Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION:	[2023] VWIC 1
ARBITRATION REFERENCE NUMBER:	[Number]

PARTIES

WORKER:	[Worker's name] (the Worker)
WORKSAFE AGENT/ SELF - INSURER:	[Agent's name] (the Agent)
EMPLOYER:	[Employer's name] (the Employer)
ARBITRATION OFFICER:	Katie Valentine
DATE(S) OF HEARING:	29 June 2023, 30-31 August 2023
DATE OF DETERMINATION:	15 September 2023

DETERMINATION

1. I determine that the Agent's decision dated 24 November 2022 is revoked. This means that the dispute is in favour of the Worker.
2. I determine that the Worker is entitled to compensation from 6 October 2022 payable in accordance with the Act. I direct the Agent calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.
3. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

4. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.
5. If there is a dispute in relation to costs, parties may apply to the Workplace Injury Commission within 30 days of the date of this determination.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Worker is entitled to compensation for a workplace mental injury.

2. The decision under review is the Agent's decision dated 24 November 2022 to reject the Worker's claim for compensation on the basis that the Worker's mental injury was of a type which does not create an entitlement to compensation. The Agent rejected the Worker's claim on the grounds that the Worker's injury was caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner by the Employer following the commencement of an investigation by the Employer.

Background

3. The Worker is 52 years old, working in a job he describes as a '[Production] Operator' employed by the Employer since 1997. His job description provided by the Employer states he is a '[Production] Manager' whose role is to follow established procedures and safe work practices so as to ensure quality products are produced.

4. On 29 September 2022, the Worker attended a meeting with a number of colleagues (the 29 September meeting), including [Ms Z] (the complainant). There was a discussion about certain sample results that gave rise to some disagreement. Following the meeting the complainant was upset and left the work site.

5. On the same day, the complainant's manager, [Ms Y], had a discussion with the Worker about the 29 September meeting, which the Employer later described as a 'welfare check' (the welfare check).

6. On 30 September 2022, the complainant made a formal complaint (the complaint) to the Employer about the Worker's conduct at the 29 September meeting.

7. On 5 October 2022, [Ms X], Human Resources Business Partner at the Employer, phoned the Worker advising him of the complaint and requesting he attend a meeting at 4pm the next day (the 5 October call).

8. On 6 October 2022, the Worker worked until 4pm and then attended a meeting with [Ms X], [Mr W] (a production manager), and two union representatives – [Mr V] and [Mr U] (the 6 October meeting). He was read a letter that set out three allegations (the 6 October letter), and was provided two of the Employer's policies.

9. At the 6 October meeting it was agreed the Worker would respond in writing.

10. Following the 6 October meeting, the Worker ceased work. It is not clear if the Worker has been able to return to work in any capacity.

11. The Worker submitted that the management action caused him a mental injury.

12. On 7 October 2022, the Worker obtained a Certificate of Capacity, issued by his treating health practitioner, [Dr T] (the GP) who diagnosed the Worker with a 'Situational Crisis' and certified him unfit from 6 to 20 October 2022.

13. By letter dated 7 October 2022, and delivered to the Employer on 10 October 2022, the Worker responded in writing to the complaint.

14. On 14 October 2022, [Ms X] responded to the Worker's 7 October letter.

15. On 18 October 2022, the Worker lodged with the Employer Part A of a Worker's Injury Claim Form (claim form).

16. On 24 October 2022, the Employer issued a letter advising the Worker of the investigation's outcome into the complaint (the outcome letter). The Employer found that the first and second allegations were unsubstantiated and that there was insufficient corroboration to determine whether the third allegation was substantiated or not. It also issued another letter of the same date attaching the Employer's Code of Conduct.

17. On 25 October 2022, the Worker sent a grievance letter to the Employer.

18. On 27 October 2022, the Worker lodged Part B of the claim form with the Employer. This was lodged with the Agent on the same day.

19. On 2 November 2022, the Worker sent a further grievance letter to the Employer.

20. On 17 November 2022, the Worker attended an Independent Medical Examination with [Dr S] (the IME).

21. By notice dated 24 November 2022, and senior review dated 21 December 2022, the Agent rejected the Worker's claim for compensation.

22. The Worker lodged an application for conciliation with the Workplace Injury Commission (WIC). Following conciliation, on 9 March 2023, a Conciliation Officer issued a Genuine Dispute Certificate.

23. On 10 March 2023, the Worker lodged a request for review by the Workers Compensation Independent Review Service (WCIRS). On 12 May 2023, WCIRS affirmed the Agent's decision.

24. On 24 May 2023, the Worker lodged a referral for arbitration with WIC.

Evidence

25. In making this determination, I have considered all the material provided by and exchanged between the parties. It is included in the Arbitration Book (pages 1-321), Schedule B of the Arbitration Book (pages 322-972), and an email from the Worker dated 4 September 2023.

26. An initial hearing was held by video conference on 29 June 2023 and a subsequent hearing also by video conference on 30 and 31 August 2023, attended at both by the Worker, [Ms R] (the Worker's representative) and [Mr Q] (the Agent).

27. At the hearing on 30-31 August 2023, oral evidence was provided by the following witnesses:

    - [Ms X] (Employer, Human Resources Business Partner)
    - [Mr V] (Union delegate)
    - [the Worker] (Worker)

28. The relevant evidence will be discussed below, in the analysis and findings.

ISSUES

29. The relevant legislation in this matter is the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act).

30. Aside from the preliminary matters determined below, the issues to be considered in this dispute are:

- Has the Worker suffered an injury arising out of or in the course of employment?
- What was the date of injury?
- Was the injury caused wholly or predominantly by
  - management action or
  - any expectation of management action?
- What was the management action?
- Was the management action taken on reasonable grounds?
- Was the management action taken in a reasonable manner?

Preliminary Matters

Can WIC determine the date of injury?

31. The Agent submitted that WIC does not have jurisdiction to hear any claim for any alleged injury on 5 October 2022 on the basis that:
    - The claim relates to a date of injury stated by the Worker to be 6 October 2022
    - The Agent cannot lawfully deal with any other date of injury than that stipulated in the claim form and submits their view is supported by *Robinson v SPI Electricity* [2012] VMC 30
    - The Agent has not made a decision relating to any alleged injury on 5 October 2022, and
    - The Genuine Dispute Certificate relates to the Agent's notice of 24 November 2022 rejecting the claim for compensation only in relation to an injury on 6 October 2022.

