WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1779/20**
Applicant: **Michael Elmiski**
Respondent: **DNATA Airport Services Pty Limited**
Date of Determination: **21 July 2020**
Citation: **[2020] NSWWCC 250**

The Commission determines:

1. The respondent is to pay the applicant weekly compensation of:

    (a) $1,594.48 from 26 June 2019 to 25 September 2019, and
    (b) $1,342.72 from 26 September 2019 to date and continuing

2. The respondent is to pay the applicant's s 60 expenses.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Michael Elmiski was employed by Dnata Airport Services Pty Limited (Dnata) as a baggage handler and supervisor. He suffered a psychological injury on 25 June 2019 as a result of dismissal from his employment. He claims weekly compensation and medical expenses.

2. There is no dispute that the injury arose as a result of the dismissal and no dispute that Mr Elmiski has had no current work capacity since the date of his dismissal.

3. The only issue to be determined in the proceedings is whether the injury results from reasonable action with respect to dismissal, within the meaning of s 11A of the *Workers Compensation Act 1987*.

PROCEDURE BEFORE THE COMMISSION

4. 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.

5. The matter was listed for conciliation conference and arbitration hearing by telephone on 27 May 2020. Mr Tanner of counsel appeared for Mr Elmiski and Mr Combe of counsel appeared for Dnata.

6. At the hearing, the Application to Resolve a Dispute (ARD)was amended to plead the date of injury as 25 June 2019 and to claim weekly compensation from 26 June 2019. It was agreed that Mr Elmiski's pre-injury average weekly earnings were $1,594.48.

7. Following the arbitration hearing, I sought written submissions as to how I should view the statements in the Reply from Ms Karen Edwards and Mr Samuel Maybury of Dnata because I was not taken to those statements by counsel during oral submissions. Submissions were received in accordance with that direction.

EVIDENCE

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

    (a) ARD and supporting documents;
    (b) Reply;
    (c) Mr Elmiski's Application to Admit Late Documents dated 12 May 2020, and
    (d) Dnata's Application to Admit Late Documents dated 20 May 2020.

9. There was no oral evidence.

10. Mr Elmiski made a statement dated 23 September 2019 to Dnata's insurer's investigator and three statements for his solicitors dated 20 March 2020 27 March 2020 and 8 May 2020. Ms Edwards, Dnata's Head of Human Resources, made statements dated 30 September 2019 and 22 April 2020 and Mr Maybury whose role is described as HR Business Partner, made statements dated 6 November 2019 and 8 April 2020. I have dealt with the evidence in chronological order.

11. Because the only issue is whether the conduct of Dnata was reasonable conduct with respect to dismissal, it is unnecessary to review the medical evidence. The diagnoses are similar. Dr R Rastogi, qualified by Mr Elmiski's solicitors, diagnosed adjustment disorder with depressed and anxious mood and Dr S Dayalan, qualified for Dnata, diagnosed adjustment disorder with mixed depression and anxiety symptoms.

Mr Elmiski's employment

12. In his first statement, Mr Elmiski said that he worked a rotating roster starting at 5.30 am or 6.00 am for seven days then he had four days off. He then worked seven night shifts and had three days off. He worked a rostered week of 40 hours but did a lot of overtime. He said that he did not receive any training when he became a supervisor. He said:

> "As a supervisor I did not have to load bags, but due to always being under staffed I was always loading and offloading multiple flights. There were times where I would have to load 2000-2500 bags on a shift due to being so short on staff."

13. As a supervisor, Mr Elmiski was required to allocate shifts and overtime when it was available. He said:

> "With respect to the way I allocated shifts and overtime hours, there would be people that would constantly say no to overtime hours as they simply could not work those hours. There were other people that showed interest in always working overtime. Clearly, these people who showed interest in working extra hours and who needed the money would be the ones working these overtime hours. The only reason that other people would not be working overtime hours or extra hours is because they simply declined to work these hours or would not show any interest.
>
> With respect to allocating myself extra shifts that were apparently below me, I would simply pick up the remaining shifts after they had been allocated and if other teams were struggling with their duties I would happily assist them in completing and assisting with their duties."

14. Mr Elmiski said that he had not received any warnings in the five and a half years he worked for Dnata.

15. Mr Elmiski said:

> "I can only recall one incident where I was pulled into Craig Pendagast (nickname Pendo) who was in charge of the entire rostering. He called me and some other supervisors into his office and simply just stated that we needed to ensure that there is fair rostering. There were no specific allegations made against me. I reject that I had the habit of picking the higher rate working hours."

16. In respect of that incident, Mr Maybury said in his statement dated 6 November 2019:

> "In relation to the claimant's workplace performance, there was no real issues except the allocation of hours. Michael had the habit of picking the higher rate working hours, he would work up to 12 hours a day instead of giving hours to other staff. This was area of performance improvement which Michael was aware of."

17. In his second statement, Mr Maybury said:

> "The claimant did reject that he had a habit of picking up extra hours and he indicated that this was never raised with him however that is incorrect. In late 2018, we did have a review with staff performing too many extra hours and the incorrect hours being allocated. We had this conversation with the claimant and another supervisor about picking up too many shifts. We laid down the foundation that you cannot pick up a shift one level below and you cannot pick up more than one shift per week. Along with the discussion with Craig Pendergast there was an additional conversation with the Ramp Manager Keith Filander."

18. Ms Edwards said that Mr Elmiski had been

> "challenged on a number of occasions by management in relation to what appeared to be favouritism with roster allocations in particular the distribution of overtime and extra shifts to a set few individuals. The claimant also allocated himself excessive amounts of overtime and picked up shifts below his level which could hand should have been more fairly allocated to other staff."

Events leading up to 6 March 2019

19. Unistoni (or Uinistoni or Winston) Tolutau, a baggage handler employed by Dnata, was arrested on 6 March 2019 and charged with offences relating to the importation of 32 kg of methamphetamine on an inbound flight. Mr Tolutau had swapped one of his shifts to be at work on that day. Mr Elmiski was his supervisor.

20. Mr Elmiski said that in March 2019, a team leader under his supervision was arrested. He said:

> "The charge was for the importation of illegal substances. He was a team leader, I was his supervisor on the shift that day that the arrested occurred. He was an experienced person and staff member, so I would not monitor every staff every time of the day. If something goes wrong, then the team leader is supposed to step in, I would only assist if I was called into to help."

21. Shortly afterwards, Mr Elmiski was asked to take leave on specific dates because he had too many leave hours owing.

22. In his second statement dated 20 March 2020, Mr Elmiski said that Mr Tolutau asked while they were working if there were any shifts for 6 March 2019. Mr Elmiski said there was nothing available in the system but that Mr Tolutau should keep asking or potentially swap with a colleague. After that another employee (Constantinos Bletsas) came to Mr Elmiski looking to give away his shift and Mr Tolutau ended up picking up one of his shifts.

23. In his third statement dated 27 March 2020, Mr Elmiski said:

> "The allegation that I reached out to Constantinos to arrange a shift swap is incorrect. He approached me and was wanting to give some of his shifts away. This occurred approximately a week prior to the 5th of March 2019. This has been covered in my previous statements. The events that occurred was that Unistoni initially asked me to pick up extra shifts. I said there was nothing available at this stage. thereafter, Constantinos informed me that he was looking to give some shifts away. Thereafter, Unistoni approached me for a second time asking if there were any shifts. As I had recently been informed from Constantinos that he was looking to upload some shifts, I said that it may be worthwhile to try and arrange a shift swap or something of that nature with Constantinos."

24. Mr Maybury said:

> "… the claimant was the supervisor for the staff member on the date of the incident and he was the supervisor that allocated the shifts for that staff member. We know that according to the staff members statement that the claimant pulled this guy up to say that I have someone to cover your shift so don't worry about coming in. The claimant went out of his way to find the shifts for the staff member by arranging the shift swap on behalf of the arrested employee.
>
> We have the shift swap dated the 3 March 2019, the reason this shift swap was more suspicious was if two employees want to swap shifts they fill out the forms and bring them to the manager and he checks the roster to make sure they have the right skill set, if it is possible then it is approved and the work sheet is updated. In this case the shift swap form for the employee who was arrested and another employee was dated 1 March 2019 but it wasn't actually processed until Tuesday, March 2019 when the claimant was on shift. That rings true because we know that Michael called the other employee, not the one that was arrested the other one and said do not worry about coming in I have someone to cover your shift. We have screen graphs of the roster not changing until the Tuesday, the AFP asked that we take screen grabs of our work sheets each day AM, midday and PM. So we could actually track the changes from Tuesday PM when the claimant was in and he has updated the spreadsheet for the Wednesday, 6 March. The shift form sheet was back dated from the 1 March 2019."

