

CITATION: *Yao v Northern Territory of Australia*
[2026] NTCA 5

PARTIES: YAO, Lie

v

NORTHERN TERRITORY OF
AUSTRALIA

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL from the Supreme
Court exercising Territory jurisdiction

FILE NO: AP 2 of 2025 (22521634)

DELIVERED: 2 July 2026

HEARING DATE: 14 August 2025

JUDGMENT OF: Grant CJ, Huntingford J & Riley AJ

CATCHWORDS:

WORKERS COMPENSATION – Reasonable management action

Whether Supreme Court erred in finding that Work Health Court erred in finding that the worker’s mental injury was not excluded by operation of s 3A(2) of the *Return to Work Act* – Work Health Court misdirected itself in law – Work Health Court failed to determine whether totality of management actions pleaded by employer were taken on reasonable grounds and in reasonable matter – Appeal dismissed.

Return to Work Act 1986 (NT) s 3A

Comcare v Martin (2016) 258 CLR 467, *Corbett v Northern Territory of Australia* [2015] NTSC 45, *Department of Education and Training v Sinclair* [2005] NSWCA 465, *Georges and Telstra Corporation Limited*

[2009] AATA 731, *Harris v Northern Territory of Australia* [2023] NTSC 39, *Hart v Comcare* (2005) 145 FCR 29, *Horne v Sedco Forex Australia* (1992) 106 FLR 373, *Keen v Workers Rehabilitation & Compensation Corporation* [1998] SASC 6519, *Lee v Macmahon Contractors Pty Ltd* [2018] NTCA 7, *Lynch v Comcare* [2010] AATA 38, *Nguyen and Comcare (Compensation)* [2018] AATA 1623, *Re Ms SB* [2014] FWC 2014, *Slade v CGH Group Pty Ltd* [2026] NTSC 53, *State Transit Authority of New South Wales v Fritz Chemler* [2007] NSWCA 249, *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, *Wiegand v Comcare Australia* [2002] FCA 1464, *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

REPRESENTATION:

Counsel:

Appellant:	K Sibley
Respondent:	D McConnel SC with J Nottle

Solicitors:

Appellant:	Halfpennys Lawyers
Respondent:	Hunt & Hunt Lawyers

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

Yao v Northern Territory of Australia [2026] NTCA 5
No. AP 2 of 2025 (22521634)

BETWEEN:

LIE YAO

Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**

Respondent

CORAM: GRANT CJ, HUNTINGFORD J & RILEY AJ

REASONS FOR JUDGMENT

(Delivered 2 July 2026)

THE COURT:

- [1] This is an appeal from a decision of the Supreme Court delivered on 14 February 2025¹ allowing an appeal from the Work Health Court².

Brief factual background

- [2] The appellant (**the worker**) was born on 14 June 1970 and was 52 years of age at the time of the hearing before the Work Health Court.

¹ *Northern Territory of Australia v Yao* [2025] NTSC 6.

² *Yao v Northern Territory of Australia* [2022] NTWHC 004.

- [3] The worker had been a permanent employee of the respondent (**the employer**) performing clerical duties in the Northern Territory Public Service since in or about 2013.
- [4] It was common ground at the trial that the worker was a ‘worker’ within the meaning of the *Return to Work Act 1986* (NT).
- [5] The worker took an extended period of recreation leave and long service leave for 17 months from early October 2017 to 4 March 2019.
- [6] Between 4 March 2019 and 3 June 2019, the worker did not occupy a specific position in the public sector agency in which he was employed and performed duties as instructed from time to time.
- [7] On 3 June 2019, the worker was offered and he accepted an AO4 position as a records officer within the Department of Treasury and Finance.
- [8] The worker ceased work on or around 10 February 2020 and made a claim under the *Return to Work Act* for mental injury. He claimed he had suffered an ‘injury’ within the meaning of subs 3A(1) of the *Return to Work Act* because it arose out of or in the course of the employment.
- [9] The employer disputed the worker’s claim and the worker commenced proceedings in the Work Health Court.

The decision of the Work Health Court

- [10] By Statement of Claim dated 8 October 2020, the worker pleaded relevantly that he sustained a mental injury during the course of his employment with

the employer (paragraph 3), and that the injury arose as a result of 17 separate incidents, failures or circumstances in the workplace which took place between June and December 2019 (paragraph 4) following the worker's return to employment on 4 March 2019. The specific injury pleaded was an Adjustment Disorder with mixed anxiety and depression and/or a Major Depressive Disorder.

