WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number:	**2589/20**
Applicant:	**James George Freeth**
Respondent:	**Broadspectrum (Australia) Pty Ltd**
Date of Determination:	**16 July 2020**
Citation:	**[2020] NSWWCC 242**

The Commission determines:

1. The applicant suffered psychological injury deemed to have occurred on 6 December 2019 in the course of his employment with the respondent.
2. The respondent has not established that the psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to transfer, demotion, promotion, performance appraisal/discipline and/or the provision of employment benefits and the defence pursuant to section 11A of the *Workers Compensation Act 1987* (the 1987 Act) is not made out.
3. The respondent is to pay the applicant weekly payments:
    (a) in the sum of $1,532.35 from 7 December 2019 to 5 March 2020 pursuant to section 36 of 1987 Act
    (b) in the sum of $1,290.40 per week from 6 March 2020 to date and continuing pursuant to section 37 of the 1987 Act
4. The respondent is to have credit for any wages paid to the applicant in respect of his attendance at work on 7 December 2019.

A brief statement is attached setting out the Commission's reasons for the determination.

W Dalley
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. James Freeth (the applicant/Mr Freeth) was employed as a watch room operator at the Fire Station at HMAS Albatross. Fire services were supplied to the air base by civilian contractors who employed Mr Freeth. From October 2014 those services were supplied by Broadspectrum (Australia) Pty Ltd (the respondent)

2. On 6 December 2019, Mr Freeth returned to work after being on leave. On return, he encountered a different arrangement with regard to lunch breaks as well as a high degree of activity due to bushfires.

3. After attending work on 7 December 2019 Mr Freeth, complained of certain matters to the Station Officer and left the workplace complaining of stress. He has not returned to work since.

4. Mr Freeth subsequently consulted his general practitioner and was referred for psychological counselling. A claim for workers compensation benefits based on an allegation of psychological injury on 6 December 2019 was declined by the insurer.

5. The insurer disputed the claim, denying that Mr Freeth had suffered a psychological injury or, in the alternative, asserting that any psychological injury was due to the reasonable actions taken by the respondent with respect to the applicant's "transfer, demotion, promotion, performance appraisal, discipline, retrenchment, dismissal of workers and provision of employment benefits" pursuant to section 11A of the *Workers Compensation Act 1987* (the 1987 Act). The respondent also denied that Mr Freeth had a total or partial incapacity for work resulting from the subject injury

6. An Application to Resolve a Dispute (ARD) was filed in the Commission seeking weekly payments commencing from 6 December 2019. The respondent by its Reply, maintained the dispute as to injury.

7. At a telephone conference held on 10 June 2020 the respondent conceded that Mr Freeth had suffered psychological injury on 6 December 2019 and was incapacitated from performing his pre-injury duties.

ISSUES FOR DETERMINATION

8. The parties agree that the only issue in dispute was whether the applicant's psychological injury was wholly or predominantly caused by the reasonable actions taken, or proposed to be taken by the employer with respect to transfer, demotion, promotion, performance appraisal/discipline and/or provision of employment benefits.

PROCEDURE BEFORE THE COMMISSION

9. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute and attached documents, and
    (b) Reply and attached documents.

11. Both parties filed Applications to Admit Late Documents. The document filed by the respondent in response to the direction made at the telephone conference for the respondent to supply particulars of the defence pursuant to section 11A of the 1987 Act was accepted as an aide memoire. Neither party pressed the admission of the balance of the material as this was relevant only to the issue of incapacity which is not disputed at the hearing.

Oral evidence

12. No application was made to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

13. The respondent presented its case pursuant to section 11A(1) in accordance with the particulars supplied pursuant to the direction made at the telephone conference.

14. Those particulars assist in understanding the issues and are worth noting at the outset. The respondent submitted:

> "3. The respondent confirms its assertion that the psychological injury sustained by the respondent in employment was wholly or predominantly as a result of the reasonable actions taken, or proposed to be taken, by the employer with respect to:
>
> a) Transfer,
>
> b) Demotion,
>
> c) Promotion,
>
> d) Performance appraisal/discipline,
>
> e) Provision of employment benefit to workers.
>
> 4. The Respondent submits that their actions with respect to their handling of the worker's complaint about the damaged chair and inappropriate chair in the watch room was reasonable action in respect of provision of employment benefits.
>
> 5. The Respondent submits that their actions with respect to the requirement that the Watch Room not be left unattended for Toilet or Lunch Breaks was reasonable action with respect to performance appraisal/discipline.
>
> 6. The Respondent submits that their actions with respect to giving the worker and other employees notice of the requirement to undertake further training by 1 December 2019 so as not affect their classification and paygrade under the Enterprise Agreement was reasonable action taken or proposed to be taken with respect to performance appraisal/discipline, provision of employment benefits, transfer, demotion or promotion.

7. The Respondent submits that their actions in giving the worker duties to perform was reasonable action taken with respect to performance appraisal/discipline.

8. The Respondent submits that their actions in responding to the worker's leave request was reasonable action taken with respect to provision of employment benefits.

9. The Respondent submits that their action on 6-7 December 2019 with respect to requesting that the worker have lunch in the watch room or wait until later in the day to have lunch in the lunch room, and discussions surrounding the practice of breaks going forward was reasonable action taken or proposed to be taken with respect to performance appraisal/ discipline and provision of employment benefits."

It is in the context of those particulars that the evidence is considered.

The Applicant

15. In his statement dated 20 March 2020, Mr Freeth outlined his employment history and detailed his work tasks in the course of his employment with the respondent.

16. Mr Freeth commenced employment as a watch room operator in the fire station at HMAS Albatross on 24 August 2009. That employment continued when the contract for the provision of fire services at the naval base was awarded to the respondent's parent company and subsequently with the respondent.

17. Mr Freeth said that the role of a watch operator had evolved over time. He described the watch room as being like a "control room/communication room with two desks. One desk was equipped with six screens and one with seven screens". From this room, Mr Freeth said he "monitored two major military bases, two active airfields and four other military installations' fire detection systems as well as monitoring the air band radios for aircraft emergencies."

18. The respondent's contract with the defence establishment required response time of between three and four minutes. He said the system was regularly tested by outside contractors. There had been occasions when there had been "over six hundred tests in a shift at times with six hundred faults on the same day"[1] although this was "excessive and rare".

19. Mr Freeth was required to work two 10 hour day shifts and two 14 hour night shifts per week. After 24 weeks there was a 28 day block of leave. His employment at the time of the subject injury was governed by an Enterprise Agreement (EA) approved on 8 February 2019. Under that agreement it was recorded that "employees will be allowed a one (1) hours paid meal break during each shift and will remain on duty." The agreement provided that the meal break is to commence within five hours of commencing duty, "subject to operational requirements". Mr Freeth said that a break away from the watch room at lunch was essential for his mental well-being.

20. The operations room had to be permanently manned. If the operator required a break then the operator would call for a replacement over the public address system. The operator then conducts a hand over which was logged before leaving the watch room.

21. Mr Freeth said that he had noticed a reluctance among the other employees to cover for him in the watch room. He said the job could be complicated and the watch room was a "daunting place when things are happening. In other times it can be quiet."

[1] ARD p3 Statement par 16

22. Mr Freeth referred to a number of different aspects of his employment:

(a) "Leave Issue" – Mr Freeth noted that leave was required under the EA to be taken in blocks of 28 days but mistakes by the respondent had led to some of the employees "not accruing the correct number of hours to cover our 28 day leave blocks". The affected employees were required to shorten their leave blocks "until this is resolved". The applicant does not say that he was one of the affected employees nor how this impacted upon him.

(b) "Qualification issue" – Mr Freeth said that he suffered "an immense amount of stress" over the respondent's approach to his qualifications to continue to be paid within his grade 3 rating. He said he was informed a few months before the deadline on 1 December 2019 that his pay would drop by $140 a week if his qualifications were not brought up to the required level. He said that he was given no "clear-cut answer" as to how he would be affected. He was told that it was the respondent's policy which was going to be implemented but he had also been told that he should "just keep working towards it, just in case".

(c) "Pay issues and duties" – Mr Freeth said that he was paid at a "level 3 watch room operator/firefighter level 1" rate although not fully qualified. Mr Freeth said that he understood this was due to the complexities of the position and the fact that he was carrying out the role satisfactorily. Mr Freeth said that he was constantly being given additional duties. He gave an example of having to complete narratives which involved recording incidents at which he had not been present. He said he would have to obtain the information from a worker who had attended the incident and then record this.

Mr Freeth's duties included ringing the "fuelies" (refuellers) "every time the tower changed status because a fuel truck driver made a mistake." The applicant gave no details of how often this occurred nor what was involved other than having to make a phone call.