25. The shift swap form appears in the file and does not suggest on its face that it was backdated. The screen grabs referred to in the above paragraph do not appear in the file nor is there any statement from Mr Bletsas.

Meeting on 11 April 2019

26. On 9 April 2019, Mr Maybury wrote to Mr Elmiski and said:

> "We advised [sic] that as a result the recent arrest of a Dnata employee, an external formal investigation is being conducted In accordance with our procedures.
>
> You have been named as a potential witness to some of the matters raised and we will require you to undertake an Interview with Karen Edwards Head of Human Resources and Agents from the AFP."

27. The letter was addressed to Mr Elmiski at work. It told him that the interview was in the city on 11 April 2019 and invited him to bring a support person. It reminded him that the details of the matter were confidential and he was asked not to discuss them with colleagues.

Mr Elmiski

28. Mr Elmiski did not describe the letter dated 9 April 2019 in his first three statements.

29. Mr Elmiski said that he was asked to meet Mr Maybury in the city. Mr Elmiski said he thought he was there to meet "HR to discuss what happened on the day with Winston." When he arrived, Mr Maybury suggested they have coffee. When they went to Dnata's office, two detectives from the Australian Federal Police (AFP) were present. They suggested he seek legal advice before being interviewed. Mr Maybury assisted Mr Elmiski to obtain legal advice by telephone. After receiving that advice, Mr Elmiski informed the AFP officers that he did not wish to continue the interview and they did not press him to.

30. Mr Elmiski said in his second statement dated 20 March 2020 that there was no mention of the AFP when the meeting was arranged. He said that he felt traumatised by the way that Dnata handled the meeting.

31. In his fourth last statement, Mr Elmiski said that he was never told that he was going to be conferring with the AFP but said that the letter did indicate officers may be present. Before he entered the room he was not told that the AFP representatives were there. He said that when he asked Mr Maybury why he was called in to the office, Mr Maybury told him that he did not know.

Ms Edwards

32. Ms Edwards said that Mr Elmiski's duties included:

> "• Managed staff allocation of duties;
> • Manage calls on absences;
> • Manage the rostering of days off, leave and overtime.
> • Ensuring OHS policies requirements are adhered to including Fatigue Management Policy."

33. She said:

> "On the day of the incident the claimant was involved in changing the roster for the implicated staff member and we noted that he also altered the roster for the staff member on several previous occasions.
>
> The baggage handling section has two parts, the basement and 'airside'. Prior to the incident in March 2019 the claimant had also rostered the staff member for three shifts in the basement which was not the area that the staff member was allocated to work in, he was on a training program to work 'airside'.
>
> I am also aware that the claimant was friends with the staff member."

34. Ms Edwards said that Dnata was being "instructed by the AFP" in relation to a criminal investigation. She said that Mr Elmiski was the supervisor of the staff member who was arrested and that he was "involved in changing the roster for the implicated staff member and we noted that he also altered the roster for the staff member on several previous occasions." She said that she was aware that Mr Elmiski was friends with the staff member. She said:

> "As a result of this incident in March 2019 the AFP conducted an investigation which is ongoing. The claimant was provided a letter on 9 April 2019 advising that he was to meet with the AFP and myself on 11 April 2019. The claimant was advised that the AFP would be attending and that he could have a support person present."

35. In her second statement dated 22 April 2020, Ms Edwards confirmed her comment that Mr Elmiski had been challenged about favouritism in roster allocations, allocating himself excessive overtime and picking up shifts below his level and that those issues were raised in the investigation. She said that the meeting on 11 April was not in relation to the disciplinary investigation which commenced after the inquiries by the AFP.

Mr Maybury

36. Mr Maybury said in his statement dated 6 November 2019 that his first interaction with Mr Elmiski was after 6 March 2019. He said that Mr Elmiski was one of three supervisors, who were required to make sure that there was enough staff to cover requirements. He said, without identifying the source that Mr Elmiski had, until a complaint was made in mid 2018, picked up shifts when staff called in sick. He said that Mr Elmiski did not manage his time well. He said:

> "In relation to the claimant's workplace performance there was no real issues except the allocation of hours. Michael had the habit of picking the higher rate working hours, he would work up to 12 hours a day instead of giving hours to other staff. This was area of performance improvement which Michael was aware of.
>
> In relation to the incident on 6 March 2019, I am aware that the level of contact between the claimant and the other employee was more regular. I did ask if they were friends outside of work and he said no but has mentioned that they used to text a lot.
>
> ... We were waiting for the completion of the investigation. We wanted to look if we had gaps in our policies and procedures and figure out what they were. The AFP made the arrest but they were still asking questions. We did not want to cross over in the police investigation. We started our investigation after the AFP met with Michael. After that meeting the AFP said we could move forward with our business processes. There was a breach of processes and there was some very odd behaviour.
>
> The claimant was the supervisor for this staff member on the day and lead up to the incident and he was also the staff member that allocated the individual the shifts. There was changing of shifts and that person was not rostered to work that morning and through this shift being allocated by Michael the shift given was in breach of the fatigue policy and a breach in the process, he would have worked over 16 hours that day. There was also some unusual behaviour and changes made by Michael as the supervisor with this staff member."

37. Mr Maybury said that he gave Mr Elmiski the letter dated 9 April and said that the AFP wanted to meet a series of people. He said that Mr Elmiski was reluctant to attend the meeting. He met Mr Elmiski for coffee before the meeting and said that Mr Elmiski looked pale and shaken.

38. Mr Maybury provided a second statement dated 8 April 2020. He said, referring to the letter asking Mr Elmiski to attend the meeting:

> "These are crucial documents because in neither of the responses does the claimant ever refer to or talk about being surprised or not knowing that he was going to be talking to the AFP. He did not comment on not understanding or knowing what was going on during this process. I believe this is key information to show that after the fact the claimant has raised no concerns about this or even raised this with his union representative.
>
> The emailed exchange between myself and the claimant shows there was no animosity or tension between us during this time. There was also zero emotion in the emails from a negative stand point additionally no mention of the shock and concern of meeting with the AFP."

39. He said:

> "I have also provided the telephone records which I have been able to obtain from Optus . The claimant made in his statement that he had no idea why he was attending the York Street office to meet with the AFP. If this was the case then why on the morning of 11 April 2019, we were on the telephone for 31 minutes and 50 seconds . How can you be on the telephone with someone for 31 minutes and not explain what was going on, I spoke to the Claimant about what the meeting was in relation to, the Claimant was fully aware that he was meeting with the AFP in relation to the events of March 6th 2019."

Letter dated 2 May 2019 and Mr Elmiski's response

40. Mr Elmiski said that on 3 May 2019, his last day at work before leave, Mr Maybury gave him a letter and told Mr Elmiski he should open it at home. He opened the letter on Saturday 4 May 2019 and discovered that he was required to answer a list of questions and respond by the following day, a Sunday.

41. On 2 May 2019, Ms Edwards wrote to Mr Elmiski, referring to the "Fact-Finding Investigation" conducted by herself and Mr Maybury as a result of the AFP investigation. She said:

