

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**MATTER NO:** 4783/18  
**APPLICANT:** Stuart Riley  
**RESPONDENT:** State of New South Wales (Far West Local Health District)  
**DATE OF DETERMINATION:** 19 December 2018

The Commission determines:

1. The applicant sustained a psychological injury arising out of or in the course of his employment on 7 July 2017 (deemed).
2. The applicant's employment was the main contributing factor to his injury.
3. The applicant has had the capacity to undertake some work for 20 hours per week since 9 December 2017.
4. The applicant requires medical treatment as a consequence of his injury.
5. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.

The Commission orders:

6. Award for the respondent in respect of the claim for weekly compensation from 7 July 2017 to 8 December 2017.
7. The respondent to pay the applicant weekly compensation in accordance with the *Workers Compensation Act 1987* as follows:
  - (a) \$451.70 per week from 9 December 2017 to 9 March 2018 pursuant to section 36(1)(b);
  - (b) \$451.70 per week from 10 March 2018 to 31 March 2018 pursuant to section 37(1)(b), and
  - (c) \$478.50 per week as adjusted from 1 April 2018 to date and continuing pursuant to section 37(1)(b).
8. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

9. No order as to costs.

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

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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

**Abu Sufian**  
**Senior Dispute Services Officer**  
As delegate of the Registrar



## **BACKGROUND**

1. Stuart Riley (the applicant) is 57 years old and was employed by the State of New South Wales (Far West Local Health District) (the respondent) as the Chief Executive Officer (CEO) on 4 January 2011. His services were terminated on 7 July 2017. The applicant submitted a claim to the respondent on 1 March 2018 in respect of a psychological injury.
2. On 19 April 2018, Employers Mutual Ltd (the insurer) issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that compensation was payable for his psychological injury because it was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.
3. The insurer denied that the applicant was incapacitated and indicated that any on-going medical expenses were not reasonably necessary as a result of any work injury. It cited ss 11A, 33 and 60 of the *Workers Compensation Act 1987* (the 1987 Act) and identified the date of injury as 9 December 2017, being the first date of incapacity.
4. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 13 September 2018, the applicant claims weekly compensation from 7 July 2017 to date and continuing pursuant to ss 36 and 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to a psychological injury sustained during the course of his employment on 7 July 2017 (deemed).

## **PROCEDURE BEFORE THE COMMISSION**

5. The parties attended a conciliation conference and arbitration hearing on 10 December 2018. 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.
6. 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.

## **ISSUES FOR DETERMINATION**

7. The parties agree that the following issues remain in dispute:
  - (a) whether the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect of discipline – s 11A (1) of the 1987 Act;
  - (b) extent and quantification of the applicant's capacity – ss 36 and 37 of the 1987 Act;
  - (c) the respondent's liability with respect to medical expenses – s 60 of the 1987 Act.

## **Documentary evidence**

8. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application and attached documents;
  - (b) Reply and attachments;
  - (c) Application to Admit Late Documents received on 30 October 2018, and

(d) Application to Admit Late Documents received on 10 December 2018.

### Oral evidence

9. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

### REVIEW OF EVIDENCE

#### Claim documents and the applicant's statements

10. The applicant submitted a claim via email to the respondent on 28 February 2018. In the covering email, the applicant advised that he had never envisaged making a claim. He indicated that "I understand this is more than 6 months after I left the position, but I thought I could manage the situation until events in November."
11. The applicant apparently attached a claim form with a 46-paragraph statement, but complete copies are not in evidence.
12. A notice of injury form was completed on or about 1 March 2018. It was noted that the applicant notified the respondent on 1 March 2018 that he was suffering from depression allegedly caused by bullying and harassment at work. The date of injury was identified as 1 June 2015.
13. In his statement dated 21 June 2018, the applicant indicated that he had no health issues from 20011 to 2013. In 2014, he had concerns about the performance of Ms Corcoran. In February 2015, Ms Corcoran's husband, Dr Flecknoe-Brown made a complaint about bullying to the [REDACTED].
14. The applicant stated that Dr Flecknoe-Brown submitted a written complaint to [REDACTED] and later caused problems at the Senate Select Committee meeting in June 2015, which led to statements being made to the media by the doctor and disgruntled staff, and by politicians in the media and in Parliament. Nevertheless, the applicant was exonerated following the investigation into the complaint in mid-July 2015. Surprisingly, there are no documents regarding this complaint, the investigation or the media content in evidence.
15. The applicant had issues with [REDACTED] with his overzealous and fastidious approach to his work and his dealings gradually became more difficult. His annual review with [REDACTED] was aggressive and unreasonable, with an excessive focus on the issues relating to Ms Corcoran and Dr Flecknoe-Brown. There was also an Ombudsman's investigation into the bullying allegations that was later suspended.
16. The applicant stated that he had sleeping difficulties and he was anxious about going to work. He tried to minimise his dealings with [REDACTED]. He was passed over when he applied for a job on the Central Coast and he assumed that Mr Hynes and Dr Flecknoe-Brown were actively undermining his efforts to find an alternative position.
17. The applicant identified a number of incidents where [REDACTED] had reacted in an aggressive fashion, but he did not mention how these incidents impacted on his mental state. There were also issues at Board meetings with instances of aggression. The applicant had concerns about the behaviour of Board members, Dr Tomlinson and Mr Johnston. He feared that there was a conspiracy to terminate him.
18. According to the applicant, he became increasingly tired and he was concerned about the actions of [REDACTED], Mr Johnston, Dr Tomlinson and another Board member, Mr O'Halloran. His sleep and mood continued to deteriorate.

19. The applicant stated that a draft Governance Audit Report was critical of him. He obtained legal advice before responding in June 2016. By this stage, he had sleep problems and he often became nauseous when going to work. His sleeping issues became more acute when [REDACTED] attempted to gain control of the performance review process in July 2016. Attempts at mediation proved fruitless.
20. The applicant indicated that the issues at Board level continued. In October 2016, four members were dismissed. He found it enormously difficult to sleep and he struggled to remain focused on his role. He had to deal with complaints made against Mr Barnett by Dr Allen, and by Ms Ferry regarding Dr Tomlinson's behaviour towards the applicant and the Governance Audit. By this stage, he was feeling exhausted and he had often found himself in tears in his backyard before work.
21. The applicant stated that on 5 January 2017, he appointed an investigator for the complaint against Dr Tomlinson. [REDACTED] was furious and sought to have the investigation quashed. The applicant had issues with the performance of Mr Barnett, but in February 2017, Mr Barnett formally lodged a complaint against him to [REDACTED].
22. The applicant stated that by April 2017, an investigator had still not been appointed to deal with Mr Barnett's complaint. Mr Barnett's behaviour was out of control and the applicant had to counsel him about his and disrespectful behaviour. Eventually Mr Barnett was placed on leave.
23. The applicant stated that Ms Corey, Mr Barnett's partner, lodged a complaint against him in late May 2017. He was struggling to cope and was close to tears. He reported his difficulties to Susan Pearce, the Deputy Secretary at the Ministry, in mid-May 2017. On 2 June 2017, [REDACTED] resigned and Andrew Refshauge was appointed as Chairman.
24. On 3 June 2017, the applicant was informed that a journalist from the ABC had a copy of the Governance Audit and the investigation into Dr Flecknoe Brown's complaint. He also knew about the complaints made against Mr Barnett. The ABC and the Barrier Daily Truth confirmed that the information had been provided to them. The applicant suspected that [REDACTED] had leaked the information. He continued to have difficulty sleeping, he was teary on most days and he was not confident that things would get better.
25. On 27 June 2017, the applicant met with Dr Refshauge about his contract. The applicant indicated that he would prefer to terminate his contract in August 2017 or September 2017, but Dr Refshauge suggested an earlier date. It was later agreed with Ms Pearce that his contract would be terminated on 7 July 2017. He went home after this telephone conversation and cried before returning to work. He was unsure whether this was because he was sad or relieved.
26. The applicant stated that he left Broken Hill on 10 July 2017 and he was very happy to be back at home with his wife. He began to go to the gym and go running and cycling regularly. He went on holidays to Japan and on his return, he went skiing with friends. He stated that as he drove to Perisher, he cried at various points and he went home early after five days because he was sad. He also cried at various points on the drive home.
27. The applicant indicated that he commenced work for three days per week with Health Outcomes International Pty Ltd (HOI) on 6 August 2017. He did not feel confident that he could manage full time work immediately. He continued to have difficulties with his sleep, experienced nightmares and his concentration was poor. He was often close to tears.
28. An article was published in the Barrier Daily Truth on 23 September 2017 that was based on the leaked documents. The article claimed he had left the role because of the Governance Audit. Similar comments were made on the local ABC.