Mr Freeth listed the tasks that needed to be completed at the commencement of the day shift and throughout the shifts. He noted that these needed to be logged subsequently.

(d) "Unreliable systems and equipment" – Mr Freeth complained that he was expected to manage "broken complex systems and still operate flawlessly". He said some parts of the monitoring and communication systems were maintained by one of the station officers and other parts by contractors. Mr Freeth had said that this made repair and maintenance a complex issue. He said he understood that there had been one day on which there had been 1,200 faults.

Mr Freeth was also concerned that the team had been working from an outdated version of the Airfield Emergency Plan. He said the updated plan was only provided to them a couple of months before an exercise. He felt that this could have led to problems for the respondent which would have been blamed upon the workers. The applicant did not explain why he had difficulty understanding the document or the extent of the changes in the updated document.

(e) "Toilet Breaks" – under this heading Mr Freeth noted that he had received unfavourable comments and questions when requesting a relief operator when he needed to go to the toilet. He said that in a 10 hour shift he would sometimes need to go to the toilet only two or three times but at other times it would be more often and other employees would comment unfavourably. He said this impacted his self-esteem. He was upset that the workers would be watching a movie when he asked but would be reluctant to help him. Mr Freeth noted that he had suffered from kidney stones and bladder infection when he had needed more frequent breaks. He said "Both these situations were accommodated by the crew. There may have been others, but these were rare occurrences." He felt that his reluctance to ask for breaks had affected his development of kidney stones.

(f) "Degrading comments" - Mr Freeth said that often when he left the watch room he was met with jibes which he felt belittled his role. He cited as an example a comment "Oh! Who let you out of your box?" He said that this type of comment was repeated to the point where it became a matter of concern for him.

(g) "Chair issue" – Mr Freeth noted that a large part of his role was spent seated in front of screens which required appropriate seating. He said that one of the chairs had broken and he had appropriately tagged it, following which he had been accused of breaking the chair deliberately. He said the replacement chair was not suitable but was told that "If you can't use that chair, we may need to have you medically assessed to see whether you are suitable to do your job."

(h) "Inconsistency among Station Officers and Leading Firefighters" – Mr Freeth said that there was inconsistency between the requirements of different Station Officers and Leading Firefighters as to how duties were to be performed. He said it was necessary to remember the particular requirements of different officers which he said left him "feeling like a second-class citizen not worthy of consideration or empathy".

(i) "General treatment over key issues" – Mr Freeth said he had suffered from a general lack of support from management in performing his duties as well as with regard to mental health issues involved in having to remain in a room for 10 or 14 hour shifts. He said that he felt this was "akin to feeling like a rat in a cage". On very busy days, he became fatigued with little support offered. He said that "we miss out on important information sometimes, it is passed on in morning briefings and never relayed to us." He said that he had to rely on firefighters or another "whatchie" [scil watch room operator] for this information. He found this stressful.

Mr Freeth complained of the level of assistance provided when the watch room was busy and the absence of support. Mr Freeth said that the watch room was supposed to have been upgraded a number of years ago but this was still not complete. While the work was being carried out he was expected to work in a corner of the room at a time when there were "massive network meltdowns". He said this was immensely stressful. He had complained to the regional manager who had given him a good hearing but no action was taken to address the problem.

Mr Freeth said the layout of the watch room was problematic. He was unable to put maps on the wall although accessing the maps by the computer was difficult. The layout of the screens was suboptimal.

> Mr Freeth said that in removing the emergency exit (the fireman's pole) made him feel cut off from other staff and increased his feeling of isolation. Mr Freeth said that the Occupational Health & Safety aspects of being at the furthest point from the external door to the evacuation point was identified as a concern but disregarded by management.
>
> The radio speakers provided were poor quality making it difficult to understand what was said at times.
>
> Management refused permission for meal lockers to be brought into the watch room without explaining why this could not be done.
>
> Mr Freeth said that he received contradictory instructions with regard to a major ADF [Australian Defence Force] exercise that was conducted at some point in time. He said at the commencement of the exercise he had received a telephone call from the Station Officer at HMAS Creswell requiring him to act in a way contradictory to the Airfield Emergency Plan and requiring him to subsequently transcribe all communications relating to the exercise which he had to do at a later date, when things were quiet.

23. Mr Freeth detailed the events of 6 December 2019 when he returned from leave and 7 December 2019 when he ceased work. The handover was difficult as both the computer monitoring systems were down and the printer did not work. He said communications with HMAS Creswell were poor, relying on a mobile phone.

24. Mr Freeth said the morning was busy. He arrived at the workplace at about 7.10 am but by midday had not been offered a break for lunch. He requested relief over the public address system but was not relieved. He said a firefighter had entered the room and had agreed to relieve him for a short period while Mr Freeth went to seek assistance from the Leading Firefighter, Gary Gilbert (LFF Gilbert). He was told that things were "really busy" but he would see what he could do. The Station Officer then told him that he may need to eat his lunch in the watch room due to the pressure of work.

25. On looking into the lunch room, Mr Freeth noticed that the room was full with the firefighters appearing to be having their lunch or looking at their phones. He said he felt "somewhat miffed". He had eaten his meal at his desk over a period of an hour because of the workload in the watch room. Mr Freeth said that he subsequently confronted Mr Gilbert to enquire whether he had done something to upset him. He was asked to discuss the situation with the Station Officer who then told him that the situation had changed while he was away on leave and that everyone was now busier and eating in the watch room is going to be the "new norm".

26. Mr Freeth said that he felt this was treating the watch room operators as second-class employees. It meant that he would have to sit in a room for 10 or 14 hours per day without a break apart from toilet breaks which were not easily obtained.

27. Station Officer Peacock (SO Peacock) had also told Mr Freeth that the members of the team had complained about him abusing his breaks. He was told his replacement while on leave had worked throughout his lunch break and he was expected to do the same.

28. Mr Freeth said that he was concerned as to how he was going to handle shifts without a break from the watch room. He said that he felt angry at SO Peacock "who had previously coerced me into having a toilet break schedule drawn up where the crew would offer me breaks at certain times." He said he found this very humiliating and the crew had not co-operated.

29. On returning to the watch room, Mr Freeth reflected on what had been said and felt "the last little bit of normalcy and respect was disappearing from this job." He said he felt isolated from his crew who thought that he abused them by taking too many toilet breaks and for too long.

30. Mr Freeth said that he believed the crew had obviously discussed this but it was never brought to his attention. He went home feeling "absolutely gutted" and barely slept. He said that he resolved to address the problem the next day.

31. Upon attending work the next day Mr Freeth said he was feeling very tired and stressed. During the morning he recalled that he was offered two toilet breaks but by midday he had not been offered a lunch break. He said that he normally took his lunch break at 11.00 am before the room became crowded. He said the crew had usually accommodated this but on 7 December this had not occurred.

32. Mr Freeth said he had heated his meal in the microwave provided in the watch room but had no plate or cutlery. He said he felt anger and resentment and did not know how to deal with this. He said that he felt the need to get out and asked to speak to SO Peacock who was unavailable at that time.

33. Mr Freeth was subsequently told that SO Peacock wanted to speak to him in his office where he told SO Peacock about his concerns about lunch breaks and toilet breaks. He said "it felt like my head exploded. I needed to get away from this toxic environment." He told SO Peacock that he was going home "on stress".

34. Mr Freeth noted feeling "victimised, undervalued and a pariah in my own platoon." He said that he believed that this stemmed from the reluctance of other members of the crew to do duty in the watch room.

35. Mr Freeth said:

> "It's not just this recent issue of being expected to eat in the watch room. It's the whole way we are treated. The events on 6 and 7 December 2019 were the culmination of prior poor treatment in the workplace. The lunch room issue really became the final straw."

36. Mr Freeth described his mental state from and after 7 December 2019. The evidence as to those matters was not referred to in submissions and is not relevant to assessing the issue to be decided.

37. Mr Freeth commented upon statements made by SO Peacock and other fellow workers. With respect to SO Peacock's statement which is referred to below, Mr Freeth noted that he had received a prior injury when working for an earlier employer at the naval base. He said that his suitable control room chair had been replaced with a secretarial chair which apparently had led to a back injury.

38. Mr Freeth noted that SO Peacock had said that the EA required him "to remain on duty and inside the watch room for my meal breaks" (original emphasis). He said this was not a requirement under the EA.

39. Mr Freeth said that the account of the conversations recorded by SO Peacock in his statements confused conversations which had occurred on the two consecutive days. He said that he had provided an explanation for leaving: "It was because of the new lunch break interpretation but it's was [sic] not just that it was the whole way we are treated, the piss breaks and everything."