> "As a result of this investigation Dnata Airport Services Pty. Limited (Dnata) has determined that there has been a gross departure from process and consider these extremely serious. The purpose of this letter is to provide you with the allegations arising out of the investigation, whereby you will be required to provide your formal written response.
>
> **Allegations:**
> • You made last-minute changes to the roster with no clear operational requirement in the lead up to Wednesday 6th March 2019, by awarding Unistoni Tolutau with three (3) shifts 4th March, 5th March & 6th March all commencing at 0300
> • On Tuesday 5111 March 2019 you reached out to Constantinos Bletsas to arrange a shift swap in behalf of Unistoni Tolutau
> • Despite these roster changes Unistoni Toutau [sic] did not actually work on 4th nor the 5th of March 2019
> • You arranged the shift swap for Unistoni Tolutau on Wednesday 6th March 2019 even though Unistoni Tolutau was rostered on for a training shift on the RAMP commencing at 1400, meaning he would have been working 16 hours in one day.
> • Additionally, on the 11th February 2019 you initiated a change and cancelled a shift for Brendon Oloapu even though he had reported for duty via phone 'That he has been unwell and Is running late but will be there.'·
>
> **Questions**
> • How did Unistoni Tolutau communicate to you regarding shift pickups during the period of 4th March 2019 – 6th March 2019?
> • What was the reason that Unistoni Tolutau gave you regarding the necessity for him to pick up three (3) consecutive 0300 shifts?
> • Why did Unistoni Tolutau then not work on 4th and 5th March? How were these absences managed? How were the shifts then covered?
> • Why did you initiate and arrange the shift swap between Constantinos Bletsas and Unistoni Tolutau for Wednesday 6th March 2019?
> • Why did you not follow the direction from Keith Filander and Albert Bollard regarding maximum twelve (12) hours per day?
> • For what reason did you approve a shift swap for Unistoni Tolutau even though he was rostered for a training shift on Wednesday 6th March 2019 that was clearly marked on the roster?
> • What time did Brendon Oloapu call to say he was late for his shift?
> • Why did you cancel Brendon Oloapu Shift and award this to Unistoni Tolutau and when did this occur?
> • What time did you call Unistoni Tolutau to cover the shift for Brendon Oloapu?
>
> Dnata Airport Services Pty Limited is now considering all of its options due to the severity of the Investigation. Prior to any decision being made, we will provide you with the opportunity to submit your written response to the above matters."

42. Mr Elmiski was asked to provide a written response by email by 6.00 pm on Sunday 5 May. He provided the response just before 8.00 pm on that day. He said that, based on his experience as a baggage supervisor for three and a half years, additional shifts were generally offered a week before. The availability was communicated by staff approaching supervisors or by the supervisors informing all staff. Sometimes staff approached supervisors during a shift and asked if additional hours were available. Mr Elmiski said that he didn't recall giving Mr Tolutau three consecutive 3.00 am starts and that usually only two shifts were offered at a time so that work was evenly shared. He said:

> "As supervisors we deal with many shift swaps and covering available shifts daily, therefore I do not recall what happened on the 4th and 5th March.
>
> In regards to the shift giveaway between Constantinos Bletsas and Unistoni Tolutau, about a week or so beforehand Constantinos Bletsas approached me and said he needed to get rid of his Wednesday 0300 shift due to working at another job the night before and will not be finishing till around midnight. Constantinos Bletsas stated that he tried asking around but had no luck. I informed him I'll keep a note of it on the supervisors desk and I will find someone looking for a shift.
>
> Unistoni Tolutau approached me stating that he was still eligible to pick up shifts in the basement even though he was rostered ramp training. I informed Unistoni Tolutau that there were no available shifts at the time though Constantinos Bletsas was looking to give away his shift on Wednesday, 6th March.
>
> I then informed Unistoni Tolutau that if he was going to pick up Constantinos Bletsas shift he would require to finish no later than 1000 due to mandatory requirements of having a minimum four hour gap between shifts, as he had a shift starting at 1400 on the ramp. Also, to complete a shift swap/give away form signed by both individuals and to place it on the office desk in which they did."

43. Mr Elmiski said that there was a lot of confusion about the policy with respect to maximum hours and that he believed that an employee was allowed to work a maximum of 12 hours before requiring a four hour "gap". He said:

> "In regards to the matter of Brendon Oloapu, higher management are well aware of the situation that occurred and have emails from both Brendon Oloapu and the agency he worked for and that I followed protocol and procedures.
>
> As all this has happened quite some time ago, above statement is everything I can recall in regards to the questions asked in the letter."

Ms Edwards and Mr Maybury

44. Ms Edwards merely said in her first statement that "[t]he claimant was given an opportunity to respond to the letter."

45. Mr Elmiski said:

> "I was on three weeks annual leave, two weeks after my mum got really sick. I asked if I could extend my leave because my mum was so sick. I sent this email the second week of my annual leave, I only received a response on the last day of my leave. I was told that I could have the leave extended if I would attend a meeting."

46. Mr Maybury sent an email dated 9 May 2019 arranging the meeting:

> "Hi Michael,
>
> Thank you for your response. Should any further information come to mind I please send through a follow up email.
>
> As mentioned in the letter we would like to meet for an interview regarding the events in February and March. I am conscious that you are on leave at the moment. Are you available to meet next Friday 17th May 2019 @ 11:30? If not we can arrange to meet on your return from leave.
>
> Let us know,
> Samuel"

47. Mr Maybury said:

> "We were waiting for the completion of the investigation. We wanted to look if we had gaps in our policies and procedures and figure out what they were. The AFP made the arrest but they were still asking questions. We did not want to cross over in the police investigation. We started our investigation after the AFP met with Michael. After that meeting the AFP said we could move forward with our business processes. There was a breach of processes and there was some very odd behaviour."

48. He said:

> "Prior to giving the letter of allegation in relation to a breach of process to the claimant, we would have had a meeting with the claimant to go through the letter. Our process is to always give a letter's in person with a full explanation. At this point it was just allegations, so the claimant would have still been working. He did have some leave booked. He was going on annual leave from Monday, 6 May 2019.
>
> We gave him the letter and had a meeting to discuss. The meeting was pushed back because Michael was unwell.
>
> Michael responded on the 5 May 2019, to the letter of allegations. I sent him an email thanking him for his response. I advised that we. needed to meet with him to discuss the allegations."

49. With respect to the subsequent meeting, Mr Maybury said:

> "We had a meeting on 17 May 2019, we went through his response. We asked further questions in relation to his response. I asked him if he needed more time and we just needed to know why this happened. His actions were the catalyst for the events on 6 March 2019. I wanted to ensure that Michael felt safe in the meeting. He never said this is unfair or I do not understand.
>
> He always had a support person and was given a minimum of 24 hours notice. Also all staff are given a letter first prior to any meeting."

50. Mr Elmiski described the meeting:

> "I attended a meeting on 17 May 2019, I was in the meeting for about an hour. I felt that they were accusing me of being involved, I said why are you doing this to me. They said we are not accusing you of anything. I said why am I here and why I are you doing this to me. Karen said we told you we were going to do an internal investigation. I was asked alot [sic] questions like did I know the guy that was arrested outside of work and other stuff. I said ask me whatever you want, I said, do you want to check my bank statements, my house whatever you want you can do it, I have nothing to hide.
>
> Samuel said calm down, we are not accusing you of anything. I started shaking my head and he said what is wrong. I said I am disappointed and he said are you disappointed in myself. I said no I am disappointed because of what you guys are doing to me. Karen said this is like a cheese block, and we are trying to fill in all the gaps. I said this is unbelievable, I said I am obviously just a number. Karen took offence to this. I said if I was involved in this do you think I would be working 70 hours per week. I said do you want to check my phone, do you want to check my bank account, do you want to check my house. I said I have nothing further to say, I said I have answered everything. It was hard to me remember shift changes for a certain day. I had the meeting and they said they would get back to me."

Letter dated 11 June 2019

51. Mr Maybury sent Mr Elmiski an email on 7 June 2019 which read:

> "In light of the ongoing investigation regarding the events that occurred in the lead up to Wednesday 6th March 2019. You are required to attend a meeting with myself and Keith Filander on Tuesday 11th May [sic] 2019 at 12:00pm (Midday). The meeting will be held in the Cargo Shed Conference room.
>
> You are not required to return to work on Monday 10th June 2019 this shift will be paid as per your roster. You are welcome to have a support person attend this meeting."

