?*
>
> *"Cleveland: Lost it, oh. I probably – my tone probably changed a little bit. I mean, I wasn't yelling, but I was probably showing that I was frustrated and so my tone might have been raised a little bit. But there was no way that I would be yelling in the office, so.*

"Counsel: To your recollection, was anybody else there?

"Cleveland: No. On that day – well, as the – Cassie had mentioned, she was not in that day. And Natalie Stott, who was the other person that sat there, was also on sick leave that day.

"Counsel: Alright. Who else in the unit…?

"Cleveland: Lulu would be there, but she was at the far end, on the other side of the desk.

"Counsel: And you said that the conversation then moved on from discussion about that – the specifics around that work. Where did the conversation move to?

"Cleveland: Sort of went down the path of why he is often away from his desk for extended periods of time, taking his phone with him and he said that he is in the toilet for a long time in the mornings because he has diarrhoea. And I said,' Well, you've had it for months then, because this happens every day."

89. The Worker went on to give evidence about how his various interactions with more senior staff at work had affected him. Starting at transcript page 48.9 to two page 49.2, 4 October 2021, the Worker gave the following evidence:

"Counsel: So by February 2020, how were you feeling after all of this?"

"Worker: Sorry, I was complete – my brain doesn't work functional very much. I have a heavy diarrhoea. I was so feeling so low. I have a night sleep disturbance. Sometimes I wake up, couldn't get back asleep for two, three hour. And I feel terrible. I feel my – I cannot concentrate at doing a lot of things. I was loss of concentration. I feel a loss energy. I feel nervous, unhappiness."

"Counsel: And you saw your GP, did you?"

"Worker: Yes"

90. In summary, the Worker gave evidence in chief that he believed he was the subject of excessive and at times intrusive scrutiny by his immediate supervisors in his performance of his work duties. He gave evidence that he perceived this to be micromanagement and, sometimes, to amount to bullying behaviour.

91. In cross examination, Mr McConnel SC of counsel for the Employer asked and the Worker answered a great many questions about the nature and extent of the training processes provided on behalf of the Employer to the Worker following his return to work on 4 March 2019. The Worker had given some evidence about this in his examination in chief, but the cross examination examined this subject in much greater detail. On the basis of the Worker's evidence on this subject in chief and in cross examination I am satisfied and I find that on balance, the Worker's evidence does not objectively support his pleaded case that he was not provided

with adequate training or training opportunities following his return to work on and after 4 March 2019. However, I am satisfied and I find that the Worker had formed the belief that this was the case.

92. Mr McConnel SC cross examined the Worker, also at great length, about errors the Worker was said to have made in the course of carrying out his work tasks in the employment from June 2019. Overall, the Worker conceded the specific errors raised in this cross examination, although he did attribute some of them to inadequate training.

93. The Worker's immediate supervisor Janet Cleveland admitted in cross examination at transcript page 279.2 that she didn't think the Worker was a good A04 before he went on extended leave in 2017. She said that she did not want the Worker back if he returned in 2019 with the same attitude he had displayed in 2017. She said that "*it would have made my life easier*" if the Worker went to another agency on his return to the workplace in 2017 – transcript page 282.3.

94. At transcript page 288.8 Janet Cleveland said in cross examination that she had discussed the Worker with Regina Bolton who was the Managing Director of Human Resources Shared Services to the Department of the Chief Minister and also to the Department of Treasury and Finance. Janet Cleveland said that she told Regina Bolton that the Worker had "*a long history of being a non-performer*".

95. At transcript page 298 Janet Cleveland in cross examination admitted that she had told Lulu Ng that the Worker was to be subject to greater scrutiny, as follows:

> *"Counsel: And that greater scrutiny was discussed by you and Cassie Spiers?"*
>
> *"Cleveland: Yes."*
>
> *"Counsel: And Lulu Ng?"*
>
> *"Cleveland: Yes, as the second in charge when I'm not there, yes, and to help manage the team across the board."*
>
> *"Counsel: And greater scrutiny includes documenting everything, every task, and certainly every occasion when he failed to perform the task timely or properly?"*
>
> *"Cleveland: Yes."*

96. At transcript page 300.1 Janet Cleveland admitted that she "*might have*" told C Hendrick , somebody junior to the Worker in the same office, that he was to be subject to closer scrutiny and that all observations of his performance were to be recorded.

97. At transcript page 298.5 Janet Cleveland agreed with counsel for the Worker that "*at no stage from on or about 3 June 2019 did you tell Mr Yao that he was going to be subject to greater scrutiny".*

98. I am satisfied on the basis of the Worker's evidence set out above and on the evidence of Janet Cleveland set out in the foregoing paragraphs, and I find, that the Worker was the subject of closer than usual supervision and scrutiny engaged in by his immediate supervisors of his work performance, from around June 2019 and continuing until he ceased work on 10 February 2020.

99. I am satisfied and I find that this closer than usual supervision and scrutiny by the Employer of the Worker's work performance over this period, and in the light of Janet Cleveland's admitted attitude to his performance, and in the light of the awareness of this attitude on the part of at least two of the Worker's co-workers, including Lulu Ng, provides the factual basis from which the Worker could have developed a perception of a hostile working environment generally, and specifically that he was being micromanaged by his supervisors and, at times, that he was being bullied by Janet Cleveland and/or Lulu Ng in the workplace.

100. I am satisfied on the basis of the preceding finding and further on the basis of the expert psychiatric opinion of Dr Hundertmark set out earlier in these Reasons that the Worker had presented with "*overvalued ideas of a paranoid nature, which is not delusional but bordering on delusional*", and that he had become "*depressed with paranoid features*", and I find, that the Worker did in fact develop the perception over the relevant period from around June 2019 until he ceased work on 10 February 2020, that he was being micromanaged and bullied by his supervisors in the workplace.

101. I am satisfied on the basis of the expert psychiatric opinions of each of Dr Hundertmark and more specifically of Dr Takyar set out earlier in these Reasons, and I find, that the Worker's perception set out in the preceding paragraph contributed to the injury.

