QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Scott v Workers' Compensation Regulator* [2021] QIRC 110
PARTIES:	**Scott, Michael** Appellant v **Workers' Compensation Regulator** Respondent
CASE NO:	WC/2019/190
PROCEEDING:	Appeal against a decision of the Workers' Compensation Regulator
DELIVERED ON:	31 March 2021
HEARING DATES:	1 September 2020 and 2 September 2020
DATES OF WRITTEN CLOSING SUBMISSIONS:	Appellant's submissions, 27 October 2020 Respondent's submissions, 10 November 2020
MEMBER:	McLennan IC
HEARD AT:	Brisbane

ORDERS:
Oo

1. **The appeal is allowed.**
2. **The decision of the Respondent dated 21 October 2019 is set aside.**
3. **The Appellant's application for compensation under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) is accepted.**
4. **The Respondent is to pay the**

Appellant's costs of, and incidental to, the appeal to be agreed or, failing agreement, to be subject to a further application to the Commission.

CATCHWORDS:	WORKERS' COMPENSATION – APPEAL AGAINST DECISION OF WORKERS' COMPENSATION REGULATOR – where psychological injury is accepted – where injury caused by management action is accepted – whether this was reasonable management action taken in a reasonable way – appeal upheld
LEGISLATION:	*Fair Work Act 2009* (Cth) s 389
	Workers' Compensation and Rehabilitation Act 2003 (Qld) s 32
AWARD:	*Clerks Private Sector Award 2010*
CASES:	*Aigner v Q-COMP* [2011] ICQ 14
	Blackwood v Mahaffey [2016] ICQ 10
	Church v Workers' Compensation Regulator [2015] ICQ 031
	Construction, Forestry, Mining and Energy Union and others v BHP Coal Pty Ltd (2012) 220 IR 287
	Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Pty (1998) 88 IR 202
	Davis v Blackwood [2014] ICQ 9
	Hodgson v Amcor Ltd [2012] VCS 94
	John v Rees [1970] Ch 345
	Kavanagh v Commonwealth (1960) 103 CLR 547
	Maswan v Escada Textilvertrieb t/as Escada [2011] FWA 4239

McMah v Workers' Compensation Regulator [2014] QIRC 13
Ribeiro v Workers' Compensation Regulator [2019] QIRC 203

Seltsam Pty Ltd v McGuiness (2000) 49 NSWLR 262

Stark v Toll North Pty Ltd [2015] QDC 156

State of Queensland (Queensland Health) v Q-Comp and Beverley Coyne (2003) 172 QGIG 1447

Tomvald v Toll Transport Pty Ltd [2017] FCA 1208

Turner v Q-COMP [2013] QIRC 148

Ulan Coal Mines Ltd v Honeysett (2010) 199 IR 363

Versace v Braun (2005) 178 QGIG 315

Wicks v Workers' Compensation Regulator [2018] QIRC 63

WorkCover Queensland v Kehl (2002) 170 QGIG 93

APPEARANCES:

Mr M Black of counsel, instructed by Queensland Workplace & Workplace Injury Law for the Appellant.

Ms D Callaghan of counsel, directly instructed by the Respondent.

Reasons for Decision

[1] Mr Michael Scott started with Steritech Pty Ltd ('Steritech', 'the company') as a Plant Operator in 2003.

[2] The company provides industrial radiation decontamination services at various locations across Australia.

[3] Throughout his career with Steritech, Mr Scott worked locally at the company's Narangba plant in Queensland.

[4] In 2010, Mr Scott was promoted to the position of 'Irradiation Supervisor'.

[5] He reported to Mr Glenn Robertson, Queensland General Manager of the company.

[6] In 2017 and 2018, Mr Scott required time off due to a medical condition. This was unrelated to his work.

[7] Shortly after his return to work,[1] Mr Scott was called to a meeting with management where he was advised that his position had been made redundant effective immediately.

[8] Mr Scott suffered a major depressive disorder as a result. It is not a matter of dispute between the parties that the termination of Mr Scott's employment was the major significant contributing factor to his psychiatric injury.

[9] This case turns on whether or not the termination of Mr Scott's employment on 7 August 2018 constituted "reasonable management action taken in a reasonable way".

Claim details

[10] Mr Scott lodged an application for compensation with WorkCover on 31 October 2018. That claim was in respect of a psychological injury sustained on 7 August 2018.

[11] WorkCover rejected Mr Scott's application, finding that Steritech's decision to make his position redundant constituted "reasonable management action taken in a reasonable way". This had the effect of excluding Mr Scott's injury pursuant to s 32(5) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('the Act').[2]

[12] Mr Scott applied to the Workers' Compensation Regulator ('the Regulator') to review that decision on 17 July 2019.

[13] The Regulator confirmed WorkCover's decision on 21 October 2019.

[14] Mr Scott subsequently filed this appeal against the Regulator's decision on 6 November 2019.

What legal tests must be satisfied for Mr Scott's appeal to succeed?

[15] The definition of injury, per the iteration of the Act at the relevant time, was (emphasis added):

> **32 Meaning of *injury***
>
> (1) An injury is personal injury arising out of, or in the course of, employment if -
>
> (a) for an injury other than a psychiatric or psychological disorder - the employment is a significant contributing factor to the injury; or
>
> (b) for a psychiatric or psychological disorder - the employment is the major significant contributing factor to the injury.

[1] The meeting was held on 7 August 2018.
[2] Correspondence from the Workers' Compensation Regulator dated 21 October 2019, pages 1–2.

…

(5) Despite subsections (1) and (3), injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances -

(a) **reasonable management action taken in a reasonable way** by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by the Regulator or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way-

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

[16] An injury arises out of employment where there is a causal connection between the employment and the injury.[3] That element is not in dispute between the parties. However, a psychiatric or psychological disorder is not taken to be an 'injury' under the Act where it arises out of "reasonable management action taken in a reasonable way by the employer in connection with the worker's employment". That is the crux of this matter.

[17] An appeal such as this is a hearing de novo.[4] Mr Scott bears the onus to prove, on the balance of probabilities, that he sustained an injury within the meaning of the Act. As explained by Deputy President Merrell in *Ribeiro v Workers' Compensation Regulator*:

> The balance of probabilities test requires a court to reach a level of actual persuasion and that process does not involve a mechanical application of probabilities.[5]

What is the question to be determined?

[18] There is no dispute between the parties that:

- Mr Scott was a worker within the meaning of s 11 and sch 2 of the Act, during the relevant period;[6]
- Mr Scott suffered a personal injury (namely, major depressive disorder);
- Mr Scott's injury arose out of the course of his employment, which was the major significant contributing factor; and

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[3] *Kavanagh v Commonwealth* (1960) 103 CLR 547, 558–559.
[4] *Church v Workers' Compensation Regulator* [2015] ICQ 031, [27]; *State of Queensland (Queensland Health) v Q-Comp and Beverley Coyne* (2003) 172 QGIG 1447.
[5] [2019] QIRC 203, [101], citing *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, [136].
[6] The date his position was made redundant – 7 August 2018.