29. In October 2017, the applicant received a letter that confirmed that none of Ms Corey's allegations had been substantiated. A copy of the investigation was provided to him upon request and he decided to take the matter no further. He continued to have problems with his sleep and concentration.
30. The applicant stated that on 17 November 2017, he received a letter from Dr Refshaug advising that two of Mr Barnett's allegations had been substantiated and that the behaviour had breached the NSW Health Code of Conduct and potentially brought the NSW Health system into disrepute. The applicant was devastated when he received the letter. He had not been afforded the opportunity to respond and he had not received a copy of the investigation report. His request for access to the report was refused.
31. On 19 November 2017, the applicant advised HOI about the findings. He thought that he would not be in a fit state to work reliably, so he ceased being paid and he did not take on any critical roles whilst he dealt with the matter.
32. The applicant claimed that throughout December 2017, he continued to have difficulty sleeping and he remained obsessed with the events at the respondent. He was unable to work on a proposal over Christmas, because he was unable to concentrate. He began to contemplate suicide.
33. The applicant stated that on 27 December 2017, he consulted Dr Cunningham and was referred to a psychiatrist. He had difficulty getting to sleep and he woke frequently throughout the night. He saw Dr Brownlee on 16 January 2018 and it was agreed that he would attend on a weekly basis. He was prescribed antidepressant medication in late February 2018 or early March 2018. This assisted his sleep problems and mood, but he continued to wake at night. He eventually submitted a claim on 2 March 2018.
34. The applicant experienced considerable distress because Dr Refshaug refused to provide him with a copy of the investigation report to enable him to respond. The findings of the investigation were finally rejected on about 29 March 2018, more than a year after the original allegations were made instead of the recommended 12 weeks under the NSW Health Policy.
35. The applicant stated that Dr Brownlee changed his medication on 9 June 2018. He still experienced disturbed sleep and teariness. He was keen to return to a stimulating full-time role, however, his experiences over the past three years had left him feeling anxious. His professional reputation had been damaged by the concerted and deliberate campaign by Dr Flecknoe-Brown, [REDACTED] Mr Johnston and Dr Tomlinson.
36. In his statement dated 15 October 2018, the applicant advised that his contract with HOI commenced on 7 August 2017 and was due to conclude on 5 February 2018. The contract was for three days per week at a rate of \$876 per day. He indicated that by December 2017, he felt that he could not work at a level commensurate with his experience, so he agreed with the manager, Lilian Lazarevic, to work without payment while he sorted himself out. He continued to attend the office as he found the social contact to be beneficial. He participated in preparing proposals and supporting junior staff. Since 6 December 2017, he only received reimbursement for travel expenses.

### **Clinical notes of Malvern Medical Centre**

37. The clinical notes of the Malvern Medical Centre commence on 28 February 2005 and the last consultation was on 27 February 2018. They were printed on 25 May 2018. What has transpired since that time is unknown.
38. At the consultation on 27 December 2017, Dr Cunningham recorded that the applicant "fell apart last week after more media publicity". He was tearful and angry. She noted that the

applicant had been running a health district with a “psychopath chairman” who left in May 2017. He asked for his contract to be terminated, but his current boss said that he had to leave.

39. The applicant complained that he had issues with his sleep and appetite. He had poor concentration. He was trying to exercise to lose weight. He had suicidal ideation in past. He had mood issues for the last 20 years and he was reluctant to take antidepressants. The doctor noted that the applicant had been experiencing problems since June 2015 and his moods were worse since the multiple investigations. He had been cleared in one of the investigations and was now consulting out of the public system.
40. Dr Cunningham did not prescribe any medication and she referred the applicant to Dr Brownlee. The referral letter dated 27 December 2017 is identical to the doctor’s entry.
41. On 12 January 2018, Dr Cunningham recorded that the applicant’s mood had been up and down and he had not yet seen Dr Brownlee. The doctor noted that the applicant seemed less anxious, more reactive and interactive, he was laughing and he was more open.
42. At the final consultation on 27 February 2018, Dr Cunningham recorded that the applicant was seeing the psychiatrist on a weekly basis and he had been prescribed Sertraline. He was attending the office for social contact but he was not working and he was not being paid. He continued to attend the gym on most days and he went bike riding.
43. Dr Cunningham noted that the applicant’s issues started at work from June 2015. He was trying to self-manage his symptoms and lack sleep and he did not see a doctor. His symptoms increased on 7 November 2017. It was noted that a complaint was made against him February 2017, but it was not investigated until May 2017. He was not informed of the outcome until October 2017. He had not seen the results of a second investigation. The applicant told the doctor that he had never expected the physical and mental impact on him.
44. In a report to the insurer dated 19 March 2018, Dr Cunningham indicated that the applicant’s mood changes deteriorated markedly from June 2015. He had been able to self-manage any increased stress symptoms with exercise and good sleep. His symptoms were caused by on-going work stressors regarding management, staff interactions, his perceived behaviour and repeated investigations. There were Board sackings in late 2016, complaints against him, investigations into the complaints and delays in the investigations. His symptoms increased markedly from 7 November 2017.
45. Dr Cunningham diagnosed a Major Depressive Disorder. There were repeated and on-going work related causative events that had a compounding effect on his depression. She considered that he had no current work capacity since 9 December 2017.
46. On 27 February 2018, Dr Cunningham provided a back-dated certificate for the period 9 December 2017 to 30 May 2018 due to depression arising from increasing work stressors, investigations and publicity.

#### **Investigation outcome letters**

47. On 26 October 2017, Dr Refshauge wrote to the applicant regarding the outcome of the investigation by Mr Baldwin into the complaint made by Ms Corey. He determined that none of the complaints could be substantiated. Therefore, he was satisfied that the matter was resolved and he confirmed that the process was to remain confidential.
48. In an undated letter that was apparently received on or about 17 November 2017, Dr Refshauge advised the applicant about the outcome of the investigation by Mr Klein into the complaint made by Mr Barnett. The letter sets out the six complaints raised by Mr Barnett

and provided extracts of the interviews as well as a summary of discussions with other witnesses.

49. One allegation could not be substantiated and the investigator was unable to make a finding in respect of three allegations.
50. Mr Barnett made an allegation about inappropriate behaviour and unprofessional comments made by the applicant regarding nitrous oxide related deaths. Although the investigator determined that the allegation was substantiated, he concluded that it did not represent misconduct as the comments were made within the confines of a meeting of the Executive.
51. However, the investigator found that the applicant's comments made to an external party regarding the advantages of working for the respondent had the potential to bring NSW Health into disrepute. Therefore, this allegation was substantiated and the applicant's actions constituted a breach of the Code of Conduct.
52. Mr Barnett's final allegation related to disrespectful and counter-productive interactions with external parties. The applicant did not deny making the alleged inappropriate comments, although he had a different perception about the context in which they were made. The investigator determined that the allegation was substantiated and constituted a breach of the Code of Conduct.