40. Mr Freeth said that SO Peacock's recall that he had telephoned Mr Freeth regarding his shift after Mr Freeth had left the workplace was not correct and that it was another station officer who rang him regarding his shift.

41. In response to the assertion that Mr Freeth had been told by Mitchell Pakes that he would not suffer reduction in pay if he continued to work towards obtaining the qualifications required for the grade at which he was then being paid Mr Freeth said:

> "My take away from the conversation was that it was company policy and it could be implemented at their whim, but I should continue to try and gain the qualifications as this may reduce the chance of that happening. Then being told that they were not even sure if the company could actually provide all the training required or that I may not be fit enough to undergo said training. All very ambiguous. Assurance was certainly not what I took away from the conversation."

42. Mr Freeth denied SO Peacock's assertion that he had a poor attendance record and had used up nearly all of his sick leave. He said that he still had 225 hours of sick leave unused prior to the subject injury. He had had two or three weeks off for three operations the previous year which, he said, did not constitute poor attendance.

43. With respect to assertions made by LFF Gilbert, Mr Freeth agreed that he may have had three toilet breaks prior to his conversation with LFF Gilbert on 6 December 2019. He said with respect to the assertion that he made mistakes on a routine basis that he did make mistakes from time to time and had accepted this and taken appropriate action to correct the situation. He said it was not "routine" and had not been raised with him as an issue.

44. Mr Freeth disputed the statement by Mitchell Evans (FF Evans) to the effect that Mr Freeth would take up to 15 toilet breaks a day. He said that after coming back to work following his kidney stone surgery he had an increased requirement to go to the toilet and estimated at this period that he would have needed to go 8 to 10 times in a shift.

45. Mr Freeth referred to the statement of Tim Thistleton (FF Thistleton) and said that the assertion in that statement, that he went to the toilet almost every hour, may have been correct when he had the kidney stone problem but otherwise was an exaggeration. He noted FF Thistleton's assertion that he appeared upset because his leave had been cut down to 14 days and said that his leave had been "normal". He did not elucidate whether he had, in fact, taken 28 days leave.

46. An email by Mr Freeth dated 13 April 2019 to various recipients noted that another watch room chair had been "tagged out" for safety reasons. Mr Freeth said that he had brought this to the attention of ASO [? Acting Station Officer] Gilbert and had been told to "tag it out". Mr Freeth said:

> "As this will probably mark me as a target yet again, I would appreciate your full support should any victimisation occur over this. As this is the third chair to be tagged out by me, I deserve the Nobel Safety Medal for preventing accidents and following Corporate policy. I think we all know this is unlikely and may cause more unpleasantness directed towards the watch room from management. For this I apologise."

47. An email in reply from one of the recipients, Bryan Murphy, reads; "Have already been warned by S/O Kinnear this morning not to make noise in regards to chair. How is that eh. Let's see what pans out."

48. In an email dated 1 July 2019 to SO Peacock and LFF Gilbert, Mr Freeth requested training which h had been told had to be completed by 1 December 2019. Mr Freeth noted that this is "many hours of training" which he felt needed to be started as soon as possible. He identified the units of competency required to be completed and those that he had achieved.

49. Mr Freeth thanks the recipients for assisting in planning out the required path and explaining the complexities. He stated that he has requested to go on first aid courses on a number of occasions but had not been successful which he said was "extremely unfair" given the tight schedule to complete the requirements. He said "I have had multiple verbal assurances that these qualifications were not required and just want this to be noted, just in case of any legal repercussions."

50. In an email dated 22 August 2019, Mr Freeth notes that he has been informed that the respondent will pay for him to get the two units required to bring him up to Watch Room Operator Level 2. He asks whether RPL (Recognition of Prior Learning) is appropriate or whether it would be just as easy to do the course online. Mr Freeth notes that he requires to have the qualification by 1 December and will be going on leave in November and so needs to obtain the qualification as soon as possible. The role of the recipient of the email, Leon Wilks, is not identified.

51. In an email dated 9 September 2019 addressed to Mitchell Pakes, SO Peacock, LFF Gilbert and a number of other recipients (including himself) Mr Freeth requested a meeting to discuss the qualifications for "dedicated Watch Room Operators". He noted that the criteria of the "Prevent Injury" unit of competency was rescue based and not part of the activities performed in the watch room. He notes "it also makes it relatively unachievable to obtain from this position or to maintain any currency." Mr Freeth sought an assurance that he would not suffer reduction in pay if the qualification was not obtained by 1 December 2019.

52. Mr Freeth said:

> "We were all employed as dedicated Level 3 Watch Room Operators and have repeatedly requested training and have never been included on any Public Service Courses. We were repeatedly told that the qualification framework did not apply to us, only two Firefighters/Watch Room Operators who wish to progress to the floor."

53. In an email dated 2 November 2019 sent to 14 recipients (including himself and LFF Gilbert), Mr Freeth noted that testing was being conducted with a total of 967 events needing to be verified as being from the buildings being tested.

54. In the email Mr Freeth reports his observations of problems with the scheme. He reported:

> "For an operator to maintain composure and be aware of the location of all resources across both bases as well as monitoring CTAF radio was conducting the stressful level of activity poses another chance for a real AFA to be missed."

And:

> "**Operator fatigue**: is another issue that needs to be considered. The longer the operator is exposed to this level of activity, the chance for mistakes to be made, is also increased. Observation skills suffer. Gathering correct, critical information over telephone and radio can also be compromised."

Mr Freeth also notes a fault with a location designation at HMAS Creswell. He notes that the testing group are aware of the "overload issue" and he reports a possible source of the problem.

55. An email from Mr Freeth to the manager, Mitchell Pakes, dated 4 November 2019 was in evidence. In that email Mr Freeth expresses reluctance to reduce his leave saying that he would like to see proof and explanation of how the situation has come about. He asks whether he has not been accruing sufficient entitlement under the current arrangements.

56. Mr Freeth also refers to his sick leave entitlement, noting that he appears to have lost 12 hours from his sick leave when he believed that it should have only been six hours. He suggested that mistakes of this type may have occurred earlier and requested an investigation with a "moratorium" on adjustment. He asked for approval to contact the pay office to have his entitlements checked with a view to correcting the issue, if required, in his next leave.

SO Peacock.

57. A statement by Steve Peacock, station officer employed by the respondent at the HMAS Albatross naval base was in evidence. SO Peacock confirmed that the respondent had assumed the firefighting contract in 2014. He had been employed with the previous contractor since 1995 and had been working at HMAS Albatross since 2000. He identified his manager as Mitchell Pakes.

58. SO Peacock said that he had known Mr Freeth throughout his employment with both companies. He said that Mr Freeth had complained of no injury or disability at the commencement of his employment. Mr Freeth was rotating roster comprised to two 10 hour days from 8.00 am to 6 pm and then two 14 hour days commencing at 6.00 pm until 8.00 am followed by a break of four days. During the night shift he was able to sleep from 11.00 pm to 7.00 am.

59. Mr Freeth's duties were usually performed alone in the watch room. SO Peacock stated that Mr Freeth was required to answer telephone calls and respond appropriately to fire alarms which included turnout bells, radio communications and to monitor fire indicator panels. Mr Freeth would also monitor airfield communications and coordinate alarm tests. He also acted as the point of contact for the outside world ("externals"). SO Peacock noted that there were significant periods of inactivity which he suggested could be used by Mr Freeth to play his guitar.

60. With regard to meal breaks SO Peacock said that Mr Freeth was required by the EA to remain on duty throughout the lunch break and remain inside the watch room. He said that he had applied this provision flexibly generally permitting Mr Freeth to come to the staffroom to have his meal with another worker being detailed to relieve him.

61. SO Peacock said that Mr Freeth used the restroom between 5 to 10 times a day although he did not know why he needed to go so frequently. He believed "it may have something to do with medication that he is on and the supplements he uses". He did not know the nature of the medication or the supplements nor the medical condition for which they were required

62. SO Peacock confirmed that Mr Freeth had been given an additional task with regard to informing the refuellers of changes of radio-frequency by the control tower. He said this was a thirty second call.

63. SO Peacock said that Mr Freeth was not required to enter narratives. He said that these were typically done by himself and that, if Mr Freeth was required to perform that task, it was simple, requiring just completion of some drop boxes on the system.

64. SO Peacock confirmed that work activities on 6 December 2019 were particularly busy. He listed 12 activities needing to be performed. These included activities such as timesheet processing, carrying out a water bomber familiarisation, testing and servicing rescue equipment, conducting the daily vehicle inspection and testing and station cleaning as well as other activities. SO Peacock said that Mr Freeth had spoken to him "in front of the platoon" at about 12.30 pm about wanting to take his lunch break SO Peacock said:

> "I said to him that he could grab some lunch and take it upstairs and eat in the watch room if he wanted to have his lunch at that moment in time (as per his certified agreement). I then asked him if the alarm technicians were doing tests. He said yes. I then suggested he could go up and continue with such tests and when they finished he could give me a yell and I would organise for someone to come and relieve him in the watch room if he wanted to have his break in the staffroom.. I made this comment to him because other watch room officers had been doing this whilst he had been away on leave and the system had worked well. The claimant then went back upstairs to the watch room and I believe he had his meal break in the watch room. I thought nothing of the matter."