- The employment issue that was the major significant contributing factor to Mr Scott's injury was the redundancy on 7 August 2018.

[19] In my view, the termination of Mr Scott's employment on 7 August 2018 was neither "reasonable management action" nor was it "taken in a reasonable way".

[20] My reasons follow.

Evidence and submissions

[21] Written closing submissions were directed in the order Appellant – Respondent – Appellant (in reply, on issues of law only).

[22] The Appellant's written closing submissions were filed on 27 October 2020.

[23] The Respondent's written closing submissions were filed on 10 November 2020.

[24] The Appellant elected not to make any written closing submissions in reply.

[25] The evidence of the four witnesses and 15 Exhibits tendered at the Hearing, together with the written closing submissions of each Party, were considered in this Decision.

Appellant's Submissions

[26] The agreed facts are that on 7 August 2018:[7]

- Mr Scott had been employed by Steritech for 15 years and 4 months;
- Mr Robertson informed Mr Scott that his position had been made redundant;
- Steritech neither consulted with nor forewarned Mr Scott about the redundancy; and
- The termination of Mr Scott's employment that day was the major significant contributing factor to his injury.

[27] The following applies with respect to s 32(5) of the Act:

- "Reasonable" means "reasonable in all the circumstances of the case" (including the worker's psychological makeup), such that "…a reasonable person would take that knowledge into account in assessing what is a reasonable way in which to implement an otherwise reasonable decision."[8]
- "Management action need not be perfect or above criticism. The term "'reasonable management action' permits failings, deficiencies and flaws provided

[7] Appellant's closing submissions, filed 27 October 2020, page 2, [9]–[10].
[8] Appellant's closing submissions, filed 27 October 2020, page 4, [18]; *WorkCover Queensland v Kehl* (2002) 170 QGIG 93.

the management action was sound, based on reason, was not arbitrary, did not involve any unfairness and did not produce an unfair result."[9]

- "The mere fact that management action may have amounted to a contravention of another statute, such as workplace safety or anti-discrimination legislation, does not necessitate a finding that the management action was unreasonable in all cases. However, such a finding may be taken into account when considering whether or not the management action was reasonable and taken in a reasonable way."[10]

- "It is not necessary that the Appellant show what would have constituted reasonable management action." Rather, "…the proper task is to assess the management action which was taken and determine whether it was reasonable and whether it was taken in a reasonable way. Sometimes, that may involve consideration of what else might have been done but that will only be relevant to whether what was done was, in fact, reasonable."[11]

[28] The Appellant asserts that the termination of his employment on 7 August 2018 (the 'management action') was neither "reasonable" nor "taken in a reasonable way":

> That is for either or both of the following reasons:
>
> (a) The termination decision was ***made*** in an unfair and unreasonable way.
>
> (b) The termination decision was ***implemented*** in an unfair and unreasonable way.[12]

Decision was made in an unfair and unreasonable way

[29] Mr Scott's position is that the termination decision was *made* in an unfair and unreasonable way because Mr Robertson had:[13]

- formed a negative view of Mr Scott's work performance, which in part informed the determination to make his position redundant;

- not given consideration to the possibility of Mr Scott taking up a Day / Afternoon Shift Operator position;

- neither consulted with, nor notified, Mr Scott about the possibility of redundancy at any time.

Work performance

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[9] Appellant's closing submissions, filed 27 October 2020, page 4, [18]; *Wicks v Workers' Compensation Regulator* [2018] QIRC 63, [42].
[10] Appellant's closing submissions, filed 27 October 2020, page 4, [18]; *McMah v Workers' Compensation Regulator* [2014] QIRC 13, [40]-[41].
[11] Appellant's closing submissions, filed 27 October 2020, page 4, [19]; *Davis v Blackwood* [2014] ICQ 9, [47].
[12] Appellant's closing submissions, filed 27 October 2020, page 5, [20].
[13] Appellant's closing submissions, filed 27 October 2020, page 5, [23].

[30] The Appellant maintains that Mr Robertson's evidence during the proceeding was that he had received complaints that Mr Scott was "basically offloading his duties to others" and that was "one of the things" he considered in the local staffing structure when undertaking the plant's annual budget review.

[31] It is submitted that Mr Robertson had concluded that the Day and Afternoon Shift Operators were performing the functions of the Irradiation Supervisor[14] - but that it was unfair and unreasonable for him to rely (albeit in part) on such complaints when deciding to terminate Mr Scott's employment, because:

> The complaints about the Appellant's work performance were never documented. It is unclear when those complaints were raised with the Appellant, if at all. If the complaints were put to the Appellant, it was only (in Mr Robertson's words) that Mr Robertson "wasn't very happy" the issue (sic). It was never explained to the Appellant that the complaints might affect his employment, or be taken into account in reviewing whether his position or employment should continue. It was unreasonable for Mr Robertson to take the complaints into account without first giving the Appellant a full and fair opportunity to understand the complaints and their relevance, and to address the complaints by improving his performance.[15]

Redeployment

[32] The Appellant stated that it was unreasonable for Mr Robertson not to consider redeploying Mr Scott to an alternative position at the plant, as making his position redundant is different to terminating his employment in its entirety.

[33] Mr Robertson's evidence was that the Irradiation Supervisor's duties had been absorbed into the functions of the Day and Afternoon Shift Operators - and that once he had decided to make that position redundant, he then "had three staff members who were perfectly capable of performing those functions. That is, Mr Scott, Mr Denimoza and Mr Cross." The Appellant argued that Mr Robertson should have (but did not) consider enabling Mr Scott to compete for one of the two remaining positions.[16]

[34] It was asserted that this was unreasonable because Mr Scott was a longstanding employee, he had experience both as a Plant Operator and as a Supervisor, he used to perform the duties that had been reallocated to the two remaining positions and that would have been an opportunity to remain employed.

Consultation

[35] With respect to consultation, it was submitted that:

> …Mr Robertson did not consult with or notify the Appellant about the possibility of his position becoming redundant at any time prior to the decision being made and implemented.[17]

[36] The Appellant elaborated that this resulted in the Day and Afternoon Shift Operators taking on the functions of the Irradiation Supervisor "on a permanent basis without any

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[14] Appellant's closing submissions, filed 27 October 2020, pages 5–6, [24]–[25].
[15] Appellant's closing submissions, filed 27 October 2020, pages 6–7, [26].
[16] Appellant's closing submissions, filed 27 October 2020, pages 7–8, [27]–[29].
[17] Appellant's closing submissions, filed 27 October 2020, page 8, [31]–[39].

corresponding increase in salary" and "removed a potential step in the options for career progression of plant operators."[18]

[37] It was submitted that Steritech failed to consult in accordance with its obligations under the collective agreement that applied to plant operators. Although Ms Morrison had opined that the collective agreement did not apply to Mr Scott, the Appellant disputed that contention in circumstances where both Mr Robertson and Mr Scott's evidence was that the Irradiation Supervisor position involved doing hands-on 'plant operator' work.

[38] The Appellant also maintained that the collective agreement applied to his colleague plant operators (building in the broader requirement to utilise the consultative mechanism).