32. The Worker submitted that:
    - According to section 20 of the Act, the claim form is only required to state the date on which the Worker ceased work because of the injury
    - The Act does not mandate a worker establish the date of injury in order to establish their claim and cites *Gosper v Pilbara Iron Company (Services) Pty Ltd* [2021] WADC 47, and
    - The exact date of injury is not required to determine an entitlement to compensation under section 40(1)(a) of the Act, or the Act in general.

33. I consider that I have jurisdiction to determine the date of injury in this dispute. This is because:
    - The Agent was aware that the Worker was aggrieved by being contacted on a rostered day off (the 5 October call), as set out in his letter to the Employer dated 7 October 2022.
    - It is clear that the 5 October call forms part of the Employer's management action, which is the stated cause of the Worker's injury.
    - My role is (and in making its decision, the Agent's role was) to determine whether the injury was caused wholly or predominantly by management action carried out on reasonable grounds and in a reasonable manner. I must also consider whether there are other potential causes of the injury (therefore, not just that which occurred on the stated date of injury, 6 October 2022), to determine whether the Agent's defence succeeds.

- In relation to the Agent's submission that their view is supported by *Robinson v SPI Electricity* [2012] VMC 30, I note these principles which have been adopted in many magistrates' court judgments relate to a worker seeking to expand claim for a frank injury claim to one over the course of employment. This is not what the Worker seeks to claim in this dispute.
- Considering also the objects of the Act at section 10(d) to 'ensure appropriate compensation…is paid to injured workers in the most socially and economically appropriate manner, as expeditiously as possible', I consider these objects would be frustrated by a failure to consider whether the injury arose on 5 October or 6 October 2022.
- *Gosper v Pilbara Iron Company* cited by the Worker does not relate to the Victorian jurisdiction and does not assist me.

34. I therefore find that I have jurisdiction to determine the date upon which the Worker's injury arose.

Was the Agent's decision made within 28 days?

35. The Worker submitted that the claim is deemed to have been accepted because:

- The Agent did not make a decision within 28 days of receiving the claim.
- The Worker's representative spoke with Worksafe Advisory Services three times on 22 May 2023 who confirmed that the 'Agent Receipt Date' represented day 1 of the 28 day claim determination timeframe.
- Part A of the claim form states that 'The claim determination timeframe of 28 days will commence from the date the Agent receives Part B from you.'
- The WorkSafe Claims Manual states that any email received is deemed to be accepted on the day up until 11.59pm.

36. The Agent submitted that 27 October 2022 is 'day 0' per section 44 of the *Interpretation of Legislation Act 1984* (Vic) (Interpretation Act) and that the decision to reject the claim was made on 24 November 2022, which was on day 28.

37. Section 75(1) of the Act provides that if the Agent does not give written notice rejecting the claim within 28 days after receiving the claim, the claim is deemed to have been accepted and the Agent must pay compensation to the Worker.

38. The WorkSafe Claims Manual provides that the '…date shown in the email as being received by the Agent's email system is the actual Agent Received Date regardless of the time the email is received.' There is no dispute that the Agent received Part B of the claim form on 27 October 2022.

39. Section 44(1) of the Interpretation Act provides that 'a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.'

40. I note that any WorkSafe policy, guideline or form is subordinate to the provisions of the Act and the Interpretation Act to the extent of the inconsistency. In any event I do not consider there to be an inconsistency. In accordance with the Interpretation Act, I find that 27 October 2022 is day 0, and is not included in the day count of 28 days for the Agent to make a decision. The date of the Agent's decision on 24 November 2022 is 28 days from 27 October 2022, as, following section 44(1) of the Interpretation Act, day 1 is 28 October 2022. I therefore find that the claim is not deemed to have been accepted under section 75 of the Act.

CONSIDERATION OF ISSUES

Burden and Standard of Proof

41. The Worker must establish, on the balance of probabilities, that he has an injury arising out of or in the course of employment pursuant to section 39(1) of the Act. The Employer and Agent have the onus of proof regarding the Employer's management action and defence relied upon under section 40(1) of the Act: *Pulling v. Shire of Yarra Ranges* [2018] VSC 248 at [78].

Has the Worker suffered an injury arising out of or in the course of employment?

42. Section 40(1) is enlivened when the Worker has suffered a mental injury.

43. There are varying diagnoses provided by the medical practitioners. On 7 October 2022, the GP diagnosed the Worker with a 'Situational Crisis'. In a report dated 17 November 2022, the IME diagnosed the Worker with an 'Adjustment Disorder with mixed Anxiety and Depressed Mood'. In a report dated 22 December 2022, the GP diagnosed the Worker with 'Depression'.

44. I find that the Worker has a mental injury, namely an 'Adjustment Disorder with Mixed Anxiety and Depressed Mood' on the basis that I accept and prefer the opinion of the IME who diagnosed this condition and whose specialty is in psychiatry.

45. There is no dispute that the injury arose out of or in the course of employment. The Agent's decision states that the Worker's condition arose following the commencement of the Employer's investigation. The IME also states the Worker's injury is a '…new condition since after the meeting on 05/10/2022'. I therefore find that the injury arose out of or in the course of employment.

What was the date of injury?

46. The Worker submitted that 'the 'exact' date of his injury is not required to determine his entitlement to compensation under s.40(1)(a) of the Act, or the Act in general.' However, I consider it necessary to determine the date of injury, as the Employer's defence can only be examined with reference to events that caused the injury.

47. The Worker's witness statement sets out at length the events that he states gave rise to his injury. In brief, he states these are the events reported to the GP on 7 October 2022, namely; 'the two meetings on the 29 September with [the Complainant] and then [Ms Y], the phone call on 5 October, the meeting on 6 October, the false allegations, the large number of alleged employment breaches and the threats to my employment.'

48. The Worker submitted that the management action commenced with the welfare check on 29 September 2022, during which he was not afforded procedural fairness, the ability to have a support person or witness present or the other procedural requirements relating to management action set out in the Employer's Code of Conduct and policy documents.

49. The Worker also submitted that the injury 'became apparent to him on the 5 October 2022' as supported by the GP whose letter dated 22 December 2022 states relevantly:

> *He saw me in the past as he felt depressed due to unfair treatment at workplace. On 07/10/2022 at consultation he also mentioned the following:*

He had unplanned meeting with a senior manager on 29/09/2022. He received a telephone call from HR while he was on leave (05/10/2022) for another meeting.
The reason why they wanted a meeting was they didn't want to discuss allegations over the phone or put them in writing.
He felt ambushed at the meeting with serious allegations on 06/10/2022.
He felt stressed and agitated as those allegations were false.
[The Worker] thinks his co-worker has complained against him as she hasn't done her job.
He has been stressed and not slept very much since the phone call from work on 05/10/2022.
He got distressed and depressed more after the meeting as he was thretened by managers to dismiss from work and the fact that co-worker made false allegations against him. (sic)

50. The Agent submitted that the Worker first claimed his date of injury was at 4pm on 6 October 2022 and now seeks to amend it to 5 October 2022. The Agent submitted the medical evidence supports the date of injury of 6 October 2022, and that the Worker continued to work until 4pm on 6 October 2022; therefore he had no incapacity until that time. The Agent submitted the IME has incorrectly stated the Worker was injured after the meeting on 5 October 2022, as the meeting did not occur until 6 October 2022.

