CITATION: *Andreasen v ABT (NT) PTY LTD [2015] NTMC 026*

PARTIES:	ELSE ANDREASEN
	V
	ABT (NT) PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	21450157
DELIVERED ON:	2 DECEMBER 2015
DELIVERED AT:	DARWIN
HEARING DATE(s):	4 & 5 AUGUST 2015
JUDGMENT OF:	ARMITAGE SM

CATCHWORDS:
WORK HEALTH – extension of time – other reasonable cause - mental injury – recurrence or aggravation- reasonable administrative action – onus of proof

Workers Rehabilitation and Compensation Act (NT) s3(1), s104(3), s104(4)

Rivard v Northern Territory (1990) 150 FLR 33, *Miller v ABC Marketing and Sales Pty Ltd* (2012) 31 NTLR 97 applied
Corbett v Northern Territory [2015] NTSC 45, Swanson v Northern Territory (2006) 204 FLR 392, Barnett v Northern Territory [2010] NTMC 70, *Tracey Village Sports & Social Club v Walker* (1992) 111 FLR 32, followed
Wattyl Australia Pty Ltd v Barry Robin York No 198 of 1996 Supreme Court NT unreported, *Commonwealth Bank of Australia v Reeve & Anor* (2012) 199 FCR 463, *Reynolds v Don Kyatt Spare Parts Pty Ltd* 21232333 unreported Work Health Court 11 March 2013, *McGrath & Anor v Sydney Water Corporation t/as Sydney Water* [2013] FWA 793, considered

REPRESENTATION:
Counsel:

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Employer:	Mr Wade Roper

Solicitors:

Worker:	Davison Legal
Employer:	Hunt & Hunt
Judgment category classification:	B
Judgment ID number:	026
Number of paragraphs:	79

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

No. 21450157

BETWEEN:

ELSE ANDREASEN Worker

AND:

ABT (NT) PTY LTD Employer

REASONS FOR JUDGMENT
(Delivered 2 December 2015)

Ms Armitage SM:

Introduction

1. The Worker, Ms Else Andreasen, commenced work with the Employer, ABT (NT) Pty Ltd, in September 2009. She was employed as a manager of a service station.

2. In about March 2011 Ms Andreasen commenced managing a service station at Palmerston. In that role she said she was bullied by her supervisor and was unsupported when dealing with a difficult member of staff. Ms Andreasen was hospitalised for an unrelated illness in June 2012. Ms Andreasen claimed that on returning to work she was moved to the Coolalinga service station. Although she was on the same pay, she said she was effectively demoted to second-in-charge. She felt humiliated and undervalued. Ms Andreasen claimed that on or about 21 August 2012 she broke down and suffered a mental injury (stress, anxiety and depression diagnosed as an adjustment disorder). She said she broke down because of her work (the First Injury). Ms Andreasen lodged a claim for compensation for the First Injury on 23 August 2012 (the First Claim). That claim was denied but settled through mediation.

3. Ms Andreasen participated in a return to work program which was completed on about 8 April 2013. She then continued on her same (manager's) pay and conditions but in the role of second-in-charge at Coolalinga. Apparently there were some staff

complaints about her and on 23 June 2014 the Employer gave Ms Andreasen a letter of suspension[1]. On or about the same day, namely 23 June 2014, Ms Andreasen claimed she suffered a further mental injury (stress, anxiety, depression, agoraphobia) and/or a recurrence or aggravation of the First Injury (the Second Injury). Ms Andreasen lodged a claim for compensation for the Second Injury on 17 July 2014 (the Second Claim). On 29 July 2014 the Employer denied the Second Claim and subsequent mediation was unsuccessful.

4. On 30 October 2014 Ms Andreasen commenced these proceedings in respect of the First and Second Claims. Proceedings in respect of the First Claim were commenced out-of-time[2] but Ms Andreasen claimed she had "reasonable cause"[3] for the delay and sought an extension of time.

5. The Employer denied the First Claim on the following grounds, namely, that:

(i) Ms Andreasen did not suffer the First Injury, but if she did,
(ii) The First Injury did not arise out of or in the course of Ms Andreasen's employment, or alternatively,
(iii) The First Injury arose from reasonable administrative action, and finally,
(iv) Ms Andreasen had no reasonable cause for commencing proceedings out of time.

6. The Employer denied the Second Claim on the following grounds, namely, that:

(i) Ms Andreasen did not suffer the Second Injury, but if she did,
(ii) The Second Injury was not a recurrence or aggravation of the First Injury, and
(iii) The Second Injury arose from reasonable administrative action.

7. There was a further dispute between the parties as to who bore the onus of proof on the question of reasonable administrative action.

8. The principle issues in the proceedings were:

(i) As to the First Claim:
  (a) Did Ms Andreason suffer the First Injury? If so,
  (b) Did it arise out of or during the course of her employment? If so,
  (c) Who bore the onus and burden of proof as to the question of reasonable administrative action?
  (d) Was the First Injury caused wholly or primarily by reasonable administrative action?
  (e) Did Ms Andreasen have reasonable cause for commencing proceedings out of time?

(ii) As to the Second Claim:

(a) Did Ms Andreasen suffer the Second Injury? If so,
(b) Did it arise out of or during the course of her employment? If so,
(c) Was it a recurrence or aggravation of the First Injury?
(d) Was it caused wholly or primarily by reasonable administrative action?

Did Ms Andreasen suffer the First Injury? If so, did it arise from her employment?

9. It was not in dispute that the worker bears the burden of proof in respect of the existence of a mental injury under the *Workers Rehabilitation and Compensation Act* (the Act)[4].

10. Ms Andreasen gave evidence. She said that from about March 2011 she was employed as the manager of the Caltex Service Station, Palmerston[5]. While in that position Ms Andreasen said she was bullied by her boss Mr Brendan Walkley and she experienced difficulties managing her second-in-charge, Mr JW. Ms Andreasen said these difficulties were raised with Mr Brendan Walkley but they were not adequately addressed.

11. Concerning the bullying by Mr Brendan Walkley; Ms Andreasen said he screamed at her, shouted at her and swore at her. She said on occasions Mr Brendan Walkley would ask for her opinion then accuse her of "trying to run my business". Ms Andreasen said "I tolerated his mannerisms because he was my boss. I tolerated everything he dished out."

12. Concerning Mr JW; Ms Andreasen said that he didn't like taking instructions, she gave him warnings, and reported him to the owners. The owners spoke to Mr JW and he promised to behave but he didn't.

13. As a result of these working conditions Ms Andreasen said she felt small and uncomfortable but went to work each day. She was stressed, not sleeping well and her appetite was up and down.