[39] In either scenario, the Appellant does not accept that meant Mr Scott could be considered 'award free'. In the alternate, the Appellant instead argued that Mr Scott may have been covered by the *Clerks Private Sector Award 2010* ('the Clerks Award').

[40] In advancing this coverage contention, the Appellant noted Mr Robertson's evidence that the position of Irradiation Supervisor was more than 50 percent paperwork (as contained in the transcript excerpt at [99] below). It was therefore submitted that cl 8.1 of the Clerks Award required the employer to discuss termination and restructuring decisions with affected employees.

[41] Leaving aside Steritech's industrial instrument obligations to consult, the Appellant submitted that it was reasonable for Mr Robertson to do so given Mr Scott's length of service with the company,[19] his position as a senior employee at the plant, the company's communication to Mr Scott that he was a valued employee that implied his employment was continuing,[20] and Mr Scott's efforts to resume more regular work attendance following his significant absences due to illness.[21]

[42] The Appellant's closing submissions noted that in all the circumstances:

> …it was unreasonable for the Employer not to at least notify the Appellant that the ongoing need for his position was under review (even if there were no strict legal obligation). Instead, the Employer formed the view that there were no legal requirement to consult with the Appellant and simply went no further.[22]

[43] It was further maintained that:

> This Commission has recognised the importance and value of consultation in the context of redundancies. It enables different points of views to be put forward, potentially leading to modifications to a proposal. It avoids the "big shock to everyone" that Mr Cross described.[23]

Decision was implemented in an unfair and unreasonable way

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[18] Appellant's closing submissions, filed 27 October 2020, page 8, [31].
[19] 15 years and 4 months with the company.
[20] March 2018.
[21] By August 2018.
[22] Appellant's closing submissions, filed 27 October 2020, page 10, [37].
[23] Appellant's closing submissions, filed 27 October 2020, page 10, [38].

[44] Mr Scott has asserted that the termination decision was *implemented* in an unfair and unreasonable way because:[24]

- He was a long-standing employee of more than 15 years.

- Although he had been absent due to illness, in the period April to August 2018 he was in a 'return to work' phase.

- He had no inkling that his position (or indeed any position at the Narangba plant) was at risk of redundancy for any reason, including construction of the company's new interstate facility.

- Mr Robertson had given Mr Scott the impression that his job was safe, whilst he was on leave due to illness during 2018.

  For example, on 28 March 2018, Mr Robertson wrote to Mr Scott to request a doctor's assessment of work capacity, with a view to determining "when you may be able to safely return to your full time working hours" stating "We value you as an employee and are trying to support you where possible in the workplace." However, by that time, Mr Robertson was already undertaking a review of the Irradiation Supervisor position as part of the annual budget review.[25]

- He had no advance notice of the meeting held on 7 August 2018, nor of the purpose of the meeting. Rather "Mr Robertson simply called the Appellant into his office "cold"."[26] It was submitted that this compounded the shock of the situation for Mr Scott.

- He was not given an opportunity to have a support person at the meeting even though Mr Robertson thought he may become angry or aggressive upon hearing his position had been made redundant, knew it would come as a complete surprise and that Mr Scott was in the process of trying to return to work after a period of illness. However, in accordance with Steritech's practice, Mr Robertson had arranged for another management representative to attend the meeting as his own witness.[27]

- Ms Morrison's evidence was that Steritech had no redundancy or termination policy. However, she indicated that the company's normal practice was that the manager "…would always have a witness, a management witness, to what was happening" at these types of meetings. The Appellant's closing submissions noted that this consideration was not extended to the employee.

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[24] Appellant's closing submissions, filed 27 October 2020, page 10, [41].
[25] "Somewhere between that February/March/April" in 2018; Appellant's closing submissions, filed 27 October 2020, page 11, [41]; Transcript, 1 September 2020, page 1–48, lines 23–26.
[26] Appellant's closing submissions, filed 27 October 2020, page 11, [41].
[27] Mr Seth Hamilton.

- Mr Robertson acknowledged that he said to Mr Scott words to the effect of "there's no easy way to have this meeting" and that his position was redundant effective immediately, before handing him a termination letter.

- It has been argued that even if Mr Robertson's own account of what happened at the meeting on 7 August 2018 is accepted, it supports the conclusion that the implementation of the termination decision was not reasonable management action taken in a reasonable way.

- Mr Scott's evidence was that Mr Robertson then escorted him from the premises. While Mr Robertson denied doing this, it was observed in the Appellant's closing submissions that:

> …sits uncomfortably with his assertion that he was concerned about the safety of other employees if the Appellant were told about the redundancy. It is objectively unlikely that, having those concerns, Mr Robertson would simply have left the Appellant to his own devices within the plant despite observing that the Appellant "was obviously shocked from the redundancy."[28]

Respondent's Submissions

[45] The parties agree that the termination of Mr Scott's employment was the "management action" for the purposes of this Decision.[29]

Work performance

[46] The Respondent's position was that the termination decision was fair and reasonable and constituted:

> …a genuine redundancy in accordance with common law principles – which includes whether there has been a redistribution of job functions, where the duties performed by an employee are redistributed amongst other employees such that the original position does not exist.[30]

[47] They have contended that Mr Scott's position was made redundant because his duties were being performed by the Day and Afternoon Shift Operators, rendering it no longer necessary.

[48] The Respondent submitted that at the end of 2017 into 2018, Mr Robertson told Mr Scott that he was unhappy that he had been "handballing" his job duties to the Day and Afternoon Shift Operators and not keeping up with the required administrative functions.[31] Mr Cross gave evidence that Mr Scott preferred not to deal with customers, do the scheduling of the product or perform warehouse tasks.

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[28] Appellant's closing submissions, filed 27 October 2020, page 13, [47]; Transcript, 1 September 2020, pages 1–49 and 1–70, lines 45–47.
[29] Respondent's closing submissions, filed 10 November 2020, page 7, [47].
[30] Respondent's closing submissions, filed 10 November 2020, page 7, [48]; *Hodgson v Amcor Ltd* [2012] VCS 94.
[31] Respondent's closing submissions, filed 10 November 2020, page 3, [24].

[49] It was also noted by the Respondent that Ms Morrison said that in the last 18 months to 2 years of his employment, Mr Scott had become unreliable in providing payroll and occupational health and safety / injury management information to her – and that she obtained it from Mr Robertson or other staff.

[50] The complaints about Mr Scott relinquishing his duties to the Day and Afternoon Shift Operators was one of the things that led Mr Robertson to review the staffing structure of the Narangba Plant. The Respondent emphasised that this should be distinguished from the complaints directly leading to a decision to terminate Mr Scott's employment on work performance grounds - not a contention that had been put to Mr Robertson.

[51] With respect to work performance concerns, the Respondent noted Mr Robertson's evidence that Mr Scott appeared under the influence of drugs or alcohol when he crashed a forklift into a bollard, side of a truck and the cool room in an incident at the end of 2017. Mr Robertson stated that he had addressed this incident with Mr Scott at the time.

