



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION: 2024 VWIC 4
ARBITRATION REFERENCE NUMBER xxxxxx

PARTIES

WORKER [Worker's name] (The Worker)

WORKSAFE AGENT/SELF-INSURER [Agent's name] (The Agent/Self-insurer)

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Claire Setches

DATE(S) OF HEARING(S) 16 and 17 April 2024

DATE OF DETERMINATION 16 May 2024

DETERMINATION

1. I determine that the Agent's decision dated 27 July 2023 under review is revoked. This means that the determination is in favour of the Worker.
2. I determine that the Worker is entitled to compensation payable in accordance with the *Workplace Injury and Rehabilitation Act 2013 (Vic)* (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 the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for Costs Decision* form to the Workplace Injury Commission (WIC) within 30 days 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. On 24 June 2023, the Worker lodged a claim for compensation for an injury described as 'Depression and Mental Health affected'. The Worker asserts that 'it is a recurrence and aggravation of my previous mental health injury caused by work. Series of incidents at work contributed to it'. The claim form notes the date of injury as '15/06/23 at 0840', also noting the injury 'happened over time and then on 19/6/23'.
3. The Claim form was accompanied by a Certificate of Capacity from Dr [P], (General Practitioner) dated 24 June 2023, whereby he diagnosed the Worker's condition as 'depression, panic disorder, GAD (Generalised Anxiety Disorder)' and certified the Worker as having no capacity for employment from 15-19 June 2023.
4. The decision under review is that of the Agent, dated 27 July 2023 (the Notice), 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 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.
5. In the Notice, the Agent identified the Employer's relevant 'management action' as:
 - the appraisal of the Worker's performance,
 - the investigation in relation to an incident on 15 June 2023, and
 - the expectation of further management action and communication in relation to the above management action.
6. On 4 August 2023, the Worker lodged an application for conciliation with WIC. Following conciliation, a Conciliation Officer issued a Genuine Dispute Certificate on 12 October 2023.
7. On 30 August 2023, the Worker attended an independent medical examination with psychiatrist, Dr [D], Independent Medical Examiner (IME).
8. On 13 September 2023 after reviewing the IME report, the Agent issued a further decision maintaining their rejection of the Worker's claim.
9. On 16 October 2023, the Worker applied to the Workers Compensation Independent Review Service (WCIRS) for a review of the Agent's decision. WCIRS provided its decision on 25 January 2024, affirming the Agent's decision.
10. Following the WCIRS decision, the Worker lodged a referral for arbitration dated 30 January 2024.
11. An initial hearing was held by video conference on 20 February 2024, attended by the Worker, the Worker's partner, the Worker's representative, and the Agent's representative. A further hearing was held in person on 16 and 17 April 2024 attended by the Worker, the Worker's husband, the Worker's representative, and the Agent's Representative.

Evidence

12. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-230) and Schedule B of the Arbitration Book (pages 231-2678), and the evidence and submissions presented at the hearing.
13. At the hearing on 16 and 17 April 2024, the Worker gave affirmed oral evidence. Affirmed oral evidence was also provided by witnesses:
 - a. [AB] - Driver Training Compliance Officer at the Employer, and
 - b. [CD] - Director of Workplace Relations at the Employer.
14. At the close of the hearing the parties were given an opportunity to provide final submissions. The Agent provided further written submissions and a copy of the *Post Operational Incident: Driver Return to Work Procedure* policy. I requested the Agent provide the clinical records from Dr [H], Occupational Medicine from [Health provider] by 29 April 2024. The Worker did not provide further submissions.
15. I will refer to the relevant aspects of the evidence presented in the arbitration and my consideration of the issues in the analysis and findings below.

ISSUES

16. The relevant legislation in this matter is the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*.
17. The *issues* to be considered in this dispute are:
 - Did the Worker sustain an injury?
 - Did the injury arise out of or in the course of employment?
 - Was the injury caused wholly or predominantly by:
 - management action, or
 - any expectation of management action?
 - Was the management action taken on reasonable grounds?
 - Was the management action taken in a reasonable manner?