The Performance Management Process

102. The Worker returned to work in the employment on 4 March 2019 after having been on extended leave for 17 months. For the first two months until 3 June 2019 he was unattached and did not have a specific position in the Department of the Chief Minister ("DCM") and carried out duties as directed on an *ad hoc* basis. He was invited by Jodie Wheeler of the HR branch of DCM to apply for positions with other NT government Departments and he did make some such applications – email 12 March 2019 page 191 Volume 1.

103. At some point between 4 March 2019 and 4 April 2019 the Worker was asked to submit a "MyPlan form" and he did so. By email dated 4 April 2019 Cassie Spiers of DCM informed the Worker of a meeting with her to discuss the MyPlan form he had submitted – page 195 of Volume 1.

104. The Court heard evidence from Ms Kay Densley who was NT Secretary of the Community and Public Sector Union. Ms Densley provided a report dated 10 August 2021 which appears from page 185 of Trial Book 1. The parties accepted and I find that Ms Densley is an expert in Public Service management matters generally. I further find she is an expert in the area of Public Service performance management processes specifically.

105. Ms Densley gave evidence that a MyPlan form is one identifying the tasks that should be achieved by a Public Service employee in a specific position. Such a document is part of a normal Public Service performance management process and it is expected to be prepared by all employees. It is usual for employees to meet with their supervisor every six months to discuss their performance in the light of their MyPlan form. Ms Desley stated in paragraph 11. of her report:

> "*Conversations should occur in between these more formal discussions so there would be no 'surprises' at these meetings. Bad performance or issues with standards of work should be discussed at an informal level when/if they occur."*

106. Ms Densley contrasted the MyPlan performance management process with an entirely different process called a Personal Improvement Plan ("PIP"). She stated in paragraphs 12. to 15. inclusive of her report as follows:

> "*12. A Personal Improvement Plan (PIP) is far more serious form of performance management and should concern any employee."*
>
> *"13.* ***PIPs are applied to or imposed on only a very small fraction of employees and are regarded as a last-ditch effort to manage the performance of an employee. Actually, they are often regarded as a euphemism for the last stage prior to termination*** (my emphasis)***.*** *They are a serious black mark against the employee as any employee who manages to continue to be an employee after a PIP will have a very hard time achieving a promotion or a transfer. On paper a PIP will look similar to a MyPlan in that it has columns recording targets and achievements with comments."*
>
> *"14. PIPs usually run for a shorter period of weeks and involve meetings between the employee, the manager, and support people, every week or so.*
>
> *"15. All public sector managers should be aware of the MyPlan form of performance managers* (sic – I presume this should be 'management') ***but because PIPs are so rare*** (my emphasis)*, many managers would not be aware of the process of imposing a PIP and I am not aware of any formal or transparent process document on how to conduct these processes."*

107. The Worker gave evidence in chief that he first became aware of a PIP process affecting him when he received an email from Janet Cleveland in August 2019 mentioning that process. He said at that time he did not know what a PIP was – transcript page 43.9, 4 October 2021.

108. The Worker gave evidence that he asked Janet Cleveland about this, as follows:

> *"I think I have a quick verbal ask when she walk around, I said, 'What do you mean for performance – what this mean?' She say,* ***'This is just improving your skill and improving your Records Management, all your knowledge'*** (my emphasis)" - transcript page 44.4, 4 October 2021.

109. The evidence establishes that the Employer went through the actual process of developing the formal PIP documentation from 9 August 2019 until 1 October 2019.

110. The Worker went on to give evidence that he was provided with a hard copy of the formal PIP documentation in early October 2019. He said as follows:

> "*I think the early October or early October, and Janet send me email and gave me hard copy, put on my desk. I was sitting there, he just walking past, pop under that. I haven't looked at this form, which is like made up by the word of (inaudible) of the big documentation, maybe five, 10 pages. And I ask her, 'What's this?' He said, 'This is' - and also she say, 'DCIS only have this for performance management."*
>
> "*DCIS only have this…?' 'Only has this form. I said, 'What's this form for?' I was asking about the performance improvement plan, the form. I said, 'What's this for?' He say, 'This one?' Then I didn't say any words, I just say, asking her one more time, I say, 'Can you able email to me, electronic, as word of (inaudible, I can change, I can make some comments for if I want to make some change.' And she said to me, 'You just need to write under that.' She doesn't give me the – at that time he doesn't give me the electronic copy, saying – yeah, sorry. Too much."*

111. It was noted by counsel and by me that the Worker tended to use third person singular pronouns interchangeably, confusing the gender of the person referred to. It was agreed that in the foregoing exchange the Worker was talking about Janet Cleveland - transcript page 44.8, 4 October 2021.

112. Janet Cleveland met with the Worker on 2 October 2019 to inform him about the PIP process and provide him with a copy of that document. She invited his input.

113. The Worker consulted his GP the following day, 3 October 2019, complaining of work-related stress.

114. Starting at transcript page 135.5 on 5 October 2021, Mr McConnel SC cross examined the Worker on his being subjected to a PIP. The Worker agreed that he had been presented with a formal PIP document on 2 October 2019 and that he was to have a meeting with Janet Cleveland about that the following day, 3 October 2019. However, he instead attended on his GP on 3 October 2019 and reported work-related symptoms of stress, and was then absent from work for a number of days.

115. The Worker specifically denied Mr McConnel's suggestion that the Worker's symptoms of stress described to his GP on 3 October 2019 were solely a reaction to his receiving the PIP. The Worker said rather that his stress levels had been building up since he commenced his new job on 3 June 2019, in the context of the micromanagement and bullying he had been subjected to in that new job, and that was the background to his consulting his GP on that date - transcript pages 137.9 to 138.2, 5 October 2021.

116. The Worker agreed in cross examination that he did not attend a meeting to discuss the PIP over the following days after 3 October 2019 because he had again attended his GP and had again been certified unfit for work because of stress related symptoms. When on 18 October 2019 the Worker eventually did attend a meeting to discuss the PIP, he arranged to take a support person with him.

117. The Worker had included the PIP performance management as part of his history of work-related stressors which he provided to psychiatrist Dr Takyar - his report of 20 January 2021 at page 2.8. He also included this history of the PIP performance management as part of his history of work-related stressors to psychiatrist Dr Hundertmark - his report of 6 May 2021 at page 3.2 and 3.6.