[52] In the same vein, Mr Robertson's evidence was that he had expressed concern about Mr Scott attending work without a medical clearance, noting it was essential that the Irradiation Supervisor did not have impaired cognition at work. Further, Mr Robertson said that Mr Scott had received an official warning about this on 17 November 2017, although this was denied by Mr Scott.

[53] Ms Morrison confirmed concerns about Mr Scott's work attendance without a medical clearance, adding that he sometimes slurred his words, admitted to taking Endone and leaving the medication on his work desk.

[54] The Respondent submitted that consideration of whether notice of performance issues was provided or not is not relevant in circumstances of a genuine redundancy.

Budget process

[55] Mr Robertson had carriage of Steritech's budget for the Queensland operation for the following three-year period – reviewing service delivery, expenses and operational requirements including resources and staff. He determined Mr Scott's position was no longer necessary.

[56] With respect to the chronology of events, the Respondent noted that Mr Robertson confirmed that the budget process had commenced in March 2018, ahead of the company's national budget meeting on 20 May 2018. It was maintained that:

> There is no evidence that Mr Robertson had made any decision or had undertaken any serious consideration of Mr Scott's redundancy as at 28 March 2018 and it was not put to him in cross-examination that he had done so.[32]

[57] At the beginning of 2018, Steritech had plants in Narangba, Sydney and Melbourne. Only the Narangba plant had an Irradiation Supervisor at that time, with the positions in Sydney and Melbourne made redundant.[33]

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[32] Respondent's closing submissions, filed 10 November 2020, page 8, [64].
[33] Respondent's closing submissions, filed 10 November 2020, page 3, [22].

[58] The Respondent emphasised that both Mr Robertson and Ms Morrison refuted any suggestion that Mr Scott was made redundant due to his illness.

Redeployment

[59] With respect to redeployment, the Respondent indicated that Steritech was not compelled to invite Mr Scott to compete for one of the two available Shift Operator positions. Employers are entitled to select an employee for redundancy on the basis of:

> …objective criteria – such as efficiency, experience, particular skills and attendance records and what contribution a particular employee can make to the employer's business enterprise.[34]

[60] Additionally, it was argued that the option of redeployment was not extended to Mr Scott as those two positions were already filled and attracted lower remuneration besides.

Consultation

[61] The Respondent has asserted in closing that:

> …consultation means giving an individual or group an opportunity to respond, to have an exchange of information and ensure there is an actual and genuine opportunity to influence the outcome. The reasonableness of consultation should be viewed in the light of the circumstances of a particular case and the likelihood that genuine consultation will result in any opportunity to influence the outcome of managerial decisions.[35]

[62] Further, they say that persuasive evidence has not been provided that any collective agreement or award applied to Mr Scott and if so, which industrial instrument.

[63] The Respondent claimed that:

> Although notification or suggestion that the appellant's position was under review may sound reasonable, if there is no real prospect of the appellant's input changing the decision, it as just as likely that earlier notification would simply prolong the process and period of anxiety.[36]

[64] In light of the above, the Respondent contended that Mr Scott could not have been advised that his position was under review whilst on sick leave, particularly given he was concerned his job was at risk due to his absences from work in late 2017.

Redundancy process

[65] The Respondent stated that Mr Robertson consulted Ms Morrison about the planned redundancy of Mr Scott's position in around May 2018. It was her role to advise on the

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[34] Respondent's closing submissions, filed 10 November 2020, page 7, [54].
[35] Respondent's closing submissions, filed 10 November 2020, page 8, [58]–[59].
[36] Respondent's closing submissions, filed 10 November 2020, page 8, [62].

process and she sought advice from Fair Work, the Australian Industry Group and referred to information on the employee files. Ms Morrison advised that Mr Scott was no longer under an Enterprise Bargaining Agreement ('EBA'), since his promotion from plant operator, and so the redundancy process should follow the Fair Work guidelines. Mr Robertson decided to pay Mr Scott in lieu of notice due to his temperament and consideration of the safety of other workers and company property. Ms Morrison advised that Mr Scott was paid 16 weeks' redundancy pay, rather than the 12 weeks' redundancy pay entitlement.

[66] The Respondent noted that Mr Robertson planned for Mr Scott's position to be made redundant at the end of the 2018 financial year but this timeframe had to be pushed back to 7 August 2018 due to Mr Scott's absences.

Conduct of the meeting

[67] With respect to the reasonableness of a support person being present in a meeting for notifying an employee of a redundancy, the Respondent submitted that Mr Scott had not evidenced how this would have softened the experience for him. Additionally, Mr Seth Hamilton was also present as an independent witness (who neither party chose to call).

[68] The Respondent suggested that should the lack of a support person be considered unreasonable, it is merely a blemish or imperfection.

[69] The closing submissions urged that:

> "Reasonable" means reasonable in all the circumstances of the case, including anything peculiar to the worker that is known to the employer…There was no evidence that Mr Robertson or Ms Morrison knew of any previous psychological condition suffered by Mr Scott that would make him vulnerable to psychiatric injury as a result of conducting the redundancy process in that way Mr Robertson chose to conduct it.[37]

[70] The Respondent summarised various points of difference in witnesses' recollections of the conduct of the meeting as including: whether Mr Scott was asked to come to the meeting in person or by telephone, whether Mr Scott was given an opportunity to read the redundancy letter handed to him, whether Mr Scott was asked for his keys or handed them over voluntarily, whether Mr Scott was provided with an opportunity to say goodbye to colleagues and gather his personal items or was escorted from the premises, and whether Mr Scott and Mr Cross spoke after the meeting or not.[38]

Witnesses

a) Mr Michael Scott

[71] Until 7 August 2018, Mr Scott held the position of 'Irradiation Supervisor' at Steritech's Narangba plant.

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[37] Respondent's closing submissions, filed 10 November 2020, page 9, [69]–[70].
[38] Respondent's closing submissions, filed 10 November 2020, pages 5–6, [37].

[72] My general impression of Mr Scott as a witness was that his recall appeared to be somewhat infected by how he felt about what had happened to him.

[73] It is also the case that considerable time has elapsed between Mr Scott's position being made redundant and the hearing of this matter.

[74] I observed that he did not always answer the questions put to him in a direct and clear manner; however, I do not think he was attempting to mislead the Commission.

[75] Although I have found that Mr Scott's recollection of events was not always accurate, that is not fatal to his case in circumstances where many of the key events are not in dispute between the parties.

b) Mr Glenn Robertson

[76] Mr Robertson is the General Manager of Steritech's Queensland Branch and was Mr Scott's direct manager.

[77] Elements of Mr Robertson's evidence conflicted with Mr Scott's account, including some details of the 7 August 2018 meeting.

[78] Mr Robertson also stated that complaints about Mr Scott's poor work performance was *one* of the things that made him look closely at the plant's staffing structure. Ultimately, he had satisfied himself that the duties of the Irradiation Supervisor position were being discharged by others.[39]

c) Ms Kim Morrison

[79] Ms Morrison is Steritech's National Human Resource Manager. She has held that role for around 12 – 13 years and has worked in human resources at the company for 22 years.[40]

[80] Ms Morrison also gave evidence that Mr Scott's work performance was poor in some respects.