CONSIDERATION OF ISSUES

Burden and standard of proof

18. The Worker must establish, on the balance of probabilities, that she 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 the defence relied upon under section 40(1) of the Act; *Pulling v. Shire of Yarra Ranges* [2018] VSC 248 at [78].
19. Under section 40(1) of the Act, the Agent must prove, on the balance of probabilities, that the Worker has no entitlement to compensation as a result of a mental injury caused 'wholly or predominantly' by any one or more of the following —

- *management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;*
- *a decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;*
- *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.*

Background

20. I consider the following facts are not in dispute:

- The Worker commenced employment as a Trainee [vehicle] Driver on 15 February 2021 with the Employer.
- On 5 November 2022, the Worker lodged a Workcover claim for a mental injury sustained whilst undertaking a driving assessment. The Agent accepted the Worker's claim and the Worker received weekly payments and medical and like expenses until 16 January 2023 (the previous claim).
- On 16 January 2023, the Worker returned to work under a return-to-work plan.
- On 16 February 2023, the Worker crossed a [type of] signal while driving a [vehicle] (the [S] incident). As a result of this incident, the Employer determined the Worker was required to participate in a further three observation runs as part of her return-to-work plan. Each observation run was supervised by a different Driver Training Compliance Officer (DTCO).
- On 23 February 2023, the Worker completed an observation run supervised by DTCO [AB]. DTCO [AB] completed a report noting gaps in driving abilities and errors, and recommended a further observation run with a three-month return-to-work plan (RTW).
- On 19 April 2023, the Worker requested copies of the three observation run notes and her RTW, copying the three DTCOs into her email.
- DTCO [AB] declined the request for the reports.
- On 20 April 2023, the Worker reiterated her request for copies of the observation runs and raised concerns regarding DTCO [AB]'S conduct in the observation runs.
- In response, on 24 April 2023, the Senior Workplace Relations Specialist notified the Worker that the Employer was reviewing her complaints, and they would respond within one week.
- On 2 May 2023, 17 May 2023, and 1 June 2023 the Worker requested the Employer respond to her request.
- On 1 June 2023, the Senior Workplace Relations Specialist invited the Worker to attend a meeting on 8 June 2023.
- On 8 June 2023, the Worker attended a meeting to discuss her grievances and the DTCO's observations.

- On 13 June 2023, the Senior Workplace Relations Specialist emailed the Worker providing her initial findings and advising of the next steps. The requested report was not provided to the Worker.
- On 15 June 2023, the Worker, whilst being supervised by a Practical Training Driver (PTD), failed to 'stop the [vehicle appropriately], resulting in a [rough slowing] collision with another [vehicle]' (the Collision). The Employer commenced a *Post Operational Incident: Driver Return to Work Procedure*, and the Worker was removed from driving duties. The Worker completed a drug and alcohol test (which was clear) and stayed at work until the end of her shift and was told to return to work the next day for an update.
- On 16 June 2023, the Worker attended work and remained in her car in the car park for her eight-hour shift. At lunchtime, the Worker called her trainer who advised her he had no updates or information. During that day, the Employer requested the Worker attend a 'human factor interview' (as part of a Just Culture assessment) on 19 June 2023.
- The Worker attended the human factor interview with a support person. The interview was chaired by DTCO [AB] (as acting Compliance Manager) and initiated to understand the cause of the Collision. During the interview, the Worker was shown a video of the Collision.
- Following the human factor interview on 19 June 2023, the Worker made an appointment with her treating general practitioner and psychologist.
- The Worker ceased work on 20 June 2023.

Has the Worker suffered an injury?