### **Investigation report and correspondence**

53. The investigation report dated 4 August 2017 regarding Ms Corey's complaint confirms that Mr Baldwin was satisfied that the complaint could not be sustained because it did not disclose any matter that would be a proper basis for taking formal action against the applicant. He recommended that the findings of the investigation be communicated to Mr Barnett, Ms Corey and the applicant, who had a legitimate interest of knowing the outcome even though he had resigned.
54. Mr Baldwin made some interesting comments at the end of the report as follows:

“...I have little doubt that there will be a perception, arising out of the events from the making of Mr Barnett's complaint to Mr Riley's resignation, that Mr Barnett and Ms Corey have, at long last, got rid of Mr Riley. I make the comment above in a somewhat dramatic way because I have little doubt that, following earlier complaints, the 2016 audit, and now the two complaints in 2017, Mr Riley's resignation is likely to be so perceived.

The issue which I think thus arises, and must be managed by the incoming CE, is the risk that some staff will see him as a good man unfairly hounded from office, while others will see him as a problem who finally got his comeuppance. Thus, I think it will be important that, in the aftermath of his resignation, Mr Riley's legacy is not to be a catalyst for division within the staff of FWLHD.

While Mr Riley had his critics, no-one to whom I spoke doubted Mr Riley's deep commitment to the FWLHD and the proper health care of its residents. At a personal level, nobody seemed to dislike him (except, obviously, Ms Corey and Mr Barnett). Whatever his failings, it seemed to be generally acknowledged that he had done a good job in guiding the LHD from its inception to the present day...

It would seem inevitable that some, putting two and two together, will infer that Mr Riley resigned because of the 2017 complaints, whatever the truth may be.”

55. On 26 October 2017, the applicant wrote to Stephen Rodwell, the new CEO of the respondent, and formally registered a complaint that in making the allegations to the Minister,



the Secretary and subsequently to senior officers of the NSW Ministry of Health, Ms Corey had made vexatious allegations, behaved mischievously and acted maliciously.

56. Mr Rodwell dismissed the applicant's complaint on 10 November 2017, because the investigator had concluded that Ms Corey's complaint was not malicious or mischievous. He considered that the matter was closed. The applicant sent a further email to Mr Rodwell on 14 November 2017, but Mr Rodwell's response to this is unknown.
57. The applicant apparently sent an email to Dr Refshauge on 18 November 2017, requesting a copy of Mr Klein's investigation. In an undated letter, Dr Refshauge declined his request as he considered that the applicant had been provided with the relevant information in the outcome letter. He invited the applicant to respond to the letter by 8 December 2017.
58. On 30 November 2017, the applicant wrote to Dr Refshauge and sought confirmation as to whether a final decision had been made. He again requested a copy of Mr Klein's investigation report, otherwise he would not be in a position to provide a complete response to his findings. It seems that the report was never provided to the applicant.
59. It seems that on 29 March 2018, the applicant was cleared of any wrongdoing. Remarkably, the letter informing the applicant that he was exonerated is not in evidence.

### **Report of Dr Canaris**

60. Dr Canaris reported on 16 July 2018. He recorded that in 2014, the applicant appointed Ms Corcoran to the position of general manager of Broken Hill Hospital, but she struggled with the demands of the job. Eventually, he told her that she did not have the requisite skills. Subsequently, Dr Flecknoe-Brown lodged a complaint of bullying and harassment against the applicant and this was reported in the Sydney Morning Herald.
61. Dr Canaris reported that in 2015, ██████ took issue with the applicant's performance and told the applicant that if it was up to him, he would not be reappointed. His draft performance agreements were changed and he was constantly undermined by ██████.
62. Dr Canaris noted that after the media coverage, the applicant found himself waking in the middle of the night and he had difficulty getting back to sleep. By late 2016, he found himself struggling, but he continued to work. ██████ was the subject of an investigation and later resigned.
63. Dr Canaris reported that in February 2017 [sic], the applicant had to contend with a complaint by Mr Barnett [sic] and later by Ms Corey. He was told that complaints against him were substantiated and that he had brought NSW Health into disrepute. These findings were overturned in March 2018.
64. Dr Canaris noted that the applicant left the employ of the respondent in July 2017 because he felt his position was untenable. He was not sleeping, he was drinking too much and he was shattered. He had a brief holiday to Japan and he later had a holiday at Perisher, but he "cried all the way back."
65. Dr Canaris noted that the applicant subsequently worked for a colleague for three days a week but he was unable to cope. He still went to work on flexible hours, but he had not been paid since November 2017 because he was not working at the requisite level. He had considered suicide around Christmas 2017 and he had been seeing Dr Brownlee since January 2018. His mood had improved with medication, but it was up and down. His sleep remained fragmented and he became teary when he was tired.
66. Dr Canaris noted that the applicant had started to look for another job, but he lacked confidence and focus. He was withdrawn and he did not know people in Adelaide. He went

out with his wife at least once per week and he planned to go to Vietnam for a half marathon. There were no issues with self-care and travel, and he did most of the cooking at home. His relationship with his wife had been affected by his irritability in the last year and he lacked an interest in sex. His concentration presented difficulties. He was now having about two drinks per night.

67. Dr Canaris diagnosed a Major Depressive Disorder, which had partially responded to treatment, and this was caused predominantly by his workplace difficulties. He was exposed to a difficult workplace situation involving the management of the Board and a dysfunctional work culture with strong personalities who eventually complained about him.
68. Dr Canaris considered that numerous difficulties and tensions in the dysfunctional workplace preceded the complaints that were made against him. He stated that whilst the applicant's past issues and family history may have made him more vulnerable, they would not have caused his present illness.
69. Dr Canaris stated that the applicant would have been unfit for work when he left the employ of the respondent and whilst he had returned to work, he was only doing this in a voluntary capacity because he seemed unable to work in an effective and sustained fashion. He stated that the applicant would not be able to return to his previous position.

### **Report of Dr Smith**

70. Dr Glen Smith examined the applicant on 8 March 2018 and he reported on 18 March 2018. He noted that from June 2015, the applicant experienced anxiety and depressive symptoms with associated sleep disturbance. He did not want to go to work due to anxiety with associated physical symptoms such as nausea. A complaint of bullying and harassment had been made against him Dr Flecknoe-Brown that was reported in the media and in Parliament, but he was exonerated. Notwithstanding his anxiety and distress, he did not have any time off work.
71. The applicant stated that on 29 September 2015, he received a letter from [REDACTED] about a range of issues. Throughout 2016, he spent a lot of time responding to the Governance Audit report of Ms Ball. Although his sleep had been disturbed and he felt stressed and anxious, he continued to work.
72. Dr Smith noted that in September 2016, some Board members were sacked and there were changes to the Board structure. He found these events particularly stressful. In February 2017, Mr Barnett submitted a complaint and followed by that of Ms Corey in May 2017.
73. The applicant told the doctor that he was knocked over and devastated by these events. He met with Dr Refshauge in June 2017 and had discussions regarding the way forward, but on 7 July 2017, his contract was terminated. He was relieved, moved back to Adelaide, travelled to Japan for two weeks and then had a skiing holiday in Perisher Valley for one week. The applicant claimed that he did not feel good. He felt anxious and depressed.
74. The applicant told the doctor that he started working for three days per week with HOI from August 2017 but he found it difficult to concentrate due to his anxiety and depression. In October 2017, he received a letter advising him that none of the complaints made by Ms Corey had been substantiated. He felt relieved notwithstanding that his submission that the complaint had been vexatious had not been supported.
75. The doctor reported that in mid-November 2017, the applicant was advised that two complaints that had been made by Mr Barnett had been substantiated. He felt depressed, and ruminated over it. He did not know how he could respond. He became extremely distressed by the findings because of the impact on his career. Curiously, the applicant did not tell the doctor that he was exonerated in March 2018.