65. At 3.30 pm, LFF Gilbert had spoken to him about an exchange with Mr Freeth and SO Peacock had told LFF Gilbert to bring Mr Freeth to the office. He described the subsequent meeting where Mr Freeth expressed his anger/distress saying that he was "over this bullshit and crap". Mr Freeth explained that he was angry about the meal break entitlement. SO Peacock had explained that this was in accordance with the EA and, while it was possible on lighter days to have the meal in the staffroom, on busy days the requirement to eat in the watch room had to be enforced.

66. Mr Freeth was then asked by LFF Gilbert whether he had had any breaks today and Mr Freeth confirmed that he had. LFF Gilbert asked him then what he was complaining about. SO Peacock said that Mr Freeth went red in the face and started to shout and stormed out of the office. SO Peacock said that he could not understand why Mr Freeth had behaved "so disproportionately" in response to LFF Gilbert's comment. SO Peacock said that he then went to the watch room and spoke to Mr Freeth. He gained the impression that Mr Freeth had "blown off his steam and things were settled". He noted that Mr Freeth had worked the rest of the shift without further incident.

67. The following day SO Peacock said that Mr Freeth came to his office at about 12.45 pm appearing agitated. Mr Freeth said words to the effect "I can't do this anymore" and left the office saying that he was going home.

68. SO Peacock denied that Mr Freeth had mentioned the issue of breaks or any change of policy regarding breaks or the issue of his replacement during breaks. SO Peacock said that he contacted his manager and then went to locate Mr Freeth in the communications room. He advised him to contact the EAP [employee assistance program]. SO Peacock said he did not understand why Mr Freeth was stressed. He spoke to him about "how the recent covering of the fire pole may be causing him to feel isolated in the comms room". Mr Freeth said it could be a contributing factor.

69. SO Peacock said that the issue of pay rates may have been "relevant to the subject matter". He said that the respondent advised all staff that employees needed to hold qualifications for their current level of employment if they were to be paid at their current rate. He noted that Mr Freeth was paid at a level 3 rate but was qualified at level 2. He said that Mr Freeth had spoken about reaching level 3, that is he would need to be a qualified firefighter and noted that the training would be exhaustive and that he doubted Mr Freeth would have the fitness to even complete such training. He said the difference in pay between level 2 and 3 was about $100 per week.

70. SO Peacock said that he was aware that the matter was being addressed by his manager, Mr Pakes, and that the manager had advised Mr Freeth that "as long as Mr Freeth showed he was making reasonable attempts to address his training he would ensure the insured did not drop his pay level." He did not explain how this was to be achieved.

71. SO Peacock said that Mr Freeth's work performance had been below average. There had been a number of issues identified by LFF Gilbert before Mr Freeth went off work where Mr Freeth had not recorded information. SO Peacock said that Mr Freeth overall had been slow in performing his duties and has an inability to pass on messages in a clear and concise manner. However he accepted instructions well. Despite these issues SO Peacock said that Mr Freeth had not been performance managed whilst employed with the insured.

72. He said that Mr Freeth's attendance had been poor and that he had used up "most sick leave and carers leave in the last 24 months".

73. In an email dated 4 November 2019 from SO Peacock to Mitchell Pakes, the station officer records that he had "a few concerns after a meeting with Jim Freeth". He notes that Mr Freeth was qualified as a "level 2" but paid as a "level 3". He said:

> "Jim stated that he will do whatever it takes to maintain his current pay rate, which would include weekly steroid injections to mask or manage former injuries he has suffered and that he was concerned he would not be able to pass fitness medical and the ramifications for this.
>
> My concern is that the company will be exposed for a liability/injury claim if Jim attempts to undertake the training involved to gain firefighter qualifications such as Open Circuit Breathing Apparatus, Respond to Aviation Incidents and Respond to Structural Fires to mention a few."

LFF Gary Gilbert

74. In a statement dated 17 January 2020 LFF Gilbert confirmed that Mr Freeth was employed at the Naval Base as a permanent full-time watch room operator. He had observed that Mr Freeth used the restroom at work between 5 to 10 times a day. He said he was unsure as to why this frequency was necessary. LFF Gilbert said that fellow workers were "always willing to cover for him when he attends the restroom" but no other watch room operators required to use the restroom as often.

75. LFF Gilbert said that Mr Freeth would often use the restroom breaks to chat to other members of the team and would sometimes extend his break to 10 minutes.

76. LFF Gilbert confirmed that the unit was extremely busy on Friday, 6 December 2019 when Mr Freeth returned to duty from leave. He said "Friday is always busy but because of the bushfires that day [we] were totally flat out". He recalled that Mr Freeth had come to him about midday to ask when he could have a lunch break. He said "I was surprised by his request because we had been simply so busy."

77. LFF Gilbert said that he had told Mr Freeth that everyone was busy and that he could stop when "everyone else had a break". He noted that Mr Freeth had already had numerous breaks that day. He said he knew this because a relief operator was required whenever a break was taken.

78. LFF Gilbert said that he had not been present when Mr Freeth spoke to SO Peacock. He commented "I might add that the claimant is like that – if he gets a response that he does not like then he will go and ask the same question to someone else." He recalled that Mr Freeth had come to see him at about 3.00 pm. He appeared red in the face and was asking what he had done wrong. LFF Gilbert said that he was "blown away by his attitude and confused as to what he was saying". He suggested that Mr Freeth come with him to speak to SO Peacock in his office.

79. LFF Gilbert described the conversation in the Station Officer's office. He said that Mr Freeth had complained of not having his lunch break. LFF Gilbert had asked him whether he had had any restroom breaks and Mr Freeth had confirmed that he had taken three. LFF Gilbert then pointed out that the crew was busy because of the bushfires and they had only just reached a point where they could think of a break.

80. LFF Gilbert said at this point Mr Freeth had "changed tangent" and had spoken about his worry about reduction in his pay because his qualifications were not up-to-date. LFF Gilbert told him that "he knew that to maintain his current rate of pay he needed the qualifications or be working towards them." Training had been organised and Mr Freeth only needed to communicate with the manager, Mitchell Pakes, to show that he was working towards his qualifications so that his pay would not be impacted.

81. LFF Gilbert said that Mr Freeth had then calmed completely down. He accepted that the following day would be a quiet day and that he would have plenty of downtime. LFF Gilbert said "I believe that the claimant then left the office satisfied."

82. LFF Gilbert said: "I note that the claimant then took an hour off in the staffroom – I don't know if he had already eaten upstairs – it is more than likely that he had already eaten because for the claimant it is always about him and not anyone else – that is just the way he is."

83. The following day LFF Gilbert said that, at about 10.00 am he had been asked by SO Peacock to go to his office because Mr Freeth wished to speak to him and he wanted a witness. He said that Mr Freeth had started talking about not having a break that day. LFF Gilbert had asked how many breaks he had had and he replied three. LFF Gilbert then said "what are you carrying on about." Mr Freeth had then said "Right that is it, I am going out on stress" and had walked out of the office.

84. LFF Gilbert said that Mr Freeth had then gone to the watch room and entered into the occurrence book "that he had been victimised and not supported". LFF Gilbert said that he found the entry "to be total garbage and indeed highly offensive as all our platoon has been is [sic] totally supportive of him." He noted that Mr Freeth had "then left the workplace driving in an erratic and dangerous manner."

85. LFF Gilbert said:

> "I can confirm that the claimant makes mistakes at work on a routine basis; in particular, not making all appropriate entries in the occurrence book. He has been spoken to informally about his work performance on a number of occasions."

86. An email dated 10 January 2018 by LFF Gilbert sent to himself and the regional manager of the respondent, had as the subject; "James Freeth RE: Stress and work volume". The email records that Mr Freeth had spoken to LFF Gilbert "in relation to his home financial situation" and the "work volume issues in regard to annual testing". He recorded that Mr Freeth "intended to call in sick today due to the stress levels he is enduring from his financial situation". He noted that Mr Freeth was concerned that he was close to losing his house and was having difficulty sleeping.

87. LFF Gilbert noted that the workload was compounding the issue "with the sheer volume of testing when annual tests are conducted sometimes in excess of 500 alarms". He recorded that Mr Freeth was worried that there was potential of missing an actual alarm and thus being responsible for the respondent breaching its contract. LFF Gilbert recorded that he had suggested the employee assistance program might be of assistance to Mr Freeth who had said that he was aware of the service "and it may soon come to requiring that assistance".

