CITATION:	*Harris v Northern Territory of Australia* [2023] NTSC 39
PARTIES:	HARRIS, Ben v THE NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	(No. 25 of 2019) 21730995
DELIVERED:	28 April 2023
HEARING DATES:	21 November 2019
JUDGMENT OF:	Blokland J

CATCHWORDS:

WORKERS COMPENSATION – WORKPLACE INJURY – APPEAL employer accepted injury sustained in the course of employment – defence of 'management action taken on reasonable grounds and in a reasonable manner' – whether grounds of appeal raise a question of law – question of fact/law distinction – whether 'reasonableness' of management action is a question of law capable of appellate review.

WORKERS COMPENSATION – WORKPLACE INJURY – APPEAL – injury sustained in the course of employment – defence of 'management action taken on reasonable grounds and in a reasonable manner' – whether respondent employer knew or ought to have known of appellant's mental illness – not a question of law – ground one not upheld.

WORKERS COMPENSATION – WORKPLACE INJURY – APPEAL – defence of 'management action taken on reasonable grounds and in a reasonable manner' – whether error made by Work Health Court by failing to consider whether emotional state of appellant when considering management action taken on reasonable grounds and if on reasonable grounds whether taken in a reasonable manner – whether medical certificate stating appellant 'better' sufficient to ground reasonableness of management actions – emotional vulnerabilities or emotional make-up to be taken into account when assessing reasonableness of management action – ground two upheld.

WORKERS COMPENSATION – WORKPLACE INJURY – APPEAL – defence of 'management action taken on reasonable grounds and in a reasonable manner' – whether error made by Work Health Court by holding appellant failed to provide medical reports to substantiate assertions about his health – whether breach of departmental guidelines concerning performance management – held no error concerning potential breach of guidelines – guidelines relevant but not determinative of whether management actions reasonable – ground three dismissed.

WORKERS COMPENSATION – APPEAL – Whether workplace injury resulted in partial incapacity when the appellant could not return to previous workplace but was otherwise capable of work – whether the *Return to Work* 1986 (NT) contemplates partial incapacity both in the medical and economic sense given s 65 creates its own regime on the question of capacity and earnings tied to the most profitable employment reasonably open – ground four upheld.

WORKERS COMPENSATION – NOTICE OF CONTENTION – whether a 'sittings allowance' received by appellant during employment at the Legislative Assembly should be excluded from the calculation of normal weekly earnings – whether earnings from other employment for one period of outside employment should be excluded when calculating payments under the *Return to Work Act* 1986 (NT) – Notice of Contention dismissed.

Accident Compensation Act 1985 (Vic) s 5
Fair Work Act 2009 (Cth) s 789 FD (2)
Worker's Compensation Act 1926 (NSW) s 11
Return to Work Act 1986 (NT) ss 3, 3A(2), 49A, 64 65 116
Safety Rehabilitation and Compensation Act 1988 (Cth) s 5A(2)

Arnott's Snack Products Proprietary Limited v Yacob; Attorney General for the State of New South Wales; Azzopardi v Tasman UEB Industries Ltd; BHP Billiton Mitsui Coal Pty Ltd v The Workers' Regulator and Anor [2017] QIRC 084; *Bill Williams Pty Ltd v Williams; Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16; *Byrnes v RMIT* [2010] VMC 50; *Castellucci v Sisters of St Joseph* [2012] VMC 40; *Collector of Customs v Agfa-Gevaert Limited* 186 CLR 389*; Collector of Customs v Pozzolanic* (1993) 43 FLR 280; *Comcare v Eames* [2008] FCA 422; *Comcare v Martin* (2016) 258 CLR 467; *Comcare v Martinez (No 2)* [2013] FCA 439; *Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees v Chenhall* (1992) 37 FCR 75; *Corbett v Northern Territory of Australia* [2015] NTSC 45; *Da Costa v The Queen* 118 CLR 186; *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Devasahayum and Comcare* [2010] AATA 785; *Edwards (Inspector of Taxes) v Bairstow*[1956] AC 14 at 36; *Foresight Pty Ltd v Maddick* (1991) 105 FLR 65; *French v Jolson Corp Pty Ltd* [2020] VMC 11; *Georges and Telstra Corporation Limited* [2009] AATA 731; *Global Insulation Contractors (NSW) Pty Ltd v Keating* (2011) 258 FLR 129; *Grygiel v Baine* [2005] NSWCA 218; *Hart v Comcare* 145 FCR 201; *Hegarty v Queensland Ambulance Service* [2007] QCA 366; *Hewitt v Southern Health & Another* [2013] VCC 1247; *Hell v Parks Victoria* [2022] VMC 1; *Hope v The Council of the City of Bathurst* (1979-1980) 144 CLR 1; *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126; *Ilir Sadiku v Trussmakers* (Vic) Pty Ltd 26 June 2015, VMC 20; *Instrumetic Ltd v Supabrase Ltd* [1969] 1 WLR 519; *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362; *Jadwan Pty Ltd v Rae & Partners (a firm) and Others* (2020) 378 ALR 193; *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138; *Keen v Workers Rehabilitation & Compensation Corporation* [1998]; *Kerridge v Monsfelt Pty Ltd* [2009] VCC 0154; *KG v Firth* [2019] NTCA 5; *Lynch v Comcare* [2010] AATA 38; *Mc Kinnon v Secretary, Department of Treasury* [2005] FCAFC 142; *Murwangi Community Aboriginal Corporation v Carroll* (2002) 12 NTLR 121; *Nguyen and Comcare (Compensation)* [2018] AATA 1623; *Osland v Secretary to the Department of Justice* [2010] HCA 24; *Paradis v Settlement Agents Supervisory Board* (2007) 33 WAR 361; *Re Ms SB* [2014] FWC 2014; *Rivard v Northern Territory of Australia* [1999] NTCA 28; *Roy Morgan Research Centre Pty Ltd v Commissioner for State Revenue (Vict)* [2001] HCA 49; *Ruh amah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; *Saitz v NTA* [2008] NTMC 104; *Schmid v Comcare* [2003] FCA 1057; *Scicluna v New South Wales Land and Housing Corporation* (2008); *Susan Wordley v State of Victoria (WorkCover)* [2015] VMC 5; *Swanson v Northern Territory of Australia* [2006] NTSC 88; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 41; *Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585; *Tito (Administrator of the Estate of Atkins) v Atkins* [2022] FCA 183; *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Vassallo v Intermotor Sales* [2017] VMC 16; *Watkins Ltd v Renata* (1985) 8 FCR 65; *Waylexson Pty Ltd (t/as Peterson Earthmoving Repairs) v Clarke* (2010) 25 NTLR 168; *Wei v Comcare* [2010] AATA 894; *Williams v Metropolitan Coal Ltd* [1948] HCA 8; *Wilson v Lowery* (1993) 4 NTLR 79; *Wilson v Lowery* (1994) 4 NTLR 79; *WorkCover Queensland v Kehl* [2002] 170 QGIG 93; *XCO Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 37; *Yao v Northern*

Territory of Australia [2022] NTWHC004 (29 June 2022); *Yu v Comcare* [2010] AATA 960, *referred to.*

Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (The Federation Press, 2nd ed, 2023) 16-18

Return to Work Legislation Amendment Bill 2015, Serial No 127, Explanatory Statement, clause 4.

REPRESENTATION:

Counsel:

Appellant:	M Crawley SC
Respondent:	T Anderson

Solicitors:

Appellant:	Ward Keller
Respondent:	Roussos Legal Advisory

Judgment category classification:	A
Judgment ID Number:	BLO2304
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ben Harris v The Northern Territory of Australia [2023] NTSC 39
No. (25 of 2019) 21730995

BETWEEN:

BEN HARRIS
Appellant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 28 April 2023)

Introduction

[1] This is an appeal from a decision of the Work Health Court made on 15 February 2019. The Work Health Court dismissed the appellant's claim for relief brought under the *Return to Work Act 1986* (NT) (the Act).

[2] The jurisdiction of this Court to hear an appeal from the Work Health Court is confined to a decision or determination on a question of law as provided by s 116(1) of the Act.

> **116 Appeals**
>
> (1) Subject to subsection (3), a party to a proceeding before the Court constituted by a Local Court Judge who is aggrieved by

a decision or determination of the Court may appeal against the decision or determination on a question of law to the Supreme Court within the time and in the manner prescribed by the Rules of the Supreme Court.

(2) In deciding the appeal, the Supreme Court may:

(a) confirm or vary the decision or determination; or

(b) set aside the decision or determination and substitute its own decision or determination; or

(c) set aside the decision or determination and remit the matter to the Work Health Court.

(2A) For subsection (2), the Supreme Court may make the orders and give the directions it considers appropriate.

[3] On 27 March 2017, the appellant made a claim for compensation for mental injury sustained in the course of his employment with the Department of the Legislative Assembly (DLA) in April 2016. In short, the appellant claimed the mental injury was effectively caused by bullying and harassment.

[4] The claim was initially rejected by the respondent employer on 10 April 2017. The appellant commenced proceedings against the respondent in the Work Health Court. Towards the end of the hearing, the respondent informed the Work Health Court that it no longer disputed that the appellant had suffered a mental injury, nor did the respondent dispute that the injury arose out of his employment. The issues that remained below were whether the injury was compensable or was excluded by s 3A(2) of the Act, and

whether the appellant suffered any incapacity and the extent of any such incapacity. Section 3A(2) provides:

> (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 exception 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.

[5] Following the hearing in the Work Health Court, the Judge determined *inter alia* that:

> 1. The appellant suffered a mental injury arising out of his employment with the respondent;
>
> 2. That the mental injury arose out of workplace actions taken on reasonable grounds and in a reasonable manner; and
>
> 3. The worker was incapacitated for work as a consequence of the injury until November 2017

[6] On the basis of those ultimate findings, the Work Health Court ordered the appellant's application be dismissed and that he pay 80% of the employer's costs.

[7] Ground 1 of the appeal claims primarily that certain action taken by the respondent was not 'management action taken on reasonable grounds and in a reasonable manner' as required by s 3A(2).[1]

[8] The question of law said to be raised in ground one is that the Court erred 'in concluding the management actions of the employer were reasonable and taken in a reasonable manner, which conclusions were not reasonably open in light of the accepted evidence'.[2]

[9] The first incident of management action impugned by the appellant was in respect of an incident and actions taken by the respondent on 7 January 2016.

[10] Errors were also alleged with how the Work Health Court dealt with the question of management action taken on or about 22 February 2016 and the further workplace events and management action taken from 22 February to 4 April 2016 and the cumulative effect of those actions.

[11] Given the significant concession made by the respondent towards the end of the trial in the Work Health Court, namely that the respondent accepted the injury arose out of course of employment and was caused by its actions, it is fair to read the reasons as implying the Work Health Court accepted that one or more of the management actions taken by the respondent contributed in a material way to the appellant's injury.

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1 AB 426-434.

2 AB 427.

[12] The appellant initially contended error on the basis that there was no finding that various workplace actions constituted ‘management actions’ for the purposes of s 3A(2) and that there were no findings identifying which of the various actions were the whole or primary cause of the injury.[3] However, the appellant accepted the respondent's contention that the appellant's case at trial was not pleaded or presented on such a basis and therefore on procedural grounds could not be argued on appeal.[4] The appellant’s case at trial was that the injury was caused by the respondent’s unreasonable management actions cumulatively.[5]

[13] Ground 2 claims that when assessing whether the management action taken by the respondent was on reasonable grounds and in a reasonable manner, the Work Health Court erred by failing to direct itself on the need to consider the emotional state of the appellant and what the respondent knew or ought to have known. Additionally, ground 2 contends the Work Health Court’s conclusion that it was reasonable for the respondent to proceed with its decisions made on the information available to it was not reasonably open.

[14] Ground 3 alleges the Court was in error for concluding that as the appellant failed to provide medical reports to substantiate his assertion about his health, the respondent acted reasonably and did not breach any departmental

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3 Outline of Submissions by the Appellant 15 August 2019, 6-7.

4 Respondent Submissions, 15 November 2019, 2-4.

5 Ibid.

guideline by embarking upon performance management without taking advice. The appellant argues such a conclusion was not reasonably open.

[15] Ground 4 claims that given the Work Health Court found that the worker was incapable of returning to work at his pre-injury site of employment under the relevant manager, the Court was in error by concluding the appellant was no longer partially incapacitated by November 2017.

[16] Grounds of appeal of this kind in turn raise consideration about whether each ruling under challenge is correctly characterised as a 'decision or determination on a question of law' in the terms required by s 116.

[17] The respondent filed a Notice of Contention which challenged the following conclusions made by the Work Health Court. First, that the 'sittings allowance' previously received by the appellant should be included in the calculation of the appellant's normal weekly earnings. Second, that some of the appellant's earnings from other employment not be excluded when calculating compensation payable under s 65(2) of the Act.

