

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2096/19  
**Applicant:** Shane Wood  
**Respondent:** Woolworths Limited  
**Date of Determination:** 5 August 2019  
**Citation:** [2019] NSWCC 266

The Commission determines:

1. Award for the respondent in respect of the claim of psychological injury.

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

Rachel Homan  
**Arbitrator**

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

*A Jackson*

Ann Jackson  
A/Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Mr Shane Wood (the applicant) was employed as a store person by Woolworths Limited (the respondent). The applicant alleges that throughout the course of his employment with the respondent he experienced various incidents of bullying and harassment which caused the gradual onset of a psychological injury.
2. The applicant notified the respondent of an injury on or around 13 January 2018 and, on 7 March 2018, the respondent's insurer issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) declining liability.
3. On 27 August 2018, the applicant through his solicitors, forwarded a claim for weekly benefits from 26 March 2018 and ongoing, medical expenses and lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). A further s 74 notice was issued on 16 October 2018 declining liability on the grounds that the applicant had not sustained an injury pursuant to s 4 of the 1987 Act and had no entitlement to compensation pursuant to ss 33, 60 or 66 of the 1987 Act.
4. Claims for compensation for psychological injury had previously be made by the applicant and were disputed by the respondent on 3 November 2015 and 19 September 2016.

### PROCEDURE BEFORE THE COMMISSION

5. On 1 May 2019, an Application to Resolve a Dispute (ARD) was filed in the Commission seeking compensation in the form of weekly benefits from 26 March 2018 to date and continuing, incurred medical expenses and lump sum compensation in respect of a psychological injury deemed to have occurred on 13 January 2018.
6. At teleconference on 30 May 2019, the applicant was directed to file an amended ARD omitting irrelevant material. An amended ARD was received by the Commission on 12 June 2019.
7. The parties attended a conciliation conference and arbitration hearing on 1 July 2019. The applicant was represented by Mr Bruce McManamey of counsel, instructed by Mr Nayven Taouk. The respondent was represented by Mr Andrew Parker of counsel.
8. At the conciliation conference, the ARD was amended to allege a deemed date of injury pursuant to s 15 of 1987 Act of 26 March 2018. The parties were in agreement that the applicable pre-injury average weekly earnings (PIAWE) figure was \$842.48 as claimed in the ARD. It was also agreed that a general order for medical expenses would suffice in the event of a determination in favour of the applicant.
9. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

## **ISSUES FOR DETERMINATION**

10. The parties agree that the following issues remain in dispute:
  - (a) Whether the applicant sustained a psychological injury as pleaded pursuant to s 4 of the 1987 Act;
  - (b) The extent and quantification of any incapacity resulting from the injury;
  - (c) Entitlement to s 60 expenses, and
  - (d) Entitlement to s 66 lump sum compensation.

## **EVIDENCE**

### **Documentary evidence**

11. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Amended ARD filed 12 June 2019 and attached documents;
  - (b) Reply and attached documents;
  - (c) Documents attached to an Application to Admit Late Documents filed by the applicant on 7 June 2019, and
  - (d) Pages 201 and 423 of the ARD filed on 1 May 2019.
12. Neither party applied to adduce oral evidence or cross-examine any witness.

### **Applicant's evidence**

13. The applicant's evidence is set out in written statements made by him on 31 January 2018, 20 October 2018 and 17 April 2019.
14. In his first statement, the applicant said he had not been diagnosed previously for depression, anxiety, stress or any psychological condition. The applicant said he had, however, suffered from work-related stress prior to his current claim due to bullying in the workplace.
15. The applicant described a series of incidents in the workplace including an occasion on 6 January 2018 when he packed a packet of M&Ms in his lunch bag, which he brought to work and left in the lunchroom. In the afternoon, the applicant went to retrieve the M&Ms and noticed they were missing. The applicant had previously had issues with food being taken from his lunch bag which he had reported to management. The applicant reported the issue to a security officer and asked him to check the CCTV footage of the lunchroom, presuming the M&Ms had been stolen. The security officer said he would check and get back to him.
16. Approximately 15 to 20 minutes later, the applicant was paged to come to the shift office. The applicant was asked by a team leader why he had gone to the security office. The applicant was told that he should notify a team leader if he had any issues. The applicant denied being aware of that procedure and explained that his M&Ms had gone missing from his lunch bag. The team leader said he would look into it and get back to the applicant.

17. The applicant was paged to return to the shift office about an hour later whereupon the applicant was told that he had been seen taking the M&Ms or a yellow packet from his lunch bag himself. The applicant explained that this was a yellow packet of lolly snakes. The applicant was asked to retrieve the empty packet from the bin, which he did. The applicant was told he was not to eat anything whilst on the floor and should only eat in the lunchroom. The applicant protested that other employees ate whilst working but was told not to worry about everyone else and to just worry about himself. During a break, the applicant telephoned his wife and she said that she had taken the packet of M&Ms out of his lunchbox because of his high cholesterol.
18. The next day, the applicant asked a safety officer about the policy around eating on the floor. The applicant was informed that there was to be no eating whilst working on the floor. The applicant requested that the policy be enforced for everybody.
19. Later that day, the applicant went to discuss a work matter with a team leader when he was paged to return to his zone as it was dirty. When the applicant returned to his zone he saw it was clean. A co-worker told the applicant that another team leader, Angela Brown had instructed him to page the applicant. The applicant described having previous issues with Ms Brown.
20. On 13 January 2018, the applicant noticed that a female co-worker had a cooling towel around her neck. The applicant asked a team leader if he could grab a cooling towel and walked over to a box and picked one up. Another colleague who was present told the applicant that he already had one. The applicant denied this and became a bit agitated saying he would take two. The team leader phoned another team leader who apparently confirmed that the applicant already had one. The applicant suggested the team leader check the computer. A check later revealed that the applicant had not received a cooling towel. The applicant complained that he had seen other workers have multiple cooling towels around their necks and he was being harassed for asking for just one. The applicant felt discriminated against.
21. A similar incident had occurred previously at Christmas time when the applicant had gone to get a Christmas hamper and was told by Ms Brown that he had already taken one when he had not. It was only when the CCTV footage was checked that it was discovered that the applicant's name had been marked off as having received a hamper by mistake.
22. As the applicant left the office, he noticed a colleague sitting in another office with bowls of lollies and chips looking guilty. The applicant perceived that this was because the safety officer had told staff not to eat in the warehouse and only the lunchroom.
23. At about 5.00pm on the same shift, the applicant noticed a colleague named "Michel" putting food in his mouth and smiling or smirking at the applicant. The applicant perceived that he was trying to antagonise the applicant. The applicant asked some fellow workers to witness what Michel was doing but they did not want to get involved. The applicant tried to ignore the obvious antagonising but could not as this had been a pattern of behaviour for years. The applicant finished his order then went to the shift office and told the team leader that he had had enough and was going home. The applicant said he was sick of the bullying and harassment.
24. On the way home, the applicant went to a medical centre to get a WorkCover certificate as he knew he would need one from some previous claims. The applicant was due to fly out of Sydney on a planned holiday the next day, on 14 January 2018. The applicant emailed a photograph of the certificate, which certified him as having no current work capacity until 27 January 2018, to his employer.