88. An email from LFF Gilbert to SO Peacock notes a problem with Mr Freeth's management of an alarm on that day and failure to record information regarding occurrence into the occurrence book although noting that this had been recorded on a sheet of paper.

Firefighter Mitchell Evans

89. In his statement dated 17 January 2020, FF Evans said that he had been present on 6 December 2019 when Mr Freeth had spoken to SO Peacock. He said that they have just returned from "the field". Mr Freeth had spoken about wanting a break. SO Peacock had said that "everyone had been busy because of the bushfires and that no one had had a break and that he could grab his food and go back to his room and eat; and that once things had settled down he could come back down and have a proper break." FF Evans said that Mr Freeth had appeared satisfied with that. He did not recall any further events that day.

90. FF Evans said that on the following day he had been in the crew room when Mr Freeth had come to him and asked where LFF Gilbert was. He observed Mr Freeth then to go outside and abuse LFF Gilbert, pointing his finger at him and appearing quite agitated. FF Evans said that Mr Freeth appeared "very aggressive".

91. FF Evans said that he found it "incredible" that Mr Freeth would complain about his treatment at work. He said that Mr Freeth routinely takes breaks and could take up to 15 breaks a day. He said that Mr Freeth would go to the restroom and then have a walk and a drink. At lunch he could disappear for up to 90 minutes. He said "Despite the amount of breaks he takes, no one says anything and everyone covers for him as we are part of a team."

Firefighter Timothy Thistleton

92. FF Thistleton in his statement dated 17 January 2020 said that he **had** been present in the watch room when Mr Freeth "allegedly came down and spoke to Peacock about having a break".

93. He said the following day he had not witnessed any of the conversation and had been surprised that Mr Freeth had left the workplace. He said he found it strange that Mr Freeth had left work "stressed" when "prior to 6 December 2019 the claimant had been on extended leave."

94. He noted that Mr Freeth had complained that his leave had been cut back from 28 days to 14 days "because he did not have enough leave owing" but had appeared "happy and satisfied at work".

95. FF Thistleton confirmed that Mr Freeth "does have an abnormal use of the toilet, going every hour". He said that he was unaware why Mr Freeth needed to go so often.

Dr Yajuvendra Bisht, Psychiatrist

96. Mr Freeth was examined by Dr Bisht, Psychiatrist, at the request of the respondent on 2 January 2020. She provided a report which was in evidence.

97. Dr Bisht recorded the history provided by Mr Freeth which included his employment as watch room officer with the respondent for a period of about eight to nine years. The psychiatrist noted that work was performed at a "military air base" at Nowra. Mr Freeth informed Dr Bisht that work was "quite complex" involving monitoring two major airbases as well as other locations. Mr Freeth said there were four platoons and four watch room officers.

98. Dr Bisht recorded:

> "He said that he is not allowed to leave the room without getting someone to replace him. He said this has been a constant source of stress for a few years, along with the quality of the seats. He said that sometimes it can be a slow-paced job, and other times, it can be quite hectic."

99. Mr Freeth told Dr Bisht that his wages would be reduced if he didn't get additional training and that there had been additions to his work responsibilities over the last few months, referring to the need to advise the refuellers (of wireless frequency changes) and the need to do narratives.

100. Dr Bisht noted that Mr Freeth had told her that, on returning from leave, he been told that he was not allowed to eat his lunch in the staff room and when he complained of this he was told the processes had changed. Mr Freeth told the psychiatrist that he believed this was because the firefighters did not want to go into the watch room. He had not had much sleep that night and on the following day no one had come to offer him a lunch break and he began to feel "wound up" as a result.

101. Mr Freeth reported having disturbed sleep with frequent awakenings in a panic on some nights for about a year as well as "excessive preoccupation about the work stressors every few days." Mr Freeth described his ongoing symptoms.

102. The psychiatrist noted Mr Freeth's domestic situation, including the disability suffered by Mr Freeth's wife, his financial stress and his surgery for kidney stones.

103. Dr Bisht diagnosed "adjustment disorder with mixed depressed and anxious mood". She gave as her reason for that assessment:

> "Stressful work-related experiences occurred at the workplace the last few months.
>
> The onset of the condition coincided with the stressful work experiences.
>
> These workplace stressors would be considered severe enough to cause a psychological condition.
>
> There is no history of any pre-existing condition. There haven't been any non-work related psychological stressors in the last few years, which would account for being the main contributing factor.
>
> There is no significant contribution from any medical conditions or any medications or any substances of abuse."

104. Dr Bisht was asked by the respondent:

> "If you consider the worker has sustained a work-related psychological injury, is it your opinion that her [sic] injury is wholly and predominantly caused by our client's actions taken or proposed to be taken with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers in particular:
>
> (a) The investigation in respect to her [sic] qualifications for his role and future training is required" [sic].

Dr Bisht responded:

> "I am of the opinion that his injury is wholly and predominantly caused by your client's actions taken or proposed to be taken with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers, including the investigation in respect to his qualifications for his role in [sic] future training is required, and the issues raised with him about his role and responsibilities."

105. Dr Bisht was of the opinion that Mr Freeth was not currently fit for his pre-injury duties and required fortnightly appointments with a psychologist. She felt that the incapacity was "primarily as a result of his duties with your client".

Dr Robert Gertler, Psychiatrist

106. A report by Dr Robert Gertler, psychiatrist, dated 9 April 2020 was in evidence. Dr Gertler interviewed Mr Freeth by audiovisual link on 30 March 2020 at the request of the applicant's solicitors. He was provided with a copy of Mr Freeth's statement, the report of Dr Bisht and the statements of the fellow employees noted above.

107. Dr Gertler noted Mr Freeth's concerns relating to meal breaks, relief for toilet breaks and the issue of qualifications needed to maintain his pay rate. Dr Gertler diagnosed "adjustment disorder with anxious and depressed mood". He reported:

> "The symptoms of anxiety and depression have developed on the basis of Mr Freeth's experiences in the workplace, notably the demands made on him in relation to workplace conditions such as toilet breaks and lunch breaks, resulting in Mr Freeth feeling victimised, lacking in support from other workers, coupled with ongoing, implied threats to his remuneration and need to obtain further qualifications which he believes are unrealistic.
>
> The situation at work appears to have come to a head when he returned to work after annual leave in December and was confronted with the changes to his work conditions as well as a lack of understanding and support by senior staff."

108. Dr Gertler said that he agreed with Dr Bisht's conclusions and diagnosis.

Other relevant documents

109. The relevant EA referred to was in evidence. Paragraph 32 relating to meal breaks relevantly provides:

> "32.1 Employees will be allowed a one (1) hours paid meal break during each shift and will remain on duty.
>
> 32.2 Subject to operational requirements, meal breaks will be taken at regular times and will be commenced within five (5) hours of commencing duty."

110. A document entitled "Toolbox talk – Broad-spectrum" refers to a "Skills Enhancement Program Clause 21.12." The document refers to the EA and notes:

> "If employees reach time served in a classification level and there has been a clear non-provision of training by the company preventing them from obtaining the required qualifications then Broad-spectrum will progress the employee to the next level of classification (Clause 21.12.1)

> Employees who are employed at the commencement of the agreement and hold classification above which they are qualified, at a make reasonable steps to obtain any qualification required in accordance with Appendix A. (Clause 21.12.4)
>
> Failure to obtain the qualifications by the date agreed in clause 21.12.4 (1 December 2019) may result in employees being reclassified to the level of qualifications they hold.
>
> Clause 21.12 is appropriate for ALL classification levels regardless of time served with Broad-spectrum."

Consideration

111. The submissions of the respondent at the hearing substantially followed the submissions which form part of the written particulars of the section 11A defence noted above and also identified the evidence relied upon in support of those submissions.

112. Counsel for the applicant referred to the opinion of Dr Bisht with regard to causation. Counsel for the applicant noted that Dr Bisht had referred to the condition as being "wholly and predominantly" caused by the actions of the respondent with respect to every one of the actions set out in section 11A.

113. Counsel for the applicant pointed to the contradiction inherent in the words "wholly *and* predominantly", noting that these are different concepts and a finding had to be made as to one or the other[2]. Dr Bisht's opinion asserted that the psychological condition was caused by each of the factors identified in section 11A(1), although a number of those factors were not relied upon by the respondent and on the evidence were not in existence. These included demotion, promotion, retrenchment or dismissal. Further, properly understood, there was no evidence of action by the respondent with respect to discipline or performance appraisal. Accordingly, the opinion of Dr Bisht could not be relied upon to satisfy the requirement for the respondent to demonstrate that the events referred to in evidence and noted by the respective independent medical experts constituted reasonable actions with respect to one or more of the grounds in section 11A(1)[3].

