CITATION:	*Northern Territory of Australia v Yao* [2025] NTSC 6
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v YAO, Lie IN THE MATTER of an appeal under the *Return to Work Act 1986* (NT)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-01845-SC
DELIVERED:	14 February 2025
HEARING DATE:	19 August 2024
JUDGMENT OF:	Kelly J

CATCHWORDS:

Return to Work Act 1986 (NT) s 3A - Appeal against decision of Work Health Court rejecting the employer's defence under s 3A of the *Return to Work Act 1986* (NT) that any injury suffered by the worker was caused wholly or primarily by management action taken on reasonable grounds and in a reasonable manner – appeal allowed

Work Health Court erred in law in finding that procedural fairness required the application of Public Service Instruction Number 3 and that management action failed to accord procedural fairness and was therefore unreasonable

Work Health Court erroneously applied the concept of common law duty of care to the assessment of the reasonableness of the appellant's management action

Work Health Court erred in law in failing to engage with the appellant's pleaded case; failing to determine whether the totality of the management actions relied upon by the appellant were taken on reasonable grounds and in a reasonable manner

Work Health Court erred in law by determining reasonableness by reference to the worker's perceptions rather than determining objectively whether the management action was in fact taken on reasonable grounds and in a reasonable manner

Public Sector Employment and Management Act 1993 (NT)

Return to Work Act 1986 (NT), s 3A, s 3A(2)

Christou v Minister for Health [2008] WASCA 214; *Comcare v Martin* (2016) 258 CLR 467; *Comcare v Martinez (No 2)* [2013] FCA 439; *Department of Education v Sinclair* [2005] NSWCA 465; *Devasahayum and Comcare* [2010] AATA 785; *Georges and Telstra Corporation Limited* [2009] AATA 731; *Harris v Northern Territory* [2023] 380 FLR 58; [2023] NTSC 39; *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; *Keen v Workers Rehabilitation & Compensation Corporation* [1998] SASC 6519; *Lynch v Comcare* [2010] AATA 38; *Nguyen and Comcare (Compensation)* [2018] AATA 1623; *Northern Territory of Australia v Yao* [2024] NTSCFC 1; *Re Ms SB* [2014] FWC 2014; *Wei v Comcare* [2010] AATA 894; *Wilson Lowery* (1993) NTLR 79; *Yu v Comcare* [2010] AATA 960, [2010] 121 ALD 583, referred to

REPRESENTATION:

Counsel:

Appellant:	D McConnel SC
Respondent:	K Sibley

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Halfpennys

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Yao [2025] NTSC 6
No. 2022-01845-SC

IN THE MATTER of an appeal under the *Return to Work Act 1986* (NT)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

LIE YAO
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 14 February 2025)

Summary

[1] This is an appeal from a decision of the Work Health Court allowing a worker's claim for compensation for a mental injury and rejecting the employer's defence under s 3A of the *Return to Work Act 1986* (NT) ("the Act") that any injury suffered by the worker was caused wholly or primarily by management action taken on reasonable grounds and in a reasonable manner.

[2] There are 12 grounds of appeal. Ground 12, that the trial judge erred in law in deciding that the appellant (employer) bears both the legal and evidential

onus of proof that any mental injury suffered by the respondent (worker) is excluded by reason of s 3A(2) of the Act was referred to the Full Court and dismissed (with some qualification).

[3] The following grounds of appeal (which are summarized for the purpose of these reasons) are allowed:

Ground 4: that the trial judge erred in law in finding that procedural fairness required the application of Public Service Instruction No 3 and that it required notice to be given to the respondent before making a decision to proceed towards the implementation of formal performance management of the respondent;

Grounds 5 & 6: that the trial judge erroneously applied the concept of common law duty of care to the assessment of the reasonableness of the appellant's management action and erroneously took into account the respondent's pre-existing mental health condition and the appellant's knowledge of it when neither party had pleaded or argued the case on that basis;

Ground 7: that the trial judge erred in law in failing to engage with the appellant's pleaded case; failing to determine whether the totality of the management actions relied upon by the appellant were taken on reasonable grounds and in a reasonable manner;

Grounds 10 and 11: that the trial judge erred in law by asking the wrong question, namely "whether the worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace rather than asking whether the management action in question was in fact taken on reasonable grounds and in a reasonable manner.

[4] All other grounds of appeal are dismissed.

[5] The matter is remitted to the Work Health Court to decide according to law and in accordance with these reasons.

Reasons for Decision

[6] The respondent in the present proceedings brought a claim in the Work Health Court seeking compensation for mental injury arising out of or in the course of his employment with the appellant. The respondent was successful in prosecuting his claim in the Work Health Court and the appellant has appealed against that decision to the Supreme Court.

[7] There are 12 grounds of appeal. The appellant contended in Ground 12 that the trial judge erred in law in deciding that the appellant bears the legal and evidentiary onus of proof that the respondent's mental injury was caused by reasonable management action.

[8] I referred the following questions of law for determination by the Full Court.

(1) Did the trial judge err in law in deciding that the appellant (employer) bears both the legal and evidential onus of proof that any mental injury suffered by the respondent (worker) is excluded by reason of s 3A(2) of the *Return to Work Act*?

(2) Did the trial judge err in law in deciding that the onus on the appellant requires the appellant to prove each of the following:

(a) the conduct of actions complained of by the respondent constitute management action as defined in section 3;

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

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

(d) the reasonable management action wholly or primarily caused the mental injury?

[9] On 22 March 2024, the Full Court handed down its decision answering those questions as follows:

> [1] The questions of law referred to the Full Court are answered as follows.[1]
>
> Question 1:
>
> Did the trial judge err in law in deciding that the appellant (employer) bears both the legal and evidential onus of proof that any mental injury suffered by the respondent (worker) is excluded by reason of s 3A(2) of the *Return to Work Act*?

1 *Northern Territory of Australia v Yao* [2024] NTSCFC 1 at [59]

Answer

No, although that determination should not be understood to mean that the respondent (worker) did not also carry an evidential burden in relation to that matter.