76. The applicant stated that in December 2017, he experienced depressed mood with suicidal thoughts. He was referred Dr Brownlee, who diagnosed depression, and he had continued to see her on a weekly basis. He had been prescribed Sertraline.
77. The applicant told the doctor that his mood was "stuffed" and he was frequently teary. His interest in activities had been diminished and he had reduced energy, although he continued to go to the gym, and go cycling and running. His sleep was disturbed with multiple middle awakenings, but his appetite was reasonable. He had very poor concentration and on-going feelings of hopelessness and suicidal ideation.
78. The applicant denied any history of depression or other psychological issues, apart from a psychological assessment in his youth. The doctor noted that the applicant had past issues with alcohol consumption prior to 2012. From 2016 to 2017, his alcohol consumption escalated in the context of his anxiety and depressive symptoms.
79. Dr Smith diagnosed a Major Depressive Disorder of moderate severity. There was also a history of an Alcohol Use Disorder, Cannabis Use Disorder and significant cocaine consumption in the 1980s. According to the history, the applicant's drug disorders were in remission.
80. Dr Smith stated that the anxiety and depressive symptoms arose in the context of employment difficulties from June 2015, after the first complaint of bullying and harassment that was later determined to be unsubstantiated.
81. Dr Smith noted that the applicant's mood had been affected by the complaints in early 2017. There was a marked deterioration in his anxiety and depression in July 2017, after his employment had been terminated and a marked worsening in November 2017, after he was informed that complaints made against him had been substantiated. His mood had deteriorated in that context as he felt that his career had been negatively impacted.
82. Dr Smith considered that the work-related causative events were the main contributing factor to the applicant's psychiatric disorder. He felt that the predominant contributing factors to the development of his depressive symptoms were the complaints made against him, the investigation into the complaints made against him, his termination of employment in July 2017 and then the most significant factor, the letter informing him that two complaints had been substantiated against him
83. Dr Smith stated that the applicant was unfit for his pre-injury and managerial duties due to his difficulties with cognitive functioning, but he would be able to work in lower level duties for up to 20 hours per week over three days per week. He recommended on-going treatment.

### **Financial records**

84. There are 11 tax invoices that were submitted by the applicant to HOI. These show that he worked from 7 August 2017 to 6 December 2017. He also submitted invoices for travel expenses to Melbourne in January 2018 and to Sydney in February 2018. These seem to total \$57,870.83. When he worked at the University of Wollongong on 9 November 2017 and 10 November 2017, he was paid \$1,300 for each day.
85. A purchase register created on 6 November 2018 shows a total of \$58,894.90 was received prior to 16 January 2018. The company tax return for the year ending 30 June 2018 showed gross income of \$53,121.
86. The service contract agreement between the applicant and HOI shows that he was retained as the Director, Business Development for six months from 7 August 2017. He was to contribute to the performance, business development and Human Resources.

87. It was agreed that the applicant would work for three days per week at the Adelaide offices of HOI at a fixed rate of \$876 per day plus GST. He would also be reimbursed for all expenses reasonably and properly incurred. He was required to give two weeks' notice in the event that he wished to resign.

### **APPLICANT'S SUBMISSIONS**

88. The applicant's counsel, Mr Carney, submits that injury is not in dispute. The issue concerns whether the applicant's injury was wholly or predominantly caused by reasonable action taken by the respondent with respect to discipline.

89. Mr Carney submits that the applicant provided a detailed statement and described the issues that he had experienced since 2015. The complaint lodged by Dr Flecknoe-Brown was investigated and the applicant was exonerated. There was also a campaign waged in the local media.

90. Mr Carney submits that the applicant had issues with ██████████ that escalated as time passed. ██████████ called him early in the morning, he was attending meetings and taking notes. He was difficult in their weekly meetings and in his expectations. He had problems with others and these were highlighted in the letter from ██████████ in September 2015.

91. Mr Carney submits that the applicant had issues when he was contacted by Ms Ball for the purpose of the Governance Audit in January 2016. In March 2016, ██████████ was furious about the investigation into the death of the patient after discharge and he thought that ██████████ was attempting to escalate the matter at the Board meeting. There was a long, on-going dispute with ██████████ and Dr Tomlinson regarding the Governance Audit that did not go away. The Public Interest Disclosure issue in December 2016 also put pressure on the applicant.

92. Mr Carney submits that the applicant experienced problems with Mr Barnett in early 2017 relating to his performance before Mr Barnett lodged his complaint. The applicant's problems were well advanced before this complaint was received. ██████████ had threatened that he would not be reappointed. The complaint was not finalised until the end of 2017. He also had issues with Ms Corey about an investigation in to the conduct of an obstetrician. This was on the background of on-going issues with ██████████ and Dr Tomlinson.

93. Mr Carney submits that the problems with Mr Barnett continued and there were issues at the Board meetings. Documents were leaked to the press and the ABC and the applicant suspected that ██████████ was responsible. The outcome of the investigation into Dr Flecknoe-Brown's complaint was supposed to be confidential.

94. Mr Carney submits that Dr Refshauge suggested that the applicant leave work earlier than he expected and his contract was terminated on 7 July 2017. The applicant continued to have problems sleeping and had difficulties with his concentration. In October 2017, he was exonerated of any bullying and harassment of Ms Corey. He was still troubled by sleep and mood problems.

95. Mr Carney submits that the applicant was devastated when he received the letter from Dr Refshauge on 17 November 2017. He had never been afforded the opportunity to respond to the allegations and his request to gain access to Mr Klein's report was refused. He continued to have issues with his sleep and remained obsessed with the events at the respondent. There were a number of events over a period of time and the length of time to investigate the complaints exacerbated the applicant's injury.

96. Mr Carney submits that Mr Barnett made his complaint in late 2016 and it was formalised in February 2017. It took 10 months before the investigation findings were published. There

was a long history of problems with Board members and the investigation should have been dealt with earlier. The applicant had already left the employ of the respondent by that stage. The whole and predominant cause of his injury and the reasonableness of action must be considered on a background of the long delay in the investigations and the issues with [REDACTED], who was aggressive and confronting.

97. Mr Carney submits that the first complaint of psychiatric problems was made by the applicant on 27 December 2017. There was reference to the issues with the media, with [REDACTED] and the termination of his contract. The system was flawed and the problems dated from 2015. This represented an on-going process and cumulative process that predated the findings in November 2017. The respondent has not discharged the onus under s11A of the 1987 Act.
98. Mr Carney submits that Dr Canaris confirmed that the applicant's problems developed over a period of time. He diagnosed a Major Depressive Disorder that was in partial remission and he considered the applicant's problems were predominantly due to the events at the respondent and that he was unfit for his pre-injury duties.
99. Mr Carney submits that Dr Smith had a similar view and diagnosis, but he felt that there had been a significant deterioration in his symptoms after the applicant's employment had been terminated and this was before the outcome of the investigation. He submits that the applicant's psychological problems were in existence well before he was advised about the outcome of the investigation.
100. Mr Carney submits that the applicant explained why he stopped working for HOI. Dr Smith considered that the applicant was fit for low level work for 20 hours per week. He submits that perhaps the applicant could work in a menial position in retail or in data entry, but the applicant was not fit for managerial work when Dr Smith saw him in March 2018.
101. In reply, Mr Carney submits that the applicant indicated in his statement that he was working every day and was only earning \$1,045 per week. The letters from Dr Refshaugue were only summary documents and not investigation reports. The applicant was reimbursed expenses, but this did not constitute wages.
102. Mr Carney submits that Dr Canaris had a history of the work that the applicant was performing after he left the employ of the respondent and the opinion of Dr Smith regarding the applicant's capacity was not inconsistent with the work that he was doing.

## **RESPONDENT'S SUBMISSIONS**

103. The respondent's counsel, Ms Goodman, submits that the applicant commenced employment in his own company on 7 August 2017 shortly after he ceased work at the respondent. The financial records show that from 16 August 2017 to 26 December 2017, he earned \$58,894.90, which exceeds the weekly statutory maximum in s 34 of the 1987 Act. There is no evidence that the applicant's capacity lessened in any way after he ceased work at the respondent.
104. Ms Goodman submits that Dr Canaris did not appear to have obtained a history that the applicant had worked for five months before he suffered an injury, so less weight should be given to his opinion. The doctor stated that the applicant's depression would have made him too unwell to work at the time of his departure from his workplace, but the applicant in fact was able to work. Dr Canaris may have had a different opinion if he knew this. She submits that the applicant was earning and could earn an income in excess of the statutory maximum.
105. Ms Goodman submits that Dr Canaris also indicated that the applicant would not achieve an assessment of 15% whole person impairment, which suggests that his condition is not overly great. The applicant also told the doctor that he was still going into work, but he was not

being paid. The applicant submitted invoices for travel expenses, which is not consistent with someone only doing voluntary work.