21. The Worker must establish that she has suffered an injury arising out of or in the course of employment with the Employer to be entitled to compensation under section 39(1) of the WIRC Act.
22. The Worker made a claim for workers compensation for a 'depression and mental health' injury.
23. The parties agreed during the hearing that the Worker had suffered a mental injury within the meaning of the Act.
24. The IME, Dr [D] (psychiatrist) in a report dated 30 August 2023, diagnosed the Worker with:

'Exacerbation (since 19 June 2023) of pre-existing unspecified anxiety disorder with panic attacks and traumatisation features'.
25. The Worker's treating psychologist, Ms [S], in her report dated 10 October 2023, made a *'provisional diagnosis of PTSD, Unspecified anxiety disorder with panic attacks and depressed mood'*.
26. The Worker's general practitioner, Dr [P], confirmed in an undated report that *'On 26/5/2023, the diagnoses changed to depression, panic disorder and GAD, because there was the direct causative factor from work up to this moment'*.
27. Based on the consensus of the medical evidence and the opinion of *the Worker's* treating psychologist, who had seen the Worker on 13 occasions up until 4 October 2024, I find

that the Worker suffered a mental injury in the form of PTSD, unspecified anxiety disorder with panic attacks and depressed mood.

Did the injury arise out of or in the course of employment?

28. The Worker claimed she developed her mental injury as a 'recurrence and aggravation of my previous mental health injury caused by work' and that a 'series of incidents at work' contributed to it.
29. The parties agreed at the hearing that the Worker's injury arose out of or in the course of employment. The medical evidence similarly attributed the Worker's injuries to work.
30. The IME, Dr [D] (psychiatrist), in a report dated 30 August 2023, stated the Worker experienced her symptoms as a result of the Employer's management action of:
'the longer RTW plan given by management and her own response to the collision on 19 June 2023Feb2023 against the background of the incident in Feb 2023'.
31. The Worker's treating psychologist, Ms [S], on the Psychology Treatment Notification form dated 31 July 2023, described the condition as *'symptoms consistent with PTSD exacerbated by recent [vehicle] collision.'*
32. The Worker's general practitioner, Dr [P], in an undated report confirms that *'On 26/5/2023, the diagnoses changed to depression, panic disorder and GAD, because there was the direct causative factor from work up to this moment'.*
33. I find based on the opinions of the medical practitioners that the Worker's mental injury arose in or out of the course of employment.

Date of Injury

34. On the claim form, the Worker wrote that the date of injury was '15/06/23 at 0840'. In response to the question, 'When did you first notice the injury/condition?', the Worker stated 'it happened over time and then on the 19/06/23'.
35. During the hearing, the parties agreed that the Worker's injury occurred throughout the course of employment.
36. In final written submissions, the Agent submitted (unedited) 'whilst the worker has cited a date on injury on the claim form as 15/06/23 the date of injury should more properly be 19/06/23. This in line with the claim which notes; "it happened over time and then on 19/06/23" '.
37. In response, the Worker's representative maintained that the injury was sustained over the course of employment.
38. For the reasons I have outlined above, I have found that the Worker's mental injury arose in or out of the course of employment.
39. I find the discussions in relation to the 15 June 2023 versus the 19 June 2023 date are more relevant to determining the whole or predominant cause of the Worker's injury, which I will discuss below.

Was the injury caused wholly or predominantly by any or more of the factors set out in section 40(1)?

40. Having determined that the Worker suffered an injury out of or in the course of her employment, I now need to address whether the circumstances of the claimed mental injury disentitle the Worker to compensation on management action grounds.
41. The Agent submitted that if the Worker's injury arose out of or in the course of employment, she is not entitled to compensation as her mental injury was caused 'wholly or 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; or*
 - 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.*
42. At the hearing, no submissions were made in relation to s40(1)(b) a decision of the Worker's employer, on reasonable grounds, to take, or not to take, any management action.
43. Accordingly, I will now consider whether the injury was caused wholly or predominantly by management action or any expectation of management action. I first need to determine what the management action was.