25. The applicant had planned to return to work on 24 January 2018 but due to flight delays did not return to Sydney until 26 January 2018. On 27 January 2018, the applicant returned to the medical centre and was certified fit for pre-injury duties from 29 January 2018. The applicant returned to work on 31 January 2018.
26. In his second statement, the applicant provided details of additional instances of “bullying”. The applicant said he had noticed that he was not particularly popular but this did not bother him as he focussed on his work. The applicant eventually found out that his colleagues were of the opinion that he bragged about going on holidays when in fact he travelled overseas to seek medical treatment for his daughter and was smart about using frequent flyer points.
27. The applicant described an altercation with a manager, Michel, from whom he bought eggs. Michel appeared to take offence when the applicant was hesitant to buy his goats milk and had suggested that they do a “tasting”. The applicant claimed that Michel made his life uncomfortable and would regularly make faces at him. Michel and other colleagues began to deliberately ostracise the applicant. At one stage, the applicant and Michel participated in a mediation but the behaviour did not change.
28. The applicant claimed that his car had been scratched at work and the tyres slashed. There was offensive graffiti about the applicant on the walls of the toilets. Although the applicant complained, nothing was ever done.
29. The applicant described a colleague named “David” who was particularly volatile towards him. David would eat the applicant’s lunch when the applicant was not around. At other times, David would pick food from the applicant’s plate while he was eating. The applicant was scared of David as he was a known drug user who could get violent. The applicant said he complained on numerous occasions to managers and asked for a transfer but his requests were denied. David began spreading rumours about the applicant and telling others not to talk to him.
30. The applicant described an incident in 2015 when Ms Brown told the applicant to clean up a spill. The applicant went to a wall phone to inform her that he could not do so as he was already busy. Ms Brown then paged the applicant insisting he see her in her office. When the applicant arrived in Ms Brown’s office, she yelled words to the effect of “if you lie to me there will be trouble”. Ms Brown asked if the applicant had used his mobile phone to call her. The applicant said he used a work phone but was accused of lying. The applicant asked Ms Brown to check the cameras but she continued to yell. The applicant was given a warning and told to go home. The applicant put in a complaint against Ms Brown but nothing was ever done. The applicant began to be micromanaged and pulled up for minor infringements compared to other workers.
31. On another occasion, Ms Brown yelled at the applicant, claiming she had seen him talk to someone for an hour instead of working. The applicant denied the allegation and asked her to check the security footage. Eventually, Ms Brown realised it was another employee who looked like the applicant.
32. On one occasion, the applicant approached two colleagues who were talking to ask a question. One of the colleagues slapped the applicant in the face and said words to the effect of “can’t you see we are talking?”
33. The applicant became angry and frustrated but did not complain as he thought it might make the situation worse. Instead of retaliating, the applicant focused on work and won numerous awards for being a hard worker.
34. The applicant confirmed that on 28 July 2015, he consulted a general practitioner and was certified as unfit for work for a period of time. The applicant lodged a claim for compensation on 18 August 2015 and it was declined on 3 November 2015.

35. The bullying and harassment continued and the applicant began to receive threatening and anonymous phone calls. In January 2016, the applicant made a formal complaint and saw another doctor who issued a WorkCover certificate. That claim was also denied on 16 September 2016.
36. The applicant said he began to feel so nervous at work that he would sweat and have to use towels to mop the sweat up. Eventually, barely anyone would talk to the applicant. One colleague would sit with the applicant in the lunchroom and told him that another colleague had said words to the effect of, "if I had a gun and brought it to work, Shane Wood would be the first person I would shoot".
37. In 2017, the applicant became increasingly scared of David. On one occasion, the applicant was in the lunchroom and David walked in and put the applicant in a headlock. The applicant told him he couldn't breathe but David continued. Eventually, he let go and the applicant was left gasping for air. As the applicant left the room, David slapped him across the back of the head. An investigation was undertaken and David's manager informed but David continued to taunt the applicant and eat his lunch.
38. After this incident, the applicant hired a private investigator as he feared for the safety of his family and put up video cameras around his home. The applicant did not feel safe at home and did not trust anyone.
39. In 2017, the applicant injured his hip at work and was placed on light restricted duties. The applicant was given a special job which he had not seen any other employee do, involving scrubbing the floor and metal poles. The applicant complained to the manager that the task was not within his duties but was told he could go home if he could not do it. The applicant continued to do the job whilst other workers laughed and took photos of the applicant on their phones.
40. The applicant ceased employment in February 2018 as he had enough of the bullying and harassment and genuinely feared for his life. The applicant's general practitioner prescribed Xanax and alprazolam. The applicant consulted with a psychologist, Adrian Lumbewe.
41. The applicant described, in detail, the ways in which the injury had impacted his life.
42. In the third statement, the applicant described various consultations at Engadine Medical Centre in which he complained of stress and anxiety between 2008 and 2014. These were said to be related to the applicant's daughter's medical conditions, a panic attack on a flight, anxiety about flying, consumption of excessive coffee and his wife's pregnancy. The applicant said his reporting of anxiety symptoms was sporadic and did not stop him from performing his work duties.
43. The applicant responded to witness statements procured on behalf of the insurer.

**Dr Elisabeth Ayliff**

44. In evidence is a letter of referral from the applicant's general practitioner, Dr Elisabeth Ayliff, to the applicant's psychologist, dated 3 March 2018. The letter states,

"Thank you for seeing Mr Shane Woods under WorkCover. He is currently suspended from work pending investigation into a Facebook account of 'Mark Wiseman' who has threatened to harm Woolworths staff. The IP address was apparently traced to his house so he is under investigation. He investigated and states his IP address has been hijacked. He does have a history of long term difficulties with his employer."

45. In a report dated 11 July 2018, Dr Ayliff said she had been the applicant's general practitioner for 2.5 years. Dr Ayliff diagnosed the applicant with depression on 21 May 2018. Dr Ayliff expressed the opinion that the applicant's previous employment had been a key contributing factor to his current psychological diagnosis of depression. Whilst she treated the applicant for a left hip injury, the applicant had alluded to being singled out by staff members and given different treatment/instructions compared to other staff.
46. Dr Ayliff recalled one incident where the applicant told her he had been asked to clean some metal bars which involved being on his hands and knees which was a job that had never been assigned before. The applicant felt he was being asked to do it because staff were trying to exacerbate his hip condition and cause detriment to his return to work plan. Dr Ayliff said that she was not aware of any prior history of mental health conditions.
47. Dr Ayliff said she had spent long periods of time discussing and debriefing the applicant about events in the workplace. These culminated in him being dismissed from work, which had resulted in a loss of self-esteem, self-confidence, sense of well-being and sense of worth. Dr Ayliff expressed the belief that the main factor leading to the applicant's current depression had been the reported harassment and bullying in the workplace.
48. Dr Ayliff confirmed that she had referred the applicant for psychological therapy. Dr Ayliff expressed the belief that the applicant was unfit for work between 3 March 2018 and 22 June 2018 as a result of being bullied and harassed at work for a period of years. However, Dr Ayliff said that the applicant did have capacity to work now. Dr Ayliff said she had discussed suitable employment with the applicant and suggested he search for a job with less physical exertion in view of his hip injury. Otherwise, Dr Ayliff did not recommend any specific restrictions.
49. Dr Ayliff agreed that at the time of a report by Associate Prof Kaplan in February 2018, the applicant may not have appeared depressed. Dr Ayliff said that the applicant subsequently became depressed following the termination of his employment. The applicant was said to have an excellent prognosis but needed a period of time with his psychologist, perhaps three months, to come to terms with the events that happened in the workplace that had contributed to his current depression.
50. In a further report to the applicant's solicitors, dated 14 December 2018, Dr Ayliff confirmed that the bullying and harassment claimed by the applicant was a substantial cause of his current psychological state. Dr Ayliff indicated that she had issued WorkCover certificates certifying the applicant as not fit for work from 3 March 2018 to date. Dr Ayliff clarified that, although the applicant had a diagnosis of depression, that did not mean he was unfit for work. Dr Ayliff said she had approached the topic of a return to work with the applicant at various intervals and did feel it would benefit his mental health overall and assist with his recovery process but he did not feel capable of doing so. Dr Ayliff strongly recommended that he continue with his psychological therapy. Dr Ayliff said the applicant did have the potential to be fit to return to work and she would regularly encourage him to at least try to seek new employment as she believed it would be therapeutic for him.