106. Ms Goodman submits that Dr Smith suggested that the applicant could work in a lower level management position for up to 20 hours per week. In the applicant's subsequent employment, he earned \$100 to \$120 per hour, so he would be able to earn in excess of the statutory maximum. Dr Smith obtained a detailed history and noted that the applicant's problems commenced in June 2015 and there were a number of subsequent events, but he did not require any treatment until 27 December 2017. She submits that the applicant has no on-going incapacity or any incapacity is very minimal.
107. Ms Goodman submits that Dr Cunningham certified that the applicant had no current work capacity in a post-dated certificate that she issued on 27 February 2018. In her report dated 27 December 2017, the doctor advised that the applicant "fell apart last week" after more media publicity. The doctor did not seem to have a history that the applicant worked for five months and earned about \$2,000 per week. Further, she provided no explanation as to why the applicant had no current work capacity since December 2017.
108. Ms Goodman submits that Dr Cunningham reported that the applicant's symptoms started in June 2015 arising from on-going work stressors, but there is no reference to any problems in her clinical notes and the first time the applicant saw the doctor about his symptoms was on 27 December 2017. The applicant did not consult a doctor from 2011 to 2015. On 5 December 2015, when he consulted another doctor, there was no mention of any psychological issues. There is also no report from the treating psychiatrist, Dr Brownlee.
109. Ms Goodman submits that the respondent does not dispute that there were a lot of things happening in the workplace, but there is an issue as to whether the applicant suffered a psychological injury. Despite the suggestion in the applicant's statement that his problems started in 2015, there is no evidence that they had any impact on him until December 2017.
110. Ms Goodman submits that Dr Smith noted that the applicant reported that he was shattered after he spent a lot of time responding to a report of Ms Ball, but he did not see any doctor for treatment.
111. Ms Goodman submits that the complaint was submitted by Mr Barnett in February 2017 and by Ms Corey in May 2017. There was not a great deal of time between the submission of the complaints and the publication of the findings of the investigations. The applicant told Dr Smith that he was knocked over and he was devastated following this complaint and was considering negotiating a way out. His contract was terminated and the applicant stated that it was a relief to get out.
112. Ms Goodman submits that Dr Smith recorded that the applicant received the letter in mid-November 2017 that indicated that two of the complaints had been substantiated. It was on the basis of this history that Dr Smith diagnosed Major Depressive Disorder. The doctor reported that the applicant described the development of anxiety and depressive symptoms in the context of difficulties in his employment from June 2015 after a complaint had been made against him. There is no necessity under s 11A of the 1987 Act for the complaint to have been substantiated.
113. Ms Goodman submits that the employer's actions with respect to the discipline must be the whole and predominant cause of the psychiatric injury. There was a complaint about the applicant in 2015 and the employer reasonably investigated it with the applicant's participation. The respondent collected evidence from various people, made findings and the applicant was advised that he was exonerated of any wrongdoing. If there were any symptoms arising from these events, then s 11A of the 1987 Act comes into play.

114. The complaints in 2017 were investigated and lengthy reports were produced. If symptoms arose, they resulted from reasonable action by the respondent. From early 2017, the respondent was dealing with two complaints. There were fully investigated and lengthy reports were produced by Mr Klein and Mr Baldwin. The applicant was given the opportunity to make statements and deal with the evidence.
115. Ms Goodman submits that according to Dr Smith, there was a causal nexus between the applicant's condition and this process. He advised that there was a significant deterioration in the applicant's anxiety and depressive symptoms in July 2017 after his employment was terminated and his anxiety and depressive symptoms worsened markedly in November 2017 when he received the letter informing him that the complaints made against him had been substantiated.
116. Ms Goodman submits that Dr Smith reported that the predominant contributing factors to the development of his depressive symptoms were the complaints made against him, the investigation into the complaints made against him, his termination of employment in July 2017. However, the most significant factor was the letter informing him that two complaints had been substantiated against him. These matters all arise out of discipline in the context of s 11A of the 1987 Act.

## REASONS

### **Was the applicant's psychological injury wholly or predominantly caused by the reasonable action taken or proposed to be taken by the respondent with respect to discipline?**

117. There is no dispute that the applicant suffers from a psychological condition. The issue for me to determine is twofold. Firstly, whether the injury was wholly or predominantly caused by action taken or proposed to be taken by the respondent with respect to discipline, and secondly, whether that action was reasonable, in accordance with s 11A(1) of the 1987 Act.
118. Section 11A (1) of the 1987 Act provides:
- “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.”
119. The issue of causation must be determined based on the facts in each case. This requires a consideration of the statutory provisions and the principles regarding causation set out in *Kooragang Cement Pty Ltd v Bates*<sup>1</sup>.
120. In *Kooragang*, Kirby J stated:
- “The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’ is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. What is required is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.”<sup>2</sup>

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<sup>1</sup> (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*)

<sup>2</sup> *Kooragang*, [463].

121. Although the High Court in *Comcare v Martin*<sup>3</sup> raised some concerns about the common - sense evaluation of the causal chain, it still has a role to play in the application of the legislation to the facts of the case.
122. The respondent carries the onus of establishing the action taken was reasonable in accordance with the principles discussed in *Pirie v Franklins Ltd*<sup>4</sup> and *Department of Education & Training v Sinclair*.<sup>5</sup>
123. The test is objective, based on the facts, and involves questions of fairness. In *Irwin v Director-General of School Education*<sup>6</sup>, Geraghty CCJ stated:
- “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 a test of convenience. The test of ‘reasonableness’ is objective and must weigh the rights of employees against the objective of employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”
124. When considering what is reasonable, it is also important to have regard not only to the end result, but to the manner in which it is effected. This was discussed in some detail by Truss CCJ in *Ivanisevic v Laudet Pty Ltd*<sup>7</sup>, as well as by the Court of Appeal in *Northern NSW Local Health Network v Heggie*<sup>8</sup> and *Sinclair*.
125. Ms Goodman acknowledges that there were a number of events to which the applicant was exposed during the course of his employment. According to the applicant, he had no issues before 2013. A complaint of bullying being made by Dr Flecknoe-Brown in 2015, but this was subsequently found to be unsubstantiated. The applicant had no health issues then.
126. Unfortunately, it is difficult to gain much of an impression of the effect that the work events had on the applicant. The 26-page statement consists of 214 paragraphs. It seems that this was drafted by the applicant with minimal input, if any, from his solicitor. Unfortunately, it contains a large amount of irrelevant background material regarding the system of work and other matters of little probative value. It is rambling at times, refers the applicant’s personal views about a variety of matters and it provides little focus on the issues in dispute.
127. It seems that the applicant’s problems stemmed from his dealings with [REDACTED] and the dysfunctional Board, the persistent campaign waged by Dr Flecknoe-Brown and the complaints made by Mr Barnett and his partner, Ms Corey. The situation was further complicated by the involvement of disgruntled staff members, the media and politicians in State Parliament.
128. No doubt the applicant would have found Dr Flecknoe-Brown’s actions and that of the other participants distressing, but he only indicated that he experienced difficulty sleeping. He did not suggest in his statement that he had any other mental health problems.
129. The applicant’s statement is lacking in any detailed comment regarding how these various events impacted on his physical and mental state. The early symptoms seemed to be confined to sleeping difficulties and tiredness, and these symptoms seemed to progress as time passed. Eventually he became nauseous when thinking about going to work.

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<sup>3</sup> [2016] HCA 43, [42].

<sup>4</sup> [2001] NSWCC 167; 22 NSWCCR 346 (*Pirie*).

<sup>5</sup> [2005] NSWCA 465; 4 DDCR 206 (*Sinclair*).

<sup>6</sup> NSWCC No 14068/97 (unreported, Geraghty J, 18 June 1998) (*Irwin*).

<sup>7</sup> (unreported, 24 November 1998).