Question 2

Did the trial judge err in law in deciding that the onus on the appellant requires the appellant to prove each of the following:

(a) the conduct of actions complained of by the respondent constitute management action as defined in s 3 of the *Return to Work Act*;

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

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

(d) the reasonable management action wholly or primarily caused the mental injury?

Answer

No, although that determination should not be understood to mean that the respondent (worker) did not also carry an evidential burden in relation to those matters.

[10] These answers have implications for some of the other grounds of appeal which depend for their success upon the contention that the trial judge erred and that the worker bore the onus of proof on these matters.

[11] The background facts are largely uncontentious. The major argument between the parties in the Work Health Court being the interpretation placed on various admitted conversations and interactions and the inferences that could and should be drawn from the documents, notably an email from Rosalie Lamour, Assistant Director, Human Resources Shared Services, Department of the Chief Minister to Nathalie Cooke and Joanne Quayle on 23 May 2019. The following summary of the facts is taken largely from the appellant's submissions.

The facts

[12] The respondent was a permanent employee of the NT Public Service. He had worked as a records officer in the Department of Treasury and Finance for many years. In 2017, following some undisclosed issues at work the respondent took a period of extended leave.

[13] The respondent returned to work after about a two year absence in March 2019. He returned to his former workplace, albeit that the unit had undergone some structural changes as a result of a merger between two departments. Those structural changes were ongoing in 2019. As a result, the respondent's former position was not available on his return, and he was placed into an unattached position in the unit and given ad hoc responsibilities.

[14] The respondent was known to the manager of the unit, Janet Cleveland. She had managed the respondent in the workplace prior to his departure in 2017. Janet Cleveland had some knowledge of the respondent's performance history and considered him a poor performer.

[15] In May 2019, an AO4 position within the unit became vacant because of the departure of an employee and that AO4 position was offered to the respondent.[2]

[16] A meeting of directors was held on 23 May 2019, following which an email of the same date was sent by Rosalie Lamour, Assistant Director, Human

2 The Job Description with annotations applying to that position is at AB 2298.

Resources Shared Services, Department of the Chief Minister, to Nathalie Cooke and Joanne Quayle. This email assumed crucial importance in the case. It read:

> **Subject:** CONFIDENTIAL – Matter from CS Directors meeting
>
> Hi Nathalie and Jo
>
> I'm just passing on some notes from the CS Directors meeting this morning (I stood in for Jodie W). It was regarding Lie Yao in Records. Regina advised that with Mel Smith leaving this Friday, she wants to move Lie back into the ongoing AO4 position and commence formal performance management asap.
>
> Please discuss with Cassie Spiers as she would like to collate any/ all prior performance documentation on Lie and discuss providing coaching in the process to Janet.
>
> Kind Regards
>
> Rosalie Lamour

[17] The appellant had in place a performance management system as required by the *Public Sector Employment and Management Act 1993* (NT) ("PSEMA"). The performance management system was established under an Employment Instruction issued by the Commissioner for Public Employment (EI 4).[3] It was known as a "MyPlan" and was documented in a publication called "MyPlan Performance Management & Development Guidelines".[4] A MyPlan applied to all employees of the agency and formed part of the ordinary day to day performance management of all employees.

[18] There was also a process known as Performance Improvement Plan ("PIP") which was implemented in cases where it was considered necessary to

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3 AB 2515

4 AB 2506

manage underperformance of an employee. A PIP is a performance management plan within the meaning of the Department of Corporate and Information Services Managing Employee Performance and Behaviour Framework[5] and Policy.[6]

[19] On the respondent's return to work in March 2019, and while still unattached, he underwent the MyPlan performance management process in accordance with the Guidelines. A MyPlan was completed and formed part of his employment record.[7]

[20] After the respondent was placed in the AO4 position, his MyPlan was re-done, so as to align with the new position.[8] As identified in the MyPlan, the respondent and his managers identified a training program for him to complete and a Training Plan spreadsheet was created and maintained.

[21] A number of asserted performance issues were raised with the respondent by his manager and supervisor, Lulu Ng. The first of these arose shortly after the respondent resumed working in March 2019 (before the AO4 position and before the 23 May 2019 email). The manager continued to raise performance issues with the respondent from time to time. Some of the issues were mundane (punctuality, lunchbreaks, and so on) while others

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5 AB 2285

6 AB 2288

7 AB 2567

8 AB 2256

referred to the performance of the tasks required of his position (both the unattached position and the AO4 position).

[22] In early August 2019 after one such issue was raised with the respondent there was an increasingly tense exchange of emails between the respondent and Janet Cleveland.

[23] Janet Cleveland informed the respondent that what she asserted were continuing issues relating to the respondent's performance would be escalated to discussion of a PIP.[9]

[24] The PIP documentation was developed over the course of the next eight weeks. It was presented to the respondent by Janet Cleveland on 2 October 2019, both in person and under cover of an email.[10]

[25] The respondent was absent from work the following day and consulted his GP complaining of work-related stress.[11] Over the following days the respondent's manager sought to schedule the first meeting to discuss the PIP. The meeting was eventually held on 18 October 2019 to accommodate the respondent's absence from work and his request to have a union representative attend the meeting.

[26] The PIP process went until 15 January 2020.[12]

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9 AB 1087

10 AB 1259

11 Clinical notes AB 799

12 A chronology of the PIP process prepared internally by the appellant is at AB 1945-AB 1948.

[27] At the end of the PIP process the respondent was advised that his performance continued to be unsatisfactory. Details of the alleged unsatisfactory performance were set out in a minute of the meeting and provided to the respondent.[13] The further management of the respondent's performance was placed in the hands of Human Resources (Joanne Quayle).