### **Mr Adrian Lumbewe**

51. The applicant's treating psychologist, Mr Adrian Lumbewe, reported to Dr Ayliff on 10 May 2018 that he had seen the applicant on three occasions for assessment and treatment. The applicant reported a history of workplace bullying. The applicant reported that as a result of such, he snapped and made threats against staff members. The applicant had no intention of following through but felt it necessary for people to take him seriously. As a consequence, the applicant was fired from his job in February 2018.

52. In a psychological treatment report, dated 21 September 2018, Mr Lumbewe indicated that he had seen the applicant on eight occasions between April and September 2018. The applicant presented with major depressive disorder. Treatment had included cognitive behavioural therapy. Mr Lumbewe considered the applicant should continue with treatment including cognitive behavioural therapy, supportive counselling and acceptance and commitment therapy.
53. A mental health care plan prepared by Mr Lumbewe dated 22 May 2019 indicated that the applicant had participated in six sessions in the calendar year to date. Expected treatment length was said to be medium-term or to continue into a second year. The diagnosis was major depressive disorder.

#### **Other evidence from treating practitioners**

54. Attached to the ARD are clinical records from UHG, dating from 5 March 2008. Relevantly to the present proceedings, those records show a number of consultations for psychological symptoms.
55. On 5 March 2008, the applicant consulted a general practitioner reporting insomnia and anxiety since the birth of his daughter. The applicant had attended hospital on three occasions with muscular pains and aches and palpitations. The applicant was commenced on medication for anxiety but did not take it. There was no family history of a mental health disorder. The applicant was given a sample of Zyprexa.
56. On 12 March 2008, the applicant reported receiving some benefit from Zyprexa and sleeping better. The applicant presented for cognitive behavioural therapy education and management of anxiety.
57. On 17 March 2008, a mental health care plan was created and a letter of referral created for psychologist, Stephen Scicluna.
58. On 3 June 2008, the applicant reported a panic attack during a recent flight.
59. An entry on 12 March 2009 indicated that anxiety was still present. The note refers to cognitive behavioural therapy education and anxiety management techniques. It was noted that the applicant drank a lot of coffee and had long-standing low libido.
60. On 16 March 2009, the applicant presented for review of a mental health care plan and was referred to Stephen Scicluna for review.
61. On 6 November 2009, the applicant reported feeling very anxious. The applicant was given another sample of Zyprexa.
62. On 30 March 2011, the applicant consulted a general practitioner for anxiety management in the context of having to fly to Melbourne for medical treatment for his daughter. The note indicated that the applicant was seeing "TSH Mental Health Team".
63. On 15 September 2011, the notes again refer to a fear of flying.
64. On 1 May 2012, the applicant was prescribed Diazepam.
65. On 16 May 2012, there was a further prescription of Diazepam in the context of going on a 14-hour flight.



66. On 15 February 2013, the applicant reported anxiety symptoms and was given a prescription for Xanax which would last one year.
67. On 7 June 2013, the applicant was seen in relation to a work cover physical injury and pain. The applicant requested Diazepam scripts.
68. On 5 July 2013, the applicant was prescribed Xanax before a planned flight. The applicant was prescribed the same again before a flight on 1 October 2013.
69. On 1 November 2013, the applicant wanted Xanax for sleeping.
70. On 8 January 2014, the applicant again requested Xanax before a flight.
71. On 8 April 2014, the applicant was seen in relation to his mental health care plan and a letter to Stephen Scicluna prepared.
72. On 23 May 2014, the applicant discussed his mood and anxiety. The applicant referred to a boss bullying him for medical certificates.
73. On 28 May 2014, the applicant was seen for review of his mood. This had worsened since making a formal report to work. The applicant felt unable to go in and wanted to put the matter under WorkCover. The applicant was to be reviewed by a psychologist.
74. On 2, 10 and 19 June 2014, the applicant consulted his general practitioner regarding ongoing anxiety symptoms in the context of a WorkCover matter apparently relating to a physical injury. On 22 August 2014, the applicant reported feeling much better as his boss had moved to a different department.
75. In February 2015, the applicant consulted his general practitioner on several occasions in relation to low libido and reported anxiety about his libido.
76. On 11 June 2015, the applicant reported feeling harassed at work and gave an example of being two minutes over his break periods. Counselling was done.
77. On 4 August 2015, the applicant reported being bullied on return to work from a physical injury. The applicant was prescribed Temazepam and Kalma. A similar complaint was made on 8 September 2015.
78. On 8 December 2015, the applicant requested Kalma as he was "stressed with work++" and it helped him sleep. The applicant said he felt he was being victimised at work and placed on warnings for no reason.
79. On 30 December 2015, the applicant requested a day off work due to bullying at work in the context of not being given a Christmas present and being called names after he expressed disapproval of a colleague having a photograph of a teenage girl on his phone.
80. On 21 January 2016, the applicant was referred to Ms Kim Pastor for opinion and management in relation to "generalised anxiety disorder".
81. On 2 August 2016, the applicant complained of stress related to bullying at work in the context of being given a first and final warning for not using an electronic pass.
82. On 31 January 2017, the applicant reported ongoing bullying at work by his immediate boss in circumstances where there was confusion over the areas he had been assigned to clean. The applicant said he was using Xanax sparingly to wind down after stress at work.

83. On 22 September 2017, there was a consultation in which the applicant complained of having to clean bollards on the warehouse floor with wet wipes. The applicant questioned his boss's motivation for asking him to do this as he was told, "we have a special job for you Shane".
84. On 22 November 2017, a consultation was recorded as follows:
- "Problems at work' recent years; personal issues with a manager. On Saturday, 18/11/17 asked employer to take into account hours he had spent in meeting; this was done but was still given a warning for not meeting required hours; although with meeting time taking into account had met this level. Returned to full duties as storeman for Woolworths in September following back pain Workcover claim He feels that he is being unfairly victimised by management.
- Doesn't feel he is depressed. Just wants to attend today to have incident recorded in notes."
85. On 26 February 2018, the clinical notes state:
- "Took stress leave from work after Christmas. Put in a work Cover claim. Saw a Psychiatrist as part of this Work Cover claim was however declined on the basis of 'external factors Told them he would 'take matters into his own hands'. Was suspended for threatening outside contractors Had a call from a union employee - postings have been made on the Woolworth's website making threats - alleged that these were made by him under a false name. Shane claims that Telstra says someone has 'piggybacked' his IP address - he suspects a colleague with a vendetta has done this to him to incriminate him. Still on suspension - waiting on a call from his employers. Long chat Reason for contact: Anxiety"
86. On 3 March 2018, the clinical notes state:
- "currently suspended pending investigation into a Facebook account which threatens Woolworths staff, apparently traced back to his IP address. he states his IP address must have been hijacked and he is being framed, understandably stressed. saw another GP who issued a WorkCover certificate for harassment at work. would like to see a psychology counsellor to help him through this difficult period, acting in patient best interests, if his IP address has been hijacked and he is being framed, there is good reason to help support his mental health through this period so referral done."
87. A GP Mental Health Care Plan dated 3 April 2018 identifies the "reason for presenting" as "fired from work". The relevant history is consistent with the clinical note of 3 March 2018.
88. There are multiple WorkCover certificates of capacity in evidence covering various periods from 2014 onwards. On 3 March 2018, the applicant was certified fit for pre-injury duties in relation to a date of injury of 13 January 2018 and diagnosis of "harassment at work".
89. A WorkCover certificate of capacity issued on 2 May 2018 certified the applicant as having no current work capacity until 30 May 2018. The diagnosis given is "harassment at work". Certificates indicating the same are in evidence up until 21 December 2018.