51. The Worker's claim form states that the injury occurred and was first noticed at 4pm on 6 October 2022.

52. The GP's clinical notes record on 7 October 2022:

He has been bullyed and haresed at work yesterday
He had a stressfull night
No suicidal thoughts or ideation of self harm
…
Diagnosis: Situational Crisis… (sic)

53. The IME states that the Worker's condition arose as follows:

He reported reactive anxiety and depressive symptoms since 05 Oct 2022.

54. The IME's diagnosis of an Adjustment Disorder with mixed Anxiety and Depressed mood arose as:

A new condition since after the meeting on 05/10/2022:
The worker...states that he had experienced stress on account of the lack of procedural fairness (by HR and management) in the context of serious false allegations made against him by a female co-worker. The secondary stress was receiving a letter that state he needed to follow a code of conduct of behaviour and he found that every (sic) upsetting and stressful as he has been a good loyal employee for 25 years and now, he has to face allegations and no action has been taken against the female worker for making false allegations...

55. The Worker submitted that he could not possibly foresee the welfare check would become a matter of consequence.

56. The Worker submitted that he 'was clearly aggrieved' from 5 October 2022. I also note his witness statement that he 'had trouble sleeping that night; I kept replaying conversations and wondering what I was going to be walking into tomorrow.' [Mr U] stated in his witness statement that at the 6 October meeting, the Worker commented the 'he hadn't slept well, his [medical condition] had been affected from the stress of not knowing anything about the meeting and that his anniversary had been ruined the day before.'

57. I find that the Worker's injury arose on 6 October 2022, as a result of the 6 October meeting that notified him of the nature of the allegations and the possible consequences of an investigation. This is because:

- The GP's clinical notes show an attendance on 7 October 2022. The notes are written contemporaneously with the consultation on that date and note that he was bullied and harassed at work on 6 October 2022. There is no mention that his mental injury arose as a result of events prior to 6 October 2022.
- The Certificate of Capacity dated 7 October 2022 states the Worker had no capacity for employment from 6 October 2022.
- Whilst the GP's letter on 22 December 2022 notes that he was told about the events of 29 September and 5 October, he does not state that the injury arose other than on the date he had already certified the Worker unfit, and notes the Worker's condition deteriorated after the 6 October meeting. I consider it therefore developed into a diagnosable mental injury from that date.
- The IME states that the Worker 'had experienced stress on account of the lack of procedural fairness (by HR and management) in the context of serious false allegations made against him by a female co-worker'. The IME also states that the injury arose after the meeting on 5 October 2022. I note that the meeting actually occurred on 6 October 2022 and consider the IME incorrectly stated the meeting occurred on 5 October 2022.
- The IME's opinion was that the Worker's illness was 'in the context of serious false allegations…' The allegations themselves were only known to the Worker at the 6 October meeting, as the Employer did not tell him what the allegations were during the 5 October call.
- The Worker attended work on 6 October 2022 and worked until 4pm.
- The claim form states that the injury was first noticed and arose at 4pm on 6 October 2022; therefore, at the 6 October meeting and upon receipt of the 6 October letter.

58. I therefore find on the balance of probabilities that the Worker's injury arose on 6 October 2022.

59. It is therefore not relevant to make further findings concerning the welfare check or the 5 October call.

Was the injury caused wholly or predominantly by management action or any expectation of management action?

60. Under section 40(1) the onus is on the Agent to prove, on the balance of probabilities, that the Worker has no entitlement to compensation as a result of a mental injury caused 'wholly of predominantly' by any one or more of the following —

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

61. When considering the meaning of ‘wholly or predominantly’, Bell J held in *Pulling* [79] that ‘[t]o be the predominant cause, that cause must exceed all other causes in power and influence.’

62. Whilst the Agent submitted that the Worker’s expectation of the taking of management action was ‘one of the pre-dominate’ [sic] causes of his injury, I consider that, following *Pulling*, I must decide what was *the* predominant cause of his injury; there cannot be more than one.

63. The parties submitted that I should consider subsection 40(1)(a), whether the Worker’s injury was wholly or predominantly caused by management action taken on reasonable grounds and in a reasonable manner.

64. However, I have also had regard to subsection 40(1)(c), whether the mental injury was wholly or predominantly caused by any expectation by the Worker that any management action would, or would not, be taken.

65. The Victorian Court of Appeal has found that an ‘expectation’ (referred to in equivalent provisions in the *Accident Compensation Act 1985* (Vic)) was ‘anticipatory of the taking of ‘such action’ or the making of ‘such a decision’: *Department of Education & Anor v Unsworth* [2010] VSCA 77 at [46].

66. This means that any of the management actions that had already occurred at the time the injury arose on 6 October 2022 are not able to fall under subsection 40(1)(c). I must therefore consider whether the Worker’s injury was wholly or predominantly caused by any management action that the Worker expected but that had not yet occurred.

67. Section 40(7) defines management action relevantly as follows:

> *In this section—*
> ***management action**, in relation to a worker, includes, but is not limited to, any one or more of the following—*
>
> *…*
> *(b) counselling of the worker;*
> *…*
> *(d) disciplinary action taken in respect of the worker's employment;*
> *…*
> *(g) dismissal of the worker;*
> *…*
> *(m) investigation by the worker's employer of any alleged misconduct—*
> *(i) of the worker; or*
> *…*
> *(n) communication in connection with an action mentioned in any of the above paragraphs;*

68. I consider that the investigation by the Employer of any alleged misconduct under subsection 40(7)(m) and some communication in connection with the investigation under subsection 40(7)(n) had already commenced by the date of the Worker’s injury.

69. In light of the Worker’s submissions that there were threats made to terminate his employment, I also considered whether the Worker had an expectation of management action under subsections 40(7)(b) ‘counselling of the worker’, 40(7)(d) ‘disciplinary action taken in respect of the worker's employment’ and 40(7)(g) ‘dismissal’ and 40(7)(m) any communication in connection with any of these matters.