52. Mr Maybury gave a letter to Mr Elmiski at the meeting on 11 June 2019. The purpose of the letter was said to be to provide the allegations arising out of the investigation "and an opportunity to justify your actions to which Dnata Airport Services Australia allege that your actions enabled the importation of an illegal substance." The letter read:

> "On Friday 17th May 2019, you attended an interview with Karen Edwards (Head of HR) and Samuel Maybury (HR Business Partner) to discuss your response and the events that occurred in the lead up and including Wednesday, 6th March 2019. It was during this interview it was established that standard shift allocation and absence management processes were not followed and because of this breach this enabled the importation of an illegal substance.
>
> You displayed that you understand the correct absence management process on Monday 11th March 2019 when a casual employee had failed to report for on time for duty. You contacted the employee and informed him that he is not required to complete his shift. You also followed the process of reporting this incident to management as a No Show; and documented this on the end of shift report. This led to the employee's casual agreement being terminated from the Dnata. [sic]

This process was however not followed in the week leading up to Wednesday, 6th March 2019, As a result, Dnata Airport Services Australia is now issuing you with a Show Cause Letter. This is a final opportunity for you to explain and justify the actions and decisions you made in the lead up to Wednesday, 6th March 2019

1. On Monday 4th March 2019, Uinisitoni Tolutau failed to show for a 0300-1100, shift that you had allocated to him on Sunday 3rd March 2019. You failed to report this absence as a 'no show' additionally you failed to arrange any coverage for this shift [sic]
2. On Tuesday 5th March 2019, Uinisitoni Tolutau failed to show for a shift that you had allocated to him on Monday 4th March 2019. You failed to report this absence as a "no show" additionally you failed to arrange any coverage for this shift
3. On Tuesday 5th March 2019, you contacted Constantinos Bletsas to arrange a shift give away on behalf of Uinistoni Tolutau, even after he had failed to attend to previous shifts;
4. On Wednesday 6th March 2019, you allocated a 0300-1100 shift swap back dated to Friday 1st March for Uinisitoni Tolutau shift in the baggage room in direct contradiction to the daily working parameters that were instructed to you by Keith Filander. As Uinisitoni Tolutau was already clearly labelled to be performing TUG Training that afternoon . You failed to follow the correct shift allocation process or complete due diligence.

In view of the above, it is apparent that you have breached standard shift allocation procedure and the absence management process. As a leader within the Baggage leadership team it is your responsibility to lead by example and follow all processes. Through your neglect to follow the correct SOP's this has enabled the importation of an illegal substance, not only does this cause a great concern for the public but also a significant damage to the Dnata Airport Services Australia brand and reputation.

Dnata Airport Services Pty Limited is now considering all of its options due to the severity of the investigation including termination of your employment. Prior to any decision being made, we will provide you with the opportunity to submit your written response to the above matters."

53. The minutes of the meeting record that Mr Maybury said:

> "Karen Edwards, the AFP and I have reviewed our processes and come up with a number of questions such as; how we (Dnata) have allowed this to happen. We (Dnata) have noticed patterns and behaviours that we (Dnata) have been investigating. Karen and I met with you (Michael Elmiski) on May 17th and we still have some question marks. Where we are now is we are going to issue Michael with a show cause. Do you know what that is?"

54. The minutes record that Mr Maybury said that the letter was based on Dnata's investigations and findings. When Mr Elmiski asked if he hadn't answered all the questions, Mr Maybury said:

> "No, we have asked you these questions in the last meeting, but they have not been answered. There are still a few questions around why you let this happen"

55. On 12 June, Mr Elmiski prepared a response. He said:

> "As stated in the letter that I have failed to report this absence as a 'no show' Uinisitoni Tolutau shift was 0300 to 1100. My shift on Monday 4th March was 0600-1300, due to my start time I was unaware that Uinisitoni Tolutau had done a no show. At times It is difficult to supervise all staff in the basement as I am monitoring the operation to run safely and smoothly according to SOP. Ramp has 2 supervisors, and baggage has only 1 supervisor per shift, therefore I'm depending on leading hands to do their roles and communicate with me. Starting at 0600 it would have not been possible to cover the shift."

56. Mr Elmiski said that he did not recall allocating the shifts to Mr Tolutau. He said:

> "On Monday the 4th I was unaware that Uinisitoni Tolutau had done a no show as stated in point 1 of the letter. On Wednesday the 6th March 2019. I was aware that Uinisitoni Tolutau had been rostered for ramp training, but in the past if an employee was moved to ramp for training they were still eligible to pick up shifts in the bag room. In regards to the back dated part of point 4 in this letter, I have contacted Constantinos Bletsas and asked him if he remembered exactly what happened in regards to the shift give away to Uinisitoni Tolutau on Wednesday the 6th. As per Constantinos Bletsas, he signed and dated the shift swap form on his last working day before his 4 day break which was the 1st of March. The reason why I contacted Constantinos Bletsas is because this incident happened over 3 months ago."

57. Mr Elmiski described his dedication to his role and the fact that he had "never been pulled up for anything and always have had a clean record."

58. In his statement dated 27 March 2020 Mr Elmiski said:

> "'After each response to each of these letters, I was forced to go into the office by Samuel and Karen to discuss same. These were long winded meetings whereby I reiterated what I said in my very detailed responses to the allegations. I thoroughly explained myself to the best of my ability and tried to assist any investigation that was ongoing. I could not provide any more information than I did. These are detailed in my responses. This goes to more of the fact that I felt like I was being made a scapegoat for the company."

Meeting on 17 June 2019

59. Mr Elmiski said:

> "I attended the meeting on 17 June 2019 and I took Peter the union delegate. He said why did you not tell me about this before. I was asked questions, they said thanks for my time and answering the questions. Peter did most of the talking, he said listen guys you are talking about Michael. He has done so many things for the company. I just sat there, I had enough. I said to them that they had moved the whole situation, now they were accusing me of breaching an SOP, I said you knew that you had stuffed up because you could not find anything on me for what they were accusing me. Samuel said this is part of the process, he said I am sorry that you thought we are accusing you of things. He said there was a lot of changes on that day with the roster. He said why was there so many changes on that day. I said roster changes occur like that on every day. He said the pattern looked very suspicious. I said the pattern has not changed since I started in the supervisor role. Samuel said

> I do not have the time to look into this. I said you are wrecking my life and you said you do not have the time to look into it.
>
> I said it is standard that changes occur. Samuel said why did these specific changes happen. He said I cannot let you leave this room without getting a more specific answer. Samuel said we are under pressure from the AFP. Peter said what does that have to do with Michael. Samuel said we will have to put our foot down. He said it was not us, it is the police that are asking for this information. He said is there nothing else that you can give us. Peter said I think you have put enough pressure on Michael. Samuel backed off and I said I have nothing else to say. He said we will get back to you."

Dnata witnesses

60. Ms Edwards described the meeting on 17 June which she did not attend:

> "The claimant attended a meeting on 17 June 2019 with Clarice Gillies (HR Administrator), Peter Tzilliaskopoulos (Union Delegate) and Samuel Maybury (HR Business Partner) to discuss his response and the events leading up to this matter."

61. Mr Maybury said:

> "On 11 June 2019, the claimant received a show cause letter for breach of processes in the workplace and he had an opportunity to respond to that letter. During the whole process the claimant was advised every step of the way through the process. We were also very accommodating to Michael to ensure he was comfortable with the process. At the 11 June 2019 meeting we took his Asic card and he was stood down with pay. I read the letter to him to ensure that he understood the process. Once the show cause is given termination is a possible outcome and this is clear on the letter.
>
> Michael did attend the meeting on 17 June 2019 with Clarice Gillies (HR Administrator), Peter Tzilliaskopoulos (Union Delegate) and myself to discuss his response and the events leading up to this matter. We reviewed the notes taken and Michael's response and reviewed the documentation. In this meeting I asked Michael to provide something and he kept saying he could not recall, he did not recall. We spoke about the incident and his role as a supervisor, we showed that he had previously done the role properly with no issues. This was the one employee that he did not follow the process for. We told him that we were considering his termination because of the gross breach in process. At the end of the meeting, I asked if Michael if he understood the process. I said what was his thoughts and what he thought the next step should be. He advised that he was a good employee. The union representative said if he was guilty, he would have resigned rather than going through this process. A decision was not made at that meeting."

62. There is no statement from Ms Gillies.

63. The minutes of the meeting show that Mr Maybury opened it by saying:

> "Really, by the end of today what we need to know is; what happened, why it happened? And how it was allowed to happen. Clarice and I need to leave here today with an understanding so that we can take your response and a decision can be made. 32 kgs of ice was imported so this is very serious"

64. Mr Maybury asked if Mr Elmiski checked who was on shift when he was working and Mr Elmiski said that he checked for his own shift but not the previous shift. Mr Maybury noted that Dnata had emails which showed that Mr Elmiski had reported employees who were "no shows/sick" for their shifts and said:

> "We were told by the AFP prior to this happening that something was going on and they wanted to see screen grabs of our shifts and when they were swapped. So, we took screen grabs 3 times a day over the 3 different shift times and you gave Winston these shifts they are all given away when you were working and you were the only person with access to these sheets on these days as a Supervisor"

65. After further discussion Mr Elmiski said

> "I don't recalling giving him shifts, I wouldn't give someone three shifts to anyone in a week. We always try and give people a maximum of 2 shifts a week to share it around and the only time I wouldn't give someone 3 shifts is if I have shared them. If I gave him 3 shifts, he wouldn't have a day off. I wouldn't do it… I just don't recall"
>
> I understand the procedure, I don't remember that day. I give shifts to people on a daily basis"

66. When asked about his "impressions on Winston", Mr Elmiski said:

> "I have told management, Keith and Pendo about him a number of times. His attitude and attendance was poor but he was a good worker
>
> He was always nagging, no money, begging me for shifts. I don't want anything to do with Winston. His attendance was bad, I told management for a while but there is only so many times you can say something"

67. Mr Elmiski denied that Mr Tolutau had phoned or texted him asking for a shift and said that he did not see Mr Tolutau outside work.