90. An employment services assessment report, dated 17 May 2019, prepared for Centrelink, indicated that the applicant had a baseline work capacity of 8 to 14 hours per week in light, less skilled work and within two years with intervention would have a work capacity of 15 to 22 hours per week in moderately skilled work. The applicant's temporary work capacity was said to be 0 to 7 hours per week. The applicant was said to have low mood, fatigue, low motivation, poor concentration and low stress tolerance. The report indicated that with ongoing psychological intervention, work capacity may increase to 8 to 14 hours per week. With ongoing vocational support, work capacity may increase to 15 to 22 hours per week in the next 24 months.
91. A letter dated 11 September 2008 from clinical psychologist, Stephen Scicluna, to the applicant's general practitioner indicates that the applicant had completed six sessions since 12 June 2008. The letter states:

"Shane seems to be suffering from Hypochondrias. He has been to many different GPs to get a fresh opinion about his health. He is particularly concerned with his heart. He worries excessively about heart disease and having a heart attack. Initially he was also worried about cancer but this seems to have subsided. He also had beliefs that the birth of his daughter signalled that his time was up but this too has been overcome.

Shane is extremely egocentric and readily admits to using people to his advantage. While he sometimes views his anxiety as punishment for his selfishness he has no intention to change that aspect of his personality. I am not sure if his selfishness and anxiety are related.

We have completed several sessions of CBT, and I would like to continue with CBT. Several sessions were spent taking his family and personal history. Shane find CBT helpful and feels that he is learning to cope with his anxiety."

#### **Dr Thomas Oldtree Clark**

92. Consultant Forensic Psychiatrist, Dr Thomas Oldtree Clark has provided medicolegal reports for the applicant, dated 4 July 2018 and 28 February 2019.
93. Dr Oldtree Clark took a history of the applicant's experience in the workplace which was in most respects consistent with the applicant's own evidence. Dr Oldtree Clark noted that the applicant was dismissed from his employment with the respondent and then made an unfair dismissal claim, winning some 20 weeks' pay. The applicant had been consulting his general practitioner and psychologist and was prescribed Xanax and generic alprazolam. The applicant complained of frustrated, angry attacks, loss of self-care and hygiene and social withdrawal. The applicant experienced confusion driving.
94. Dr Oldtree Clark said there was no history of any other significant disorder although the applicant had always been a tense individual. At work, he would sometimes become tense and anxious such that he would have towels to mop up his sweat.
95. Dr Oldtree Clark said there was no prior psychiatric history.
96. Dr Oldtree Clark made a diagnosis of adjustment disorder as a form of nervous reaction to trauma. The applicant's condition did not qualify as post-traumatic stress disorder. Dr Oldtree Clark found the applicant's experience in the workplace to be a direct precipitant of his condition.

97. Dr Oldtree Clark recommended that the applicant continue to attend his psychologist and receive treatment from a psychiatrist. Dr Oldtree Clark considered the applicant had capacity to return to work but not to his former workplace.
98. Dr Oldtree Clark assessed the applicant as having 22% whole person impairment. He did not make any deduction for pre-existing impairment.
99. In his supplementary report, dated 28 February 2019, Dr Oldtree Clark reported that the applicant did have a prior psychiatric history. Dr Oldtree Clark noted that following the birth of his daughter, the applicant became anxious in 2008. In March 2009, the applicant was referred by his general practitioner to a psychologist. The applicant started attending his general practitioner for anxiety issues following workers compensation events in 2013. It was recommended that the applicant take antidepressants. The applicant was currently taking sertraline.
100. On this occasion, Dr Oldtree Clark diagnosed major depressive disorder on the basis that the adjustment disorder diagnosis had failed to resolve:

“Given his sleeplessness, for which he takes a sedative, his disturbance of appetite, loss of libido and general anhedonia, this has become a severe depression or Major Depressive Disorder.”
101. Dr Oldtree Clark said there was no evidence to suggest that the applicant was psychiatrically impaired following his daughter’s birth as he was now, such that there was no significant pre-existing psychiatric impairment at the time of the work harassment. The applicant’s psychiatric condition was said to be a direct effect of employment. Dr Oldtree Clark recommended that the applicant continue attending a psychiatrist.
102. Dr Oldtree Clark considered that the applicant’s earning capacity was likely to be affected but said this was the field of rehabilitation physician.
103. Dr Oldtree Clark did not alter his assessment of whole person impairment.

### **Respondent’s evidence**

104. Attached to the Reply are written statements from two of the applicant’s co-workers, Mr Ronald Bina and Ms Angela Brown, dated 16 March 2016.
105. In his statement, Mr Bina described an incident on 28 December 2015 involving the applicant and Ms Brown involving an umbrella that was being handed out. Mr Bina said there was a disagreement between Ms Brown and the applicant about whether he had received an umbrella. The applicant claimed he had not but Ms Brown had paperwork that was signed off saying he had been given it.
106. Mr Bina’s opinion was that Ms Brown’s patience was wearing thin. Mr Bina did not believe that Ms Brown was inappropriate in the way she spoke to the applicant. She did not raise her voice or use inappropriate language. She was being fairly direct and straightforward.
107. The applicant was upset that Ms Brown did not take him at his word. The applicant left but then returned to reopen the same conversation with Mr Bina. The applicant was a little agitated. The applicant insisted on getting video footage and said he was not returning to work without seeing the footage. Mr Bina said he did not have access to CCTV footage. Mr Bina believed the footage was reviewed but said he was not involved in the investigation. It was clear that the applicant had left without an umbrella.

108. Mr Bina said the applicant was conducting himself reasonably normally. He was not aggressive, yelling or screaming or swearing but he was not happy.
109. Ms Brown also provided a written statement on 16 March 2016. Ms Brown said she had been the applicant's team leader for six years but only interacted with him two days a week. Ms Brown said the applicant worked as an order selector and a cleaner. Ms Brown considered the applicant worked well in order selection but said there had been some issues with his cleaning. The applicant had been pulled up for using his mobile phone, mainly when he was cleaning.
110. Ms Brown also provided an account of events on 28 December 2015. The applicant came in to Ms Brown's office and asked where his "bag" was. Ms Brown did not know what he was talking about but later understood that the question referred to Christmas bags that had been given out about two weeks beforehand. At the time of this conversation, umbrellas were now being given out. Ms Brown felt the applicant was demanding something of her and not asking nicely so that made her a bit upset. Ms Brown asked the applicant what he was talking about. He responded that it was about the gift bags. The applicant was pointed towards the back and told he could get one himself.
111. The applicant then returned and asked where his umbrella was. Ms Brown reached for a list to sign the applicant off as having received an umbrella and saw that he had already been signed off as having received one. The applicant leaned forward and said, "remember the talk we had about trusting me?" The applicant then asked to look at the list and Ms Brown showed it to him. The applicant kept saying he did not have an umbrella and Ms Brown kept saying she would look into it the next day. The applicant left and did not look upset. Ms Brown denied telling the applicant to grab one and leave.
112. Ms Brown denied using any foul language during the conversation or accusing the applicant of trying to get a second umbrella. Ms Brown said that, knowing the applicant, if she did use such language, he would have been upset and she would have noticed it. Ms Brown denied the applicant talked to her about wanting to see cameras or footage.
113. Ms Brown had intended to follow the matter up but was prevented from doing so because the applicant lodged a complaint. This was not the first time that the applicant had made allegations against her and the allegations were unsubstantiated. Ms Brown said she was just following a process and was told not to hand out umbrellas if they were assigned as already given out. The applicant did not give her an opportunity to follow-up and his claims about her swearing at him were not true.
114. Ms Brown confirmed that there were issues between the applicant and "Michel" that were being investigated.

### **Associate Professor Kaplan**

115. Forensic psychiatrist, Associate Prof Robert Kaplan, prepared a medicolegal report for the insurer, dated 6 February 2018.
116. Associate Prof Kaplan took a history of events in the workplace broadly consistent with the applicant's evidence. Things came to a head on 6 January 2018 when M&Ms were "stolen" from the applicant's lunch bag. The applicant was chided by management for not putting the problem to them. They alleged that the applicant was seen eating lolly snakes on the floor which was not permitted. The applicant pointed out that people ate all the time but nothing was done about it. Nothing was done about drug addicts who abused the applicant. The applicant also had difficulties with a manager who would eat chips noisily behind the applicant. The applicant went to the union but was told that he was rocking the boat. A dispute later broke out over the use of a cooling towel on a hot day. There had also been problems before Christmas.