[11] By Notice of Defence dated 30 October 2020, the employer pleaded relevantly:

The Employer denies Paragraph 3 of the Statement of Claim and states that the Worker did not suffer an injury arising out of or in the course of his employment or, in the alternative, if an injury was so suffered, it is not an injury compensable pursuant to the *Return to Work Act* given any such injury (which injury is denied) was caused wholly or primarily by management actions contemplated by section 3A of the Act.

[12] The employer subsequently filed a Notice of Defence to an Amended Statement of Claim which pleaded substantive facts and provided extensive particulars of the management actions. Those particulars concluded with the pleading that by reason of the foregoing matters the injury was wholly or predominantly caused by management action taken by the employer; and the management action was taken on reasonable grounds and in a reasonable manner by the employer within the meaning of s 3A(2)(a) of the *Return to Work Act*.

[13] The Work Health Court was satisfied on the basis of the worker's evidence and the medical opinion received at trial that the worker suffered an injury

in the form of a Major Depressive Disorder from on or about 3 October 2019 when symptoms were first recorded.

[14] The Work Health Court found that the worker had attended on treating general practitioners with symptoms of psychological stress on 25 separate occasions between 18 February 2013 and 29 January 2020. There were no records of medical attendances during the period of the worker's leave between October 2017 and March 2019. The trial court found further that the employer was aware prior to March 2019 that the worker had a medical history of stress-related presentations to general practitioners. That finding was made on the basis that the worker had provided the employer with medical certificates following periods of sick leave prior to October 2017.

[15] The worker's essential contention was that he was micromanaged and bullied by senior personnel in the workplace and subjected to an unusual performance management process which was deliberately targeted to his dismissal. The medical evidence was to the effect that the worker had ideas of a paranoid nature bordering on delusion which led him to perceive the workplace as hostile. In those circumstances, the Work Health Court identified its task as follows:

I am required to consider whether the Worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace, against the background of those findings. I am not required to determine whether any such perception or perceptions were justified or reasonable. Then, I am required to consider and make a finding

whether those perceptions caused or materially contributed to the injury.³

[16] The Work Health Court made a number of findings in that respect. First, it found that the worker's evidence did not objectively support his pleaded case that he was not provided with adequate training or training opportunities following his return to work on 4 March 2019. However, the trial court was satisfied that the worker had formed the subjective belief that was the case.⁴ Second, the trial court found that the worker was the subject of closer than usual supervision and scrutiny of his work performance from around June 2019.⁵ Third, the trial court found that the supervision and scrutiny formed a factual basis from which the worker could have developed a perception of a hostile working environment generally, and specifically that he was being micromanaged and bullied in the workplace.⁶ Fourth, the trial court was satisfied that the worker did in fact develop the perception over the relevant period that he was being micromanaged and bullied in the workplace, and was satisfied on the basis of the expert psychiatric opinion that this perception contributed to the injury.⁷

[17] The Work Health Court then went on to make a number of findings in relation to the performance management process. The worker gave evidence that he first became aware of a Personal Improvement Plan (**PIP**) process for

3 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [67].

4 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [91].

5 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [98].

6 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [99].

7 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [100]-[101].

him when he received an email from his supervisor in August 2019. The employer developed the formal PIP documentation between 9 August 2019 and 1 October 2019. On 2 October 2019, the worker's supervisor met with the worker to inform him about the process. On 3 October 2019, the worker attended on his general practitioner and complained of work-related stress. During the course of his evidence, the worker denied the suggestion that those symptoms of stress were a reaction to receiving the formal PIP documentation and said that his stress levels had been building up since he had commenced in the position as a records manager on 3 June 2019.

- [18] The Work Health Court found that the worker began to experience symptoms of stress attributable to the PIP process from 3 October 2019, and that those symptoms were in addition to the symptoms of stress he was already experiencing as a consequence of his perception that he was being micromanaged and bullied in the workplace. The Work Health Court then made the following findings:

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

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

that he was being deliberately and negatively targeted by a formal 24 performance management process in the workplace, namely the PIP process.

I am satisfied on the basis of the expert psychiatric opinions of each of Dr Hundertmark and Dr Takyar set out earlier in these Reasons, and I find, that the Worker's perception set out in the preceding paragraph contributed to the injury.⁸

[19] The Work Health Court characterised the worker's injury as a disease which developed gradually over a period of time and found that the employment materially contributed to the disease in the sense that it was the real, proximate or effective cause of the injury.⁹

[20] The Work Health Court then went on to consider the issue of reasonable management action. It was satisfied that the actions of the employer in subjecting the worker to supervision and scrutiny of his performance in the workplace, and in deciding to subject him to the PIP process, were 'management actions' in the relevant sense. The trial court found that the commencement of a formal performance management plan in the form of a PIP process was first discussed on 23 May 2019 and that was 'a process likely to lead to the termination of the worker's employment'.¹⁰

[21] The Work Health Court then found that the employer did not give the worker opportunity to be heard about the commencement of a formal management plan, that public-sector Employment Instruction No 3 required the worker to be afforded notice and the opportunity to be heard in relation

8 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [122]-[124].