68. Mr Maybury showed Mr Elmiski the screen grabs on which he relied and said that there was a swap form for some of the changes. The explanation of the screen grabs does not appear in the minutes. After the discussion, Mr Maybury said:

> "Not saying you have imported drugs, but there is a process which needs to be followed and you have not followed these processes for 3 days. But you followed the process for years
> …
> This is serious you could face termination, worst case. This will go to a discussion board with all of the facts and it will be discussed with the pages and notes Clarice has written here today"

Meeting on 25 June 2019

69. On 18 June 2019, Mr Maybury sent Mr Elmiski an email which read:

> "Hi Michael,
> I just wanted to let you know that I am still awaiting to hear on availabilities for this week. I will be in contact within the next 48 hours with a date for the conclusion meeting.
> All the best,
> Samuel"

70. He sent a further email on 23 June 2019:

> "Good evening Michael,
>
> As mentioned in our last meeting there would be a follow up meeting, following the show cause meeting held last week. I would like to confirm our meeting for Tuesday 25th June @ 14:30. The meeting will be held in the Cargo Shed Conference room.
>
> You are welcome to have a support person with you for this meeting.
>
> All the best,
> Samuel"

71. The meeting took place at 12 noon on 25 June 2019 and Mr Tziliaskopoulos attended with Mr Elmiski. The minutes record that Mr Elmiski's supervisor, Keith Filander, was present as were Mr Maybury and Ms Gillies.

72. Mr Maybury gave Mr Elmiski a letter informing him that his employment would be terminated immediately. Mr Maybury referred to the interview on 17 June 2019 and said that Mr Elmiski had been given "multiple opportunities to validate the changes that were made to the shift allocation spreadsheet during your shift." Mr Maybury said that there were six changes over a three day period. He said:

> "You were unable to put forward any reasonable information to explain why process was so grossly neglected on the following occasions:
> 1. You had allocated Uinisitoni Tolutau a 0400-1100 shift for Monday, 4th March 2019 to cover a vacant line 49. When Uinisitoni Tolutau failed to show for this shift and you as the supervisor on duty failed to report this both to management and on the daily shift report. You did however arrange cover for shift.
> 2. You had allocated Uinisitoni Tolutau a 0300-1100 Shift for Tuesday, 5th March 2019 to cover Line 48 even though he had failed to show for his shift on Monday 4th March 2019. When Uinisitoni Tolutau failed to show for this shift and you as the supervisor on duty failed to report this both to management and on the daily shift report. You did however arrange cover for this shift.
> 3. You processed a shift swap for Uinisitoni Tolutau and Constantinos Bletsas on Tuesdaym 5th March 2019. This shift swap form was back dated to Friday, 1st March 2019 but had not been processed until Tuesday, 5th March 2019 when you were supervisor on shift. You arranged this shift swap for Uinisitoni Tolutau even though he failed to attend the previous two (2) shifts you had allocated him. Additionally, you processed this shift swap in contradiction to the instruction given to you by Ramp Management regarding maximum hours work in one day, as Uinisitoni Tolutau was rostered on for TUG training later that day at 14:00-22:30 this means he would have worked sixteen (16) hours in one day.
>
> In view of the above it is apparent that you have breached standard shift allocation procedure and the absence management process. As a leader within the Baggage leadership team it is your responsibility to lead by example and follow all processes. Through your neglect to follow the correct SOP's this has enabled the importation of an illegal substance, not only does this cause a great concern for the public but also a significant damage to the Dnata Airport Services Australia brand and reputation.

> There has been a clear negligence to the correct absence management and shift allocation processes and these actions have enabled Uinisitoni Tolutau to attempt the importation of 32kg of methamphetamine. As a supervisor in the business is it your duty and responsibility to uphold all Dnata Airport Services processes and procedures. In the week leading up to Wednesday, 6th March 2019 there has been a clear breach of process to which you have been unable to offer and suitable explanation."

73. Ms Edwards was not at the meeting but said that Mr Elmiski's statement that he had not received a written warning was incorrect because he had received a Letter of Allegation for Breach of Process on 2 May 2019. Ms Edwards' statement is disingenuous – Mr Elmiski's evidence is clearly to the effect that he had not received a warning of any kind before the events which are the subject of the proceedings.

Other evidence

74. There is no written evidence with respect to Dnata's investigation besides the statements prepared for the purpose of these proceedings and documents collected by investigators appointed by Dnata's insurer for the purpose of these proceedings.

75. A document headed "Chronological order of changes made by the Claimant" is attached to the Reply. It bears Dnata's logo but does not indicate who it was prepared by nor does it identify the material on which it is based. It contains detail which does not otherwise appear in the file. I asked Mr Combe during submissions who it was prepared by but he did not tell me.

76. Counsel also referred to a series of emails dated 3 March 2019 at 3.05 pm, 4 March 2019 at 1.33 pm, 5 March 2019 at 1.27 pm, 6 March 2019 at 1.58 pm and 8 March 2019 at 2.56 pm. Each is headed "AM BAGGAGE SHIFT REPORT." The reports include a list of sick calls and provides a comment as to the coverage for the evening's operations. There are no references in those documents to "no shows."

77. Both Ms Edwards and Mr Maybury noted that Mr Elmiski had commenced proceedings in the Fair Work Commission "for unfair dismissal however he was not successful in that claim. [Dnata] did agree to alter the claimant's termination of employment to a resignation of employment." Identical words appear in Ms Edwards' statement dated 30 September 2019 and Mr Maybury's statement dated 6 November 2019. There is no information as to what happened in those proceedings but the agreement to rescind the termination and allow a resignation suggests a compromise agreement to resolve proceedings rather than a determination that Mr Elmiski's claim failed.

78. Mr Elmiski said that officers from the AFP came to his house in about September or October 2019 and asked him to go to a café with them. He said:

> "I asked them what they would like me to say as I felt I had already informed everyone of everything I knew. Initially, they started making comments to the effect of 'how much money are you getting paid by them' and 'did they slip you anything on the side'. I told them sorry I have no idea what you are talking about. I informed them that they are welcome to search my house and bank records and anything to assist any sort of investigation. They eventually changed their tone and just said that they only want to have a chat. I told them that I have done everything that the company and that the organisation has asked from me and now I have been terminated from my employment. The police officers completely changed their tone after hearing that and informed me that I am obviously being made a scape goat for the company. I found that interaction very strange and I couldn't handle it any more. I asked them to please leave me alone as I was starting to feel stressed out and they proceeded to leave."

79. Both parties relied on Dnata's Disciplinary Action Policy dated April 2015. I refer to the detail of the policy below.

80. Dnata's insurer issued a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 1 November 2019. The notice disputed that Mr Elmiski had suffered a psychological injury and that any injury suffered was wholly or predominantly caused by reasonable action taken or proposed to be taken with respect to performance appraisal, discipline and dismissal. The substance of the notice appeared to accept that Mr Elmiski suffered a psychological injury and it is difficult to see how that could have been disputed when Dr Dayalan, qualified by Dnata's insurer, accepted that he suffered an injury as a result of the termination of his employment.

81. It is not necessary to consider the medical evidence because there is no dispute that Mr Elmiski suffered a psychological injury and that he has been totally incapacitated for work since the date of that injury. Counsel did not refer me to the medical evidence.

SUBMISSIONS

82. The oral submissions of counsel were recorded and the written submissions remain on the Commission's file.

Oral submissions

83. Mr Tanner said that the three reasons given in the termination letter dated 25 June 2019 all related to roster irregularities and could not form the basis for dismissal. At best they should have given rise to a warning and corrective action to assist Mr Elmiski to comply with procedures. While there was no evidence that Mr Elmiski was involved in any criminal conduct, the focus of the disciplinary process was an endeavour to link Mr Elmiski with the conduct of Mr Tolutau. In doing so, it made him a scapegoat.