118. As noted earlier in these Reasons, the Worker consulted his GP on 3 October 2019 for work-stress for the first time since he had returned to work on 4 March 2019. He then consulted his GPs on eight further occasions for work-stress, before ceasing work on 10 February 2020. This is a total work period of just over four months, reduced by the number of public holidays over the Christmas/New Year period. An analysis of the relevant eight medical certificates issued at the consultations when the Worker complained of work-stress reveals that he was certified unfit for work over this period, for a total of 17 days.

119. I find that the Worker first became aware of the existence of a formal PIP process affecting him only on 9 August 2019 when he received the email from Janet Cleveland, and that this was really brought home to him when the formal PIP document was given to him by Janet Cleveland on 2 October 2019.

120. I accept the Worker's evidence and I find that the Worker began to experience symptoms of stress attributable to the PIP process at least from 3 October 2019 when he consulted his GP complaining of work-related stress.

121. I am satisfied and I find that the symptoms of stress experienced by the Worker attributable to the PIP process were in addition to the symptoms of stress he was already experiencing by 2 October 2019 as a consequence of his perception that he was being micromanaged and bullied in the workplace.

122. I am satisfied and I find that the notification by email on 9 August 2019 and the subsequent delivery of the PIP documentation to the Worker on 2 October 2019, and the meeting with Janet Cleveland on 18 October 2019 to discuss the mechanics of the PIP process, all happening against the background of a closer than usual supervision and scrutiny of the Worker's performance in the workplace, provided the factual basis for the Worker further to develop a perception of a hostile working environment, and specifically that he was being negatively targeted by the formal PIP process.

123. I am satisfied on the basis of the preceding findings and further on the basis of the expert psychiatric opinion of Dr Hundertmark set out earlier in these Reasons in relation to the Worker's "*overvalued ideas of a paranoid nature, which is not delusional but bordering on delusional*" and that the Worker had become "*depressed with paranoid features*", and I find, that the Worker did in fact develop the perception that he was being deliberately and negatively targeted by a formal

performance management process in the workplace, namely the PIP process.

124. I am satisfied on the basis of the expert psychiatric opinions of each of Dr Hundertmark and Dr Takyar set out earlier in these Reasons, and I find, that the Worker's perception set out in the preceding paragraph contributed to the injury.

Cause of or Material Contribution to the Injury

125. The Worker's case as understood by the Employer and confirmed on behalf of the Worker at the hearing was that on his return to work on 4 March 2019 the Worker was in good mental health – see transcript page 31.5 on 4 October 2021. The Worker provided a history to psychiatrist Dr Takyar on 15 January 2021 as follows: "*When I returned in March 2019, I was fresh and happy, I don't think I have any anxiety and I am also sleeping very well, eating well, healthy, I have a good energy, return to work"* – page 2.5 of Dr Takyar's report of 20 January 2021. On the basis of this history and of the Worker's GPs' records and the other medical evidence before the Court identified and discussed earlier in these Reasons, I am satisfied and I find that the Worker was not suffering from the injury specifically when he returned to work on 4 March 2019 after having been on leave for the previous 17 months before that date. Additionally, I note that there is no evidence before me that the Worker was suffering from any other mental injury when he returned to the employment on that date.

126. "*Disease*" is defined in subsection 3(1) of the Act to include *"… a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of Part 5."*

127. I am satisfied that the injury did not develop suddenly. The injury manifested over a period first recorded when the Worker presented to his GP on 3 October 2019 complaining of symptoms of work-related stress. The Worker thereafter continued in the employment but continued to present to his GPs from time to time complaining of symptoms of work-related stress. This happened on eight further occasions after 3 October 2019 until he finally ceased work because of the injury four months later, on 10 February 2020. I find that the injury was one of gradual development.

128. Subsection 4(5) of the Act provides:

> *"(5) An injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of time and the employment in which he or she was employed at any time during that period materially contributed to the injury."*

129. Subsection 4(6A) of the Act provides:

> *"(6A) Subject to this section, a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's*

contraction of the disease or to its aggravation, acceleration or exacerbation."

130. Subsection 4(8) of the Act provides:

> *"(8) For the purposes of this section, the employment of a worker is not to be taken to have materially contributed to:*
>
> *(a) an injury or disease; or*
>
> *(b) an aggravation, acceleration or exacerbation of a disease,*
>
> *unless the employment was the real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation*."

131. The foregoing require that in order to be satisfied that the injury arose out of or in the course of the employment I must be satisfied on the balance of probabilities that the employment materially contributed to the injury. To be satisfied as to that, I must first be satisfied that the employment was "*the real, proximate or effective cause…"* of the injury.

132. There is no evidence before me of any cause or causes of, or contribution or contributions to, the injury other than the employment. It is of course the Worker who bears the onus of positively establishing on the balance of probabilities that the injury is work-related.

133. I am satisfied that the Worker has established this. On the basis of the evidence identified earlier in these Reasons, namely from the Worker, the work documentation, the GPs' records and the evidence of the two psychiatrists, and on the basis of my findings as to the impact on the Worker of his perception of micromanagement and bullying in the workplace, and the impact on him of the PIP performance management process, I am satisfied and I find that the employment was the real, proximate and effective cause of the injury. I find that the employment materially contributed to the injury.

134. I find that the injury arose out of and in the course of the employment.

MANAGEMENT ACTION

135. I have found that the Worker is totally incapacitated for work on the basis of the injury, namely a Major Depressive Disorder, and I have found that the injury arose out of and in the course of the employment. The Worker has therefore established his entitlement to be paid compensation under the Act, unless I find that the injury was caused wholly or primarily by management action taken on reasonable grounds and in a reasonable manner by the Employer, within the meaning of subsection 3A(2)(a) of the Act.