[81] Ms Morrison expressed opinions about which Awards or Agreements may or may not apply to Mr Scott.

d) Mr David Cross

[82] Mr Cross is the Day Shift Operator at Steritech's Narangba plant.

[83] Mr Cross worked for Steritech as the Day Plant Operator. My impression of him as a witness was that he was honest and open in his account of the events, as best as he could recall them. His evidence was generally straightforward and appeared unencumbered by any other agenda.

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[39] Appellant's closing submissions, filed 27 October 2020, page 3, [13]–[14].
[40] Respondent's closing submissions, filed 10 November 2020, page 3, [19]; Transcript, 2 September 2020, page 2–3, lines 10–17.

[84] Mr Cross gave evidence about his interaction with Mr Scott on 7 August 2018. However, his recollection of Mr Scott dropping his work keys on his desk cannot be accurate in circumstances where that differs from both Mr Scott and Mr Robertson's account that the keys were obtained during the meeting in the office.

[85] He stated there was "no communication" about Mr Scott's redundancy in advance and that "it was a big shock to everyone."[41]

Consideration of "Reasonable management action taken in a reasonable way"

[86] Justice Martin has observed in *Davis v Blackwood* that:

> The task of the Commission when applying s 32(5) does not involve setting out what it regards as the type of actions that would have been reasonable in the circumstances. There may be any number of actions or combinations of actions which would satisfy s 32(5). The proper task is to assess the management action which was taken and determine whether it was reasonable and whether it was taken in a reasonable way. Sometimes, that may involve consideration of what else might have been done but that will only be relevant to whether what was done was, in fact, reasonable.[42]

[87] In *Blackwood v Mahaffey*, Justice Martin further said that:

> The difficulties in construing s 32(5) support the conclusion that more than one interpretation of s 32 is available and that, therefore, the beneficial interpretation approach should be applied. In the cases decided in this Court, any attempt to provide some type of formula or application of dominant cause has been rejected. Section 32 must be applied in light of the evidence accepted by the Commission. If, after considering all the relevant evidence and weighing up the factors which were accepted as having given rise to the personal injury, the Commission forms a conclusion that any of the conduct referred to in s 32(5) does not, on balance, displace the evidence in favour of the worker then a finding in the workers favour must follow.[43]

Was it 'reasonable management action'?

a) Consultation

[88] A finding on this first limb of the question to be decided requires some exploration of the basic consultation requirements for a redundancy, compared with what actually happened to Mr Scott.

[89] The meaning of genuine redundancy that applies to a national system employee like Mr Scott is contained in s 389 of the *Fair Work Act 2009* (Cth) (the 'FW Act').

> **389 Meaning of genuine redundancy**
>
> (1) A person's dismissal was a case of ***genuine redundancy*** if:
>
> (a) the person's employer no longer required the person's job to be performed by anyone because of the changes in the operational requirements of the employer's enterprise; and

[41] Appellant's closing submissions, filed 27 October 2020, page 3, [13]; Transcript, 2 September 2020, page 2–29, lines 35–37.
[42] [2014] ICQ 9, [47].
[43] [2016] ICQ 10, [57].

> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer.

[90] Sub-clause 1(b) of this provision requires the employer to comply with any obligation in a modern award or enterprise agreement to consult about the redundancy.

[91] Ms Morrison's evidence was that she had sourced information from Fair Work and the Australian Industry Group in order to advise Mr Robertson on the redundancy process. Ms Morrison asserted that while Mr Scott had been covered by the *Steritech (Narangba) Plant Operators Collective Agreement 2007* (EBA) previously, it no longer applied to him upon his promotion to Irradiation Supervisor. In addition, she believed Mr Scott to be award-free.

[92] I note the various employment documents that are Exhibits in this case do not reference the applicable EBA or award for either the Irradiation Supervisor or Day / Afternoon Shift Operator positions.[44] This omission would certainly present an impediment to workers (and indeed management) understanding their rights and responsibilities in a redundancy situation such as this.

[93] I do not agree with Ms Morrison's contention that Mr Scott was neither covered by any award or the EBA. That is most unlikely. My reasons follow.

Consideration of collective agreement application to Mr Scott

[94] The parties to the EBA include "employees who are employed as a Plant Operator at this site".[45]

[95] As Mr Scott's Position Description clearly expressed the requirement for skills, experience and current qualifications to perform this function – and supported by evidence that he sometimes was required to perform that work[46] – I find that the EBA applied to him.

[96] In forming this conclusion, I note that the Irradiation Supervisor Position Description[47] requires "Essential Qualifications" that underscores the hands-on nature of Mr Scott's position.[48] The "Objectives and Responsibilities" contained in Mr Scott's Position Description also indicate he is to "Undertake any other responsibilities, consistent with skills, qualifications and experience, as may be required from time to time."

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[44] Exhibits 1, 8–10: Letters of Appointment and Position Description employment documents.
[45] *Steritech (Narangba) Plant Operators Collective Agreement 2007,* cl 3.
[46] Evidence of Mr Robertson and Mr Scott.
[47] Exhibit 8.
[48] Such as Plant Operators Licence and Current Forklift Licence.

[97] Mr Scott's evidence was that he worked alongside Plant Operators as required. Mr Robertson too confirmed that warehousing tasks were performed, notwithstanding it was less than 50 percent of work time. Mr Cross also supported the contention that Mr Scott performed warehousing duties, notwithstanding his perspective that such performance generally occurred without enthusiasm.[49]

[98] Mr Scott gave the following account of the nature of his work:

> Mr Black: …So just to finish off, in terms of your duties as irradiation supervisor, you said the guys on the floor pretty much knew what they were doing. But did you spend time on the floor?
>
> Mr Scott: Yeah. When we were, like, doing fruit – you know, there was a number of commodities that kind of came on – mangoes that were going to New Zealand and to Malaysia, and there were some other products. But normally they would be done sort of in the morning so they could be offsite back to the exporter and on a plane or in a container and off to wherever they were going to go. So if the guys were busy when I got in there, once I had taken care of paperwork and a few other things I needed to do, I would pretty much get on to the floor and give them a hand if they needed a hand until the phones started ringing. And then generally speaking by about 6:30 am most mornings, we had pretty much everything under control. The idea was that we would have that done before we open the gate so that we would just be concentrating on normal day-to-day activities.[50]

[99] Mr Robertson's evidence was also that Mr Scott performed work in the warehouse:

> Ms Callaghan: …What were the tasks in the warehouse that the irradiation supervisor was directly involved in?
>
> Mr Robertson: In the warehouse? He'd be scheduling products, booking product in, forklift, unloading, loading trucks.
>
> …
>
> Ms Callaghan: In percentage terms?
>
> Mr Robertson: How much percentage in the warehouse?
>
> Ms Callaghan: Doing the warehouse work as opposed to the paperwork?
>
> Mr Robertson: I guess there's other people to do that warehouse role. His job is to be supervising them. So maybe it would be less than 50 percent, I guess.
>
> Ms Callaghan: Okay. But it, being less than 50 percent, was still – would you say it was still a substantial part of the role?
>
> Mr Robertson: It was still a part of the role there.[51]

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[49] Transcript, 2 September 2020, page 2–27, lines 20–23; Mr Cross said "…only if required, and absolutely if required. In busy periods there might be times when Michael would help us out."
[50] Transcript, 1 September 2020, pages 1–10, line 43 – 1–11, line 9.
[51] Transcript, 1 September 2020, pages 1–71, line 44 – 1–72, line 13.