117. The applicant left work on 13 January 2018, at which time he was irate, frustrated, and felt victimised by management. The applicant's complaint about the issue of staff eating in the warehouse was investigated. The applicant was happy to resume duties on 27 January 2018. At the time of the examination, the applicant was not having any treatment.
118. Associate Prof Kaplan concluded that the applicant had experienced some distress but this would not meet the requirements for a clinical disorder. The applicant had not received treatment and made a medical recovery on his own. The applicant was diagnosed with a "V-code disorder (occupational difficulty)". Associate Prof Kaplan noted that the applicant attributed his injury to perceived victimisation and harassment from managers. Associate Prof Kaplan said he was not in a position to know whether the applicant had been subjected to unreasonable behaviour or disciplinary actions. Associate Prof Kaplan found no evidence of pre-existing problems and said the applicant could continue with his full duties.
119. Associate Prof Kaplan provided a supplementary report to the respondent on 24 September 2018. At the time of the supplementary report, Associate Prof Kaplan had access to the reports of Dr Oldtree Clark and Mr Lumbewe, as well as various medical certificates. Associate Prof Kaplan did not change his findings or diagnosis.
120. Associate Prof Kaplan concluded that the applicant did not have a psychiatric injury and work was not a substantial contributing factor to an injury. There was no change in Associate Prof Kaplan's assessment of the applicant's fitness for employment.

### **Respondent's submissions**

121. Mr Parker submitted that if Associate Prof Kaplan's opinion were to be accepted there was no "injury".
122. Mr Parker said support for Associate Prof Kaplan's opinion appeared in Dr Ayliff's report of 11 July 2018. Dr Ayliff agreed with Associate Prof Kaplan that the applicant may not have appeared depressed in February 2018. Dr Ayliff believed the applicant subsequently became depressed following the termination of his employment. Mr Parker submitted that the applicant did not rely on the termination of his employment as a matter contributing to his psychological injury in the pleading of injury in these proceedings. The pleading was restricted to bullying and harassment.
123. Mr Parker submitted that there was a significant credibility issue and that the applicant's evidence as to events in the workplace should not be accepted.
124. Mr Parker submitted the applicant had also attempted to frame a series of frank injuries that had been the subject of previous claims into a "nature and conditions" claim in order to avoid the respondent's defences. Mr Parker submitted that those events should not be taken into account in the present proceedings and, to the extent that they were relied upon by the experts, the expert opinions should not be taken into account.
125. Mr Parker noted that the applicant had first claimed a psychological injury on or about 19 May 2014 although there did not appear to be a dispute notice in relation to that claim in evidence. A further psychological injury was claimed on 27 July 2015. A dispute notice pursuant to s 74 of the 1998 Act was issued declining liability for injury on 3 November 2015. Psychological injury was claimed again on 28 December 2015 and a dispute notice issued pursuant to s 74 of the 1998 Act on 16 September 2016.
126. Mr Parker submitted that whilst the respondent did not concede liability for injuries on those dates, the applicant had made claims of frank injury and was now precluded from including those injuries as part of a "nature and conditions" injury. The defences relied on in each of the previous s 74 notices were still relied upon by the respondent. Mr Parker submitted that the applicant was unable to satisfy the onus for a "nature and conditions" injury, excluding those frank events.

127. With regard to the issue of credit, Mr Parker noted that Dr Oldtree Clark was initially given no history of any pre-existing condition. Similarly, Dr Ayliff indicated in her report of 11 July 2018 that she was also not aware of any prior mental health conditions. The applicant in his first written statement denied having been diagnosed previously for depression, anxiety, stress or any psychological condition. The applicant denied having any stressors outside work. In response to a direct question, the applicant expressly denied having previously suffered from anxiety or depression. Asked whether there was anything in his personal life that had caused him to suffer anxiety or depression, the applicant responded “no”. Mr Parker submitted that these were lies.
128. Mr Parker contrasted the history set out in Dr Ayliff’s letter of referral dated 3 March 2018, with the history taken by Mr Lumbewe in his letter on 10 May 2018. That is, the applicant told Dr Ayliff that his IP address had been hacked and used to make threats to harm Woolworths staff, but he told Mr Lumbewe that he had snapped and did make threats but had no intention of following through.
129. Mr Parker submitted that there was no doubt that the applicant had a significant pre-existing psychological condition that had nothing to do with employment. Mr Parker took me through the clinical notes referred to above and submitted that the first reference to any psychological symptoms related to employment appeared in 2014. Mr Parker submitted that the earlier clinical notes referring to psychological symptoms could not simply be explained by a fear of flying. The applicant had been prescribed large amounts of Xanax and Diazepam as well as other medication. Mr Parker noted that there were entries in the clinical notes relating to physical injuries and WorkCover without reference to any bullying at work in 2013. Had the applicant in fact been experiencing such bullying, Mr Parker submitted that this would have been a perfect opportunity to report it.
130. Mr Parker referred to the report of psychologist Mr Scicluna, dated 11 September 2008, and noted that none of the matters referred to were in any way related to employment. Mr Parker submitted that in view of this report and the clinical records, it was a lie for the applicant to claim that he had no prior psychological conditions.
131. Mr Parker noted that it was not until his final written statement in 2019 that the applicant admitted to some pre-existing issues but at that point drastically downplayed the number and nature of the previous psychological consultations. Mr Parker submitted that the applicant had not explained why he had told Dr Oldtree Clark and Dr Ayliff that he had no prior conditions. The applicant had not explained why he required such a large amount of Diazepam and Xanax in the context of flights. Mr Parker submitted that the applicant had not explained why it took him three attempts to tell the truth about his medical history in his written statements. The applicant had lied to Dr Ayliff about his computer being hacked. Mr Parker submitted that in view of the applicant’s lack of credit there was no reason to accept his claims of bullying and harassment.
132. Mr Parker submitted that a glaring problem for the applicant was his claim to have been bullied and harassed since 2008. Despite multiple entries in relation to psychological conditions and WorkCover matters in the clinical notes there was no reference to any workplace bullying or harassment until May 2014.
133. Mr Parker submitted that neither Dr Ayliff nor Mr Lumbewe had an accurate history. Mr Parker submitted that Dr Oldtree Clark in his last report took a narrow or rudimentary history of psychological conditions. Mr Parker submitted that the opinions given by Dr Oldtree Clark in that report could not stand in light of the extensive clinical history.
134. Mr Parker submitted that the injury had been pleaded as one falling within s 4(b)(i) having regard to Dr Oldtree Clark’s opinions and assessment and not one falling within s 4(b)(ii) of the 1987 Act. The claim was not of a pre-existing condition being made worse or aggravated by employment. To suggest that the applicant did not have a significant pre-existing impairment at the time of the alleged bullying and harassment at work was plainly wrong.

135. Mr Parker reiterated that should there be a referral to an Approved Medical Specialist (AMS), the previous psychological injuries claimed should be omitted from the referral. With regard to work capacity, Mr Parker submitted that the opinions on capacity in Dr Ayliff's and Dr Oldtree Clark's reports were based on the applicant's word. Associate Prof Kaplan considered the applicant could work. Mr Parker submitted that the report prepared for Centrelink suggested that there was some greater capacity for work than was certified by the general practitioner.

### **Applicant's submissions**

136. Mr McManamey noted that the expression, "nature and conditions" had no meaning under the legislation but was used to refer to an injury occurring as a result of a sequence of events. If an injury consisted of a disease or the aggravation of a disease, then the series of incidents or occurrences at work contributing to the disease needed to be examined. Mr McManamey noted that the Court of Appeal in *Federal Broom Co Pty Ltd v Semlitch*<sup>1</sup> had confirmed that a psychological injury could be a "disease".