<sup>8</sup> [2013] NSWCA 255 (*Heggie*).



130. The applicant had major issues in his dealings with [REDACTED]. [REDACTED] was aggressive and difficult to work with, but he did not mention how these incidents impacted on his mental state. The applicant's evidence regarding [REDACTED] has not been challenged by the respondent.
131. The applicant stated that he felt that [REDACTED] was plotting to get rid of him and that he sabotaged his job application for the position on the Central Coast. It also seems likely that [REDACTED] was responsible for leaking the confidential reports to the media outlets. The publication of this material and the suggestion by the media that he left work because of the Governance Audit apparently placed the applicant in an extremely uncomfortable position. Remarkably, none of the media material is in evidence and his statement does not identify any psychological issues that were caused by this. He merely stated in general terms that his sleep and mood continued to deteriorate and at times he was in tears.
132. The applicant's dealings with Mr Barnett were obviously a source of distress. He had to reprimand Mr Barnett for poor behaviour whilst the investigation into the bullying complaint against Mr Barnett was pending. The applicant was also faced with Mr Barnett's complaints about him, as well as the complaint made by Ms Corey. He made a cry for help to Ms Pearce in June 2017, which has not been disputed by the respondent. This was not long before Dr Refshaugue suggested that he cease work sooner than he had hoped too. This conversation affected his mental state, because he went home and cried before returning to work, although he was not sure whether this was due to disappointment or relief.
133. According to the applicant's evidence, after he left the respondent, he remained active but he suffered episodes of crying. He was able to work for three days per week for HOI, leaving paid employment in early December 2017 because he felt that he could not be reliable and justify his position. This evidence has not been corroborated by Ms Lazarevic. He continued to have difficulties with his sleep, he was teary and he had nightmares and poor concentration.
134. The applicant was advised about the outcome of the Ms Corey's complaint on 26 October 2017. It is clear from his subsequent correspondence to the respondent that he was not willing to accept the "referee's decision" without having the last word, even when he was found have no case to answer.
135. There is no doubt the finding in respect of Mr Barnett's complaint had a "devastating" effect on the applicant, to use his words. He claimed that he was not provided with the opportunity to respond, although he provided detailed responses to the investigator. There seems little doubt that he was initially deprived of having the last word, something that he undoubtedly craved.
136. Nevertheless, the applicant was exonerated on 29 March 2018 and his statement does not provide any detailed explanation regarding this outcome or how he felt after this. It is remarkable that there is no documentary material regarding the findings and the reasons for this decision in evidence.
137. In summary, according to the applicant's evidence, he was troubled by psychological symptoms since the first complaint was made against him in June 2015. His symptoms gradually worsened, but nevertheless he managed to remain at work and he did not seek or require psychological treatment.
138. The applicant had issues with Dr Flecknoe-Brown and the campaign that he waged in the media and in Parliament, with [REDACTED] and with members of the Board. He was distressed by the contents of the Governance Audit report, the circumstances of his termination, the publicity in the media following the leaking of information, presumably by [REDACTED] and the complaints that were made by Mr Barnett and Ms Corey. He had a major breakdown when he received the letter from Dr Refshaugue on or about 17 November 2017.

139. Although he was traumatised by the contents of the letter, he did not seek treatment for another six weeks or so. In the meantime, he obsessed about the events at the respondent and he even contemplated suicide. When he saw Dr Cunningham on 27 December 2017, he was not given any treatment. It was not until he was referred to Dr Brownlee in late February 2018 or early March 2018 that he had counselling and he was prescribed antidepressant medication.
140. The medical evidence in this matter is lacking. There are no substantive reports of note from Dr Cunningham, apart from the hand-written report sent to the insurer. There is only one certificate and even that was back-dated.
141. Given that the applicant has continued to see Dr Brownlee, it is remarkable that there is no report from the doctor or copies of her clinical notes. Therefore, in the absence of such evidence and any explanation of same, one can only conclude that Dr Brownlee's evidence would not have advanced the applicant's case on the principles set out in *Jones v Dunkel*<sup>9</sup>.
142. According to Dr Cunningham, when she first saw the applicant on 27 December 2017, he fell apart a week earlier following media publicity. He identified the issues with [REDACTED], his termination and symptoms of poor sleep and concentration that had been troubling him since June 2015 and had become worse following the multiple investigations. In other words, he had multiple issues and was not focussed solely on the outcome letter.
143. Significantly, at the consultation on 27 February 2018, Dr Cunningham recorded that the applicant was trying to self-manage his symptoms and lack sleep and he did not see a doctor. This history explains the lack of treatment prior to December 2017. The applicant also raised concerns about the time that Mr Klein's investigations had taken, which commenced in February 2017 and were not finalised until November 2017.
144. Dr Cunningham referred to this history in her handwritten report dated 19 March 2018. She advised that the applicant's symptoms were caused by on-going work stressors with management, the Boards sackings, staff interactions, his perceived behaviour and repeated delayed investigations into complaints made against him. She believed that the repeated and on-going work-related events that had a compounding effect on his depression. Therefore, there were multiple issues.
145. A similar view was expressed by Dr Canaris in July 2018. The applicant identified the issues with Dr Flecknoe-Brown and [REDACTED], the media coverage and the investigations into the complaints about him and the finding that he had brought NSW Health into disrepute. He recorded that the applicant left work because he felt his position was untenable.
146. Dr Canaris attributed the applicant's Major Depressive Disorder predominantly to the difficult workplace situation involving the management of the Board, a dysfunctional work culture and the complaints against him. He did not single out the investigation outcome as the predominant cause.
147. In summary, according to the applicant's doctors, the cause of his injury was multifactorial and accumulative or compounding, and it was not merely isolated to the investigation and receipt of the outcome letter of 17 November 2017.
148. Dr Smith considered that the applicant's Major Depressive Disorder arose due to employment difficulties from June 2015, with a marked deterioration after his employment had been terminated and again in November 2017. His history was the most detailed of all of the doctors and referred to the issues with Dr Flecknoe-Brown and [REDACTED], the media

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<sup>9</sup> [1959] HCA 8; 101 CLR 298.

coverage and Parliamentary discussions, the sacking of the Board members, and the complaints by Mr Barnett and Ms Corey.

149. It seems that the applicant was devastated by these allegations and he was extremely distressed by the outcome of the second investigation. Some of these issues may well relate to the other grounds in s 11A of the 1987 Act, such as performance appraisal, retrenchment or dismissal, or for that matter, termination, but the respondent only relies on the defence relating to discipline.
150. It is clear from the dispute notice that the insurer focussed on the investigation into the complaints and the letter advising the applicant about the adverse findings. The medical evidence is divided as to the predominant cause of the applicant's injury. There is certainly compelling evidence in the guise of Dr Smith's report regarding the predominant cause of the applicant's psychological injury and this relates to the disciplinary procedures undertaken by the respondent.
151. Dr Smith indicated that the outcome letter was the most significant factor. The Macquarie Dictionary defines the word "significant" as:

"significant

*adjective* 1. important; of consequence.

2. expressing a meaning; indicative.

3. having a special or covert meaning; suggestive.

–*noun* 4. *Obsolete* something significant; a sign.

[Latin *significans*, present participle, signifying]

–**significantly**, *adverb*"

152. The definition for "predominant is"

"predominant

*adjective* 1. having ascendancy, power, authority, or influence over others; ascendant.

2. prevailing.

[French *prédominant*]

–**predominantly**, *adverb*"

153. Therefore, if one interprets the terminology used by Dr Smith in accordance with the dictionary definition, he seems to suggest that the outcome letter was most "important" and "of consequence", rather than it "having ascendancy" or "prevailing" over the other workplace events.
154. Significantly, Dr Smith acknowledged that the work events were the main contributing factor to the applicant's psychiatric disorder. Therefore, he accepted that the applicant suffered an injury that had many causative elements, and it was not restricted to just the receipt of the letter informing him that two complaints had been substantiated.
155. Whilst it is true that receipt of the outcome letter in November 2017 had a profound impact on the applicant, in my view this was the final straw for a person who was already suffering from

a longstanding and untreated fragile mental state. The applicant's medical evidence supports such a finding.