[28] The respondent was requested to provide a response to the PIP documentation and feedback, which he did on 21 January 2020.[14]

[29] On 12 February 2020, the Executive Director of the Department (Peta Preo) advised the respondent that she was satisfied as to the validity of the performance issues identified by the PIP process and that a report would be provided to the Chief Executive for consideration of any further action.[15]

[30] The respondent submitted a workers compensation claim form to the appellant on 12 February 2020 citing an injury date of 10 February 2020.[16]

[31] The appellant disputed the claim on the basis that if the respondent had suffered an injury, it was caused wholly or primarily by management action undertaken on reasonable grounds and in a reasonable manner.[17]

The decision below

[32] The trial judge found that:

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13 AB 2178-AB 2209

14 AB 1705

15 AB 2250

16 AB 734

17 AB 745

(a) the appellant had decided in a meeting on 23 May 2019 to commence a PIP in respect of the respondent, and that this was ‘management action’;

(b) the decision to commence a PIP was taken without affording procedural fairness to the respondent and so was unreasonable management action; (It was management action not taken on reasonable grounds or in a reasonable manner.)

(c) the respondent was subjected to closer than usual supervision and scrutiny from around June 2019 which provided a factual basis for the respondent to develop a perception of a hostile working environment;

(d) the subjection of the respondent to closer scrutiny and supervision was ‘management action’ not taken in a reasonable manner;

(e) the respondent had a pre-existing mental health condition at the time that the management action occurred and the appellant had not demonstrated that it had, in conformity with a duty to do so, taken the pre-existing mental health condition into account when it took the management action to commence a PIP, nor when it took the management action of subjecting the respondent to closer than usual supervision and scrutiny;

(f) the failure to take the pre-existing mental health issues into account rendered the management action as not taken in a reasonable manner; and

(g) all of the management action relied upon by the appellant could not be separated from the initial management action which was to commence a process to terminate the respondent's employment.

The appellant's submissions

Grounds 1 and 2 – the trial judge erred in law in finding that the decision of 23 May 2019 was management action when that was not pleaded by either party and there was no evidence to support that finding

[33] In Grounds 1 and 2, which are argued together, the appellant contended that the trial judge erred in law in finding that:

(a) the decision referred to in the email of 23 May 2019 was management action; and

(b) placing the respondent under closer than usual supervision and scrutiny of his performance was management action.

[34] The appellant contended that it was not open to the trial judge to make these findings because the findings departed from the pleaded cases of the parties, the respondent's case on the pleadings being confined to an argument that subsequent management action (as defined by the pleadings and relied upon by the appellant) was taken merely to create performance documentation and

justify a decision already made on 23 May. The appellant was therefore not on notice that the decision referred to in the 23 May 2019 email and the scrutiny and supervision of the respondent were alleged to be management actions, and therefore not on notice that the reasonableness of those matters was in issue.

[35] The appellant contended further that these findings, (especially the scrutiny and supervision finding) were "contrary to the evidence" and that there was no evidence to support a finding that the action referred to in the 23 May 2019 email (ie to place the worker on "formal performance management asap") was actually undertaken.

[36] The respondent contended that the trial judge decided the case on the basis upon which the respondent ran his case at trial and that the appellant was on notice of that case, and, further, that there was evidence to support the relevant findings by the trial judge.

(a) In his amended reply filed on 16 July 2019, the respondent pleaded, essentially, the case as decided by the trial judge.

(b) The respondent's written submissions at the trial included a submission that management action was taken on and from 23 May 2019 without the respondent's knowledge and the management action taken on and after 23 May 2019 was not taken on reasonable grounds and/ or in a reasonable manner. The appellant was therefore on notice of the respondent's intention to make such a submission and, therefore of the

possibility that the trial judge would make findings to this effect, and had the opportunity to meet that case.

(c) The respondent contended that there was evidence to support each of the findings complained of by the appellant including:

(i) evidence from the respondent of the treatment he received from his line manager Janet Cleveland after 23 May 2019, and the impact that had on him and his health;

(ii) expert evidence from Kay Densley of the probable nature of the decision that was made on 23 May 2019, which was not objected to;

(iii) evidence in cross-examination of Ms Cleveland about her beliefs about the respondent's competence and her attitude towards him including that she thought he would require serious work and training to upskill him; that the performance management referred to in the email of 23 May 2019 was a performance improvement plan and not a "MyPlan"; that she had started collating material on his performance and behaviour issues before he went on leave in 2017; that he was in fact subject to greater scrutiny from the time he was placed in the AO4 position; and that she told others in the Department of this but that she did not tell the respondent.

[37] Grounds 1 and 2 cannot succeed. While the appellant may be technically correct that the respondent did not plead his case in precisely the same terms as the findings made by the trial judge, the appellant was on notice of the substance of the respondent's case and the substance of the respondent's case was reflected in the decision of the trial judge.

[38] As the appellant has conceded in written submissions, the respondent's case on the pleadings was that the appellant had already decided on 23 May 2019 to take steps to terminate the respondent's employment by placing the respondent on "formal performance management asap" which would involve placing the respondent on a PIP, and that all subsequent management action was (essentially) a sham, taken merely to create performance documentation and justify the decision already made on 23 May, and that, therefore, the respondent's mental injury was not due to management action reasonably taken. Although not going so far as to find that the subsequent actions by the appellant were a sham, the trial judge effectively decided the case on the basis argued by the respondent.

[39] In his reply, the respondent pleaded:[18]

> *In response to subparagraph 3 c. says:*
>
> *a. on 23 May 2019 the Employer:*
>
> *i. decided to place the Worker on "formal performance management asap";*
>
> *ii. sent the above decision in an email to approximately 10 other employees;*

18 Respondent's Reply at 3 a.

iii. did not inform the Worker of the above decision;

iv. called for an employee(s) to "collate any/all prior performance documentation on" the Worker;

v. called on another employee to "discuss providing coaching in the process" of imposing the performance management on the Worker;

vi. labelled the email containing the decision to impose the PIP as

"CONFIDENTIAL";

b. on 23 May 2019 the Employer did not have any reasonable grounds to place the Worker on formal performance management;

c. on 23 May 2019 the Employer did not inform the Worker of the grounds for placing him formal performance management;

d. the Worker was not aware of the possibility of formal performance management or a performance improvement plan (PIP) until 9 August 2019 when he received an email saying that there would be a meeting "Regina and Lulu will be meeting with you to discuss a Performance Improvement Plan";