Definition

136. **"***Management action*" is defined in subsection 3(1) of the Act as follows:

> *"**management action**, in relation to a worker, means any action taken by the employer in the management of the worker's employment or behaviour at the workplace, including one or more of the following:*
>
> *(a) appraisal of the worker's performance;*
>
> *(b) counselling of the worker;*
>
> *(c) stand down of the worker, or suspension of the worker's employment;*
>
> *(d) disciplinary action taken in respect of the worker's employment;*
>
> *(e) transfer of the worker's employment;*
>
> *(f) demotion, redeployment or retrenchment of the worker;*
>
> *(g) dismissal of the worker;*
>
> *(h) promotion of the worker;*
>
> *(i) reclassification of the worker's employment position;*
>
> *(j) provision to the worker of a leave of absence;*
>
> *(k) provision to the worker of a benefit connected with the worker's employment;*
>
> *(l) training a worker in respect of the worker's employment;*
>
> *(m) investigation by the worker's employer of any alleged misconduct:*
> *(i) of the worker; or*
> *(ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;*
>
> *(n) communication in connection with an action mentioned in paragraphs (a) to (m)".*

137. I am satisfied and I find that the actions of the Employer considered above in subjecting the Worker to closer than usual supervision and scrutiny of his performance in the workplace, and in deciding to subject him to the PIP process, come within this definition of "*management action*". Specifically, they come within sub definitions (a), (b), (l) and (n).

The Email of 23 May 2019

138. On Thursday 23 May 2019 a meeting was held involving senior HR personnel of DCM. It was attended among others by Ms Regina Bolton who was the Managing

Director of Human Resources Shared Services to the DCM and also to the Department of Treasury and Finance. The Worker and his position with DCM was discussed at this meeting. An email was sent that day following the meeting as follows:

> *"From: Rosalie Lamour*
> *Sent: Thursday, 23 May 2019 1237 PM*
> *To: Nathalie Cooke; Joanne Quayle*
> *Cc: DCMSharedServices Human Resources*
> *Subject: CONFIDENTIAL – Matter from CS Directors meeting*
>
> *Hi Nathalie and Jo*
>
> *I am just passing on some notes from the CS Directors meeting this morning (I stood in for Jodie W).*
>
> *It was regarding Lie Yao in Records. Regina advised that with Mel Smith leaving this Friday, she wants to move Lie back into the ongoing AO4 position* ***and commence formal performance management asap*** (my emphasis)***.***
>
> *Please discuss with Cassie Spiers as* ***she would like to collate any/all prior performance documentation on Lie*** (my emphasis) *and* ***discuss providing coaching in the process to Janet*** (my emphasis)***.***
>
> *Kind Regards,*
>
> *Rosalie Lamour*
> *Assistant Director*
> *Human Resources Shared Services Department of the Chief Minister"*

139. The interpretation of this email is important in this matter.

140. The Worker's case is that the email's reference to "*formal performance management asap*" meant a PIP rather than the MyPlan process. The Worker says that the true purpose of the PIP proposed at that very early stage, only two months and three weeks after the Worker had returned to work performing *ad hoc* duties following a 17 month absence, was to achieve the termination of the Worker's employment with the Employer.

141. The Worker says further that the email's reference to "*Please discuss with Cassie Spiers as she would like to collate any/all prior performance documentation on Lie"* was intended to encompass all prior performance material on the Worker, including from before he took his 17 months' leave in October 2017, and this was to assist the Employer to achieve that purpose of terminating the Worker's employment.

142. The Employer disputes this interpretation of the email. Its case is set out in paragraph 47 of the Employer's Closing Submissions received 24 December 2021 as follows:

"*47. There was no mention of a PIP until 9 August 2019. Prior to that date, the Worker was simply being performance managed within the usual bounds of employee performance management by his supervisor and manager. The documents in the Court Book demonstrate the multitude of performance related issues that Lulu Ng and Janet Cleveland dealt with in the period from March to August*."

143. The author of the email was Rosalie Lamour, Assistant Director, Human Resources Shared Services, Department of the Chief Minister. The email was passing on some information and instructions arising from a meeting held on the same date, 23 May 2019, attended by Regina Bolton who was the Executive Director, Human Resources Shared Services, Department of the Chief Minister and also Department of Treasury and Finance, and therefore senior to Rosalie Lamour.

144. By email dated 9 August 2019 Janet Cleveland informed the Worker as follows:

"Hi Lee

"Yes I agree and it's time to escalate these ongoing issues.
Regina and Lulu will be meeting with you to discuss a Performance Improvement Plan".

145. Janet Cleveland gave evidence that Executive Director Regina Bolton was standing beside her desk when Janet Cleveland was about to send the email of 9 August 2019 to the Worker. Janet Cleveland gave the following evidence at transcript page 300.7 on 7 October 2021:

"Mr O'Loughlin: And you didn't say that he will be placed on a PIP, you just said that there will be a meeting to discuss a PIP?"

"Janet Cleveland: Yes, because at the time this email conversation had obviously started earlier in the day or the day before, and Regina Bolton was at my desk, and she had seen this email, and I was discussing ongoing issues, and it was a directive from her, just going, 'Right, you can now tell him that this is happening'."

"Mr O'Loughlin: We can now tell him that this is happening?"

"Janet Cleveland: Yes, so it was a directive from my Executive Director."

"Mr O'Loughlin: Are they the words she used, or did she say, 'You can now tell him that a PIP will happen?"

"Janet Cleveland: Yes."

"Mr O'Loughlin: And was that your plan, that a PIP would happen at some stage, but we will go through MyPlan first?"

"Janet Cleveland: Yes. Well, ***the MyPlan happens anyway*** (my emphasis), *but*

the training plan and everything that was put in place to up re-skill or up-skill him was the approach that I took first."

146. In cross examination at transcript page 289.1 Janet Cleveland was taken to the email of 23 May 2019. It was put to her that the email's reference to "*formal performance management asap*" was not a reference to the MyPlan process, and she agreed with this. It was further put to her that this reference was something more serious, along the lines of a PIP, to which she replied "*That's right*".

147. The email of 23 May 2019 was marked "*CONFIDENTIA*L". The sole subject matter of the email was the Worker. Specifically, the email discussed moving the Worker into an ongoing A04 position being vacated by another staff member, commencing formal performance management of the Worker "*asap*" which meant "as soon as possible", and requesting that these matters be discussed with the Worker's supervisor Cassie Spiers to arrange to collate prior performance documentation on the Worker, and requesting that coaching in the formal performance management process referred to earlier in the email be discussed with "Janet". It is not in dispute and I find that this was a reference to Janet Cleveland.