Decision or determination on a question of law

[18] As will be seen from the overview of the reasons below, which are set out later here, the Judge at first instance made numerous findings of fact after carefully assessing the credibility and reliability of witnesses, particularly of the appellant and the Clerk who as the manager, effectively embodied the respondent employer. Clearly those decisions cannot be the subject of appeal as this Court has no jurisdiction to entertain an appeal on findings of fact,

whether on credibility or otherwise. This Court must also take care not to elevate a disputed finding of fact into a question of law.

[19] The limited nature of the right of appeal of the type granted by s 116 has been considered on numerous occasions. An appeal 'on a question of law' is to be distinguished from an appeal from a decision that 'involves a question of law' and an appeal 'on a question of law from a decision of'. An appeal that 'involves a question of law' allows the whole decision of the lower court or tribunal to be reviewed, and not merely the question of law.[6] An appeal 'on a question of law from a decision of', when involving a decision of a tribunal has been held to confer original and not appellate jurisdiction.[7] The scope of an appeal 'on a question of law' is substantially narrower;[8] the subject matter of the appeal is the question or questions of law.

[20] The authorities on this point acknowledge that the borderline between a question of fact and a question of law can be notoriously difficult to delineate.[9] Dean Mildren notes 'no satisfactory test of universal application has yet been drawn'.[10]

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6 *XCO Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 37; 124 CLR 343 at [10]; *Ruh amah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148 at 151.

7 *Osland v Secretary to the Department of Justice* [2010] HCA 24; *Roy Morgan Research Centre Pty Ltd v Commissioner for State Revenue (Vict)* [2001] HCA 49; 207 CLR 72 at [15]; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 41 at [5].

8 *Paradis v Settlement Agents Supervisory Board* (2007) 33 WAR 361 at [53].

9 *Waylexson Pty Ltd (t/as Peterson Earthmoving Repairs) v Clarke* (2010) 25 NTLR 168; *Global Insulation Contractors (NSW) Pty Ltd v Keating* (2011) 258 FLR 129; *Wilson v Lowery* (1994) 4 NTLR 79; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239.

10 Dean Mildren, The Appellate Jurisdiction of the Courts in Australia (The Federation Press, 2nd ed, 2023) 16-18, citing *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36; 186 CLR 389.

[21] The Court of Appeal in *Tiver Constructions Pty Ltd v Clair*[11] discussed whether a question of law was involved in the conclusion that a worker suffered personal injury by accident 'in the course of his employment'. In holding that such a question was a question of law, Martin and Mildren JJ said:[12]

> In our opinion, the question of whether or not, on the facts as found by the learned magistrate or on the undisputed evidence, the respondent suffered injury by accident in the course of his employment is a question of law. The question of law involved is whether there was evidence upon which the learned magistrate could competently find that the respondent's injuries arose out of the course of his employment... In some cases, in arriving at such a decision, there may also be an error of law appearing ex facie in the reasons for a court's decision; for example, the wrong legal test may have been applied to the facts. Where there is no ex facie error, the test is whether any person acting judiciously and properly instructed as to the relevant law could arrive at the conclusion under appeal. As Lord Ratcliffe observed in *Edwards (Inspector of Taxes) v Bairstow*:
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> > In those circumstances, too the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true an only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only take their colour from the combination of circumstances in which they are found to occur.

11 (1992) 110 FLR 239.

12 (1992) 110 FLR 239 at 245-246; citations removed.

[22] The majority in *Tiver* left the Magistrate's findings of fact undisturbed and decided that the appeal required an application of the law which defined 'interval' cases in worker's compensation cases. It was held that the law at that time did not preclude a worker from claiming resumption of their employment after a period of misconduct, hence as a matter of law the injury was held to arise in the course of employment.[13]

[23] The discussion in *Tiver* needs to be seen in the context of the question of law it resolved. In *Da Costa v The Queen*,[14] Windeyer J said the 'distinction between matters of fact and of law depends upon, is influenced by, and differs with the circumstances in which the questions arise'.

[24] In *Attorney General for the State of New South Wales*,[15] Spigelman CJ said the body making the distinction was of relevance:

> The determination of whether a particular alleged error…answers the description "question of law" will depend on the scope, nature and subject matter of the body making the relevant distinction.

[25] In *Tracy Village Sports and Social Club v Walker ('Tracy Village')*,[16] which has been referred to and relied on in many cases,[17] Mildren J set out the principles relevant to the question of what constitutes error of law, or

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13 *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 248; *Wilson v Lowery* (1993) 4 NTLR 79.

14 [1968] HCA 51; 118 CLR 186 at 194.

15 [2000] NSWCA 199; 49 NSWLR 653 at [28].

16 (1992) 111 FLR 22; 37-39.

17 For example recently in *KG v Firth* [2019] NTCA 5.

otherwise. For present purposes the following propositions are drawn from Mildren J's judgment. The process of a court arriving at an ultimate conclusion involves a number of stages. The first is to find the primary facts. In terms of findings of fact which are based on the preference given to one account over another, such a finding is a question of fact and is not reviewable on appeal, even if the reason for preferring a particular witness is patently wrong.[18] Regardless of the reasons, if there is evidence which if believed, would support the finding, there is no error of law.[19]

[26] If there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute (for example, that injury by accident arose out of the course of employment) there is an error of law.[20]

[27] A finding of fact cannot be disturbed on the basis that it is 'perverse', or 'against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence.'[21] The Court of Appeal may not review a finding of fact because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision, and even if the reasoning was demonstrably unsound.[22]

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18 *Tracy Village* at 37 per Mildren J.

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid.

[28] The second stage of fact finding is the drawing of inferences from primary facts to arrive at secondary facts.[23] This is subject to the same limitations as apply to primary facts. If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact *might* be inferred, there is no error of law. It is not sufficient that the Court of Appeal would have drawn a different inference from those facts. The question is, whether there were facts upon which an inference *might* be drawn.[24] Mildren J acknowledged statements in older cases which confirmed that if an inference cannot reasonably be drawn,[25] it errs in point of law.[26] However, caution is required when considering 'reasonableness' in that context. If an inference cannot reasonably be drawn, it will be because the inference cannot be drawn from the primary facts. However, in the case of an inference about which minds might differ, it being a question of judgement or degree, the inference not only can be drawn but it would not be unreasonable to draw it.[27]

[29] The third stage is when a trial judge directs on the law. If a mistake is made at this stage, there will be an error of law.

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23 Ibid.

24 *Tracy Village* at 38, per Mildren J.

25 *Instrumetic Ltd v Supabrase Ltd* [1969] 1 WLR 519 at 521; [1969] 2 A II ER 132 at 132, per Lord Edmund Davies LJ and Phillimore LJ agreed; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.

26 *Tracy Village* at 37-38, per Mildren J

27 Ibid.

[30] The final stage is when the trial judge applies the facts to the law to arrive at the ultimate conclusions. Mildren J adopted what the majority said in *Azzopardi v Tasman UEB Industries Ltd*:[28] 'it is only in marginal cases that the statutory test is satisfied or not satisfied as a matter of law, because no other application is reasonably open'. A similar passage was noted from *Humphrey Earl Ltd v Speechley* (*'Speechley'*)[29] '…..in a matter of degree ….. it is not open to a court to make any but one finding'. Aside cases where the reasoning process is insufficient, it may be noted that sufficient facts may have been found (or the facts may not have been in contest) for the Court to decide whether or not, as a matter of law, the ultimate conclusion may have been open, or whether the opposite conclusion should have been reached. There may be a situation where the facts are, according to Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow*[30] 'neutral in themselves and only... take their colour from the combination of circumstances in which they are found to occur' and from which the only conclusion to be drawn is one that 'contradicts the determination' in which case, the inference will be drawn that there has been 'some misconception of the law.'[31]

[31] The respondent argued that the types of errors alleged here, if errors of law, concern only the question of whether certain conclusions were 'not

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28 (1985) 4 NSWLR 139 at 157.

29 (1951) 84 CLR 126 at 124, per Dixon J.

30 [1956] AC 14 at 36.

31 *Tracy Village* at 38, per Mildren J.

reasonably open'. To be successful on such a ground would require this Court to find that there was only one conclusion open, and that such a conclusion was not the one reached by the Work Health Court. The respondent submits and I agree that where different conclusions are reasonably open, generally speaking the question of which is the correct conclusion is a question if fact. In this context where the question is *what is reasonable?* it is not so clear cut. There must be some qualification to the proposition put forward by the respondent as errors of law may not be explicit in the ultimate decision. There may be, for instance an implicit decision on a question of law which is not expressed explicitly in the ultimate conclusion.[32]

[32] Although a number of the grounds are, as counsel for the respondent noted, couched in terms of conclusions 'not reasonably open' such a ground is not confined to assessing only the facts, but when analysed, may call for an assessment of whether the facts as found meet the legal standard or enliven legal consequences which is a question of law.

[33] The principles enunciated by Mildren J in *Tracey Village* were discussed and approved by the Court of Appeal in *Wilson v Lowery*.[33] In *Waylexson Pty Ltd t/as Peterson Earthmoving Repairs v Clarke* ('*Waylexson'*)[34] a case about whether or not an activity engaged in was in the course of employment or

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32 As was discussed in *Scicluna v New South Wales Land and Housing Corporation* (2008) 72 NSWLR 674 at 676 [3]-[4]; *Grygiel v Baine* [2005] NSWCA 218, at [29], per Basten JA.

33 (1994) 4 NTLR 79 at 84-85.

34 (2020) 25 NTLR 168.

arising out of the employment, the Court of Appeal again confirmed that an appeal court is not free to draw its own conclusion if all that is shown is that a different conclusion is reasonably open from the conclusion reached at trial. Either specific error must be found or it must be shown that there is really only one conclusion reasonably open which is different from the one found at trial.[35] Justice Riley (as his Honour then was) said the question for determination is 'not whether the learned (magistrate) ought to have decided the case in the respondent's favour, but rather whether he was bound in law to do so'.[36]

[34] In *Speechley*,[37] on whether a journey fairly resulted from the nature and incidents of employment, Dixon J analysed the difference between a worker making an excursion for their own purposes rather than employment purposes and said:[38]

> Such questions must involve matters of degree, but it does not follow that their decision is always a question of fact open in point of law to a finding either way. Even in a matter of degree the facts may show so great a departure from what is an allowable incident of the employment that it is not open to a court to make any but one finding.

[35] Dixon J concluded that the finding that the worker was injured in the course of his employment was not reasonably open to the Commission which heard

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35 *Waylexson*, Mildren J at [31]-[32].

36 *Waylexson*, Riley J at [62] citing *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 154.

37 (1951) 84 CLR 126.

38 *Speechley* at 134.

the matter as the Commission erred in law in holding the injury was sustained in the course of employment.[39]

[36] Similar expressions are found in *Bill Williams Pty Ltd v Williams*,[40] another case concerning whether a worker had established that an injury occurred in the course of his employment. Walsh J said:[41]

> It is not enough for the respondent to assert that it would have been open to the learned judge to find that the respondent was doing at the time of his injury something that was incidental to his employment and that, therefore, he was in the course of employment at that time. He must establish that the circumstances, as they were found by the judge, were such that as a necessary legal consequence the respondent must be held to have been then engaged in the course of his employment.
>
> The principles just stated were recognised by the Court of Appeal. Mason JA referred to the principle that "if different conclusions are reasonably possible, the determination of which is the correct conclusion is a question of fact". A fairly recent example of the application of that principle in a case where the question was, as here, whether or not the worker was at the time of his injury in the course of employment is furnished by the case of *Hall v Yellow Cabs of Australia Ltd.* Mason JA said also, that “the facts of the present cases necessarily fall within the statutory expression”, that is to say, the expression "course of employment". The question to be considered is whether the principles thus recognised were correctly applied to the facts found by the primary judge.
>
> In some cases it is a difficult task to determine whether different conclusions or but one conclusion are or is reasonably open. It is easy in endeavouring to make a decision on that question, to slip across the boundary which must be maintained between the evaluation of the legal consequences of facts already found and the making of findings of fact. In this case our attention must be confined to the facts which the learned judge stated as having been found by him. On a consideration of those facts, I have reached a

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39 *Speechley* at 135.

40 (1972) 1 CLR 146.

41 *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 155-56

> conclusion that it was not a case in which his decision should have been held to have been erroneous in law. (footnotes omitted).

[37] In *Hope v The Council of the City of Bathurst*[42] in the context of the *Local Government Act*, 1919 (NSW) Mason J discussed whether the facts admitted or found came within the description of 'business' or 'industry' as those words applied to the definition of 'rural land' under the Local Government Act. His Honour noted judgements of the Court of Appeal of New South Wales which held that as 'business' is an ordinary English word, its meaning is not a question of law. Therefore, whether the activities of the appellant constituted a business was a question of fact which involved the determination of an ultimate finding of fact, accordingly there was no error of law. It was said that many authorities exist which confirm that the question of whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law.[43] Further, special considerations apply when the statute is found to use words according to their common understanding and the question then is whether the facts as found fall within those words. Mason J found 'business' in the statute has its ordinary or popular meaning and the critical issue for decision is whether the material before the Court reasonably admits of different conclusions on the question of whether the appellant's activities constitute a 'business'. On the facts as found, Mason J held no other conclusion was reasonably open.