70. In oral evidence, the Worker stated that he believed he was being ‘set up’ for misconduct, not for the termination of his employment. I therefore find that the Worker did not have an expectation of dismissal under subsection 40(7)(g).

71. Under subsections 40(7)(b), (d) and (m), whilst I consider the Worker had an expectation that counselling, disciplinary action and/or communication in connection with counselling or disciplinary action, I do not consider this was the whole or predominant cause of the Worker's injury. This is because the Worker's correspondence to the Employer dated 7 October 2022 and 25 October 2022, and communications consistently thereafter, centred on his belief that the investigation was not being carried out in a fair manner, both in relation to the 6 October meeting and the way in which the investigation was conducted. This was borne out in the Worker's oral evidence.

72. I therefore find that an expectation of management action under section 40(1)(c) was not the whole or predominant cause of the Worker's injury.

73. Based on the GP's and IME's opinions that there was no other cause of the Worker's injury, I also find that the Worker's injury was caused wholly by the management action from 6 October 2022, which is discussed below.

What was the management action?

74. I must specify the scope of the management action that is being examined for reasonableness. This is important because the Worker submitted that a number of events both before and after 6 October 2022 were unreasonable and contributed to his injury. I have already dealt with the management action prior to 6 October 2022 above, concluding at paragraph 59.

75. The Agent initially submitted that all events which took place after the date upon which the Worker lodged his claim, namely 18 October 2022, cannot be the subject of this claim and cannot be lawfully considered in any determination made.

76. However, the Agent later submitted that:

> *27. Noting the DOI of 06.10.22 relates to the meeting arising from the allegations of 30.09.22, we say the scope of the claim is limited to the Investigation carried out by the employer in relation to that complaint.*
>
> *28. The employer completed their investigation on 24.10.22 and so the process was finalized on that date.*
>
> *29. The worker's subsequent letter of appeal against the investigation findings in our view constitutes and new and separate course of action.*
>
> *30. We say this is not the subject of the claim and cannot be lawfully considered by the Arbitrator in line with the case of Rennie vs State of Victoria.*

77. The Agent also submitted:

> *11. In line with the case of Rennie vs State of Victoria at pt 124 His (sic) Honour agreed "separate causes of action must be considered separately and not conflated as a 'continuation' of each other and not a conflated cause of action"*
>
> *12. It is our view that finding is logical otherwise there could be no end if separate grievances were continued to be lodged.*
>
> *13. The Arbitrator should therefore find the worker's email to the employer on 02.11.22 containing his appeal and formal grievance letter requesting an investigation and written response to be a separate course of action and not one that forms part of this claim.*
>
> *14. The Arbitrator should agree the investigation which gave rise to this claim being made commenced on 30.09.22 and was completed on 24.10.22.*

15. The Arbitrator should find the further grievances raised by the worker after the 24 October 2022 cannot be jurisdictionally considered.

78. The Worker submitted that I must look at the entire investigation process to see if it was reasonable action: *Department of* Education *& Training v Sinclair [2005] NSWCA 465* at [35] and *Buxton v Bi-Lo Pty Ltd* [1998] NSWCC 13 at [92]-[94], and that I must have regard to part 1.4.1.1 of the WorkSafe Claims Manual, sections 269 and 301H(1)(a) and (b) of the Act, and section 55 of the *Evidence Act 2008* (Vic) which, he submitted, instructs me to take all management action material into account.

79. In relation to the Worker's submissions in the previous paragraph I make the following comments:

- I note my earlier comments about the primacy of the Act over the WorkSafe Claims Manual.
- Section 269 of the Act only relates to how documents may be used in this dispute. Section 301H of the Act requires the parties to a dispute to produce all relevant information; neither section prescribes the part of the management action I must have regard to.
- Section 55 of the *Evidence Act* states that 'the evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect … the assessment of the probability of the existence of a fact in issue in the proceeding.' This merely defines relevant evidence and does not instruct me what evidence to take into account. In any event, the rules of evidence do not apply to arbitration at WIC.
- The cases cited above relate to the interpretation in 1998 of section 11A of the *Workers Compensation Act 1987* (NSW) and do not apply to this dispute.

80. The Worker lodged Part A of the claim form on 18 October 2022, which the Agent received on 20 October 2022. The Agent received Part B of the claim form on 27 October 2022.

81. Section 75 of the Act requires the Agent to have received both Part A and Part B of the claim form in order for it to consider the claim validly lodged in order for time to commence in assessing the claim. Having regard to the reasoning in *Rennie v State of Victoria* [2022] VMC 26 at [130] that 'the … claim did not and could not extend to events and circumstances subsequent to its lodgement', I find that I must take into account management action comprising the investigation that occurred from the date of injury on 6 October 2022 until the claim lodgement on 27 October 2022. Any injury or grievance after this date cannot arise from this cause of action.

Was the management action taken on reasonable grounds?

82. The 6 October letter sets out the allegations against the Worker as follows:

It has been alleged that:

- *You raised your voice and 'waved/shoved' an email in [the Complainant's] face (dated 24 January), and read highlighted exerts of the communication making [the Complainant] feel severely ridiculed in an open forum, and leaving [the Complainant] feeling embarrassed, victimized, intimidated and belittled. To the point where she left site in a distressed manner.*
- *By raising arguments against the [specialist] advice [the Complainant] provided (without prior notification and in front of others at the meeting) when [the*

Complainant] is a [specified type of] Specialist in an unprofessional, aggressive, must win manner was intimidating and undermined her position.

- *You did not provide a safe, supportive environment where the team leader ([the Complainant]) could respond, allegedly speaking over [the Complainant], acting in an unprofessional manner, without providing respect, support, care or a collaborative solution to the issue.*

83. Despite earlier submissions to the contrary, the Worker conceded later that there were reasonable grounds for the management action (without specifying which management action in particular).

84. However, at the hearing the Worker submitted that the Employer should have made informal inquiries of [Mr P] (the Worker's senior manager) and [Mr O] (the Worker's supervisor), also in attendance at the 29 September meeting, to ensure the complaint was sound, defensible and well-founded prior to commencing a disciplinary process against the Worker. This submission is effectively that the grounds for the management action were not reasonable.

85. The Agent submitted that in determining whether the grounds are reasonable or not, regard must be had to provisions of the Enterprise Agreement, the EEO, Discrimination, Harassment and Bullying Policy and the Code of Conduct 'Complaints and Grievance Process' (Complaints and Grievance Process) which requires the Employer to follow formal procedures to resolve a formal complaint.

86. The Employer's EEO, Discrimination, Harassment and Bullying Policy states that 'All complaints will be handled in accordance with the company's Grievance and Dispute Policy and Procedure'.