137. Mr McManamey submitted that the series of events contributing to the disease in this case included the events referred to in the claims made in 2014, 2015 in 2016. Mr McManamey submitted that there was little evidence as to what claims were made on those occasions other than what appeared in the s 74 notices. The claim forms were not in evidence although there were some responses to the incident in 2015. The statements of Mr Bina and Ms Brown confirmed that there were incidents or events in the workplace capable of being perceived as different treatment by the applicant.

138. Mr McManamey noted that there was no factual dispute as to the events in January 2018. He said it would have been easy for the respondent to put on written statements addressing those events but it had not. The applicant had some time off and was certified as fit to go back to work. The applicant had returned to work by the time the applicant was first seen by Associate Prof Kaplan. Associate Prof Kaplan's report was addressing the applicant's condition at that particular point in time. Given that the applicant had returned to work, Associate Prof Kaplan's opinion was not particularly surprising.

139. Mr McManamey submitted that the applicant decompensated following his return to work. Mr McManamey noted that the circumstances leading to the decompensation were somewhat unclear but conceded by reference to Dr Ayliff's letter of 3 March 2018 that there was an incident involving the applicant's IP address being hacked. Mr McManamey noted that Mr Lumbewe's letter of 10 May 2018 referred to the applicant snapping and having made threats. Mr McManamey submitted that there was nothing to suggest that the events referred to in Mr Lumbewe's letter were the same as those referred to in Dr Ayliff's letter. Mr McManamey said there was nothing to suggest any inconsistency.

140. Mr McManamey inferred that in the period following the return to work, the applicant was harassed some more and decompensated and every practitioner who had seen him since, had diagnosed an incapacitating psychological condition. The opinions given by Dr Ayliff, Mr Lumbewe and Dr Oldtree Clark were based on consistent histories.

141. Mr McManamey submitted that the initial diagnosis was an adjustment disorder which had developed into a major depressive disorder. Mr McManamey said that it was significant that the current condition was a depressive one.

---

<sup>1</sup> [1964] HCA 34; 110 CLR 626 at 632.



142. Referring to the applicant's written statements, Mr McManamey submitted that the applicant was uncertain about when the bullying and harassment commenced but related it to the aftermath of the fallout with his manager Michel in around 2013. Mr McManamey submitted that this timeframe was not necessarily inconsistent with the clinical notes which first noted complaints of workplace related symptoms in 2014. Mr McManamey submitted that the applicant did not claim to have a psychological condition since 2008.
143. Mr McManamey submitted that it was significant that the clinical notes consistently referred to bullying and harassment at work after mid-2014. The statements of Mr Bina and Ms Brown tended to confirm that the applicant had reacted to events in the workplace in a particular way. Mr McManamey submitted that it was clear from the statements that there were difficulties with communication and interpersonal exchanges in the workplace.
144. Mr McManamey submitted that the earlier clinical records related to issues involving the applicant's daughter's health, his wife's pregnancy and a fear of flying. Mr McManamey submitted that these were anxiety conditions and related to very specific matters. There was nothing in the clinical notes suggesting any time off work for those matters. The treatment received was for those discrete matters and the applicant remained functional. In those circumstances, Dr Oldtree Clark's opinion that there is no evidence of pre-existing psychiatric impairment at the time of the harassment at work was right.
145. Mr McManamey submitted that Associate Prof Kaplan's opinion was irrelevant because he had seen the applicant before the current condition developed. The treating practitioners and Dr Oldtree Clark had provided consistent opinions on injury. No defence based on s 11A had been relied upon by Mr Parker in submissions. To the extent that the issue was still live based on the earlier s 74 notices, Mr McManamey submitted that there was no medical evidence that those individual events were the whole or predominant cause of the applicant's current condition.
146. Mr McManamey submitted that the applicant had no current work capacity consistent with Dr Oldtree Clark's assessment. With regard to the Centrelink report, Mr McManamey submitted that it should be read as indicating capacity for less than eight hours per week of work. An assessment still needed to be made as to whether there was any suitable employment and Mr McManamey submitted that this would lead to a conclusion that there was total incapacity given the applicant's wide-ranging impairment.
147. With respect to the s 66 claim, Mr McManamey noted the amendments to s 65 of the 1987 Act and s 293 of the 1998 Act from 1 January 2019. Mr McManamey submitted that as arbitrator, I had power to make a determination and should do so in this case as the assessment of Dr Oldtree Clark complied with the Guidelines and was uncontroverted. Mr McManamey said Dr Oldtree Clark's assessment should be accepted and any further expense or delay associated with a referral to an AMS avoided.
148. Mr McManamey submitted that in any event I had no power to refer the matter to an AMS. Mr McManamey submitted that the power to refer a matter to an AMS for assessment of whole person impairment was previously contained in s 321 of the 1998 Act but had been omitted from 1 January 2019. Section 321A contained a regulation making power to prescribe circumstances in which a referral may be authorised, required or not permitted but no such regulations had been made. Mr McManamey submitted that there was no referral power in s 321A itself. The only other source of power to refer to an AMS was the Registrar's power in s 293 of the 1998 Act. However, that power was limited to medical disputes within the meaning of Part 7. Mr McManamey submitted that Part 7 was therefore the source of power and it had been amended to exclude referrals for assessment of permanent impairment unless and until regulations were made pursuant to s 321A.

149. Mr McManamey confirmed that the injury was pleaded as one falling within s 4(b)(i) on the basis that any prior psychological conditions were unrelated.

### **Respondent's submissions in reply**

150. Mr Parker submitted that he was not in a position to meet the submissions with regard to the power to refer the matter for assessment of permanent impairment at hearing. Mr Parker submitted that it was appropriate for an opportunity to be provided to SIRA to make submissions and the matter should be listed for further teleconference.

151. It was agreed with the parties that I would proceed to determine the liability dispute for injury first. In the event of a favourable finding for the applicant, the matter would be listed for further teleconference to discuss how to proceed with regard to the submissions made by Mr McManamey.

### **FINDINGS AND REASONS**

#### **Has the applicant sustained a psychological injury as pleaded pursuant to s 4 of the 1987 Act?**

152. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act. The term 'injury' is defined in s 4:

"In this Act:

**injury:**

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
  - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
  - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

153. Subsection 11A(3) provides that a 'psychological injury' is:

"an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system."

154. In *Attorney General's Department v K<sup>2</sup> (K)* Deputy President Roche summarised the principles to be applied in determining causation in cases of psychological injury at [52]:

---

<sup>2</sup> [2010] NSWCCPD 76.

"The following conclusions can be drawn from the above authorities:

- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);
- (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
- (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand* at [31]), and
- (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."

155. Further at [54]:

"The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances."

156. It is the applicant who bears the onus of proving on the balance of probabilities all matters for consideration.

157. The documents in evidence present a complex factual and medical history and an issue of credit has been squarely raised by Mr Parker. Mr Parker's submission was that the applicant's credibility was undermined by his failure to declare any prior episodes of anxiety or depression in his written statements and in the histories provided to his treating practitioners and the independent medical experts. Mr Parker additionally relied on an apparent inconsistency in the histories provided to Dr Ayliff and Mr Lumbewe regarding events in February 2018.

158. There is insufficient information before me regarding the events in February 2018 to enable me to make a determination that there is an inconsistency in the histories provided to Dr Ayliff and Mr Lumbewe and I draw no adverse inference from the letters to which I was referred.