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42 (1979-1980) 144 CLR 1.

43 *Hope v The Council of the City of Bathurst* (1979-1980) 144 CLR 1 at 7-9; Gibbs, Stevens, Murphy and Aickin JJ agreeing.

Consequently the error of the trial judge and the majority of the Court of Appeal was one of construction and therefore one of law.[44]

[38] Dealing with a 'journey' claim, Gleeson CJ, Gummow and Callinan JJ in *Vetter v Lake Macquarie City Council* ('*Vetter*')[45] reviewed the earlier authorities and concluded the correctness of the following propositions. Whether the facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law.[46] Another way to put it is whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. Their Honours approved of the following statement by Jordan CJ from *Australian Gas Light Co v Valuer-General*:[47]

> [I]f the facts inferred... from the evidence... are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law.
>
> Further, an error of law arises if "the true and only reasonable conclusion contradicts the determination."[48]

[39] In *Vetter* the High Court approved Mason J's discussion summarised above in *Hope v Bathurst City Council,*[49] to the effect that special consideration was required when dealing with words in a statute which are to be used

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44 *Hope v The Council of the City of Bathurst* (1979-1980) 144 CLR 1 at 9-10.

45 (2001) 202 CLR 439 at [24]-[27].

46 *Vetter* at [24].

47 (1940) 40 SR (NSW) 126 at 138.

48 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, per Lord Radcliffe.

49 (1980) 144 CLR 1 at 7

according to their common understanding. If different conclusions are reasonably possible, the determination of which is the correct conclusion is a question of fact.[50] A question of law arises when on the facts found, only one conclusion is open.[51]

[40] None of the principles discussed exclude the proposition that implicit errors of law may be made in the reasoning process. In terms of its legal effect, the phrase 'taken on reasonable grounds and in a reasonable manner' implies conclusions or questions which may either be questions of fact or law; questions of fact when different conclusions are reasonably possible and questions of law when the question is whether the facts as found answer the statutory description of 'reasonable grounds and reasonable manner'.

[41] In *Collector of Customs v Agfa-Gevaert Limited*,[52] dealing with the interpretation of composite phrases, the High Court discussed six propositions or rules of construction taken from *Collector of Customs v Pozzolanic*[53] to distinguish questions of fact from questions of law. Ultimately it was observed such general propositions may 'lose a degree of their utility when, as in the present case, the phrase or term used is complex or the inquiry that the primary decision maker embarked upon is not clear'.[54]

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50 *Vetter* at [26].

51 Ibid at [27].

52 [1996] HCA 36; 186 CLR 389.

53 (1993) 43 FLR 280 at 287.

54 *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389.

[42] ‘Reasonable’, reasonably’ and similar words demand an objective test.[55] In the employment law setting, ‘reasonableness’ has been described as a ‘chameleon-like’ concept, tailored to the circumstances’.[56] In a number of contexts, the standard ‘reasonable’ is considered a question of law. For example, the existence of a duty to take ‘reasonable care’ is a question of law.[57] What reasonable care was required to discharge such a duty depends upon all of the factual circumstances.[58] Whether a restraint of trade term in a contract is reasonable or unreasonable is a question of law.[59] In one matter the Federal Court proceeded on the basis that whether the Superannuation Complaints Tribunal’s conclusion that a Trustee’s decision was fair and reasonable was a question of law.[60] In New South Wales a failure to undertake an assessment of whether certain actions of an employer were reasonable in the context of workers compensation legislation, which included a defence of reasonable action by an employer, has been held to give rise to an error in point of law.[61] The point of law determined was that reasonableness is to be assessed objectively, and was not to be assessed on the narrower basis of compliance with contractual duties.[62]

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55 *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16.

56 *Wei v Comcare* [2010] AATA 894, Professor RM Creyke Senior Member at [66].

57 *Jadwan Pty Ltd v Rae & Partners (a firm) and Others* (2020) 378 ALR 193.

58 Ibid.

59 *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362.

60 *Tito (Administrator of the Estate of Atkins) v Atkins* [2022] FCA 183.

61 *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.

62 *Jeffrey v Lintipal Pty Ltd* [2008] NSWCA 138 at [33], [43], [44], [77]-[503] per Basten JA; Hodgson JA agreeing.

[43] Decisions on earlier versions of s 4 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) and whether particular conduct amounted to 'reasonable disciplinary action' has long been treated as a question of law.[63]

[44] In other settings, concepts expressed as 'reasonable cause to believe' or whether 'reasonable grounds' exist have been held to be questions of fact.[64]

[45] In the context of s 3A(2) of the Act, I have concluded 'reasonable grounds' and 'reasonable manner' are capable of referring to both matters of fact and of law. The factual findings are not reviewable on appeal but errors of law may occur when the facts as found do not answer the statutory description. Further, errors of law may be implied if relevant material or consideration are omitted or if irrelevant matters are considered in the assessment of the statutory standard.

Management action taken on reasonable grounds and in a reasonable manner

[46] Section 3A(2) of the Act is set out above.[65] It operates as a defence to a claim for mental injuries, including in accordance with s 3A(1), the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury. It was not disputed before the Work Health Court, albeit not until close to the end of the trial, that the appellant suffered a mental injury

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63 *Comcare v Eames* [2008] FCA 422; *Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees v Chenhall* (1992) 37 FCR 75; *Schmid v Comcare* [2003] FCA 1057; (2003) 77 ALD 782, [84].

64 *Mc Kinnon v Secretary, Department of Treasury* [2005] FCAFC 142.

65 Paragraph [4].

arising out of his employment. The Court did not find it necessary to prefer one diagnosis over another,[66] but found initially the appellant was suffering to some extent, from chronic PTSD arising out of his deployment to Afghanistan. Additionally from April 2016 he was suffering from a second condition, an adjustment disorder or depression and anxiety arising out of the events at the workplace.[67] The nature of the causal connection required to establish that an injury was suffered as a result of 'administrative action', under a similar statutory scheme was considered by the High Court in *Comcare v Martin*.[68] The High Court held in part:[69]

> [T]he causal connection is met if without the taking of the administrative action, the employee would not have suffered the ailment or aggravation that was contributed to, to a significant degree by the employee's employment.

[47] The Work Health Court found that while there may have been some contribution from the appellant's personality type and the chronic post-traumatic stress disorder to the onset of the second condition, the primary cause of the second condition was the workplace.[70] The question of causation was conceded by the respondent and accepted by the Work Health Court.

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66 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [45].

67 Ibid.

68 (2016) 258 CLR 467.

69 Ibid at [47].

70 Ibid.

[48] Management Action under s 3 of the Act is defined as 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)

[49] As was observed by the Work Health Court, both s 3A and the definition of 'management action' were amended in 2015.[71] The Second Reading speech refers to the new sections as providing guidance. The relevant Minister said:[72]

> There is currently a defence available to employers for a mental injury claim based on reasonable, administrative action. It is proposed to replace the current information of administrative action with management action to improve guidance. The amendment provides a detailed explanation of what comprises management action and this will make the situation much clearer for employers and workers.

[50] The Explanatory Statement similarly referred to the amendment providing a comprehensive meaning of 'management action' for the purposes of the definition of 'injury' in s 3A[73] and providing a defence for a claim against the employer for mental injury if caused by management action taken on reasonable grounds and in a reasonable manner.

[51] As the Work Health Court explained, to establish the defence in order to defeat an entitlement to compensation, the employer must establish the

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71 Return to Work Legislation Amendment Bill 2015, Serial No 127.

72 Return to Work Legislation Amendment Bill 2015; Second Reading speech 2015; Austlii.

73 Return to Work Legislation Amendment Bill 2015, Serial No 127, Explanatory Statement, clause 4.

injury was caused wholly or primarily by reasonable management action.[74] In this context the Work Health Court Judge said, and it is agreed here, the respondent must satisfy the Court that:[75]

> (i) the conduct or actions complained of by the worker constitute management action as defined in section 3; and
>
> (ii) the management action was taken on reasonable grounds; and
>
> (iii) the management action was taken in a reasonable manner; and
>
> (iv) the reasonable management action wholly or primarily caused the mental injury.

[52] Prior to the amendments under consideration, s 3 of the *Work Health Act* (NT) relevantly provided liability for injury could be excluded through the 'but does not include' part of the definition of 'injury':

> [B]ut 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.

[53] In *Rivard v Northern Territory of Australia*[76] the Court of Appeal held the employer must prove the relevant 'reasonable administrative action' (as was the term at that time) was the sole cause of the worker's injury. In *Corbett v*

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74 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [7]; AB 384.

75 Ibid.

76 [1999] NTCA 28.

Northern Territory of Australia[77] Barr J doubted the correctness of this approach, preferring instead the Full Court of the Federal Court's approach in *Hart v Comcare*[78] which concerned a similar exclusionary provision. The Full Court of the Federal Court found it did not require any modifying language to restrict the exclusion in the manner the Court of Appeal did in *Rivard v Northern Territory of Australia* by adding the word 'only' so that the exclusion effectively read 'only' reasonable disciplinary action or 'only' reasonable administrative action.

[54] The previous interpretation in *Rivard v Northern Territory of Australia* seems no longer strictly relevant as the current exclusion in s 3A(2) of the Act covers injuries 'wholly or primarily' caused by reasonable management action.[79] The current terms of s 3A(2) has parallels with the language employed by the High Court in *Comcare v Martin*[80] mentioned above, 'the employee would not have suffered the ailment or aggravation that was contributed to, to a significant degree by the employee's employment'.

[55] The authorities from other jurisdictions which have similar legislative regimes emphasize the need to objectively assess the management action in the context of the circumstances and knowledge of those involved in the

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77 [2015] NTSC 45.

78 [2005] FCAFC 16; 145 FCR 201.

79 Just prior to publishing this judgement I have become aware of the Work Heath Court decision of *Yao v Northern Territory of Australia*, 29 June 2022. *Yao* discussed issues of onus and the construction of s 3 and 3A including an analysis of the previous provision discussed in *Swanson v Northern Territory of Australia* [2006] NTSC 88 and later *Work Health Court* decisions at [172]-[185]. I agree with Acting Judge Neill's analysis on the construction point as it seems consistent with the approach of the High Court in *Comcare v Martin*.

80 (2016) 285 CLR 467 at [47].

work place incident, the circumstances that created the need for management action to be taken, and the consequences that flowed from the management action.[81] The attributes and circumstances of the particular situations including the emotional state and psychological health of the employee have been held to be relevant factors in the assessment of reasonableness.[82] Management actions need not be perfect or ideal to be considered reasonable and a course of action may still be 'reasonable action' even if particular steps are not taken and even if there may be legitimate criticisms.[83] Consistent with the objective nature of such an assessment, the alleged 'unreasonableness' must arise from the actions in question rather than the worker's perception of it.[84] Consideration is also to be given to whether the management action involved a significant departure from established policies or procedures and if so, whether the departure was reasonable in the circumstances.[85] The management action relied on must be lawful, there must be nothing untoward about the action and must not be 'irrational,

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81 *Georges and Telstra Corporation Limited* [2009] AATA 731 at [23]. 'Reasonable administrative action' under s 5A(2) of the *Safety Rehabilitation and Compensation Act* 1988 (Cth); *Re Ms SB* [2014] FWC 2014 at [49]-[51] application for an order to stop bullying under s 789FD of the *Fair Work Act* 2009 (Cth); s 789 FD (2) provides the section does not apply to 'reasonable management action'; *Lynch v Comcare* [2010] AATA 38.

82 Ibid.

83 *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Re Ms SB* [2014] FWC 2014; *Nguyen and Comcare (Compensation)* [2018] AATA 1623, [63].

84 *Re Ms SB* [2014] FWC 2014 at [51].

85 *Department of Education and Training v Sinclair* [2005] NSWCA 465.

absurd or ridiculous'.[86] Reasonableness must be assessed against what is known at the time without the benefit of hindsight.[87]

[56] Whether the management action was taken in a reasonable manner will again concern all of the facts and circumstances giving rise to the action and the way the action impacts upon the worker and any other relevant matter.[88] Although the impact on the worker and their particular circumstances are to be considered, it has been held that that factor by itself cannot establish whether or not the management action was carried out in a reasonable manner as some degree of humiliation may be the consequence of the employer's exercise of lawful and appropriate authority.[89] Whether further investigations or more timely investigations should have taken place or whether established policies and procedures were followed have all been considered relevant factors when assessing whether the actions were carried out in a reasonable manner.[90]

[57] Although to some extent there is overlap between ground 1 and 2, ground 2, potentially raises a questions of law as it alleges a failure of the Court below to properly direct itself on matters required to be taken into account, namely the emotional state of the appellant and what the employer knew or ought to

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86 *Re Ms SB* [2014] FWC 2014; *Lynch v Comcare* [2010] AATA 38, [106], [107].