14. In May or June 2012 Mr JW resigned[6].

15. In mid –late June 2012 Ms Andreasen contracted a viral infection resulting in her hospitalisation. While on sick leave Ms Andreasen was told by another supervisor, Mr Chris Keating, that she had been transferred to Caltex Coolalinga. Although she was to be transferred on the same pay and conditions, Ms Andreasen was told that she would be second-in-charge[7]. Ms Andreasen said "I needed a job so I accepted it".

16. On returning to work Ms Andreasen said she found working at Coolalinga under the manager, Ms Cathy McKay, stressful. Ms Andreasen was working on the counter and not continuing with her previous level of responsibilities which had included stock ordering. When there were ordering requests she said she had to refer them to Ms Cathy McKay. She said customers asked her if "she had been a bad girl". Ms Andreasen said she felt humiliated, anxious and stressed by the change in her responsibilities, which felt like a demotion. Ms Andreasen said she "couldn't breathe" and was not sleeping very well.

17. In August 2012 Ms Andreasen said Ms McKay made a mistake with the rosters. Ms Andreasen said she was rostered to work mornings but received a phone call from Ms Cathy McKay and was directed to work afternoons. Ms Andreasen was upset because she was not requested to change her times (but directed to do so) and because Ms Cathy McKay did not acknowledge her rostering mistake. Ms Andreasen said following this phone call she had a breakdown. She cried and felt humiliated and disrespected.

18. Ms Andreasen said the next morning she had a hospital appointment for her viral infection but while there she broke down and was referred to the Casuarina Medical Clinic.

19. Ms Andreasen obtained a medical certificate which she provided to the personnel officer, Ms Janice English[8]. She spoke to Ms Janice English and Ms Janice English made notes of Ms Andreasen's complaints and emotional state[9]. Ms Janice English's notes were largely consistent with Ms Andreasen's evidence. Ms Andreasen lodged a worker's compensation form[10], which again was largely consistent with her evidence.

20. On 24 August 2012 Dr Satbir Aulakh provided the first worker's compensation medical certificate. On examination Dr Aulakh noted that Ms Andreasen was "stressed, very teary, not sleeping well and suffering anxiety". As to the cause Dr Aulakh noted, "She has been screamed and swore at by one particular person over the past few months. She has lost her position and made to feel humiliated at various times. On 21/8/12 she broke down and couldn't tolerate any longer". Dr Aulakh diagnosed "adjustment disorder due to workplace bullying", complicated by insomnia. In his opinion the injury was "consistent with the stated cause". Dr Aulakh referred Ms Andreasen for counselling with psychologist Mr Phuong Tu Prowse.

21. Medical certificates and psychological reports consistent with the history were thereafter obtained by Ms Andreasen and provided to the Employer[11]. In his letter of 17 September 2012 Mr Prowse described Ms Andreasen as "currently experiencing high levels of anxiety, depression and stress"[12]. In his report of 26 August 2012[13] Mr Prowse provided a diagnosis of Major depressive order single episode, severe without psychotic features and acute stress disorder.

22. The First Claim was denied by the employer and the matter proceeded to mediation. Although the employer's insurer continued to deny liability, the insurer agreed to pay Ms Andreasen's wages and medical expenses while she underwent a return to work program[14].

23. The return to work program was completed by 8 April 2013. During the course of the program Ms Andreasen returned to the Coolalinga service station as second-in-charge (but on her manager's salary) and gradually increased her hours to full time.

24. Both Ms Andreasen and Mr Prowse were cross examined. In my view, neither made any significant concessions concerning their evidence. The employer called no evidence but submitted I should carefully consider what weight should be attributed to the worker's evidence. The employer noted that between March 2011 and August 2012 Ms Andreasen had not reported her symptoms to the employer or sought medical assistance for her symptoms. Further the employer noted that Mr Prowse's opinions were based on his uncritical acceptance of Ms Andreasen's self-reported symptoms.

25. In *Wattyl Australia Pty Ltd v Barry Robin York*[15], an unreported appeal from the Work Health Court, Angel J considered a work related stress claim. In the third last paragraph of that decision he noted,

> It is not, as has been pointed out in the authorities, necessary to establish fault on the part of the employer or any unusual stress or factor or special circumstance in the employment itself, see eg *West Coast v ACT* (1987) 17 FCR 235 at 240. In the present case the respondent had satisfied the learned Magistrate more than simply that the employment was the background in which the development of the respondent's depression took place, ie, more than employment was simply an inert factor… The learned Magistrate… was not bound.. to isolate causes when on the evidence, as the learned Magistrate said, no single factor was causative…I agree with the learned Magistrate that as the evidence discloses it was the respondent's whole work situation which caused the breakdown…and which led to him being unfit for work…

26. Whilst I accept that there is not a lot of detailed evidence about the circumstances of Ms Andreasen's employment or the specific occasions giving rise to her anxiety and stress, the evidence she gave about her work and it being the cause of her mental injury was largely uncontested and uncontradicted. In addition her evidence remained consistent over time and was supported by medical opinion. In those circumstances I have little difficulty accepting her evidence that her work was stressful and that it was that work stress which resulted in her seeking medical assistance, being declared unfit for work and being diagnosed with either an adjustment disorder with insomnia or a single episode of severe depression and acute stress disorder. On the evidence it is not possible for me to resolve which is the correct diagnosis but both diagnoses are consistent with Ms Andreasen suffering a mental injury resulting in at least a temporary incapacity for work. Accordingly I am satisfied that Ms Andreasen did suffer the First Injury. I am also satisfied the First Injury arose out of or in the course of her employment.

Who bore the onus and burden of proof as to the question of reasonable administrative action?

27. A compensable injury does not include an injury suffered by a worker as a result of reasonable administrative action taken in connection with the worker's employment[16].

28. On the issue of "reasonable administrative action" a matter of significant contention between the parties was the question of who bore the onus of proof. The employer argued I should follow a line of persuasive South Australian authorities which establish, in the context of the South Australian legislation, that the onus remained on the worker throughout. The employer made the following submissions[17]:

> 4) The Worker carries the burden of proof in respect of the existence of an injury, compensable under the Worker's Rehabilitation and Compensation Act.
> 5) The Worker must demonstrate both the existence of an injury arising out of or in the course of her employment[18] and that the same is "productive of financial loss"[19].
> 6) An injury is relevantly defined in the Act as follows.
> "**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. (emphasis added)

7) The Worker's burden extends to negativing the exceptions emphasised above[20].
8) The comments by the learned Chief Magistrate in Barnett v Northern Territory of Australia [2010] NTMC 70 at [11], delivered in seeming ignorance of the wealth of authority to the contrary, are, with the greatest respect, considerably suspect and ought not be followed.