159. I am satisfied, however, that there has been a repeated and significant failure by the applicant to disclose his relevant medical history in the context of this claim. As noted by Mr Parker, the applicant in his first statement volunteered that he had not been diagnosed previously for depression, anxiety, stress or any psychological condition other than work-related stress prior to the current claim. In response to direct questions, the applicant again denied having any stressors outside work, denied having previously suffered from anxiety or depression and denied that there was anything in his personal life that had caused him to suffer anxiety or depression.
160. In his initial report, Dr Oldtree Clark was told that there was no prior psychiatric history and no history of any other significant disorder, although it was noted that the applicant had “always been a tense individual”. In her report of 11 July 2018, Dr Ayliff indicated that she had been the applicant’s regular general practitioner for 2.5 years and was not aware of any prior history of any mental health condition. Associate Prof Kaplan also took no history of any prior psychological symptoms or conditions.
161. In contrast, the clinical notes dating from March 2008 show numerous consultations in relation to symptoms including anxiety, insomnia or other sleeping difficulties, low libido, and panic attacks. From March 2008 onwards, the applicant was prescribed Zyprexa, Xanax, Diazepam, Temazepam and Kalma (alprazolam). Multiple mental health care plans were prepared. The applicant was referred to a psychologist, Stephen Scicluna, and in 2011 was noted to be seeing the mental health team at The Sutherland Hospital. The letter from Mr Scicluna dated in September 2008 indicated that the applicant had completed six sessions to date. That report and the clinical notes indicated anxiety and issues around hypochondria, the birth of the applicant’s children, his daughter’s health, an “extremely egocentric personality” and fear of flying. A referral to Mr Scicluna was made again in 2009. The first reference to difficulties at work causing issues with mood or anxiety appears in May 2014.
162. Mr McManamey’s submissions suggested that the early clinical notes identified discrete or specific matters causing anxiety that had no bearing on the present condition, which was a depressive one. Irrespective of the merits of this submission, which I will come to below, the fact remains that the applicant specifically denied having any outside stressors or having experienced any anxiety or other psychological conditions in the past. This was patently untrue and is a matter that impacts on both the credibility of the applicant’s lay evidence and the reliability of the expert evidence.
163. In making factual findings as to the events relied on by the applicant as causative of a psychological injury, all of the evidence must be weighed. In *Brines v Westgate Logistics Pty Ltd*<sup>3</sup> Keating P said:
- “Where a worker has given untruthful evidence, the Arbitrator must carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of the evidence may have been acceptable because other independent or objective evidence confirmed it. However, where a worker’s evidence was not independently supported it clearly must be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings (see *Malco Engineering Pty Ltd v Ferreira and others* (1994) 10 NSWCCR 117 and *Divall v Mifsud* (2005) NSWCA 447).”

---

<sup>3</sup> [2008] NSWCCPD 43.

164. The applicant has identified a large number of incidents characterised by him as bullying and harassment in the workplace. There is no evidence from the respondent to refute the majority of these incidents. Some of these events appear to have been the subject of specific claims for compensation in the past.
165. The statements from Mr Bina and Ms Brown dated 16 March 2016 confirmed that there was an incident in December 2015 involving the giving out of umbrellas and gift bags. Ms Brown's evidence also confirmed that there had been workplace issues previously in relation to cleaning and use of mobile phones. Ms Brown additionally confirmed that there were issues between the applicant and Michel.
166. The statements of Mr Bina and Ms Brown do cast doubt over whether the incidents concerned in fact constituted bullying and harassment. Their evidence also suggests that some of the matters relied upon by the applicant were not real, including the use of foul language, the content of certain conversations and the making of accusations. Ms Brown indicated that the applicant had made allegations against her previously which were unsubstantiated.
167. Nonetheless, the respondent's statements do tend to confirm that some of the workplace events identified by the applicant were real. The statements also tend to confirm that the applicant may have perceived real events in the workplace as hostile. For example, Ms Brown said that, knowing the applicant, if she used foul language or had accused the applicant of trying to get a second umbrella, he would have been upset. Mr Bina described the applicant as being visibly unhappy.
168. Some of the events relied upon by the applicant also appear to have been reported contemporaneously to his general practitioners. In fact, the clinical notes suggest that the applicant was quite conscious of ensuring that there was a record of events in the workplace which he regarded as bullying or harassment. The clinical note of 22 November 2017, for example, states that the applicant did not feel depressed by problems at work but wanted to have the incident in question recorded in notes.
169. The applicant's second written statement makes a number of serious allegations, including some allegations of criminal conduct, which do not appear to be confirmed by any other evidence. These include having his car scratched and tyres slashed; offensive graffiti about the applicant on toilet walls; being slapped in the face; a threat to shoot the applicant; being placed in a headlock until he couldn't breathe; being slapped on the back of the head; and being taunted and photographed by co-workers. Nothing has been put into evidence by the respondent to suggest that these events were not real. Nonetheless, in the absence of any corroboration and having regard to my concerns as to the applicant's credibility, I am not satisfied that each of these particular events was real.
170. I am satisfied that the applicant has a history, dating from at least May 2014, of difficult interactions in the workplace, particularly involving his supervisors, relating to matters such as the provision of WorkCover certificates and suitable duties in the context of various physical work injuries; the implementation of and compliance with workplace policies; the provision of gifts including umbrellas, cooling towels and Christmas hampers; the allocation of work tasks; and the issuing of warnings and reprimands. I am also satisfied that the applicant had particularly difficult personal interactions with his colleague Michel, and another colleague named David.
171. I am further satisfied on the basis of the clinical notes, medical reports, the applicant's evidence and the respondent's witness statements, that the applicant perceived the events referred to above as creating an offensive or hostile workplace, whether or not that perception was rational, reasonable or proportionate.

172. Mr Parker made submissions that the events which were relied upon in relation to the previous claims for compensation should be excluded from my consideration of the injury which is the subject of the present claim. Mr Parker did not articulate an argument based on any form of estoppel but appeared to base his submissions on the assumption that the events previously relied on had caused frank injuries. There is simply insufficient evidence before me as to the nature or content of the previous compensation claims for me to be satisfied that any of the events in question should be excluded. I take the applicant's case to be reliant upon the cumulative effect of multiple events between at least May 2014 and early 2018. The case does not rise or fall on any one interaction or event.
173. The question that remains is, whether the events which I accept were real caused, and were the main contributing factor to, the applicant contracting a psychological injury. In this regard, it is noted that the description of injury at Part 4 of the ARD, medical reports and submissions at hearing all indicated that the injury being pleaded was one falling within s 4(b)(i) of the 1987 Act. That is, the contraction of a disease, and not the aggravation, acceleration, exacerbation or deterioration of a disease.
174. Amongst other things, the applicant relies on evidence from Dr Ayliff and Dr Oldtree Clark in support of his claim that the question above should be answered in his favour. Both of these practitioners have provided an opinion that the applicant has sustained a psychological injury as a result of bullying and harassment in the workplace. I am not, however, satisfied that there is a "fair climate of fact" for the acceptance of their opinions.
175. In the Court of Appeal in *Paric v John Holland (Constructions) Pty Ltd*<sup>4</sup>, Samuels JA said:

"I have myself looked at the evidence and looked at the hypothetical facts and while I would agree that in some respects the material put does differ in terms from what was proved, all in all I would regard it as open to the tribunal of fact to consider that it was a fair foundation and remains a reasonable support for the opinions which were sought and given.

We were referred to Wigmore on Evidence 3rd ed, vol II, s 680 and foll at 6, in which this area of the law is discussed. In a footnote which I find in the 1940 edition (at 800), there is a reference made to a decision of *Boardman v Woodman* (1866) 47 New Hampshire 135. I confess I have not looked at the original report, but the passage extracted by the learned author, which I would fully accept as accurate, is as follows:

'... so proved as to resemble as near as may be the case under consideration; the jury can judge whether the case supposed is so far like the one they are considering as that the opinion of the expert on the supposed case is any guide to them.'