87 *Devasahayum and Comcare* [2010] AATA 785.

88 *Keen v Workers Rehabilitation & Compensation Corporation* [1998] SASC 6519 concerning 'reasonable administrative action' under s 3OA of the *Workers Compensation and Compensation Act* 1986 (SA); *Re Ms SB* [2014] FWC 2014.

89 *Comcare v Martinez (No 2)* [2013] FCA 439.

90 *Georges and Telstra Corporation Limited* [2009] AATA 731; *Yu v Comcare* [2010] AATA 960, [2010] 121 ALD 583; *Wei v Comcare* [2010] AATA 894.

have known in relation to the appellant's emotional state. Error is alleged in the finding that it was reasonable for the Clerk to proceed with decisions on the information he had.

[58] Ground 3 relies in part on an error of law, in as much as the Work Health Court held that the failure of the appellant to provide medical material to the respondent meant the respondent acted reasonably and did not breach employment guidelines by embarking on performance management without taking advice.

[59] One element of ground 4 raises a question of law as it requires consideration of the meaning of 'partial incapacity' under the Act.

[60] The Notice of Contention raises questions of law, namely whether on a proper construction of the Act the 'sittings' allowance' should be included in the calculation of normal weekly earnings and whether earnings from another employer should be included in the calculation of benefits under s 65 of the Act.

Proceedings and findings in the Work Health Court

[61] Some history of the proceedings, including an overview of certain events which took place at the workplace and how those events were treated by the Work Health Court is required here to place the arguments made on appeal in proper context. As above, as Windeyer J remarked, whether there is a question of law 'depends upon, is influenced by and differs with the circumstances in which the questions arise'.

[62] The appellant's previous employment history included 14 years in the Australian Army as a solider, where he ultimately attained the rank of Major. During the course of his military career he served in Afghanistan in an area which was subject to hostile fire. He suffered from post-traumatic stress disorder, anxiety and depression arising from his service in the Australian Army.[91] The Work Health Court accepted that from the middle of 2011 to the middle of 2013, while employed by the Army and for a short time when employed by the DLA, the appellant saw a clinical psychologist to help manage his symptoms. The Court noted the opinion of the appellant's treating clinical psychologist to the effect that despite the diagnoses relevant to that period, the long working hours and personal stressors, the appellant was 'functioning very well' and 'didn't stop working'.[92]

[63] In 2013 the appellant secured a position with the respondent in the DLA. The job title was 'Director Procedural Support and Education Services'. The position was designated Senior Administrative Officer Level 2 (SA02).[93] SA02 was the highest possible designation for permanent employment as an administrative officer in the public service structure, aside from the next level which comprised executive officers.

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91 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [20]; AB 389.

92 Ibid.

93 Ibid.

[64] The key responsibilities under the DLA Job Description[94] were to provide accurate financial and human resource management of the Chambers Services Unit; preparation of documentation such as Minutes of Proceedings, Notice Papers, Procedural Notes of Legislation, processing Petitions, Questions and Answer's taken on notice and procedural requirements of the Government and Opposition; direct and coordinate the operation of the Hansard Service; manage the development and maintenance of the DLA's websites; provide advice and procedural documents to various officials of the Parliament and serve the Clerk-at-the Table during Parliamentary Sittings; oversee the operations of the Parliamentary Education Service including undertaking high level research and report writing as directed by the Clerk.

[65] Despite the diagnoses mentioned above, it was accepted by the parties and the Work Health Court that the appellant initially did not suffer any form of employment incapacity when he was first working for DLA.

[66] The Work Health Court found that in 2014 the appellant received a merit based salary increment due to his 'superior performance'.[95] The Clerk of the Legislative Assembly ('the Clerk') described the appellant's performance at that time as 'superior', although his opinion changed dramatically in late 2014 as a result of the appellant's behaviour. The change in behaviour was exhibited initially in late 2014 during a Parliamentary Open Day. The Clerk

94 AB 839.

95 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [21]; AB 390

described the appellant's behaviour on that occasion as "becoming very upset, abusive and agitated".[96] Following that incident the appellant told the Clerk that he had depression and/or PSTD, that he was changing his medication and that the issue was between himself and the Army and was a Veterans Affairs matter.[97] Although the Court found that the appellant advised the Clerk of his condition, the Court rejected the appellant's evidence to the effect that he had provided documentation about a mental health plan and medication.[98]

[67] The Work Health Court made findings with respect to the events of the Parliamentary Open Day and other events which occurred in late 2014 and 2015, notwithstanding the work place injury was in 2016. The reason the Judge thought it was necessary to make those findings was that those events were relevant to the Clerk's knowledge of the appellant's mental state at the time of the injury and was a means through which the Court could assess the reliability and accuracy of witnesses.[99]

[68] In terms of the relevant events, the Court found that in 2015 the appellant's performance deteriorated. A performance management process was commenced in April 2015, concluding in October 2015. The appellant's performance was then considered satisfactory.[100] There were factual issues

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96 Ibid at [22]; AB 390.

97 Ibid at [24]; AB 390.

98 Ibid.

99 Ibid at [23]; AB 390.

100 Ibid at [25]; AB 391.

surrounding that process, including the question of the level of the appellant's cooperation with the process. The Court ultimately found the appellant had been cooperative. On other surrounding factual issues the Clerk's evidence was preferred.[101]

[69] The Work Health Court accepted that during regular meetings which occurred during the performance review between the appellant and the Clerk throughout 2015, there were no conversations about the appellant's health and that the Clerk was not aware of the appellant suffering any 'ongoing problems or difficulties as far as affecting his work'.[102] The Court found that much of the appellant's evidence of events in 2015 was inaccurate, exaggerated or embellished.

[70] Many of the subjects raised by the appellant in both his Statement of Claim and in evidence were specifically rejected by the Work Health Court. Those included the following. That he routinely was unable to leave work for up to two hours after the House had risen on sitting days.[103] That he was required to conduct professional development training, known as "Hot Tuesday Topics" on an hour's notice, without adequate time to prepare. More specifically, training on the subject "Privilege" was an unfamiliar topic for him and therefore "highly embarrassing and humiliating".[104] The Court

101 Ibid at [25]-[26]; AB 391-392.

102 Ibid at [26]-[33]; AB 392-394.

103 Ibid at [27]; AB 392.

104 Ibid at [28]; AB 391-392.

found relevant contemporaneous emails were inconsistent with the appellant's recollections and that other complaints were exaggerated.

[71] The appellant claimed to have played a significant role in the hosting a successful Commonwealth Youth Parliament in October 2015. He complained that the Clerk made it more difficult for him to organise the event and failed to provide guidance. This account was denied by the Clerk. Again the Court found support for the Clerk's account in the contemporaneous emails and was persuaded the appellant's version was incorrect.[105]

[72] Similarly, the Court rejected the appellant's allegation that while he was asked to make a presentation at the New Zealand Parliament in February 2016, he was asked at the very last minute so he begrudgingly agreed. He sent an email which turned out to be sent to the wrong address for the New Zealand Parliament. In that email he apologised to the organisers and said that he would not be attending. The Court found the appellant's evidence to be unconvincing in all of the circumstances surrounding the arrangements for, and the cancellation of his attendance in New Zealand.[106]

[73] The Court was satisfied there was only one conversation by the end of 2015 between the appellant and the Clerk concerning the appellant's mental health, namely the conversation mentioned above in December 2014 in which the appellant informed the Clerk of mental health issues connected to

105 Ibid at [30]; AB 393.

106 Ibid at [31]-[32]; AB 393-394.

his service in the Army. The Court was satisfied the appellant did not inform the Clerk of any continuing or new mental health concerns during 2015. The Court was not persuaded that the Clerk or any reasonable manager, ought to have inferred or gleaned that the appellant's performance issues in 2015 were related to a mental illness or a change of medication.

[74] The Court rejected submissions made on behalf of the appellant about the unreasonableness of the respondent's actions which the Court said were based on a supposition that the Clerk knew or ought to have known the appellant was suffering a mental illness or permanent disability from 7 January 2016 through to 5 April 2016.[107] The Court said it would be expected that if there were any ongoing mental health issues, such issues would have been communicated by the appellant to the Clerk. The appellant said he would have communicated such issues given his training in the Army to be upfront about problems that may affect his work capacity.[108]

[75] As mentioned, until late 2014, the Clerk described the appellant's performance as "superior". The appellant's deterioration in behaviour and/or performance was first noticed to be a problem when he organised the Parliamentary Open Day. His performance was discussed at a meeting between himself and the Clerk on 1 December 2014. The Work Health Court accepted the appellant at that time told the Clerk he had depression and/or

107 Ibid at [93]; AB 412.

108 Ibid at [33]; AB 395.

PTSD and informed him that he was changing his medication.[109] Earlier that same day, the appellant had consulted his general practitioner and on 2 December 2014 consulted the psychologist Dr Jan Isherwood-Hicks who he had consulted on 33 previous occasions for PTSD, the last of those consultations being in mid-2013.

[76] The appellant took annual leave from 16 December 2015 and returned to work on 4 January 2016. With other colleagues he participated in a stocktake audit of the storerooms on 4 and 5 January 2016. The Clerk asked the appellant about the New Zealand seminar and the appellant informed him that he was not going as he had not arranged his travel. There was some acknowledgement that this would be discussed further.[110]

The absence from work on 6 January 2016 and relevant management action

[77] The Work Health Court accepted that on the evening of 5 January 2016 the appellant learnt an Army colleague was involved in a car accident and he believed he was seriously injured. He did not attend work on 6 January 2016 and returned to work on 7 January 2016. Relevant DLA officers were unable to contact him through regular channels. The Court found events of 7 January 2016, summarised below to be 'relevant management actions'.[111]

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109 Ibid at [33]; AB 394.

110 Ibid at [35]; AB 395.

111 Ibid at [56] and [57]; AB 400-401.

[78] In terms of the finding that the appellant did not communicate any further issues about his mental health, on appeal on behalf of the appellant, it was pointed out that the Clerk's evidence was that the appellant's performance did not improve from the time of the meeting in December 2014 when the appellant informed the Clerk he had mental health issues connected to military service. It did not occur to the Clerk that the "remarkable" drop in performance was relevant to the metal health problem, communicated to him in December 2014.[112]

[79] When the appellant returned to work on 7 January 2016, he completed an online sick leave request in respect of the 6th January absence. The sick leave request was made on the "myHR" system and forwarded to a supervisor for approval or comment. The Clerk responded to the appellant by an email entitled "Professionalism and Questions I require a Response to.[113] The email was as follows:

> **Subject: Professionalism and Questions I require a Response To**
>
> **Legislative Assembly of the Northern Territory**
>
> Dear Ben
>
> I require an explanation of the following matters;
>
> Your failure to abide by the notification requirements of the DLA Personal Leave Policy on 6 January 2016
> http://uluru.ntgov.au/lant/ServiceCentre/Perosnal_Leave_Policy.pdf

112 AB 1341.

113 AB 490.

Your lack of response to my email of 6 January 2016 asking if you were at work.

Your failure to respond to telephone messages left on your work supplied smart phone from my secretary Ms Jane Gunner on 8 January.

Lack of adequate detail in your application for personal leave submitted 7 January.

In addition to the above matters I am concerned that you will not be attending the ANZACATT professional Development Seminar in Wellington. When I prompted a response to this matter on 5 January you advised me on have not submitted the required travel requests in time: Why did you not submit the required travel requests in time?

Please provide a copy of your email to Lesley Ferguson in NZ advising that you have cancelled and will not be able to facilitate your assigned workshop.

My staff and I have had a 100% failure rate in reaching you on your work supplied smart phone. Please advise why this is so.

I am concerned that 2016 has commenced poorly after a lengthy performance management process was concluded in 2015.

You are a senior professional in this agency and if you don't respect the requirements of the agency I will be required to proceed accordingly.