29. The worker submitted that the South Australian authorities were neither binding nor persuasive on this issue. In support of its submissions the worker relied on:

(i) *Rivard v Northern Territory of Australia* (1999) 150 FLR 33 at [20] in which Priestly J noted differences in the structure and some wording as between the South Australian and Northern Territory legislation, such that he considered the South Australian authorities were not helpful in determining the proper construction of the Northern Territory legislation, and

(ii) *Miller v ABC Marketing and Sales Pty Ltd* (2012) 31 NTLR 97 at [21] in which Mildren J discussed from first principles the onus of proof in "avoidance" cases, That the matter of who bore the legal onus of proof must be derived from first principles. The general rule is that he who asserts must prove, and this usually means that there is an evidential as well as a legal onus on the same party. The rule was expressed by Walsh JA in *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125 thus:

> 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 in 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 claim, which, prima facie, the plaintiff has.

30. Although the employer sought to persuade me against the Chief Magistrate's reasoning in *Barnett*, I note that on the issue of the onus of proof the Chief Magistrate was applying the decision of Martin (BR) CJ in *Swanson v Northern Territory* (2006) 204 FLR 392 at 86[21]. In *Swanson* the Chief Justice held that the onus rested on the employer to prove that the injury suffered by the worker was as a result of reasonable administrative action taken in connection with the worker's employment. In my view

the decision in *Swanson* is a binding authority on this issue and is consistent with Mildren J's analysis in *Miller*.

31. In addition I note that shortly after submissions were made in this case, the decision of *Corbett v Northern Territory of Australia* [2015] NTSC 45 was published. In *Corbett* Barr J held at [5],

> Where the reasonable administrative action exclusion is relied on by an employer, **the employer must prove** that the relevant reasonable administrative action was the sole cause of the worker's injury. This proposition is established by the decision of the Court of appeal in *Rivard v Northern Territory* (1999) 150 FLR 33. (emphasis added)

32. Although Justice Barr expressed disagreement with some of the reasoning in *Rivard*, the parties in that case did not dispute, and Barr J did not disagree with, the onus falling on the employer. In any event, Barr J acknowledged that he was bound to apply *Rivard*.

33. I am persuaded that there is a line of binding authority on this issue in the Northern Territory[22]. The employer bears the onus of proof on the question of reasonable administrative action.

Was the First Injury caused wholly or substantially by reasonable administrative action?

34. What is meant by "reasonable administrative action" was considered in *Commonwealth Bank of Australia v Reeve & Anor* (2012) 199 FCR 463. In the context of the *Safety, Rehabilitation and Compensation Act* (Cth) (SRC Act), Gray J held at [33],

> …It is what is done with respect to the employment relationship that the particular employee has with the employer that is excluded from the definition of "injury", unless the action taken was not reasonable, or was not reasonably taken.

Rares and Tracey JJ held at [60]–[61],

> …the Parliament intended that the exclusory action be specific administrative action directed to the person's employment itself, as opposed to action forming part of the everyday duties or tasks that the employee performed in his or her employment or job…

> …Mr Reeve's employment included the tasks of attending the teleconferences and dealing with the consequences, results and outcomes of the customer surveys. Thus, the teleconferences, customer's surveys and their uses were not administrative action taken in respect of his employment – they were part and parcel of his employment.

35. In *Barnett v Northern Territory of Australia* [2010] NTMC 070, Dr Lowndes SM persuasively considered what was meant by "reasonable administrative action" in the Northern Territory Act and noted at [187]-[190],

> [187] Unlike the exclusionary provisions of the *Safety, Rehabilitation and Compensation Act (*Cth) there is no definition of reasonable administrative action under the Northern Territory Act. In the absence of a statutory definition, the following opinion expressed by the Chief Justice in *Summers* (1995) 65 SASR 243 provides some guidance as to the meaning of "administrative action":
>
> …I consider that the expression "administrative action" is probably intended to apply to decisions or actions by the employer which are in some way related to the workings or functioning of the work place rather than the actual tasks performed by the worker…
>
> [188] What is clear is that there is a wide range of actions taken by employers that are capable of being regarded as "administrative action": see *Re Steuregger* [2009] AATA 757.
>
> [189] Although s5A(2) of the Commonwealth Act provides some guidance as to the type of actions or conduct that might be regarded as "administrative action" it is important to note that at the Commonwealth level there is only one statutory exclusion – namely, "reasonable administrative action" – and the Commonwealth definition of "reasonable administrative action" includes actions or conduct that would be more appropriately regarded as falling within the other two exclusions in s 3 of the Northern Territory Act.
>
> [190] It is clear that bullying and harassment – however that might be defined – would not come within the "reasonable administrative action" exclusion.

36. In my view Ms Andreasen's mental injury arose from multifactorial causes which included: perceived bullying and harassment by Mr Brendan Walkley, the decision that she move to Coolalinga, her humiliation at her practical demotion to second-in charge, negative customer comments which Ms Andreasen perceived as relating to her practical demotion, and Ms Andreasen's reluctance to take instructions (particularly when she considered the instructions to be wrong).

37. I am of the view that the decision to move Ms Andreasen from Palmerston to Coolalinga was "administrative action" because it related to the employment

relationship or the functioning of the work place and not to the actual tasks performed by Ms Andreasen. However, Mr Brendan Walkley's behaviour, the practical demotion associated with the move, customer comments, and Ms Andreasen's difficulties in accepting instruction, were not "administrative action" because these matters were closely connected to the tasks or work undertaken by Ms Andreasen on a day to day basis as part and parcel of her job.

38. In *Corbett* Barr J followed the Court of Appeal decision in *Rivard* which established that where the reasonable administrative action exclusion is relied on, it must be the sole cause of the worker's injury. Although Barr J considered the decision incorrect on this point he noted at [7] that he was bound to follow it.

39. Applying *Rivard*, while I am satisfied that one causative component of the mental injury was administrative action (the move to Coolalinga), the administrative action was not the sole or primary cause of the mental injury. Each of the other identified causes played a not insignificant causative role. Accordingly, I am satisfied that the First Injury was not caused wholly or primarily by administrative action.

40. Giving my finding that the administrative action was not the primary cause of the mental injury, it was not necessary for me to determine whether the administrative action (the move to Coolalinga) was reasonable. I note, however, that reasons for the decision were provided in the employer's defence[23]. Had there been evidence consistent with those reasons I might have been persuaded that the decision was reasonable. However, the only evidence on this issue came from Ms Andreasen. She refuted the employer's proffered explanation for her move. Consequently, had it been necessary for me to determine the question of reasonableness, relying only on the evidence of Ms Andreasen, I would not have been satisfied that the decision to move Ms Andreasen was reasonable.