9 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [126]-[134], with reference to *Return to Work Act*, ss 4(5), (6A) and (8).

10 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [160], [163].

to that decision, and that the employer failed to do so. For those reasons, the trial court purported to find that the decision to commence the PIP process and the delay in informing the worker of that process constituted management actions which were not taken in a reasonable manner.¹¹

[22] The Work Health Court then addressed the employer's knowledge of the worker's mental health issues. In that respect, the trial court found that the employer was aware that the worker had a history of stress-related presentations to his general practitioners, that the employer owed the worker a duty of care to avoid the foreseeable risk of mental injury, that the employer failed to take those issues into account in determining whether to implement performance management action, and the management action was therefore not taken in a reasonable manner.¹²

[23] As a consequence of those findings, the Work Health Court concluded that the worker suffered a mental injury arising out of or in the course of his employment, and that the employer had failed to prove that the management action of subjecting the worker to scrutiny and supervision and the PIP process was taken on reasonable grounds or taken in a reasonable manner. Orders were made for the employer to pay the worker arrears of weekly benefits, weekly benefits, interest and medical and like expenses.

11 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [190]-[201].

12 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [203]-[213].

The appeal to the Supreme Court

[24] The employer brought an appeal against that decision to the Supreme Court. One ground of appeal included an assertion that the trial judge erred in law in deciding that the employer bore the legal and evidentiary onus of proof that the worker's mental injury was caused by reasonable management action. The Supreme Court referred the following questions of law for determination by the Full Court.

- (1) Did the trial judge err in law in deciding that [the employer] bears both the legal and evidential onus of proof that any mental injury suffered by [the 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 employer] requires [the employer] to prove each of the following:
 - (a) the conduct of actions complained of by [the worker] constitute 'management action' as defined in s 3 of the *Return to Work Act*; and
 - (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?

[25] By a decision delivered on 22 March 2024,¹³ the Full Court answered the questions as follows.

Answer to Question (1):

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

Answer to Question (2):

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

13 *Northern Territory of Australia v Yao* [2024] NTSCFC 1.

[26] The appeal was then heard by the Supreme Court. Of the 12 grounds of appeal, the Supreme Court allowed the appeal 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 No 3 and that it required notice to be given to [the worker] before making a decision to proceed towards the implementation of formal performance management of [the worker];

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 employer's] management action and erroneously took into account [the worker's] pre-existing mental health condition and [the employer'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 employer's] pleaded case; failing to determine whether the totality of the management actions relied upon by [the employer] 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."¹⁴

[27] All other grounds of appeal were dismissed, and the matter was remitted to the Work Health Court to decide according to law and in accordance with the Supreme Court's reasons. The worker has brought this appeal challenging the decision of the Supreme Court.

Grounds of appeal

[28] The amended notice of appeal before this Court pleads the following grounds.

¹⁴ *Northern Territory of Australia v Yao* [2025] NTSC 6 at [3].

1. The Supreme Court erred in law in limiting the determination of whether the employer's decision on 23 May 2019 was taken on reasonable grounds and in a reasonable manner to a question of the application of Public Service Employment Instruction No 3 and failing to deal with the Work Health Court's finding of fact that the employer's decision denied the worker fairness more generally and was not taken in a reasonable manner.¹⁵
2. The Supreme Court erred in law in finding that the worker's earlier mental health issues were not properly before the Work Health Court and not properly a matter for consideration by the Work Health Court in determining whether the management action by the employer was taken on reasonable grounds and in a reasonable manner.¹⁶
3. The Supreme Court erred in law in failing to consider the totality of the reasoning of the Work Health Court in relation to whether the management actions taken by the employer were taken on reasonable grounds and in a reasonable manner, including: ¹⁷
 - (a) the employer's decision of 23 May 2019 was unfair;

15 That contention of error is made with specific reference to the reasons in *Northern Territory of Australia v Yao* [2025] NTSC 6 at [55]-[65].

16 That contention of error is made with specific reference to the reasons in *Northern Territory of Australia v Yao* [2025] NTSC 6 at [66]-[71].

17 That contention of error is made with specific reference to the reasons in *Northern Territory of Australia v Yao* [2025] NTSC 6 at [72]-[87].