Consideration of collective agreement regarding consultation with other plant operators

[100] The question of whether or not the company was required to consult ahead of making a redundancy decision also relies on the "consultative mechanism" within the EBA. Clause 9 Consultation states:

> The employer and the employees shall establish a consultative mechanism and procedures appropriate to the size, structure and needs of the enterprise.
>
> Matters raised by the employer or employees designed to increase the productivity, efficiency and competitiveness of the business and to enhance the career opportunities and job security of employees shall proceed through the consultative mechanism.
>
> The employer shall permit a notice board to be erected at the enterprise to facilitate communication with employees.

[101] Mr Robertson's evidence was that he considered making Mr Scott's position redundant in the context of the budget process, within the express purpose of the above provision.

[102] The Appellant has submitted that, at the very least, there was an EBA requirement to discuss the proposed change with a cohort of staff at the plant. I agree.

[103] In a departure from the EBA requirement to consult, Mr Cross gave the following account:

> Mr Black: Then you said you didn't know about the redundancy of the irradiation supervisor position until it actually happened?
>
> Mr Cross: Yes, that's correct.
>
> Mr Black: So I take it from that there was no discussion with management about the change in structure or anything like that?
>
> Mr Cross: No. It was – there was noth – no communication to me at all that there was even – it – it – it was a big shock to everyone, so ---

[104] Sensibly, the person most directly impacted by any such determination would also be part of that discussion. In this case, the company did not consult either Mr Scott or his colleagues ahead of the redundancy decision being made.[52]

Consideration of award application to Mr Scott

[105] Even if I were to be wrong in finding that the EBA covered the position of Irradiation Supervisor, I note that under the heading "Remuneration" contained in the 'Letter of Appointment - Irradiation Supervisor', it is stated that "…is inclusive of all allowances paid under the award…"[53] That reference would be quite nonsensical if indeed there was no award that applied to Mr Scott's position.

[106] At the Hearing, Mr Scott articulated his understanding of the award applicable to his position in these terms:

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[52] Appellant's closing submissions, filed 27 October 2020, page 9, [32].
[53] Exhibit 1.

Mr Scott: Can I just make a correction. I'm pretty sure it was the clerks private sector award that I was under.[54]

[107] The particular award referred to by Mr Scott is the *Clerks Private Sector Award 2010* (the 'Clerks Award').

[108] The Clerks Award describes coverage at cl 4.1 as follows:[55]

> The award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature, and to those employees. However, the award does not cover:
>
> (a) an employer bound by a modern award that contains clerical classifications; or
> (b) an employee excluded from award coverage by the act.

[109] Clause 8.1 Consultation of the Clerks Award regarding major workplace change states that (emphasis added):

> (a) Employer to notify
>
> (i) **Where an employer has made a definite decision to introduce major changes in** production, program, organisation, **structure** or technology **that are likely to have significant effects on employees**, the **employer must notify the employees who may be affected by the proposed changes** and their representatives, if any.
>
> (ii) **Significant effects include termination of employment**; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; **and the restructuring of jobs**. Provided that where this award makes provision for alternation of any of these matters an alteration is deemed not to have significant effect.
>
> (b) Employer to discuss change
>
> (i) **The employer must discuss with the employees affected** and their representatives, if any, **the introduction of the changes referred to in clause 8.1(a), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees** and / or their representatives in relation to the changes.
>
> (ii) **The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes** referred to in clause 8.1(a).
>
> (iii) For the purposes of such discussion, **the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes** including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect

[54] Transcript, 1 September 2020, page 1–10, line 35.
[55] The provisions of the Clerks Award that applied as at 27 July 2018 have been used for the purposes of this Decision.

> employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.

Requirement to consult in terms prescribed by an applicable industrial instrument

[110] In circumstances where either a collective agreement or award applied to Mr Scott, then the requirement to consult would be enlivened under s 389(1)(b) of the FW Act (emphasis added):

> A person's dismissal was a case of ***genuine redundancy*** if:
> …
> (b) the employer has complied with **any obligation in a modern award or enterprise agreement that applied to the employment to consult** about the redundancy.

[111] In any or all considerations of applicable industrial instruments explained above, I find that the company had a requirement to consult and did not do so.

Meaningful consultation

[112] To discharge this requirement, *meaningful* consultation is required of employers ahead of any predetermined decision to make an employee redundant. It is not simply for appearances after a decision has been fixed.[56] This inherently requires the employer to discuss proposed changes with, and to genuinely consult, affected employees before the definite determination has been made. In *Construction, Forestry, Mining and Energy Union and others v BHP Coal Pty Ltd,* Commissioner Roe quoted an earlier Full Bench Decision[57] in these terms:

> As the Privy Council said in *Port Louis Corporation v Attorney General of Mauritius*:
>
> > The requirement of consultation is never to be treated perfunctorily or as a mere formality.
>
> In the context of a case concerning the statutory obligation to consult in relation to decisions regarding variations in public transport routes Sachs LJ observed:
>
> > Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals – before the mind of the executive becomes unduly fixed.[58]

[113] In *Tomvald v Toll Transport Pty Ltd*, Justice Flick said:

> The requirement to consult affected workers would, accordingly, not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their view taken into account when a decision is made. Listening to affected workers with no intent to take the views they express into account falls short…Genuine consultation would generally take place where a

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[56] *Maswan v Escada Textilvertrieb t/as Escada* [2011] FWA 4239.
[57] *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Pty* (1998) 88 IR 202.
[58] (2012) 220 IR 287.

> process of decision-making is still at a formative stage. But, having genuinely consulted with affected workers, the views expressed need not prevail; affected workers…have no right of veto.[59]

[114] In contrast, no consultation - or even advance notice – ahead of a decision being made to make Mr Scott's position redundant was afforded in this case. This fact is not in dispute between the parties.

[115] The question of whether or not redeployment may have been possible has also been raised. Section 389(2) of the FW Act above prescribes that it is not a genuine redundancy if it would have been reasonable for the person to be redeployed. It is not in dispute that no attempt was made to redeploy Mr Scott within the company.

[116] In *Ulan Coal Mines Ltd v Honeysett* a Full Bench of the FWC said:

> The question remains whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.[60]

[117] It has been asserted by the Respondent that Mr Scott's redeployment to a Day / Afternoon Shift Operator position would not have been possible, as those positions were filled and were paid less than that of Irradiation Supervisor. Conversely, it has been asserted by Mr Scott that he ought have been given the opportunity to compete for either of those positions, as he had the skills and experience to perform the role. While I accept it would not be reasonable to displace the current incumbents of the Day / Afternoon Shift Operator positions in a spill-and-fill type scenario, the consideration of possible redeployment further emphasises the importance of consultation. For example, Mr Scott may well have been content to remain employed at Steritech in a position of Plant Operator and relinquish his promotional position, in light of his health challenges over an extended period. He may well have weighed the benefits of a less stressful role near to home and continued employment as far preferrable to unemployment. In the absence of consultation ahead of any definite decision being made regarding the proposed redundancy, we simply cannot know what Mr Scott's view of the matter may have been.