114. Further, it was submitted, even if it was established that the psychological injury was due wholly or predominantly to the actions of the respondent with respect to elements of section 11A, those actions were unfair and hence not reasonable.

115. I accept that, if read literally, the report of Dr Bisht attributes the onset of Mr Freeth's psychological injury to each one of the elements listed in section 11A(1). I accept that there is no evidence of promotion, redundancy or dismissal and, at least to that extent, the opinion of Dr Bisht is not supported by evidence.

116. In *Hamad* Snell DP said (at [88]:

> "The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the

[2] *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130.
[3] *Hamad v Q Catering Limited* [2017] NSWWCCPD 6 (*Hamad*).

facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience."

117. In the present case there is agreement that events in the workplace caused Mr Freeth to suffer a psychological injury. There are limited areas of dispute as to the facts. The respondent has addressed particular areas of stress identified in the statement of the applicant and sought to relate these to actions by the respondent with respect to transfer, demotion, promotion, performance appraisal/discipline, and provision of employment benefit to workers.

118. That approach does not take into account the generally stressful background nature of the applicant's work in monitoring the fire alarm systems of major defence establishments and isolated setting.

119. I accept that there is some force in the applicant's argument that the report of Dr Bisht does not, on its face, support the proposition that the actions of the respondent with respect to the activities identified as reflecting aspects of section 11A(1) were the whole or predominant cause of the psychological injury.

120. However, it is possible to interpret Dr Bisht's report as supporting an opinion that the specific matters raised by Mr Freeth upon examination were the events that wholly or substantially gave rise to the psychological injury. The categorisation of those events and the decision as to whether they fell within section 11A(1) would be a matter for the Commission to determine.

121. In the circumstances, I think it is appropriate to examine the evidence in relation to each of the elements of section 11A(1) relied upon by the respondent to determine which of those elements are made out and then to determine whether the actions of the respondent with regard to such elements were reasonable.

122. Having determined those matters it will then be possible to decide whether those elements correspond to the history obtained by Dr Bisht and whether those elements which are found to constitute "reasonable" actions are shown to be the whole, or the predominant, cause of the psychological injury.

123. The history obtained by Dr Bisht included the following stressors:

    (a) the work was complex;

    (b) Mr Freeth was not permitted to leave the watch room without having someone to replace him;

    (c) the quality of seating was poor;

    (d) the work was slow-paced at times and other times hectic;

    (e) without additional training Mr Freeth would suffer reduction in wages;

    (f) additional tasks have been added to his role as watch officer, and

    (g) he was required to eat his lunch in the watch room.

124. The summary of the history provided by Dr Bisht appears to me to reasonably accurately reflect a number of the matters raised by Mr Freeth in his statement (although not all). The report of Dr Gertler refers to the perception by Mr Freeth that other team members were unsympathetic to his need for relief from time to time, but perhaps that is comprehended by Dr Bisht in her noting that the question of relief in the watch room was a source of stress. I note that Dr Gertler did have the benefit of Mr Freeth's statement and Dr Bisht's report, with which he agreed.

125. The submissions of the respondent sought to address these matters. In assessing the issue of whether the actions of the respondent were "reasonable" with respect to each of the areas, I have had regard to the decision in *Irwin v Director General of Education*[4] (*Irwin*) where Geraghty CCJ said:

> "… The question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness."

The watch officer's chair.

126. The respondent submitted that "their actions with respect to their handling of the worker's complaint about the damaged chair and inappropriate chair in the watch room was reasonable action in respect of provision of employment benefits". Counsel for the respondent noted that Mr Freeth worked two 10 hour day shifts on consecutive days followed by two 14 hour shifts at night. The evidence establishes that facilities were provided for Mr Freeth to sleep during part of the night shift.

127. Counsel for the applicant disputed that the provision of a chair constituted "employment benefits" but I do not think it is necessary to determine that question, given that I do not accept that the actions of the respondent as appearing from the evidence, were reasonable.

128. Mr Freeth in his statement complained that he was required to spend considerable time seated in a chair and that an appropriate chair was necessary. He said that when a chair was broken it was replaced with a "light duty chair not appropriate or suitable for the job". He said that he was told by "the management" that if he could not use that chair then he would need to be medically assessed to see if he was suitable for the job. At one point he was accused by his manager of deliberately breaking the chair.

129. Those statements are not contradicted by any evidence and I accept the statement of the applicant in this regard.

130. The negative attitude which Mr Freeth asserts with regard to the provision of a suitable chair is to a certain extent corroborated by the email in evidence from Bryan Murphy who, in response to Mr Freeth's email, referred to above, said "have already been warned by S/O [scil Station Officer] Kinnear this morning not to make noise in regards to chair. How is that eh".

131. There is no further evidence of any action by or on behalf of the respondent with respect to the complaint regarding the provision of a suitable chair in the watch room for the operator.

132. I accept that this was a matter that caused stress to the applicant and which formed part of the incidents that gave rise to his psychological injury.

[4] NSWCC 14068/97.

133. The only evidence of action by or on behalf of the respondent is that the respondent regarded the problem as being whether Mr Freeth was suitable to the job rather than whether the chair was suitable. Neither that reaction nor the reaction of SO Kinnear was reasonable in the circumstances, given that Mr Freeth was required to occupy the chair while performing his duties which on many occasions involved no activity other than being present to monitor the alarm system for long periods. The idea that it was Mr Freeth who may be unsuitable rather than the chair was not a reasonable, balancing of the requirements of the respondent in the circumstances.

134. The evidence did not establish why the respondent felt that it was the suitability of the operator rather than suitability of the chair that needed to be assessed.

Toilet and lunch breaks.

135. The respondent submitted that "their actions with respect to the requirement that the watch room not be left unattended for toilet or lunch breaks was reasonable action with respect to performance appraisal/discipline."

136. As noted above, Mr Freeth detailed the complexity and importance of the work that he performed. I accept it was reasonable in the circumstances for the respondent to require that the watch room be not left unattended.

137. The question of whether actions by the employer constitute "performance appraisal" were discussed by Geraghty CCJ in *Irwin* where His Honour said that performance appraisal should be "formal, somewhat like an examination or test rather than extended and continuing assessment". That decision was followed by Nelson CCJ in *Bottle Wieland Consumables Pty Ltd*[5] where His Honour described performance appraisal as a "process".

138. Counsel for the respondent submitted that the actions of the respondent in this regard also constituted actions with respect to "discipline". In *Northern NSW Local Health Network v Heggie*[6] (*Heggie*), Sackville AJA in considering section 11A with respect to "discipline" said at [52]:

> "A broad view has been taken of the expression 'action with respect to discipline'. In *Department of Education and Training v Sinclair*, Spigelman CJ observed (at [35]) that the formulation in s 11A 'extends to the entire process involved in ... "discipline" including the course of an investigation'. His Honour also noted (at [96]) that actions with respect to discipline usually involve a series of steps which cumulatively can have psychological effects:
>
> > 'More often than not it will not be possible to isolate the effect of a single step. In such a context the "whole or predominant cause" is the entirety of the conduct with respect to ... discipline.'"

and at [59]:

> "The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:
>
> (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
>
> (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.

[5] [1999] NSWCC 32; (1999) 19 NSWCCR 135.
[6] [2013] NSWCA 255.

(iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.

(iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.

(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

(vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact."

139. I accept that consideration of these elements of section 11A(1) requires examination of the process or processes adopted by the respondent with respect to the applicant.

140. Counsel for the respondent noted the evidence of Mr Freeth's fellow workers as to the number of toilet breaks taken by Mr Freeth in the course of a shift. These are estimated at 5 to 10 times per shift and sometimes 15.

141. That suggestion is disputed by Mr Freeth.[7] Mr Freeth estimated that when he was having problems the previous year with kidney stones and related surgery that he would have required to take a toilet break between 8 to 10 times, but normally he would require substantially fewer breaks.

142. The applicant's evidence with regard to the actions of the respondent in this regard were that when Mr Freeth required a break to go to the toilet, he would request another member of the team to relieve him by voicing a request over the public address system. He would then conduct a hand over before leaving the room. Presumably a similar handover would be conducted when he returned. These handovers were logged.

143. The log would provide convincing evidence of the number of breaks taken but the log was not in evidence. Nevertheless, I accept that Mr Freeth would customarily take a larger number of toilet breaks than might be thought usual and this was remarked upon by other members of his team.

144. The action taken by the respondent with respect to toilet breaks is difficult to elucidate from the evidence. It appears that an informal arrangement was in place whereby the applicant would call for assistance when he required a toilet break and a member of the crew would respond.