- (b) the employer's course of conduct thereafter in subjecting the worker to supervision and scrutiny posed a risk of mental injury to the worker of which the employer was aware;
 - (c) the employer's failure to consider the worker's prior medical history was unreasonable;
 - (d) the delay in informing the worker that he had been placed in a performance management process was not reasonable management action; and
 - (e) the finding that the worker had suffered a work-related mental injury by 3 October 2019 as a consequence of management actions which were taken in the period after 23 May 2019.
4. The Supreme Court erred in law in focusing solely on the use of the word 'perception' in the reasons of the Work Health Court and not considering the totality of the findings, including:¹⁸
- (a) the employer's decision of 23 May 2019 was unfair;
 - (b) the employer's course of conduct thereafter in subjecting the worker to supervision and scrutiny posed a risk of mental injury to the worker of which the employer was aware;
 - (c) the employer's failure to consider the worker's prior medical history was unreasonable;

18 That contention of error is made with specific reference to the reasons in *Northern Territory of Australia v Yao* [2025] NTSC 6 at [89]-[90].

- (d) the delay in informing the worker that he had been placed in a performance management process was not reasonable management action;
- (e) the finding that the worker had suffered a work-related mental injury by 3 October 2019 as a consequence of management actions which were taken in the period after 23 May 2019; and
- (f) the failure by the employer to discharge the onus of establishing that the management actions it took were taken on reasonable grounds and in a reasonable manner.

[29] The worker seeks orders that the judgment of the Supreme Court be set aside and that the judgment of the Work Health Court be affirmed.

The nature of this appeal

[30] Appeals from the Work Health Court to the Supreme Court in proceedings brought under the *Return to Work Act* are restricted under the terms of s 116 of that Act to “a question of law”. The effect of that limitation has been described in various cases, including *Tracy Village Sports & Social Club v Walker*¹⁹, *Wilson v Lowery*²⁰, *Lee v Macmahon Contractors Pty Ltd*²¹ and, most recently, *Slade v CGH Group Pty Ltd*²².

19 *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32.

20 *Wilson v Lowery* (1993) 4 NTLR 79.

21 *Lee v Macmahon Contractors Pty Ltd* [2018] NTCA 7.

22 *Slade v CGH Group Pty Ltd* [2026] NTSC 53.

[31] In *Wilson v Lowery*, this Court observed that although s 51 of the *Supreme Court Act* (NT) governs appeals from the Supreme Court to this Court in a general sense, and does not expressly restrict appeals of that type to questions of law, this Court's function on the hearing of an appeal from the Supreme Court in a workers' compensation matter should be confined in the same way as an appeal from the Work Health Court to the Supreme Court.²³ In other words, this Court is limited to considering questions of law and to determining whether the Supreme Court was right or wrong on any question of law properly identified in the grounds of appeal. An appeal to this Court in a workers' compensation matter is not a general appeal on fact and law, and this Court does not ordinarily undertake its own fact-finding process, or revisit findings of fact made by the Work Health Court except to the extent they may be infected by error of law.

The operation of the relevant statutory provisions

[32] The term 'injury' is defined in s 3A of the *Return to Work Act* in the following terms.

3A Injury

- (1) An injury, in relation to a worker, is a physical or mental injury arising out of or in the course of the worker's employment and includes:
 - (a) a disease; and
 - (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.
- (2) Despite any other provision of this Act, a mental injury is not considered to be an injury for this Act if it is caused wholly or primarily by one or more of the following:

²³ *Wilson v Lowery* (1993) 4 NTLR 79 at 83-4.

- (a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;
- (b) a decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;
- (c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action.

[33] The term 'management action' is defined broadly in s 3(1) of the *Return to Work Act* in the following terms.

management action, in relation to a worker, means any action taken by the employer in the management of the worker's employment or behaviour at the workplace, including one or more of the following:

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

- [34] In conformity with the answers given by the Full Court, and the reasons for those answers, the onus is on the worker to establish that an injury arose out of or in the course of employment, in which case the employer will then bear the onus of establishing any contention that the injury was ‘caused wholly or primarily’ by reasonable management action.²⁴
- [35] The progenitor of s 3A of the Act was the definition of ‘injury’ in s 4(1) of the *Commonwealth Employees’ Rehabilitation and Compensation Act 1988* (Cth), which came into operation on 1 December 1988.²⁵ The definition excluded injuries suffered by an employee as the result of reasonable disciplinary action taken against the employee, reasonable administrative action in relation to the employee, or a failure on the part of the employee to obtain a promotion, transfer or benefit in connection with his or her employment.
- [36] The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (Cth) made significant amendments to the exclusions in the definition of ‘injury’ with effect from 13 April 2007. The definition of ‘injury’ was transferred to a new s 5A, which uses similar terms to s 3A of the Act but is quite differently structured. Subsection 5A(1) defines injury with reference to the common conceptions of injury *simpliciter*, disease and aggravation, and then immediately excludes injury suffered ‘as a

²⁴ See also *Corbett v Northern Territory of Australia* [2015] NTSC 45 at [4]-[8].