What was the management action?

44. Management action is defined non exhaustively in subsection 40(7) as:

In this section—

management action, *in relation to a worker, includes, but is not limited to, any one or more of the following—*

- (a) appraisal of the worker's performance;*
- (b) counselling of the worker;*
- (c) suspension or stand-down 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 of leave of absence to the worker;*
- (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 any of the above paragraphs;

45. The Agent submitted the Employer undertook the following management actions:

- Identified concerns regarding the Worker's competency as a [vehicle] driver following the incident on 16 February 2023 and during an assessment on 23 February 2023.
- Implemented a return-to-work plan and directed the Worker to perform modified duties until she passed training assessments.
- Held a meeting with the Worker on 8 June 2023 to address her various concerns.
- Stood down the Worker from employment on 21 June 2023 whilst the Employer investigated the incident of 15 June 2023.
- Requested the Worker to undergo a human factor interview on 20 June 2023.
- Considered if disciplinary action was appropriate, and
- Communicated to the Worker in connection with the above actions.

46. The Agent submitted the above management actions fall within sections 40 (7) (a), (b), (c), (d), (l), and (m).

47. Whilst the dates on which the Worker was removed from [vehicle]-driving duties or when certain meetings took place differ from dates presented in oral evidence, there is no dispute as to whether these events occurred and therefore I am satisfied the above management actions fall within sections 40 (7) (a), (b), (c), (d), (l), (m) and/or (n) of the Act.

48. I am also satisfied that the removal from driving duties, the direction to attend work on 16 June 2023 and the human factor interview were management actions within subsections 40(7)(c) and (d).

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

49. Having identified the management actions, I now need to determine whether the listed management actions are the predominant cause of the Worker's injury.

Agent submissions

50. The Agent submits that the Worker's injury arose wholly or predominantly from the employer's management actions listed above or from an expectation of such action. If that is the case, the Worker is not entitled to compensation.

51. The Agent's written submissions set out the evidence they rely on in support of the above as follows:

- a. The evidence of the psychologist, the IME, and the timing of her first appointment with the general practitioner;
- b. The Worker's claim form attributes her mental injury to a series of incidents at work; and
- c. The Worker's written submissions and oral evidence that her injury was contributed to by:
 - i. The [S] incident; and
 - ii. The observation run on 23 February and ensuing communications; and
 - iii. The Collision, which gave rise to an expectation of management action; and
 - iv. The human factor interview where the video of the collision was played.

52. At the conclusion of the hearing, the Agent submitted that, it appeared, the human factor interview was the ultimate tipping point for the Worker, as evidenced by the Worker seeking treatment immediately afterwards and from the Worker's oral evidence in which she stated that after watching the video she knew '*herself to be a danger.*'

Worker Submissions

53. The Worker submitted that the injury did not arise wholly or predominately from the above management actions. Rather, she narrowed the cause of the injury to the Collision itself and to her expectation that following the human factor interview she would be treated unfairly and unreasonably in future investigations, disciplinary action, retraining and associated communications.
54. The expectation of future unreasonable treatment was borne from the following:
- having experienced a lack of communication from management regarding a previous complaint and a perception that management had neglected her review in relation to previous investigations and retraining; and
 - the human factor interview being conducted by DTCO [AB], which in her view was inappropriate and breached a duty of care owed to her by the employer, given her prior complaint against DTCO [AB].
55. The Worker submitted that although the management actions identified by the Agent contributed to her stress, they should be considered fairly minor or insignificant, as evidenced by her continuing to work after the [S incident], the observation; and after enquiring about the issues relating to her performance appraisals and return to work plan. The Worker submitted that as she didn't have much treatment during the February to June period; she didn't go see her GP, nor did she supply certificates of capacity indicating she was unfit for suitable employment. These issues therefore could not "exceed all others" so as to satisfy the test laid out in *Pulling v Yarra Ranges Shire Council* [2018] VSC.