Did Ms Andreasen have reasonable cause for commencing proceedings out of time?

41. Ms Andreasen notified her employer of the First Injury on 23 August 2012. The employer deferred its decision as to liability and then on 3 October 2012 denied liability. The matter went to mediation and a Certificate of Mediation was issued on 8 November 2012. Ms Andreasen made her First Claim for compensation on 20 February

2015, well outside the 28 days of receiving the Certificate of Mediation, required by s 104(3) of the Act. However, Ms Andreasen submits that this delay is not a bar to the proceedings because the delay fell within one of the grounds specified in s 104(4) of the Act, namely "other reasonable cause". Accordingly, Ms Andreasen seeks an order in respect of the First Claim extending the time in which she could make the claim.

42. The excuse of "other reasonable cause" was considered in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at p41 by Mildren J:

> The test of reasonableness, it is to be noted, is an objective one. In *Commonwealth v Connors* Northrop and Ryan said:
>
> As was said by the court in *Black v City of South Melbourne* when considering "reasonable cause", the inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression "reasonable cause" appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable. In *Quinliven v Portland Harbour Trust* Scholl J used these words: "the sub-section means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of things which might be expected to delay the giving of notice by a reasonable man.

43. In *Reynolds v Don Kyatt Spare Parts Pty Ltd*, 21232333 of the Work Health Court at Darwin, 11 March 2013 at [40], Dr Lowndes considered the effect of Riley J's decision in *Van Dongen v NTA* [2005] NTCA 6. Summarising that decision Dr Lowndes said:

> His Honour also affirmed that each case must be assessed upon its own facts and circumstances, and the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the claimant must be considered in order to determine whether reasonable cause is established. It is a question of determining whether a claimant's conduct was conduct which a reasonable man would consider properly sensible in the circumstances, and sufficient to amount to a cause for his or her failure to do what was required, as was consistent with a reasonable standard of conduct.

44. In my view it is well settled that the relevant period in which to enquire as to "reasonable cause" is limited to the 28 day period provided for in Act[24].

45. The attempt at mediation was unsuccessful because the employer's insurer continued to deny liability for the claim. However, on a "without prejudice" basis the insurer relevantly agreed to,

1. Continue to pay wages while the claimant undergoes a return to work program

2. Arrange for a return to work plan for the claimant

3. Pay medical expenses for the complainant to continue seeing the psychologist

4. ..[25]

46. It is not disputed that during the 28 day period following mediation Ms Andreasen had her wages and medical bills paid and she participated in the return to work program. Her psychologist, Mr Prowse, reported that prior to her injury Ms Andreasen was functioning at a high level. He considered that psychological support, a clear return to work plan and a supportive workplace "would contribute significantly to an improved mental health outcome for Ms Andreasen instead of regression in her mental health"[26]. He noted that Ms Andreasen was "very motivated to return to work" and "was confident she can return to work".

47. Ms Andreasen was declared fit for full time employment on 8 April 2013[27].

48. In *Barnett,* when considering whether reasonable cause for delay had been established, Dr Lowndes noted at [98],

> ..I draw comfort from the fact that in *Re Brady and Australian National Railways Commission* (1987) 13 ALD187 at 191 the Tribunal held that the applicant had reasonable cause for failing to make a claim within 6 months of his injury because sick pay paid to him was more than compensation and he hoped to get back to work

49. Ms Andreasen immediately notified her employer of her injury. Although the employer's insurer denied the injury and liability for it, all practical and financial aspects of Ms Andreasen's claim were met by the insurer. A return to work program was implemented and Ms Andreasen engaged with and completed the program. Ms Andreasen was confident that she could return to work successfully and, indeed, appeared to do so. Throughout the relevant period, Ms Andreasen was not legally represented. I am satisfied that these combined circumstances provide a reasonable cause to explain Ms Andreasen's failure to make the First Claim within the required 28 day period.

Did Ms Andreasen suffer the Second Injury?

Did it arise out of or during the course of her employment?

50. After the First Injury, Ms Andreasen returned to full-time work in accordance with an agreed three month Return to Work Plan[28]. Ms Andreasen was declared fit for full time employment on 8 April 2013[29]. She continued to work thereafter apparently without significant complaint to her employer or any incapacity.

51. On 23 June 2014 Ms Lisa Schwinghammer attended the service station. Ms Schwinghammer took Ms Andreasen into a store room and gave her a letter of suspension[30]. Ms Andreasen said she was told to leave the premises in a loud voice and two other staff were nearby (Ms Becky Smith and Ms Hodge). Ms Andreasen said she was not told why she was being suspended and had not received any warnings.

52. The next day Ms Andreasen phoned Ms Schwinghammer and sought further information about her suspension and alleged misconduct. No further details were provided. Ms Andreasen then went on stress leave[31].

53. On being suspended Ms Andreasen said she was upset and emotional and "it all came flooding back". She said "that was the drop that made the cart flow over". Ms Andreasen said she didn't sleep, she was churning over what the allegation was and what was going to happen. Ms Andreasen said she couldn't see people, talk to the staff or go to the service station "because everyone knew about this". She said she commenced medication to help her sleep but that it didn't really work.

54. Following a medical examination on 15 July 2014, Dr Sunjaya Muhandiram provided the First Worker's Compensation Medical Certificate[32]. In the certificate the date of injury was identified as 23 June 2014. The worker's description of injury was noted as "work place harassment, humiliating in front of other workers, intimidating, threatening behaviour toward her". On examination Ms Andreasen was noted to be "emotionally distress, anxious+++". The diagnosis was "emotionally distress due to alleged workplace harassment" complicated by "anxiety, depression". It was the doctor's opinion that the diagnosis was consistent with the stated cause and he declared Ms Andreasen totally unfit for work.

55. A worker's compensation claim form was lodged on 17 July 2014[33] and its contents were consistent with the First Worker's Compensation Medical Certificate. Later medical certificates contained a diagnosis of "work related stress, anxiety, depression, agoraphobia" and treatment as "valdoxin, counselling"[34].

56. Ms Andreasen was referred back to Mr Prowse and saw him ten times between 21 August 2014 and 26 February 2015. Mr Prowse provided a psychological assessment and evaluation report dated 23 March 2015[35]. In the report he noted that he had previously seen Ms Andreasen in 2012 and 2013 and stated,

> She was rehabilitated on 8/4/13 and returned back to her workplace with set plans of continued monitoring of a safe return to work by her case worker at QBE. Ms Andreasen re-engaged after a workplace allegation of reported stealing of food on 21/8/14.