²⁵ The title of that Act was amended to the *Safety Rehabilitation and Compensation Act 1988* with effect from 24 December 1992.

result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment'. Subsection 5A(2) then provides a non-exhaustive definition of the term 'reasonable administrative action'.

[37] There is a large body of authority in the federal jurisdiction dealing with the construction and operation of those exclusionary provisions in their various forms since 1988. There are two important principles arising from those authorities which also govern the relevant operation of the *Return to Work Act*.

[38] The first principle relates to the question of causation. The commonly cited case of *Hart v Comcare*²⁶ involved whether an adjustment disorder suffered by the employee was materially contributed to by her failure to obtain promotion. The Full Federal Court held that the injury was attributable to that failure notwithstanding that there may have been other operative causes, and it followed that the adjustment disorder was not an 'injury' as defined.

The Court stated:

There was no debate that the factual findings made by the Tribunal amount to a conclusion that the disease or injury suffered was as a result of the failure to obtain the promotions.

In order to succeed, the appellant must assert, as she does, that operative causes are not excluded and that given the provision's purpose some modifier should be read into the words to restrict the effect of the exclusion to circumstances where there were no other employment related causes. We do not agree. The operation of the provision had the evident purpose of removing from the field of compensation a disease, injury or aggravation which was a result of something. We see no evident purpose to remove from the field of compensation a disease, injury or aggravation which was only a result

²⁶ *Hart v Comcare* (2005) 145 FCR 29.

of that thing. The words do not readily admit that construction. The cases on multiple causes in tort or general law do not assist that enquiry.²⁷

[39] Although the Commonwealth legislation is in different terms, it is also unnecessary under the *Return to Work Act* that the reasonable administrative action be the sole cause of the worker's injury in order for the exclusion to have operation. However, the reasonable administrative action must be at least the 'primary' cause.

[40] The second principle derived from the Commonwealth authorities which is relevant for these purposes relates to the interaction between the worker's subjective beliefs and the objective approach which must be taken to the assessment of administrative action. In *Comcare v Martin*,²⁸ the High Court identified that the legislative purpose of the exclusion was to ensure that reasonable human resource management action does not give rise to liability. That purpose would be defeated if the operation of the exclusion was dependent upon the subjective reaction of the worker. The Court stated:

That reading conforms to the purpose of the exclusion. The purpose was described in the explanatory memorandum to the Bill for the Amending Act as being to "ensure that the wide range of legitimate human resource management actions, when undertaken in a reasonable manner, do not give rise to eligibility for workers' compensation" and as including, in particular, to prevent claims "being used to obstruct legitimate management action by excluding claims where an injury (usually a psychological injury) has arisen as a result of" such action. The taking of administrative action in respect of an employee's employment was in that way sought to be insulated from need for concern about the psychological effect of the decision on the employee.

²⁷ *Hart v Comcare* (2005) 145 FCR 29 at [21]-[22].

²⁸ *Comcare v Martin* (2016) 258 CLR 467.

This purpose would be defeated if the operation of the exclusion were dependent upon the subjective psychological drivers of the employee's reaction.²⁹

[41] The *Return to Work Act* has a similar operation. While it is possible under the operation of the legislation for a worker's subjective belief of a hostile workplace environment to cause mental injury, that injury will not be compensable if it was caused wholly or primarily by management action which, on an objective appraisal, was reasonable. That is so regardless of whether the worker had a genuine subjective belief that the management action was unreasonable or hostile, and regardless whether that management action has in fact caused injury to the worker.

[42] It falls to consider the worker's grounds of appeal having regard to the limited nature of the appeal, both from the Work Health Court to the Supreme Court and from the Supreme Court to this Court, and those principles which govern the assessment of whether management action was taken on reasonable grounds and in a reasonable manner by the employer within the meaning of s 3A(2)(a) of the *Return to Work Act*.

The application of Employment Instruction No 3

[43] By his first ground of appeal, the worker contends that the Supreme Court erred in law in limiting the determination of whether the employer's decision on 23 May 2019 was taken on reasonable grounds and in a reasonable matter to a question of the application of Public Service

²⁹ *Comcare v Martin* (2016) 258 CLR 467 at [46].