148. Janet Cleveland agreed in cross examination at transcript page 284 that in May 2019 she would not have needed coaching or training for a MyPlan process for the Worker.

149. At the time of this meeting and this email on 23 May 2019, the Worker had been back at work since 4 March 2019, a period of two months and 20 days. The Worker had returned to work on 4 March 2019 after a lengthy absence of 17 months when he had been on leave. Following his return to work on 4 March 2019 and up until 3 June 2019, the Worker was not provided with a specific job in a specific position and he carried out work on an *ad hoc* basis, as directed essentially from day to day.

150. Neither Rosalie Lamour nor Regina Bolton was called to give evidence in this proceeding. They were the two people who could have given the best evidence as to the meaning and purpose of the discussions and decisions concerning the Worker at the Corporate Services Directors' meeting held on 23 May 2019, and therefore as to the meaning and purpose of the email. Regina Bolton was also the best person to give evidence as to the timing of the implementation of the formal PIP affecting the Worker, and as to why she personally as an Executive Director had taken such a hands-on interest in the performance management of an AO4 clerk. I would have expected the evidence of both these persons to be led before the Court.

151. Janet Cleveland gave evidence at transcript page 304.8 that she believed Regina Bolton was now living in Perth. There was no other evidence before the Court as to the whereabouts of Regina Bolton or as to why she had not been called, whether by video link or otherwise, to give evidence before the Court. There was no evidence before the Court as to why Rosalie Lamour was not called to give evidence.

152. On the basis of the principle in *Jones v Dunkel*, I conclude that the evidence of Regina Bolton and Rosalie Lamour, or either one of them, would not have assisted the Employer's case.

153. The Employer called no evidence from any person who had attended the meeting on 23 May 2019 or who was a named recipient of the email of that date. No explanation was provided for this absence of plainly relevant evidence.

154. The Court was left without any evidence by way of explanation from the Employer as to why senior personnel in the relevant Departments had held a confidential meeting to discuss an A04 staff member, and why that meeting decided at that time to put that staff member under formal performance management as soon as possible, rather than at some later time, and why any/all prior performance documentation was to be collated for that purpose.

155. On the basis of the foregoing matters, I am satisfied and I find that the discussions and decisions concerning the Worker at the meeting on 23 May 2019 and referred to in the email of 23 May 2019 did not relate solely to the standard of his performance of his *ad hoc* duties in the short period between 4 March 2019 and 23 May 2019.

156. On the same basis I am satisfied that the reference in the email to collating "*any/all*" of the Worker's prior performance documentation must have included all or part of the Worker's performance earlier in the employment before his return to work on 4 March 2019 - that is, before he went on 17 months' leave in early October 2017.

157. I find that the discussions and decisions concerning the Worker at the meeting on 23 May 2019 and which led to the email of that date included the Worker's performance over all or at least a great part of the period of his earlier employment with the Employer up until he went off work in early October 2017 and took 17 months' leave.

158. On the basis of the description and explanation of the MyPlan process provided by expert witness Kay Densley set out earlier in these Reasons, on the basis of the evidence of Janet Cleveland in the passages set out in paragraphs 144. and 146. above, and on the basis of the email dated 4 April 2019 from Cassie Spiers to the Worker informing him of a meeting to discuss the MyPlan form he had already submitted to her at least one month and three weeks before the meeting and email of 23 May 2019, I am satisfied and I find that the "*formal performance management asap*" referred to in the email of 23 May 2019 was not a reference to the MyPlan process.

159. There is no evidence before me of the existence of any formal performance management processes other than the MyPlan process and the PIP process. There may well be any number of informal performance management processes which might be considered and utilised in the management of public service employees but I heard no evidence of these, and in interpreting the email of 23 May 2019 I am limited by its very words to a formal performance management process.

160. I am satisfied on the balance of probabilities and I find that the reference to commencing a "*formal performance management asap*" in the email of 23 May 2019 was a reference to a PIP.

161. Ms Kaye Densley in her report of 10 August 2021, referred to in paragraph 104. Above, offered her expert opinion that:

> "*PIPS are applied to or imposed on only a very small fraction of employees and are regarded as a last-ditch effort to manage the performance of an employee.* ***Actually, they are often regarded as a euphemism for the last stage prior to termination*** (my emphasis)."

162. Ms Densley said further concerning a PIP in examination in chief as follows:

> *"As I said above, this is a black mark that an employee would want to avoid at all costs* ***and it is also a sign that termination of employment is not far off*** (my emphasis)*."*

163. I am satisfied and I find that the discussions at and the decisions taken concerning the Worker at the meeting on 23 May 2019, as evidenced by the email of that date, had the purpose of commencing a process likely to lead to the termination of the Worker's employment with the Employer.

164. I find that the decision of the Employer on 23 May 2019 to commence this process likely to lead to the termination of the Worker's employment was a management action, coming within sub definition (g) of the definition in the Act.

The Onus – Subsection 3A(2)

165. The parties disagree which of them bears the onus of proving or disproving whether the injury was caused wholly or primarily by reasonable management action within the meaning of subsection 3A(2)(a) of the Act.

166. Subsection 3A(1) of the Act defines the concept of "*injury*" for the purposes of the Act. The whole of section 3A was introduced into the Act on 1 October 2015 by section 5 of the *Return To Work Legislation Amendment Act 2015.* Previously, "*injury*" had been defined along with other words in subsection 3(1) which is the general definition section of the Act.

167. The previous definition of "*injury*" in subsection 3(1) of the Act was in the following terms:

> *"**injury**, in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his or her employment and includes:*
>
> *(a) a disease, and*
>
> *(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a*

pre-existing injury or disease,

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

168. The current definition of "*injury*" is set out in section 3A as follows:

"***Injury***

"3A(1) An injury, in relation to a worker, is a physical or mental injury arising out of or in the course of the worker's employment and includes:

(a) a disease; and

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

"(2) Despite any other provision of this Act, a mental injury is not considered to be an injury for this Act if it is caused wholly or primarily by one or more of the following:

(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;

(b) a decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;

(c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action."