Furthermore, there is another reference in a footnote to the same section, and this is in the 1979 edition (at 942). This is a reference to a Wyoming case, *Culver v Sekulich* (1959) 80 Wyoming 437 at 458. It is in these terms:

'From our analysis of the record it appears to us that there was some evidence to support every hypothetical question to which objection was made. Such evidence was not always complete, was sometimes hazy as to time, distance and other vital words, but in general, furnished a fair climate for the consideration of the views of the expert witnesses.'

---

<sup>4</sup> [1984] 2 NSWLR 509–510.

I would respectfully adopt that last statement as exactly in point and its application disposes of both aspects of the problem to which I have earlier referred. It is a question of whether the hypothetical material put to the expert witnesses represents a fair climate for the opinions they expressed. I do not think there is any requirement that the matter put is precisely consonant with the material provided; and certainly, it cannot be contended that there was no evidence upon which the opinions could be based.

Discrepancies may be fatal; in some cases, even slight discrepancies may be fatal; in other cases, even broad departures are not likely to affect the force of the expert opinion. Moreover, it is for the tribunal of fact to assess this factual basis. In the present case, it seems to me that there was a fair climate in which the expert views could properly flourish, and certainly it was open to the learned judge to come to that conclusion.”

176. In the High Court<sup>5</sup> the following was said on this point:

“It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence (*Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642). But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from Wigmore on Evidence cited by Samuels JA in the Court of Appeal (Wigmore on Evidence, (1940) 3rd ed, vol II, 680, p.800; 2 Wigmore, Evidence 680 (Chadbourn rev. 1979), p.942) to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.

As Wigmore states (at pp.941-942, Chadbourn rev.), ‘the failure which justifies rejection must be a failure in some one or more important data, not merely in a trifling respect’.”

177. As discussed above, Dr Oldtree Clark was not, at the time of his initial examination on 19 June 2018, provided with any of the medical history set out in the clinical notes. Dr Oldtree Clark said there was no prior psychiatric history. Dr Oldtree Clark proceeded to express the opinion that the applicant suffered from anxiety and depression, diagnosed as an Adjustment Disorder. The matters noted on mental state examination included referral to a psychologist, a recommendation to take antidepressants, lost concentration, sleep difficulties and functional impairments including reminders of his experiences and difficulty travelling. No deduction was made for a pre-existing condition in the assessment of permanent impairment.

178. In preparing his supplementary report of 28 February 2019, Dr Oldtree Clark did take a prior psychiatric history as follows:

“Mr Woods has a prior psychiatric history. Following the birth of his daughter, he became anxious. This was in 2008. In March 2009, his GP referred him to a psychologist.

He has also consulted a geneticist. No hereditary element was found in regards to his daughter's problems.

He attends his GP for physical complaints. He attended his GP for anxiety issues following his workers' compensation events. This started in 2013 and continued to the present time.”

---

<sup>5</sup> *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58; 59 ALJR 844 (19 September 1985).

179. In addressing the extent to which this history contributed to the applicant's current condition, Dr Oldtree Clark stated:
- "Mr Woods did have a depression and anxiety following his daughter's birth. However, there is no evidence presented that he was psychiatrically impaired on that occasion, as he is now. There is no reason to suggest he therefore had a significant pre-existing psychiatric impairment at the time of the harassment at work."
180. Dr Oldtree Clark noted that the applicant had attended his general practitioner on 5 March 2008; 12 March 2008; 3 June 2008; 12 March 2009; 16 March 2009; 6 November 2009; 1 May 2012; 15 February 2013; and 8 April 2014; but did not engage with what was recorded in the clinical notes on those occasions or refer to the other relevant consultations identified above.
181. I am not satisfied that this history constitutes an accurate reflection of the clinical evidence. In particular, Dr Oldtree Clark, makes no reference to the extensive use of prescription medication prior to 2013; the multiple consultations with a psychologist; the observations of Mr Scicluna, including his reference of factors other than the applicant's daughter's birth and health including hypochondria and personality traits; or the involvement of a mental health team. In adjusting his diagnosis to one of major depressive disorder, Dr Oldtree Clark relied on the taking of a sedative for sleeplessness and loss of libido amongst other things, which are matters reported in the clinical notes prior to the alleged instances of bullying and harassment.
182. Dr Ayliff's opinions, as expressed in her reports of 11 July 2018 and 14 December 2018, are affected by the same defect. Dr Ayliff said she was not aware of any prior history of any mental health condition and said there were no significant other psychosocial factors or health concerns which had precipitated the recent diagnosis of depression.
183. I am not satisfied in this case that the deficiencies in Dr Oldtree Clark's and Dr Ayliff's reports are merely trifling. The matters that they have failed to take into account are in my opinion significant and directly relevant to the opinions being expressed. It may be that having been provided with all relevant information, Dr Oldtree Clark and Dr Ayliff would remain of the view that there was an injury, perhaps in the form of an aggravation of a disease or that any prior condition did nothing more than predispose the applicant to psychological injury in the sense of an "eggshell psyche". Those opinions are, however, unknown and not in evidence before me.
184. A second difficulty in accepting the opinions of Dr Ayliff and Dr Oldtree Clark, is that both practitioners take into account the effects of the termination of the applicant's employment in giving their opinions on the applicant's current condition. This is not, however, a matter on which the applicant has relied. The applicant makes no mention of the circumstances leading to the termination of his employment in any of his written statements. The matter is not specifically pleaded at Part 4 of the ARD, which refers only to bullying and harassment. Although the deemed date of injury was amended at conciliation, the date relied on by the applicant in his current claim for compensation, the WorkCover certificates and included in the ARD as filed, pre-dated the termination of the applicant's employment. I am not satisfied that the applicant has claimed, or that the respondent has disputed, a psychological injury caused wholly or partly by the termination of the applicant's employment or the circumstances surrounding it.



185. It is undisputed that following the events in early January, the applicant took a period of time off work before being certified as fit for pre-injury duties. Following the applicant's return to pre-injury duties, Associate Prof Kaplan examined the applicant and found no evidence of a diagnosable psychological condition. Dr Ayliff has, in her 11 July 2018 report, agreed that the applicant may not have appeared depressed at the time of the assessment in February 2018. Dr Ayliff expressed the belief that the applicant subsequently became depressed following his termination of employment. The current period of certified incapacity commenced after the applicant's employment was terminated. Similarly, the history taken by Dr Oldtree Clark included:

"He was dismissed and then made an unfair dismissal claim, winning some 20 weeks' pay. He is still not working and not fit to work."

186. There is minimal evidence before me as to the events occurring in the workplace between the applicant's return to work in late January 2018 and the termination of his employment, or the circumstances surrounding the termination of employment. It can be inferred from references in the clinical notes, the most recent mental health plan and correspondence between Dr Ayliff and Mr Lumbewe, that some sort of threats were made, including by way of a Facebook account traced back to the applicant's IP address. I do not, however, take the applicant to be relying on those matters in the current pleading of injury and there is insufficient information for me to enable a determination as to what in fact took place. As a result, both Dr Oldtree Clark and Dr Ayliff have relied on events not part of the present claim in giving their opinions on causation.
187. The effect of both defects is such that I do not place weight upon the opinions on causation expressed by either Dr Oldtree Clark or Dr Ayliff.
188. Turning to any other evidence relevant to causation before me, I note the applicant's own lay evidence. The applicant's evidence, however, suffers from the same defect as the expert opinions in that the applicant initially denied any pre-existing psychological symptoms. In his final statement, the applicant provided an account that I am not satisfied is accurately reflected in the clinical evidence.
189. Mr Lumbewe has taken a history of both workplace bullying and termination of the applicant's employment. I do not read in any of the reports of Mr Lumbewe a clear opinion on causation.
190. Associate Prof Kaplan provides no opinion on causation on the basis that he was not satisfied there was a psychological injury at all.
191. After careful analysis of the evidence before me, I am not satisfied that the applicant has discharged the onus of proof. I am not satisfied that the applicant has contracted a psychological injury as pleaded. There will be an award for the respondent in respect of the claimed compensation.