[7] ARD p 13 (par 90(c)(i).

145. Mr Freeth's evidence establishes that he was made to feel that he was imposing on his fellow workers when he requested a break and that they had a negative attitude towards him as a result.

146. The statements of LFF Gilbert and the other co-workers supports a perception that Mr Freeth took an abnormally large number of breaks and that he abused this right. I am satisfied that Mr Freeth did receive negative comments as detailed in his statement and perceived that there was a negative attitude towards him as a worker who was slacking off by taking unnecessary breaks from the watch room.

147. The statements of SO Peacock and LFF Gilbert establish that there had been a perception for some time that Mr Freeth was taking an abnormally large number of toilet breaks but it does not appear that any procedure was put in place to deal with this problem. Mr Freeth said that one point he was required to produce a roster but this was never enforced

148. No formal system for Mr Freeth's replacement was established so as to eliminate the need for him to request assistance over the public address system and the question of replacement was left to the goodwill of the other members of the crew.

149. No attempt was made to performance manage Mr Freeth with regard to this issue. No complaint appears to have been brought against him and no disciplinary proceedings instituted.

150. Counsel for the respondent submitted that the term "discipline" should be construed broadly and in accordance with the interpretation of that term by Neilson J in *Kushwaha v Queanbeyan City Council*[8] as "learning by instruction, and the maintenance of that learning by training, exercise or repetition; the narrow meaning of punishment or chastisement as secondary to this broader meaning."

151. Counsel for the applicant submitted that this was now too broad a definition, noting the comments of Wood DP in *Webb v State of New South Wales*[9]. In that case the Deputy President noted: "Judge Neilson, in *Soutar v The Commissioner of Police*,[36] acknowledged that in his decision in *Kushwaha*, he may have taken too broad an approach."

152. Wood DP said:

> "[141] The more recent authorities indicate that what is involved in 'discipline' stems from action taken in respect of the worker's conduct or performance in the workplace, or arising out of the worker's employment (*Dennis*). Discipline can include offering support and training to improve performance (*Soutar*). As Snell AP determined in Mascaro, communicating adverse findings as to conduct in employment, requiring and administering a mentor program intended to improve performance, and advising that the worker's mentoring program was to continue because of the worker's unsatisfactory progress are all matters that fall within the scope of 'discipline.' Of course, what was referred to by Neilson CCJ in Kushwaha as the narrow definition of discipline, chastisement, and actions implementing adverse consequences for inappropriate behaviour in the workplace will also be matters of discipline".

[8] [2002]NSWCC 25; (2002) 23NSWCCR 339.
[9] [2019] NSWWCCPD 50.

153. A consideration of the case as noted above leads to the conclusion that the concept of "performance appraisal" and "discipline" involve the identification of some form of process directed towards modification of the worker's actions in the workplace. There is no evidence of any such process in the present case.

154. In effect the respondent noted that there was a problem with Mr Freeth taking an abnormally large number of toilet breaks but took no steps to address the issue. The issue of relief for Mr Freeth was left to the goodwill of his fellow employees which, on the evidence, was becoming strained.

155. I accept that this was a source of stress to Mr Freeth which contributed to the onset of his psychological disorder.

156. I do not accept that the approach of the respondent, in leaving the issue of relief for toilet breaks to the goodwill of fellow members was reasonable in the circumstances. A defined roster for relief should have been in place if the constraints of employment was such that required the watch officer to perform his duties alone in the watch room and to have to call over the public address system for relief when required.

157. With respect to lunch breaks, the respondent submitted that similar considerations apply. The evidence establishes that the dayshift was 10 hours long and Mr Freeth clearly expressed his distress at being unable to take his lunch outside the watch room.

158. The statement of SO Peacock establishes that he told Mr Freeth that he was required by the EA to eat his lunch in the watch room pursuant to section 32(1)[10]. Paragraph 32.2 requires that, "subject to operational requirements, meal breaks will be taken at regular times and will be commenced within five (5) hours of commencing duty."

159. There is no clear requirement in the EA for meals to be consumed in the watch room. How the consumption of lunch while continuing to be seated in the watch room constitutes a "break" is not explained in the submissions of the respondent.

160. I accept that the word "break" should be given a meaning which effectively requires a cessation from usual activities notwithstanding that the officer may still be "on duty" at the time. I do not accept that the requirement for Mr Freeth to remain in the watch room constituted a "meal break" as required by the EA.

161. There is no evidence that the respondent put any process in place for "meal breaks to be taken at regular times". The evidence establishes that Mr Freeth was only able to take a meal break when he was able to obtain relief from a fellow worker. I am satisfied that Mr Freeth complained of this on 6 February 2019 but the grievance process which is set out in the EA was not implemented.

162. In the circumstances I do not accept that the respondent has demonstrated that its actions with respect to Mr Freeth's taking of toilet breaks and meal breaks was action with respect to performance appraisal or discipline. Nor do I accept that the actions of the respondent in this regard were reasonable.

[10] ARD p 144.

Maintenance of Level 3 pay rate.

163. The respondent submits:

> ".. Their actions with respect to giving the worker and other employees notice of the requirement to undertake further training by 1 December 2019 so as not affect their classification and paygrade under the Enterprise Agreement was reasonable action taken or proposed to be taken with respect to performance appraisal/discipline, provision of employment benefits, transfer, demotion or promotion."

164. The uncontradicted evidence was that Mr Freeth had been paid as a "level 3 watch room operator/firefighter level I"[11]. In February 2019 the Fair Work Commission approved the EA pursuant to which Mr Freeth was required to obtain further qualifications in order to maintain his Level 3 rate of pay. Those qualifications were to be obtained in accordance with a "skills enhancement program"[12]

165. Paragraph 22.2 sets out the minimum weekly wage rates payable for employees working the roster which applied to Mr Freeth. The table supplied provides that from after 1 July 2019 the applicable pay rate for a watch room Level 2 officer is $1,252.26 per week and for watch room Level 3 officer it is $1,391.40 (a difference of $139.14).

166. There is little or no evidence as to the availability or requirements of the "skills enhancement program" that was to be available to workers. That aspect was not raised by the applicant and I will assume that training was available.

167. It is clear from the email sent by SO Peacock to Mitchell Pakes on 4 November 2019 that it was unlikely that Mr Freeth would be able to successfully undertake that training[13]. That opinion is confirmed in SO Peacock's statement:

> "The claimant spoke to me about reaching Level 3 – he would need to be a qualified firefighter – such training would be exhaustive and I doubt the claimant would have the fitness to even complete such training. The difference in pay between level 2 and 3 is about $100 per week."

168. SO Peacock said that he had been informed by his manager; "as long as the claimant showed he was making reasonable attempts to address his training he would ensure the insured did not drop his pay level".

169. However, the email referred to above casts strong doubt on whether Mr Freeth would be able to undertake the training. I am satisfied that as at his return to work on 6 December 2016 Mr Freeth would have been aware that:

    (a) that the deadline for obtaining the qualifications had passed;

    (b) Mr Freeth was under financial stress[14];

    (c) the station officer had doubts as to whether Mr Freeth was physically fit to undertake the necessary training, and

    (d) Mr Freeth had been performing his role as a watch officer without those qualifications for many years and accepting additional duties in that time.

---

[11] ARD 4 (para 27).
[12] EA par 21.6 ARD p 132.
[13] Reply p 26.
[14] file note LFF Gilbert 10 January 2018 (reply p 21).

170. There is no evidence that the additional qualifications were required to perform the duties of a watch officer Level 3. The EA did not mandate a reduction in pay but simply provided a minimum weekly wage for each level.

171. The evidence does not disclose how the actions taken by the respondent with regard to determining the level at which Mr Freeth should continue to be paid for performing the same duties that he been performing for many years constituted "performance appraisal" or "discipline".

172. There is no evidence of any suggestion that Mr Freeth was to move from one position to another. The situation was that he was a Level 2 officer being paid at a Level 3 rate. This did not involve any promotion or demotion.

173. I am satisfied on the evidence that Mr Freeth was able to perform his tasks as a watch room officer without additional qualifications and had been doing so for many years while in the employ of the respondent.

174. There is no evidence of any benefit to be gained by the respondent from having Mr Freeth attain the additional qualifications required nor that the value of his work to the respondent would in any way be increased.

175. The EA did not mandate a lowering of the wage but prescribed a minimum wage. There was no impediment to the respondent continuing to pay Mr Freeth at his pre-injury rate as remuneration for the work that he performed.

176. I accept that, as at 6 December 2019 on returning from leave, Mr Freeth would have been apprehensive as to his future. I accept the extent of the loss of weekly pay that was in contemplation as being closer to the figure of $140 estimated by Mr Freeth rather than the figure of $100 suggested by SO Peacock. I accept that this was a matter of serious concern to Mr Freeth and one of which he felt anxiety because of his financial situation.