169. Both the previous and the current definitions of "*injury"* in the Act exclude a mental injury from the definition of injury, and therefore from being compensable, in the circumstances of certain categories of work-related action or failure to take action by an employer or of a failure by a worker to obtain an expected work benefit ("the exclusion"). Subsection 3A(2) however limits the exclusion to a mental injury whereas the previous definition in subsection 3(1) made its exclusion applicable to any injury, physical or mental.

170. Mr McConnel SC for the Employer argues from first principles that the Worker bears the onus of disproving reasonable management action – that is, that the Worker must prove a negative. He does not cite any authority for this proposition. In his undated *Employer's Closing Submissions* filed 24 December 2021 Mr McConnel submits in paragraph 13 as follows:

"*13. The Employer contends that the legal onus remains on the Worker, as a matter of construction and logic. The entitlement to compensation depends on*

the Worker proving an injury. To prove an injury, the Worker must satisfy the definition of injury within the Act. Subsection (2) of s.3A is part of the definition of injury. In order, therefore, for the Worker to prove that he comes within the definition of injury for the purposes of the Act, he must positively identify that the events that caused the injury were "out of" the employment ***and he must positively identify that those events were not reasonable management action*** (my emphasis)."

171. Mr McConnel's argument from first principles and analysis is equally applicable to the definition of "*injury*" in subsection 3(1) of the Act as it previously stood. However, the case law relevant to the definition of "*injury*" in subsection 3(1) at that time did not support this analysis.

172. There is authority relevant to the question of onus under that previous definition. The question of which party bore the onus in respect of the exclusion in the definition of "*injury*" in the previous definition in subsection 3(1) of the Act arose in a number of Decisions of Northern Territory courts over a number of years.
173. One of these was a Decision of Chief Justice Brian Martin (BR) of the NT Supreme Court in *Swanson v Northern Territory of Australia* [2006] NTSC 88 ("*Swanson"*) where he said at paragraph [86] as follows:

"*In the light of the evidence to which I have referred, the Magistrate was required to determine whether the respondent* (employer) *had proved that the injury was suffered by the appellant* (worker*) "as a result of" reasonable administrative action taken in connection with the appellant's employment. The respondent* (employer) *was required to prove that the injury "was the result of" …"*

174. His Honour did not provide any analysis leading to this conclusion as to onus. I note that *Swanson* was a matter where the worker's claim had been disputed at first instance, as with the present proceeding.

175. The approach in *Swanson* to this question of onus was followed by Magistrate Dr John Lowndes (as he then was) in the Work Health Court in *Barnett v Northern Territory* [2010] NTMC 70 at paragraph [11] where he cited *Swanson* and said as follows:

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

176. In *Corbett* (above) at paragraphs [4], [5] and [8] Justice Barr applied this onus. He was not required by the parties to provide any analysis of the question. He said as follows:

*"[4] The parties agree that the employer (respondent) had the onus of establishing the reasonable administrative action exclusion. The parties conducted their respective cases in the Work Health Court on the basis that the employer had to prove that the worker's injury was "*as a result of reasonable administrative action taken in connection with the worker's employment*."*

"[5] Where the reasonable administrative action exclusion is relied on by an employer, the employer must prove that the relevant reasonable administrative action was the sole cause of the worker's injury..."

"[8] …The employer had the onus of proving that there was no operative cause of the injury other than the identified reasonable administrative action."

177. These Decisions were considered and their position on the onus question was followed by Magistrate Armitage (as she then was) in the Work Health Court in *Andreasen v ABT (NT) Pty Ltd* [2015] NTMC 026 in paragraphs 27 to 33 inclusive. Her Honour concluded in paragraph 33:

"*I am persuaded that there is a line of binding authority on this issue in the Northern Territory. The employer bears the onus of proof on the question of reasonable administrative action*."

178. These Decisions were not limited to a failure to obtain a promotion or benefit – they covered all of the elements of the exclusion as it previously existed in the definition of "*injury*" in section 3 of the Act.

179. I have found only one specific consideration by any Court of section 3A generally and of subsection 3A(2) specifically since their introduction on 1 October 2015. That is the Decision of Judge Armitage in the Work Health Court in *Harris v NT of A* [2019] NTLC 3 ("*Harris*"). In paragraph 7. of *Harris* Judge Armitage said as follows:

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

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

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

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

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

180. Judge Armitage in *Harris* provided no analysis of the question of which party bore the onus, and the passage I have quoted in the preceding paragraph suggests that the question had not been argued before her and that she proceeded on the uncontested basis in that case that the employer bore the onus.

181. The underlying issue has been considered by superior courts. In *Millar v ABC Marketing and Sales Pty Ltd* ("*Millar*") [2012] NTSC 21 Mildren J of the NT Supreme Court discussed from first principles the onus of proof in what have been termed "avoidance" cases. He said the general rule is "*he who asserts must prove*" and this usually involves an evidential as well as a legal onus on the same party. He cited with approval *Currie v Dempsey* (1967) 69 S.R. (NSW) 11 where Walsh JA said at page 125:

> "*The burden of proof in establishing a case lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element of his cause of action, for example if its existence is a condition precedent to his right to maintain the action. The onus is on the Defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claims, which* prima facie*, the plaintiff has*."

182. In the present case I consider that the essential elements to be established to meet the definition of "injury" and thus of the Worker's cause of action are as set out in subsection 3A(1) of the Act, namely that he sustained a physical or mental injury and that it arose out of or in the course of his employment. There are no other elements to be proved identified in subsection 3A(1). The question of reasonable management action is identified as a separate issue set out in a separate subsection. Subsection 3A(2) is not part of the initial definition of "injury" set out in subsection 3A(1). Rather, it calls for consideration of a further state of affairs after the definition of "injury" has been met, and then only in respect of a mental injury, which, if established, would constitute a good defence - that is, an "avoidance" of the Worker's claim.