Considerations

56. Under section 40(1) the Agent must show on the balance of probabilities, that the Worker has no entitlement to compensation as a result of a mental injury caused wholly or predominantly by any one or more of the management actions set out above.
57. The evaluation of whether management action is the whole or predominant cause of the injury is not carried out in any technical or formal way but by applying common sense to the facts of the particular case. *In Pulling v Yarra Ranges Shire Council* [2018] VSC 248, the Court said:
- a. *management action can be the predominant cause where other causes contribute to the injury, but that cause is still the predominant cause; and*
 - b. *to be the predominant cause, that cause must, in its power and influence, exceed the other causes.*
58. I have considered all of the grounds under s40(1) concerning the 'whole or predominant cause' of the injury and on balance I find that the Worker's injury was predominantly caused by an expectation, following the human factor interview, that she would be treated unreasonably in any future investigations, retraining and possible disciplinary action.
59. I find this is the case and for completeness I will consider each of the management actions below individually in making my determination.

The [S incident], the 23 February observation run, and communications regarding grievances

60. The evidence, regarding the [S] incident in February 2023; the Observation runs with DTCO [AB]; the RTW; and the communications with DTCO [AB] and the Senior Workplace Relations Specialist suggests the Worker may have been suffering some stress. This is noted in the IME's report dated 30 August 2023, where it states:
- She was on an RTW plan 3 months after the Feb 2023 incident and whereas most co-workers in similar roles on a RTW would come back on RTW plan within 3 days.....She was stressed about the management action of giving her a longer RTW plan and lack of communication from management.*
61. While I accept the Worker was suffering some stress, it was not to the extent of an injury. This conclusion is supported by the Worker's treating psychologist who acknowledges the stress the Worker was under whilst noting the condition is not '*exacerbated until June 2023*'. In her report she states:
- [Worker] first presented to therapy for support managing her return to work following an incident on in February 2023 when she crossed a [type of] signal while driving a [vehicle].*
- She underwent an unusually longer RTW plan of 3 month.*
- On June 15, 2003 [Worker] had an incident where she experienced a collision while driving the [vehicle]. She reports being at fault, she was stood down from duties.*
- Since the June 2023, [Worker's] condition has exacerbated.*
62. In reviewing the psychologist's clinical records prior to 19 June 2023, I can only find two references to what I consider generic work-related stress as follows:
- 16/3/2023 - current issues at Work p 328*

63. A review of the general practitioner's clinical notes uncovers no references to any psychological symptoms or treatment until 24 June 2023.
64. Therefore, given that the Worker continued to work, did not provide any certificates of capacity; and did not seek treatment until 19 June 2023, I do not find that the [S incident]; the 23 February observation run; and the communications regarding grievances were the whole or predominant cause of the Worker's injury. It was only when the human factor interview happened on the 19 June 2023 that there was a material change in the Worker's health as demonstrated by the need to seek treatment, and her incapacity for work.

The Collision

65. Whilst the Worker's written submissions prior to the hearing referred to the Collision as the whole or predominant cause of her injury, during the hearing she provided clear and detailed oral evidence describing the Collision as '*being minor*' that there was '*no damage*' and it was just considered a '*rough slowing*'.
66. The general practitioner's clinical notes of 20 June 2023 also describe the rough easement as a minor incident (unedited):

Has an incident

Quite unfair for her

They didn't let her drive for 6 weeks, as of [description of incident].

later they found out, [vehicle] fault

there is an collision, very minor.

she is thinking about it why she was advised to cease driving and while other was advised to drive after 3 days of [incident].

67. Based on the Worker's detailed oral evidence at the hearing, which I accept, and the above medical evidence, I am not satisfied that the Collision was the whole or predominant cause of the injury.