177. I accept that the stress of that uncertainty was one of the circumstances that led to the psychological injury. It is clearly referred to specifically by Dr Bisht in her report[15].

178. To the extent that the actions of the respondent with respect to this issue were actions with respect to the provision of benefits, I do not accept that the actions of the respondent were reasonable. I do not accept that the actions of the respondent with respect to this issue constituted actions with regard to performance appraisal or discipline.

Allocation of additional duties.

179. The respondent submitted that "their actions in giving the worker duties to perform was reasonable action taken with respect to performance appraisal/discipline".

180. Mr Freeth in his statement notes stress from additional duties which included "completing narratives" and contacting refuelling teams to advise changes in status in the flight tower. There is no evidence as to how often these additional duties were required.

181. SO Peacock states, and I accept, that completing narratives was not an odorous task but it was a responsible duty. On 6 December 2019 LFF Gilbert emailed SO Peacock to report that Mr Freeth had failed to record "the times I attended 'A' hanger to allow technicians to conduct works" in the occurrence book but had recorded them on a sheet of paper for later transfer. LFF Gilbert said:

> "I know during an incident or exercise this may have to be recorded elsewhere, however for routine movements the information should be recorded directly into the book alleviating the loss of recorded information."

[15] Reply p 50.

182. This email was sent at a time when, on the evidence of both SO Peacock and LFF Gilbert, the crew was extremely busy dealing with activities around the bushfires on the New South Wales South Coast. I draw the inference that the entries into the occurrence book were a matter of significance and a matter of concern to Mr Freeth.

183. I accept, as uncontradicted, Mr Freeth's concerns on the day of the ADF exercise when he was told by the officer at HMAS Creswell to ignore the protocols set out in the emergency plan leading to him being required subsequently to have to spend a full shift entering in the occurrence book[16].

184. While it is not unreasonable for the respondent to allocate additional duties to Mr Freeth, it does appear questionable that he was then to be paid less while performing this additional work.

185. Adopting what I have set out above with regard to the type of actions that constitute "performance appraisal" and "discipline" I could not be satisfied that the actions in allocating these additional duties constituted either. No process appears to have been involved in the action of allocating additional duties and this could not reasonably be construed as "performance appraisal" or "discipline".

Leave request

186. In his statement Mr Freeth said that "Due to mistakes by the company some of us are not accruing the correct number of hours to cover our 28 day leave blocks." In his email to Mitchell Pakes on 4 November 2019 Mr Freeth detailed the error which he believed had occurred.

187. The respondent submitted that "their actions in responding to the worker's leave request was reasonable action taken with respect to provision of employment benefits." I accept that, for the purposes of this decision, the allocation of annual leave constituted "provision of employment benefits".

188. It is not possible to assess the weight to be given to the respondent's submission as no evidence, other than that of the applicant, was adduced. In the absence of any evidence as to what occurred with respect to Mr Freeth's leave it is impossible to decide whether the actions of the respondent were reasonable in this regard.

189. I could not be satisfied on the evidence that this was a matter that weighed heavily on Mr Freeth's mind at the time of his injury. It was not reported to Dr Bisht as a concern. Mr Freeth in his statement says that he returned to work on 6 December 2019 in a positive frame of mind and it is unclear whether he had been given 28 days leave or less.

190. In those circumstances I could not be satisfied that any problem with the allocation of annual leave played a part in the onset of a psychological injury. The evidence does not support a finding that whatever action was taken was "reasonable".

Actions on 6 and 7 December 2019.

191. The respondent submitted that:

> "their action on 6 – 7 December 2019 with respect to requesting that the worker have lunch in the watch room or wait until later in the day to have lunch in the lunch room, and discussions surrounding the practice of breaks going forward was reasonable action taken or proposed to be taken with respect to performance appraisal/discipline and provision of employment benefits"..

[16] ARD p 7 para 41(j).

192. Counsel for the respondent submitted that the actions of SO Peacock and LFF Gilbert on 6 and 7 December 2019 were reasonable in the circumstances. I do not accept that those actions constituted actions with respect to "performance appraisal" or "discipline" for the reasons set out above. The actions of these two officers were taken in conformity with a decision that appears to been made while Mr Freeth was on leave. The process involved and the factors which were weighed by the respondent in coming to that decision were not the subject of any evidence apart from the fact that the replacement watch officer had accepted the practice without complaint.

193. SO Peacock when speaking to Mr Freeth on 7 December 2019 recognised that his isolation in the watch room might well be a stressful matter. He said:

> "because I did not know why he was stressed I spoke about something that I thought could be causing him to stress and spoke to him about how the recent covering of the fire pole may be causing him to feel isolated in the comms room – as when the hole was present this was a means of communication between him and others. The claimant then said that this could be a contributing factor."[17]

194. The actions of the respondent on 6 December 2019 failed to take into account the obvious distress of Mr Freeth over his isolation in the watch room, his long hours with frequent periods of inactivity and the arrangements for his relief when he required a toilet break.

195. It is evident from the statements of those two officers that neither understood why Mr Freeth would be complaining about these matters.

196. The EA in evidence provided a mechanism for resolution of disputes and grievances[18] but neither officer suggested implementation of the dispute resolution provisions to Mr Freeth.

197. The problem of toilet breaks had been ongoing for some time and no effective plan had been put in place by the respondent to mitigate the problems that were inherent in Mr Freeth having to call out for assistance over the public address system when he needed relief.

198. Having regard to the knowledge possessed by SO Peacock as to the isolation and demands of operating the watch room and having regard to the obvious distress of Mr Freeth on 6 December 2019, the situation was one that called for a more reasoned approach than for the officers to simply inform Mr Freeth that he was in future to have his lunch in the watch room and continue to have to utilise the public address system to announce his need to go to the toilet.

199. As noted above, the decision to require Mr Freeth to have his lunch in the watch room in the course of a 10 hour shift could not be regarded as reasonable in the circumstances, particularly having regard to the isolation of that room with the removal of the pole and access hole. That arrangement did not provide Mr Freeth with a "meal break" but rather directed him to continue to perform his normal activities while he ate his lunch.

200. The extent that the actions of the respondent in this regard constituted provision of employment benefits, those actions were not reasonable.

[17] Reply p 14 (par 38).

[18] AE par 12 ARD p125.

Other matters.

201. Mr Freeth addressed a number of other factors in his statement which he said he found stressful. These included the unreliable system and equipment, inconsistency as to directions from different Station Officers and Leading Firefighters, lack of progress with upgrading the watch room and its layout with the inability to readily access maps and the use of cheap speakers which made comprehension of the message difficult.

202. It is unnecessary to decide whether these formed part of the causal matrix leading to the onset of the psychological injury on 6 December 2019 because of the conclusion that I have reached with respect to the reasonableness of the actions of the respondent in regard to the other issues.

Conclusion

203. Dr Bisht noted the complexity of the work performed by Mr Freeth, his isolation in the watch room, the quality of the seating, the pace of work, at times slow and at other times hectic, the threat of reduction in wages, the additional tasks in the role of watch officer and the requirement to eat lunch in the watch room as stressors reported by Mr Freeth.

204. Based on that history Dr Bisht assessed that employment was "a substantial and primary contributing factor to the psychiatric condition".

205. Dr Gertler who had the benefit of the applicant's statement, reached a similar conclusion.

206. I do not accept the categorisation by Dr Bisht of these actions as action taken by the respondent "with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers." I think the appropriate approach is to examine the history provided by the respective independent medical experts and then reach conclusion whether that history satisfies the criteria in section 11A(1).

207. I am not satisfied that there is an appropriate correspondence between the history obtained by Dr Bisht and Dr Gertler with the categories identified by the respondent from within section 11A(1) as being the whole or substantial cause of Mr Freeth's psychiatric injury.

208. To the extent where there is correspondence between the actions of the respondent and the nominated categories in section 11A(1), for the reasons set out above, I am not satisfied that the actions of the respondent were reasonable.

209. Accordingly the defence pursuant to section 11A(1) fails. There is no dispute as to Mr Freeth's claim of total incapacity for work and I am satisfied that he is entitled to receive weekly payments from and after 7 December 2019 in accordance with sections 36 and 37 of the 1987 Act.

210. The agreed pre-injury average weekly earnings are agreed at $1,613 per week. Accordingly Mr Freeth is entitled to be paid weekly payments at the rate of $1,532.35 per week for the first entitlement period and the sum of $1,290.40 per week in the second entitlement period to date and continuing during incapacity.

211. The respondent is to have credit for any payment made to Mr Freeth in respect of his attendance on 7 December 2019.