183. Subsection 3A(2) as it now appears in the Act has made some changes to the exclusion question in the definition of "injury" from the previous definition. However, I can see nothing in these changes or in the overall language or scheme of section 3A of the Act as a whole or in subsection 3A(2) specifically which might require a change to the previous approach by NT courts to the question of onus. Because subsection 3A(2) presents a somewhat different version of the exclusion previously contained in subsection 3(1) of the Act, the superior court Decisions of *Swanson* and *Corbett* are not strictly binding on this Court in considering the new subsection. Even so, I consider the Decisions of the Northern Territory Supreme Court and of the Work Health Court identified above continue to represent the correct approach in the Northern Territory to "avoidance" cases, including the onus arising by virtue of subsection 3A(2) of the Act.

184. I rule that where an employer seeks to rely on subsection 3A(2) of the Act to exclude a claimed mental injury then that employer bears both the legal and evidential onus of proving the exclusion.

185. I rule that discharging that onus requires the employer to prove each of the four elements identified by Judge Armitage in paragraph 7. in *Harris* which I have set out in paragraph 179 above. I rule that the Employer bears that onus in this proceeding.

REASONABLE GROUNDS/REASONABLE MANNER

186. I now turn to the question of whether the management actions I have identified were taken on reasonable grounds, and/or whether they were taken in a reasonable manner, by or on behalf of the Worker's Employer.

187. An employer plainly has the right to manage the performance of its employees, including taking action to terminate the employment of an employee who is consistently unable or unwilling to perform the duties of the employment in a satisfactory manner. This right is subject however to a range of restrictions, including those imposed by statute and regulation, duties of care owed by an employer to an employee pursuant to a contract of employment or tort, the principles of natural justice, common law interpretation of all these, and fairness generally. This right is further subject to any specific terms of the applicable contract of employment.

188. Where an employer is found to have taken any such management action contrary to one or more such restrictions, the employer must prove on the balance of probabilities that such action was nevertheless reasonable and/or carried out in a reasonable manner, in those circumstances.

Natural Justice/Procedural Fairness/Fairness

189. In *Kaefer Integrated Services Pty Ltd v Spohn & Ors* [2022] NTSC 45 at paragraph [45] Justice Brownhill recently reiterated some well-known principles of procedural fairness as follows:

> *"[45] It is trite that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case, and the statutory framework within which a decision maker exercises the statutory power; procedural fairness is essentially practical in that the concern of the law is to avoid practical injustice; that notice and an opportunity to be heard before a decision is made are generally regarded as fundamental; and that the purpose of notice is to enable participation in whatever manner is appropriate in the particular circumstances of the case."*

190. I am satisfied and I find that in this matter the Employer gave the Worker neither notice nor the opportunity to be heard in respect of the management decision made on 23 May 2019.

191. In evidence before the Court at Trial Book 5 at pages 1770A and 1770B was NT Public Service Employment Instruction Number 3, issued by the Commissioner for Public Employment. This Instruction is in the following terms:

2. Natural Justice

"2.1. A person who may be adversely affected by an impending decision must be afforded natural justice before a final decision is made. This means that:

a) the person must be informed of any adverse information and other relevant information that may be taken into account by the decision maker;

b) the person must be given a reasonable opportunity to respond to the information including providing any evidence he or she wishes to include in the response;

c) the decision maker must impartially consider the employee's submissions, prior to making a decision; and

d) a decision maker must not have a personal interest in the outcome of a decision, and he or she must make the decision in a fair and considered manner, based on a consideration of all of the relevant information."

192. I am satisfied and I find that as at 23 May 2019 the Worker was a person who might be adversely affected by the impending decision of the Employer which was made on that date, within the meaning of Public Service Employment Instruction Number 3.

193. I am satisfied and I find that the Employer did not inform the Worker in advance of 23 May 2019 or at all, of any adverse information and other relevant information that was to be taken into account by the decision maker at the meeting on that date.

194. I am satisfied and I find that the Employer did not give the Worker a reasonable opportunity to respond to the information that was taken into account at the meeting on 23 May 2019 in arriving at its decision on that date.

195. I am satisfied and I find that the Employer did not invite and did not receive any submissions by or on behalf of the Worker prior to arriving at the decision made on 23 May 2019, and therefore did not impartially consider any such submissions.

196. In *Commissioner of Police v Minahan* [2003] NSWCA 239 the New South Wales Court of Appeal considered the reasonableness of an employer's action under the equivalent New South Wales workers' compensation legislation. It said as follows:

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

197. I have earlier in these Reasons found that the Worker was first informed of the decision to subject him to the PIP process only on 9 August 2019, some 2.5 months

after that decision was taken on 23 May 2019. This was by email without any detail of the process. He was first provided with the PIP documentation only on 2 October 2019, some 4.25 months after the decision was taken. Expert witness Kay Densley gave the following evidence in chief before the Court in relation to the Worker's lack of knowledge of the decision to commence the PIP process:

> *"You can't have a PIP or any form of performance management for that matter, with only one side of the table knowing that you're having one. Any employee would jump to attention at the mention of a PIP even as a possibility. As I said above, this is a black mark that an employee would want to avoid at all costs and it is also a sign that termination of employment is not far off. It would be unreasonable for an employee to plan a PIP but not inform the employee until months afterwards."*

198. I am satisfied and I find that the Employer did not comply with Public Service Employment Instruction Number 3 specifically, and further, that it did not afford the Worker natural justice/procedural fairness or fairness generally, in arriving at its decision on 23 May 2019 to commence the PIP process likely to lead to the termination of the Worker's employment with the Employer, and in its decision to delay informing the Worker of that PIP process.

199. For these reasons I am satisfied and I find that both the decisions of the Employer referred to in the preceding paragraph were management actions within the meaning of the Act which were not taken in a reasonable manner by the Employer.

200. Additionally, the onus is on the Employer to establish that either or both of these management actions were taken on reasonable grounds. The Court has not been made aware of the grounds for the decision of 23 May 2019. The Employer has not provided any adequate documentation or explanation for this decision or its basis as at that date. It has failed to discharge this onus.