Concerning the later ten sessions Mr Prowse said,

> ..her mood states were ranging from extremely severe to moderate levels of psychological distress..
>
> ..was often distracted by ruminations and hopelessness as a result of her alleged workplace allegations of stealing

Mr Prowse reported that he had conducted psychological testing which revealed Ms Andreasen was suffering from moderate to severe levels of anxiety, stress and depression and moderate levels of clinical hopelessness.

57. Mr Prowse provided a further report dated 6 June 2015[36]. Mr Prowse considered that Ms Andreasen's symptoms met the DSM-5 diagnosis of adjustment disorder with mixed anxiety and depressive symptoms. He noted that Ms Andreasen reported her symptoms were the direct result of the "recent events of termination and history of alleged workplace bullying". Mr Prowse said,

> As result of recent alleged workplace incident and dismissal, Ms Andreasen reported that her increased levels of anxiety and worries have been exacerbated directly by the workplace incident. Her rumination and worries has affected her daily functioning where Ms Andreasen reports difficulties undertake previous daily activities that requires her leaving her home…
>
> Ms Andreasen was allowed by her workplace two additional psychological sessions to integrate her back into the workplace in 2013. At the time she was positive and optimistic of her return to work. Her symptoms at last scheduled session on 8/4/2013 were in normal ranges…Ms Andreasen did not seek psychological session until when she re-engaged on 24/8/2014 as a result of alleged theft. I cannot

comment on her mental state following the return workplace after 2013 as she had ceased treatment.

I cannot comment as to whether this recent allegation is a contributing factor to previous alleged workplace bullying of 2012. Ms Andreasen did not engage in treatment from 8/4/2013 to 21/8/2014, hence a clinical assessment and comparison cannot be made. Nevertheless, Ms Andreasen re-engaged after a workplace allegation of reported stealing of food on 21/8/2014. **Her presenting psychological symptoms are the result of recent alleged theft resulting in a reported dismissal.**

Ms Andreasen would benefit from a staged plan return to work. **Her current psychological symptoms are the result of the reported workplace allegations of stealing**..

From my clinical opinion Ms Andreasen's prognosis is positive..(emphasis added)

58. I note that Mr Prowse refers to Ms Andreasen's "termination" and "dismissal" when in fact Ms Andreasen was "suspended". I have considered whether this is significant and whether it ought to affect the weight which is given to Mr Prowse's opinion. Although the incident described by Ms Andreasen involved a suspension, it was in my view couched in terms suggestive of a real threat of termination. In addition I note that Ms Andreasen had not returned to work. In those circumstances I do not consider that Ms Andreasen's incorrect terminology created any significant misunderstanding as to the circumstances of the work place incident described by her and considered by Mr Prowse. Overall I am satisfied that the mis-description does not affect the weight that should be given to Mr Prowse's opinion.

59. As noted earlier, Mr Prowse gave evidence and was cross-examined. As to his opinion that Ms Andreasen was suffering from an adjustment disorder he acknowledged that he relied on both what was reported to him by Ms Andreasen, and his testing (using what I understand to be psychometric assessment tools widely considered to be reliable and valid). He said he accepted what Ms Andreasen told him and it was not his role to interrogate her. However, I also note that cross examination did not highlight any inconsistencies between Mr Prowse's clinical observations and Ms Andreasen's self-reports. He agreed that a diagnosis of adjustment disorder required marked distress out of proportion with the stressor, and significant impairment in social, occupational or other important areas of functioning. By his evidence I understood that he was satisfied that his testing of Ms Andreasen demonstrated, inter alia, depression and anxiety into the severe range. I understood that it was his assessment that these levels were disproportionate to the work stressor described by Ms

Andreasen. I also understood that Mr Prowse was also satisfied that Ms Andreasen had suffered significant impairment in functioning, and in particular he noted her difficulty leaving home. I note this identified impairment in functioning is consistent with the medial certificates documenting, inter alia, agoraphobia.

60. Dr Muhandiram provided a medical opinion dated 11 June 2015[37]. It was his opinion that Ms Andreasen was suffering from "anxiety stress and symptoms of depression". He thought causes for her condition "could be multifactorial" but "could be related to workplace incidents. The allegation of theft could be a contributing factor for her current symptoms." Dr Muhandiram considered that Ms Andreasen was not physically unfit for work, "however psychological opinion would be useful to determine the suitability of return to any capacity of work". Dr Muhandiram did not give evidence and was not cross-examined. While Dr Muhandiram's report was not highly persuasive, it lent some support to Mr Prowse's opinion that Ms Andreasen was suffering moderate to severe levels of stress, anxiety and depression.

61. In my view, under cross examination no significant concessions were obtained from either Ms Andreasen or Mr Prowse.

62. From 23 June 2014[38] through to 10 December 2014[39] Dr Muhandiram declared Ms Andreasen unfit for work with a diagnosis of stress, anxiety and depression. Mr Prowse saw Ms Andreasen for 10 treatment sessions and he considered her symptoms met the diagnosis of adjustment disorder with mixed anxiety and depressive symptoms. Although the diagnoses of Dr Muhandiram and Mr Prowse were not exactly the same, they each independently identified that Ms Andreasen was suffering from anxiety and depression. Ms Andreasen gave evidence that her distressed state was because of work and Mr Prowse accepted this explanation. No other causes of her stress, anxiety, or depressive symptoms was suggested on the evidence. Accordingly, on that evidence before me, I am satisfied that Ms Andreasen did suffer the Second Injury and that it arose out of or during the course of her employment.

Was the Second Injury a further mental injury or a recurrence or aggravation of the First Injury?

63. It was pleaded by Ms Andreasen that the Second Injury was a "further mental injury and/or a recurrence of aggravation of the First Injury". The employer submitted that the First Injury had resolved and if there was a Second Injury it was not a recurrence or aggravation of the First Injury.

64. Ms Andreasen returned to work in accordance with an agreed three month Return to Work Plan[40]. It was clearly agreed that Ms Andreasen was to return as second in charge of the Coolalinga service station but on a manager's pay. Occupational therapist and rehabilitation consultant, Ms De Grandi, was to monitor Ms Andreasen's return to work "via weekly telephone contact and/or worksite reviews as required" and Ms Andreasen was to "report any difficulties, issues or concerns with her work duties and/or physical status to her Employer or APM (Advanced Personnel Management)". Ms Andreasen did not raise any "difficulties, issues or concerns" with Ms De Grandi.