[40] The trial judge found that the reference in the email of 23 May 2019 to commencing "formal performance management" asap was a reference to a PIP,[19] that the email of 23 May 2019 evidenced a decision taken at a meeting on that date concerning the respondent and that the decision had the purpose of commencing a process (a PIP) likely to lead to the termination of the respondent's employment.[20] This latter finding was based on evidence by Ms Kay Densley, NT Secretary of the Community and Public Sector Union and an expert in Public Service management matters generally, that a PIP was "*a black mark that an employee would want to avoid at all costs* ***and it***

19 *Yao v Northern Territory of Australia* [2022] NTWHC004 ("Judgment") at [158]

20 Judgment at [163]

is also a sign that termination of employment is not far off"[21] and "***often regarded as a euphemism for the last stage prior to termination"***.[22]

[41] The trial judge went on to find that the decision of the Employer on 23 May 2019 to commence that process likely to lead to the termination of the worker's employment was a management action, coming within sub definition (g) of the definition in the Act.[23] He then found that the appellant did not give the respondent notice of the intention to make the decision or an opportunity to be heard[24] as required by Public Service Employment Instruction Number 3, the respondent being "a person who may be adversely affected" by the impending decision to commence a PIP as soon as possible.[25] (Public Service Employment Instruction Number 3 provides that a person who may be adversely affected by an impending decision must be afforded natural justice before a final decision is made.)[26]

[42] His Honour concluded that, for those reasons, the decision on 23 May 2019 to commence the PIP process likely to lead to the termination of the worker's employment, and the decision to delay informing the worker of that PIP process until 9 August 2019 when the formal PIP process began,

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21 Judgment at [162]

22 Judgment at [161]

23 Judgment at [164]

24 Judgment at [190]

25 Judgment at [192]

26 Judgment at [192]

were management actions within the meaning of the Act which were not taken in a reasonable manner by the Employer.[27]

[43] Finally, the trial judge concluded:[28]

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

[44] It is true that the trial judge focused on the decision which he found had been made on 23 May 2019, as evidenced by the email of that date, to commence a process likely to lead to the termination of the respondent's employment (and on placing the respondent under closer than usual supervision and scrutiny) and characterised these as 'management actions' rather than focusing on the matters pleaded by the respondent as having caused his mental injury. It is also true that the respondent did not plead that the decision found to have been made on 23 May 2019 was a management action; the words "management action" are missing, but the

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27 Judgment at [198]-[199]

28 Judgment at [202]

respondent pleaded in his reply that there were no reasonable grounds to take that action.

[45] The trial judge's decision engaged with the substance of the respondent's case; the appellant was on notice of the substantive case being argued by the respondent; and in those circumstances I do not think it can be said that the trial judge fell into error in the manner contended by the appellant in Grounds 1 and 2. (That part of the judgment in which the trial judge found that the decision of 23 May was rendered unreasonable by reason of the failure to give notice and to accord natural justice in accordance with Public Service Employment Instruction Number 3 is dealt with under Ground 4 below.)

[46] The appellant contended that "the factual contest that was clearly set up by the pleadings was whether the actions relied upon by the appellant as management action were justifiable or were merely to justify action allegedly taken in secret in May 2019" and that "the trial judge was required to consider the management action as pleaded and decide whether there were proper grounds for the employer to take that management action or it was merely to justify a previous secret decision".[29] Although argued in connection with Grounds 1 and 2, this is a different contention to those advanced in support of these Grounds. This contention addresses the issue in Ground 7 (which ground of appeal is allowed) and is more appropriately

29 Appellant's written submissions at [70]

considered in the discussion of that ground. Put simply, for the reasons outlined above, the error made by the trial judge did not consist of straying outside the case pleaded by the respondent (though his Honour may technically have done so) but rather in not engaging at all with the appellant's pleaded case and not determining the question of reasonableness by reference to the totality of the management actions relied on by the appellant.

[47] A further aspect to the appeal on Grounds 1 and 2 is a complaint by the appellant about the *Jones v Dunkel*[30] inference drawn by the trial judge at [150] – [160] of the decision below. Those paragraphs are as follows:

> 150. Neither Rosalie Lamour nor Regina Bolton was called to give evidence in this proceeding. They were the two people who could have given the best evidence as to the meaning and purpose of the discussions and decisions concerning the Worker at the Corporate Services Directors' meeting held on 23 May 2019, and therefore as to the meaning and purpose of the email. Regina Bolton was also the best person to give evidence as to the timing of the implementation of the formal PIP affecting the Worker, and as to why she personally as an Executive Director had taken such a hands-on interest in the performance management of an AO4 clerk. I would have expected the evidence of both these persons to be led before the Court.
>
> 151. Janet Cleveland gave evidence at transcript page 304.8 that she believed Regina Bolton was now living in Perth. There was no other evidence before the Court as to the whereabouts of Regina Bolton or as to why she had not been called, whether by video link or otherwise, to give evidence before the Court. There was no evidence before the Court as to why Rosalie Lamour was not called to give evidence.

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30 [1959] HCA 8; (1959) 101 CLR 298 ("*Jones v Dunkel*")

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

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

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

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

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

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

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

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

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

[48] In relation to the "missing" witnesses Rosalie Lamour and Regina Bolton, paragraphs [150] to [152] are a straight forward and unexceptional application of the principle in *Jones v Dunkel*. The appellant submitted:

> The rule cannot be applied to elevate an inference from 'no assistance' to 'positively damaging'. "The rule cannot be employed to fill gaps in the evidence or to covert conjecture and suspicion into inference".[31]

[49] The trial judge did not do so; rather his Honour drew an inference from the evidence favourable to the respondent and expressed the view that he might more readily do so in the absence of evidence from witnesses who might have been expected to be called by the appellant.