[80] The appellant responded to the email by attending on the Director of Business Services, Ms Jacqui Forrest. Ms Forrests' notes of the meeting were admitted and were not challenged.[114] Relevant parts of her file note of 7 January 2016 are as follows:

RE Meeting with Ben Harris 7 January 2016

114 AB 493.

> Mr Ben Harris attended my office at approximately 9am on Thursday 7 January 2016, He shut the door and sat down. Mr Harris appeared emotional and his hands where physically shaking.
>
> Mr Harris advised that he had received an email from the Clerk questioning why he had not attended work the previous day. He stated the Clerk was aware that he needed "mental health" days and that his email was unreasonable. Mr Harris referred to the Clerk in derogatory terms, including "cunt" and made the statement that the Clerk just wanted to "get rid of him". I told Mr Harris that I didn't think he was thinking rationally and that he needed to talk to the Clerk and explain to him how he is currently feeling.
>
> Mr. Harris advised me that prior to Christmas his doctor and his psychiatrist had put him on new medication that was a lower dose and that his current state was normal while he adjusted to the medication. I stated to him that in his current state it appeared that perhaps it was not normal and that he should see his doctor to discuss.
>
> Mr Harris stated he felt that he should resign.
>
> I advised Mr Harris that he should not make any rash decisions while he was in his current state. I told Mr Harris that he did not look well and asked him if he had seen a doctor recently. I asked if he had been sleeping and he advised he had not slept or eaten in three days. I advised Mr Harris that I thought it was important that he see his doctor today.
>
> I asked Mr Harris to come to the front balcony with me to sit outside as he appeared extremely anxious. We sat outside for a while and I again reiterated that he probably should not be at work while he was unwell and told him again that I thought he should see his doctor.

[81] The appellant then had a meeting with the Clerk as recommended by Ms Forest. It is common ground that part of the discussion included the Clerk telling the appellant to "stop playing me for a fool"[115] and that the appellant was to take time off and not return until he was medically certified to return

115 AB 1345.

to work. The Work Health Court found the "stop playing me for a fool" comment was made, however it was noted the Clerk provided some context, namely that the appellant needed to keep them informed so they could make appropriate arrangements.[116] Relevant parts of that meeting recorded by the Clerk were in an email of 7 January 2016 and sent to the appellant which included the following:[117]

> **Legislative Assembly of the Northern Territory**
>
> Dear Ben
>
> As discussed, I provide the following notes concerning our meeting this morning:
>
> You entered my office and stated that you are surprised at what you allege is my lack of sympathy over a period of 18 months for your situation and that you had worked hard on your personal problems.
>
> This was the first time you have made such an allegation.
>
> You cited my email this morning asking for an explanation of your absence from the workplace yesterday as the primary example.
>
> I advised you I am sympathetic and have demonstrated my willingness to assist at numerous meetings over the past year or more.
>
> You advised me that you had experienced depression yesterday. I was not aware of this until you advised me today.
>
> At our meeting you requested personal leave from today until Monday. I approve that leave as you are visibly upset and appear to be unfit to attend to your duties. Please seek medical assistance.
>
> I will require a medical certificate stating that you are fit for work before you may return to duty. This is not an arbitrary matter; it is

116 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [53]; AB 339.

117 AB 491.

> for your well-being as well as to satisfy me that what is required of you at work will not contribute to further difficulties for you either personally or medically.

[82] In evidence the Clerk said it did not occur to him to try and find out what had happened the day before. He acknowledged the appellant was not required to submit a medical certificate for the absence of 6 January 2016 and that he had been advised the appellant was upset about the tone of the email.[118]

[83] The Work Health Court was satisfied that the emails and meeting between the Clerk and the appellant on 7 January 2016 were relevant management actions to manage the appellant's behaviour, specifically they were communications on the question of mis-conduct concerning possible non-compliance with departmental policies.[119]

[84] The appellant was then absent from work. He again went to see Ms Forrest, who made a file note on 8 February 2016, tendered to the Work Health Court. Relevant parts of her file note are as follows:[120]

> Mr Harris stated his doctor queried why he returned to work when the organisation he works for is aware that he has a permanent disability and that they cannot state that he would not have periods where his unwell again in the future. Mr Harris stated his doctor thought this was unusual.

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118 AB 1344.

119 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [56]; AB 400.

120 AB 500.

> Mr Harris advised he is meeting the Psychologist next week and that the Psychologist will inform his treating doctor if he is fit to return to work.
>
> Mr Harris stated however, that he did not wish to communicate with the Clerk and preferred not to be contacted by him at the moment.

Events between 22 February 2016 and 5 April 2016 and relevant management actions

[85] The psychologist referred to in Ms Forrest's note of 8 February 2016 was the appellant's treating psychologist for PTSD who, as mentioned above, had seen him on numerous occasions. The contents of Ms Forrest's note were communicated to the Clerk.[121] On 20 February 2016, Dr Senadeera Rajapakse certified the appellant would be able to resume his regular occupation from 22 February 2016. The Certificate stated 'Mr Ben Harris has a medical condition and better now.'[122] The appellant returned to work on 22 February 2016.

[86] In relation to the return to work on 22 February 2016 a psychologist called by the respondent, Dr Hundertmark gave the following evidence:[123]

> Alright. So is it reasonable for anyone to conclude, having just been away for 6 1/2 weeks following a complaint of depression, his mental state is not that good. Is that - and we can all see that you said - is that right?
>
> That's right. You don't – you do not need to be Sigmund Freud to see that if you've been away from work for 6 1/2 weeks and you are just

121 AB 1347.

122 AB 501.

123 AB 1379.

> coming back to the workplace your mental state is not very good. That is self-evident.
>
> Right and at that point an employer should take some care in how they ease him back into the workplace on the first day at least – would that be reasonable?
>
> Well I think it's a very interesting point. You also told me the general practitioner had signed him off as being fit for work did you not?
>
> Yes? So if he is fit for work he is fit to make a return to the workplace and take part in normal workplace duties and if normal workplace duties include being advised that performance management is necessary, then that is part of workplace duties.[124]

[87] Of this evidence the Work Health Court concluded that having received a full and unqualified medical clearance for return to work without reference to any ongoing medical conditions or limitations, the respondent was entitled to proceed on the basis the appellant was fit for all normal workplace matters, including performance management if it was required.[125]

[88] After consideration of the medical and psychological evidence and giving consideration to the particular workplace events, the Court confirmed it was not in dispute that on or by 4 April 2016 the appellant had suffered a mental injury arising out of his employment, however there remained a dispute about which work events contributed to the mental injury.[126]

[89] Upon the appellant's return to work he was directed to report to the Clerk. He was not informed of the purpose of the meeting and was not invited to

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124 AB 1380.

125 Ibid at [63]; AB 402.

126 Ibid at [48]; AB 398.

have a support person in attendance.[127] The Clerk presented him with a letter, in part set out below, dated 22 February 2016.[128] On the Clerk's evidence the purpose of the letter was to commence further performance management with the appellant, make enquiries in relation to the appellant's medical condition, and to provide the appellant with a notice of investigation into a disciplinary issue relating to his performance.

[90] In terms of the management material relevant to performance management, the DLA Performance Management Policy was before the Work Health Court.[129] The relevant parts identified by counsel are as follows:

> **POLICY STATEMENTS**
>
> This policy outlines a process for developing and maintaining a professional, innovative and capable workforce, through effective performance management. This includes affording all employees with a fair and supportive process when performance concerns and improvement opportunities are identified and managed by supervisors.
>
> **DEFINITIONS**
>
> Performance management is the process of supporting employees to satisfactorily fulfil their duties by identifying and managing performance concerns in a timely and constructive manner. This can be undertaken by an employee supervisor or unit head in a variety of ways, depending on what is most appropriate, and must generally include a structured performance improvement plan (PIP).

[91] The DLA Performance Management Procedure is set out in a document by the same name which includes the following:[130]

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127 AB 1348.

128 AB 502-505.

129 AB 485.

Procedure

Performance feedback and support

1. **Identification**: The supervisor or (Unit Head) gathers factual and detailed information and examples of an employee's actual duties performed, required job tasks, specific performance concerns, and available actions for constructively supporting the employee to improve.

2. **Communication**: The supervisor identifies a suitable and private opportunity to communicate informally the identified performance concerns, whilst avoiding making any presupposed judgements or decisions. During the discussion the employee must be given an opportunity to respond to the identified concerns, and also whether there are any other factors, such as personal or medical, that may be affecting his or her performance. If any serious concerns or medical grounds are identified, the matter must be promptly escalated to the Human Resources Manager and/or Director of Strategic and Business Support Services for guidance, and advice to the Deputy Clerk or Clerk.

[92] The rest of the document concerns the development of a performance improvement plan, the support that may be offered, the discussion of a draft agreement, opportunities for feedback, documentation and review.

[93] The letter given to the appellant on 22 February 2016,[131] makes plain that the matter is one of performance management. It starts with the words 'I write to raise with you my ongoing concerns relating to your performance in your role as Director Procedural Services'. The letter then reiterates that the appellant was written to on 13 April 2015 to advise that his performance was unsatisfactory and that a performance management process was undertaken. The letter notes that the appellant's conduct and productivity in 2015 had

130 AB 450.

131 AB 450.

improved to a satisfactory level, but the improvement was not sustained. It also summarises some of the issues raised in the Memo from Ms Forrest, set out above, and notes the appellant has been on personal leave from 6 January to 19 February 2016. The letter continues as follows:[132]

> Your poor performance and the advice of your permanent disability require me to conduct further investigation.
>
> I will determine if there are reasonable grounds to demonstrate if your conduct relates to an inability due a medical condition or unsatisfactory performance, pursuant to section 44 of the *Public Sector Employment and Management Act* (the Act) or to potential breaches of discipline pursuant to section 49 of the Act.
>
> **Particulars of Performance Concerns**
>
> I have identified that a number of matters remain incomplete and a number of issues that I suspect are breaches of discipline as outlined in section 49 of the Act. In particular these relate to the following:
>
> 1. Failure to follow direction as required, including examples below related to the ANZACATT Professional Development Seminar, lack of action on tabled paper and document audit and storage, and lack of action on the e-tabling initiative ordered by the Subordinate Legislation Committee's recommendation to the Assembly as adopted in 2013.
>
> 2. Failure to complete duties in a timely manner, for example the two years of continued inaction relating to tabled papers.
>
> 3. Failure to communicate and respond to reasonable requests such as my emails to you on 6 and 7 January 2016 and emails associated with draft CYP7 media releases.
>
> 4. Failure to resolve the CYP accounts with CPA HQ as directed.
>
> 5. Failure to prepare correspondence as directed, in relation to Ministers, the Administrator and others in preparation for

132 AB 502-505.

CYP7 and follow up for CYP 8 and for Open Day arrangements in 2015.

6. Failure to complete CYP7 article and report as directed.

7. Failure to complete the requirements to attend the ANZACATT seminar resulting in me having to prepare and substitute for you.

8. Taking a valuable professional development opportunity from another member of staff by not attending ANZACATT.

9. Failure to provide requested evidence of confirmation from NZ parliament of non-attendance at ANZACATT 2016.

10. Advising me the NZ secretariat had been so advised when they had not been (s 49 m).

11. Incomplete finalisation of Minutes of Proceedings from August to December 2015.

12. Failure to keep accurate records under the Records Management System.

13. Failure to administer and arrange Bills and Papers store rooms as requested during weekly meetings in 2014 and 2015.

14. Failure to provide a status report on Bills and Paper Stores planning by December 2015 as requested.

15. Failure to comply with the Department's personal leave policy to advise of absences on 6 January 2016.

Based on advice that I have received that you attended the Office of the Director of Business Services during your absence on 8 February 2016 and provided medical certificates to her rather than contacting me as your direct manager, and her advice to me that you do not wish to have contact from me concerning your workplace absences, I suspect you have taken my request for you to comply with the Department policies personally rather than professionally.

Your position has never reported to the Deputy Clerk or the Director of Business Services, contacting them rather than me during your

absence is avoiding your professional responsibilities as an employee.

[The letter refers to various policies not reproduced here]

Medical Condition

This is obviously a sensitive and difficult situation because I have raised serious concerns about your performance in the past but now, for the first time, I understand that you may be asserting that these matters relate to a permanent disability.[133]

[The letter refers to the need to provide further information, not reproduced here]

Please provide me with written advice within 14 days of receipt of this letter of the extent of your disability and its impact upon you complying with daily duty requirements while at work and any workplace policies. Without such advice I will continue to require you to adhere to the Department's policy about notification of absences.

Return to Work – Duties

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

[The letter refers to the February sittings of the Legislative Assembly]

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

[The letter refers to working cooperating with the Director of Business Services]

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133 At that time the appellant's assertion of a permanent disability was unsupported by the psychological evidence.

> You are not required to undertake any duties as Serjeant at Arms and the Director of Security will continue to report to me. I will continue to oversee the Table Office and sittings procedural matters for sitting days without your assistance.
>
> You will not be required to participate in the Know Your Assembly seminars for 2016.
>
> Because of the Deputy Clerk's role with Parliament House store rooms and site management and her reporting line to the Director Business Support relating to records management you are to seek direction from her for routine tasks but you will continue to report to me on a daily basis commencing 22 February 2016 for performance management reasons.
>
> Should any of the matters raised in the correspondence be of concern they can be discussed at out meeting tomorrow
>
> Should you require employee assistance this is available to you through the Employee Assistance Scheme.
>
> I look forward to working through the issues I have raised with a productive and professional approach.