65. In accordance with the return to work plan, Mr Prowse saw Ms Andreasen on three occasions and provided update reports. On 17 January 2013 Mr Prowse reported that Ms Andreasen's "distress is still high"[41]. On 8 February 2013 Mr Prowse reported concern about Ms Andreasen's anxiety and stress levels but noted that her "depression and hopelessness feelings have improved". In addition he noted Ms Andreasen felt isolated from her colleagues and felt they did not assist her when she needed assistance[42]. On 8 April 2013 Mr Prowse conducted psychological testing which placed Ms Andreasen in the normal – low range for depression, anxiety and hopelessness. Dr Prowse reported,

> …last session is today…although Ms Andreasen's full work status as manager is not fully reinstated (currently working as a 2OIC) she is happy with her progress and work duties.
>
> …
>
> Ms Andreasen reports that she is now a stronger person and is able to face challenging situations at work. She has learnt to recognise stressful situations and now does not fight other peoples' battles. Ms Andreasen is able to take good care of herself and is able to implement letting go and acceptance of situation. Ms Andreasen believes she will cope with her work situation even though things have not returned back to what they used to be. Ms Andreasen is very accepting of this and has learnt to "stay calm and not let things build up inside" of her. This attitude

towards work and skills learnt has assisted Mrs Andreasen to return to work safely[43].

66. As noted above, Ms Andreasen was declared fit for full time employment on 8 April 2013[44]. In his final medical certificate dated 8 April 2013 Dr Aulkah opined, "The worker has ceased to be incapacitated for work. The worker's incapacity is no longer the result of a work related injury. It is my opinion that the worker has fully recovered from this injury. Grounds for the opinions in medical assessment: Not stressed. Feels quite well"[45].

67. Ms Andreasen gave evidence about her return to work and working conditions thereafter. She said she spoke to Mr Chris Keating about Mr BW's outbursts. After the meeting she had less contact with Mr Brendan Walkley and "he was better".

68. Ms Andreasen said that she did not like the reduction in her responsibilities which made her feel "small and humiliated". In particular she complained that she: was not invited to a managers' Christmas function; was not doing "daily balancing", rosters or staff training; rarely assisted with stock orders, and for a long time she did not have keys to the office. She did "read the pumps at the end of the day". Ms Andreasen said on one occasion the manager, Ms Janice English, shouted at her because Ms Andreasen had given a direction to the cook.

69. Ms Andreasen said Ms Angela Hodge replaced Ms English as manager after Easter 2014. Ms Andreasen said she felt that Ms Hodge treated her like she didn't know anything and she felt demeaned. When asked to recall any specific issues with Ms Hodge, Ms Andreasen said there were "only small issues" such as disagreements about how to put stock away which had to be done "her (Ms Hodge's) way". Ms Andreasen recalled that she was also getting tired of "doing fridges". She had a meeting with Mr Keating, Mr Brendan Walkley and Ms Hodge and she was "straight away taken off fridge duties".

70. Ms Andreasen said after her return to work she still had some problems sleeping and with anxiety but was doing breathing exercises to cope. She said she did not seek further medical assistance or tell anyone about her issues and just "accepted it". There was no evidence before me of any incapacity for work during this 14 month period.

71. It was raised as a possibility on the evidence that perhaps Ms Andreasen was still suffering from an adjustment disorder during the period from her return to work until

23 June 2014. Mr Prowse confirmed that Ms Andreasen was functioning in the normal range when she returned to work in 2013 but he was unable to positively confirm whether Ms Andreasen's First Injury (diagnosed as an adjustment disorder by Dr Aulakh in 2012) had ever fully resolved because he did not continue to see her for long enough to confirm that she remained functioning in the normal range for a period of six months.

72. However, taking into account:

(i) Dr Aulakh's declaration on 8 April 2013 that Ms Andreasen had "fully recovered from this injury",
(ii) Mr Prowse's opinion concerning the Second Injury, namely that "her presenting psychological symptoms are the result of recent alleged theft resulting in a reported dismissal".
(iii) Ms Andreasen's own account which provided no evidence of any continuing significant impairment or incapacity, and
(iv) The lack of any medical opinion that Ms Andreasen was suffering from any continuing mental illness during the 14 months between the First and the Second Injury,

I am satisfied that the First Injury had fully resolved before the Second Injury, and the Second Injury was a further or distinct mental injury and not a recurrence or aggravation of the First.

Was the Second Injury caused wholly or primarily by reasonable administrative action?

73. The evidence establishes that the Second Injury occurred on 23 June 2014 when Ms Andreasen was handed a letter of suspension.

74. There was no real dispute between the parties that the letter of suspension was "administrative action" in the context of s 3(1) of the Act. The real issue between the parties was whether the action was "reasonable". As stated earlier, I am satisfied that the onus rested on the employer to prove the administrative action was reasonable.

75. In *Barnett* Dr Lowndes considered the test and relevant considerations to be applied in determining whether the administrative action was "reasonable". Although Dr Lowndes noted differences between the Commonwealth and Northern Territory legislation he did not consider the differences were material[46]. Applying *Gilbert v Comcare* [2009]

AATA 24 and *Re Inglis v Comcare* (AAT 12155, 27/8/1997), and extensively considering a number of other authorities, Dr Lowndes made the following persuasive observations:

[205]…it is now clear that determining whether the exclusionary provisions apply is an objective test…

[206] ..there were cases determined prior to the (Commonwealth) amendments that pointed to not only the need to look at the reasonableness of the disciplinary action itself, but also the reasonableness of the manner in which it was taken…

[207] In my opinion, the "reasonable disciplinary action" and "reasonable administrative action" exclusions contained in s 3 of the *Workers Rehabilitation and Compensation Act* are to be objectively tested. In applying the test it is necessary to look at the reasonableness of an employer's actions in all the circumstances. That requires not only an examination of the reasonableness per se of any administrative or disciplinary action taken by an employer, but also an examination of the reasonableness of the manner in which the action was taken or implemented.

[208] ….

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

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

Both of these further matters will be an inquiry of fact to be determined objectively. Whether the administrative action is reasonable is simply a matter of fact. Whether the administrative action was taken in a reasonable manner by the employer will depend upon the administrative action, the facts and circumstances giving rise to the requirement for the administrative action, the way in which the administrative action impacts upon the worker and the circumstances in which the administrative action was implemented and any other matters relevant to determining whether the administrative action was taken in a reasonable manner by the employer.

[216] In order to be reasonable, disciplinary action must be "relative or related to the conduct or behaviour giving rise to that action": see *Re Pandos v Commonwealth of Australia* (1991) 22 ALD 784 at 785…

[217]…

[218] In *Burner v Serco Australia* (J.D.39/1995) the Full bench of the Tribunal observed:

There is no doubt that the worker had the right to expect that he would be afforded natural justice in connection with the disciplinary proceedings. In general terms, we respectfully adopt the summary of natural justice provided…in *University of Samon v Fernando* (1960) 1 WLR 223 at 232:-

First I think that the person charged should know the nature of the accusation made; secondly, that he should be given the opportunity to state his case; and thirdly of course that the Tribunal should act in good faith…

[219] Hence, lack of procedural fairness in disciplinary action resulted in the action being held to be not reasonable in *Re Inglis v Comcare.*

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

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

[221] Whether or not particular administrative or disciplinary action on the part of an employer is reasonable will often come down to whether the worker has been afforded procedural fairness. The question that needs to be asked is whether the worker has been treated fairly in a manner which is regarded as procedurally correct.