The human factor interview and collision video

68. The parties agreed that in the human factor meeting on 19 June 2023, the Worker was shown a video of the '*rough slowing*'.
69. The Worker, in her oral evidence stated that it was at this point '*when I started feeling...what was actually felt like heart attack...that's when I call my GP and I called my psychologist.*'
70. The Worker went on to describe in detail the impact the human factor interview and the watching of the collision video had on her breathing and stress levels; the feelings of panic the interview generated and the realisation that she would be subject to further management action. In her evidence the Worker stated (unedited):

I think I was under a lot of stress. I was.. not feeling all that panic, but yes, I wasn't functioning properly. I wasn't talking to my kids, even at home. I was...quiet. I just wanted to be left alone. I wasn't eating properly. I had difficulty sleeping, that, that feeling of panic that feeling of

breathlessness that started on the 19th, the stress was always there and it started after watching the video and yes" ...that sort of snapped me out of freeze mode. So I mean...that point I also had to face the fact that I might have to stay off work and just sort of, you know, well go through that process again have a target on my back, be back in the limelight.

71. The general practitioner provided clinical notes that confirmed the Worker sought treatment on 20 and 24 June 2023.
72. The Agent submitted that the Worker is disentitled to compensation because the alleged mental injury arose out of the Worker's expectation that management action would be taken following the Collision. This submission is based on the Worker's oral evidence that when watching the video, she knew she would be a 'danger'.

73. When asked directly what impact watching the video had, the Worker said:

Just made me realise that I'm sort of a danger. That's what I felt in my current state of mind. I'm not fit to be driving [vehicles]. And [vehicles] are heavy and they can cause a lot of damage.

74. Whilst I accept the Worker's evidence that she was feeling a degree of stress after the collision on 15 June 2023, having considered the Worker's oral evidence and the application of paragraphs 40 (1) (a) and (c), I find that the expectation of management action that flowed from the human factor interview on 19 June 2023 was the 'wholly or predominantly' cause of the Worker's injury and that that expectation exceeded all other causes in "power and influence". I make this finding based on the following;

- The description provided by the Worker of the physical impact of watching the collision video and the demonstrated shift in her health following the human factor interview as evidenced by the medical evidence;
- The Worker's decision to seek medical treatment with her General Practitioner immediately after the interview; and
- The Worker's evidence that after watching the collision video, she knew she was 'not fit to drive [vehicles]', and that further investigations would follow, pursuant to the Employer's policies.

75. I find that the Worker had an expectation of management action under subsections 40(7)(b) counselling, 40(7)(d) disciplinary action, 40 (7)(l) training, 40(7)(m) investigation and 40(7)(n) communications in connection, and that this was the whole or predominant cause of the Worker's injury.

Defence under subsection 40(1)(c)

76. The defence under subsection 40(1)(c) will be overcome by the Worker, if I find that the Worker's subjective expectation (based on the existence of facts known to the Employer and the Worker) was that management action would be undertaken on unreasonable grounds or in an unreasonable manner; *Unsworth*.

Did the Worker subjectively expect investigations and disciplinary action?

77. The Agent submitted the Worker expected that management action would follow the collision based on the Worker's own oral evidence.

78. The Worker's evidence was that she expected to be removed from driving duties pending an investigation and that a human factor interview would naturally follow a collision, pursuant to the Employer's policies. She explained that all drivers knew the procedure.
79. In her detailed written submissions, the Worker also described her prior experience with management action, having attended a human factor interview following the [S incident] in February, being removed from [vehicle]-driving duties, attending observation runs with DTCOs and undergoing a previous extended RTW.
80. Based on this prior experience of management action and her understanding of the Employer's policies and procedures, I am satisfied the Worker had a subjective expectation that she would be the subject of further investigations, disciplinary action, and training.

Was the Worker's expectation that the management action would be taken on reasonable grounds and in a reasonable manner?