Employment Instruction No 3 and failing to deal with the Work Health Court's finding of fact that the employer's decision denied the worker fairness more generally and was not taken in a reasonable manner. The Court's finding in that respect was as follows.

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.

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 employer] 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.

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.

...

I accept [the employer'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 employer] 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.

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 employer] denied [the worker] natural justice in relation to that decision.³⁰

[44] In our respectful opinion, that conclusion was correct. In its terms, the Employment Instruction had no application to the process to which the Work Health Court purported to apply it and nor did ordinary concepts of procedural fairness require natural justice to be afforded before commencing

30 *Northern Territory of Australia v Yao* [2025] NTSC 6 at [59]-[64].

a process of that nature. The purpose of the process itself is to afford a worker notice of performance issues and opportunity to respond.

[45] As to the nature of the Work Health Court's error, it found that Employment Instruction No 3 required the worker to be afforded notice and the opportunity to be heard in relation to the implementation of performance management, and that the employer failed to do so. For that reason, the trial court purported to find that the decision to commence the PIP process, and the delay in informing the worker of that process, constituted management actions which were not taken in a reasonable manner. That finding involved a mixed question of fact and law. However, the underlying finding of fact was vitiated by an error of law, because it was based on a misdirection of law concerning the need to afford natural justice at that point in the process.

[46] In reaching that conclusion, it was unnecessary for the Supreme Court to give any broader consideration to whether the employer's decision denied the worker fairness more generally and was not taken in a reasonable manner. The effect of the Supreme Court's finding in relation to that particular ground of appeal was to vitiate the Work Health Court's finding that the employer had failed to establish that its management action was reasonable because it had denied the worker procedural fairness. The particular ground of appeal did not call for any wider enquiry, and that finding did not in itself vitiate the alternative basis for the Work Health Court's ultimate conclusion that the management action was not reasonable.

That alternative basis was the subject of other grounds of appeal before the Supreme Court.

The worker's earlier mental health issues

[47] By his second ground of appeal, the worker contends that the Supreme Court erred in law in finding that the worker's earlier mental health issues were not properly before the Work Health Court and not properly a matter for consideration by the Work Health Court in determining whether the management action by the employer was taken on reasonable grounds and in a reasonable manner. The Supreme Court's finding in that respect was as follows.

... 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.

I also consider that there is merit in [the employer's] contention that the trial judge was in error to decide the case on the basis of a proposition that had 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.³¹

[48] In our respectful opinion, that conclusion was also correct. First, that issue was not ever pleaded or otherwise ventilated during the course of the trial before the Work Health Court. The matter was first addressed in the trial

31 *Northern Territory of Australia v Yao* [2025] NTSC 6 at [69]-[70].

court's reasons for decision, and that denial of procedural fairness in itself constituted an error of law on the part of the Work Health Court. Second, as the High Court's decision in *Comcare v Martin*³² which is extracted above makes plain, the purpose of the reasonable management action exception is to ensure that actions of that nature do not give rise to eligibility for workers' compensation. The taking of administrative action is thereby 'insulated from need for concern about the psychological effect of the decision on the employee. This purpose would be defeated if the operation of the exclusion were dependent upon the subjective psychological drivers of the employee's reaction'.³³ A finding that management action is unreasonable if it does not take into account a worker's psychological potential reaction to that action would undermine the operation of the provision and constitute error of law.

- [49] Those errors of law vitiated the Work Health Court's finding that the employer owed the worker a duty of care to avoid the foreseeable risk of mental injury, that the employer failed to take those issues into account in determining whether to implement performance management action, and that the action was therefore not taken in a reasonable manner.

Failure to consider the totality of the Work Health Court's reasoning

- [50] By his third ground of appeal, the worker contends that the Supreme Court erred in law in failing to consider the totality of the reasoning of the Work Health Court in relation to whether the management actions taken by the

³² *Comcare v Martin* (2016) 258 CLR 467.

³³ *Comcare v Martin* (2016) 258 CLR 467 at [46].

employer were taken on reasonable grounds and in a reasonable manner, including that the decision of 23 May 2019 was unfair; that subjecting the worker to supervision and scrutiny posed a risk of mental injury to the worker; that the failure to consider the worker's prior medical history was unreasonable; that the delay in informing the worker that he had been placed in a performance management process was unreasonable; and that the worker had suffered mental injury as a consequence, in part, of supervision and scrutiny after 23 May 2019.