[222]…

[224]…in *Wilson v Comcare* [2010] AATA 396 the Tribunal observed…that reasonable action does not have to be perfect provided that it was "tolerable and fair"…

76. As to what is required by procedural fairness, the worker referred me to the following observations in *McGrath and Anor v Sydney Water Corporation t/as Sydney Water* [2013] FWA 793, an unfair dismissal case considering s 387 of the Fair Work Act (Cth):

> [377] In *Wadey v YMCA Canberra* 1996 IRCA 568, Moore J made clear that an employer cannot merely pay "lip service" to giving an employee an opportunity to respond to allegations concerning the employee's conduct. His Honour said:
>
> In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware of the allegations concerning the employee's conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself…
>
> [378] Nevertheless, procedural steps should be applied in a common sense and practical way. In *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, Wilson CJ said at 7:
>
> Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or

her job at risk and given an opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, common sense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section.

77. Turning to the facts in this matter.

78. As noted above, on 23 June 2014 Ms Lisa Schwinghammer attended the service station. According to Ms Andreasen, Ms Schwinghammer took Ms Andreasen into a store room and gave her a letter of suspension[47]. Ms Andreasen said she was told to leave the premises in a loud voice and two other staff were nearby (Ms Becky Smith and Ms Hodge). Ms Andreasen said she was not told why she was being suspended and had not received any warnings.

79. The letter of suspension was in the following terms,

Subject: Show Cause

Date: 23 June 2014

This letter is to advise you of the decision made following investigation into reports of alleged misconduct/theft by you in your position as second-in-Charge – Caltex Palmerston.

As a result of these investigations, it is apparent that a theft or failure to pay for various items may have occurred. As you are aware, wilful and deliberate behaviour involving theft and pilfering even on a small scale and on a regular and systemic basis is in direct breach of our company policy which constitutes as serious misconduct…

You are now requested to respond to these allegations. Please advise in writing, within 7 working days of this letter, whether you think your behaviour has been acceptable, whether there are any mitigating circumstances in relation to your behaviour that should be considered and show us reason why we should not review your employment …

After we have received your written response by close of business Friday June 27 2014, you are required to attend a meeting at the Yarrawonga premises….at 3pm on Monday June 30 2014 so that we can formally raise with you a number of serious matters that have arisen in relation to your alleged performance and alleged conduct in the workplace.

You are formally advised that you may at your election have a legal, union and or other representative or support person attend the meeting with you…

You are also formally advised that pursuant to the Fair Work Act that for the week commencing Monday June 23 2014 to Monday June 30 2014 inclusive, your employment …is suspended on full pay and you are requested not to attend at the premises…and or have any contact with staff…during this time.

Please contact me on (phone number) if you have any queries.

80. The next morning Ms Andreasen said she rang Ms Schwinghammer and asked her to explain the allegations referred to in the letter, so that she could answer them. According to Ms Andreasen, Ms Schwinghammer replied "just read the letter". Ms Schwinghammer then asked if Ms Andreasen was getting legal advice, and Ms Andreasen said yes.

81. According to Ms Andreasen, prompted by Ms Schwinghammer's question, Ms Andreasen did see a solicitor that day, who sent a letter to Ms Schwinghammer requesting further information[48].

82. The following day Ms Andreasen obtained a doctors certificate for "stress leave"[49].

83. The employer responded to the sick leave with a letter to Ms Andreasen's solicitor confirming "that the original correspondence still stands and that upon your return to work we intend to proceed with the meeting"[50]. Ms Andreasen's solicitor responded by reiterating her original request for further information[51].

84. By letter dated 10 July 2014[52] the employer provided the following details of Ms Andreasen's alleged misconduct,

1. On June 9 2014 Ms Else Andreasen directed the kitchen staff to make her a bacon, cheese, egg and onion roll for herself to consume which she took into the office and that she entered this item into the system at a lower price and underpaid for this item.

2. On May 22 2014 Ms Else Andreasen in her capacity as site manager directed kitchen staff to make scones for her personal consumption which she then took and consumed without paying for them and she then registered the items used in the system as "station usage".

3. On May 25 2014 when Ms Else Andreasen was not the Site Manager, the Site Manager that day advised us that she noticed that the Rice Rolls had been taken from the kitchen. The Site Manager for that day advised us that she asked Ms Else Andreasen about the Rice Rolls and the response from Ms Else Andreasen was "I think I have paid for them, I am not sure". An audit has found that the Rice Rolls have not been paid for by Ms Else Andreasen.

85. The only evidence tendered by the employer in support of the misconduct allegations was,

(i) What appears to be a largely illegible copy of a computer screen dump headed "Your Electronic Journal" with unattributed handwritten notes "Lisa sprite not put on station usage" and "(illegible, possibly Kresa) put to station usage scones?"[53]

(ii) An unattributed diary entry dated 10 June 2014[54] as follows,

Ann adviced me that she took a bacon, egg, cheese, onion into the office. It was not paid for. Later comment of Anni (illegible) giving Else some rice roll also complained. Ani told else to buy it out the front if she wanted it for 9th June (sic)

(iii) A Caltex Palmerston till docket for "toastie ham ch& tom $4.50" dated 9 June 2014 at 09.01, with an unattributed handwritten note "Underpaid $1 and self served"[55].

86. So far as I can ascertain from the evidence, the misconduct alleged against Ms Andreasen involved three occasions of food consumption over about one month which the employer suspected was not purchased in accordance with company policy nor properly accounted or paid for. Given the nature of the items involved, I estimate the total value of the unpaid goods to be less than $10 retail.

68. At the time of the alleged misconduct Ms Andreasen had been an employee for more than 4 years. There was no evidence before me of any previous alleged misconduct or warnings in relation to similar (or indeed any) misconduct. The misconduct was not raised with Ms Andreasen at the time of the incidents or before the suspension. Ms Andreasen was not given any warnings. The first step taken by the employer was suspension, notice of which was delivered in the workplace during work hours when other employees and customers were likely to be in the general vicinity. Even if they did not hear the conversation, the way the suspension was handled would, in my view, have made it obvious to other employees and customers that Ms Andreasen was the subject of negative action by a supervisor. In my view, the approach adopted was heavy handed, disproportionate and unnecessarily humiliating. I am not satisfied on the evidence that this approach was either procedurally fair or reasonable.