81. In *Unsworth* at [57], the Court of Appeal held that a worker would be disentitled from compensation:

... If it established that the worker's expectation, in the circumstances, was of reasonable action taken in a reasonable manner. But if the worker's expectation was that action would be taken which, having regard to the known circumstances, would be unreasonable, or was an expectation that action taken would be unreasonable in the manner of its taking, then paragraph (c) would not apply.

82. The Court of Appeal explained further at [58]:

...did the worker have an expectation of reasonable action reasonable in the manner of its taking? That sub-question will require consideration whether there were any circumstances, known to the employer and the worker, which – reasonableness aside - could found an expectation of action; and then consideration whether, given those circumstances, the expectation was of reasonable action reasonable in the manner of its taking.

83. I find that the Worker did not expect management action would be taken in a reasonable manner based on prior communications with management, and the way in which the human factor interview was conducted. I will deal with each of these elements below individually in making my determination.

Communications with management

84. The Worker submits that she did not expect that any further management action, in the form of further reviews or investigations, would be conducted reasonably. This is because she had already been through a protracted review of her complaint about DTCO [AB], and the Employer had delayed in responding to her request for copies of her RTW plan and observation run for a period of six weeks.
85. The Worker submitted a series of emails that she states show management's delay in responding to her review and the stress she experienced as a result.
86. Both parties provided evidence that on 8 June 2023 the Senior Workplace Relations Specialist held a meeting where the Worker's concerns were addressed, and assurances were provided that the observation notes would be provided.
87. Up until 19 June 2023, the Worker continued to seek these reports. On 19 June 2023, the Worker emailed management noting *'it has been 4 months since my [S incident] and I'm*

still chasing a response. It's taking a toll on my mental health and my performance at work as well as affecting my personal life'.

88. In her final oral submission, when describing the lack of communication from management, the Worker states:

...I didn't get anything even there is no policy that says you can't have my reports... after being assured that she's going to take timely action and after that just absolutely cut off communication with me until the meeting.

So if we talk about me expecting management action after the collision, I didn't expect any sort of like you know, getting fired from the job or anything. It was just an expectation of more of what had happened, more of just seeking answers, not been given anything, just you know, just that feeling of being left in limbo, not having a normal life, not having any roster to follow. Just I was expecting that thing to continue...

In O'Brien, A. v Sacred Heart Primary School [2000] VCC 44 at [8] his honour commented in obiter:

.....'anticipation' must mean 'anticipation' of reasonable action taken in a reasonable manner. If the employer behaves in a way which gives the worker good cause to believe that he/she will be treated unfairly and unreasonably, and the apprehension of such treatment is significant in the development of stress, it would be bizarre if the employer could seek refuge in s82(2A) -a section designed to protect employers who act 'reasonably.'

89. I find based on the Worker's oral evidence and the submitted contemporaneous emails, the delay in addressing the Worker's concerns and providing the requested reports gave the Worker cause to believe that future management action would not be taken in a reasonable manner.

The human factor interview

90. The Worker submits that the human factor assessment facilitated by DTCO [AB], against whom the Worker had made a prior complaint, was an example of management action undertaken in an unreasonable manner.
91. The Worker gave oral evidence that she had made a prior complaint about bullying behaviour and demeaning comments made by DTCO [AB] that had made her feel harassed. The Worker submitted the Employer, knowing that she had felt harassed, breached its duty of care by having DTCO [AB] conduct the interview.
92. The Agent submitted:
- It was open to Ms [AB] to attend, given her acting capacity as Compliance Manager and that the incident was a separate matter to the observation run on 23 February 2023. Whilst with the benefit of hindsight, a different staff member could have attended instead of Ms [AB], there was no evidence Ms [AB] had spoken to the Worker in a bullying or demeaning manner as she had alleged, and on the available evidence the Agent submits this does not render the management action unreasonable. In any event Ms [AB] also gave evidence there are only three DTCO's .*
93. DTCO [AB] provided evidence that helped me understand the investigation and human factor process. She said that she was one of only three compliance officers able to conduct the human factor interviews for the Employer.
94. When asked who would attend such an interview, she explained that that depends on who is available. She said, '[we] try to have at least two... but it is a small team'.