84. Mr Tanner said it would have been expected that any failure to comply with procedures would result in action by Dnata soon after 6 March 2020. There was no suggestion of disciplinary action at the time of the meeting with AFP officers on 11 April 2020. The disciplinary process commenced two months after the relevant events in early May 2019 and the tone of the letter was exaggerated when the relevant conduct was a rostering irregularity. There is no case established which indicates that Dnata suffered any operational prejudice as a result of that irregularity.

85. Mr Tanner said it was absurd to correlate the crime committed by Mr Tolutau with rostering, noting that there is no evidence that Mr Elmiski was involved in or aware of the offence. He submitted it was absurd in May 2019 to require Mr Elmiski to cast his mind back two months to explain exactly what he did, particularly where his evidence is that there were many shift swaps. Mr Elmiski set out his recollection. If I was unable to determine which version of events to prefer, I should have recourse to the fact that Dnata bears the onus of proving its defence.

86. After the letter and meeting in early May, nothing occurred until the show cause letter dated 11 June 2019, when Mr Elmiski was again asked to explain events three months before. Mr Tanner said the matters relied on were not such as would result in dismissal and that "we would not be here now" if Mr Tolutau had not been arrested. The letter dated 11 June said that Mr Elmiski had breached standard shift allocation procedure and the absence management process. Mr Tanner said those issues were not serious misconduct, such as theft or assault. The suggestion that failure to follow procedures enabled the importation of an illegal substance is absurd and Mr Tanner said that Mr Elmiski was being scapegoated for trivial administrative questions. Mr Elmiski's statement shows that the work was intense and it is not surprising that he would have difficulty remembering rostering arrangements three months previously. Mr Maybury's evidence was that there were no historic issues with resource allocation.

87. Mr Tanner said that the matters relied on in the termination letter were expressed in a hyperbolic fashion and should not have led to even an oral warning.

88. The Disciplinary Action Policy, Mr Tanner said, sets out seven kinds of action. Dismissal is the final resort, for serious conduct such as assault or theft. In this case, the action was taken as the first step. Misconduct is defined but in this case, administrative inconsistencies have been deemed gross misconduct because of the conduct of Mr Tolutau. With the exception of that which relates to breaching Dnata's policies, Mr Tanner said that all of the examples would be those that the community would expect to be the subject of a formal investigation. The principles of procedural fairness set out in the policy require that there be no undue delay in the disciplinary process. Mr Tanner said that aspect of the policy was also breached because Mr Elmiski was allowed to continue to work for an extended period.

89. For those reasons, Mr Tanner said that Dnata failed to establish its defence under s 11A.

90. Mr Combe said that the case falls squarely within s 11A as interpreted in *Northern NSW Local Health Network v Heggie*[1] *(Heggie).* In that case, what mattered was the process. After a complaint about an assault on a patient, Mr Heggie was suspended in accordance with his employer's internal policy, which required an investigation. The conduct was held to be reasonable in all the circumstances. Here, Dnata was required to investigate an attempt to smuggle drugs by a worker under Mr Elmiski's supervision. The suggestion that the investigation was a witch hunt should be rejected.

91. A series of emails prepared by Mr Elmiski showed that he was aware that he was required to notify his supervisors of those who were away due to illness. Despite that, the emails did not mention the absence of Mr Tolutau. I asked Mr Combe if I should expect to see a reference to Mr Tolutau if, as Mr Elmiski said, he was rostered to commence some hours earlier. Mr Combe said that a reference to staff on overlapping shifts would be expected in a supervisor's report. Mr Combe said that the shift swap form was backdated.

92. Mr Combe said that the starting point of a consideration of Dnata's conduct is the fact that a worker who was part of a group supervised by Mr Elmiski sought to commit a criminal offence. The AFP became involved and Mr Elmiski was notified of their investigation by Dnata and invited to bring a support person to the interview, which was reasonable. Mr Combe said there was evidence about the conduct of the meeting and the investigation. After the first meeting, Dnata undertook a fact finding investigation and, as set out in the letter dated 2 May 2019, determined that there was a gross departure from process. The letter set out four allegations and asked a series of reasonable questions, so that there was no denial of procedural fairness. Mr Combe said that the attempted importation of drugs was a grave concern for a company which provided baggage services and that the language was not hyperbolic.

93. Mr Combe noted that Mr Tanner had made much of the time delay but said it was important to remember that the letters were written in the context of a fact-finding investigation and that Dnata was not rushing or prejudging the matter. He said that the letter was based on the previous interview during which it had been established that the appropriate procedure was not followed, thus allowing the attempted offence.

94. Mr Combe noted that the letter referred to an email dated 11 March 2019 which showed that Mr Elmiski was aware of the appropriate procedure, which was not followed on March 2019. In response to my question, Mr Combe agreed that email was not in the file.

95. Mr Combe also said that the backdated shift swap form raised legitimate concerns for Dnata. Those concerns were uncovered during the course of its investigation,

[1] [2013] NSWCA 255.

96. Mr Combe said that the letter of termination was the culmination of the fact finding investigation and there was a direct link between the arrest of Mr Tolutau and the uncovering of unsatisfactory conduct. Mr Elmiski was given opportunities to explain his conduct but his explanation was not accepted. The relevant conduct was summarised as being that Mr Elmiski failed to report that Mr Tolutau did not attend work on 4 and 5 March 2019 and arranged cover for his shifts. A shift swap form was processed on 5 March but backdated to 1 March. An email dated 11 March showed that Mr Elmiski was aware of the process to be adopted when a casual employee did not attend work but there was no such document with respect to Mr Tolutau.

97. Mr Combe said that the obvious inference for Dnata to draw was that Mr Elmiski's negligence had enabled the attempted importation of drugs. The fact that he had failed to attend three shifts was not reported so that Dnata lost the opportunity to "deal with" Mr Tolutau so that they might have prevented the offence. There was clearly a basis for termination when the repeated failures in procedure occurred so temporally close to the commission of an offence by Mr Tolutau.

98. Mr Maybury's first statement, Mr Combe said, showed that Dnata commenced its investigation after the AFP investigation and was focussed on looking for gaps in their processes. It showed that Mr Elmiski was the supervisor for the staff member on the day and was responsible for changing shifts in breach of the fatigue policy. The reputation of Dnata was "on the line" when a staff member was arrested on drugs charges. To conduct a viable and profitable business, it is essential that it have accurate information with respect to missing employees.

99. Having undertaken its investigation, Dnata complied with its own disciplinary policy. Arranging meetings and providing detailed notices, Dnata afforded Mr Elmiski procedural fairness and conducted the process carefully and reasonably. There was no significant delay but the process was not rushed. While the policy sets out a series of steps the process can be terminated at any stage. In particular, the policy states that Dnata reserved the right to terminate employment immediately in cases of serious misconduct, such as conduct which would jeopardise the viability and reputation of the company. In this case, the employment relationship with Mr Elmiski could be terminated when he failed to explain the circumstances around documenting Mr Tolutau's absences and the backdated shift swap form.

100. During Mr Combe's submissions I asked where to find the evidence which shows that the shift swap form was backdated but he did not take me to any specific evidence.

101. In submissions in reply, Mr Tanner said that Dnata was left having to build a house of cards to show that its conduct was reasonable. The evidence of the practical application of Dnata's policies is limited to the emails prepared by Mr Elmiski which show no more than the content of the email on those days and that is was his own practice to prepare them. The emails showed those who had called in sick rather than those who had swapped their shifts. It was important to record sick calls is that there is an industrial consequence – Dnata is liable to pay sick leave.

102. Mr Tanner said it was important not to lose sight of the fact that Dnata who knows who is present or absent on any day because it is responsible to pay them.

103. Mr Tanner highlighted a change in the allegations in the correspondence. In the letter dated 11 June 2019, it was suggested that Mr Elmiski failed to report Mr Tolutau's absence on 4 and 5 March and failed to arrange cover. Those allegations did not appear in the termination letter because they were unfounded.

104. Mr Tanner said that Dnata had failed to explain why the absence of Mr Tolutau on 4 and 5 March had any connection with the commission of the offence on 6 March. It had also not led any evidence to suggest that Mr Elmiski had any knowledge that Mr Tolutau would commit the offence. The suggestion that Dnata lost an opportunity to take action because Mr Tolutau failed to attend on 4 and 5 March was "counsel's idea" - it was not an issue relied on by Dnata in its correspondence.