87. The Employer's Complaints and Grievance Process relevantly states:

> *Complaints and grievances may be informal or formal. In either case, [the Employer] will seek to address the situation in an appropriate way on a case by case basis having regard to the nature of the underlying issues, the personnel involved and the surrounding circumstances.*
> *…*
> *If you make a formal complaint, [the Employer] will follow formal procedures to resolve the workplace issue.*
>
> *This includes investigation of the complaint (by an internal or external investigator), interviewing the parties concerned, finding and reporting an outcome and implementing a solution. All stages will be formally documented.*
>
> *All complaints and issues should be investigated promptly, fairly, impartially, and confidentially.*
>
> *If you are the subject of a complaint, you will receive all relevant information regarding the complaint, and will be given the opportunity to explain your version of events.*
> *…*
> *In formal or informal grievance discussions, an employee is entitled to have a support person assist them, to act as a witness or interpreter.*

88. The Worker submitted that there should not have been a disciplinary process at all prior to establishing the facts. Essentially, he argued that an informal investigation into the complainant's allegations ought to have been made before a formal investigation of the complaint commenced.

89. I am not satisfied that this is the case. The Complaints and Grievance Process explicitly states that if a formal complaint is made, the Employer will follow formal procedures. In

addition, I note the Worker was concerned about the confidentiality of the complaint and investigation. Had the Employer raised the complaint with other employees prior to notifying the Worker, this would not have protected his privacy, nor would it have afforded him procedural fairness.

90. I also note that even though the allegations were ultimately not substantiated, I cannot find, retrospectively, that the management action was not taken on reasonable grounds. Nor is it my task to decide whether the allegations were true, only to make findings as to the objective reasonableness of the grounds for the management action taken, at the time they were taken: *Rennie* at [200] and [210].

91. I therefore find that there were reasonable grounds for the Employer to commence management action in the form of a formal investigation.

Was the management action taken in a reasonable manner?

92. *Krygsman-Yeates v State of Victoria* [2011] VMC 57 at [35] provides guiding principles for assessing the reasonable manner of management action. The management action is to be considered objectively having regard to all of the circumstances leading to it being taken and the manner in which it is taken in a global context. The following matters are to be taken into account:

> *(i) that the management action and the manner in which is taken should not be irrational, absurd or ridiculous but moderate and fair; and*
> *(ii) the judgement is whether the action taken was done "reasonably" not whether it could have been done more reasonably or in a different way more acceptable to the court; and*
> *(iii) The action and the manner in which it is taken may be reasonable even if particular steps involved are not; and,*
> *(iv) The action and the manner in which is taken should be assessed at the time it is taken without the benefit of hindsight, taking into account the attributes and circumstances including the emotional state of the worker.*

93. I will consider the most relevant grounds upon which the Worker submitted that the management action was not conducted in a reasonable manner.

The Employer did not conduct an informal investigation

94. The Worker submitted that the Employer's Investigation Action Plan/Checklist in its '[HR] Pack' ([HR] Pack) required it to investigate the complaint prior to commencing any disciplinary action against him. The Investigation Action Plan/Checklist states the Employer is required to 'conduct informal enquiries with complainant/witnesses to establish the nature of the allegations' prior to drafting allegations, defining the scope of the investigation and issuing an allegation letter to the Worker.

95. The Agent submitted that the Employer's investigation into the complaint was in line with their Complaints and Grievance Process.

96. The Employer's Complaints and Grievance Process is not prescriptive as to whether an informal investigation ought to be conducted. Whilst it notes complaints may be formal or informal and will be dealt with on a case-by-case basis, it also states that it will follow formal procedures if a formal complaint is made.

97. In oral evidence, [Ms X] stated that the [HR] Pack is not a policy or procedure, but rather a collection of documents that the Employer may choose to use in certain circumstances. The Agent also made this submission. However, in her witness statement [Ms X] stated that the [HR] Pack:

> *…has been established by our legal team to guide any disciplinary process from beginning to end. Each step of the process has been in line with these processes...*

98. It is possible that the Employer did conduct an informal inquiry, in the form of the welfare check, prior to any investigation commencing. However, even if the Employer did not conduct an informal inquiry, I find that this part of the management action was conducted in a reasonable manner for the following reasons:

    - It is not clear that even if the Employer had conducted an informal enquiry into the 29 September meeting, the Employer would not have also commenced a formal investigation. I cannot apply the benefit of hindsight, knowing that the allegations were ultimately not substantiated.
    - Given the need for confidentiality and procedural fairness, informing the Worker of the complaint prior to making enquiries of the Worker's senior manager and the Worker's supervisor was reasonable.
    - A formal complaint had been made requiring a formal response as stated in the Complaints and Grievance Process.

Failure to advise the Worker of the allegations or potential consequences

99. The Worker submitted he was unaware of the allegations prior to the 6 October meeting or that the complaint, if substantiated, could constitute serious misconduct and result in the termination of his employment. The Worker states as a result of not knowing the allegations until the 6 October meeting he felt 'ambushed'.

100. The Worker submitted that the Investigation Action Plan/Checklist in the [HR] Pack required the Employer to provide the Worker with the allegation letter prior to meeting with him.

101. The parties agree the Worker was not told the substance of the allegations until the 6 October meeting.

102. In oral evidence, [Ms X] stated that she contacted the Worker on a rostered day off to arrange the 6 October meeting, however, she did not tell him what the allegations were because he was without a support person.

103. I find the Employer's failure to provide the Worker with details of the allegations prior to the 6 October meeting was not unreasonable because:

    - The Code of Conduct states 'If you are the subject of a complaint, you will receive all relevant information regarding the complaint, and will be given the opportunity to explain your version of events.'
    - The 6 October letter provides the Worker with an opportunity to respond at a later time. It presupposes that a further meeting would be held for the Worker to respond to the allegations. It was not expected that the Worker respond on 6 October. This is consistent with the [HR] Pack.
    - I accept [Ms X]'s reasons for not providing the allegations during the 5 October call because the Worker did not have a support person present.
    - I note that on 5 October the Worker requested the allegations be emailed to him, which the Employer declined to do. I am not satisfied that there is a good reason why this did not occur. However, I do not consider this overrides the fact that the Worker was provided with the allegations prior to being given an opportunity to respond. There was

no best time to do this; the manner in which it was done was with regard to his need for a support person at the time the allegations were communicated and I do not consider them to be unreasonable.

Inadequate notice or time to prepare for 6 October meeting

104. The Worker submitted he was not given adequate notice of the 6 October meeting. The effect of this was that the Worker had no opportunity beforehand to prepare or seek advice.