69. The suspension letter referred to the alleged misconduct in the vaguest of terms and without any information as to the specifics of the alleged misconduct. Ms Andreasen was asked to respond in writing to the vague allegations before further details were to

be provided. She was informed that at the meeting she would be confronted with "a number of serious matters that have arisen in relation to your alleged performance and alleged conduct in the workplace" to which she would be required to "show us reason why we should not review your employment". In my view, the contents of the suspension letter and the order of the proposed procedure was unfair. It demanded a response and justification for non-dismissal before the particulars of the alleged misconduct were disclosed to Ms Andreasen. In addition, at the meeting she was told she would be confronted with further serious allegations to which she was expected to respond or face the prospect of dismissal. To put her on the spot without disclosing any specific information about the details of the alleged misconduct and when the potential consequences were significant was, in my view, neither procedurally fair nor reasonable.

70. The employer submitted,

> 32) Even assuming the Employer's conduct was unreasonable, it does not automatically follow that any injury is compensable. There must be a connection between what is said was unreasonable and the resulting injury[56].

71. As noted above, Ms Andreasen gave evidence that on being suspended she was upset and emotional and "that was the drop that made the cart flow over". Ms Andreasen said she didn't sleep, she was churning, not knowing what the allegation was or what was going to happen. Ms Andreasen said she didn't know the allegations were about food. I understood from this evidence Ms Andreasen was stressed and anxious because she did not know what was being alleged against her or, in those circumstances, how she could defend herself. In my view, Ms Andreasen's evidence established the necessary connection between the employer's unreasonable conduct, in not disclosing the details of the allegations in a timely fashion and leaving Ms Andreasen *in limbo*, and the injury that followed.

72. In addition, Ms Andreasen said she tried to cope but she didn't go out because she couldn't see people, talk to the staff, or go to the service station "because everyone knew about this". I understood from this evidence that Ms Andreasen isolated herself because she felt publically humiliated, and her inability to speak to others contributed to her anxiety and stress. In my view this evidence establishes a further connection between the employer's unreasonable conduct in suspending Ms Andreasen without

warning in the work place, when staff were present and the service station was open to customers, and the Second Injury. The fact that the suspension occurred in a back room was not in my view sufficient to protect Ms Andreasen from or diminish the effects of her sense of public humiliation.

73. Even if suspension was justified based on allegations of food being consumed that was not properly paid or accounted for, I am not satisfied that either the manner in which the suspension was handed down or the proposed procedures that were to follow, were procedurally fair or reasonable. I am satisfied that there was a connection between the unreasonable administrative action and the Second Injury.

Orders and Declarations

74. Pursuant to s 104(4) of the Act Ms Andreasen is not barred from maintaining these proceedings in relation to the First Claim.

75. The employer is to pay Ms Andreasen's reasonable medical and like expenses to date and continuing.

76. The employer is to pay Ms Andreasen weekly payments of compensation from 23 June 2014 to date and continuing.

77. Interest.

78. Costs at 100% of the Supreme Court Scale, including mediation.

79. Liberty to the employer to apply within 14 days to vary the interest or costs orders.

Dated this 2nd day of December 2015.

_____

Elisabeth Armitage SM

[1] Ex2 p53
[2] *Workers Rehabilitation and Compensation Act* s104(3)
[3] *Workers Rehabilitation and Compensation Act* s104(4).
[4] s3 of the Act and see s 189(1) of the *Return to Work Act*
[5] Ex 2 p2; p37.2
[6] Ex 2 p2
[7] Ex 2 p2
[8] Ex 2 p 1
[9] Ex 2 pp3-4
[10] Ex 2 p4-6
[11] Ex 2 pp 12-22, 30-31
[12] Ex 2 p12
[13] Ex 2 pp16-21
[14] Ex 2 pp29-30
[15] No 198 of 1996 of the Supreme Court of the Northern Territory
[16] s 3 of the Act
[17] Employer's written submissions dated 6 August 2015
[18] See s4 of the Act
[19] *Miller v ABC Marketing & Sales* (2012) 31 NTLR 97 at [45]
[20] *SA Mental Health Sevices Inc v John Margursh* (unreported, Supreme Court, SA, Full Court, 8 September 1995) at [12], [13], [14], and [18]; *Workcover Corporation of South Australia v Summers* (1995) 65 SASR 243 at 246; *Keen v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 42 at [44] per Cox J and [46] per Lander J. Priestly J's comments in *Rivard v Northern Territory* (1999) 150 FLR 33 at [20] as to the benefit of decisions dealing with the construction of the corresponding provisions of the SA legislation, are properly limited to the question in issue in the proceedings then before the Court.
[21] This decision was subject to an appeal but not on this issue – see *Swanson v Northern Territory of Australia* [2007] NTCA 4
[22] *Swanson; Rivard; Corbett* supra
[23] Ex 1 p8 at [4]
[24] *Murray v Baxter* (1914) 18 CLR 622, *Tracey Village Sports & Social Club v Walker* (1992) 111 FLR 32, *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83, *Robinson v Institute for Aboriginal Development Inc* [2010] NTMC 058
[25] Certificate of mediation Ex2 p29
[26] Psychological report of Mr Prowse dated 26 August 2012 Ex 2 pp16-21
[27] Final medical certificate Ex 2 p52.
[28] QBE Return to Work Plan Ex 2 pp32-33
[29] Final medical certificate Ex 2 p52.
[30] Letter 23 June 2014 Ex 2 p53
[31] Medical Certificate Ex2 pp 58, 63
[32] Ex 2 pp70-71
[33] Ex 2 p 75
[34] Ex 2 p91
[35] Ex 2 pp101-107
[36] Ex 2 pp110-115
[37] Ex 2 p109
[38] Ex 2 p58
[39] Ex 2 p94

[40] QBE Return to Work Plan Ex 2 pp32-33
[41] Ex 2 p42
[42] Ex 2 pp46-47
[43] Ex 2 pp50-51
[44] Final medical certificate Ex 2 p52.
[45] Ex 2 p52
[46] At [202]-[203]
[47] Letter 23 June 2014 Ex 2 p53
[48] Letter Davison Legal to Ms Schwinghammer dated 24 June 2014 Ex 2 pp55-57
[49] Ex 2 p58
[50] Ex 2 p59
[51] Ex 2 p60
[52] Ex 2 p65
[53] Ex 1 p62
[54] Ex 1 p60
[55] Ex 1 p61
[56] *Keen* supra at 58 per Bleby J, see Written Submissions dated 6 August 2015