[94] As was indicated in the Clerk's letter of 22 February 2016, while the Clerk conducted further investigation for disciplinary matters, he intended to revise the appellant's duties while the appellant would continue to be remunerated at his current level. The appellant's ceremonial and formal role in parliamentary sittings was to be removed and he would deal more with the papers and routine tasks. The expert evidence indicated the appellant took this as demeaning and punitive treatment.

[95] In a statement, Dr Isherwood-Hicks stated she saw the appellant on 3 March 2016 and he showed her a letter from his boss regarding employment his performance. She said 'Ben took advice from OCPE and drafted a reply.

Effectively, he had been demoted to carrying boxes and a website task and he was told he was no longer Sergeant at Arms. That was the time when he was deemed not being up to mark. By 15 April 2016, Ben was suffering depression and anxiety as a consequence of his employment. His presentation was acutely distressed'.[134]

[96] Dr Isherwood-Hicks said the appellant stated the loss of the Sergeant at Arms position was 'Very significant. Very, very significant to him'.[135] This was because he felt 'demeaned, humiliated, degraded and demoted'.[136]

[97] Dr Isherwood-Hicks made the following comments relevant in part to the same issues later in 2016: 'On 1 September 2016, Ben received a letter stating that he was to show cause as to why he should not have his employment terminated. Ben told me of his duties being stripped and I considered that was not in his best interest in terms of his mental health wellbeing and was counter-productive. It was demeaning in the context of his senior role. It seemed punitive.'[137]

[98] Referring to the Clerk's letter of reply of 9 March 2016 to the appellant addressing various complaints that the appellant had made in regard to the process the Clerk had adopted, the Work Health Court accepted the Clerk had set out a long history of meetings, correspondence and requests (by

134 AB 658.

135 AB 1284.

136 AB 1284.

137 AB 659.

reference to dates, emails, meeting notes and minutes) relevant to the specific issues raised in relation to the appellant's performance. The Court was satisfied that regular informal discussions relevant to the appellant's duties and his performance had taken place. Further, the Court did not accept that departmental guidelines were breached on any basis, including that advice should have been taken from the Human Resources manager or the Director of Strategic and Support Services.[138] The Court reasoned that having twice been requested to provide a medical report explaining his condition, the appellant had not produced anything that explained or supported his assertion of a disability, and to the contrary, the medical certificate of 20 February 2016 said he was 'better'.[139]

[99] When dealing with the complaint by the appellant that he had communicated with Ms Forrest on 8 February 2016; that he did not wish to communicate with the Clerk and "preferred not to be contacted by him at the moment" and that it was unreasonable and unnecessary on his return to work to be asked to attend daily meetings with the Clerk, the Work Health Court said this requirement was "short lived".[140] The Court noted that within the first week of the appellant's return, the Clerk reconsidered the efficacy of the approach. He said that he "didn't want it to become personal" and he "wanted Mr Harris to have a bit of space." He therefore arranged the appellant meet with the Deputy Clerk instead of himself. Given the

138 Ibid at [74]-[75]; AB 406.

139 Ibid at [75]; AB 406.

140 Ibid at [78]; AB 407.

appellant's seniority in the organisation; that the Clerk was his direct line manager; that they had both successfully worked together through a lengthy performance management process in 2015 and in the light of the appellant's medical clearance, the Court found it was not unreasonable for the Clerk to initiate regular, even daily meetings for the purpose of managing the completion of prioritised tasks as had occurred in 2015.[141]

[100] In terms of the appellant's concerns about the changes made to his duties on his return to work mentioned above and that the draft plan proceeded through several versions with changes being made often,[142] and given the submission that the combined effect including undertaking the new project was patently and obviously unreasonable, the Work Health Court thought this incorrectly characterised the project. The Court concluded the project required the appellant to address 'the significant task of on-line management of tabled papers and the modernisation of the Assembly's approach as required by the Subordinate Legislation Committee's May 2013 recommendation to the Assembly as adopted.'[143] The letter of 26 February 2016 from the Clerk to the appellant set out the scope of the project and identified seven desired outcomes. The Court concluded the project was not a demotion and fell within the purview of the appellant's responsibilities.[144]

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141 Ibid at [78]; AB 407.

142 Ibid at [79]; AB 407-408.

143 Ibid at [80]; AB 408.

144 Ibid.

[101] Evidence before the Court from the Clerk was that the project given to the appellant, in the 2 1/2 years previously had fallen by the wayside and was given to the appellant because the office was now well behind the Assembly's Resolution and he did not want the office to be in contempt of the Assembly. The Clerk also said his intention was to concentrate the appellant's efforts on the modernisation project without all the 'fun' of a Parliamentary sitting day which is full of people coming and going and requires going in and out of the Chamber.[145] The Deputy Clerk, Ms Conaty supervised the completion of the project and the Court accepted she took the project seriously as did Ms Forrest.[146] The Court did not accept that the appellant was stripped of all other duties or isolated. It was noted the appellant was meeting with Ms Conaty to progress the project and was offered small group training. The Court accepted the evidence of the Clerk that the appellant still had line management of his staff and could call on them or the departmental support team for assistance.[147] The Court accepted the Clerk's evidence that he had genuine and legitimate grounds for temporarily requiring the appellant to focus and finalise one project and although the appellant might not have liked the project or considered it worthy, the Court concluded the decision was not implemented as a punishment nor was it a practical demotion.[148]

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145 Ibid at [81]-[82]; AB 429, 30.

146 Ibid at [83]; AB 30, 31.

147 Ibid at [84]; AB 30.

148 Ibid at [85]; AB 31.

[102] At one of the scheduled meetings between Ms Conaty and the appellant on 4 April 2016, Ms Conaty noted she made a number of further requests in relation to additional amendments to the draft, some of which had been already raised earlier meetings which had been ignored or overlooked. She noted further:[149]

> Mr Harris was civil to me during this meeting and advised that he would address these matters and continue to work on the brief to the Speaker.
>
> I noted I was aware how much work he had put into many of the tasks contained in the plan and that I had observed a lot of progress during our walk around on 24 March 2016.
>
> I thanked him for his March report which I received during the afternoon of 1 April 2016 and advised that I had provided it to the Clerk at a weekly meeting on 4 April 2016. I told Ben that if he addressed the matters I requested, I would sign the plan through to the Clerk.

[103] Shortly after the meeting with Ms Conaty, the appellant went to Ms Forrest's office. He then "lost it".[150] The Work Health Judge summarised the incident in the following way. The appellant shouted, swore and complained that he had been asked to make further changes to the draft plan which he considered "pointless". He also considered the plan contained unrealistic deadlines designed to be held against him. After railing against his work and the Clerk, he referred to matters concerning his health. As noted by Ms Conaty the appellant said:[151]

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149 Ibid at [86]; AB 410.

150 Ibid at [87]; AB 410-411.

151 Ibid.

> … [h]e is not sleeping and he said I have an anxiety attack every f* morning when I think about coming into this f* place and have to deal with the f* Clerk.
>
> Mr Harris stated he hears telephones ringing every 15 minutes and that he smells the dust from his tent in Afghanistan. Mr Harris advised that on his way to work this morning that that he was near a zebra crossing and saw the oncoming car wasn't going to stop. He advised he had considered just walking under it and killing himself. He advised that when he is ironing his shirts he thinks about pushing the iron onto his face. He also advised that he picks at his scalp.
>
> Mr Harris reiterated that the Clerk is responsible for his current states of mind.

[104] In response to the incident on 4 April 2016, including serious mental health disclosures, it was determined the appellant should be suspended from duties on full pay until he was medically fit to return to the workplace. This was communicated to the appellant on 5 April 2016 by letter and in a recorded meeting with Ms Conaty and Ms Forrest. For some time after, the Work Health Court found until November 2017, the appellant was not fit for work at all.

Findings on the question of the reasonableness or otherwise of management action

[105] As above, the Work Health Court found that the emails and meeting between the Clerk and the appellant on 7 January 2016 were relevant management actions in that they were actions taken by the employer in the management of the appellant's behaviour in the workplace and more specifically were communications on the question of possible misconduct by the appellant

concerning his possible failures to comply with departmental policies.[152] In respect of the return from sick leave on 22 February 2016 and what then transpired, the Work Health Court found the medical clearance without conditions or limitations entitled the employer to proceed on the basis that the appellant was fit for all normal workplace matters. The Court accepted the letter of 22 February 2016 was a management action pursuant to s 3A of the Act.[153] Given the seriousness of the outburst by the appellant on 4 April 2016 for which management action was taken on 5 April 2016 in the form of suspension, the Work Health Court concluded the action in the circumstances was reasonable; namely that the appellant be excluded from the workplace until his medical fitness was established and it found it was reasonable that he undergo a psychiatric assessment which he had consented to.[154] The Court dealt with the appellant's submissions on the reasonableness or otherwise of the management actions as follows:[155]

> I note that many of the Worker's submissions as to the reasonableness of the various actions, presupposed that Mr Tatham knew or ought to have known that Mr Harris was suffering a mental illness or permanent disability during the period from 7 January through to 5 April 2016. I do not accept that proposition. I accepted Mr Tatham's evidence that there was one conversation in late 2014 or early 2015 when Mr Harris told him of an illness associated with his army experience. Mr Tatham was aware on 7 January that Mr Harris was depressed which in evidence Mr Harris said was due to receiving information that a war colleague was seriously injured in a car crash. However, in my view Mr Tatham was entitled to rely on the medical certificate of 20 February 2016, which said that Mr Harris was

152 Ibid at [56]; AB 400.

153 Ibid at [63]-[64]; AB 402.

154 Ibid at [91]; AB 411.

155 Ibid at [93]-[94]; AB 412.

> "better". In his letter dated 22 February 2016, Mr Tatham invited Mr Harris to provide further medical evidence if he was asserting a permanent disability relevant to his work. In his response on 7 March 2016, Mr Harris again referred to his mental health, claimed he had provided written information about it in late 2014, and declined to provide any further information (but agreed to be psychiatrically assessed). In his letter of 9 March 2016 Mr Tatham made it clear that he had not received the medical documents in 2014 and requested copies (which were not and have never been provided). In those circumstances, I remain of the view that Mr Tatham was entitled to proceed on the basis of the medical clearance of 20 February 2016 that Mr Harris was "better". He was entitled to make management decisions on the basis that Mr Harris was "better" and "able to return to normal duties". However, even if I am mistaken, based on the limited and dated information on which the medical condition and disability was claimed, there was little more that Mr Tatham could do than to seek further information. When that was not forthcoming, in my view it was reasonable for him to proceed with the decisions that he made on the information that was available to him.
>
> In all the circumstances, having considered each of the workplace actions in turn, I was satisfied that the performance management process and medical suspension were taken on reasonable grounds and in a reasonable manner. Furthermore, I have stepped back and taken a second look at the management actions as a whole, and remain of the same view. Mr Harris has therefore not suffered an "injury" as defined by the RTWA, and the Employer has no liability to Mr Harris

Grounds of Appeal

[106] Turning more specifically to the grounds of appeal. Ground 1 claims the Work Health Court erred in law by determining the actions of the employer were taken on reasonable grounds and in a reasonable manner. Bearing in mind the relevant facts were primarily found against the appellant and are not to be re-litigated on appeal, for this ground to succeed, it must be shown the *only* conclusion open was contrary to the Work Health Court's conclusion, that the employer's management actions were reasonable and carried out in a reasonable manner. Alternatively, that specific material

error of law can be established on review of the reasoning including the factors taken into account when determining reasonableness or otherwise of the management actions.

[107] Given the Work Health Court's finding of fact that the Clerk had no knowledge, nor that he ought to have known the appellant was suffering a mental illness or permanent disability from 7 January through to 5 April 2016, there can be no appellable error on this ground. Ground 1 sets out a reasonably accurate and detailed summary of the unchallenged evidence, however in the end ground one cannot succeed in the face of the Work Health Court's relevant findings of fact.

[108] Ground one relies substantially on the assertion that the Work Health Court should have accepted the Clerk knew of the appellant's mental illness during a crucial period. This was specifically rejected below. Shorn of the assertions of fact contained in ground one, in the end, ground one invites this Court to substitute an alternative finding on the facts about what the Clerk knew or ought to have known. It cannot be concluded that on the facts as found below, the ultimate finding was not open. Nor is any specific error identified.

[109] I will not uphold ground one.

[110] The Work Health Court *did* accept a substantial amount of evidence which tended to show the appellant was in an emotional state or otherwise in a

poor emotional state and that the Clerk knew of that. This is relevant to ground two which reads:

> In assessing whether the management action taken by the Employer was on reasonable grounds and in a reasonable manner, the learned trial judge erred in law by:
>
> 2.1 Failing to direct herself of the need to consider the emotional state of the Worker and what the Employer knew or ought to have known in relation to the same; and
>
> 2.2 Concluding it was reasonable for Mr Tatham to proceed with the decisions he made on the information he then had, such conclusion not being reasonably open.