[118] In *Turner v Q-COMP,* Industrial Commissioner Fisher found that failing to consult ahead of the contemplation of redundancies constituted unreasonable management action taken unreasonably in that case.[61] The Commissioner stated:

> …the meeting on 8 September 2011 was not for the purposes of consultation. It was to notify Mr Turner of the decision to abolish his position and to terminate his employment. Although Mr Orchard invited Mr Turner to seek out and nominate alternative positions, Mr Orchard was aware that none were available. The failure to consult with Mr Turner about possible options meant that Mr Orchard could not and did not know that Mr Turner would be willing to consider a range of alternatives such as reduced income and hours and possible relocation to another part of the State. Mr Orchard also did not draw the Redundancy Policy to Mr Turner's attention. In the result Mr Turner was presented with a fait accompli and denied the opportunity to influence the outcome.

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[59] [2017] FCA 1208, [211].
[60] (2010) 199 IR 363, [29].
[61] [2013] QIRC 148.

> Sound management practice requires consultation about significant change, whether that impacts on one employee or many.
> …
> The bigger issue is that there was absolutely no indication or forewarning that any restructure possibly leading to redundancies was being contemplated. Theis could have been foreshadowed in light of the need for cost savings to be made. This silence meant that employees, and Mr Turner in particular, had no opportunity to prepare for being retrenched and to proposed alternatives.[62]

[119] I would also observe that even if consultation were not legally required under s 389 of the FW Act, it would still be unreasonable for Steritech not to do so in this case. What is 'reasonable' in the particular circumstances includes anything peculiar to the worker that is known to the employer. Whilst I accept that Mr Robertson and Ms Morrison did not have any specific information that Mr Scott may be vulnerable to a psychiatric injury, a number of factors were known that may have indicated a more sensitive approach was warranted. Some examples being Mr Scott's length of service with the company,[63] that he had previously been worried about job security but had then formed the impression that his job was safe,[64] his long-term illness and use of medication,[65] and that he had held a supervisory position at the Narangba Plant since 2010.[66]

[120] I accept that Mr Scott had a reasonable expectation that he would have been consulted in the circumstances. Mr Scott's evidence was that he was closely involved in the negotiation of Steritech's first EBA,[67] which contained a consultation provision as mandatory. In the event that EBA no longer covered him, most occupations are covered by an award (which contains as standard a 'consultation' clause). I have noted that Mr Scott's Letter of Appointment also made passing reference to an "award".[68]

[121] In the sense that no consultation at all occurred in taking the decision to make Mr Scott's position redundant, I find that management action was not reasonable in the circumstances.

b) Organisation of work

[122] In cross-examination, Mr Robertson accepted that the complaints about Mr Scott's work performance were *one* of the things that made him look closely at the staff and structure at Narangba.[69]

[123] Mr Robertson, Ms Morrison and Mr Cross each spoke of Mr Scott abrogating his work tasks and responsibilities to others at some time.

[124] Mr Robertson's evidence was that he had advised Mr Scott that he:

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[62] [2013] QIRC 148, 3, [24] – 4, [26].
[63] 15 years and 4 months.
[64] Transcript, 1 September 2020, page 1–12, lines 1–9; Exhibit 3.
[65] Exhibits 3, 12 and 13.
[66] Exhibit 1.
[67] Transcript, 1 September 2020, page 1–8, lines 1–10.
[68] Exhibit 1; Paragraph [105] of this Decision.
[69] Transcript, 1 September 2020, pages 1–61, line 39 and 1–64, lines 1–9.

> …wasn't very happy that it had been brought to my attention that he hadn't been fulfilling his duties, and handballing those duties to those – the day and afternoon shift operators.[70]

[125] While it has been argued that the decision to abolish the Irradiation Supervisor position at the Narangba Plant was consistent with the organisational structures adopted by the company's interstate plants, I am unconvinced that was significant in the decision to make Mr Scott's position redundant. The Narangba Plant self-evidently could and did operate under a different organisational structure for some time. There was no reason why they could not continue to, if Mr Robertson had elected to do so.

[126] I accept that Mr Robertson had formed an impression about Mr Scott's work performance - but there was no clear evidence whether or when those concerns had been put to him and whether he had been afforded an opportunity to respond. Certainly, Mr Robertson had not documented the discussions.[71] That contributes to my finding that the redundancy decision was not reasonable.

Was it 'taken in a reasonable way'?

c) No consultation or advance notice of the redundancy decision

[127] I have found above that Steritech was obliged to consult ahead of making the redundancy decision. It is not in dispute that they failed to do so.

[128] It is also accepted that Mr Scott was not provided any advance notice of the redundancy decision. This resulted in the "big shock to everyone"[72] – and a psychiatric injury to Mr Scott. That too is not in dispute between the parties.

[129] Mr Scott's evidence was that he had been worried about his job security due to his extended absence from the workplace due to illness.[73] He stated that the company CEO had assured workers their jobs were safe, in a video link meeting in about September / October 2017. Specifically, that:

> Mr Scott: …so basically no one – what he was trying to do was reassure everyone that no one was going to be losing their jobs. It made me feel, obviously, a little bit less sort of concerned because of the amount of absence or leave that I had had due to illness.[74]

[130] While the company CEO's presentation about the new plant was recalled by Mr Robertson, his evidence was more circumspect:

> Mr Black: …Sometime in late 2017, the Steritech CEO made an announcement about the plant. Do you agree or disagree?
>
> Mr Robertson: There was a presentation. Yes.

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[70] Transcript, 1 September 2020, page 1–46, lines 40–45.
[71] Transcript, 1 September 2020, pages 1–61, lines 46–47 and 1–63, lines 43–46.
[72] As described by Mr Cross.
[73] Transcript, 1 September 2020, page 1–12, lines 1–19.
[74] Transcript, 1 September 2020, pages 1–11, line 41 and 1–12, lines 1–8.

Mr Black:	Do you – well, I would suggest this: that during that presentation, the CEO indicated that no jobs were at risk as a result of this decision. What do you say to that?
Mr Robertson:	I don't believe so. No.
Mr Black:	Okay. Do you accept that staff at the Narangba plant had no particular reason to fear redundancies as a result of that new plant?
Mr Robertson:	Yes. I'd believe that.[75]

[131] I prefer the evidence of Mr Scott regarding the CEO's assurances to staff at the video link meeting. I am persuaded by Mr Scott's fuller recollection of the surrounding details of the meeting, such as the earlier rostering of the afternoon shift workers to enable them to come in and view the presentation, along with his comment that this was unusual as additional payment for this time worked needed to be made.[76]

[132] Mr Scott asserted that a letter from Mr Robertson dated 28 March 2018, gave him further confidence regarding arrangements for his return to work arrangements. An extract of the letter stated:

> …we would like to review your current and future work capacity to determine when you may be able to safely return to your fulltime working hours and duties as the Qld Irradiation Supervisor. We value you as an employee and are trying to support you where possible in the workplace.[77]

[133] Mr Scott contended that Mr Robertson's written assurance was provided during the same period as he was actively considering the redundancy decision. Mr Robertson's evidence was that he began to consider making Mr Scott's position redundant sometime after that.