[50] Appeal Grounds 1 and 2 are dismissed

Ground 3 – the trial judge erred in law in finding that the appellant had made up its mind on 23 May 2019 to commence a process to terminate the respondent's employment when there was no evidence to support the finding

[51] The appellant contended that there was no evidence from which the trial judge could have concluded that there had been a decision at the meeting on

31 *Christou v Minister for Health* [2008] WASCA 214 at [21]

23 May 2019 to implement a PIP in relation to the respondent as soon as possible. That submission cannot be accepted. There was evidence that there was a meeting and that was followed by the email of 23 May 2019. There were competing inferences which could have been drawn from the terms of that email. The appellant's complaint boils down to a contention that the trial judge ought to have drawn the inferences contended for by the appellant. Even if those inferences were more likely to be correct, that does not amount to an error of law consisting of a finding of fact on the basis of no evidence. There was evidence from which the inference drawn by the trial judge might be drawn.

[52] The appellant also argued that there was no evidence to support a finding that the action referred to in the 23 May 2019 email (ie to place the worker on "formal performance management asap") was actually undertaken. The appellant argued[32] that the email of 23 May 2019 "does not … demonstrate commencement of a process likely to lead to the respondent's termination of employment and does not provide evidence of the implementation of a PIP" and, further, that there is no other evidence "that a formal performance management process had been implemented prompted by the email or any decision made in the manager's meeting of the same date", that is to say there is no evidence of any secret performance management process being undertaken.[33]

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32 Appellant's written submissions at [74]

33 Appellant's written submissions at [77]

[53] This submission too must fail. It is really a submission that there is insufficient evidence to support the finding made by the trial judge. It cannot be said that there is no evidence. The trial judge inferred that such a decision had been made and implemented from evidence of the managers' meeting, the wording of the email itself and evidence that a PIP was subsequently put in place. Even if a factual finding is "perverse", if there is evidence on which it is based, then it is not an error of law.[34]

[54] Appeal Ground 3 is dismissed.

Ground 4 - that the trial judge erred in law in finding that procedural fairness required the application of Public Service Instruction Number 3 and that it required notice to be given to the respondent before making a decision to proceed towards the implementation of formal performance management of the respondent

[55] Under this ground of appeal, the appellant challenged the trial judge's findings that the appellant did not comply with Public Service Employment Instruction Number 3 because it did not give the worker a reasonable opportunity to respond to the information that was taken into account at the meeting on 23 May 2019 in arriving at its decision on that date; did not invite and did not receive any submissions by or on behalf of the respondent before arriving at that decision; and further, that it did not afford the respondent natural justice/procedural fairness in arriving at its decision on 23 May 2019 to commence the PIP process likely to lead to the termination

34 *Wilson Lowery* (1993) NTLR 79 at p 84

of the respondent's employment, and in its decision to delay informing the respondent of the decision to implement that PIP process.

[56] The first complaint by the appellant is that those findings were arrived at by a process of reasoning that placed the burden of proof on the employer. The Full Court has now held that his Honour was not in error in assigning the burden of proof in relation to reasonable management action to the employer.

[57] The second complaint made by the appellant is that the trial judge's findings involve the adoption of the proposition that any performance management of an employee requires the employee to be afforded natural justice/procedural fairness in accordance with Public Service Employment Instruction Number 3, a proposition which the appellant contends is incorrect.

[58] I do not agree that the trial judge's finding involves adoption of such a general proposition. However, the appellant contended that the Public Service Employment Instruction Number 3 is not applicable to the decision on 23 May 2019 to commence formal performance management asap [and] to collate any/all prior performance documentation. Public Service Employment Instruction Number 3, clause 2.1 provides:

> A person who may be adversely affected by an impending decision must be afforded natural justice before a final decision is made.

It goes on to say that this means that a person must be informed of any adverse information and other relevant information that may be taken into

account by the decision maker and must be given a reasonable opportunity to respond, and to require impartial consideration by a disinterested decision maker.

[59] Public Service Employment Instruction Number 3 applies only to a final decision and the decision to place the worker on a PIP as soon as possible cannot be characterised as a final decision.

[60] There are good reasons why the requirement to accord natural justice set out in Public Service Employment Instruction Number 3 is limited to final decisions. As the appellant submitted, moving to put a PIP in place involves a process, and the PIP itself involves a further process specified in Public Service "Managing Employee Performance and Behaviour Framework." The employee is necessarily involved in those processes. When engaged in a PIP, the employee has the right to have a support person or a union representative; there is a consultation process; the employee signs off on the document as part of that process; and so on. Then, at the end of a performance improvement plan process, there can be no action taken in respect of an employee's employment other than under the provisions of the *Public Sector Employment and Management Act.* Part 5 of that Act deals with employment, promotion, transfer and resignation; Part 7 deals with employee performance and inability; Part 8 deals with discipline; and Part 9 provides for reviews of grievances and appeals and in particular, s 59A of the Act provides for appeals from inability, performance and disciplinary decisions. These specified processes ensure that the employee engaged in a

performance improvement plan is accorded procedural fairness as part of the process before a final decision is made.

[61] Secondly, the policy and processes set out in the "Managing Employee Performance and Behaviour Framework" contemplate that there may be a period of time where the employee is not on notice that their performance is being subjected to scrutiny. That Framework advises managers to "observe areas of concern, tasks not being completed, performance indicators not being met, deadlines missed, high error rates, inappropriate actions, attendance" and matters of that nature and goes on:

> In some cases this will be obvious and overt, in other situations it may be something you have to 'keep an eye on' for a while.
>
> It may be other staff members who bring issues to your attention, you will need to make a judgment as to whether you act or need to make your own observations.
>
> Whatever you or others observe it must be documented with date, times and specific examples.
>
> Prior to making a decision to progress the issue you are able to seek advice from People and Development Unit (P&D).
>
> …
>
> Feedback should be provided as incidents occur.
>
> Once you have gathered information on the area/s of concern including dates, specific examples and in some cases other supporting evidence, to progress further you will need to speak to the person/s concerned.
>
> …[35]

[62] All of this, it seems to me, reflects a common sense approach to employee performance management. Put in the context of the decision which the trial judge said was made on 23 May 2019, there would seem to have been little

35 AB 2285

utility in telling the respondent in advance that his managers/superiors had concerns about his abilities and would be observing him and collecting earlier performance documentation with a view to putting him on a formal performance improvement plan if he underperforms (as they anticipate he will) and giving him an opportunity to be heard in relation to whether they should do that. Such a course is unlikely to have been helpful to either the appellant or the respondent.