156. Therefore, having regard to the evidence of the applicant and that of Drs Cunningham and Canaris, I am satisfied on the balance of probabilities that the applicant's injury was not wholly or predominately caused by the investigation into the complaints and the letter advising the applicant about the adverse findings as suggested by the insurer in its dispute notice.

157. If I am wrong in my determination of this issue and one was to accept that the predominant cause of the applicant's psychological injury was the receipt of the outcome letter in November 2017, then the next question to be considered in the alternative is whether the respondent's actions with respect to discipline were reasonable in the circumstances.

158. It was confirmed in *Heggie* that the term "discipline" in s 11A (1) of the 1987 Act includes the whole of the disciplinary process. Sackville AJA stated:

"The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:

- (i) A broad view is to be taken of the expression "action with respect to discipline". It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation;
- (ii) Nonetheless, for s 11A (1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer;
- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable;
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline;
- (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury, and
- (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 (emphasis added)."<sup>10</sup>

159. The outcome letter from the respondent referred to emails that Mr Barnett sent to the applicant on 20 February 2017 and 28 February 2017. It seems that the second email was the formal complaint as it was also sent to [REDACTED]. The Board was provided with a copy of the complaint and it was discussed at the March 2017 meeting. Remarkably neither of these emails are in evidence. The applicant was not interviewed by Mr Klein until early May 2017.

160. On 26 May 2017, the applicant was advised that Ms Corey had also lodged a complaint against him. The actual complaint is not in evidence but the investigation report shows that emails were sent by Ms Corey on 19 May 2017 and 2 June 2017.

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<sup>10</sup> *Heggie*, [59].

161. Mr Baldwin was appointed to investigate Ms Corey's complaint on 20 June 2017. According to his report, he interviewed 11 people and listened to audio recordings. He concluded that applicant had no case to answer.
162. At some stage after he ceased work, the applicant sought an update regarding the investigations from Mr Refshaugue. Eventually on or about 5 October 2017, he received the outcome letter regarding Ms Corey's complaint. This investigation took a little under five months to conclude. The applicant requested a copy of Mr Baldwin's report and he was apparently provided with same in mid-October 2017.
163. It is unclear from the evidence when Mr Klein completed his report. Remarkably the outcome letter sent to the applicant by Dr Refshaugue is undated, but it seems that he received it on or about 17 November 2017. The applicant sought a copy of the investigation report via email on 18 November 2017, Dr Refshaugue rejected his request, indicating that he had been provided with relevant information in line with the respondent's Managing Misconduct Policy Directive.
164. On 24 November 2017, the applicant requested a copy on the basis of his right to access in accordance with the relevant policy to enable him to respond. Mr Refshaugue did not respond to this email. The applicant renewed his request on 30 November 2017, but it seems that he was ignored. The respondent also failed to provide a copy of the report in answer to a Notice to Produce issued in these proceedings. It is apparent from the outcome letter that Mr Klein interviewed nine people. Whilst there were six allegations, most were only asked about the first allegation.
165. In my view, it was appropriate for the respondent to undertake the investigations into the complaints made by Mr Barnett and Ms Corey. It was also appropriate for the respondent to advise the applicant about the outcomes of investigations, even though they did not conclude until a number of months after the applicant's contract was terminated.
166. In my view, the manner in which the respondent conducted the investigation process was questionable. Ms Corey's complaint was made three months after that of Mr Barnett and its findings were issued before those of the first investigation. There is no evidence to explain why the investigations took almost five months and seven months to conclude.
167. The investigations may have been delayed due to the absence of witnesses, but in my view, it seems more probable that the delay was occasioned by unreasonable and unexplained inactivity on the respondent's part and then delays occasioned by the investigators.
168. The process has also been clouded by the refusal of the respondent to provide the applicant with a copy of Mr Klein's report, even though it had no such concerns about providing a copy of Mr Baldwin's report. I consider that the respondent's refusal to provide the applicant with a copy of Mr Klein's report, even without attachments, was unreasonable.
169. One would have thought that a reasonable employer would have investigated the complaints in a more expeditious and timely fashion, just as it had when Dr Flecknoe-Brown lodged a complaint in late May 2015, which was concluded approximately six weeks later by mid-July 2015.
170. It took the respondent three weeks to appoint Mr Baldwin and approximately three months to appoint Mr Klein. Mr Klein interviewed the applicant in late May 2017, so one would expect an outcome to the investigation within a short period of weeks, not months. In my view, this does not suggest any urgency of the respondent's behalf and the applicant's situation was further complicated by Mr Barnett's performance issues whilst the investigation was pending.
171. Therefore, the applicant's evidence supports the contention that his accepted psychological injury was caused by the various events to which he was exposed during the course of his

employment after June 2015. Even Dr Smith acknowledges that the events, which have not been challenged by the respondent, were the main contributing factor to the applicant's psychiatric disorder.

172. However, even if I am wrong and I was to accept Dr Smith's opinion that receipt of the letter was the predominant cause of the applicant's injury, I am not satisfied that the manner in which the respondent conducted the disciplinary process was reasonable in accordance with the principles in *Heggie* and *Sinclair*. Therefore, the respondent has not discharged the onus and its defence under s 11A of the 1987 Act fails.
173. Therefore, having regard to the totality of the evidence and the common-sense evaluation test in *Kooragang*, I am not satisfied on the balance of probabilities that the respondent has discharged the onus of showing that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by it with respect to discipline.

### **Extent of the applicant's incapacity**

174. An assessment of the applicant's capacity involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.

175. Section 32A of the 1987 Act defines the relevant terms as follows:

**“current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.

**no current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

**suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:

- (a) having regard to:
  - (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
  - (ii) the worker's age, education, skills and work experience, and
  - (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
  - (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
  - (v) such other matters as the WorkCover Guidelines may specify, and
- (b) regardless of:
  - (i) whether the work or the employment is available, and
  - (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
  - (iii) the nature of the worker's pre-injury employment, and
  - (iv) the worker's place of residence.”

176. “No current work capacity” requires a consideration of a worker's capacity to undertake not only his pre-injury duties, but also suitable employment, irrespective of its availability. This

was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De Boer*<sup>11</sup> and in *Wollongong Nursing Home Pty Ltd v Dewar*.<sup>12</sup>

177. Therefore, if the applicant has “no current work capacity”, I need to assess whether the applicant is unable to return to both his pre-injury duties and some suitable employment.
178. Despite the somewhat dated and inadequate state of the evidence from the applicant’s treating doctors, there is no medical evidence to suggest that he has been fit to return to his pre-injury duties since his termination on 7 July 2017.
179. Although the applicant initially saw Dr Cunningham on 27 December 2017, she did not prescribe any medication or certify that the applicant was unfit for work. She was aware that the applicant was working without pay and in her report dated 19 March 2018, the doctor indicated that the applicant had no current work capacity since 9 December 2017.
180. This was also confirmed in the back-dated certificate dated issued on 27 February 2018, certifying that the applicant had no current work capacity from 9 December 2017 to 30 May 2018.
181. Drs Smith and Canaris, who saw the applicant in March 2018 and July 2018, respectively agreed that the applicant was unfit to return to work for the respondent. Therefore, in the absence of any evidence to the contrary, I am satisfied that the applicant has at all times been unfit for his pre-injury duties.
182. The next question to consider is whether the applicant was or is fit for suitable employment as defined in s 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the worker’s age, education, skills and work experience, any return to work plan, and any occupational rehabilitation services that have been provided to her, irrespective of whether the work was available to him or of a type or nature that is generally available in the employment market.
183. The applicant is 57 years old. His statement is silent regarding his past employment, but fortunately Dr Smith recorded a detailed history. He recorded that the applicant left school at the end of year 12, studied economics at the Australian National University for one year, took a year off and then studied psychology at the University of NSW for 3.5 years.
184. Dr Smith reported that the applicant worked as a parole officer in the Northern Territory for two years, at the Drug and Alcohol Unit at St George Hospital for eight months, the Methadone Clinic at Sutherland Hospital for two years, the Directorate of the Drug Offensive for four years and in the Service, Quality and Improvement Branch for two years.
185. The doctor noted that the applicant worked from 1996 to 2001 in a trial in an Aboriginal organisation in Broken Hill and then became the Director of Mental Health, Drug and Alcohol in Broken Hill and in Adelaide from 2001. He ran his own business from 2006 to 2011 in health services planning before commencing work with the respondent.
186. Therefore, it is apparent that the applicant has long and varied work history and would have a number of transferable skills. He has not been involved in any return to work plan or provided with any occupational rehabilitation services.
187. Although the applicant indicated that he had psychological issues after he ceased work at the respondent in July 2017, he was able to obtain work for three days per week at an agreed rate of \$876 per day with HOI from 6 August 2017. The contract was for an initial period of six months.