[134] Regardless of the precise timing of Mr Robertson's consideration of the redundancy decision, the impact on Mr Scott was the same. He had no idea that the Irradiation Supervisor position would be made redundant almost immediately upon his return to work.

d) Conduct of the Meeting

[135] In light of the above, the redundancy decision announced to Mr Scott at the meeting of 7 August 2018 came as a complete shock.

[136] In *Versace v Braun,* President Hall held that a management decision such as making a person redundant may be reached reasonably but not implemented and communicated in a reasonable way.[78]

[137] Even if I were to be wrong in my determination that there was a requirement for consultation, there were further problems with the conduct of the meeting.

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[75] Transcript, 1 September 2020, pages 1–59, line 39 and 1–60, lines 1–2.
[76] Transcript, 1 September 2020, page 1–12, lines 1–18.
[77] Exhibit 3.
[78] [2005] 178 QGIG 315.

[138] Firstly, Mr Robertson failed to advise Mr Scott of the true purpose of the meeting in advance and called him into his office "cold".[79] This is not disputed between the parties.

[139] Neither is it disputed that Mr Robertson made only a brief introductory comment to the news that Mr Scott's position was being made redundant effective immediately before handing him the termination letter. At the Hearing, the conversation was recalled as:

> Mr Black: Okay. Did you say something like, "There's no easy way to say this. I'll get straight to it"?
>
> Mr Robertson: I believe I said something like that. Yeah, that there's no easy way to have this meeting, or something to that effect.[80]

[140] I accept Mr Scott's account that he was so shocked by this that he did not fully read or absorb the letter handed to him.

[141] Further compounding the unreasonableness of management's implementation of the redundancy decision was the failure to offer Mr Scott the opportunity to have a support person attend such a meeting with him. From management's perspective, I recognise that doing so would rather have alerted Mr Scott that the meeting was other than routine. Foundationally though I find that failure is more than a "mere blemish". Instead, it contributes to my determination that the management action was not taken in a reasonable way and was in fact procedurally unfair.

[142] Mr Robertson and Ms Morrison clearly both understood the importance of having a support person in such meetings. Mr Robertson had arranged for another management representative to be present at the meeting.[81] Ms Morrison confirmed that it was standard company practice to have a "management witness, to what was happening, what was going to happen within that meeting".[82]

[143] I do not accept the position that Mr Hamilton was present as an "independent witness",[83] having regard to the evidence of both Mr Robertson and Ms Morrison on the reason for his attendance.

[144] In my view, the meeting was not conducted in a reasonable manner. In circumstances where Mr Scott had served the company for more than 15 years and had just returned to work after an extended period of absence due to illness, I accept that he felt blindsided by a hastily conducted meeting absent elements of procedural fairness.

[145] With regards to Mr Scott's claim that Mr Robertson then asked him to leave the premises and watched until he did so, I do not believe the events unfolded in that way. Mr Robertson's evidence was that he stayed in his office.[84] That is supported by Mr

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[79] Transcript, 1 September 2020, page 1–69, line 28.
[80] Transcript, 1 September 2020, page 1–70, lines 1–5.
[81] Mr Seth Hamilton.
[82] Transcript, 2 September 2020, page 2–21, lines 16–20.
[83] Respondent's closing submissions, filed 10 November 2020, page 8, [65].
[84] Transcript, 1 September 2020, page 1–51, lines 20–40.

Cross, who said that he did not see Mr Robertson at all.[85] While it is possible that Mr Scott's recollection was infected by how he felt about the meeting – that he had quite unceremoniously been shown the door - I am instead persuaded that Mr Robertson's brevity in delivering his redundancy decision at the meeting with Mr Scott was due in large part to his attempt to avoid the uncomfortable aftermath of the situation. For those reasons, I find it more plausible that Mr Robertson stayed in his office even though he stated that Mr Scott "is quick to be aggressive and angry".[86]

[146] In *Aigner v QCOMP*, his Honour President Hall noted that:

> The law has long since recognised the importance of consultation with those to be affected by a decision.[87]

In that case, President Hall went on to quote from *John v Rees* where Megarry J (as his Lordship then was) observed:

> Nor of those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.[88]

[147] Leaving aside the disputed point considered in paragraph [145] above, even on the agreed facts in this matter, I am satisfied to the required standard that the decision to make Mr Scott's position redundant was neither reasonable management action nor was it taken in a reasonable way.

Conclusion

[148] Mr Michael Scott had worked at Steritech's Narangba plant for more than 15 years when he was called to a meeting with management and told that his position as Irradiation Supervisor had been made redundant.

[149] Mr Scott was not consulted about management's decision, nor had any forewarning of it.

[150] The possibility of redeployment was not discussed with him.

[151] Mr Scott had no prior notice that the meeting would take place. Steritech's Queensland General Manager, Mr Robertson, had arranged for a management witness to be present at the meeting. However, Mr Scott was not afforded the same opportunity to have a support person attend with him.

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[85] Transcript, 2 September 2020, page 2–28, lines 1–5.
[86] Transcript, 1 September 2020, page 1–49, lines 5–8.
[87] *Aigner v Q-COMP* [2011] ICQ 14.
[88] *John v Rees* [1970] Ch 345, 402.

[152] The meeting was held shortly after Mr Scott's return to work after an extended period of absence due to illness.

[153] None of that is in dispute between the parties.

[154] Despite initially worrying whether his job was safe whilst on leave, I have accepted that Mr Scott's concerns were allayed by the comments of Steritech's CEO during a company-wide video link meeting that outlined plans for a new plant interstate. Correspondence sent to him by Mr Robertson regarding his return to work further encouraged Mr Scott's belief that his position was secure.

[155] I have found that Mr Robertson had formed an impression about Mr Scott's work performance - but there was no clear evidence whether or when those concerns had been put to him and whether he had been afforded an opportunity to respond.

[156] After considering whether management had an obligation to consult with Mr Scott and / or his colleague plant operators, I have determined that they were required to do so. That management did not consult, leads me to find that Mr Scott's termination was not reasonable management action.

[157] However, even if I were to be wrong on that point, I have found that the way the termination decision was implemented - the conduct of the meeting - was not taken in a reasonable way.

[158] I order accordingly.

Orders

1. **The appeal is allowed.**

2. **The decision of the Respondent dated 21 October 2019 is set aside.**

3. **The Appellant's application for compensation under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) is accepted.**

4. **The Respondent is to pay the Appellant's costs of, and incidental to, the appeal to be agreed or, failing agreement, to be subject to a further application to the Commission.**