95. DTCO [AB], in concluding her evidence, was keen to state that they had never had problems with conflicts of interest before and didn't want to make anyone uncomfortable. If they believe they are the wrong person for the interview, they are the first *"to put their hand up"*.
96. Whilst I accept DTCO [AB's] evidence that it was not her intention to make the Worker uncomfortable and that the Employer had not found any evidence of inappropriate conduct on her behalf; I find that given the Worker's perceived conflict with DTCO [AB] and relatively recent prior complaint, that her presence, no matter how well intended, created an apprehension for the Worker that her concerns and wellbeing were being disregarded. Accordingly, any future investigation, return-to-work plans, re-training, and potential disciplinary actions would not be conducted fairly and reasonably.
97. For the reasons above, I therefore accept that the Worker did not expect that management action would be taken in a reasonable manner.

Were there circumstances known to the Employer and the Worker that founded that expectation?

98. Following *Unsworth*, the Worker's belief that she would be subject to further investigations and disciplinary action conducted in an unfair or unreasonable manner, must have been based on facts known to the Employer and the Worker.
99. It is not necessary that the Employer intended to take the action.
100. In considering whether there were circumstances known to the Employer that founded the expectation of further investigations and disciplinary action, I was persuaded by the oral evidence of the [CD], who confirmed the general awareness within the organisation, that following any safety incident, there would be a just culture assessment. In evidence he stated:
- 'the collision with the back of another locomotive was regarded as a disciplinary incident because anytime there is a serious safety incident, there is a just culture assessment...'*
101. I also considered the following circumstances, known to the Employer, founded the Worker's expectation that further investigations and disciplinary action would not be conducted reasonably:
- a. The email exchanges between the Worker and the Senior Workplace Relations Specialist, and later with a Senior Manager, where the Worker articulated the effect the delayed response was taking on her mental health.
 - b. The initial commitment to complete the review within a week, which ultimately took over six weeks, which was accepted by the [CD] in evidence as a departure from the Employee Grievance Resolution Policy and not ideal. When asked if he would categorise six weeks for a response time as generally too long, he replied 'yes'.
 - c. The Employer's knowledge of the Worker's previous mental injury claim. As the Worker submits:

[Employer] was aware that I was susceptible to stress. After everything that I was put through, an aggravation of my previous psychological injury was foreseeable but they failed to act and to provide me with a safe environment, despite myself notifying them of my deteriorating mental health on various occasions.

d. Finally, the Employer's knowledge that a grievance had been lodged against DTCO [AB] prior to the human factor interview being conducted.

102. I am satisfied, based on the above, that the Worker had good cause to believe that future management action would not be conducted reasonably.

103. I also find that these circumstances were known to the Employer and the Worker.

104. The onus is on the Agent to establish that the Worker's expectation of further investigations and disciplinary action was of "reasonable action reasonable in the manner of its taking"; *Unsworth* at [58].

105. I find this onus was not discharged.

CONCLUSIONS

106. Considering the above, I find that subsection 40(1)(c) does not apply, the Agent's defence must fail, and the Worker's claim must be accepted.

DETERMINATION

107. I determine that the Agent's decision dated 27 July 2023 under review is revoked. This means that the dispute is in favour of the Worker.

108. I determine that the Worker is entitled to compensation payable in accordance with the Act. This determination comes into effect immediately. I certify that each party is bound by this result.

COSTS

109. As this dispute 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.

110. If the parties cannot agree on the monetary amount of costs that are payable, a party may submit a *Request for a Costs Decision* form to WIC within 30 days of this determination.

[signed]

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Claire Setches
Arbitration Officer