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<sup>11</sup> [2013] NSWCCPD 41.

<sup>12</sup> [2014] NSWCCPD 55.

188. The applicant stated that as from 6 December 2017, he felt that he could no longer work at a level commensurate with his experience, and presumably his pay level, so he agreed to work without payment. This evidence has not been corroborated by HOI. The tax invoices show that since 6 December 2017, he only received reimbursement for travel expenses to Melbourne and Sydney.
189. According to Dr Cunningham, the applicant has had no current work capacity since 9 December 2017 and yet she did not prescribe any treatment. Putting aside the fact that she issued a backdated certificate that was inconsistent with the *SIRA Guidelines for Claiming Workers Compensation*, she knew that the applicant was working without being paid, so this raises some issues about the weight that can be given to her opinion, particularly in light of the other medical evidence in the case.
190. Despite the submissions of Ms Goodman, Dr Canaris was aware that the applicant worked for three days per week until he could no longer manage the job and that he continued to perform unpaid work. There was no history that this arrangement had ceased. According to Dr Canaris, the applicant was only doing the volunteer work because he seemed to be unable to work in an effective and sustained fashion. He did not place any restrictions on the number of hours that the applicant could perform this volunteer work.
191. In my view, the most persuasive opinion comes from Dr Smith. Even though he did not examine the applicant until 8 March 2018, he is the only doctor to have applied his mind to the question of the applicant's capacity and he is of the view that the applicant could work for 20 hours per week over three days in a lower level position. Dr Canaris has not addressed this other than to suggest the applicant does voluntary work because he is unable to work effectively presumably due to concentration issues.
192. Having regard to the definition of suitable employment in s 32A of the 1987 Act, the applicant's medical evidence as a whole, his age, education, skills, work experience and the other matters referred to in the definition, I am satisfied that the applicant has been fit to perform some work for 20 hours per week since 9 December 2017. As there is no evidence to support any incapacity prior to that date, there will be an award for the respondent in respect of the claim for weekly compensation from 7 July 2017 to 8 December 2017.

### **Quantification of the applicant's entitlement to weekly compensation**

193. The parties agreed that the applicant's PIAWE exceeded the statutory maximum in s 34 of the 1987 Act at all relevant times. According to his tax return for the financial year ending 30 June 2017, shortly before his contract was terminated, his gross earnings were \$210,025. This equates to \$4,038.94 per week, or \$106.28 per hour for a 38-hour week.
194. Although the claim for weekly compensation commences as from 7 July 2017, the applicant's financial material shows that in the period 6 August 2017 to 6 December 2017, a period of almost 18 weeks, he earned well in excess of the statutory maximum.
195. The applicant was paid \$2,628 per week when he worked three days per week for HOI. This equates to almost \$110 per hour. Therefore, the hourly rates are almost the same. In any event, this is irrelevant as I have determined that the applicant has not adduced any medical evidence to support an incapacity prior to 9 December 2017.
196. The evidence gives no guidance as to what type of lower level job would be suitable for the applicant to perform for 20 hours per week.
197. The applicant's statement is of minimal assistance rearguing his capacity. He indicated that his unpaid work involves preparation of proposals and junior staff support. Presumably this involves some mentoring or the like.



198. It is obvious that he is highly intelligent and he was able to respond, with legal assistance, to the investigation that was undertaken by Mr Klein in such a fashion that the findings of the investigation were overturned.
199. In June 2018, the applicant was able to write a 26-page statement of some 214 paragraphs that provided a detailed commentary about the nature of his employment and the issues that he faced. In my view, such a document would have required more focussed thought processes and concentration than one might expect for a person capable of only working in a low-level job. Dr Smith may well have changed his opinion regarding the applicant's capacity had this statement been made available to him.
200. The alleged "work for no pay" agreement with HOI is not corroborated by any evidence from Ms Lazarevic. I must confess that I find it difficult to accept that someone would voluntarily work for a non-charitable organisation without being paid for his or her services, irrespective of how effective or otherwise he or she might be.
201. The fact that the applicant was able to travel interstate to Melbourne for at least one day's work in January 2018 and to Sydney for three days in late February 2018, including travel to the University of Wollongong for a meeting, in my opinion suggests that the applicant has the capacity to undertake remunerative employment.
202. In my view, interstate travel, preparation of proposals and providing support to junior staff would involve higher cognitive functioning. One must also remember that when the applicant provided services to the University of Wollongong in November 2017 when he was on HOI's payroll, he was paid \$1,300 per day. The fact that he was meeting with representatives of a major organisation such as the University of Wollongong suggests to me that he was performing work of a higher level. Unfortunately, his statement is silent about this work and the doctors have not recorded precisely what his unpaid work entailed.
203. Therefore, doing as best that I can with the little material that is before me, I consider that the applicant would be able to perform work of an advisory nature at a lesser level for 20 hours per week at a reduced hourly rate of, say, 75% of his hourly rate with HOI, namely \$82.50 per hour.
204. In accordance with s 36(1)(b) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 9 December 2017 to 9 March 2018 is:
- $$\text{MAX} - \text{D} = \\ \$2,101.70 - \$1,650 = \$451.70 \text{ per week.}$$
205. In accordance with s 37(1)(b) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 10 March 2018 to 31 March 2018 to date and continuing is:
- $$\text{MAX} - \text{D} = \\ \$2,101.70 - \$1,650 = \$451.70 \text{ per week.}$$
206. In accordance with s 37(1)(b) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 1 April 2018 to date and continuing is:
- $$\text{MAX} - \text{D} = \\ \$2,128.50 - \$1,650 = \$478.50 \text{ per week as adjusted to date and continuing.}$$

207. Therefore, the applicant will be entitled to an award in accordance with the above calculations. Such payments will continue until the second entitlement period concludes at which time his entitlements will be governed by s 38 of the 1987 Act, or alternatively, when the insurer seeks a review of this decision or conducts a work capacity decision.

### **Medical expenses – s 60 of the 1987 Act**

208. The applicant is entitled to recover the cost of reasonable medical, hospital and related expenses pursuant to s 60 of the 1987 Act in respect of his psychological injury.

### **Costs**

209. There will be no order as to costs.

### **FINDINGS**

210. The applicant sustained a psychological injury arising out of or in the course of his employment on 7 July 2017 (deemed).

211. The applicant's employment was the main contributing factor to his injury.

212. The applicant has had the capacity to undertake some work for 20 hours per weeks since 9 December 2017.

213. The applicant requires medical treatment as a consequence of his injury.

214. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.

### **ORDERS**

215. Award for the respondent in respect of the claim for weekly compensation from 7 July 2017 to 8 December 2017.

216. The respondent to pay the applicant weekly compensation in accordance with the 1987 Act as follows:

(a) \$451.70 per week from 9 December 2017 to 9 March 2018 pursuant to s 36(1)(b);

(b) \$451.70 per week from 10 March 2018 to 31 March 2018 pursuant to s 37(1)(b), and

(c) \$478.50 per week as adjusted from 1 April 2018 to date and continuing pursuant to s 37(1)(b).

217. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the 1987 Act.

218. No order as to costs.