105. In oral evidence, [Ms X] stated that she had no expectation that the Worker would provide a response at the 6 October meeting.

106. Given that I have already found that the 6 October meeting was solely for the purpose of putting the allegations to the Worker, not for him to provide a response, I find the Employer did not fail to give the Worker adequate notice or time to prepare for the meeting.

Inadequate time to respond to the allegations

107. The Worker submitted that by requiring a response within four days, he was not afforded a reasonable time to respond to the allegations, particularly as two of the days fell over a weekend when he could not have sought advice. The Worker cites *Krygsman-Yeates*, where the same requirement to respond within four days was found to have contributed to unreasonable management action.

108. The Agent submitted that whilst the 6 October letter provided four days to respond, the Worker could have requested more time and would have been afforded a reasonable time to respond. In any event, the Worker's response dated 7 October 2022 was sent on 10 October 2022, within the four day period.

109. The 6 October letter anticipates a further meeting on 'Monday' (which the parties agree was on 10 October, four days later). It states that the Worker can provide a written response to the allegations at or before that Monday meeting.

110. [Ms X]'s meeting notes of 6 October state that 'You will need to provide us with your responses in writing by Monday, if you decline to respond, we will make a decision based on the information available to us.' In oral evidence, [Ms X] said 'that didn't mean respond by that date … if anybody fails to provide responses in any investigation, then we can only make a decision based on the information available. But we would like to provide an opportunity.'

111. [Mr U]'s witness statement states that he said the union would 'try' to get something across in writing to the Employer by 10 October. The union delegate's witness statement is that they 'would' prepare something in writing by Monday.

112. In oral evidence, the union delegate stated that at the 6 October meeting no explanation for the four day time to respond was given.

113. [Ms X]'s notes of the 6 October meeting also state relevantly:

> *[The Worker] responded that he wasn't in on Monday (letter set out Monday for responses), both [a production manager] and myself advised we are able to take responses when it suits [the Worker], parties agreed that [the Worker] would let us know when his preferred date is / if not Monday. [The Worker] spoke with [Ms N] on Friday 7.10.22 and [the Worker] advised he would provide response Monday.*

114. The Worker's letter of 7 October states relevantly:

Being instructed to provide my responses to the letter and further, attend another HR Meeting on Monday 10th October 2022 causing much stress and anxiety; I believe this is insufficient time to prepare my responses to the allegations and concerns raised however, I have attempted to document as much information as possible herein.

115. The Worker's witness statement states that even though he advised [Ms X] that 10 October was his rostered day off, she said he had to respond by this date.

116. I do not consider it reasonable that the Worker was required to respond within four days, two of which were over a weekend. However, even though the 6 October letter states otherwise, I find that the Employer informed the Worker during the 6 October meeting that he could ask for more time to respond. This is based upon [Ms X]'s 6 October meeting notes which record the interaction between the Worker and [Ms N], and the evidence of [Mr U] and the union delegate that the Worker understood that he could have asked for more time.

117. I consider that even though the Worker was able to comply with this timeframe which contributed considerably to his stress, and additional communication at this time would have been more acceptable, that is not the test of reasonableness as set out in *Krygsman-Yeates*. I find that the management action, whilst not ideal in this regard was still reasonable because the Worker was told and was aware that he could ask for more time.

The Employer incorrectly used the Performance Management Process

118. The Worker submitted that the Employer unreasonably followed the Performance Management Process (PMP) set out in the Enterprise Agreement (EA). The wording in the PMP is only to be used where a finding of misconduct has been made. Its use therefore shows 'bias' and a 'pre-determined outcome to his investigation.' The Worker submitted the Employer should have followed the Complaints and Grievances Process. Citing *Krygsman-Yeates*, the Worker submitted this was 'disproportionate to a reasonable end'.

119. In oral evidence, [Ms X] denied she had predetermined any outcome of the investigation. She also stated that she did not consider there to be a presumed finding of misconduct by the use of the PMP because employees are provided an opportunity to respond.

120. Whilst neither the 6 October letter nor the outcome letter refers to the PMP, [Ms X]'s witness statement and the Employer's email to the Agent notifying it of the claim, states that the investigation was carried out in accordance with clause 31 of the EA.

121. I note that the 2019 EA had expired and the 2022 EA was not yet in effect at the time of the Employer's investigation. However, the parties agree the 2019 EA remained in effect until the 2022 EA commenced. I am therefore satisfied that the Employer continued to consider the 2019 EA after its expiry date.

122. Clause 31 of the EA sets out the counselling process for 'employees failing to meet the Company's minimum behavioural or performance standards'. I consider this clause is to be used where poor conduct or performance has already been found to have occurred, and includes a process for an employee to respond. I consider that this clause does not apply to the investigation of the Worker, and ought not to have been used. However, I consider the Employer also followed the procedure under the Complaints and Grievances Process; by investigating the complaint, interviewing the parties concerned and making findings. I therefore consider that once the Worker became aware that the PMP was employed, it was distressing to him. However, I find it did not amount to the management action being undertaken in an unreasonable manner as the procedures followed were also those as broadly outlined in the Complaints and Grievances Process.

The Employer threatened to terminate his employment

123. The Worker submitted the 6 October letter threatened him with termination of his employment.

124. The 6 October letter sets out the consequences of the allegations if proven, including termination of employment. I do not consider these are worded in any way as a threat; rather they are a reasonable provision of information to the Worker.

The Worker could not have his support person of choice

125. The Worker submitted that the Employer refused his request for [his] senior manager and [his] supervisor to attend the 6 October meeting as his support people. His witness statement states of the 5 October call:

> *I let [Ms X] know [his] senior manager and [his] supervisor were both in the same production meeting and they would have further information about anything that may have occurred and queried her if she had spoken to either one of these senior managers. [Ms X] advised she had not. I was getting the impression she wasn't really listening to me.*
>
> *I said I would like them to come to the meeting with me. [Ms X] advised their attendance wasn't required at that stage and I would have an opportunity to provide any further information and my responses at the meeting.*

126. The Agent submitted that the Worker's oral evidence was that he wanted [his] senior manager and [his] supervisor there in order to discredit or 'back up what happened' at the 29 September meeting. It submitted I should find that the Worker's intentions were to bring them in order to refute the allegations, not to bring them as support people.

127. In oral evidence, the Worker stated that he asked for [his] senior manager and [his] supervisor to be at the 6 October meeting because they were present at the 29 September meeting; he considered they could have refuted the allegations. He also stated that he particularly wanted his supervisor there because they had worked together for 'a lot of years', and they have a good relationship. He said the union delegate works in a different department and had a different mindset; he only saw him once or twice a year.