[63] I accept the appellant's submission that performance management action which involved as its implementation the review and updating of a MyPlan to set expectations for the new role, the creation of a training plan, and the prospect of proceeding to a PIP if the worker did not meet the expectations of the role or if other behaviour issues were identified could not possibly require the employer to provide the worker with advance notice and an opportunity to respond beforehand. The appellant submitted that such a requirement would cripple the operation of the public sector. Managers could not form judgments or make assessments about the suitability of employees for their roles, or of performance issues that need to be addressed without running everything by them first. I agree.

[64] The trial judge erred in law in holding that Public Service Employment Instruction Number 3 applied to the decision on 23 May 2019 to commence formal performance management asap, and in finding that the appellant denied the respondent natural justice in relation to that decision.

[65] Appeal Ground 4 is allowed.

Grounds 5 and 6 - that the trial judge erroneously applied the concept of common law duty of care to the assessment of the reasonableness of the appellant's management action and erroneously took into account the respondent's pre-existing mental health condition and the appellant's knowledge of it when neither party had pleaded or argued the case on that basis

[66] As Grounds 5 and 6 are interrelated, the appellant argued them together.

[67] The trial judge found that the respondent had a pre-existing mental health issue and that the appellant was aware of it, and then proceeded to apply the fact of the appellant's knowledge of that prior mental health issue to the legal question of whether the management action was taken on reasonable grounds and in a reasonable manner. The trial judge held, at [206] – [208]:

> I find that the prior history of the mental health issues meant that the risk to the Worker of once again developing a mental injury associated with the employment was neither far-fetched nor fanciful.
>
> I rule that the Employer therefore owed the Worker a duty of care in the employment specifically to avoid the foreseeable risk of mental injury. It owed the Worker a duty to provide him with a safe system of work in these circumstances. In its subsequent dealings with the Worker the Employer should have taken the mental health issues appropriately into account.
>
> The Employer should have taken the mental health issues into account when it decided on and implemented the management action of subjecting the Worker to closer than usual supervision and scrutiny in the employment from about 4 June 2019. I am satisfied and I find that it was reasonably foreseeable by the Employer that subjecting the Worker with his history of the mental health issues to this management action would expose him to the risk of further mental injury.

[68] The appellant contended that this approach is in error for a number of reasons:

(a) Neither the existence of a pre-existing mental health issue nor the question of whether the mental health issue was something the appellant was required to but had failed to take into account in undertaking management action were pleaded. Further, these matters were not part of the respondent's case at trial. The appellant was not on notice that it would have to meet that case. The first the appellant learnt of the issue of any requirement to take into account a mental health issue when contemplating management action against the respondent was when the reasons for decision were published.

(b) The appellant also contended that the trial judge's reasoning as to the existence of a duty of care to workers to avoid foreseeable risk of mental injury is flawed and contrary to the Act. The Act specifically contemplates that the actions of an employer may cause a mental health injury to a worker. Moreover, it provides that the causation of such an injury is excused in certain circumstances. In essence it balances the competing interests of employers and workers in that although a worker is entitled to compensation for an injury that occurs out of or in the course of employment, the legislature accepts that in some cases, in order for an employer to manage the workplace appropriately for the whole workplace, decisions will be taken which may give rise to mental injury. The purpose of the provision is to be able to ignore the prospect of psychological injury from actions reasonably undertaken. In

Comcare v Martin, the plurality of the High Court when discussing the equivalent Commonwealth provision, observed:[36]

> The taking of administrative action in respect of an employee's employment was in that way sought to be insulated from need for a concern about the psychological effect of the decision on the employee.

The appellant contended that the purpose of the provision would be defeated if the objective requirement to manage employee performance imposed on managers in the public sector could be obstructed by a requirement to take into account a foreseeable risk of mental injury and comply with a common law duty to avoid it.

[69] I agree. The trial judge was in error to introduce into a consideration of a Work Health claim notions of common law duty of care. Entitlement to compensation for work related injuries is governed by the Act and does not depend upon the establishment of any duty of care or breach of duty, and the same applies to exceptions to entitlement to compensation for work related injuries such as that which the Act provides in s 3A for reasonable management action. Both the entitlement to compensation and any exceptions to an entitlement to compensation are governed solely by the terms of the legislation.

[70] I also consider that there is merit in the appellant's contention that the trial judge was in error to decide the case on the basis of a proposition that had

36 (2016) 258 CLR 467 at [46]

not been pleaded and did not form the basis of either party's case at trial without giving notice to the parties of his intention to do so and an opportunity for the parties to make submissions.

[71] Grounds of appeal 5 and 6 are allowed.

Ground 7 - that the trial judge erred in law in failing to engage with the appellant's pleaded case; failing to determine whether the totality of the management actions relied upon by the appellant were taken on reasonable grounds and in a reasonable manner

[72] In Ground 7, the appellant contended that the trial judge erred by failing to consider the management action relied upon by the appellant. The management action relied upon in the appellant's pleadings was substantially admitted by the respondent. The appellant contended that the trial judge was required to make factual findings about that management action and consider whether the management action was wholly or primarily the cause of the respondent's injury.

[73] The trial judge said of the management action relied on by the appellant:[37]

> [T]his subsequent management action must be considered in the light of the Employer's having already made up its mind in the initial management action to commence the process to terminate the Worker's employment. This had the effect that all subsequent day-to-day management of the Worker in the employment up to and including the subsequent management action must be seen in that light. I am not satisfied it was taken on "reasonable grounds" within the meaning of subsection 3A(2)(a) of the Act.