[111] Although the Work Health Judge directed herself on whether the Clerk had knowledge of mental illness, there was no direction or similar consideration of the employer's knowledge of the appellant's particular emotional vulnerabilities, his emotional state or overall make up at the time the various management actions were taken. Further, there was no separate consideration on whether even if the management action was reasonable, given the emotional make-up of the appellant, it was carried out in a reasonable manner. This is particularly relevant to the presentation of the letter of 22 February 2016, set out above immediately upon the appellant's return from sick leave. Although the finding that nothing was known of the appellant's mental illness grounded the finding that the management actions were reasonable, there was no consideration given to whether any of the actions were taken in a reasonable *manner* by virtue of the obvious emotional state or vulnerabilities of the appellant. There was no material

consideration of whether the action of presenting the letter rather than alternative actions particularly with respect to way the action was carried out due to the known vulnerabilities was appropriate. For example, the communication was more likely to have been reasonable if conducted by a neutral member of the management staff or utilising the human resources department.

[112] It is clear the Work Health Court accepted the appellant suffered a vulnerable emotional state or make-up. A number of findings illustrate this point. The Work Health Court accepted the appellant had informed the Clerk on 1 December 2014 that he was suffering from depression and/or PTSD and that there had been a change in his medication. The following and corresponding 'remarkable' (as the Clerk put it) deterioration in performance was observed, noted and acted upon by the Clerk by way of successful performance management which was finalised on 23 October 2015.

[113] The Work Health Court accepted the Clerk knew of the conversation that the appellant was suffering mental illness in late 2014 or early 2015 and was aware he was depressed on 7 January 2016. The content of Ms Forrest's note, set out above dated 7 January 2016 was communicated to the Clerk. Against that background and the noticeable drop in performance, it seems to have been accepted that the Clerk did not think to make inquiries about what had happened on 6 January 2016. It was reasonable in those circumstances to make some enquiries before sending an accusatory letter about non-

compliance with leave requirements. The letter contains at least an implied threat of disciplinary action. While the Work Health Court's finding that the Clerk knew nothing of the appellant suffering from a mental illness should not be disturbed here, there is no tangible consideration or direction about what was a reasonable way to convey the Clerk's concerns given the obvious emotional state of the appellant as noted by Ms Forrest and others and communicated further.

[114] Although the facts as found exclude imputing knowledge that the appellant was suffering a mental illness or disability in that period, there was no finding which told against the Clerk's knowledge of the Appellant's vulnerable emotional state. It was accepted by the Work Health Court that Ms Forrest suggested the appellant obtain medical help after his discussion with her. The content of that discussion was conveyed to the Clerk. In relation to the appellant's absence, medical certificates were provided and on return to work the Clerk's letter of 22 February 2016 set out above was presented to the appellant. The admittedly scant comparable case law indicates emotional make-up and associated vulnerabilities should be considered in an assessment of the reasonableness of management action and even if reasonable such factors should be considered with regard to whether the action was taken in a reasonable manner.

[115] In *BHP Billiton Mitsui Coal Pty Ltd v The Worker's Compensation Regulator and Anor* ('*BHP Billiton*'),[156] the Queensland Industrial Relations Commission cited Keane JA in *Hegarty v Queensland Ambulance Service*[157] and held that where an employer is fixed with the knowledge of a worker's make-up, it is incumbent on that employer to assess what was a reasonable way to implement an otherwise reasonable decision, but for the make-up of the employee.[158]

[116] This is not a case of 'unremitting solicitude'[159] as was found to be the case in *Hegarty v Queensland Ambulance Service* ('*Hegarty*').[160] In *Hegarty*, when discussing whether the actions of an employer towards an employee with poor mental health were reasonable and implemented in a reasonable way, Keane JA expressed the view that taking care for the safety of employees at work does not extend to 'absolute and unremitting solicitude for an employee's mental health'. That was not the case here. There was no unremitting solicitude. The appellant came back from sick leave having taken that leave after well-documented emotional outbursts which had resurfaced from time to time. Those outbursts were uncharacteristic when seen against his earlier work performance. The need for further performance management and change of duties and responsibilities could not have been

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156 [2017] QIRC 084.

157 [2007] QCA 366 at 47.

158 *BHP Billiton Mitsui Coal Pty Ltd v The Workers' Regulator and Anor* [2017] QIRC 084; *WorkCover Queensland v Kehl* [2002] 170 QGIG 93, 94.

159 *Hegarty v Queensland Ambulance Service* [2007] QCA 366 at 47, per Keane JA.

160 [2007] QCA 366 at 47.

communicated in a more unreasonable manner at the particular times it was done, especially the presentation of the letter and its contents on 22 February 2016. There was no direction below which deals with the issue of the reasonableness of the actions or importantly the manner in which they were taken given the appellant's obvious emotional vulnerabilities.

[117] In *BHP Billiton*, the Industrial Relations Commission (Qld) determined 'management action' was not taken reasonably in circumstances where the worker had a pre-existing psychiatric or psychological disorder which had been discounted by the employer after the worker had received a clearance to return to work. The worker's vulnerability to the disorder had resurfaced on a number of occasions. In terms of a final warning which was issued to the worker, the Commission noted that despite knowing about the worker's vulnerability, the employer issued a final warning in isolation and as a predetermined outcome. Although there were numerous other factors at play, the Commission concluded what would otherwise be 'reasonable management action' in the circumstances would not be reasonable for a person suffering vulnerabilities.

[118] There are some parallels here with *BHP Billiton*. The Work Health Court found that a clearance from a General Practitioner, which stated 'better' meant the appellant was able to return to normal duties which included the receipt of the letter alleging unsatisfactory performance, breaches of discipline and an investigation. The Medical Certificate should not have been used by the Work Health Court in a way that precluded all other

considerations on whether the management actions were reasonable and if reasonable were carried out in a reasonable manner.

[119] There was some evidence from Dr Hundertmark[161] called by the respondent which went to the weight that may be given to a general practitioner signing a worker off as being fit for work. Although concerned with the question of mental health rather than emotional make-up Dr Hundertmark said "So if he is fit for work he is fit to make a return to the workplace and take part in normal workplace duties and if normal workplace duties include being advised that performance management is necessary, then that is part of workplace duties". For an employer to rely on a 'fit for work' certificate in this context, the inquiry must go further than those observations to examine whether any action taken as a result is reasonable and importantly whether it is carried out in a reasonable manner. Dr Hundermark's evidence said nothing about the manner in which management action was or should be taken. The respondent cannot rely on the defence of reasonable management action if the action was not carried out in a reasonable manner. The Work Health Court did not direct itself on whether due to the appellant's emotional make-up and vulnerabilities, management action was reasonable, more particularly whether it was carried out in a reasonable manner. The parties agree that if any one of the identified management actions is not reasonable or not carried out in a reasonable manner, the respondent's defence must fail.

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161 Set out above at [86].

[120] The evidence, submissions and reasons have been reviewed in this Court sufficient to determine this point. Rather than remit the matter for a re-hearing and on the basis of a review of the material, it is held here that ground two is made out.

[121] I will allow ground two.

[122] Ground three states:

> Having noted that subsequently the Employer later took reasonable steps to obtain appropriate advice on how best to proceed an arranged an independent medical assessment, the learned Trial Judge erred in concluding that in light of the Worker's failure to provide medical reports to the Employer to substantiate his assertion, the Employer had acted reasonably and not breached the departmental guideline by embarking upon performance management without taking any advice, such conclusion not being reasonably open.

[123] In circumstances where the Work Health Court found as a matter of fact that the Clerk was unaware of the appellant suffering a mental illness, the respondent cannot be found to have breached the Department's Performance Management Guideline, which states in part 'if serious concerns or medical grounds are identified, the matter must be promptly escalated to the human resources manager and/or director of strategic and business support services for guidance and advice'.

[124] It may have been prudent, indeed preferable for the respondent to have sought advice from the human resources manager given the history of the manifestation of the appellant's emotional outbursts. There was a finding that the Clerk was unaware of a mental health condition. The state of affairs

was not strictly covered by the Performance Management Guideline and in my view there was no error by holding the Performance Management Guideline had not been breached. I am not sure there was a failure to provide relevant medical material by the appellant, nor what difference that may have made if further material was supplied, however that was a finding fact. The lack of a proven breach of the Performance Management Guideline is not determinative of the reasonableness or otherwise of the management action or of the mode of carrying it out. It is a relevant matter but not a decisive factor here.

[125] I will not uphold ground three.

[126] Ground four concerns the question of partial incapacity and states:

> Having found that the Worker by November 2017 was still incapable of returning to work at his pre-injury site of employment or under Mr Tatham, the learned Trial Judge erred in law in concluding that by November 2017 the Worker was no longer suffering from a partial incapacity for work, such conclusion not being reasonably open.

[127] The finding of the Work Health Court was that by November 2017, the appellant could complete all the tasks of pre-injury employment. However, it was not disputed he could not return to employment and work under the Clerk due to the 'risk of recurrence of his mental illness'.[162] The Work Health Court posed the question appropriately as follows:

> 'Mr Harris was able to complete all of the duties relevant to his pre-injury employment but he could not work under Mr Tatham due to

162 *Ben Daniel Harris v Northern Territory of Australia* [2019] NTLC 03 at [96].

> the level of animus and blame that he harboured against him. If he did work with him, his mental illness might recur. Was this qualification, namely that he could not work with Mr Tatham, a continuing partial incapacity?'

[128] Section 3 of the Act states 'incapacity means inability or limited ability to undertake paid work because of an injury'. Although dealing with a physical injury rather than a mental injury *Arnott's Snack Products Proprietary Limited v Yacob* ('*Yacob*') deals with deals with 'partial incapacity' under the then New South Wales legislation. The majority in *Yacob* held '…it follows that the concept of partial incapacity for work is that of reduced physical capacity, by reason of physical disability, for actually doing work in the labour market in which the employee was working or might reasonably be expected to work'. On the particular facts in *Yacob*, the majority held that because the respondent worker was unable to perform part of his pre-injury work, he was to be regarded partially incapacitated:[163]

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

[129] Although instructive, *Yacob* analysis a different statutory regime; the *Worker's Compensation Act* 1926 (NSW), particularly s 11, which at the time provided the concept of 'incapacity for work' means (a) physical

163 *Yacob* at 179.

incapacity for actually doing the work in the labour market in which the employee works or may reasonably be expected to work; or (b) physical incapacity resulting in actual economic loss.[164]

[130] The Federal Court subsequently held[165] 'incapacity for work' means a physical incapacity for actually doing work, resulting from injury (or disease) and …compensation is awarded for that incapacity where it reduces the employee's ability to sell his labour in the open market'.[166]

[131] In broad terms *Yacob* might be said to import the availability of work in the open market into the concept of '*partial incapacity'*. I am not at all certain the question of availability of work in the open market arises in the same way under the Act here, as while both s 64 and 65 deal with entitlement to benefits as a result of incapacity, s 65 imposes employment market tests for long term incapacity.[167] The market element relevant to the concept 7 or consequence of incapacity does not apply to s 64 which regulates compensation payments during the first 26 weeks. I doubt an open market test can apply in the same way to 'incapacity' giving rise to benefits under s 64 of the Act, given the detailed treatment of the same under s 65. In any event, on one interpretation *Yacob* applies to any circumstance of reduced incapacity to sell labour on the open market, hence being unable to return to

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164 *Yacob* at 172.

165 *Watkins Ltd v Renata* (1985) 8 FCR 65.

166 Citing *Williams v Metropolitan Coal Ltd* [1948] HCA 8; 76 CLR 431 and *Thompson v Armstrong Royse Pty Ltd* (1950) 81 CLR 585.

167 See eg, s 65(2)(b) 'most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her'; s 65(3A) defines inclusively 'most profitable employment available'.

a work place as a result of injury is an impaired capacity, both in the medical sense and in the economic sense.

[132] On the question of whether in this case the appellant could be said to have limited capacity, the Work Health Court was influenced substantially by the decision of Judge Bowman in *Kerridge v Monsfelt Pty Ltd* ('*Kerridge*')[168]. The respondent urges reliance on the same here. In *Kerridge*, the worker's capacity as a result of a mental injury from bullying was restricted to one particular place of employment while a particular person worked there. Applying *Yacob* it was held there was no meaningful restriction of the worker's ability to sell his labour in the open market, in the field he was working in. Consequently, there was no incapacity.

[133] Counsel for the appellant submitted *Kerridge* should be distinguished as the relevant Victorian statutory regime governing worker's compensation is markedly different from the *Northern Territory Act*. As indicated, I substantially agree with that submission. As discussed later, it would appear there has been some retreat from the strict approach taken in *Kerridge*. At the time *Kerridge* was decided in March 2008, the Court had recourse to the common law and cited *Yacob* in terms of a definition of 'partial incapacity' as the relevant Act, the *Accident Compensation Act 1985* (Vic)[169] did not define 'partial incapacity'.