[51] This ground of appeal is directed to the Supreme Court's treatment of the employer's contention that the Work Health Court had failed to engage with the employer's pleaded case because it failed to determine whether the totality of the management action relied upon was taken on reasonable grounds and in a reasonable manner. Having found that the management action was not reasonable on the basis of the purported breach of natural justice and the purported failure to take into account the worker's earlier mental health issues, the approach taken by the Work Health Court was to find that all subsequent action was not taken on 'reasonable grounds' without any further consideration or analysis of that subsequent action.³⁴ It was that finding to which the Supreme Court's consideration was directed.

[52] On proper analysis, the purported breach of natural justice and the purported failure to take into account the worker's earlier mental health issues were

³⁴ *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [202].

the only two bases on which the Work Health Court concluded that the employer's management action was not taken on reasonable grounds and in a reasonable manner. For the reasons already described in dealing with the worker's first two grounds of appeal before this Court, the Work Health Court's findings in both those respects were, as the Supreme Court had found, vitiated by error of law. That was enough to require the findings of the Work Health Court to be set aside and for the matter to be remitted for rehearing in accordance with law by a differently constituted tribunal.

- [53] The sole focus of the Supreme Court's consideration which is subject to this ground of appeal was the employer's additional, or alternative, contention that the Work Health Court had failed to engage with the employer's pleaded case. In its defence, the employer had pleaded and particularised that any mental injury sustained by the worker was caused solely or primarily by 31 acts, facts or circumstances said to constitute management action taken on reasonable grounds and in a reasonable manner. The employer's complaint was that there was extensive evidence received at trial to establish that the worker was subjected to a performance management program in the ordinary course which culminated in a formal performance management process, but that the trial judge made no reference to that evidence and did not engage with the employer's contention that the totality of the measures implemented by the employer constituted management action taken on reasonable grounds and in a reasonable manner. The Supreme Court made the following finding in that respect.

... the case for [the employer] was that if [the worker] 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 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 worker's] mental injury was not caused by reasonable management action.

I agree that the trial judge was obliged to engage meaningfully with [the employer'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 employer], 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.³⁵

[54] In our respectful opinion, the Supreme Court was correct in that conclusion.

[55] The Work Health Court is a court of pleading and the primary purpose of pleadings in that jurisdiction is to define the issues between the parties.³⁶ It is the pleadings which record the issues which the Work Health Court must and may legitimately decide. In circumstances where the pleadings raise a course of management action, the reasonableness of that 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

³⁵ *Northern Territory of Australia v Yao* [2025] NTSC 6 at [85]-[86].

³⁶ *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373. See also *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1; *Hunt v Collins Radio Constructions Inc* (unreported, NTSC, 3 December 1996), 15.

that individual steps involved may not be reasonable if considered in isolation.³⁷

[56] The authorities from other jurisdictions dealing with this issue were considered by the Supreme Court in *Harris v Northern Territory of Australia*.³⁸ Those authorities emphasize the need to objectively assess the management action in the context of the circumstances and knowledge of those involved in the dealings, the circumstances that created the need for management action to be taken, and the consequences that flowed from the management action.³⁹ 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 of individual steps that are taken.⁴⁰ As already described in the consideration of the previous ground of appeal, the alleged ‘unreasonableness’ must be found to arise from an objective assessment of the actions in question rather than the worker’s perception of them.⁴¹

³⁷ *Department of Education and Training v Sinclair* [2005] NSWCA 465 at [97]. See also *Keen v Workers Rehabilitation & Compensation Corporation* [1998] SASC 6519.

³⁸ *Harris v Northern Territory of Australia* [2023] NTSC 39 at [55]-[56].

³⁹ *Georges and Telstra Corporation Limited* [2009] AATA 731 at [23]; *Re Ms SB* [2014] FWC 2014 at [49]-[51]; *Lynch v Comcare* [2010] AATA 38.

⁴⁰ *Department of Education and Training v Sinclair* [2005] NSWCA 465; *Re Ms SB* [2014] FWC 2014; *Nguyen and Comcare (Compensation)* [2018] AATA 1623 at [63].

⁴¹ *Re Ms SB* [2014] FWC 2014 at [51].

[57] In *Department of Education and Training v Sinclair*,⁴² Spigelman CJ (with whom Hodgson and Bryson JJA agreed) said, in reference to the New South Wales counterpart to s 3A of the *Return to Work Act*:

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.⁴³

[58] Although that case was dealing with the reasonableness of disciplinary action, as opposed to management action, the same principle has application. In the present case, the Work Health Court manifestly failed to determine whether the whole process as pleaded constituted management action taken on reasonable grounds and in a reasonable manner. That constituted an error of law which vitiated the decision in its entirety, quite apart from the specific errors which had already been identified by the Supreme Court in its consideration of the other grounds of appeal. Having made that finding of error, it was not incumbent on the Supreme Court – and not open to the Supreme Court given the limited nature of the appeal – to go on to conduct any broader consideration of the evidence to determine for itself whether the management action was reasonable or to determine whether the Work Health

⁴² *Department of Education and Training v Sinclair* [2005] NSWCA 465.