37 Judgment at [202]

[74] The appellant contended that it was not open to the trial judge to decline to assess the circumstances relied upon by the appellant and consider whether there was, independently of the action taken on 23 May 2019, a proper basis for the appellant to take the management action in respect of the respondent relied on by the appellant. The appellant submitted that, having regard to the way in which the parties pleaded and presented their cases, the trial judge was required to consider the entirety of the management action relied upon by the appellant. Only by doing so could the trial judge fulfil the fact finding obligation imposed by s 3A. Reasonableness of management action is to be considered having regard to all the circumstances and must take into account the overall reasonableness of the action concerned, notwithstanding that individual steps involved may not be.[38]

[75] On one view, the basis of the judge's decision was that a decision had already been taken on 23 May 2019 to "performance manage" the respondent as soon as possible – meaning to move to a PIP as soon as possible - which would likely lead to termination of the respondent's employment, and, effectively, that everything that followed was a sham. If that was the effect of his Honour's decision, it might be argued that there was little or no point in the trial judge going through the exercise of determining whether there would have been a proper basis for the appellant to take the management action relied upon by the appellant, if the decision of 23 May had not already been made.

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38 *Department of Education v Sinclair* [2005] NSWCA 465 at [97]

[76] However, as Mr McConnel SC for the appellant contended, the trial judge stopped short of finding that all subsequent actions were a sham. He simply found that the earlier decision, which his Honour found was made in an unfair way and a denial of natural justice to the worker, effectively tainted anything that happened thereafter.

[77] Mr McConnel contended that the respondent's case (pleaded in its reply) was that the management actions taken by the appellant (set out in para 3 c. of the defence) were taken merely to justify a pre-determined decision to get rid of the respondent; and the appellant's case was that it could point to significant performance issues across a range of matters, relating to both competence and behaviour, which required performance management. The appellant contended that that performance management was performance management in the usual course. There was a MyPlan established with the worker, there was a training program, there were a series of task allocations, there was informal performance management communicated to the worker through meetings and emails and so forth. Issues were identified and there was an evident escalation of a workplace problem, which culminated in a formal performance management process called the Performance Improvement Plan, or PIP, being put in place. There was extensive evidence about these matters but the trial judge made no reference to them in the judgment and did not engage with the appellant's pleaded and argued case that the totality of the steps taken in this process was management action

taken on reasonable grounds and in a reasonable manner. Having found one action unreasonable, the trial judge did not enquire further.

[78] The authorities relied on by the appellant make it clear that the question for the Court to determine was the reasonableness of the employer's whole course of conduct. This was the appellant's pleaded case and the trial judge failed to engage meaningfully with that case.

[79] In *Harris v Northern Territory*,[39] Blokland J provided the following analysis of the assessment of the reasonableness of management action for the purpose of the Act s 3A:

> [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 work place incident, the circumstances that created the need for management action to be taken, and the consequences that flowed from the management action.[40] 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.[41] 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.[42] 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.[43] Consideration is also to be

39 [2023] 380 FLR 58; [2023] NTSC 39 at [55]-[56] ("*Harris*")

40 *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.

41 Ibid

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

43 *Re Ms SB* [2014] FWC 2014 at [51]

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.[44] The management action relied on must be lawful, there must be nothing untoward about the action and must not be 'irrational, absurd or ridiculous'.[45] Reasonableness must be assessed against what is known at the time without the benefit of hindsight.[46]

[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.[47] 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.[48] 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.[49]

[80] In *Department of Education and Training v Sinclair*,[50] Spigelman CJ (with whom Hodgson and Bryson JJA agreed) said, in reference to the New South Wales equivalent to s 3A:

96. Furthermore, the case before Sheahan J primarily focused on the whole course of Departmental conduct as constituting the relevant "substantial contributing factor" for purposes of s9A. His Honour appeared to approach the s11A issue on the same basis. This is an appropriate course to adopt in a context concerned, and concerned only, with psychological injury arising from matters such as

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

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

46 *Devasahayum and Comcare* [2010] AATA 785

47 *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

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

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

50 [2005] NSWCA 465 at [96]-[97]

"demotion, promotion, performance, appraisal, discipline, retrenchment or dismissal". Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the "whole or predominant cause" is the entirety of the conduct with respect to, relevantly, discipline.

97. His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation "reasonable action with respect to discipline". In my opinion, a course of conduct may still be "reasonable action", even if particular steps are not. If the "whole or predominant cause" was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, "reasonable action". For this alternative reason the appeal should be allowed.

[81] In this matter, the respondent pleaded at paragraph 3. of the amended statement of claim:

3. During the period leading up to and including 10 February 2020, the Worker sustained an injury during the course of his employment with the Employer. The injury was a mental injury within the meaning of the Act.

(Particulars of the alleged mental injury follow.)

[82] At paragraph 4. the respondent pleaded:

4. The injury arose as a result of the following:

(There follow 16 paragraphs of particulars.)

[83] To these allegations, the appellant denied that the respondent had suffered a mental injury and pleaded, in the alternative, that any injury was not compensable pursuant to the Act as it was "caused wholly or primarily by

management actions contemplated by s 3A of the Act" … "taken on reasonable grounds and in a reasonable manner by the employer". There follow, in paragraph 3 c., 34 paragraphs of particulars of actions taken by the employer pleaded to have been management action taken on reasonable grounds and in a reasonable manner. These 34 paragraphs contain a fairly detailed chronology, setting out the sequence of events (counselling, advice, conversations, meetings etc, as well as actions by the respondent such as attendances on doctors).