128. In oral evidence, [Ms X] said that she understood the Worker's senior manager and the Worker's supervisor were not being brought as support persons but as witnesses. She said she informed the Worker that if they were witnesses, she may need to speak with them later. [Ms X] also said that she would not have refused any worker who wanted to bring the support person of their choice and that she would not have known who the support person was.

129. [Ms X]'s notes of the 6 October meeting state relevantly:

> *You said you would bring a support person and then you also said you would bring the Worker's senior manager (supervisor who was in attendance at that meeting). I thanked you for the offer, but advised we would initially provide you with the details of the complaint and if we needed to interview witnesses that would be handed (sic) as part of the investigation.*

130. [Ms X]'s notes of the 5 October call state relevantly:

> *[The Worker] then became extremely agitated, started giving me the names of witnesses he wanted me to start interviewing.*
>
> *I thanked and acknowledged [the Worker]'s response, but explained that the first step was to put the allegations to him and then [the Worker] would have an opportunity to provide responses. I advised we would not speak to witnesses before we had spoken with [the*

> *Worker] – [the Worker] was very insistent in that he wanted me to contact people now and provide him with the details on the phone.*
>
> *I reiterated that we would like to meet with [the Worker] and that he is welcome to bring a support person, to which he responded he would bring someone from the union, and I responded that I would either have [Ms Y] or [a production manager] attend the meeting with [the Worker].*

131. The Worker submitted that the 5 October call notes omit the conversation that took place in relation to the Worker's request to have [his] senior manager and [his] supervisor present.

132. The Employer's Complaints and Grievance Process clearly states that an employee is entitled in such circumstances to have a support person present to 'assist them' or to act as a witness.

133. I note there are some discrepancies in [Ms X]'s oral evidence, her notes of the 5 October call and her 6 October meeting notes. I accept that the Worker said he would like to bring [his] senior manager to the meeting as a support person, and also to refute the allegations. This is borne out in [Ms X]'s 5 October call notes that 'reiterated that …he is welcome to bring a support person', which I consider means that a support person had also been offered earlier in the call. I also note [Ms X]'s 6 October meeting notes that state 'I thanked you for the offer [to bring the worker's senior manager], but advised we would initially provide you with the details of the complaint and if we needed to interview witnesses that would be handed (sic) as part of the investigation.' I consider that even if this request was not formally refused, [Ms X]'s response that they were not required as witnesses at that time led the Worker to reasonably understand that neither the Worker's senior manager or the Worker's supervisor were to attend as his support persons.

134. It is likely that had the Employer enabled the Worker to have [his] senior manager and [his] supervisor at the meeting, they would have sought to refute the allegations. It would have been the Employer's task to reinforce the purpose of the 6 October meeting; however, I consider this was not permitted, nor was it their only purpose in attending. I note in particular that the Complaints and Grievance Process enables the support person to 'assist' the worker; and that is what the Worker sought from these support persons.

135. I consider that the Employer should not have indicated that the Worker's senior manager's and the Worker's supervisor's attendance was not necessary, even if [Ms X] states that she would not actually have prevented them attending. I accept that the Worker was ultimately able to arrange two union representatives to attend with him for support. However, I am satisfied the Worker felt significantly disadvantaged by not having them present, particularly his supervisor with whom he was close and who he states has been a great support to him throughout the investigation.

136. I have considered *Krysgsman-Yeates* and in particular that the action and manner in which management action is taken should be assessed at the time it is taken without the benefit of hindsight, taking into account the attributes and circumstances including the emotional state of the worker. This failure is relevant to the Worker's circumstances, given the seriousness of the allegations and possible consequences. The failure is also relevant to his emotional state, given his belief that the process was not being carried out fairly, of which the Employer was aware from the 5 October call, the 6 October meeting, and the 7 October letter. I do not consider the handling of the support person request was done reasonably. I find that the Worker requested support persons and was told their presence was not required at that time. For the reasons stated, I therefore find that this part of the management process was not carried out in a reasonable manner.

The 6 October letter's attachments highlighted 'excessive' employment breaches

137. The Worker submitted that, together with the 6 October letter, he was provided two of the Employer's policies containing 19 highlighted employment breaches. He states this was 'excessive', they took a 'kitchen sink' approach when framing the alleged misconduct and employment breaches, and he felt they had been 'determined by the employer, prior to any workplace investigation commencing'. In his witness statement, the Worker states that '[t]he employment breaches just did not seem to align to what had allegedly occurred …on 29 September or in the [6 October] letter…I had genuine concern I was being set up for serious misconduct.'

138. The Agent submitted that the 6 October meeting was conducted in accordance with the Code of Conduct and that all the Employer's actions were taken in a reasonable manner.

139. The parties agree that at the 6 October meeting, the Worker was provided with the EEO, Discrimination, Harassment and Bullying Policy and the Code of Conduct, both of which had parts highlighted by [Ms X].

140. In the Code of Conduct, select professional standards expected of employees were highlighted; for example, 'communicate and deal with others in a professional manner', which, considering the nature of the allegations, I consider are appropriate.

141. Other parts of the Code of Conduct are highlighted, including the headings of 'bullying', 'vilification', and 'harassment'. Vilification is stated to be 'an act that can incite, encourage, urge, or stir up others to hate, have serious contempt for, or severely ridicule a person or a group of people because they are members of a particular group having a protected attribute (like race or disability).'

142. The EEO, Discrimination, Harassment and Bullying Policy also has these headings highlighted, together with 'victimisation', which is stated to be 'when a person intimidates or seeks retribution against another person because the person… has made a complaint about discrimination or harassment.'

143. In oral evidence, [Ms X] conceded that neither victimisation nor vilification were relevant to the allegations against the Worker, and stated that 'victimisation' was highlighted and provided to both the Worker and the complainant so they were 'aware of their obligations while an investigation was being undertaken'. She stated that 'vilification' was highlighted to ensure that witnesses were not spoken to and 'to make sure that nobody's coercing... that it's a fair process.'

144. When considering whether the management action was conducted in a reasonable manner, I have had regard to the policy documents that govern how the Employer is expected to conduct management action. In particular, I note the Complaints and Grievance Process that relevantly states:

> *Complaints and grievances may be informal or formal. In either case, [the Employer] will seek to address the situation in an appropriate way on a case by case basis having regard to the nature of the underlying issues, the personnel involved and the surrounding circumstances.*

145. The highlighting of policies to include behaviours not relevant to the allegations against the Worker was inappropriate and unreasonable. Based upon [Ms X]'s oral evidence, I consider that the highlighting of 'victimisation' and 'vilification' were effectively a warning to the Worker about potential future behaviour, when the allegations had not been proven and victimisation and vilification were not relevant to the investigation. I note that the word 'victimized' was

used in the 6 October letter. However, I do not consider it relates to the definition of the term provided in the EEO, Discrimination, Harassment and Bullying Policy. Based on [Ms X]'s oral evidence, I consider there was no evidence that there was a need to provide the Worker with any such warning or that these terms related to the investigation.