105. Mr Tanner stressed the highly regulated airport environment in which Dnata's employees work, so that there would be other records of who attended and did not attend work, besides Mr Elmiski's shift report. He said that there was no evidence to show that the shift swap form was backdated and that I should accept that it was completed on 1 March as Mr Elmiski said. Mr Elmiski's evidence about the preparation of the document was consistent with the face of the document.

106. Reliance on *Heggie* did not assist, Mr Tanner said because it was the termination rather than the process which caused Mr Elmiski's injury. His employer was entitled to investigate the issue but the outcome of the process was manifestly unreasonable. The assertion in the letter dated 11 June 2019 that Mr Elmiski's breach of procedure enabled the importation of an illegal substance is absurd.

107. Mr Tanner said I would not accept the explanation about the backdated document in the chronology which does not disclose its author and that I would accept Mr Elmiski's evidence.

Written submissions

108. After the conclusion of the hearing, I was concerned that counsel had not referred to some of the material in the statements of Dnata's witnesses and I issued a direction for submissions which read (omitting the timetable):

> "I note that neither counsel addressed as to how I should view the statements in the Reply and the Respondent's Application to Admit Late Documents from Ms Edwards and Mr Maybury, in particular but not limited to
>
> (a) paragraphs 31 and 37 of Ms Edwards' statement dated 30 September 2019;
> (b) paragraph 18 of Ms Edward's statement dated 22 April 2020.
> (c) paragraph 34 of Mr Maybury's statement dated 6 November 2019 and
> (d) paragraph 28 of Mr Maybury's statement dated 8 April 2020."

109. Mr Combe said that those statements should be read as part of the s 78 notice as evidence that:

(a) Mr Elmiski had been challenged on a number of occasions with respect to favouritism with roster allocations as well as allocating himself excessive amounts of overtime;

(b) Mr Elmiski was friends with staff members;

(c) the challenge about roster allocations shows that Mr Elmiski did not comply with procedures which supports the conclusion of his employer that his employment should be terminated;

(d) Mr Maybury had asked Mr Elmiski about his friendship with Mr Tolutau and was told that they used to text a lot, and

(e) Mr Maybury's statement confirmed that the shift swap had been backdated.

110. Mr Tanner noted that Dnata bears the onus of establishing its defence and said:

(a) the statements by Ms Edwards about favouritism and overtime were not supported by corroborative evidence nor particularised;

(b) if those matters were true, Dnata would have taken steps to address them and if Mr Elmiski had been counselled it would be expected that Dnata would have led evidence about it;

(c) Mr Maybury's evidence contradicts that of Ms Edwards and confirms that the issues which formed the basis for the dismissal had not previously been cause for complaint;

(d) Mr Elmiski's good record was a mitigating factor;

(e) the unsubstantiated allegations in Ms Edwards' statement are not relevant to the determination of whether the dismissal was reasonable nor is Mr Elmiski's past relationship with Mr Tolutau;

(f) there is no reliable evidence that their relationship was anything other than work colleagues, and

(g) Mr Maybury's statement about the shift swap form was a suspicion which goes nowhere and Dnata has not challenged Mr Elmiski's evidence.

FINDINGS AND REASONS

Section 11A

111. Section 11A(1) provides:

> **"11A No compensation for psychological injury caused by reasonable actions of employer**
>
> (1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

112. It is agreed that Mr Elmiski suffered a psychological injury on 25 June 2019 which was wholly caused by Dnata's conduct with respect to dismissal. The only issue is whether that conduct was reasonable.

113. The test of reasonableness was considered by Geraghty CCJ in *Irwin v Director-General of Education*[2]

> "…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."

[2] NSWCC 14068/97, 18 June 1998.

114. In *Ivanisevic v Laudet Pty Ltd*[3] Truss CCJ said:

> "In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected."

115. Those decisions were approved by the Court of Appeal in *Commissioner of Police v Minahan.*[4]

116. In *Department of Education and Training v Sinclair*[5] (*Sinclair*), Spigelman CJ, with who the other members of the court agreed, said:[6]

> "Furthermore, the case … primarily focused on the whole course of Departmental conduct as constituting the relevant 'substantial contributing factor' for purposes of s9A. His Honour appeared to approach the s11A issue on the same basis. This is an appropriate course to adopt in a context concerned, and concerned only, with psychological injury arising from matters such as 'demotion, promotion, performance, appraisal, discipline, retrenchment or dismissal'. Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.
>
> His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, 'reasonable action'."

117. The only authority to which counsel took me in this case was *Heggie*. Sackville AJA summarised the effect of the authorities with respect to s 11A[7]:

> "(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**.
>
> (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.

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[3] unreported, 24 November 1998.
[4] [2003] NSWCA 239.
[5] [2005] NSWCA 465.
[6] At [96]-[97].
[7] At [59].

(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."

118. Sackville AJA said:

> "In my opinion, the better view is that the reasonableness of an employer's action for the purposes of s 11A(1) of the WC Act is to be determined by the facts that were known to the employer at the time or that could have been ascertained by reasonably diligent inquiries. The statutory language directs attention to whether the psychological injury was caused by reasonable disciplinary action taken or proposed to be taken by the employer. Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline."

Onus of proof

119. The determination of this matter ultimately turns on the quality of Dnata's evidence. It carries the onus of proving that the defence under s 11A has been made out which, in this case, means that it must show that its conduct in dismissing Mr Elmiski was reasonable and that the process was reasonable.

120. While the Commission is not bound by the rules of evidence, the evidence relied on must provide a proper basis for it to make determinations. Section 354(2) of the 1998 Act provides:

> "The Commission is not bound by the rules of evidence but may inform itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits."

121. Rule 15.2 of the Workers Compensation Commission Rules 2011 provides:

> **"15.2 Principles of procedure**
>
> When informing itself on any matter, the Commission is to bear in mind the following principles—
>
> (1) evidence should be logical and probative,
> (2) evidence should be relevant to the facts in issue and the issues in dispute,

(3) evidence based on speculation or unsubstantiated assumptions is unacceptable,
(4) unqualified opinions are unacceptable."

122. In *Onesteel Reinforcing Pty Ltd v Sutton*[8], Allsop P said[9]:

> "Rule 15.2 of the Workers Compensation Commission Rules 2010, provides that evidence should be logical and probative, be relevant to the facts in issue and the issues in dispute, not be based on speculation or unsubstantiated assumptions, nor should it be in the form of unqualified opinions. The relationship between these requirements and lawful discharge of power at general law based on relevant material need not be explored. It suffices to say that Rule 15.2 represents a sound approach for the reliable disposition of important cases for individuals. It is not a reintroduction of the rules of evidence. Were the rule to be such a reintroduction, it would confront the inconsistency of the statute (in s 354). Thus, when one is considering the probative value of an expert report, for instance, the question is not whether it is admissible, but whether it provides material upon which the Commission was entitled to act."

123. The quality of the evidence prepared on behalf of Dnata is generally poor. While the statements were prepared by a factual investigator on behalf of the witnesses, they were signed and adopted by those witnesses. Substantial parts of the statements from Ms Edwards and Mr Maybury contain generalisations without the detail or supporting documents which would allow me to form the view that Dnata's conduct was reasonable. If I am to determine that the dismissal was reasonable, I need to be able to consider the material which provided the basis for their decisions rather than merely their descriptions of it.

124. There are a number of prejudicial conclusions in the statements of Ms Edwards and Mr Maybury which Mr Elmiski has challenged and which are not supported by evidence. Those prejudicial statements add nothing to the determination of the issue of reasonableness of Dnata's conduct in terminating Mr Elmiski's employment and detract from the value of the witnesses' evidence.

125. The paragraphs about which I sought written submissions were those which illustrate this issue most clearly.

126. As Mr Tanner noted in his written submissions, one of the sweeping generalisations in Ms Edwards' statements are shown by Mr Maybury's evidence to be incorrect, being her contention that Mr Elmiski was challenged on a number of occasions about favouritism in roster allocations and working excessive overtime. The evidence of Mr Maybury and Mr Elmiski is that the issue of picking up additional shifts was raised on one occasion and it was not the subject of any disciplinary action or warning. Mr Maybury specifically said that Dnata did not have any concerns with Mr Elmiski as a supervisor. There is no evidence to support the prejudicial allegation that he had a habit of picking up higher paying shifts.