⁴³ *Department of Education and Training v Sinclair* [2005] NSWCA 465 at [97].

Court's ultimate conclusion might validly be sustained on some other ground or basis. So far as the worker's assertion of an obligation to consider 'the totality of the reasoning of the Work Health Court', there was no reasoning or finding in relation to the totality of the management action by reason of the error which had been committed by the Work Health Court.

Focus on the word 'perception'

[59] The worker's fourth and final ground of appeal is that the Supreme Court erred in law in focusing solely on the use of the word 'perception' in the reasons of the Work Health Court and not considering the totality of the findings, including that the decision of 23 May 2019 was unfair; that subjecting the worker to supervision and scrutiny posed a risk of mental injury to the worker; that the failure to consider the worker's prior medical history was unreasonable; that the delay in informing the worker that he had been placed in a performance management process was unreasonable; that the worker had suffered mental injury as a consequence, in part, of supervision and scrutiny after 23 May 2019; and the finding that the employer had failed to establish reasonableness in its management actions.

[60] The Supreme Court found that the ground had been established on the following basis.

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 ...⁴⁴

[61] We are respectfully of the opinion that the Supreme Court was in error in that finding. In our assessment, it is based on a misapprehension of the effect and purpose of the following passage from the reasons of the Work Health Court:

I am required to consider whether the Worker did harbour a perception of micromanagement and of bullying and of being negatively targeted by an unusual formal performance management process in the workplace, against the background of those findings. I am not required to determine whether any such perception or perceptions were justified or reasonable. Then, I am required to consider and make a finding whether those perceptions caused or materially contributed to the injury.⁴⁵

[62] That statement was directed only to what the worker was required to establish to satisfy the court in the first instance that he had sustained a mental injury arising out of or in the course of employment. That formulation was consistent with the authorities which establish that a psychiatric condition caused by a perception of events which have occurred in the workplace, including the perception of a hostile workplace, is capable as a matter of law of constituting a mental injury ‘arising out of or in the course of employment’.⁴⁶ That is subject to the qualification that it must be a perception of real events, as opposed to ‘external events’ unrelated to the workplace. If conduct which actually occurred in the workplace was

⁴⁴ *Northern Territory of Australia v Yao* [2025] NTSC 6 at [89].

⁴⁵ *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [67].

⁴⁶ See *Wiegand v Comcare Australia* [2002] FCA 1464; *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249; *Corbett v Northern Territory of Australia* [2015] NTSC 45.

perceived as creating an offensive or hostile working environment, and a compensable injury followed, it was open to the Work Health Court to conclude that the worker had established causation in the discharge of the onus which he bore in the proceeding.

- [63] It was only after the Work Health Court found that mental injury arising out of or in the course of employment had been established by the worker that it went on to consider the performance management process and the employer's 'defence' of reasonable management action. So much is apparent from the trial court's subsequent statement in the reasons that:

The Worker has therefore established his entitlement to be paid compensation under the Act, unless I find that the injury was caused wholly or primarily by management action taken on reasonable grounds and in a reasonable manner by the Employer, within the meaning of subsection 3A(2)(a) of the Act.⁴⁷

- [64] That was a correct and orthodox approach to dealing with the respective onera borne by the parties. However, for the reasons already described in our consideration of the earlier grounds of appeal, the Work Health Court committed various errors of law in determining whether the worker's injury was caused primarily or wholly by reasonable management action and those errors vitiated the trial court's findings. Although the worker has established that this fourth ground of appeal is made out, that does not obviate the fact that the Work Health Court's decision and orders were made in error. Those errors required the decision to be set aside and the matter remitted to the Work Health Court for reconsideration. The worker's appeal is against the

⁴⁷ *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [135].

correctness of the judgment made by the Supreme Court. The judgment made by the Supreme Court in this case was to allow the appeal and remit the matter to the Work Health Court to decide according to law. That judgment was correct.

Disposition

[65] The following orders are made.

1. The appeal is dismissed.
2. The orders made by the Supreme Court on 19 August 2024 allowing the appeal and remitting the matter to the Work Health Court to decide according to law are affirmed.
3. In default of agreement, the parties are to file written submissions in relation to the costs of this appeal within 28 days of the delivery of these reasons.