[84] In the amended reply, the respondent admitted that each of the events set out in paragraph 3 c. of the defence occurred, except the allegation of an earlier injury date, but pleaded that these actions "were merely steps taken to justify the formal performance management decision made months earlier on 23 May 2019"[51] and, further, that the matters pleaded (including the email of 23 May 2019) "were not management action because (inter alia) [they] were merely efforts to justify the PIP when the decision had already been made on 23 May 2019".[52]

[85] That is to say, the case for the appellant was that if the respondent suffered a mental injury, it was caused by the entirety of the events and actions from before 9 August 2019 to 10 February 2020 pleaded in paragraph 3 c. of the defence and that this entire course of conduct amounted to management action taken on reasonable grounds and in a reasonable manner. In order to

51 Amended Reply at 3 vi. f

52 Amended Reply at 3 vi. k. i

properly assess whether this was the case, the trial judge would have had to look at the entirety of that process in order to determine its objective reasonableness. This his Honour failed to do, contenting himself with focusing on one action, very early in the process (23 May 2019), finding it flawed, and concluding on that basis alone that the respondent's mental injury was not caused by reasonable management action.

[86] I agree that the trial judge was obliged to engage meaningfully with the appellant's pleaded case and that he failed to do so. This amounted to an error of law. His Honour was also in error in failing to assess the reasonableness of the totality of management actions undertaken by the appellant, holding, essentially, that the unreasonableness of one step in the process was determinative of that question and failing to consider the process as a whole.

[87] Appeal Ground 7 is allowed.

Grounds 10 and 11[53] - Grounds Causation of Injury and Perception of Real Events–

[88] In these grounds of appeal, the appellant complained of the trial judge's findings that the respondent suffered an injury as a result of a perception of

53 Although not formally abandoned, Grounds 8 and 9 were not urged on the hearing of the appeal. They were both alleging findings of fact said to have been made in the absence of evidence and seemed to me, in any event, to be really complaints about findings of fact.

bullying and micromanagement commencing from around June 2019.[54] The appellant contended that:

(a) there is no evidence to support a finding the respondent perceived that he was receiving closer than usual scrutiny or that he was being bullied, or targeted, until after the PIP process commenced;

(b) the finding was contrary to the respondent's pleaded case; and

(c) the finding was inconsistent with the trial judge's finding[55] that the email on 9 August 2019, the delivery of the PIP to the respondent on 2 October 2019 and the meeting with Janet Cleveland on 18 October (all of which were part of the management action relied upon by the appellant) provided the factual basis for the respondent to further develop a perception of a hostile working environment;

(d) the trial judge asked himself the wrong question in dealing with this issue. The trial judge identified the issue to be determined as follows:[56]

> … I am required to consider whether the Worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace, …

The appellant contended that the correct question was whether the respondent's perception of micromanagement, bullying and being

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54 AB 2593 Judgment at [98]-[100]

55 Judgment at [122]

56 Judgment at [67]

targeted were wholly or predominantly a result of management action taken by the appellant, as pleaded by the appellant.[57]

[89] Taking each of these contentions in order:

(a) I reject the contention that there was no evidence to support a finding the respondent perceived that he was receiving closer than usual scrutiny or that he was being bullied, or targeted, until after the PIP process commenced. The trial judge recited the evidence on which he based that finding:[58]

> In summary, the Worker gave evidence in chief that he believed he was the subject of excessive and at times intrusive scrutiny by his immediate supervisors in his performance of his work duties. He gave evidence that he perceived this to be micromanagement and, sometimes, to amount to bullying behaviour.
>
> …
>
> The Worker specifically denied Mr McConnel's suggestion that the Worker's symptoms of stress described to his GP on 3 October 2019 were solely a reaction to his receiving the PIP. The Worker said rather that his stress levels had been building up since he commenced his new job on 3 June 2019, in the context of the micromanagement and bullying he had been subjected to in that new job, and that was the background to his consulting his GP on that date - transcript pages 137.9 to 138.2, 5 October 2021.

(b) The appellant contended that the respondent did not plead any cause of his injury other than the matters commencing in or about late September 2019.[59] It may well be that this finding did not align

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57 AB14 Defence at [3(c)]

58 Judgment at [90] and [115]

59 AB 29 Amended Statement of Claim [4(d)] – the allegations in [4] b, and c were of neglect, not micromanagement, bullying or negative targeting.

precisely with the respondent's pleaded case. However, there was evidence that supported this finding and submissions were directed to this contention and the appellant was not taken by surprise.

(c) The trial judge's finding that the respondent suffered an injury as a result of a perception of bullying and micromanagement commencing from around June 2019 is not inconsistent with the trial judge's finding[60] that the email on 9 August 2019, the delivery of the PIP to the respondent on 2 October 2019 and the meeting with Janet Cleveland on 18 October provided the factual basis for the respondent to <u>further</u> develop a perception of a hostile working environment. It is implicit in the finding at [122] that there had been <u>some</u> perception of a hostile working environment before those things occurred.

(d) However, I agree that the trial judge was in error in asking the wrong question. The issue was not "whether the worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace". The enquiry as to whether a mental injury was a result of reasonable management action is an objective one, as emphasised by Blokland J in the passage from *Harris* quoted at [66] above:

60 Judgment at [122]

> 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.[61]

[90] Appeal Grounds 10 and 11 are allowed.

[91] ORDERS:

(a) The appeal is allowed on the following grounds:

- Ground 4: that the trial judge erred in law in finding that procedural fairness required the application of Public Service Instruction Number 3 and that it required notice to be given to the respondent before making a decision to proceed towards the implementation of formal performance management of the respondent;

- Grounds 5 and 6: that the trial judge erroneously applied the concept of common law duty of care to the assessment of the reasonableness of the appellant's management action and erroneously took into account the respondent's pre-existing mental health condition and the appellant's knowledge of it when neither party had pleaded or argued the case on that basis;

- Ground 7: that the trial judge erred in law in failing to engage with the appellant's pleaded case; failing to determine whether the

61 See also *Re Ms SB* [2014] FWC 2014 at [51]

totality of the management actions relied upon by the appellant were taken on reasonable grounds and in a reasonable manner;

- Grounds 10 and 11: that the trial judge erred in law by asking the wrong question, namely "whether the worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace" rather than asking whether the management action in question was in fact taken on reasonable grounds and in a reasonable manner.

(b) All other grounds of appeal are dismissed.

(c) The matter is remitted to the Work Health Court to decide according to law and in accordance with these reasons.