127. Another example is Ms Edwards' assertion that Mr Elmiski and Mr Tolutau were friends. There is no evidence to support that contention and it is expressly denied by Mr Elmiski. Mr Maybury did not provide any source for his contention that the contact between Mr Elmiski and Mr Tolutau was "more regular" and that he mentioned that they texted a lot. The latter statement is perhaps consistent with Mr Elmiski's statement in the meeting on 17 June 2019 that Mr Tolutau often begged for shifts.

[8] [2012] NSWCA 282.
[9] At [3].

128. Ms Edwards' statements are otherwise very brief and provide little assistance in determining the matter. The unsatisfactory quality of her evidence is confirmed by her statement that it was incorrect that Mr Elmiski never received a warning because he received a letter of allegation on 2 May 2019. That letter was part of the process leading to his dismissal.

129. Mr Maybury's second statement suggests that he has become an advocate rather than a factual witness because of his comments on the evidence and Mr Elmiski's reactions. Significant examples are set out at [38] above.

130. The statements prepared for Ms Edwards and Mr Maybury do not describe the fact finding investigation which they undertook in any detail. Given the detail of the allegations in the correspondence, it is reasonable to expect that there was a written document prepared but no written document is in evidence.

131. These evidentiary deficiencies contribute to the finding that Dnata has not satisfied its onus to prove that Mr Elmiski's injury was caused by reasonable action with respect to dismissal.

Reasonableness

132. If there was a written document which set out the investigation Dnata undertook, it might provide an explanation for the protracted nature of the process and its outcome. In the absence of an explanation, I have formed the view that the disciplinary process was unreasonably drawn out.

133. If the rostering issues were significant enough to lead to dismissal, it might be expected that a meeting would be held before May 2019, two months after the offence was committed. If counselling was warranted, it is difficult to see, without explanation, how that process would have cut across any investigation by the AFP.

134. Ms Edwards and Mr Maybury said that no steps were taken to investigate the matter immediately because the AFP had to complete their investigation first. The letter dated 9 April 2019 told Mr Elmiski that "an external formal investigation is being conducted in accordance with our procedures." It told him that the interview was with Ms Edwards and officers of the AFP. Perhaps the letter is merely poorly worded but it does suggest that Dnata's investigation had commenced.

135. Mr Elmiski's statements contain evidence about his lack of awareness that AFP officers would be at the meeting on 9 April 2019. Mr Tanner did not refer to that evidence in his submissions, relying on the disciplinary investigation as the cause of Mr Elmiski's injury. Though that evidence did not form part of the case at arbitration, I am satisfied that Mr Elmiski was aware that the AFP would be at the interview on 9 April because the letter clearly told him so.

136. The first letter related solely to discipline was dated on 2 May 2019. It is headed Letter of Allegation – Breach of Process and begins with a reference to a fact-finding investigation but there is nothing to indicate that Dnata had told Mr Elmiski about that investigation. His evidence is that he was unaware of it. There is no reason not to accept Mr Elmiski's evidence that he was given the letter on Friday 3 May. He was asked to provide a response by Sunday evening. He did so.

137. There is no reason given for Dnata's need for such a prompt response. The request that Mr Elmiski reply within two days of receiving those allegations for the first time could be said to deny him procedural fairness. For example, the request that he answer by Sunday evening probably denied him the opportunity to seek any advice. When Dnata had taken two months to make the allegations, the time given to reply was not reasonable.

138. Mr Elmiski was then asked to attend a meeting about two weeks later. Mr Elmiski said that he was told in the meeting that he was not being accused of anything, despite the series of questions in the letter. Mr Maybury said in his statement that Dnata "just needed to know why this happened."

139. Another three weeks elapsed before the show cause letter was provided. That letter said that it had been "established" in the meeting on 17 May that shift allocation and absence management procedures "were not followed and because of this breach this enabled the importation of an illegal substance." It also said that Mr Elmiski's neglect to follow standard operating procedures enabled the importation.

140. The evidence does not explain how those matters were established during the meeting and the evidence about the meeting itself does not support that statement. If those matters had been established, it is puzzling why the questions were asked again.

141. Again, Mr Elmiski was asked to provide a response to a series of questions within two days and he did so. He explained that his shift commenced at 6.00 am and that Mr Tolutau had been rostered to commence at 3.00 am.

142. The third meeting took place on 17 June 2019. The minutes suggest that a decision about Mr Elmiski's employment had not been made but he was stood down.

143. The meeting at which his employment was terminated took place just over a week later.

144. There is no explanation in Dnata's evidence for the drawn out nature of the disciplinary process. The length of time the process took is, without explanation of any factors which might have caused that delay, unreasonable. As set out above, the reason for waiting for the AFP to complete its investigation is not explained.

145. Given the seriousness of the allegations made, I would have anticipated that relevant documentary evidence would have been provided to support the contention that Dnata's action in terminating Mr Elmiski's employment at the conclusion of that process was reasonable. That documentary evidence might not have strictly complied with the rules of evidence and by highlighting its absence, I do not impose an obligation to comply with those rules.

146. Dnata has not explained the relevance of Mr Tolutau not attending his shifts on 4 and 5 March 2019 and why Mr Elmiski is the supervisor whose role it was to report his absence on a shift report, when Mr Tolutau's shift commenced three hours earlier.

147. As Mr Tanner submitted, it is unlikely that the shift report was the only way that Dnata would be aware of his absence in the airport environment where security is properly of great concern. It was suggested that a shift report had been correctly completed on 11 March but that report was not in evidence. I am therefore unable to satisfy myself as to what a properly completed report looks like.

148. Another important issue is the shift swap form, about which Dnata's evidence is unsatisfactory. The form on its face is dated 1 March 2019 and appears to be completed and signed by the two staff members. Mr Elmiski gave a plausible explanation for the completion of the form. He also said that he spoke to Mr Bletsas to refresh his memory.

149. Mr Maybury sought to explain the allegation that the form was backdated in his statement by reference to "screen grabs" obtained for the AFP. Those screen grabs are not in evidence.

150. There is a document headed “Chronological order of changes made by the claimant.” The document is not signed and there is no explanation as to who prepared it or when. The lack of attribution means that the document is not probative.

151. Mr Maybury’s evidence about the shift swap is unsatisfactory. He described Dnata’s suspicions in paragraph 28 of his statement dated 8 April 2020. He said that Dnata “knew” that Mr Elmiski had contacted “the other employee … and said do not worry about coming in”. Because his evidence is presented as a series of conclusions, I do not find it probative.

152. The reason given in the letter dated 11 June 2019 for Mr Elmiski being required to show cause why he should not be dismissed, and in the termination letter dated 25 June 2019 was that he had breached standard shift allocation procedure and the absence management process. There is no evidence about the absence management process beside what appears in the statements. There is no documentary evidence beside the emails and no documentation with respect to the process which Mr Elmiski was required to follow.

153. The test in s 11A is objective and I cannot form an objective view about the reasonableness of Dnata’s action when so much of the evidence is expressed as the subjective comments of the witnesses on the views they formed and the action they took.

154. The Disciplinary Action Policy says that the principles of procedural fairness and natural justice “underpin procedures used when making a decision.” One of the principles is that “the employee must be provided with the opportunity to put their case forward.” Another is that there be “no undue delay in investigations and proceedings.”

155. This is not a case like *Sinclair* where I could find there were some flaws in an otherwise appropriate process. The nature of the evidence means that I am unable to determine the reasonableness of the process as a whole or whether the outcome was reasonable. On the evidence which has been led, there is good reason to suggest that a lesser disciplinary outcome such as a warning was appropriate.

156. I accept that Dnata has a legitimate concern to protect its reputation and that the arrest of one of its staff might have damaged that reputation. However, there is no basis to conclude, at the show cause letter alleged, that Mr Elmiski’s actions enabled the importation of an illegal substance. Any reputational damage would not necessarily be repaired by the dismissal of the supervisor of the offender.

157. I am not satisfied on the evidence that Dnata has complied with its own policy nor am I satisfied that Mr Elmiski’s dismissal was reasonable action within the meaning of s 11A.

SUMMARY

158. For those reasons, I am not satisfied that Mr Elmiski’s injury was caused by reasonable action with respect to his dismissal.

159. I order Dnata to pay Mr Elmiski weekly compensation of:

    (a) $1,594.48 from 26 June 2019 to 25 September 2019, and
    (b) $1,342.72 from 26 September 2019 to date and continuing.

160. I also order Dnata to pay Mr Elmiski’s s 60 expenses.