201. For this reason I cannot be satisfied that the management action of 23 May 2019 was taken on reasonable grounds.

202. This initial management action of the Employer in arriving at the decision on 23 May 2019 to commence the PIP process in respect of the Worker as soon as possible, including instructing relevant staff to compile the Worker's performance records over all or much of his employment with the Employer including prior to his return to work on 4 March 2019 for use in that process, cannot in the absence of explanation be separated from the subsequent management action whereby the Worker was only belatedly informed that he was to be subject to the PIP process. This subsequent management action must be considered in the light of the Employer's having already made up its mind in the initial management action to commence the process to terminate the Worker's employment. This had the effect that all subsequent day-to-day management of the Worker in the employment up to and including the subsequent management action must be seen in that light. I am not satisfied it was taken on "*reasonable grounds*" within the meaning of subsection 3A(2)(a) of the Act.

Employer's Knowledge of the Worker's Mental Health Issues

203. I have found earlier in these Reasons that the Employer was aware when the Worker took 17 months' leave from early October 2017 to 4 March 2019 that he had a medical history of stress-related presentations to GPs and related absences from the employment over a number of years, culminating in that long leave from the employment ("the mental health issues") – paragraph 63. I have cited in paragraph 59. of these Reasons the observation by the Administrative Appeals Tribunal in *McGee v Comcare* as follows:

> "*Reasonableness must be assessed against what is known at the time without the benefit of hindsight, taking into account the attributes and circumstances, including the emotional state of the employee concerned."*

204. The mental health issues were part of such "*attributes and circumstances, including the emotional state of the employee"* of the Worker as known to the Employer.

205. While the Employer was entitled to expect that the Worker was medically fit to return to work when he did so on 4 March 2019, it could not simply on that basis ignore the mental health issues known to it in its subsequent dealings with him. The Employer owed the Worker a duty of care to avoid a foreseeable risk of harm to him, provided that the risk was not far-fetched or fanciful – *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47- 48, recently cited in *Kozarov v State of Victoria* [2022] HCA 12 at paragraph 67, per Gordon and Steward JJ.

206. I find that the prior history of the mental health issues meant that the risk to the Worker of once again developing a mental injury associated with the employment was neither far-fetched nor fanciful.

207. I rule that the Employer therefore owed the Worker a duty of care in the employment specifically to avoid the foreseeable risk of mental injury. It owed the Worker a duty to provide him with a safe system of work in these circumstances. In its subsequent dealings with the Worker the Employer should have taken the mental health issues appropriately into account.

208. The Employer should have taken the mental health issues into account when it decided on and implemented the management action of subjecting the Worker to closer than usual supervision and scrutiny in the employment from about 4 June 2019. I am satisfied and I find that it was reasonably foreseeable by the Employer that subjecting the Worker with his history of the mental health issues to this management action would expose him to the risk of further mental injury.

209. The Employer has not discharged its onus to prove that it took the mental health issues into account, appropriately or at all, when deciding on and implementing this management action.

210. I find that the management action of the Employer in subjecting the Worker to closer than usual supervision and scrutiny was not taken in a reasonable manner.

211. In the same way, I am satisfied and I find that it was reasonably foreseeable by the Employer that subjecting the Worker with his history of the mental health issues to the management action of only belatedly informing him of the PIP process and then commencing to implement that process, on 9 August and 2 October 2019 respectively, would expose him to the risk of further mental injury when coupled with the foreseeable effects of the prior management process of subjecting him to closer than usual scrutiny and supervision in the employment.

212. The Employer has not discharged its onus to show that it took the mental health issues into account, appropriately or at all, when deciding on and/or informing the Worker of and/or implementing the management action of informing the Worker of the PIP process in these circumstances.

213. I find that the management action of the Employer in subjecting the Worker to the PIP process without initially affording him procedural fairness and subsequently without taking the mental health issues into account in informing him of and implementing that process, was not taken in a reasonable manner.

CONCLUSIONS

214. I have found earlier in these Reasons that the Employer's management actions of subjecting the Worker to closer than usual supervision and scrutiny, and the notification and manner of notification to him of the PIP process, individually and together provided the factual bases for the Worker to develop a perception of a hostile working environment. I have found that each of these management actions contributed to the injury. I have found that the injury arose out of and in the course of the employment.

215. I have found that on his return to work on 4 March 2019 the Worker's health had recovered and he was not then suffering from any mental injury – paragraph 123.

216. There is no evidence before me of any other contribution to the injury.

217. I have found that the Employer has failed to discharge its onus to prove that the management action of subjecting the Worker to closer than usual scrutiny and supervision was taken in a reasonable manner.

218. I have found that the Employer has failed to discharge its onus to prove that its decision on 23 May 2019 to subject the Worker to the PIP process was taken on reasonable grounds or that it was taken in a reasonable manner.

219. I have found that the Employer has failed to discharge its onus to prove that its subsequent management actions in belatedly informing the Worker of and then implementing the PIP process in these circumstances were taken in a reasonable manner.

220. Accordingly, the Employer's reliance on the defence in subsection 3A(2)(a) of the Act is not made out.

COSTS

221. The Employer has been wholly unsuccessful in these proceedings. Costs will follow the event.

ORDERS

1. The Employer pay the Worker arrears of weekly benefits in accordance with the Act from and including 10 February 2020 to the date of these Reasons.

2. The Employer pay the Worker weekly benefits from the day after the date of these Reasons and continuing in accordance with the Act.

3. The Employer pay the Worker interest pursuant to section 89 of the Act in accordance with regulation 14 of the *Workers Rehabilitation and Compensation Regulations* calculated from and including 17 February 2020 to the date of the Worker's receipt of payment of the arrears of weekly benefits.

4. The Employer pay to or on behalf of the Worker medical and like expenses pursuant to section 73 of the Act which have been incurred as a consequence of the injury between 10 February 2020 and the date of these Reasons and which have not yet been paid.

5. The Employer pay to or on behalf of the Worker medical and like expenses pursuant to section 73 of the Act which are incurred as a consequence of the injury from the day after the date of these Reasons and continuing, in accordance with the Act.

6. The Employer pay the Worker's costs of and incidental to these proceedings, including the costs of and incidental to the mediation process before litigation was commenced, to be taxed in default of agreement at 100% of the Supreme Court scale, certified fit for senior junior counsel including their attendance at all Directions Hearings and interlocutory applications after the proceedings were listed for hearing.

Dated this 29th day of June 2022

THE LOCAL COURT OF THE NORTHERN TERRITORY

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John Neill
Acting Work Health Court Judge