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168 [2009] VCC 0154.

169 No.10191 of 1985.

[134] According to the margin notes to s 5(1) of the *Accident Compensation Act* (Vic), the definition of 'partial incapacity' was inserted in 1992 and repealed in 1997.[170] 'Total Incapacity' similarly was not defined in the *Accident Compensation Act* at the time of the *Kerridge* decision.[171]

[135] In *Kerridge* it was found the worker could still 'sell his labour on the open market as a tyre fitter', notwithstanding he could not return to his previous employment while one particular person was working at the work site. The Court concluded in those circumstances: '[T]hat falls well short of the type of test applied in *Yacob*. There has been no meaningful restriction on the plaintiff's ability to sell his labour on the open market or, indeed in the field in which he had been working.'[172]

[136] *Kerridge* has been applied regularly in workers compensation cases in Victoria, on occasions cited as the '*Kerridge* principle'[173], however Judge Bowman distinguished *Kerridge* in his later decision of *Hewitt v Southern Health & Another* ('*Hewitt*'),[174] apparently on the facts. In *Hewitt*, Judge Bowman referred to the definition of 'current work capacity' in s 5 of the

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170 The margin notes provide: 's 5(1) def of *partial incapacity* inserted by No. 67/1992 s 6(i), repealed by No. 107/1997 s 30(i)(c)'.

171 The margin notes provide: 's 5(i) def. of *total incapacity* inserted by No.67/1992 s 6(m), repealed by No. 107/1997 s 30(i)(e).

172 *Kerridge* at 106.

173 See eg. *Byrnes v RMIT* [2010] VMC 50; *Castellucci v Sisters of St Joseph* [2012] VMC 40; *Susan Wordley v State of Victoria (WorkCover)* [2015] VMC 5; *Vassallo v Intermotor Sales* [2017] VMC 16; *French v Jolson Corp Pty Ltd* [2020] VMC 11; *Hell v Parks Victoria* [2022] VMC 1.

174 [2013] VCC 1247.

Accident Compensation Act 1985 (Vic). That section was not referred to in *Kerridge*[175] but provides:

> ***Current work capacity***, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-in jury employment but is able to return to work in suitable employment.

[137] In *Hewitt* the employer argued the worker was unable to return to their pre-injury employment, but able to return to work in suitable employment, the rate of weekly payments being the difference between 95 per cent of pre-injury average weekly earnings and current weekly earnings. It was argued that as the worker was able to return to pre-injury employment she did not fall within the definition of 'a current work capacity'.

[138] Judge Bowman found that in fact the worker in *Hewitt* could not return to the previous employment. His Honour did however distinguish *Kerridge*. In my view, some of the points of distinction are difficult to reconcile with the view taken to 'partial incapacity' in that case. The points of distinction made by Judge Bowman in *Hewitt* were first that in *Kerridge* the plaintiff worker was unreliable,[176] second, the general practitioner who was considered important was not called and no relevant hospital material tendered.[177] Third, the plaintiff worker's evidence of bullying by one person in one work place was not accepted in *Kerridge*. There was evidence that

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175 The margin notes indicate the definition was inserted by 107/1997, although was in forc e at that time; see No 10191 of 1985.

176 *Hewitt* at [87].

177 Ibid at [88].

after his former boss retired the worker in *Kerridge* enquired after employment at the very same premises. Thus, it was held the limit of the plaintiff's incapacity was confined to one workplace for the period that one individual was there, in circumstances where the employer owned two workplaces not a great distance away where identical work was available.[178] Fourth, it was accepted the worker simply left his employment and that no, or only brief incapacity had been established.[179] Next it was specifically found that no injury was suffered in *Kerridge* and the plaintiff workers evidence of bullying, abuse and assaults was rejected.[180]

[139] In *Hewitt* his Honour said the discussion of incapacity in *Kerridge* was 'probably not necessary' but was dealt with as it had been argued. His Honour went on further to explain he favoured the view that the words 'pre-injury employment' refer to the type or class of employment in which the injured worker was engaged. In *Kerridge* the plaintiff worker could sell his labour on the open market. Any restriction which he had was confined to one particular place of employment whilst one person was working there for one limited period.[181]

[140] Although elements of the reasoning in *Kerridge* has useful parallels factually with this matter, in the end the analysis adopted by his Honour in *Kerridge* was unnecessary on the peculiar or extreme circumstances of that

178 Ibid at [89].

179 Ibid at [90].

180 Ibid at [91].

181 Ibid at [93].

case. Clearly the Judge Bowman was influenced in *Kerridge* by the fact the employer had other work sites where the worker could be employed. Since *Hewitt*, there has been some adoption of Judge Bowman's view of 'pre-injury employment' referring to the type or class of employment in which the injured worker was engaged.[182] In other words, not job specific. The respondent submitted strongly that an inability to return to a particular work place was not a *meaningful* restriction when the appellant had capacity to work elsewhere.[183] In my view this does not take account of the structure of the Act and requires some gloss to be applied to its provisions to take the precise approach taken in *Kerridge*.

[141] As indicated, the determination here must be made under the *Return to Work Act* and associated case law, which although not precisely on this point, indicates an approach consistent with the conclusion here.[184] The inability to return to the work place because of the probability of a further injury is a relevant partial incapacity for the purposes of the Act, however, in the particular circumstances of this case, this clear gives rise to s 64 compensation. Different considerations may be required to be considered under s 65 because of the regime of earning capacity tied to the most profitable employment reasonably available. I do not think the material I have seen on appeal permits a final conclusion under s 65, however if

182 *Ilir Sadiku v Trussmakers* (Vic) Pty Ltd, 26 June 2015, VMC 20.

183 Respondent's Submissions, 15 November 2019 [50]-[58].

184 *Foresight Pty Ltd v Maddick* (1991) 105 FLR 65, 68-69.

further findings are required, there will be an opportunity for submissions as to consequential orders.

[142] I will uphold ground four.

[143] Turning to the respondent's contentions, the first contention is the Work Health Court was in error by including the 'sittings allowance' in the calculation of normal weekly earnings.[185] The relevant provision is s 49A of the Act which provides *inter alia* that certain payments may be included in the calculation of normal weekly earnings. Those payments include regular overtime, climate, district, leading hand allowances, shift allowances where there is a pattern of shift work or service grant. Excluded specifically are allowances not included in s 49A(3)(c); overtime save where provided specifically and under s 49A(4)(e). 'Any other remuneration paid by an employer to the worker in a form other than an amount of money paid or credited to the worker.'

[144] The Speakers Determination for a Daily Sittings Allowance and Time in Lieu sets out a regime for a rate of payment or time in lieu to cover extra duty that may be required during Legislative Assembly Sittings.[186] The payment is expressed throughout the Speakers Determination as an 'allowance'. The allowance must be claimed and approved.

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185 *Ben Harris v Northern Territory of Australia* [2019] NTLC 03 at [109]-[122].

186 The relevant extract is set out in *Ben Harris v Northern Territory of Australia* [2019] NTLC 03 at [110].

[145] The respondent argued that as the 'sittings allowance' was not included as an allowance in s 49A(3)(c), it is excluded from the calculation due to s 49A(4)(c). The Work Health Court relied on *Saitz v NTA* (*'Saitz'*)[187] to conclude the sittings allowance was not an 'allowance' within s 49A, but rather was remuneration simpliciter.

[146] The respondent submitted the approach taken below was in error as *Saitz* can be readily distinguished. *Saitz* involved a worker being paid at a higher salary while performing higher level duties, therefore the Work Health Court concluded it was a case of remuneration simpliciter. The fact that a payment is labelled an 'allowance' in the award, contract or determination is not determinative for these purposes under the Act. The respondent submitted the sittings allowance was of a very different nature, more in the nature of a benefit which was a 'grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of service.'[188]

[147] While it is the case that benefits for unusual conditions of work, to be separately applied for might be considered an allowance in certain circumstances and therefore excluded, I do not agree that the benefits received under the Speaker's Determination, in the context of the particular

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187 [2008] NTMC 104.

188 *Murwangi Community Aboriginal Corporation v Carroll 'Murwangi'* (2002) 12 NTLR 121 at [19].

work place are in the character of an 'allowance'. The Work Health Court found the appellant was entitled to claim the 'allowance' whenever parliament was sitting, and when parliament was sitting he worked extra hours. He did not take time in lieu.[189] In the context of the particular workplace, this was hardly an 'add on' for doing something out of the ordinary. It was available for claim during Legislative Assembly sittings periods and should be seen as 'remuneration' as that term is understood in the Act and in similar regimes. There was a clear established pattern of receiving the allowance. The approach taken by the Work Health Court supports the underlying objective of the Act to provide income maintenance.

[148] I will dismiss the first contention.

[149] The second contention is that the Work Health Court erred in concluding that the appellant's earnings with the *Precinct Tavern* should not be taken into account in calculating compensation payable under s 65(2) of the *Return to Work Act* whenever the appellant was employed full time.

[150] The appellant received remuneration at various times after he was suspended on or from 5 April 2016. Some periods were with pay, some were with leave of various types, at times he was deemed to be on pay and some periods were without pay but back paid later.[190] During a period of unpaid suspension he commenced casual employment at the Precinct Tavern. He

189 Ibid at [120].

190 Ibid at [126].

commenced a full time placement with NTPFES on 8 November 2017 at the AO7 level. He continued working at the Precinct during that period. In July 2018 he secured a position in Protocol at NTPFES at the SA01 level.[191]

[151] Section 65(2) of the Act requires a calculation be made between 'normal weekly earnings' and the amount, if any, the worker from time to time is 'reasonably capable of earning in a week' if, after the first 104 weeks of total or partial incapacity they were to engage in 'the most profitable employment (including self-employment) if any, reasonably open to him or her.'.

[152] The Work Health Judge went into considerable detail on what was considered 'reasonable' in the circumstances, noting that the concept should incorporate reasonable hours of employment, taking into account any impairments, personal characteristics and the capacity of the worker. It may not, for example be reasonable to expect some workers to work more than full time hours. Her Honour concluded that for a period the appellant was working at the Precinct Tavern but was suspended from the DLA, and later received back pay, he had work that was reasonably available to him and the Precinct Tavern wages were to be applied to the calculation under s 65(2) of the Act.

[153] It is the second period the respondent submits the Work Health Court was in error. That concerned a period when the appellant was employed full time at

191 Ibid.

NTPFES but in addition worked part time at the Precinct Tavern.[192] It was found the appellant was capable of working the additional hours but it was not reasonable to expect him to; the additional hours were not 'reasonably available' to him. In my view the respondent's argument places the wrong emphasis on the word 'amount' as though the balance of the phrase in s 65(2) relates primarily to the sum which may be earned. Clearly the Work Health Court focussed on what was reasonable which is inextricably linked to the 'amount'. While the appellant's willingness and capacity to undertake this extra employment at various times was a relevant factor for the purposes of assessing the 'most profitable employment' available at particular periods, it was not determinative. The Work Health Court took a holistic approach to the question of the 'amount', 'reasonably capable of earning', hence there are different conclusions in respect of the two different relevant periods. This does not amount to 'double dipping' under the Act as asserted by the respondent. As Kitto J stated in *Thompson v Armstrong & Royse Pty Ltd*[193] '[T]he fact that a worker, after receiving an injury, is found to be in receipt of wages is never decisive of capacity for work. This fact may or may not point towards the conclusion that he has capacity for work; and whether or not that is the proper conclusion depends upon the circumstances.'

192 *Ben Harris v Northern Territory of Australia* [2019] NTLC 03 at [138].

193 (1950) 81 CLR 585, 622.

[154] In my view the Work Health Court made no error in law on this point and the factual findings which underpin the ultimate conclusion cannot be challenged on appeal.

[155] The second contention is dismissed.

Orders

1. The appeal is allowed in part.

   Ground one is dismissed.

   Ground two is upheld. This Court finds the appellant suffered an injury during the course of his employment with the respondent. The respondent cannot rely on the defence provided in s 3A(2) of the Act.

   Ground three is dismissed.

   Ground four is upheld. The appellant was partially incapacitated as a result of the injury. The Court will await submissions before final orders are made as to relevant periods of time and consequential calculations to enable any benefits which the appellant may be entitled to under the Act.

2. The contentions outlined in the Notice of Contention are dismissed.

3. Counsel have liberty to apply to make submissions on necessary consequential orders once counsel have had an opportunity to consider the reasons.

4. I will hear counsel on the question of costs or about any further consequential orders on a date to be fixed, or by written submissions.

Note

The reasons and judgement were delayed due to illness and absences from the Court at various times since the hearing. A letter will be sent to counsel in that regard.