146. I do not consider this approach to have been just, moderate or fair; in fact I can see no rational basis for this action. I therefore find that this part of the management action was not reasonable.

The outcome letter of 24 October 2022 did not provide reasons and contained a 'warning'

147. The outcome letter states that two of the allegations were unsubstantiated, and that there was insufficient corroboration to determine whether the third allegation is substantiated or unsubstantiated. The outcome letter concludes that 'the allegations are inconclusive and this matter will now conclude'. It then sets out behaviours expected of the Worker:

> 1. *In line with the Code of Conduct policy, we expect you to behave in a constructive and respectful manner at all times in the workplace and ensure that your actions are in line with our Values.*
> 2. *In line with [the Employer's] Values, we expect you to demonstrate positive behaviours, building trust with those you work with. Additionally, we expect you to treat others respectfully, provide feedback constructively, and allowing others to constructively provide alternate opinions to yours.*

148. A separate letter to the Worker, also dated 24 October 2022 enclosed a copy of the Code of Conduct and stated relevantly:

> *This is not a disciplinary letter but a reminder of how [the Employer] expects you to conduct yourself in the workplace.*
>
> *We are concerned that your communications with [the complainant] have had a negative impact, whereas we do not believe that was your intent.*
>
> *Attached with this letter is a copy of the Code of Conduct. We are committed to supporting you with meeting the expectations of your role…*

149. The Worker submitted that:

- The Employer should have given reasons for its decision in the outcome letter, as set out in the 'Investigation Findings and Outcome' letter template in the [HR] Pack, and
- The Employer should not have given him a 'warning' in either of the letters dated 24 October 2022 (the 'warnings').

150. The Worker submitted the outcome letter contains material from the 'Letter of Expectations – Behaviour' template in the [HR] Pack, which the [HR] Pack states should not be used except for lower-level behavioural concerns, punctuality concerns, etc., and not for possible breaches of the Respect at Work policy. His letter of 25 October 2022 to the Employer said that even though the allegations were not made out, he felt these letters amounted to a warning.

151. The Agent submitted the [HR] Pack is not part of the EA and bears no relevance to whether the management action was taken in a reasonable manner.

152. In relation to the outcome letter not containing reasons, the parties agree that reasons were not given. The [HR] Pack's template letter provides a section that states whether the allegation is substantiated or unsubstantiated followed by the sentence 'This finding is made

on the basis of …'. This basis for the finding was omitted from each of the findings in the outcome letter to the Worker.

153. In oral evidence, [Ms X] stated that the [HR] Pack is 'just a template of documents', not a policy or procedure so she did not legally have to provide reasons for the decision. She stated that if the matter was substantiated, she would have put that 'clarity of information', 'so the person could understand or they could raise a dispute about that. But when it's unsubstantiated it is simply unsubstantiated.' She stated she did not feel reasons were necessary.

154. In relation to the outcome letter and the other 24 October 2022 letter, [Ms X] stated they were not a disciplinary letter or a warning 'but it's just a reminder that we have a respectful workplace and this is how we operate.'

155. The Agent has submitted throughout this dispute that the [HR] Pack is not a policy that the Employer was required to follow. It submitted that the WorkSafe Claims Manual requires that regard must be had to the EA. I do not consider this means that the EA is the only relevant document that the Employer was required to have had 'regard to'.

156. [Ms X] has also said in her witness statement that the [HR] Pack was a document that guided her throughout the entire investigation process. The investigation process in the Code of Conduct also requires reporting an outcome. The [HR] Pack provides guidance on how that outcome is to be communicated, which includes reasons, presumably as part of a procedurally fair process. There is no reason why a worker who has been found to have allegations unsubstantiated requires reasons any less than a worker against whom allegations are substantiated.

157. In the outcome letter, the Employer states that the allegations are not made out. At the same time, both the outcome letter and the other 24 October letter emphasised the Employer's advice (and as perceived by the Worker, the 'warnings') that the Worker should comply with behavioural standards at work. The Worker still felt that the Employer considered he had been involved in some wrongdoing. This significantly contributed to his dissatisfaction with the outcome, even when it was in his favour.

158. Whilst the provision of the outcome letter was required, I am not satisfied the content of the 24 October letters was objectively justifiable. I consider the statement '[w]e are concerned that your communication with [the complainant] has had a negative impact...' implies there had been a breach of some kind, even though none was found to have occurred. I therefore find that the failure to provide reasons and the 'warnings' fall short of the test of reasonableness. I note the reasoning in *Department of Education and Training v Sinclair* which states a course of conduct may still be reasonable even if particular steps are not. I do not consider these failures to be mere steps.

159. I consider my findings that:

- the Worker's choice of support persons was not available to him;
- the highlighting of 'victimisation' and 'vilification' within policies was not relevant to the investigation;
- the Employer failed to give reasons for the allegations not being substantiated; and
- the Employer gave 'warnings' in the 24 October letters

was not reasonable management action. In this dispute, many of the departures from established procedures were found to be reasonable. However, the above unreasonable

actions were not mere departures. These actions, and the unsatisfactory explanations for them, result in my finding that the management action was not taken in a reasonable manner.

Conclusions

160. Considering the onus of proof on the Employer to establish that the management action was carried out in a reasonable manner, and objectively having regard to all of the circumstances leading to the investigation's outcome, I find that I am not satisfied on the balance of probabilities that the management action was taken in a reasonable manner. For these reasons, the Agent's defence under section 40(1) is not established and the Worker's claim must be accepted.

DETERMINATION

161. I determine that the Agent's decision dated 24 November 2022 is revoked. This means that the dispute is in favour of the Worker.

162. I determine that the Worker is entitled to compensation from 6 October 2022 payable in accordance with the Act. I direct the Agent calculate and pay the amount of compensation to which the Worker is entitled, in accordance with the Act.

163. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

164. As this determination is in favour of the Worker, I award the Worker's costs as fixed under section 301W of the Act to be paid by the Agent.

165. If there is a dispute in relation to costs, parties may apply to the Workplace Injury Commission within 30 days of the date of this determination.

[signed]

……

Katie Valentine

Arbitration Officer